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Tobacco-Settlement: Document Disclosure

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Tob-scr-document disclosure

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

Case Type: Other Civil

FILE# C1-94-8565

The State of Minnesota By
Hubert H. Humphrey, III,
Its Attorney General,
and Blue Cross and Blue
Shield of Minnesota,

Plaintiffs,

vs.

Philip Morris Incorporated,
R.J. Reynolds Tobacco Company,
Brown and Williamson Tobacco Corporation,
B.A.T. Industries, P.L.C., Lorillard Tobacco Company,
The American Tobacco Company, Liggett Group, Inc.,
The Council For Tobacco Research -U.S.A., Inc.,
and The Tobacco Institute,

Defendants.

Motion of the United States for Leave to File an Amicus Brief and Supporting Declarations

1. Movant is the United States Department of Justice on behalf of the United States Department of Health and Human Services (HHS).

2. Movant requests leave to file an amicus brief and supporting declarations to present the Court with the view of the federal government that the public health would benefit from the release of documents produced by Defendants in the above-captioned action, but not available to the public. A copy of movant's proposed amicus brief and supporting declarations are attached as Exhibit A.

3. Movant's interest in the release of documents is public in nature and motivated by concern about the public health and responsibilities for public health research and education.

4. An amicus brief of the United States and the supporting declarations would set forth ways that the release of the documents could be useful to the federal government and others concerned about the health effects of tobacco.

5. Pursuant to Rule 115.10 of the Minnesota Rules of General Practice, movant contacted the

parties to this action by letter to determine whether there was any opposition to this motion. A copy of the September 2, 1998 letter is attached as Exhibit B. As of the date of this motion, the plaintiffs and one defendant have stated that they do not oppose the filing of this motion. No other party has responded. Copies of all responses that movant has received are attached as Exhibit C.

WHEREFORE, movant respectfully requests that this Court enter an order, in the form attached, granting the United States leave to file an amicus brief with supporting declarations, or granting any other such relief as this Court deems just and proper.

Respectfully submitted,

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Date _____

Notice of Motion

To: (See Attached Service List)
Attorneys for Plaintiff and Defendants .

* * * * * * * * * *

Please take notice, that the undersigned will bring the above motion for hearing before the Court at a special term thereof, to be held at the court house in the City of St. Paul, Minnesota, on a day to be determined, at a time to be determined.

Respectfully submitted,

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Brown and Williamson Tobacco Corporation,
B.A.T. Industries, P.L.C., Lorillard Tobacco Company,
The American Tobacco Company, Liggett Group, Inc.,
The Council For Tobacco Research -U.S.A., Inc.,
and The Tobacco Institute,

Defendants.

Amicus Brief of the United States in Support of Release of Documents

The United States of America hereby submits this brief in support of the release of the documents and privilege indices that Defendants have produced but which had not been released to the public.

Issue: Whether the likely benefit to the public health justifies releasing the documents and indices produced by the Defendants.

Suggested Answer: Yes.

I

Introduction

The documents produced in connection with this litigation are of national, if not

international, importance. "Other than food and water, there is probably no substance more utilized than tobacco. Its use affects hundreds of millions of people throughout the world. Its effects have been debated and reported in the press extensively. It has been the repeated subject of legislation, medical investigation,[1] and now litigation." Cipollone v. Liggett Group Inc., 106 F.R.D. 573, 576 (D.N.J. 1985) rev'd, 785 F.2d 1108 (3d Cir. 1986), opinion on remand, 113 F.R.D. 86 (D.N.J 1986).

The American people, the public health community, and local, state, and federal officials are vitally concerned with the health effects of tobacco products. Research concerning the health effects of tobacco, the physiological effects and social influences that contribute to tobacco use and addiction, as well as regulation of the sale and advertising of tobacco is prevalent throughout the country.[2] It is indisputable that any and all additional information

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[1]Medical research continues to show that tobacco can be harmful in ways that the public health community is only beginning to understand. John Schwartz, "Study: Smokers Pass Carcinogen to Fetus, " Washington Post, August 24, 1998 at A10 ("'These results demonstrate a significant potential risk to the unborn child of a woman who smokes.'") (quoting Stephen S. Hecht of the University of Minnesota Cancer Center).

[2]For example, below is a sampling of federal, state, and local activities related to tobacco. These and similar activities could benefit from the release of the Minnesota documents: the Centers for Disease Control and Prevention (CDC) Morbidity and Mortality Weekly Reports, e.g, October 21, 1994 "Reasons for Tobacco Use and Symptoms of Nicotine Withdrawal Among Adolescent and Young Adult Tobacco Users--United States, 1993;" CDC's National Center for Environmental Health and National Center for Health Statistics study to measure serum levels of cotinine (a nicotine metabolite) to assess exposure to tobacco smoke by persons in the United States aged greater than or equal to 4 years; the annual report of the Federal Trade Commission (FTC), pursuant to the Federal Cigarette Labeling and Advertising Act; the FTC's investigation into "Joe Camel," see R.J. Reynolds Tobacco Co. v. Federal Trade Commission, 1998 WL 409379 (M.D.N.C. July 17, 1998) (permitting the investigation to go forward); the American Cancer Society's national campaign to counter advertising by the tobacco industry; the Minnesota ASSIST (American Stop Smoking Intervention Study), a joint project between the Minnesota Department of Health and the American Cancer Society, Minnesota Division, a

which tobacco companies have kept from the public has the potential to further the understanding of public and private individuals and organizations that are interested in addressing the dangers posed by tobacco products.[3] See generally Declaration of Elizabeth Majestic ("Majestic Declaration"),[4] Declaration of Marc Manley ("Manley Declaration"),[5] Declaration of Mitchell Zeller ("Zeller Declaration").[6] All three of these declarations (collectively the "supporting declarations") are attached to this brief and collectively labeled as Appendix A. Accordingly, the health of the American people, and of future generations, justifies the release of the documents.

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smoking prevention coalition active in the state; the American Lung Association of Georgia's "Freedom From Smoking Cessation Clinics" which cover topics including but not limited to "understanding nicotine addiction" and "relapse prevention strategies for staying off cigarettes;" the enactment by the Mayor and City Council of Baltimore of Ordinance 307, prohibiting outdoor advertising of cigarettes in certain areas of the city of Baltimore, see Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore, 101 F.3d 332 (4th Cir. 1996), cert. denied, 117 S.Ct. 1569 (1997).

[3]The United States admits that it can neither request documents with specificity, nor state with certainty how it will use these documents. That concession, however, bolsters rather than undermines the central argument in this brief, i.e., that it is imperative that the tobacco companies not maintain a monopoly on information that affects the lives of millions of Americans. At this point, only the parties to this action have access to the documents. Based on other tobacco industry documents and press accounts of the documents in question, the United States believes that these documents may help the federal government and others address the health risks associated with the use of tobacco products

[4]Elizabeth Majestic is the Deputy Director of the Office on Smoking and Health, Centers for Disease Control and Prevention, United States Department of Health and Human Services. (Majestic Declaration at ¶ 1).

[5]Marc Manley is the Branch Chief of the Public Health Applications Branch of the National Cancer Institute, National Institute of Health, United States Department of Health and Human Services. (Manley Declaration at ¶ 1).

[6]Mitchell Zeller is the Director of the Office of Tobacco Programs, Food and Drug Administration, United States Department of Health and Human Services. (Zeller Declaration at ¶ 1).

II

Argument

The United States Department of Justice files this amicus brief and supporting declarations to provide this Court with legal and policy views of the federal government concerning the documents at issue. See State v. Finley, 242 Minn. 288, 293, 64 N.W.2d 769, 773 (1954); Blue Earth County Pork Producers, Inc. v. County of Blue Earth, 558 N.W.2d 25, 30 (Minn. Ct. App. 1997). The United States believes that the release of the documents and indices will significantly advance the public health.

A. The rulemaking record of the Food and Drug Administration shows the public health threat to children posed by tobacco products, and all information that could be helpful in addressing that threat should be released.

On August 28, 1996, the Food and Drug Administration ("FDA") published in the Federal Register "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents." 61 Fed. Reg. 44396 (1996). Annexed to and made part of this rule was the "Jurisdictional Determination," in which FDA explained its statutory authority to regulate tobacco products. 61 Fed. Reg. 44619 (1996).

FDA's extensive rulemaking record shows that tobacco use is the largest cause of preventable death in the United States. More than 400,000 people die each year from tobacco-related illnesses such as cancer, respiratory illnesses, and heart disease. Tobacco alone kills more Americans annually than AIDS, alcohol, car accidents, homicides, suicides, illegal drugs, and fires combined. The average tobacco user loses 15 years of life. 61 Fed. Reg. 44571.

Although death from tobacco use occurs among adults, FDA found in its rulemaking that tobacco use is a "pediatric disease" because most adult smokers become addicted to nicotine in

tobacco during childhood. Id. at 44421. Over 80% of the adult smokers in the U.S. started to smoke as children or adolescents. Because nearly all first use of tobacco occurs before high school graduation, if adolescents can be kept tobacco-free, most will never start using tobacco. Id. at 44399. Most of the children and adolescents who now smoke already regret their decision to start and say they want to quit, but cannot. Id. at 44398. Approximately three million American children and adolescents now smoke; an additional one million adolescent males use smokeless tobacco. Every year, approximately one million children and adolescents begin to smoke — nearly 3,000 per day. FDA found that one of every three young tobacco users will eventually die from a tobacco-related disease. Id. at 44398, 44568.

FDA found that nicotine in cigarettes and smokeless tobacco causes and sustains addiction. 61 Fed. Reg. 44630, 44665-66. Nicotine does so by exerting psychoactive, or mood-altering, effects on the brain, and by producing chemical reactions in the brain that motivate repeated, compulsive use and create dependence in the user. Id. at 44666. There has developed "a scientific consensus, on the basis of overwhelming scientific evidence, that nicotine in cigarettes and smokeless tobacco is highly addictive and produces significant effects on the structure and function of the body." 61 Fed. Reg. 45227. Every major public health organization in the United States and abroad with expertise in tobacco or drug addiction, including the American Psychiatric Association (1980), the U.S. Surgeon General (1986 and 1988), the American Psychological Association (1988), the Royal Society of Canada (1989), the World Health Organization (1992), the American Medical Association (1993), and the Medical Research Council in the United Kingdom (1994), has concluded that nicotine is addictive. Id. at 44634, 45228-33. FDA found in its rulemaking "scientific data establishing that the vast

majority of consumers who use cigarettes and smokeless tobacco are addicted to them and use these products nearly exclusively to obtain the pharmacological effects of nicotine." 61 Fed. Reg. 45227. Scientific evidence accumulated since 1980 shows that over 75% of smokers, and as many as 75% of young regular smokeless tobacco users, are addicted to nicotine and use cigarettes and smokeless tobacco to satisfy their addiction and for their mood-altering effects. Id. at 45233. See also id. at 44635-36, 44807-08.

Based on other documents that were obtained from the tobacco manufacturers, FDA determined that the tobacco companies knew that the nicotine in tobacco products caused addiction and that consumers used the products in large part because of that addiction. In the case of cigarettes, FDA found that "[m]anufacturers of commercially marketed cigarettes commonly manipulate nicotine deliveries to provide remarkably precise, pharmacologically active doses of nicotine to consumers." Id. at 44951. FDA further determined that smokeless tobacco manufacturers also manipulate nicotine deliveries. Id. at 45108.

FDA's regulations attempt to limit both minors' access to cigarettes and smokeless tobacco and the attractiveness of such products. In addition, the National Cancer Institute (NCI) supports research and educational activities related to decreasing youth smoking throughout the country. These research and educational activities, and others, would benefit from the release of the documents. (Manley Declaration at ¶ 6). Much valuable research has already been performed by the tobacco companies. That research, however, is not available to the public. (Majestic Declaration at ¶¶ 9-15); (Manley Declaration at ¶¶ 7, 9).

Access to this information is especially appropriate because tobacco companies have extensively and successfully utilized advertising to attract tobacco users, including underage

users. For example, FDA found that cigarettes and smokeless tobacco are "among the most heavily advertised and widely promoted products in America." 61 Fed. Reg. at 44475. This advertising plays a significant role in the decisions of young people to use cigarettes and smokeless tobacco, id. at 44487-88, in part because they are "very impressionable and therefore vulnerable to the sophisticated marketing techniques employed by the tobacco industry, techniques that associate the use of tobacco products with excitement, glamour, and independence." Id. at 44398.

Internal tobacco company documents released to date also provide "convincing evidence" of an intent "to attract young smokers and so-called presmokers" through advertising. Id. at 44480. See, e.g., ibid. (if R.J. Reynolds "'is to survive and prosper, over the long-term we must get our share of the youth market'"); id. at 44481 ("'[e]vidence now available * * * indicate[s] that the 14 to 18 year old group is an increasing segment of the smoking population. RJR must soon establish a successful new brand in this market if our position in the industry is to be maintained'"). Additional information about tobacco company efforts to attract minors would increase the chances that public health officials could counteract such efforts. (Majestic Declaration at ¶¶ 12, 14).

These findings demonstrate the threat to the public health posed by the harmful effects of tobacco use coupled with the tobacco companies' suppression of information and targeting of children through advertising. The United States believes that the documents produced in this case may be helpful to FDA and others in addressing this public health threat. (Manley Declaration at ¶¶ 3, 6). In particular, FDA is charged with the approval of tobacco cessation products, e.g, nicotine patches, nicotine gum. (Zeller Declaration at ¶ 7). FDA's evaluation of

such products would benefit greatly from access to tobacco industry research. (Id.) In addition, access to tobacco company research is likely to lead to the development of more effective cessation products and programs. (Id.); (Majestic Declaration at ¶ 13); (Manley Declaration at ¶¶ 6-8).

B. The release of the documents is necessary so that the Department of Health and Human Services can make recommendations to Congress for appropriate legislative actions.

The United States Department of Health and Human Services (HHS) has been given a mandate by Congress that the department and its component agencies cannot fulfill if tobacco companies are permitted to withhold important information about the health effects of tobacco. Congress has directed HHS to, inter alia, collect and analyze ingredients and additives used in tobacco products and to report to Congress on the health effects of such products. See 15 U.S.C. § 1337; 15 U.S.C. § 4407; (Majestic Declaration at ¶ 8). Within HHS, much of the responsibility for compliance with these congressional directives, as well as other tobacco-related activity, has been assigned to the Office on Smoking and Health ("OSH"). (Majestic Declaration at ¶¶ 1, 3, 4, 5, 7). In addition, pursuant to the Alcohol Abuse, Drug Abuse, and Mental Health Amendments of 1984, HHS must submit certain reports to Congress every three years. 42 U.S.C. § 290aa-2(b). These amendments direct HHS, through the Secretary of the department, to report to Congress findings on "the addictive property of tobacco" and to recommend "legislation and administrative action as the Secretary may deem appropriate." 42 U.S.C. § 290aa-2(b)(2)-(3). The release of the Minnesota documents will allow HHS to provide more comprehensive and accurate information to Congress in satisfaction of its several statutory duties. (Majestic Declaration at ¶¶ 10, 15).

Congress has assigned these responsibilities to HHS and its agencies because of their expertise in the public health arena. Based on already-released documents, it appears that the documents and indices at issue likely contain a wealth of information which will greatly assist HHS in fulfilling its congressionally assigned responsibilities.

C. The release of the documents is necessary so that HHS can educate the public about the dangers of cigarettes and smokeless tobacco.

HHS cannot fulfill its obligation to educate the American people about "the effect of cigarette smoking on human health" 15 U.S.C. § 1341(a), and "any dangers to human health resulting from the use of smokeless tobacco products," 15 U.S.C. § 4401(a),[7] if HHS does not have access to some of the most probative information available on those subjects. (Majestic Declaration at ¶ 11). The documents which have not been released very well may be the most effective tools that HHS has in educating the public. (Majestic Declaration at ¶¶ 10, 15).

D. An overriding concern with protecting public health warrants disclosure.

The documents produced in this case will be helpful in understanding the activities of the tobacco companies. (Supporting Declarations, passim). "The estimated 30 million pages of documents . . . are the 'crown jewels of a conspiracy' by the cigarette companies to deceive the

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[7]It should be noted that part of the Secretary's responsibilities under the Comprehensive Smokeless Tobacco Health Education Act of 1986 include providing expertise and assistance to states. 15 U.S.C. § 4401(b); (Majestic Declaration at ¶¶ 3, 5, 6, 17). In support of this legislation, the Honorable Henry A. Waxman said the following: "Finally, the legislation authorizes the Secretary of Health and Human Services to work closely with States in the development of educational programs and public service announcements . . . . These efforts are especially critical at the primary and secondary school levels where the pressure to begin using smokeless tobacco is so strong." 131 Cong. Rec. E43850-02 (October 3, 1985) (statement of Rep. Waxman). Clearly HHS will be better able to provide this "critical" assistance fully informed.

public about the hazards of smoking." Mark Moran, "'Jewels' emerge from tobacco settlement" Health and Fitness News Service, July 28, 1998 (quoting a spokesperson for Attorney General Hubert Humphry III). "'When Congress and the American public see I think the pervasiveness of the fraud and conspiracy that is shown so clearly in some of these documents they're going to demand action to truly protect kids from addiction and disease.'" "Special master rules on tobacco industry documents" The Minnesota Daily Online, Feb. 11, 1998 (quoting Attorney General Hubert Humphry III). The release of the Minnesota documents will give the public a fair chance to counteract the activities of tobacco companies, including but not limited to the targeting of children. (Majestic Declaration at ¶¶ 7, 10).

The United States believes that certain documents produced, but not yet released, could prove to be the most important of the group. Specifically, the United States understands that approximately 400 addiction and nicotine manipulation documents were produced but have not been made public. These documents could be invaluable to, among others, the CDC, the American Lung Association, the American Cancer Society, and the Campaign for Tobacco Free Kids, in their efforts to understand and prevent tobacco use, addiction, and disease. (Zeller Declaration at ¶ 7). Accordingly, the release of the documents will greatly further substantial public health goals.

E. Because the documents produced by Defendants in this action are so voluminous, the indices associated with these documents, including the 4A and 4B privilege logs, should be released by this Court along with the documents themselves.

The public should be able to determine which of the documents produced by Defendants are most important in light of their particular interest in the health risks posed by tobacco. It is

simply not feasible to go through each document which has been released. Public health officials have attempted to utilize the documents and privilege logs currently available and have found their attempts frustrating and unavailing. (Majestic Declaration at ¶ 18); (Manley Declaration at ¶¶ 11-13); (Zeller Declaration at ¶¶ 7-10). The now-available privilege logs provide almost no useful information about the content of the documents and, as a result, it is necessary to look at each document individually. In contrast, the 4A and 4B indices would, as we understand it, allow the reader to determine which documents would be most relevant to his/her public health concerns. Accordingly, the release of these indices will significantly advance public understanding and improve reasearch into tobacco-related health matters.

III

Conclusion

For all of these reasons, this Court should order the release of the documents and indices, including privilege logs, produced by Defendant, in furtherance of important public health concerns.

Respectfully submitted,

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The American Tobacco Company, Liggett Group, Inc.,
The Council For Tobacco Research -U.S.A., Inc.,
and The Tobacco Institute,

Defendants.

ORDER

And now on this the _____ day of _____ 1998, on Motion of the United States, it is hereby ordered and decreed that the United States is granted leave to file an amicus brief and supporting declarations in the above-captioned action.

_____
Chief Judge Lawrence Cohen

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CERTIFICATE OF SERVICE

I certify that the foregoing Motion was served on this _____ day of _____ 1998 by Federal Express on counsel as follows:

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DRAFT

DECLARATION OF ELIZABETH A. MAJESTIC

1. I am Deputy Director of the Office on Smoking and Health (OSH), which is part of the National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention (CDC), United States Department of Health and Human Services, Atlanta, Georgia. I have held this position since April 1997. OSH is the Federal government's principal office for prevention and cessation of tobacco use and the protection of non-smokers.

2. Prior to my role as Deputy Director, I was the Chief of Special Populations Program, Program Development and Services Branch, Division of Adolescent and School Health (DASH), CDC. At DASH, I was involved in the development, implementation, and evaluation of comprehensive school health programs to prevent tobacco use and other important health problems. Before coming to the CDC, I served as the Coordinator of the Alcohol and Other Drug Education Program at Purdue University. I completed my academic work at West Virginia University and Indiana University, including two masters degrees in public health education.

3. OSH's mission is to lead and coordinate strategic efforts aimed at the prevention and cessation of tobacco use and the protection of non-smokers. OSH's activities include: (a) expanding the scientific basis of tobacco use control; (b) building capacity to conduct tobacco use control programs; and (c) communicating information to, and working with, constituents such as states, localities, national public interest

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organizations, and the public. Through collaboration with the states, with national professional and voluntary organizations, and with other federal agencies, CDC leads and coordinates strategic efforts to prevent tobacco use among young people, promote smoking cessation, and reduce exposure to environmental tobacco smoke.

4. OSH is charged with providing the public, health professionals, and policy makers with current scientific information on the health effects of tobacco use, effective interventions to reduce tobacco use, tobacco use trends, and determinants of tobacco use. This information is used to develop nationwide strategic efforts to prevent and control the use of tobacco. Examples of recent efforts include Surgeon General's Reports that have addressed tobacco use among adolescents and among special populations, and CDC Morbidity and Mortality Weekly Reports addressing state laws on tobacco product access and trends in smoking initiation among young people.

5. OSH assists thirty-two states, the District of Columbia, and national public health organizations to build their capacity for sustaining broad-based tobacco control programs. Through its Initiatives to Mobilize for the Prevention and Control of Tobacco Use program (IMPACT), OSH provides extensive technical assistance and training through site visits, workshops, and teleconferences on planning, developing, implementing, and evaluating tobacco control programs. In fiscal year 1999, CDC/OSH will fund all

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fifty states and the District of Columbia to conduct tobacco control programs.

6. Through its State Tobacco Activities and Evaluation System (STATE), OSH maintains a comprehensive state-based tobacco control surveillance system that tracks legislative, program, and epidemiologic data. This data is used in materials and reports prepared by OSH for use by a range of constituents in tobacco use control and prevention efforts.

7. OSH conducts and coordinates national health communication campaigns, and provides state health departments access to all media materials developed by OSH, states, and organizations. Additionally, OSH serves as a World Health Organization Collaborating Center on tobacco and health.

8. The Secretary of Health and Human Services, through OSH, is directed by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331, *et seq.*, and the Comprehensive Smokeless Tobacco Health Education Act, 15 U.S.C. § 4401, *et seq.*, to collect and analyze ingredients and additives used in the making of tobacco products, 15 U.S.C. §§ 1335a, 4403, and to report to Congress on the health effects of tobacco products, 15 U.S.C. §§ 1337, 4407.

9. The Minnesota documents will be extremely valuable to OSH's work because they contain comprehensive research, data, and other information that is relevant to tobacco control and prevention efforts. The dissemination and analysis of such information will strengthen the body of evidence on which to base

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public policy decisions and inform public opinion regarding tobacco use, prevention, and control. OSH plans to communicate information obtained from these documents to the public and policy makers through Reports of the Surgeon General, statutorily-mandated reports to Congress, and other means.

10. The Minnesota documents will be useful in a range of OSH activities. For example, information currently available makes clear that these documents contain many internal industry statements and discussions about smoking and health, and the factors that influence smoking behavior, that are contrary to public statements by tobacco companies. OSH can use these internal statements to more accurately depict the health risks of tobacco use and to develop more effective measures to reduce tobacco use.

11. Currently available information suggests that the Minnesota documents are likely to contain important information concerning how tobacco companies developed products to appeal to a wider range of demographic groups. This includes the development of "low tar, low nicotine" products to retain health-conscious smokers in the market, "low irritation" products to reduce the nausea felt by first-time smokers, "slim" and "luxury length" cigarettes to appeal to women, and menthol cigarettes to appeal to African Americans. OSH could use this information in materials that help smokers better understand the true health risks of such cigarettes, and to develop materials to educate particular demographic groups about how the industry's

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development decisions might have influenced their smoking behavior (for example, how "slim" cigarettes suggest that smoking plays a role in weight loss). These educational efforts could motive smokers to make efforts to quit using tobacco products.

12. Available information also indicates that the documents include extensive information about successful industry advertising and other marketing techniques, particularly the targeting of specific demographic groups such as youths and minorities. OSH can use such documents to develop stronger counter-promotional strategies, and to evaluate which demographic groups may require additional efforts to combat industry targeting. Other information concerning marketing practices and strategies, such as reports of brand-specific marketing expenditures by region of the country, can be used by OSH in the planning and implementation of additional tobacco use prevention efforts.

13. The documents are likely to include industry studies of techniques that the industry has found to be effective in promoting tobacco use initiation and continued use, decreasing motivation to quit, and in generally increasing the acceptability of tobacco use. OSH can use this information to strengthen existing prevention and cessation programs and refine the practices and techniques already in place. In particular, this information will be of great use to OSH in the IMPACT program discussed in paragraph 5 of this declaration.

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14. The documents may also contain information on how the industry modified marketing strategies in response to anti-smoking campaigns, the public health strategies to prevent and reduce tobacco use that most concerned the industry, and the industry's efforts to undermine such public health strategies and campaigns. OSH could use such information to educate governmental officials and the public health community on what strategies to focus on, what opposition tactics to expect from the industry, and guidelines on how to counter-balance industry opposition techniques.

15. The documents are likely to contain extensive studies of tobacco product additives and ingredients in tobacco smoke. OSH can use this information in its prevention and control efforts. Making the information available to smokers and potential smokers would allow them to make more informed decisions about their smoking behavior and perhaps motivate them to try to stop or not to start at all. Information concerning the health effects of additives, flavorings, and other ingredients in tobacco products can also be used to better understand patterns in the use of tobacco products and the health effects of these products on users. OSH could use this information in its reports to Congress, and to facilitate further research aimed at exploring the health effects of tobacco products.

16. The documents are also likely to include information concerning the industry's strategies for combating anti-smoking

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policies in the workplace and other public places. Such information is directly relevant to OSH's currently ongoing study regarding workplace smoking policies. The documents may also contain information that is contrary to the industry's public pronouncements that the health hazards of second-hand smoke are unproven. OSH can use such evidence to prepare materials and conduct activities that support efforts to reduce exposure to second-hand smoke in public places.

17. Available information indicates that the tobacco industry is keenly interested in trends in and sales of tobacco products. As a result, the documents are likely to contain significant information concerning industry surveillance techniques that OSH could use to supplement existing tracking mechanisms and provide a wider scope of information on tobacco use trends. For example, OSH could use such information to enhance the development of the State Tobacco Activities and Evaluation System (STATE) program discussed in paragraph 6 of this declaration, and to compare its epidemiologic data with tobacco industry data.

18. Although it is generally known that the Minnesota documents contain a wide range of useful information, it is currently very difficult for OSH to utilize the documents effectively. Obstacles that hamper the identification of relevant documents include the lack of electronic availability of many of the documents, inefficient search mechanisms that do not allow for full-text searching or searching by subject or key

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word, and the inability to perform a single search across companies and institutions. Access to a comprehensive index will greatly assist OSH's efforts to identify and locate vital information in these documents. Access to the index and the resulting significant improvements in OSH's ability to efficiently and effectively access the documents will enhance OSH's efforts to further the prevention and cessation of tobacco use and to protect non-smokers.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is to the best of my knowledge and belief true and correct.

Executed this ____ day of October, 1998 at Washington, D.C.

DRAFT

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Elizabeth A. Majestic
Deputy Director, Office on Smoking and Health
National Center for Chronic Disease
Prevention and Health Promotion
Centers for Disease Control and Prevention
U.S. Department of Health and Human Services
3305 Chamblee-Tucker Road, Room 3035
Atlanta, Georgia 30341

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DECLARATION OF MITCHELL ZELLER

1. I am Director of the Office of Tobacco Programs at the Food and Drug Administration (FDA), United States Department of Health and Human Services. I have worked at FDA since April 1993, and have worked full-time on tobacco issues since March 1994. I received a Doctor of Jurisprudence degree from the American University Washington College of Law, Washington, D.C., in 1982, and a Bachelors of Arts degree with a double major in Government and Policy Studies from Dartmouth College, Hanover, New Hampshire, in 1979.

2. Prior to joining FDA, I worked as counsel to the Subcommittee on Human Resources and Intergovernmental Relations, Committee on Government Operations, U.S. House of Representatives between November 1988 and April 1993. My responsibilities included conducting investigations, organizing hearings, writing investigative reports, and coordinating media work for the oversight of food and drug issues at FDA and the U.S. Department of Agriculture. Between September 1982 and October 1988, I worked as an attorney at the Center for Science in the Public Interest in Washington, D.C., a national consumer health organization that lobbies Congress and regulatory agencies, conducts litigation, and provides information to the public on food safety and nutrition issues.

3. In August 1996, FDA asserted jurisdiction over cigarettes and smokeless tobacco products under the Federal Food,

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Drug, and Cosmetic Act, 21 U.S.C. 321, *et seq.*, and issued final regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents, 61 Federal Register 44396 (August 28, 1996). I supervised FDA's two-year investigation of the role of nicotine in the design and manufacture of tobacco products. This investigation included the review of the limited number of tobacco industry documents available at that time. The investigation's findings were reported in two documents published in the federal register, "Nicotine in Cigarettes and Smokeless Tobacco Products Is A Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cometic Act," 60 Federal Register 41454-787 (August 11, 1995), which accompanied the proposed tobacco regulations, and "Nicotine in Cigarettes and Smokeless Tobacco Is A Drug and These Products Are Nicotine Delivery Devices Under the Federal Food, Drug, and Cosmetic Act: Jurisdictional Determination," 61 Federal Register 44619-45318 (August 28, 1996), which was annexed to the final tobacco rule.

4. I am currently responsible for directing the tobacco program at FDA, which includes the creation and implementation of a plan to enforce the regulations issued in 1996. I am responsible for developing a strategic plan and budgets for the long-term growth of the tobacco program, and oversee a current budget of $34 million. I represent FDA on tobacco issues in dealings with Congress, other federal and state agencies, industry, public health groups, and the media.

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5. FDA has a great need for access to industry documents in a number of areas, including nicotine manipulation, product design, tobacco use and health issues, and advertising, marketing, and promotion. Effective access to the Minnesota documents would assist FDA in the implementation of the access and advertising restrictions issued in 1996. Further, the industry's marketing research could be useful in crafting educational campaigns concerning the effects of tobacco use. Effective access to the documents would provide FDA with information needed to determine appropriate further regulation of the product. Much needs to be learned on a range of issues in order to effectively protect the public from the hazards of tobacco products, consistent with FDA's mission of protecting, promoting, and enhancing the health of the American people.

6. The agency learned during our investigation from 1994 to 1996 that internal tobacco industry documents are a vital and valuable resource to help the agency and public health experts analyze what steps a regulatory agency like FDA should consider in the areas of access, advertising, and product regulation. For example, many questions are being raised about how to reduce the toxicity of conventional cigarettes. FDA's investigation showed that the tobacco companies extensively studied this matter over the last 30 years. The investigation also made clear that on numerous occasions, industry scientists discovered how to reduce the hazards linked to cigarettes, only to have their findings hidden by the companies. FDA, other federal agencies, and public

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health experts need access to the documents that will help us learn what the companies discovered about how to reduce the risks associated with tobacco use.

7. Access to the index and documents that are being withheld will also greatly improve FDA's work in the area of tobacco product use cessation. During the investigation, FDA discovered just a portion of what is certainly a large volume of documents that describe the companies' analysis of the difficulties users face when they are trying to stop using tobacco products. Manufacturers of several tobacco product use cessation products, such as the nicotine patch and the nicotine gum, have sought and received FDA approval for their products for the treatment of nicotine addiction. FDA's statutory responsibility to evaluate such products, and innovative cessation products that may be developed in the future, will be significantly enhanced with ready access to all of the Minnesota documents that address cessation issues. In addition, such documents, as well as documents and studies concerning nicotine pharmacology and other issues, will likely also be of significant value to researchers and companies interested in developing more effective cessation products.

8. The potential value of the Minnesota documents is greatly diminished because no comprehensive index is currently available. The agency has a great need for access to indexes that would enable FDA to review the tens of millions of pages of potentially relevant documents in an efficient and productive

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manner. The indexes are a road map, and without that road map, the agency has no idea what direction we should point ourselves to go in reviewing tens of millions of pages of material. Without access to the indexes, the agency's review and analysis of these very important documents will be significantly delayed.

9. I am aware, based upon extensive conversations and meetings with some of the leading tobacco researchers in the country, that the public health community is extremely interested in being afforded the broadest possible access to the Minnesota documents and the indexes that accompany them. Experienced researchers in the public health community are poised to study a myriad of issues — from access and advertising matters to cessation and risk reduction. Some of this work has already started, but has been slowed by the lack of an adequate index. This vitally important work would be greatly enhanced by access to the best possible index to the Minnesota documents.

10. Public availability of the indexes and additional documents would assist FDA in its efforts to better understand tobacco products. The indexes would allow members of the public interested in specific areas to locate potentially useful documents. Such persons could then make the information in the documents more widely known, and pursue analysis and further research. Enhanced knowledge regarding tobacco products could provide impetus to better public health research and development, particularly into improved smoking and other tobacco use cessation products.

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is to the best of my knowledge and belief true and correct.

Executed this ____ day of October, 1998, at Rockville, Maryland.

DRAFT

Mitchell [illegible]
Director, Office of Tobacco Programs
U.S. Food and Drug Administration
5600 Fishers Lane, Room 14-101
Rockville, Maryland 20857

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DECLARATION OF MARC W. MANLEY, M.D., M.P.H.

1. I am the Branch Chief of the Tobacco Control Research Branch at the National Cancer Institute (NCI), Division of Cancer Control and Population Sciences, Behavior Research Program. I have been a Branch Chief at NCI since March 1992.

2. I received a Doctor of Medicine from the University of Washington in 1983, and a Master of Public Health from the Johns Hopkins University School of Hygiene and Public Health in 1986. I have worked in NCI's tobacco control research program since 1987. My responsibilities have included the supervision, design, and implementation of national programs to train health professionals in scientifically valid smoking cessation and prevention techniques. I am the author or co-author of numerous publications on issues related to tobacco use, addiction, and cessation.

3. In my current position, I supervise the NCI branch responsible for extramural tobacco control research. This includes responsibility for all aspects of the American Stop Smoking Intervention Study, a 17-state demonstration project to reduce tobacco use, and over $30 million annually in contracts.

4. Between January and July 1998, I also served as Acting Associate Director of the Behavioral Research Program in NCI's Division of Cancer Control and Population Sciences. In that position, I supervised all professional and support staff in a new NCI program that is to expand basic and applied behavioral

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research to control cancer and is responsible for over $200 million in research grants and contracts annually.

5. The NCI conducts and supports research, training health information dissemination, and other programs with respect to the cause, diagnosis, prevention, and treatment of cancer, rehabilitation from cancer, and the continuing care of cancer patients and the families of cancer patients. Tobacco use is responsible for approximately one-third of all cancers.

6. The NCI currently supports research related to tobacco totaling more than $85 million annually. These research efforts include clinical studies on smoking cessation, such as the nicotine patch, self-help treatment, interactive video interventions, and community-based interventions, particularly those aimed at youth.

7. Comprehensive tobacco control research efforts can contribute to real reductions in tobacco use by, for example, helping us to understand why children smoke and how we can help them avoid tobacco use. More research is needed in order to have the information necessary to guide new policies, programs, and regulations. Some of this research has already been done by the tobacco industry, but is not available as a practical matter because it is so difficult to access or is being withheld entirely from public disclosure.

8. Many areas of research would benefit from improved accessibility to the Minnesota documents, including nicotine pharmacology, nicotine addiction, health consequences of tobacco

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use and tobacco product additives, tobacco product design, product packaging, advertising and promotion, marketing research, disruption of public health programs and intervention activities, manipulation of scientific processes, and environmental tobacco smoke.

9. The tobacco industry has conducted extensive research into many areas of interest to the tobacco use control and prevention community. For example, it has been widely reported that the industry has carefully studied why and how individuals begin to use tobacco products; the roles of racial, cultural, and gender influences in youth tobacco use; and the impact of new tobacco products and promotions on tobacco initiation and cessation rates. Public health researchers could use industry documents on these issues as the basis for further study and to develop effective intervention strategies that counter these influences, and help prevent and reduce tobacco use among young people.

10. Access to numerous other areas of industry research would benefit the public health. The industry has extensively studied the effects of nicotine on the body. This industry research could provide new information about nicotine addiction, its genesis among youth, and its continuation among adults that would be useful to researchers developing better prevention and treatment methods. Information on industry advertising strategies, especially those directed at youth, could inform counter advertising campaigns that help prevent tobacco use.

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Information about the health consequences of tobacco products and their additives could be used in the development of less harmful products. Information about tobacco industry efforts to disrupt public health programs may help in understanding the impact of community intervention programs and appropriate modifications to these programs.

11. The lack of a useful index to the Minnesota documents is a barrier to effective utilization of the documents by researchers. Recent research efforts are illustrative. Duplication of efforts occur as each investigator must find his or her own path to documents that may have already been used by other investigators. For example, NCI provided a research grant for the sole purpose of examining tobacco industry documents. Because no index exists, the bulk of the project consists of searching through some of the 26,000,000 pages of documents to identify documents relevant to the study's focus — tobacco marketing to youth. If an index were available that identified the topics of individual documents, these resources could instead focus on analyzing documents and, for example, developing strategies to counter industry marketing to youth.

12. As a result of the current state of affairs, resources are not being used as effectively and efficiently as would be the case if a index were available. Efforts to utilize the documents in ways that benefit public health are significantly delayed while resources are devoted to simply identifying the topic at issue in individual documents. If these resources could instead

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be devoted to analyzing and using the substance of the documents, we would be that much closer to efforts that would directly impact on public health.

13. In addition, researchers who have experience likely to be of significant value in research activities involving tobacco use prevention and control are deterred from utilizing the documents because they do not have the time or resources to forage through thousands of boxes of documents to find documents relevant to their area of interest. An index would encourage and allow such researchers to quickly identify relevant documents and apply their skills in ways that could significantly benefit public health.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is to the best of my knowledge and belief true and correct.

Executed this ____ day of October, 1998 at Bethesda, Maryland.

DRAFT

Marc W. [illegible]
Branch Chief
Tobacco Control Research Branch
National Cancer Institute
Executive Plaza North
6130 Executive Blvd., Room 241
Bethesda, MD 20893

Tab - set - look back penalties
(and)
Tab - nr - document disclosure

United States Senate
COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION
WASHINGTON, DC 20510-6125

April 16, 1998

Dan Mollohan, Director
Congressional Research Service
LM 203
Washington, DC 20540

Dear Mr. Mollohan:

As you may know, on April 1, 1998, the Senate Commerce Committee approved S. 1415 -- the National Tobacco Policy and Youth Smoking Reduction Act.

This bill is a comprehensive measure aimed at dramatically reducing youth smoking, and is based on the framework laid out in the proposed June 20th settlement agreement between various state attorneys general and the industry.

The measure, like the settlement, contemplates that the industry would consent to terms under the legislation by entering into a national protocol and state consent decrees. This would enable the provisions to be implemented without challenge or delay. While industry cooperation is desirable, it is not mandatory, and Congress is prepared to act with or without the industry's consent.

As you know, absent industry cooperation, it has been suggested that three titles of S. 1415, as approved by the Commerce Committee, raise constitutional concerns: advertising and marketing restrictions; the look-back penalties for non-attainment of youth smoking reduction targets; and the public disclosure of tobacco industry documents.

With respect to advertising, the Committee could address concerns by simply codifying the FDA's approach embodied in 21 CFR, Part 801. While these advertising restrictions are more narrow than what is contemplated in the legislation and by the attorneys general, they are presumptively constitutional.

The purpose of this letter, however, is to request the Congressional Research Service's recommendations regarding what changes, if any, must be made to provisions dealing with the look back penalties (Title II) and public disclosure of tobacco industry documents (Title IX), to address any constitutional or other legal deficiencies.

Your recommendations should include those modifications that are absolutely necessary, constitutionally and legally, absent industry consent. The suggestions should include alternatives Congress might consider to achieve the same purposes and goals without making itself unduly vulnerable to constitutional challenge.

Thank you for your assistance in this matter. If you have any questions regarding this request, please don't hesitate to contact me, or John Raidt, staff director of the Senate Commerce Committee at 224-1251.

As you know, the Senate intends to act on the tobacco bill prior to the Memorial Day recess. It would be very helpful if you would provide your recommendations no later than May 1, 1998.

Again, thank you for your help.

Sincerely,

John McCain
Chairman

JM/jr

Tobacco - settlement - document disclosure

DOCUMENT DISCLOSURE MECHANISMS

Conrad Bill Provisions

The Conrad bill requires tobacco manufacturers to release to the Secretary of Health and Human Services, within 3 months of enactment of the bill, all documents in their possession:

> (1) Relating, referring, or pertaining to—
> (A) any health effects in humans or animals, including addiction, caused by the use of tobacco products, or components of tobacco products,
> (B) the engineering, manipulation, or control of nicotine in tobacco products,
> (C) the sale or marketing of tobacco products,
> (D) any research involving safer tobacco products, or
> (E) such other matters as the Secretary may prescribe; or
>
> (2) Produced or ordered to be produced in any judicial or administrative proceeding, including documents produced or ordered to be produced for *in camera* inspection.

The Secretary is then required to review the documents to determine if a trade secret protection or attorney-client privilege applies, and begin releasing documents that do not contain such information within 6 months. The bill also contains a provision that allows release of documents otherwise subject to trade secret protection or the attorney-client privilege if "the Secretary determines that the disclosure of such information is necessary to promote the public health."

Recommendations

1. *Release of Documents to FDA*

Because of the potential for the appearance of conflicts of interest, FDA should not be involved in the determination of whether a document is appropriately claimed to be subject to the attorney-client privilege. FDA's regulatory role, however, warrants separate provisions to ensure FDA access to documents.

The documents in category (1) of the Conrad bill should be submitted to FDA. Any documents containing trade secret information would be subject to all existing FDA protections. Companies would be obligated to make trade secret and confidential commercial information designations pursuant to 21 C.F.R. § 20.61 of FDA's Freedom of Information Act (FOIA) regulations. Consistent with the concept of providing a central mechanism for public access to tobacco documents, private parties seeking these documents would not be able to request these documents from FDA through FOIA. All such requests would go to the office discussed in item 2.

For documents within these categories that are withheld based on claims of attorney-client privilege, the companies should be required to provide sufficiently detailed privilege logs so that FDA can evaluate whether it should pursue release of the document. Attorneys involved in the Minnesota litigation have advised FDA that the logs produced in that litigation, pursuant to the requirements of the Federal Rules of Civil Procedure, were inadequate. FDA (and/or the office discussed in item 2) should have authority to issue requirements for the content of privilege logs.

Failure to submit documents to FDA, or to include documents in a privilege log, should be a prohibited act under section 301 of the Federal Food, Drug, and Cosmetics Act (FDCA), 21 U.S.C. § 331, and be subject to criminal prosecution and/or civil money penalties under the FDCA. In addition, the improper designation of a document as attorney-client privileged should be subject to civil penalties under the FDCA. There should be no intent requirement for the imposition of civil penalties (i.e., the government need not establish that the company intended to improperly or falsely designate the document as privileged).

2. *Public Release of Documents/Mechanism to Review Claims of Privilege*

An office to manage the document provisions should be established. This office should not be in FDA. Because of possible due process concerns, the legislation should contain provisions that make clear that this office will not share documents for which attorney-client privilege is claimed with other government agencies, including the Department of Justice, unless the claim of privilege is denied and judicial remedies have been exhausted.

The office would operate in a manner similar to a FOIA board. Companies would be required to submit to the reviewing body all documents listed in the Conrad bill.

The legislation should contain the framework of the office's procedures—

- Companies should be required to specify which documents are privileged, provide the reasons for the assertion of privilege, and provide sufficiently detailed privilege logs suitable for public release. Similar logs should be required for documents that are claimed to contain trade secret information.

- Federal government agencies would be authorized to request that the office evaluate specific claims of privilege. These requests would receive priority consideration by the office (i.e., the office would make decisions on these claims before proceeding to evaluate other documents).

- The reviewing office should have the flexibility to set up procedures with respect to documents for which attorney-client privilege is claimed that do not involve *in camera* review of all documents. For example, the court in the Minnesota litigation required the documents to be categorized. The court advised the parties that the categories could include the type of privilege claims (e.g., opinion work product, fact work product, attorney-client, or joint defense), the subject matter of the document, the maker of the document, and the recipient, if any, of the document. The parties met to discuss appropriate categories, and presented their positions to the court. The court eventually ordered that the documents be designated into one of several categories.[1] The court reviewed randomly selected documents in

[1] The categories were as follows: 1. Other Litigation (documents reviewed in other litigation for which privilege was denied); 2. No Attorney Identified (documents that, on their face, do not indicate they were written or received by an attorney); 3. Science (documents relating to or referencing scientific research or research reports on smoking and health); 4. Attorney-Related Involvement in Smoking and Health; 4A. Communications of Counsel (documents relating to or referencing the Committee of Counsel, Scientific Liaison Committee, or Research Liaison Committee); 4B Special Projects (documents relating to or referencing "Special Projects" including CTR Special Products, Lawyers' Special Projects, or Special Accounts); 4C. LS, Inc. (documents relating to or referencing LS, Inc., 3i, or LRD which were formed to index, store, and retrieve information relating to smoking and health for the tobacco industry); 5. Public Statements (documents relating to or referencing positions taken or statements made by a defendant or by the industry regarding smoking and health); 6. Additives (documents relating to or referencing ingredients, formulae, constituents, chemicals, or components added to tobacco or tobacco products); 7. Children (documents relating to or referencing persons under age 18); 8. Advertisements (documents relating to or referencing advertising, promotion, or marketing of cigarettes); 9. Discovery (documents relating to or referencing requests for information, including document destruction and document transfer); 10. Government Regulations (documents relating to or

each category, and decided based on that review whether the claim of privilege for the entire category should be sustained (the court, however, reviewed all of the documents in certain categories). These procedures allowed the court to balance the need for efficiency and timeliness with due process concerns.

- If the claim of privilege or trade secret protection is upheld (or the office finds that the document would be exempt from disclosure under FOIA exemption 6, personal privacy), a private party or federal agency could challenge that determination in federal district court in the District of Columbia. The company would have to defend the determination; the office would not be responsible for its defense. The standard of review applicable to parallel FOIA matters, *de novo* review, would apply.

- If the claim of attorney-client privilege or trade secret protection is denied, the office would provide notice to company. The company would have 5 working days to object. If office decides to disclose the document after reviewing any company objections, the office would then provide notice to company that document or information will be released within 5 working days unless the U.S. District Court for the District of Columbia orders the office to not release it. The office (and/or DOJ) would defend the office's position in federal court. The APA standard of review for "reverse FOIA" cases would apply (under that standard, 5 U.S.C. § 706(2)(A), the district court sets aside agency determinations that it finds to be "arbitrary, capricious, an abuse or discretion, or otherwise not in accordance with law").

- Companies would be required to pay costs and attorneys fees if the claim of attorney-client privilege or trade secret protection is denied by the courts. Penalties would be available if a court determines that the assertion of attorney-client privilege or the trade secret claim lacked reasonable basis.

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referencing regulatory activity by the government, including labeling); 11. Patents/EPA (documents relating to or referencing the Environmental Protection Agency or patents); 12. Other Documents (documents for which privilege is claimed which do not fit into any of the previous categories).

3.. *Issues Related to the Standard for Release of Information Subject to Attorney-Client Privilege or Trade Secret Protection*

FDA anticipates that many of the documents that the industry will claim to be attorney-client privileged will have information useful to agency regulatory efforts. Mechanisms should be included in legislation to resolve these issues. Some of these documents will be found to be not legitimately privileged, and released. Others could be considered privileged under existing law. With respect to these documents, one possibility is to adopt a standard that authorizes release to FDA and/or other interested regulatory agencies unless the company shows that release of a privileged document could subject them to criminal action or that the document contains core legal advice, such as litigation strategy.

Also, categories of tobacco industry information exist which seem unlikely to involve core areas of attorney-client privilege, such as original research and possibly documents related to marketing issues. The settlement proposed that the companies be required to release to FDA original laboratory research. Consideration should be given to requiring the companies to submit to FDA all original research, and possibly also marketing-related documents and any analyses related to scientific research. Further, the court in the Minnesota litigation denied claims of attorney-client privilege for all documents in the categories relating to or referencing children and relating to or referring scientific research or research reports on smoking and health. At minimum, strong presumptions against the assertion of attorney-client privilege may be appropriate with respect to these categories.

Finally, with respect to trade secret information, consideration should be given to whether legislation should authorize public release if the office (or another body) determines that such release would be in the public interest. The Conrad bill, for example, includes such a provision for ingredient information. The National Transportation Safety Board (NTSB) has this authority. Section 1114 of Title 49, United States Code, allows the NTSB to publicly disclose information related to a trade secret "to protect the health and safety." The NTSB is required to provide notice to interested persons and an opportunity for comment if the resulting delay "would not be detrimental to health and safety." 49 U.S.C. § 1114(b)(1)(D).

tobacco - settlement document directories

ANALYSIS OF ISSUES RELATED TO PRIVILEGED TOBACCO COMPANY DOCUMENTS

This memorandum analyzes Appendix VIII to the Global Tobacco Settlement ("GTS") and the legislation that it contemplates which deal with access to assertedly privileged tobacco industry documents concerning smoking and health-related issues. The alternative proposed methods of handling privilege claims by the tobacco industry, including changes in the standards presently applied under common law, all raise significant constitutional and policy concerns. These concerns counsel against significant abrogations of attorney-client privileges, such as those proposed in Senator Conrad's Healthy Kids Act bill.

I. Background

On or before February 23, 1998, the tobacco manufacturers are expected to announce that they will post on the Internet the Minnesota select documents, some 32,000, which the Minnesota Court found were not protected by the attorney-client privilege. Minnesota's Attorney General, Skip Humphrey, urged the manufacturers to release all of the documents, including some 1,000,000 pages for which attorney-client privilege has been claimed. This posting is in response to the manufacturers' assurances to Congressman Bliley that they would expeditiously disclose all of the documents necessary for an evaluation of their conduct in connection with the GTS. In addition, the GTS contemplates that the manufacturers would, "upon finalizing a resolution of these litigations with the Attorneys General without waiting for Congress to embody these requirement(s) in the proposed legislation * * * [c]ommence a good-faith, de novo, document-by-document review of all documents previously withheld from production on grounds of privilege."

There thus appears to be agreement that there is a need for the tobacco companies to produce documents generally. There also appears to be consensus on the following: (1)the tobacco industry kept important and incriminating documents from the public, litigants and the government by abusing their attorney-client and attorney work product privileges; (2) a national depository of the tobacco documents available to the public, litigants, and others should be established; (3) Congress, the Executive and the public need to see the essential tobacco documents before evaluating the comprehensive legislative solution; (4)the production and review of those documents must occur quickly; (5) a mechanism is needed to review tobacco company documents to ensure that privilege has not been improperly asserted; and (6)violence should not be done to the attorney-client relationship by unduly eroding attorney-client privileges.

II. The Privileges

Information or documents may be required to be produced through a court-issued subpoena or court order, and Congress, pursuant to its legislative function, may compel the production of information or documents through a legislative subpoena. Both a court order (or

subpoena) and a legislative subpoena for the production of information or documents can be opposed by the party to whom it is directed on the ground that a legal privilege protects against compulsory disclosure.

Under current law, in a federal question case in federal court, where federal law neither provides for, nor precludes the assertion of, a privilege against the disclosure of certain documents or information, Federal Rule of Evidence 501 generally determines whether a privilege exists. Rule 501 provides that, "[e]xcept as otherwise required by [federal law] . . . . the privilege of a witness . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." In diversity cases in federal court, the state law of privilege generally governs.

The attorney-client privilege is one of the privileges recognized under current federal law that tobacco companies have often asserted to prevent the disclosure of information or documents. Under current federal law, the attorney-client privilege protects communications made in confidence by a client to an attorney relating to matters as to which the client is seeking legal advice. See 8 J. Wigmore, Evidence, § 2292 (McNaughton rev. 1961); United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950). This privilege is intended to encourage full disclosure by a client to an attorney, thereby promoting adequate representation, and to serve the "broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). It contains, however, an important exception for a communication that "was made to enable anyone to commit a crime or fraud." United States v. Zolin, 491 U.S. 554, 566 (1989) (quoting 21 C. Wright and K. Gordon, Federal Practice and Procedure: Evidence § 5055, p.276 (1977) (footnote omitted)).[1]

III. Legislative Modification or Revocation of Privilege

A) Congressional Authority

Absent a federal constitutional limitation, Congress is free to alter the scope of existing privileges or to abolish them altogether. It is also free to define the scope of future privileges. In addition to the constitutional concerns that the proposed legislative modification of the attorney-client privilege would raise, such modification would also raise serious policy concerns. Any attempt to abrogate (or dramatically curtail) the tobacco manufacturers' rights to confidentiality under the attorney-client privilege must also be evaluated in light of its adverse impact on the recognized benefits of such privileges in other areas.

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[1] A related privilege that tobacco companies have relied upon is the work product privilege. Broadly speaking, work product privilege is designed to protect the mental impressions and analysis of lawyers in the litigation process. See Federal Rule Civil Procedure 26(b)(3); Hickman v. Taylor, 329 U.S. 495 (1947).

B) Constitutional Concerns

The proposed legislative modification to the attorney-client privilege that you have asked us to review raises novel constitutional questions. There is little precedent to guide the analysis of these questions, and the Department is continuing to review them. The discussion that follows is necessarily preliminary and is intended simply to identify potential areas of constitutional concern.

The proposed legislation does not merely purport to clarify the future scope of the existing attorney-client privilege that would be recognized under federal law. It instead appears to permit the federal government to compel the production of information and documents that would have been protected against such production by the attorney-client privilege at the time that the information or documents were provided to an attorney. Individuals who made statements (or provided documents) to their lawyers, on the correct assumption that then-prevailing federal attorney-client privilege precluded the compelled disclosure of such communications at that time, would suddenly find themselves unable to rely upon that privilege to resist a future court order or subpoena compelling the production of that same information.

We are unaware of any case law that has addressed the constitutionality of a comparable retrospective restriction of the attorney-client privilege, nor are we are aware from our research to this point of any prior occasion on which a legislature has attempted to retrospectively restrict the scope of that privilege. We are concerned, however, from our preliminary research into this novel question that the retrospective application of such a legislative modification of the attorney-client privilege, which has been so deeply rooted in the common law and on which persons may have reasonably relied in making their communications, would raise significant constitutional concerns.

As the Supreme Court has observed of retrospective legislation generally, "[t]he Due Process Clause * * * protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause 'may not suffice' to warrant its retroactive application." Landgraf v. USI Film Products, 511 U.S. 244, 266 (1994). Although the Supreme Court declared 13 years ago that retroactive legislation will meet the test of due process if it is "supported by a legitimate legislative purpose furthered by rational means," Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729 (1984), it has more recently admonished that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." Landgraf, 511 U.S. at 265 (footnote omitted). It has also expressed concern that Congress' "responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." Id., at 266. That description could fit the tobacco companies. While concerns about retroactivity usually focus on statutes affecting substantive rights, the Supreme Court has warned against the suggestion "that concerns about retroactivity have no application to procedural rules." Id., at 275 n. 29.

The future effect of the proposed legislative modification of the attorney-client privilege also may give rise to constitutional concerns. While there are many cases that state that the attorney-client privilege is not rooted in the constitution, and thus, implicitly, that Congress may prospectively alter its scope, such statements invariably appear in cases in which litigants have sought to extend the core of the attorney-client privilege on the ground that the constitution compels its extension. Here, by contrast, the contemplated exception for health and safety would appear to be unprecedented in its breadth. Indeed, the contemplated exception would arguably make the vast majority of future communications between tobacco companies and their lawyers subject to disclosure, as a large number of such communications could be encompassed by the "health and safety" standard. The exception therefore appears to raise the vexing questions of (1) whether there is a core of the attorney-client privilege, in both civil and criminal litigation, that is constitutionally mandated (whether pursuant to the Due Process Clause, the First Amendment, or the right to privacy) and (2) assuming that there is such a constitutionally mandatory core of the privilege, whether a health and safety exception could be a permissible grounds for limiting the privilege's application.[2]

C) Policy Concerns

Aside from constitutional concerns, we believe as a policy matter that abrogating privileges after the fact is unsound. Even if Congress constitutionally could take such action, the chilling effect on candid communications in the attorney-client and other privileged communication contexts, e.g. psychotherapist/patient, would be enormous. No one could be assured that what they believed was a confidential communication at the time could not be changed by Congress (or a state legislature) at a later point in time. We do not believe it would be sound to embark on a path of this kind, even if provisions could be crafted that would pass constitutional muster.

Senator Conrad's Healthy Kids Act bill would, however, embark on a path of privilege abrogation. Section 578(a)(1) appears to require the tobacco companies to produce to the Secretary of Health and Human Services all documents relating to the health effects of tobacco on humans, the sale or marketing of tobacco products, and research, including privileged documents. Although the Secretary must review the documents and generally cannot disclose those that are validly privileged, even validly privileged documents can be disclosed if "such information is necessary to promote the public health." This type of abrogation raises all the problems identified above, and goes well beyond simply ensuring that attorney-client privileges

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[2] Finally, the proposed legislation may also raise constitutional concerns regarding the effect that it might have in application on the procedural protections that criminal defendants enjoy under the Fifth and Sixth Amendments. These constitutional concerns may in turn mean that the disclosures that the legislation would effect could impair the ability of prosecutors to bring cases against tobacco company officials. We are continuing to review these issues.

were not misused by the tobacco companies to prevent disclosure of non-privileged materials.[3]

Accordingly, we believe for policy reasons that no effort should be made retroactively to abrogate privileges. We believe the Conrad bill's proposal should not be adopted. We believe that a proposal along the lines of Appendix VIII of the GTS would be most appropriate. Such a plan would (1) provide a central, public tobacco document depository, (2) establish a process for raising and resolving the tobacco companies' privilege claims with respect to documents which would be placed in this depository, and (3) streamline judicial evaluation of such privilege claims and limit the tobacco companies' ability to invoke improperly the attorney-client privilege to shield disclosable documents.

IV. Plan for Resolving Privilege Issues

We continue to believe the following plan, which we proposed last September, is the best method for dealing with privilege issues:

▸ Create a central "Article II" Board, consisting of several members with expertise in tobacco and health, appointed by the Secretary of Health and Human Services, for a designated term;

▸ Require the tobacco companies to submit to the Board all documents in their custody or control that relate in any way to: (1) any health effects caused by or associated with the use of tobacco products; (2) the use of nicotine in tobacco products; or (3) the sale or marketing of tobacco products to children. These submissions must be made within 90 days of the creation of the Board. Thereafter, the tobacco companies will be under a continuing obligation to submit to the Board any newly-created documents that fall under any of the above three categories.

▸ Require the tobacco companies to include with their submission to the Board a separate submission of any material which they claim to be subject to the attorney-client, attorney work product, or trade-secret privileges. Those submissions of allegedly privileged material must be segregated, if feasible, into the following initial categories: attorney-client communications; opinion work product; ordinary or "fact" work product; trade-secret privilege. Where appropriate, the Board will consider whether these documents must be further divided into subcategories, such as those ordered by the court in Minnesota v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct., 2d Dist., filed May 22, 1997), including, for example:

-all documents as to which a previous claim of privilege was denied.

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[3]The Conrad bill also proposes disclosure of documents containing trade secrets. Such disclosure raises additional issues, including that the possibility that the United States would be required to compensate tobacco companies for their trade secrets. Those issues are discussed more fully in our separate memo on trade secrets.

-all documents that on their face show no evidence that they were written or received by an attorney.

-all scientific research or reports on smoking and health or information relating to smoking and health, and memoranda regarding the same.

▸ Require that, along with any submission of allegedly privileged documents, the tobacco companies provide a detailed privilege log which includes, for each document as to which a privilege is claimed: (a) a description of the document, including date, author, addressee, purpose of the document, and general subject matter, (b) an explanation as to why the document, or a portion of it, is privileged, and (c) a statement as to whether any previous claim of privilege was denied. This privilege log must be signed and sworn by a person with knowledge of the contents, pursuant to 28 U.S.C. 1746.

▸ Direct the Board to make available to the public, as soon as possible, all documents as to which the tobacco companies do not claim a privilege.

▸ Authorize the Board to review any privilege claims asserted by a tobacco company, and, applying federal privilege law, make a determination as to whether the material is subject to the claimed privilege. In conducting this review, the burden shall be on the tobacco company to prove that the document in question is subject to a recognized privilege, and that the privilege applies. Unless the Board determines that the document is not subject to a recognized privilege, it shall review the document in camera before deciding whether the privilege applies. The Board will notify the manufacturer in writing of its final determination, and will include in that notification a brief explanation of the basis for that determination.

▸ Authorize the tobacco companies to obtain judicial review of any final board determination in the District of Columbia Circuit. Under the APA, the Board's findings of fact would be reversed by the court only if clearly erroneous, and its legal conclusions would be reviewed de novo by the court. The tobacco company shall have the burden of proving that the document in question is subject to a recognized privilege, and that the privilege applies. Unless the court determines that the document is not subject to a recognized privilege, it shall review the document in camera before deciding whether the privilege applies. Judicial review must be sought within 60 days of the date of the Board's final determination.

▸ Authorize the Board to disclose an assertedly privileged documents to the public if, after a tobacco company has obtained judicial review and has pursued all appeal rights, the final judgment is that a document is not privileged. The tobacco company will be estopped from claiming that the document is privileged in any other proceeding. If a company fails to seek timely judicial review of a final determination by the Board that a document is not privileged, the Board will disclose the document to the public, and the manufacturer will be estopped from claiming that the document is privileged in any other proceeding.

▸ Prohibit the Board from disclosing to the public any document it determines is

privileged, and require the Board to return it to the submitting tobacco company. Current or future litigants who seek to challenge a company's assertion of that privilege in any legal proceeding will not be bound by the Board's final determination.

▸ Create civil penalties for any person who violates the requirements of this plan, in an amount not to exceed $10,000 for each such violation, and not to exceed $1,000,000 for all such violations adjudicated in the same proceeding. Civil penalties will be assessed by the Board, in an order made on the record after the opportunity for a hearing. A party against whom the Board assesses a civil penalty under this paragraph may seek judicial review of that penalty in federal district court.

▸ Nothing in this plan precludes the disclosure of relevant information, including information that is privileged or a trade secret, to other federal agencies, as permitted or required by any other provision of federal law.

This plan would avoid the constitutional concerns presented by the proposed legislation; no privilege is abrogated, and the tobacco companies are afforded a process to resolve all privilege claims in an orderly administrative fashion. The tobacco companies must, however, substantiate their privilege claims with a detailed privilege log and a sworn statement, and the plan madates in camera review of all privileged documents. The plan would not intrude upon legitimate attorney-client relationships nor implicate the Fifth or Sixth Amendments. Finally, the plan would not work retroactive injustice by disturbing settled expectations. Instead, it would simply allow expeditious scrutiny of the companies' privilege claims under existing standards of law.

POTENTIAL FEDERAL LIABILITY FOR TAKINGS ARISING OUT OF THE DISCLOSURE OF TOBACCO COMPANY DOCUMENTS CONTAINING TRADE SECRETS

You have asked us to review draft legislative language pertaining to the disclosure of documents held by manufacturers of tobacco products. The provision at issue would require tobacco companies to submit a wide range of documents, including documents pertaining to health effects, nicotine levels, marketing, and research on safer tobacco products, to the Secretary of Health and Human Services for review and, in many instances, public disclosure. The Secretary generally would withhold from disclosure information that was "entitled to protection as a trade secret or under the attorney-client privilege." However, even information that was found to qualify for one of these protections still could be disclosed if the Secretary "determine[d] that the disclosure of such information [was] necessary to promote the public health."

This proposal raises two sets of constitutional concerns. First, disclosure of tobacco company trade secrets raises a risk of liability under the Just Compensation Clause of the Fifth Amendment. Second, abrogation of the attorney-client privilege could raise separate constitutional concerns. This memorandum addresses the just compensation issues.

I. Potential Takings Claims Based on Disclosures of Trade Secrets under the General Document Disclosure Scheme

According to the Supreme Court, property interests qualifying for protection under the Takings Clause are not created by the Constitution. Instead, they "are created and their dimensions . . . defined by existing rules and understandings that stem from an independent source such as state law." Ruckleshaus v. Monsanto, 467 U.S. 986, 1001 (1984) (internal quotations omitted); accord, e.g., Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1030 (1992). Trade secrets, according to Ruckleshaus, are among the "intangible property rights created by state law [that] are deserving of the protection of the Taking Clause." 467 U.S. at 1003. Accordingly, if the Secretary disclosed information that would have been protected from disclosure under otherwise applicable state trade secret law, tobacco companies could claim a federal infringement of their property rights within the scope of the Just Compensation Clause.

Public disclosure of tobacco company documents under the provision described above could give rise to takings claims against the United States under two circumstances.[1] First, the

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[1] We note at the outset that the takings issues do not implicate the constitutionality of the proposed document disclosure provision. Successful takings claims by tobacco

Secretary's definition of a trade secret could be less protective than otherwise applicable state-law standards. The disclosure provision at issue here does not specify how the Secretary would determine which information is "entitled to protection as a trade secret." If the Secretary applied a uniform federal standard that was arguably less protective than some state-law standards, tobacco companies might claim that federal disclosure resulted in takings of their property.[2] A second class of potential takings claims could arise when the Secretary abrogated the federally recognized trade secret privilege -- however that privilege might be defined -- based on a finding that disclosure was "necessary to promote the public health." Tobacco companies might claim that any invocation of this authority must result, by definition, in the infringement of trade secret rights.[3]

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companies would increase the cost of the proposed legislation to the United States. However, unless Congress unambiguously withdrew the Tucker Act remedy, there would be no taking without just compensation and, therefore, no basis for a judgment invalidating the document disclosure provision as violative of the Just Compensation Clause of the Fifth Amendment. See, e.g., Preseault v. United States, 494 U.S. 1, 12-17 (1988).

[2] Our takings analysis focuses on the proposed treatment of trade secrets, disregarding potential abrogations of attorney-client and work product privileges. Courts have described them as judge-made doctrines for the protection of the adjudicative process. See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (purpose of the attorney-client privilege is to "promote broader public interests in the observance of law and administration of justice"); Hickman v. Taylor, 329 U.S. 495, 510-11 (1947) (similar account of the work product privilege). Although litigants have occasionally claimed property rights based on the work product privilege, see In re Berry, 521 F.2d 179, 183-84 (10th Cir. 1975) (rejecting contention that lawyer who had been forced to testify was deprived of property without due process); United States v. IBM, 62 F.R.D. 530, 534 n.5 (S.D.N.Y. 1974) (reciting law firm's assertion that the work product privilege defines a property right sufficient to support intervention), we are not aware of any decisions upholding such a claim.

[3] Massachusetts and Minnesota recently enacted disclosure laws for tobacco companies doing business within those states. See Mass. Gen. L. ch. 94, § 307B (1996); 1997 Minn. Laws c. 227, § 5 (to be codified at Minn. Stat. § 461.17). Tobacco companies have sued to block implementation of these laws, arguing federal preemption under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331, et seq. (1994), and a series of federal constitutional claims, including claims that disclosure would result in uncompensated takings. In the Massachusetts litigation, the tobacco companies' claim of federal preemption has been rejected. See Philip Morris Inc. v. Harshbarger, 122

A. Establishing a Uniform Federal Standard for Identifying Tobacco Company Information That Qualifies as a Trade Secret

Congress has instructed federal agencies, in a number of contexts, to withhold from disclosure undefined "trade secrets." In implementing such instructions, federal agencies have used uniform federal standards of what constitutes a trade secret, rather than attempting to identify and apply relevant state-law standards. See, e.g., 5 U.S.C. § 552(b)(4) (1994) (FOIA exemption authorizing agencies to withhold trade secrets);[4] 18 U.S.C. § 1905 (criminal prohibition on unauthorized disclosure of trade secrets by federal employees). If, following this approach, the Secretary adopted a uniform federal standard of what constitutes a tobacco company trade secret -- and if that uniform standard were less protective than at least some otherwise applicable state-law standards -- tobacco companies could claim that disclosure under the provision at issue here must be treated as a compensable infringement of state-law property rights.

To establish that disclosure of information through application of a uniform federal standard for identifying tobacco company trade secrets resulted in a taking, a tobacco company

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F.2d 58 (1st Cir. 1997) (rejecting companies' preemption argument on interlocutory appeal). However, the companies reportedly obtained a preliminary injunction against implementation of the Massachusetts statute on grounds that disclosure could effect a taking without just compensation. See V. 11, No. 16 Mealey's Litig. Rep.: Tobacco 15 (Dec. 18, 1997) (describing unpublished December 10, 1997, preliminary injunction entered by Judge O'Toole (D. Mass)). The Minnesota statute has also been challenged on similar grounds, although the district court apparently has not yet issued a ruling in that case. See Minnesota Sued by R.J. Reynolds Over New Tobacco Disclosure Legislation, V. 11, No. 4 Mealey's Litig. Rep.: Tobacco 15 (June 19, 1997) (describing tobacco companies' May 30, 1997, complaint in R.J. Reynolds Tobacco Co. v. Hubert H. Humphrey III, (D. Minn.)).

[4] Companies that are required to submit information to federal regulators have occasionally argued that FOIA disclosure has taken or threatened to take their property by destroying the value of trade secrets. See, e.g., FTC v. Owens-Corning Fiberglass Corp., 626 F.2d 966, 972 n.12 (D.C. Cir. 1980) (rejecting as premature takings challenge to anticipated FOIA releases of information submitted to the Federal Trade Commission); Burnside-Ott Aviation Training Center, Inc. v. United States, 617 F. Supp. 279, 282 (S.D. Fla. 1985) (rejecting claim that FOIA disclosure effected a taking on grounds that released information contained no trade secrets). However, we are unaware of any decision upholding such a claim.

would have to make a two-part showing. The company would have to establish first that disclosure overrode otherwise state-law protections and second that the resulting infringement on its property rights rose to the level of a taking.

Tobacco companies may find it difficult to establish that decisions by the Secretary to disclose tobacco company documents had the effect of overriding state-law trade secret protections. It may be difficult for a company to establish that any particular body of state trade secret law would have been more protective than the federal trade secret standard. Moreover, because tobacco companies currently face numerous suits in different fora, they may be vulnerable to arguments that their documents were potentially subject to disclosure, even in the absence of the federal disclosure scheme, under more than one state-law trade secret regime and that the least protective body of potentially applicable state law ought to define the companies' property rights. In spite of these difficulties, it seems probable, given the value of the trade secrets at issue, that some companies would assert takings claims based on federally compelled disclosures.

Once a tobacco company established that the Secretary had ordered disclosure of a state-law trade secret, the company would still bear the burden of establishing that the federal devaluation of its property rights rose to the level of a taking for which the Fifth Amendment requires compensation. In Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984), Monsanto sued the Environmental Protection Agency (EPA) for the Agency's use and disclosure of health, safety, and environmental data that the company had submitted in order to register its products for sale within the United States as required by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Court found that Monsanto was entitled to compensation for EPA's use and disclosure of information that the company had submitted between 1972 to 1978, when FIFRA contained an explicit assurance that data registration data would be kept confidential. Id. at 1011. On the other hand, the Court rejected Monsanto's claim to compensation for EPA's use and disclosure of data that the company had submitted before 1972 and after 1978, periods during which FIFRA contained no such assurance.

The Court began its analysis in Ruckleshaus by recounting that regulatory taking claims call for an "ad hoc, factual inquiry" -- that no "set formula" can determine whether "justice and fairness" require compensation in a particular case. Id. at 1005, citing Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1977). The Court recited the three factors, which it first articulated in Penn Central, that it has frequently used to structure the ad hoc regulatory takings inquiry: "the character of the government action, its economic impact, and its interference with reasonable investment-backed expectations." Id. (internal quotations omitted); accord, e.g., Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 641-

43 (1993). While Ruckleshaus focused primarily on the third factor, the Court's observations respecting all three factors are relevant to this assessment of the tobacco companies' potential claims.

The Court rejected EPA's argument that the nature of the federal undertaking in FIFRA, creation of a comprehensive regulatory scheme for the registration of hazardous chemicals, allowed EPA to use and disclose registration data without compensating registrants for the infringement of any state-law rights to (or federal assurances of) confidentiality. In defending the uncompensated disclosure of data submitted during the 1972 through 1978 period, EPA argued that Congress, in amending FIFRA in 1978 to provide uniform use and disclosure rules for all registrant data, had effectively pre-empted contrary state trade secret law (as well as repudiating earlier federal assurances of confidential treatment) in the interest of establishing a comprehensive registration scheme. Id. at 1012. The Court ruled that the uncompensated use and disclosure of state-law trade secrets could not be justified on these grounds, stating that if Congress could "'pre-empt' state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality." Id. at 1012.

The Court also rejected EPA's argument that the loss to Monsanto, assessed in relation to the total value of its registration data, was too small to support a taking claim. The relevant property interest, as Ruckleshaus analyzed the issue, was not the data that Monsanto had submitted to EPA, which retained substantial value to the company despite its disclosure, but the "competitive advantage over others that Monsanto enjoy[ed] by virtue of its exclusive access to the data." 467 U.S. at 1012. Disclosure, by "destroy[ing] that competitive edge," was viewed as having eliminated essentially all of the value of the relevant property. Id. Ruckleshaus's narrow conception of the property right affected by compulsory trade secret disclosure appears to foreclose any argument by the United States, in defending against tobacco company claims for alleged takings of trade secrets, that the companies did not lose a high enough proportion of the initial value of their property to require the payment of compensation.

The third Penn Central factor, whether the disputed government action interfered with the property owner's reasonable investment-backed expectations, provided EPA with a partial defense to Monsanto's claim. The Court determined that an explicit statutory assurance of confidentiality, contained in FIFRA from 1972 to 1978, "formed the basis for a reasonable investment backed expectation" that its registration data would not be disclosed. Id. at 1011. However, with respect to data that Monsanto had submitted before 1972 and after 1978, periods when FIFRA contained no such assurance, the Court found that Monsanto had no reasonable expectation of confidentiality. These data, the Court found, were freely submitted to the government,

with no assurance of confidentiality, in return for the registration needed to sell the relevant pesticides within the United States. See id. at 1007.

The Court specifically rejected Monsanto's argument that FIFRA's imposition of a data-disclosure requirement, as a precondition to the registration of pesticides for sale within the United States, represented an unconstitutional condition on access to a valuable government benefit:

> [A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data in exchange for the economic benefit of registration can hardly be called a taking.

467 U.S. at 1007; see Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584-85 (1985). Accord Westinghouse Electric Corp. v. United States Nuclear Regulatory Commission, 555 F.2d 82, 95 (3d Cir. 1977) ("voluntary submission of information by an applicant seeking the economic advantage of a license can hardly be a taking"); New Jersey Chamber of Commerce v. Hughey, 600 F. Supp. 606, 627-28 (D. N.J.) (similar analysis of public disclosure under state right-to-know legislation), aff'd in relevant part, 774 F.2d 587, 598 (3rd Cir. 1985). Although Congress could not unilaterally redefine Monsanto's state-law rights to the confidentiality of its registration data, Congress could make Monsanto's assent to EPA use and disclosure of those data the price of a critical federal benefit -- legally required registration to sell pesticides within the domestic market. See 467 U.S. at 1007.[5]

In subsequent decisions, the Court has declined to extend Ruckleshaus' seemingly permissive approach to the conditioning of government benefits on property rights concessions. In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), the Court ruled that California could not, without compensation, require

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[5] FIFRA, as amended in 1978, did not allow pesticide registrants to avoid mandatory licensing of their data by cancelling their registration and exiting the American market. The use provision applied to "all data submitted after December 31, 1969, by an applicant or registrant." 7 U.S.C. § 136a(c)(D)(ii) (1982) (emphasis supplied). The public disclosure provision applied to "[a]ll information," with enumerated exceptions that are irrelevant here, "concerning the objectives, methodology , results, or significance of any test or experiment performed on or with a registered or previously registered pesticide." Id. § 136h(d)(1) (1982) (emphasis supplied). These provisions support the Court's focus on "the expectations of the submitter at the time the data were submitted." Ruckleshaus, 467 U.S. at 1013 n.17.

beachfront property owners, as a condition of a building permit, to cede a public easement across their beachfront. Id. at 831-42; accord Dolan v. City of Tigard, 512 U.S. 374, 389-95 (1994). Justice Scalia, writing for the Nollan majority, distinguished Ruckleshaus, finding that EPA's establishment of a condition on the receipt of a "valuable government benefit" -- pesticide registration -- could not be equated to California's imposition of a burden on an essential property right -- the "right to build on one's own property." 483 U.S. at 834 n.2.

Nollan and Dolan announced and elaborated a regulatory exaction doctrine, which limits governments' ability to require landowners, without compensation, to open their property to the public in order to obtain desired land-use permits. These decisions, taken together, hold that permit conditions of this nature may be validly imposed only if (1) denial of the permit would be a valid exercise of the police power and not a taking; and (2) the permitting authority can demonstrate a "'reasonable relationship' between the required dedication and the impact of the proposed development." Dolan, 512 U.S. at 386-90; see Nollan, 483 U.S. at 836. While the Court has not applied this doctrine outside the context of land use permitting, application of some type of reasonable relationship test to so-called "regulatory exactions" would not be a surprising development.[6] Indeed, without some such limit, the power to regulate -- through imposition of a registration requirement, for example -- would carry with it the power to extract all manner of uncompensated property rights concessions outside the real property sphere.

Ruckleshaus suggests that Congress could make consent to trade secret disclosure a condition on receipt of a valuable federal benefit -- continued authorization to market tobacco products within the United States. Following the enactment of federal legislation making these terms clear, any tobacco company that continued to sell its products within the United States would be treated as having accepted the federal disclosure regime.[7] A tobacco company that objected to disclosure as a

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[6] The lower courts have thus far declined to extend the Nollan and Dolan regulatory exaction doctrine to other contexts. See Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1996) (Nollan and Dolan "limited to the context of development exactions where there is a physical taking or its equivalent"); Harris v. City of Wichita, 862 F. Supp. 287, 293 (D. Kan. 1994) (Nollan and Dolan inapplicable where land use regulation does not require landowner to cede physical control over part of the property), aff'd, 74 F.3d 1249 (10th Cir. 1996) (table citing mem. op.).

[7] The United States might also argue that tobacco companies accepted specific risks of compelled disclosure under federal law in place at the time when these trade secrets were created. However, it does not appear that any existing federal disclosure

precondition to lawful sale, like a pesticide company that objected to data use and disclosure as a precondition to registration after 1978 (see 467 U.S. at 1007 n.11), could eschew the domestic market and elect to sell only overseas.[8]

B. Authorizing the Secretary to Disclose Information that Qualifies as a Trade Secret Based on a Finding that Disclosure is "Necessary to Promote the Public Health"

The draft disclosure provision could also lead to takings claims arising out of the Secretary's disclosure, on public health grounds, of information that meets the bill's trade secret definition.[9] In this circumstance, the document disclosure

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regime poses a serious threat of disclosure for most of the information that would be affected by the document disclosure provision at issue here. Tobacco company trade secrets are subject, at least in theory, to compelled disclosure in the discovery supervised by federal courts. However, the federal rules permit trade secret owners to apply for protective orders to block disclosure (see Fed. R. Civ. P. 26(c)(7)), and courts commonly grant such protection (see, e.g., Federal Open Market Comm. v. Merrill, 443 U.S. 340, 363 & n.24 (1979) (although there is no absolute privilege against discovery of trade secrets, trial courts balance the values served by protection and disclosure by "enter[ing] a protective order restricting disclosure to counsel") (collecting cases)). Current federal law also requires tobacco companies to submit ingredient data to the Food and Drug Administration (FDA). See 15 U.S.C. § 1335a (1994). However, this information is submitted in a manner that prevents the FDA from determining which companies and products use particular ingredients (id.), and the FDA is generally required to treat these ingredients submissions "as trade secret and confidential information" (id. § 1335a(2)(A)).

[8] Congress's assurance that tobacco companies' prior submissions of ingredients information to the FDA would be preserved from disclosure (see supra note 7) would not be affected by this bargain. This distinguishes the proposed tobacco document disclosure provision from the 1978 amendments to FIFRA. Those provisions, in their retrospective application, were specifically intended to abrogate the assurances of confidentiality that governed prior data submissions (see supra note 5).

[9] Where applicable state law fails to provide explicit protection for information that the Secretary seeks to disclose on public health grounds, the conflict between compulsory disclosure and trade secrets may be narrower than the drafters of the disclosure provision expected. The Supreme Court has rejected, for example, claims that ingredient-disclosure requirements deprived manufacturing companies of property without due process. See Corn Products. Ref. Co. v. Eddy, 249 U.S. 427,

provision contemplates that trade secret classification would give way to the Secretary's judgment that disclosure was justified on public health grounds. To analyze the risk of takings liability for the exercise of this authority, it is necessary, again, to look to Ruckleshaus. We have already discussed one relevant line of defense that Ruckleshaus suggests: consent to the Secretary's authority to override trade secret protection (however defined) on public health grounds could be characterized as an additional condition on eligibility for a valuable government benefit -- continued authorization to market tobacco products within the United States. A tobacco company that objected to disclosure as a precondition to lawful sale under a new regulatory regime (again, like the pesticide companies discussed in Ruckleshaus) would be free to abandon the American market and sell only overseas.

Ruckleshaus also suggests a second, supplemental line of defense against takings claims arising out of the Secretary's abrogation of trade secret protections on public health grounds. Ruckleshaus upheld EPA's authority to use and disclose pesticide data submitted prior to 1972, even though neither FIFRA nor (according to the district court, at least), agency policy had provided for such use and disclosure. See Ruckleshaus, 467 U.S. at 1010-11 & n.14. The Court reasoned that pesticide companies, operating in an industry that had long been "the focus of great public concern and significant government regulation," necessarily accepted a substantial risk that the federal government "upon focusing on the issue, would find disclosure to be in the public interest." Id. at 1008-9. A similar rationale might apply to the disclosure of tobacco company trade secrets for public health purposes. Tobacco companies may argue that Congress cannot insist upon uncompensated disclosure of trade secrets as the price of continued access to the American market because the companies invested in the creation of trade secrets based on an expectation of continued domestic exploitation of this valuable property. But any tobacco company that invested in the creation of valuable trade secrets should have understood that the tobacco industry, like the pesticide industry, has long been "the focus of great public concern and significant government regulation" and that the federal government, "upon

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431-32 (1919), (the "right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of the police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth"); National Fertilizer Ass'n v. Bradley, 301 U.S. 178 (1937) (reaffirming Corn Products in decision upholding a state law requiring ingredients labelling on fertilizer bags). In this circumstance, background principles of fair disclosure, analogous to background nuisance principles in the real property context (see Lucas, 505 U.S. at 1029), may defeat takings claims arising out of federally mandated disclosure of certain reasonable ingredients information.

focusing on the issue" would find that the public interest required disclosure of information relevant to the health effects of tobacco products. Id.; see also Concrete Pipe, 508 U.S. at 645 ("'[t]hose who do business in a regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end,'" quoting FHA v. The Darlington, Inc., 358 U.S. 84, 91 (1958)).

C. Potential Modifications of the Draft Disclosure Provision to Reduce the Risk of Federal Liability for Takings of Tobacco Company Trade Secrets

One approach to reducing the takings risk associated with establishment of the proposed tobacco document disclosure scheme focuses on achieving a close correspondence between the FIFRA data disclosure provisions at issue in Ruckleshaus and the tobacco document disclosure provisions in the legislation contemplated by the proposed resolution. Ruckleshaus, as we have seen, upheld the uncompensated use and disclosure of state-law trade secrets owned by a pesticide manufacturers where the pesticide manufacturer submitted those trade secrets to EPA without any assurance of confidentiality. Subsequently, in Nollan and Dolan the Court held that governments can be required to pay compensation when they use regulatory power to exact property rights concessions. While Nollan and Dolan involve exactions of easements across real property, their analysis suggests that Ruckleshaus may be insufficient to sustain particularly aggressive deployments of regulatory power to secure property rights concessions in other contexts as well. Accordingly, the odds of mounting a successful takings defense based on Ruckleshaus should improve as disparities narrow between the bargain that Congress offers the tobacco companies under the document disclosure provisions of the contemplated tobacco legislation and the bargain that Congress offered pesticide companies in FIFRA (in its pre-1972 and post-1978 forms).

Congress, following the FIFRA model, could ban sales of unregistered tobacco products and make formal consent to a federal document disclosure scheme a condition of registration. The practical effect of a product registration requirement might differ little from the effect of a bare requirement that tobacco companies submit to the new document disclosure regime. However, registration would give the companies clear and unequivocal notice of the terms of the market-access bargain. The proposed tobacco disclosure provision could also be made to conform more closely to the Ruckleshaus data disclosure requirements if tobacco companies were permitted to make independent choices concerning trade secrets pertaining to separate products. Under a product registration system, a tobacco company could decide that trade secrets peculiar to a particular product were more valuable than the ability to market that product in the United States. Compare Ruckleshaus, 467 U.S. 1007 n.11 (noting that "Monsanto could decide to forgo registration in the United States and sell a pesticide only in foreign markets"). Tobacco

legislation that permitted this choice, in addition to achieving a better fit with Ruckleshaus, would also fare better under the "reasonable relationship" test that Nollan and Dolan have established for exactions of easements.[10]

A second general approach to reducing the United States' potential exposure for disclosure of tobacco company trade secrets would involve broadening the scope of the federal trade secret privilege. For example, the disclosure provision of the tobacco bill could define trade secrets in a manner that conformed to the most protective state standards. Similarly, the Secretary's authority to disclose information despite its trade secret status could be defined narrowly. The bill might specify, for instance, that only research on health effects or improving the safety of tobacco products could qualify for disclosure. Any reduction in takings risk under this heading, of course, would come at the price of a reduction disclosure.

A third and final approach to reducing the United States' exposure to tobacco company takings claims would only address potential claims by settling tobacco companies. The document disclosure provision that we have seen appears to call for a uniform document disclosure regime applicable to settling and non-settling tobacco companies alike. The entire tobacco industry would be offered the same basic Ruckleshaus-inspired bargain: continued access to the American market in exchange for a partial waiver of trade secret rights. Under some of the legislative proposals that we have seen, however, tobacco companies that consented to advertising restrictions would obtain additional benefits under the statute, most notably immunity from punitive damages and multi-plaintiff lawsuits. If these additional benefits for settling parties were conditioned on a waiver of state-law trade secret protections, the United States would obtain a second line of defense against takings claims by those settling defendants.

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[10] Adapted to the current setting, the critical question posed by Nollan and Dolan would be whether the federally required dedication of tobacco company property -- that is, disclosure of certain state-law trade secrets -- is reasonably related to the federal government's legitimate interest in controlling the social costs of tobacco. The relationship here is self-evident. Fuller disclosure of tobacco company documents can be expected to improve the efficacy of numerous government and private efforts to address tobacco-related health problems. Indeed, a strong argument could be made that the required relationship would exist even if access to the American market for sales of a single tobacco product were conditioned on tobacco companies' acceptance of the federal document disclosure regime for all company documents. Nonetheless, existence of the reasonable relationship required by Nollan and Dolan would be far clearer if documents pertaining to products that a company has chosen to sell only overseas were not subject to the federal disclosure system.

Tob - ntr - document disclosure

PUBLIC DISCLOSURE OF TOBACCO INDUSTRY DOCUMENTS

FINDINGS. — The American tobacco industry has made claims of attorney-client privilege, attorney work product, and trade secrets to protect from public disclosure thousands of internal documents sought by civil litigants. A number of courts have found that these claims of privilege were not made in good faith. To promote understanding by the public of the tobacco industry's research and practices, Congress finds that a prompt and full exposition of tobacco documents will further the purposes of this Act.

(a) APPLICABILITY. — This Title shall apply to all manufacturers of tobacco products as a necessary requirement of participation in the American tobacco market.

(b) NATIONAL TOBACCO DOCUMENT DEPOSITORY. — Manufacturers of tobacco products shall, within __ days after the enactment of this Act, establish and maintain a National Tobacco Document Depository (the Depository) in the Washington, D.C. area.

(1) DOCUMENT CATAGORIES. — Within __ days after the enactment of this Act, each manufacturer of a tobacco product shall submit to the Depository every existing document in the manufacturer's possession, custody, or control —

(A) relating, referring, or pertaining to —

(i) any health effects in humans or animals, including addiction, caused by the use of tobacco products or components of tobacco products;

(ii) the engineering, manipulation or control of nicotine in tobacco products;

(iii) the sale or marketing of tobacco products;

(iv) any research involving safer or less hazardous tobacco products;

(v) studies of smoking habits of minors;

(vi) the relationship between advertising or promotion and youth smoking;

(B) produced, or ordered to be produced, by the tobacco product manufacturer in any health-related civil or criminal proceeding, judicial or administrative; or

(C) that the National Tobacco Documents Review Board, as described in subsection (c) below, determines is appropriate for submission to the Depository.

(2) DOCUMENT IDENTIFICATION AND INDEX. — Documents shall be sequentially numbered and marked to identify the tobacco manufacturer. Within __ days of submission of documents to the Depository, each tobacco manufacturer shall supply the Depository with a comprehensive document index which references the applicable

document catagories contained in section (b)(1)(A) of this subtitle.

(3) PRIVILEGE AND TRADE SECRET CLAIMS. — Any document that is subject to a claim by a tobacco manufacturer of privilege or trade secret protection shall be so marked and shall be submitted separately to the Depository. Compliance with this section shall not be deemed to be a waiver of any applicable claim of privilege or trade secret protection.

(A) PRIVILEGE AND TRADE SECRET LOGS.-- Within __ days after the enactment of this Act, each manufacturer shall submit to the Depository a comprehensive log which identifies on a document-by-document basis all documents produced to the Depository for which the manufacturer asserts attorney-client privilege, attorney work-product, or trade secrecy. The determination of privilege shall be the result of the manufacturer's good faith de novo review of all documents for which it previously has asserted one or more of the aforementioned privileges or trade secret protection. In making such a claim, the manufacturer shall adopt the standards set forth in subsection (c)(2) below.

(i) The log shall be organized in numerical order based upon the document identifier assigned to each document. For each document, the log shall contain: (a) a description of the document, including type of document, title of document, name and position or title of each author, addressee and other recipient (e.g., cc's), document date, document purpose and general subject matter; (b) an explanation why the document or a portion of the document is privileged or subject to trade secret protection; and (c) a statement whether any previous claim of privilege or trade secret was denied and, if so, in what proceeding. Within ___ days of receipt of such a log, the Depository shall make it available for public inspection and review.

(ii) Each manufacturer shall submit a declaration, pursuant to 28 U.S.C. Section 1746, by an individual with responsibility for the de novo review of documents, preparation of the privilege log and knowledge of its contents. The declarant shall attest to the manufacturer's compliance with the requirements of this Title pertaining to the review of documents and preparation of a privilege log.

(4) DISCLOSURE BY THE DEPOSITORY. — Within __ days of receipt of a document that is not subject to a claim of attorney-client privilege, attorney work product, or trade secret protection, the Depository shall make the document available to the public using the Internet and other means.

(c) NATIONAL TOBACCO DOCUMENTS REVIEW BOARD. — There shall be a National Tobacco Documents Review Board (the Board) consisting of ___ members each of whom shall be appointed by the President and confirmed by the Senate. Any person who is a citizen of the United States and who has attained the age of thirty years shall be eligible to serve as a member of the Board. Each Board member shall be appointed for a term of seven years and shall be

eligible for reappointment. The Board shall have the power, not subject to judicial review, to hire such staff and establish such operating procedures as it deems necessary to carry out its functions as specified hereunder.

(1) RESPONSIBILITY FOR DEPOSITORY. — The Board, in consultation with the General Services Administration, shall establish guidelines and procedures for the establishment and operation of the Depository, including guidelines for the immediate disclosure of documents that are not subject to unresolved claims of privilege or trade secrecy. The Depository shall be open to the public and maintained in a manner that permits it to be used as a resource for litigants, public health groups, and persons with an interest in tobacco industry records and research concerning smoking and health, addiction or nicotine dependency, safer or less hazardous cigarettes, and underage tobacco use and marketing.

(2) RESOLUTION OF DISPUTED PRIVILEGE AND TRADE SECRET CLAIMS. — The Board shall determine whether to uphold or reject disputed claims of attorney client privilege, attorney work product, or trade secret protection with respect to documents submitted to the Depository. Any person may petition the Board to resolve a claim that a document submitted to the Depository may not be disclosed to the public. Such determination shall be made by a single member of the Board, in writing, and shall be subject to judicial review as specified in this Title. All such determinations shall be made solely on consideration of the subject document and written submissions from the person claiming that the document is privileged and/or protected by trade secrecy and from any person seeking disclosure of the document.

(A) PRIVILEGE.-- The Board shall apply the attorney-client privilege and the attorney work-product doctrine in a manner consistent with federal law.

(B) TRADE SECRET.-- The Board shall define "trade secret" as "any commercially valuable plan, formula, process or device that is used for making or preparing trade commodities and that can be said to be the end product of either innovation or substantial effort. There must be a direct relationship between the trade secret and the productive process."

(3) FINAL DECISION — The Board may uphold a claim of privilege or protection in its entirety or, in its sole discretion, it may redact that portion of a document that it determines is protected from public disclosure under (C)(2) above. Any decision of the Board shall be final unless judicial review is sought as specified in subsection (c)(4) of this Title. In the event that judicial review is so sought, the Board's decision shall be stayed pending a final judicial decision. The Board's decision shall not be binding on Federal and State courts.

(4) PETITION; RIGHT OF APPEAL. — Any ~~interested~~ person may obtain judicial review of a final decision of the Board by filing a petition for review with the United States Court of Appeals for the Federal Circuit within __ days after the entry of such

decision. A copy of the petition shall be transmitted by the Clerk of the Court to the Board. The Board shall file in the court the record of the proceedings on which the Board based its decision (including any documents reviewed by the Board *in camera*) as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall have exclusive jurisdiction to affirm or set aside the Board's decision, except that until the filing of the record the Board may modify or set aside its decision.

(A) ADDITIONAL EVIDENCE AND ARGUMENTS. — If the petitioner applies to the court for leave to adduce additional evidence or arguments respecting the decision being reviewed and shows to the satisfaction of the court that such additional evidence or arguments are material and that there were reasonable grounds for the failure to adduce such evidence or arguments in the proceedings before the Board, the court may order the Board to provide additional opportunity for the presentation of evidence or arguments in such manner and upon such terms as the court deems proper. The Board may modify its findings or make new findings by reason of the additional evidence or arguments and shall file with the court such modified or new findings, and its recommendation, if any, for the modification or setting aside of the decision being reviewed.

(B) STANDARD OF REVIEW; FINALITY OF JUDGMENTS. — The Board's findings of fact, if supported by substantial evidence on the record taken as a whole, shall be conclusive. The court shall review the Board's legal conclusions *de novo*. The judgment of the court affirming or setting aside the Board's decision shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of Title 28.

(5) PUBLIC DISCLOSURE AFTER FINAL DECISION.-- Within __ days of a final decision by the Board that a document, as redacted by the Board or in its entirety, is not protected from disclosure by a claim of attorney-client privilege, attorney work product, or trade secret protection, the Board shall direct the Depository to make the document available to the public.

(d) SANCTIONS.--

(1) Each tobacco manufacturer must act in good faith and have a readily understood claim of privilege or trade secret protection based on fact and law as set out in subsection (c)(2) of this Title. If the Board determines that a tobacco manufacturer has not acted in good faith with full knowledge of the truth of the facts asserted and with a reasonable basis under existing law, the manufacturer shall be assessed costs, which shall include the full administrative costs of handling the claim of privilege, and all attorneys' fees incurred by the board and any party contesting the privilege. The Board may also impose civil penalites of up to $ ___ per violation if it determines that the manufacturer knowingly acted with the intent to delay, frustrate, defraud, or obstruct the Board's determination of privilege, attorney work product, or trade secret protection claims.

(2) A failure by a tobacco manufacturer to produce indexes and documents in compliance with the schedule set forth in this Title shall be punished by a civil penalty of up to $ _____ per violation. A separate violation occurs for each document the manufacturer has failed to produce in a timely manner. The maximum penalty under this subsection for a related series of violations is $____. In determining the amount of any civil penalty, the Board shall consider the number of documents, length of delay, any history of prior violations, the ability to pay, and such other matters as justice requires. Nothing in this Title shall replace or supercede any criminal sanction under Title 18 or any other Title of the United States Code.

(e) FDA AUTHORITY. — No assertion that a document constitutes or contains trade secret material, and no determination by the Board that a document constitutes or contains trade secret material, shall limit in any way the ability of the Food and Drug Administration to obtain such a document from or through the Board. Provided that, unless and until it is finally determined pursuant to this Title, either through judicial review or because the time for judicial review has expired, that such a document does not constitute or contain trade secret material, the Food and Drug Administration shall treat the document as a trade secret in accordance with the Federal Food, Drug, and Cosmetic Act and the regulations promulgated thereunder. In no event shall the Food and Drug Administration disclose such a document, and the only recourse to obtain such a document shall be to the Board. Nothing herein shall limit the authority of the Food and Drug Administration to obtain and use, in accordance with any provision of the Federal Food, Drug, and Cosmetic Act and the regulations promulgated thereunder, any document constituting or containing trade secret material.

(f) OTHER.– For the purposes of this Title,

(1) the term "DOCUMENT" shall include originals and drafts of any kind of written or graphic matter, regardless of the manner of production or reproduction, of any kind of description, whether sent or received or neither, and all copies thereof that are different in any way from the original (whether by interlineation, receipt stamp, notation, indication of copies sent or received or otherwise) regardless of whether "confidential", "privileged", or otherwise, including any paper, book, account, photograph, blueprint, drawing, agreement, contract, memorandum, advertising material, letter, telegram, object, report, record, transcript, study, note, notation, working paper, intra-office communication, intra-department communication, chart, minute, index sheet, routing sheet, computer software, computer data, delivery ticket, flow sheet, price list, quotation, bulletin, circular, manual, summary, recording of telephone or other conversation or of interviews, or of conferences, or any other written, recorded, transcribed, punched, taped, filmed, or graphic matter, regardless of the manner produced or reproduced. Such term shall also include any tape, recording, videotape, computerization, or other electronic recording, whether digital or analog or a combination of the two;

(2) the term "MANUFACTURER OF A TOBACCO PRODUCT" also includes the Tobacco Institute, the Council for Tobacco Research, the Smokeless Tobacco Council, the Center for Indoor Air Research, or any other trade association or entity that is

primarily funded by persons who manufacture a tobacco product;

(3) any action undertaken pursuant to this Title, including but not limited to, the search, indexing, and production of documents, is deemed to be a "proceeding" before the executive branch of the United States.

(4) the disclosure process in this Title is not intended to affect the Federal Rules of Civil or Criminal Procedure or any federal law which requires the disclosure of documents or which deals with attorney-client privilege, attorney work product, or trade secret protection.

TYPES OF DOCUMENTS

Product Regulation

A. Nicotine

- interaction between nicotine and other components in tobacco products including ingredients in the tobacco and smoke components
- the role of nicotine in product design and manufacture, including product "charters," any parameters in product development, the tobacco blend, filter technology, paper, etc.
- the role of nicotine in tobacco leaf purchasing
- "reverse engineering" activities involving nicotine, i.e. analyzing other companies' products
- analysis of nicotine delivery
- the biology, psychopharmacology and any other health effects of nicotine

B. Other Ingredients

- the identification of ingredients in tobacco products and constituents in smoke, including additives used in product components such as the paper, filter, wrapper, etc.
- any research on the health effects of ingredients
- any research or other information explaining what happens to ingredients when they are heated and burned

C. "Less Hazardous" or "Safer" Products

- any research or product development information on activities involving reduced risk, less hazardous, low-tar or reduced-tar, low-nicotine or reduced-nicotine or nicotine-free products

Advertising, Marketing, and Promotion

Any documents related to the design of advertising campaigns, including the desired demographics for individual products on the market or being tested

Any documents on age of initiation of tobacco use, tobacco use behavior generally, "beginning smokers," "pre-smokers," and "new smokers," etc.

Any documents on effects of advertising

Any documents on future marketing options or plans in light of FDA final rule or provisions in settlement

3-3

Document Disclosure

1. Compos & bd
2. Appeal proc
3. Penalty scheme
4. Treatment of WP/TS docs
5. FDA's access to doc - public WP
6. Notice & override - release of TS docs to public
7. Future or past

Disclosure - conditioned on mkr participation

Compos & bd - Art II body - standalone - Pres. appoint / Sen confirm

Substantive disclosure -

All disclosed to Bd -

All non-AC + non-WP to FDA (incl. TS)

Bd deals w/ past docs only

(future - FDA could promulgate regs to extent of their auth)

~~Bd~~ No override on AC or WP.

TS material to FDA

Bd also considers TS

Auth ~~for FDA~~ to override TS for public health reasons

DoT says no abrogation

FDA wants Bd override -

I SAID NO - APPEALABLE

Appeals system - Federal Circuit automatic

Penalties -

a. Bd or Tob. cos for invalidly claiming pers. didn't come up w/ specifics.

b. ~~Sup. penalty scheme~~ Civil actions for improper non-disclosure

Tobacco - settlement - document disclosure

appeal route

work product → - exactly what?
- trade secret deal w/ differently? process // public health exception
- future or past
- penalties - Bybell

- FDA access to wk product

Feb 25 Documents

ALT II

DOT - Article II Court should be established - various bd.

no p.f. can.

existing standards & privileges

if binding of privileges could not 2nd bite at apple

policy & const - not good idea to abrogate ~~subst~~ priv (e.g. w/ public health standards)

- opens door to changing privileges generally

university contested does not entail

} now about 10,000 documents

don't need even specific categories - now that docs are small

[what re new documents? probably only old
Court does extend into future]

Direct appeal to DC Circuit

HHS - Admin agency - not HHS - trade secret and privilege.

If determ is to w/hold, requester can bring suit

If determ is to release, industry can bring suit

FDA Access -

All docs except AC priv docs.

Perhaps, Thus, narrow AC priv w/r/t docs to FDA.

Not a waiver.

But criminal issues / due process

Tobacco - settlement - document disclosure and notes + memos

Document Disclosure

For decades, the tobacco industry has failed to disclose essential facts in its possession about the dangers and addictiveness of tobacco products. Indeed, the tobacco companies have used the attorney-client and/or work-product privileges to cloak scientific research and findings -- and to shield evidence of the companies' criminal or fraudulent behavior. It is therefore necessary to establish an effective and speedy mechanism to pierce fraudulent or otherwise improper claims of privilege and to force the disclosure of information that will advance public health interests.

The Administration supports legislation to create a national tobacco document depository and require tobacco companies to turn over immediately all documents (including assertedly privileged documents and detailed privilege logs) relating to the health effects of tobacco products, the use of nicotine in those products, and the sale or marketing of those products to children. Companies may not claim privilege in this process for any descriptions or analyses of scientific research conducted or paid for by the company. **[Correct phrasing?]** A three-person Board, appointed consistent with the Constitution, shall review documents claimed to be privileged -- including through an expedited process allowing any person, without a prima facie showing, to challenge a privilege claim -- shall disclose any document found not to be privileged (with that determination binding on the company), and may impose appropriate monetary sanctions.

Under the legislation, this administrative process will not be the only means to contest a claim of privilege. Any person can challenge a claim of privilege in a legal action against a tobacco company, even if the Board of the depository has upheld or failed to rule on the claim. In addition, the administrative process will not govern the disclosure of documents to the FDA. Companies must disclose to the FDA all documents containing information about the health effects or addictive qualities of tobacco products, regardless of any claim of privilege. **[Correct phrasing?]**

Internal notes:

The proposal outlined above strengthens the document disclosure provisions of the settlement in several ways. First, the proposal makes the administrative disclosure process non-exclusive, so that a litigant can challenge a privilege claim in a lawsuit, even if the Board of the depository has not completed its review or has ruled in favor of the company. (By contrast, a Board finding that a document is not privileged binds the company in all other proceedings.) Second, the proposal provides the FDA with access to all health-related documents, notwithstanding any claims of privilege. Third, the proposal somewhat broadens the category of materials for which companies cannot claim a privilege in the administrative process. In addition, the proposal as outlined here gives us some wiggle-room on details -- relating, for example, to the composition of the Board (which the Justice Department believes is unconstitutional as written) and the procedures that the Board will follow.

The proposal, however, does not broadly abrogate the attorney-client or work-product privileges, as Rep. Waxman's proposed legislation would do. The Justice Department has expressed serious concerns about any broad abrogation of the privilege, arguing that such an approach would undermine the privilege generally and would enable a tobacco company official charged with criminal conduct to assert a violation of his Sixth Amendment right to effective assistance of counsel. But some public health groups may demand the abrogation of the companies' attorney-client privilege in a settlement -- or, even more broadly, insist (as Sen. Leahy, Rep. Waxman, and Attorney General Skip Humphrey have done) that the tobacco companies disclose all privileged documents before any consideration of a settlement takes place.

U.S. Department of Justice
Office of the Assistant Attorney General
Civil Division

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July 15, 1997

PRIVILEGED AND CONFIDENTIAL MATERIAL

VIA FACSIMILE
(202) 456-2878

Ms. Elena Kagan
Deputy Assistant to the President for Domestic Policy
Old Executive Office Building, Room 218
Washington, D.C. 20501

RE: Review of Proposed Tobacco Settlement

Dear Ms. Kagan:

Enclosed is a short memorandum prepared by the Federal Programs Branch of the Civil Division reviewing the document production regime set up in the proposed agreement. It also reviews Congressman Waxman's proposal and then offers a possible alternative. Anne Weismann and Gary Grindler will attend tomorrow's meeting and will be prepared to give a briefing on these issues and their alternative proposal.

Sincerely,

George J. Phillips

cc: Frank W. Hunger
Enclosure

This memorandum sets forth our evaluation of the legal and policy ramifications of Appendix VIII to the proposed tobacco settlement, as well as possible alternatives to that proposal that would provide a mechanism to resolve privilege claims over documents otherwise required to be placed in a national tobacco document depository. Part I addresses the proposal contained in Appendix VIII, part II addresses legislation proposed by Congressman Waxman, the Tobacco Accountability Act, and parts III and IV discuss other alternatives.

I. APPENDIX VIII

As currently drafted, Appendix VIII establishes, through legislation, a national tobacco document depository available to the public and consisting of tobacco industry documents concerning various smoking and health-related issues. Privileged and trade secret materials are exempt from disclosure into the depository. The proposal establishes a three-judge panel to resolve conclusively all privilege claims over documents otherwise required to be placed in the depository. The legislation is intended to "provide for binding, streamlined and accelerated judicial determinations with nationwide effect . . . over the legitimacy of claims of privileges or protections."

By way of background, we understand it has been the widespread practice of at least some of the tobacco manufacturers to cloak what are essentially scientific documents and studies under the attorney-client or work product privileges. Upon the allegations of crime or fraud by various plaintiffs, courts have conducted in camera reviews of some of these documents and concluded that the privileges were improperly invoked to shield evidence of crime or fraud. It is therefore the goal, of at least the plaintiffs and the FDA, that Appendix VIII provide an effective mechanism to pierce fraudulent, or at least improper, claims of privilege.

The efficacy of Appendix VIII is difficult to evaluate fully because the proposal is vague in certain key respects. First, while the depository would include all documents produced to the plaintiffs by the manufacturers in specified actions, it would also include certain additional existing documents of unspecified "manufacturers or trade associations." Moreover, the proposal does not anticipate the possibility that one or more of the specified plaintiffs may opt out of the settlement. The confusion about who is covered by the proposal's requirements is compounded by the provision that the determinations of the three-judge court "shall be binding upon all federal and state courts in all litigation in the United States," and the requirement that all disputes concerning privilege claims, except those in pending cases that can be resolved prior to the three-judge court's review, be resolved through the process set forth in the Appendix -- provisions that, on their face, do not appear to be limited to the parties to the settlement..

Second, the proposal does not define key terms, including "privileged," "trade secret," and "confidential." While the proposal refers, for example, to the Uniform Trade Secrets Act, 18 U.S.C. § 1905, as providing controlling law for the three-judge panel, section 1905 does not provide a definition of the terms used in this proposal, but rather makes release of confidential information by a federal employee a federal crime.

Third, it is unclear whether the mechanism described in this proposal would override the

FDA's existing authority, under the FDCA, to obtain access to documents containing trade secret, confidential, or privileged information.

Fourth, while the proposal creates a judicial body authorized to resolve conclusively all privilege claims over the documents, it does not specify which law the panel is to apply.

Aside from these ambiguities, which may simply be the result of careless drafting, there are substantive problems with the proposal. First, the three-judge panel would consist of Article III judges appointed by the Judicial Conference. It is not clear, however, whether there would be "cases or controversies" over which this panel would have jurisdiction. For example, paragraph 4 purports to create a process of accelerated judicial review for "any public or private person or entity" to challenge "any claims of privilege or trade secrecy before the three-judge panel." These challenges could arise outside the context of litigation.

Second, the proposed three-judge panel is an inappropriate use of Article III judges that is not warranted by the nature of the responsibilities they would have. The Department has historically opposed the creation of three-judge panels as clumsy procedures that only generate more litigation about whether a particular action is properly heard by the panel in question. These objections apply equally to this proposal.

Third, the proposed preclusive effect of the panel's rulings (subject to review only through certioriari) is particularly troubling from a legal and policy perspective. It seems fundamentally unfair to bind all future litigants who are not parties to this settlement and who may not be parties to any specific dispute resolved by the panel. This is particularly so where the privilege in question is qualified (such as work product) and would require the panel to balance the need of a particular litigant for the document against the purpose served by the privilege to determine whether the document should be disclosed. In addition, counsel for the Minnesota Attorney General has advised us that, if this provision requires all of their pending or future privilege disputes to be resolved by this panel, the effect would be an inordinate delay in the trial of their case (Minnesota v. Philip Morris Inc., No. C1-94-8565 2d Dist.), to their detriment. There a special master is currently conducting an in camera review of over one million pages of documents based on the crime-fraud exception, and the pace of that review is geared toward their trial date. The panel, by contrast, would not have the same incentive to resolve any privilege disputes at issue in their litigation in a timely manner that would ensure their current trial schedule is met.

Finally, we question whether the proposal would provide an effective mechanism to pierce fraudulent or improper claims of privilege. Toward that end, the legislative proposal would create an accelerated process with a right of intervention by any member of the public, and would authorize in camera review without any prima facie showing as a prerequisite (unlike the procedure used in the crime-fraud exception, which requires the contesting party to first make a showing that such review may reveal evidence of crime or fraud). Given the volume of documents that are likely to be subject to in camera review (in the Minnesota action over one million documents are currently under review by a special master), it is unrealistic to expect that such review will streamline the process; if anything it is likely that resolution of privilege

disputes will be delayed as the panel wades through an enormous volume of documents.

Moreover, the proposal in essence accepts the status quo. The tobacco manufacturers can continue to claim privilege with the same ease and over the same documents they have withheld as privileged in pending litigation. The proposal would require them to prepare a privilege log with all of the descriptive detail required by the Minnesota court, but the Federal Rules of Civil Procedure currently impose this requirement. And we have been advised by counsel for the Minnesota Attorney General that their court's privilege log standard should not be the standard, as it is grossly deficient. Apart from providing for accelerated and easily accessible in camera review, the proposal does not alter substantively the requirements the manufacturers must meet to sustain a privilege claim.

II. CONGRESSMAN WAXMAN'S PROPOSED "TOBACCO ACCOUNTABILITY ACT"

On June 12, Representative Waxman introduced a bill in the House of Representatives (H.R. 1881 or "Waxman Bill"), which, like Appendix VIII, would require tobacco manufacturers to submit documents relating to the health effects of tobacco products and the marketing of such products to children to a central body, to be made available to the public. But, rather than providing a central judicial or quasi-judicial procedure for addressing the manufacturers' claims that certain of these documents are protected by the attorney-client privilege, the Waxman Bill would simply abrogate the manufacturers' right to assert that privilege (as well as their right to assert the work product privilege). Although this proposal certainly streamlines the process of resolving privilege claims (by ruling them out legislatively), it raises significant constitutional and policy concerns, particularly with respect to its abrogation of the attorney-client privilege.

A. The Waxman Bill

The Waxman Bill would establish a "Tobacco Accountability Board," consisting of five members with expertise on tobacco and public health, appointed for six-year terms by the Secretary of Health and Human Services. H.R. 1881 § 2. The Bill requires the tobacco manufacturers to submit to the Board all documents relating to the health effects of tobacco products, the manipulation of nicotine in tobacco products, and the sale or marketing of tobacco products to children. Id. § 3(a). The Bill also requires the manufacturers to submit the 150,000 "attorney-client" documents which the manufacturers have been ordered to produce to the court for in camera review in the Minnesota tobacco litigation.

The Waxman Bill would require the Board to make all of the documents submitted by the manufacturers available to the public, with the exception only of trade secret information, H.R. 1881 § 3(b) & (c), thereby eliminating the manufacturers' existing right to protect attorney-client communications from disclosure.[1/]

[1/] In addition, the Bill would vest the Board with broad power to investigate all matters relating to the tobacco industry and public health; it would give the Board enforceable subpoena power

A staff report accompanying the Bill, entitled "Secret Attorney-Client Documents are Evidence of Potential Crimes or Fraud by the Tobacco Industry," explains that the Bill's abrogation of the manufacturers' right to assert the attorney-client privilege is based on: (1) a handful of attorney-client documents from Liggett & Myers Tobacco Company which appear to contain evidence of crime or fraud on the part of the manufacturers; and (2) rulings of several courts in tobacco litigation, finding that tobacco manufacturers and their attorneys have abused the attorney-client privilege to shield from the public important evidence of the dangerous health effects of smoking.

B. The Attorney-Client Privilege and the Crime-Fraud Exception

The attorney-client privilege is based in common law and, as the Supreme Court has emphasized, is essential "to encourage full and frank communication between attorneys and their clients" and that the privilege thereby promotes "broader public interests in the observance of law and administration of justice." Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). The privilege, however, does not protect attorney-client communications made in order to "get[] advice for the commission of a fraud or crime." United States v. Zolin, 491 U.S. 554, 563 (1989). This "crime-fraud exception" is meant to prevent parties from abusing the attorney-client privilege to shield unlawful activity.

The Supreme Court has held that in camera inspection is an appropriate mechanism for determining the applicability of the crime-fraud exception, and that such inspection is permissible if the party raising the crime-fraud exception makes an initial showing to support a good faith belief that such review may reveal evidence of crime or fraud. Zolin, 491 U.S. at 572. However, regardless of whether a court engages in in camera review, courts have held that, because of the importance of protecting attorney-client communications, the party asserting the privilege must be given an opportunity to present evidence and argument in its defense, before a court may order disclosure of those communications under the crime-fraud exception. See, e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 97 (3d Cir. 1992).

C. Constitutional Concerns

Because the Waxman Bill eliminates tobacco manufacturers' existing right to protect legitimate attorney-client communications, with no opportunity for judicial review, based on a congressional finding that certain of the manufacturers' documents are subject to the crime-fraud exception, the Bill presents a potential violation of the Constitution's Bill of Attainder Clause (Art. I, § 9). A bill of attainder is a law that "legislatively determines guilt and inflicts punishment without provision of the protections of a judicial trial." Selective Service System v. Minnesota PIRG, 468 U.S. 841, 846-47 (1984). The Clause is based on separation of powers principles and reflects "the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness and of,

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and the authority to conduct full evidentiary hearings; and it would require the Board to report annually to Congress. H.R. 1881 §§ 4, 5, 7.

and levying appropriate punishment upon, specific persons." United States v. Brown, 381 U.S. 437, 444 (1965).

Legislation which, like H.R. 1881, applies to a specific class of persons and deprives them of a previously enjoyed right without the protections of a judicial trial may be a bill of attainder if, given "the type and severity of the burdens imposed," it cannot be said to further nonpunitive goals. One could argue that the purpose of the Waxman Bill is not to punish the manufacturers, but to make important evidence of fraud available to the public and to protect the public from future attempts by the manufacturers to withhold evidence of the dangers of tobacco products. Those goals assume, however, that the manufacturers are guilty of such fraud; and, as such, could be construed as punitive within the meaning of the Bill of Attainder Clause, especially in light of the burden imposed — mandatory disclosure of all attorney-client communications and all work product material. See Brown, 381 U.S. at 458-59 (punishment barred by Bill of Attainder Clause includes inflicting deprivation on some blameworthy individual in order to prevent his future misconduct).

The congressional staff report accompanying the Waxman Bill, which conveys the staff's determination that certain attorney-client documents are subject to the crime-fraud exception and therefore that the manufacturers should lose the very important right to assert that privilege, is further indication that the bill would constitute a "legislative determin[ation] of guilt that inflicts punishment . . . without provision of the protections of a judicial trial." Selective Service, 468 U.S. at 846.

It should be noted, however, that legislation which achieved the same end but was premised instead on a congressional finding that the public's need for these documents outweighed the manufacturers' need to maintain their privileged status would probably pass constitutional muster, particularly because the attorney-client and work product privileges are not constitutionally based.

In addition to presenting a possible bill of attainder, the Waxman Bill might also implicate the manufacturers' Sixth Amendment right to effective assistance of counsel, to the extent that the Bill might require the manufacturers to reveal attorney-client communications regarding potential criminal proceedings against the manufacturers. In light of the Supreme Court's recognition that the attorney-client privilege is essential to the administration of justice, the Bill could be seen as hindering the manufacturers' right to obtain effective legal representation in criminal cases[2].

D. Policy Concerns

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[2]In addition, at least one court has suggested that interference with the ability to protect essential attorney-client communications might raise basic due process concerns. See Haines v. Liggett Group, 975 F.2d 81, 97 (3d Cir. 1992). We question that conclusion, however, as the right to assert the privilege in the first place is not of constitutional dimension, but arises from common law.

Even if the Bill's potential constitutional infirmities could be overcome, any legislative abrogation of the attorney-client privilege may raise policy concerns within the government. As discussed above, the attorney-client privilege is essential to ensure full and open communication between clients and their legal counsel. The privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client." Upjohn, 449 U.S. at 389. The government, no less than private litigants, relies on this privilege to protect and promote the ability of government agents to communicate openly with government attorneys. These concerns would be minimized, however, if the legislation were based on a specific finding that the health concerns raised by tobacco manufacturers' products and the corresponding need of the public to have access to documents that deal with those concerns outweigh the manufacturers' need to protect attorney-client communications.

The Waxman Bill's abrogation of the manufacturers' right to assert the work product privilege — which protects confidential written materials prepared by attorneys or their agents in the course of legal representation — should raise similar policy concerns within the government. Unlike the attorney-client privilege, the work product privilege is qualified and may be overcome by a showing of substantial need for the materials. See, e.g., Fed. R. Civ. P. 26(a)(3). Thus, the Waxman Bill's abrogation of work product privilege is less likely to engender the same degree of constitutional concern as its abrogation of the attorney-client privilege. Nonetheless, as the Supreme Court has noted, the work product doctrine is crucial to enable attorneys to represent clients well, and is based on "strong public policy." Upjohn, 449 U.S. at 398 (citations omitted). The government most likely would oppose any congressional attempt to restrict its ability to invoke this privilege.

For all of these reasons, the Waxman Bill, or any similar proposal to abrogate the tobacco manufacturers' right to assert the attorney-client privilege or the work product privilege, does not appear to be a wise approach.

III. ALTERNATIVE PROPOSAL TO CREATE TOBACCO DOCUMENT DEPOSITORY AND REVIEW BOARD

As an alternative to Appendix VIII and the Waxman Bill, we have come up with a rough outline for legislation which would provide a central, public tobacco document depository and would create a central process to streamline evaluation of the manufacturers' privilege claims, without denying them their existing right to judicial review of those claims.

The principal elements of such legislation are:

- Creation of a central "Article II" Board, consisting of [3] members with expertise in tobacco and health, appointed by [either the Secretary of Health and Human Services or by FDA] for [ ] year terms.

- The tobacco manufacturers must submit to the Board all documents in their custody or control that relate in any way to: (1) any health effects caused by or associated with the use of

tobacco products; (2) the use of nicotine in tobacco products; or (3) the sale or marketing of tobacco products to children. These submissions must be made within 90 days of the passage of this Act. Thereafter, tobacco manufacturers shall be under a continuing obligation to submit to the Board any newly-created documents that fall under any of the above three categories.

▸ The manufacturers must include with their submission to the Board a separate submission of any material which they claim to be subject to the attorney-client, attorney work product, or trade-secret privileges. Those submissions of allegedly privileged material must be segregated, if feasible, into the following initial categories: attorney-client communications; opinion work product; ordinary or "fact" work product; trade-secret privilege. Where appropriate, the Board will consider whether these documents must be further divided into sub-categories, such as those ordered by the court in Minnesota v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct., 2d Dist., filed May 22, 1997), including, for example:

-all documents as to which a previous claim of privilege was denied.

-all documents that on their face show no evidence that they were written or received by an attorney.

-all scientific research or reports on smoking and health or information relating to smoking and health, and memoranda regarding the same.

▸ Along with any submission of allegedly privileged documents, manufacturers must provide a detailed privilege log which includes, for each document as to which a privilege is claimed, a description of the document, including author, person(s) to whom it is addressed, purpose of the document, and general subject matter, along with an explanation for why the document, or a portion of it, is privileged and a statement as to whether any previous claim of privilege was denied. This privilege log must be signed and sworn by a person with knowledge of the contents, pursuant to 28 U.S.C. § 1746.

▸ As soon as practicable, the Board will make available to the public all documents as to which the manufacturers do not claim a privilege.

▸ The Board will review any privilege claims asserted by a manufacturer, and, applying federal privilege law, will make a determination as to whether the material is subject to the claimed privilege. In conducting this review, the Board may, in its discretion, engage in in camera review of any documents. The Board will notify the manufacturer in writing of its final determination, and will include in that notification a brief explanation of the basis for that determination.

▸ A manufacturer may obtain judicial review in federal district court [in the District of Columbia? or any federal district court, subject to venue requirements of 28 U.S.C. § 1391] of any final Board determination. The Board's findings of fact shall be reversed by the court only if clearly erroneous. The Board's legal conclusions shall be reviewed de novo by the court. Judicial review under this section must be sought within 60 days of the date of the Board's final

determination.

▸ If, after a manufacturer has obtained judicial review and has pursued all appeal rights, the final judgment is that a document is not privileged, the Board will disclose that document to the public, and the manufacturer will be estopped from claiming that the document is privileged in any other proceeding. If a manufacturer fails to seek timely judicial review of a final determination by the Board that a document is not privileged, the Board will disclose the document to the public, and the manufacturer will be estopped from claiming that the document is privileged in any other proceeding.

▸ If the Board determines that a document is privileged, the Board may not disclose it to the public, and the document shall be returned to the submitting manufacturer. Current or future litigants who seek to challenge a manufacturer's assertion of that privilege in any legal proceeding will not be bound by the Board's final determination.

▸ Nothing in this section precludes the disclosure of relevant information, including information that is privileged or a trade secret, to other federal agencies, as permitted or required by any other provision of federal law.

▸ Any person who violates a requirement of this chapter shall be liable to the United States for a civil penalty in an amount not to exceed [$10,000] for each such violation, and not to exceed [$1,000,000] for all such violations adjudicated in the same proceeding. Civil penalties under this paragraph shall be assessed by the Board, by an order made on the record after the opportunity for a hearing. A party against whom the Board assesses a civil penalty under this paragraph may seek judicial review of that penalty in federal district court, as provided in Paragraph [ ] of this Section.

This approach has several advantages. First, it does not raise the same constitutional concerns; no privilege is abrogated and the manufacturers are provided a process to resolve all privilege claims, with full review in the district and appellate courts. Moreover, the panel's conclusion that a particular document is privileged does not have a preclusive effect, but leaves future litigants free to challenge the claim of privilege in subsequent litigation.

Second, the panel would consist of Article II officials, not Article III judges, and the effectiveness of its review would be reinforced by its sanction authority. Moreover, as with Appendix VIII of the proposed settlement, our alternative would permit in camera review without first requiring a showing of potential crime or fraud. This review would be facilitated by the requirement that the manufacturers produce to the panel all documents in their possession and control, even those over which they claim a privilege. Although such review could be enormously time-consuming, given the vast quantity of documents potentially involved, it would be concurrent with any judicial review in pending litigation and would not, therefore, delay the trial schedules of ongoing cases. In addition, to facilitate in camera review and resolution of privilege claims, the panel would be authorized to require manufacturers to segregate their privileged documents into substantive categories that are most likely to correspond to categories of documents where the privilege has been improperly invoked.

Third, this alternative makes it clear that the FDA would retain its ability under existing law to access privileged or trade-secret protected information.

Notwithstanding these advantages, we question whether, in the final analysis, such a panel would meet one of the stated goals of Appendix VIII — providing a mechanism for accelerated and streamlined determinations over privilege claims. As the Minnesota Attorney General's office has pointed out, review of this volume of documents by an outside panel that need not accommodate trial schedules is unlikely to result in timely determinations.

IV. RETAIN THE STATUS QUO

Finally, there is at least a serious question whether any legislation is warranted. The experience in the Minnesota action illustrates that courts currently have the ability to review and resolve privilege claims over large volumes of documents in an expeditious manner. The crime-fraud exception provides an effective mechanism to pierce the privilege. Even where fraud or crime is not at issue, the Federal Rules of Civil Procedure authorize sanctions for misuse of the discovery process, which would include improper use of privileges. Moreover, where these privilege issues arise in multi-district litigation, discovery disputes are transferred to one judge for resolution.

By contrast, Appendix VIII, the Waxman Bill, and our proposed alternative all present fairly cumbersome vehicles by which to resolve privilege questions that do not ultimately ensure any greater success in piercing improper privilege claims or streamlining the dispute resolution process.

Tobacco - ext - document release

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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To: The Public Health Community & Other Interested Parties December, 1997

Re: An Update on Minnesota's Tobacco Litigation on Eve of Trial

Minnesota Court Orders Production Of Over 800 Previously Secret Tobacco Industry Documents

> "The facts and application of the law demand that the light of discovery penetrate to some of the darkest bowels of the tobacco industry, revealing what the industry knew, when it knew it, and if the information was disseminated."

On December 16, 1997, Judge Fitzpatrick of the Ramsey County, Minnesota District Court ordered that over 800 previously secret tobacco industry documents be released to attorneys for the State of Minnesota and Blue Cross-Blue Shield of Minnesota.

The documents were part of a larger set of documents obtained from the Liggett Group as part of a settlement with over 20 state Attorneys General earlier this year. In ruling the Liggett documents should be released, Judge Fitzpatrick rejected the tobacco industry's claims of a "joint defense" privilege.

Instead, the Court found evidence of "a conspiracy of silence and suppression of scientific research" by the tobacco companies and their trade associations. The Court ruled the industry's joint defense claims should be denied as a sanction for the industry's abuse of the attorney-client privilege, abuse of the process established by the Court for review of the privilege claims and violation of Court orders and rules. Examples cited by the Court include:

- o claiming privilege for documents where no privilege "even arguably existed;"
- o refusing to turn over written documentation of "joint defense agreements" as ordered by the Special Master assigned to make recommendations to the Court; and
- o submitting *ex parte* and *in camera* to the Special Master alone documents which were not confidential and which should have been presented in open court, including a "Privilege Map" exhibit which showed decisions about scientific matters flowing through tobacco industry lawyers.

The Special Master's Findings and Recommendations Shed More Light

Judge Fitzpatrick's Order adopts, with certain clarifications, the findings of fact, conclusions of law and recommendations made to him by the Special Master appointed to review the industry's privilege claims. The Special Master's findings were issued September 10, 1997, and had previously been under seal.

The Special Master's findings are based upon the evidence presented by the State and Blue Cross during the privilege hearings. The findings contrast the tobacco industry's public and private views and actions

on vital smoking and health issues. Citing many documents the Minnesota trial team obtained from industry files -- made public for the first time through discovery in Minnesota's case -- the Special Master's findings state that:

> o "for years the industry acted in concert to suppress or eliminate internal research on smoking and health, notwithstanding the industry's public representations to conduct research into 'all phases of tobacco use and health' and report all facts to the public;"
>
> o "The defendants and their representatives have, in fact, been aware that cigarette smoking is probably hazardous to the health of the smoker" (citing documents dating from the 1950s through the 1980s);
>
> o "Notwithstanding these internal documents, the industry's public relations strategy has been to deny causation and to keep the controversy alive;"
>
> o "industry attorneys were a driving force behind the direction of and the suppression of scientific research;" and
>
> o "this attorney-directed control of an industry's research does, in fact, fall within the confines of the crime-fraud exception to the attorney-client privilege."

In recommending release of the 800-plus Liggett documents, the Special Master concluded and Judge Fitzpatrick agreed that "contemporaneous corporate knowledge of the defendants as to the safety of their products is an appropriate area of inquiry and discovery in a case such as this. This inquiry should not be defeated because the research function was controlled by attorneys."

Congress Posts Liggett Documents on the Internet

On December 4, 1997, Representative Bliley, Chair of the House Commerce Committee, issued a subpoena for those Liggett documents recommended by the Special Master for disclosure in Minnesota's case. Congressman Bliley has said that Congress needs to know whether the industry has engaged in "criminal or fraudulent activities" before deciding whether the grant the tobacco companies the protection from lawsuits included in the national settlement proposed to Congress last June.

The tobacco companies complied with the Congressional subpoena on December 5, 1997. After a preliminary review of the documents, Rep. Bliley determined they should be made public and posted the documents on the Internet. Prior to Minnesota's efforts to obtain these documents, only eight of the "joint defense" documents from Liggett's files had been made public.

Judge Creates Tobacco Trial Website

Judge Fitzpatrick's court orders can also now be accessed on the Internet. More than 180 orders issued by the Judge since Minnesota's case began in 1994 are posted. The website established by the Court is: www.courts.state.mn.us./districts/second/tobacco/orders.html.

Special Master Should Rule Soon on Access to More Secret Evidence

The Liggett documents are only a tiny subset of the documents Minnesota's trial team has argued long and hard for. A much larger group of documents remains under review by the Special Master after

hearings in October. These documents include over 240,000 documents from the bigger cigarette companies, including Philip Morris, RJ Reynolds and the industry's trade groups. These documents, we believe, contain more internal industry secrets on smoking and health, on nicotine addiction and manipulation, on youth marketing and on other issues central to our case.

The State and Blue Cross have argued these documents should be produced for the same basic reasons relied upon by the Court and Special Master to release the Liggett documents: the documents are not covered by the privilege in the first place and, even if they are, the crime-fraud exception to the privilege (which says that documents created in the perpetuation of a crime or a fraud cannot be kept secret or "privileged") applies.

Many Final Pre-Trial Issues Decided: Trial Begins in January

Minnesota's trial is set to begin on January 20, 1998, and trial preparations continue. The Court has issued a Trial Management Order which imposes a time limit on the number of hours of testimony--225 hours per side -- which will be heard by the jury. The Judge has moved the trial to Courtroom 2 in the Federal Courthouse in St. Paul, which is somewhat larger than the courtrooms available in City Hall.

By the end of December, the parties will file motions to restrict or limit the evidence the jury will hear and will exchange exhibit lists. Exhibits will be provided on CD-ROM with information designed to provide easy access during trial. The Court's Trial Management Order anticipates that over 50,000 exhibits may be listed on the exhibit lists.

Court Has Other Motions Under Advisement

Summary judgment motions (asking that portions of the case be allowed to go to trial or be dropped from the case before trial) were argued in November and should be decided soon. The industry filed numerous combined motions to dismiss or narrow the case against them; the State and Blue Cross-Blue Shield moved to add a claim for punitive damages and to strike several industry defenses.

Arguments about two of the industry's defenses -- the "early grave" defense and the "cigarette tax" defense, may be of particular interest since these arguments are showing up in policy discussions across the country. In the "early grave" defense, the tobacco industry seeks to argue that the State pays less overall for smokers because smokers are less likely to live long enough to enter nursing homes. One of the State's lawyers noted that if the industry's arguments were accepted, "The tobacco companies then get a benefit for killing people." The industry, however, denies it is asserting a "death benefit" defense.

Another industry defense involves the assertion that any monetary damages owed to the State should be reduced by the amount smokers paid in cigarette excise taxes. We contend that the industry didn't pay the taxes to begin with -- consumers did -- and, in any event, paying taxes cannot be used as an "offset" for damages awarded to compensate for violations of law. Rulings on all the summary judgment motions are expected soon.

Sanctions Considered Against American Tobacco Company

A motion for sanctions against one of the defendants, American Tobacco Company, also remains under consideration by Judge Fitzpatrick. The Court previously found that American, now merged with Brown and Williamson, "willfully failed to answer the questions and produce documents...in a complete, full and unevasive fashion" as ordered by the Court. American, maker of Lucky Strikes, once had the biggest

cigarette market share in the U.S. Yet, according to papers filed with the request for sanction, the documents American has produced in the case so far have been "virtually devoid of the types of smoking-and-health, research-and-development and new-product development documents that have been produced ... by every other manufacturer."

After unsuccessful efforts by American to appeal to the Court of Appeals and the Minnesota Supreme Court, the issue of what sanctions should be imposed against American was heard by Judge Fitzpatrick on December 9, 1997. The State and Blue Cross urged the Court to (1) issue a finding that plaintiffs have met their initial burden of proving their allegations against American; (2) order disclosure of 1,114 American scientific research documents now under review by the Special Master; (3) impose a substantial monetary sanction to be paid to the Court and/or (4) award plaintiffs' their attorney's fees and costs in connection with the sanctions issue.

Tobacco - settlement - document disclosure

COMMERCE COMMITTEE

NEWS RELEASE

FOR IMMEDIATE RELEASE:
THURSDAY, NOVEMBER 13, 1997

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BLILEY DEMANDS PUBLIC DISCLOSURE OF 864 TOBACCO DOCUMENTS

"The American people must know the facts," Says Chair

WASHINGTON (November 13) -- House Commerce Committee Chair U.S. Representative Tom Bliley (R-VA) opened his Committee hearings on the proposed tobacco settlement by demanding that the tobacco industry turn over 864 documents which a Special Master in Minnesota has ruled are not covered by the Attorney-Client privilege because they evidence the commission of crimes and fraud.

Under the proposed tobacco settlement between State Attorneys General and the tobacco industry, Bliley said, the documents "will not see the light of day until after Congress approves the tobacco industry's agreement."

"This cannot stand," Bliley told a packed Committee room. "If the tobacco industry engaged in criminal or fraudulent activities, then Congress has a right -- a duty -- to know before legislation is enacted granting that industry any form of immunity against lawsuits."

"There are some, I know, who will say that my demand for disclosure of these 864 documents is dilatory, but where I come from, it's called being responsible. We cannot expect the American people or their Representatives in Congress to leap before they look."

Bliley said he has asked the industry to supply the requested documents voluntarily, but that if his request is refused, he is prepared to seek issuance of a subpoena for their production -- something the Commerce Committee has not done in the three years Bliley has chaired the panel.

A full text of the Chairman's prepared remarks follows; his actual words may differ somewhat:

"Today, we begin the work of redefining the role of tobacco in American society. We will examine the tobacco settlement reached by the state attorneys general and the tobacco industry.

"The history of this Committee demonstrates clearly that its Members take their responsibility toward protecting children seriously, and I share that commitment. Today's hearing, the first in a series, will begin our careful examination of all credible proposals aimed at reducing tobacco use by children.

"Our examination will be deliberative, proceeding in a manner consistent with the

seriousness of the question before us. I want to make clear that I will take an evenhanded approach to this Committee's work. Despite what some may think, I am not bound by the negotiated settlement; I'm going to make sure that this Committee does what's right for America's children, but in a way that doesn't ignore the other health risks that children face: alcohol, drugs and sexually transmitted diseases. I want to make sure that this agreement doesn't needlessly hurt small business owners in the retail industry. We also need to make sure that we don't create a black market in contraband cigarettes which puts unrealistic demands on law enforcement. Moreover, as a Virginian who is proud of the hardworking men and women in my state who toil in the tobacco fields and in factories, I'm going to ensure that it's fair to them as well.

"I believe that the Attorneys General had the interests of children at heart when they negotiated with the tobacco industry on behalf of their states. However, the Members of this Committee have an obligation beyond our individual states. We have an obligation to serve the interests of our nation as a whole. All of us, myself included, take that obligation with the utmost seriousness. We are the ones to whom America's children and parents will be looking to ensure that this or any settlement actually works. They are counting on us, and they are counting on us getting it right. At this point, we have many more questions than we have answers; but, I promise the Members of this Committee and the American people that we will find the answers.

"I will demand that we are given the answers, before this Committee moves forward with legislation. It is too important for us to accept less. We will work with the President to answer many of the questions raised by his position on the settlement. I have said publicly and at the White House that I am extremely disappointed that President Clinton has failed to send Congress legislation. However, I will not allow that to keep us from working together -- although it does make the task much more difficult. I am fully committed to working with my colleagues in Congress to develop tough laws to protect our children against tobacco.

"The decision to use tobacco products is one which should only be made by adults fully informed of the consequences of their decision. As with many other adult activities, tobacco use by minors must be off-limits; on this, we all agree.

"However, we cannot get ahead of ourselves. At this early stage, the American people have reserved judgment on this agreement, as have I.

"Congress and the President need to know all the facts before we can make informed decisions. In this respect, the Agreement contains at least one fundamental flaw. It asks us, the Congress, to act first and get the facts later. The Agreement would establish a judicial process to disclose internal industry documents only <u>after</u> legislation is enacted. I cannot think of another case in which Congress was expected to enact legislation first, and then afterwards obtain the information essential to fulfilling its legislative responsibilities.

"While such arrangements may be proper in the context of litigation, in my judgment it is wholly inappropriate for Congress. The American people want the facts, and they deserve them. They need to know the truth: not just what this agreement means, but on the whole history of the tobacco industry's practices leading up to this day. We deserve to know the full extent of the industry's knowledge of the health risks associated with tobacco use. We need to know the full extent of the industry's knowledge about marketing appeals to children. We need to know whether the tobacco industry engaged in activities to hide this information from the

American people. We need to know whether the attorney-client privilege was abused for criminal or fraudulent purposes so as to keep secret information vital to public health.

"A Special Master in Minnesota has said that 864 tobacco industry documents are not subject to the attorney-client privilege because they contain evidence of crime and fraud. Under the agreement, none of these documents will see the light of day until after Congress approves the tobacco industry's Agreement. This cannot stand. If the tobacco industry engaged in criminal or fraudulent activities, then Congress has a right -- a duty -- to know before legislation is enacted granting that industry any form of immunity against lawsuits.

"Today I am signing correspondence to the tobacco industry demanding that all 864 documents be turned over to this Committee voluntarily and forthwith.

"I sincerely hope that this request will be acted upon voluntarily. In three years as Chairman of this Committee, we have not had to resort to compulsory process even once, and I am proud of that. But if my demand is not received favorably, I am prepared to seek the issuance of a formal subpoena for their production. The Representatives of the American people must know the facts; nothing less will do. If this agreement is to go forward, if we are to truly redefine the role of tobacco in American society, then it is incumbent upon every one of us to act in good faith.

"There are some, I know, who will say that my demand for disclosure of these 864 documents is dilatory, but where I come from, it's called being responsible. We cannot expect the American people or their Representatives in Congress to leap before they look.

I now recognize my friend, the Gentleman from Michigan, Mr. Dingell."

- 30 -

Commerce Committee News Releases and related documents are available on our Web Page: www.house.gov/commerce

STATE OF MINNESOTA

Tobacco - settlement - documents

OFFICE OF THE ATTORNEY GENERAL
HUBERT H. HUMPHREY III
102 State Capitol
St. Paul, MN 55155

TO: BRUCE REED
JERRY MANDE
ELENA KAGAN

FAX # (202) 456-2878

FROM: ERIC JOHNSON

DATE: 9/11/97

8 pages, including this cover.

Message:

FOLLOWING FYI IS INFORMATION PERTAINING TO A RULING ISSUED LATE YESTERDAY BY THE SPECIAL MASTER IN MINNESOTA'S CASE AGAINST THE TOBACCO INDUSTRY CALLING FOR THE RELEASE OF AN UNPRECEDENTED NUMBER OF TOBACCO INDUSTRY PRIVILEGED DOCUMENTS.

PLEASE FEEL FREE TO CONTACT US WITH ANY QUESTIONS.

EJ/JP

If there are any problems or questions concerning this transmission, please call (612) 296-6196 or:

_____ at (612)_____

Docket #1319

September 10, 1997

Re: Tobacco Litigation
Court File No. C1-94-8565
Our File No. 10514-1

To All Counsel:

Today I am filing my report to Judge Fitzpatrick on the Liggett documents.

Judge Fitzpatrick directed me to file the entire report as a confidential document. For public purposes, I am filing a separate pleading which simply sets forth my recommendations with respect to each of the categories.

Very truly yours,

/s/

MARK W. GEHAN

MWG:tkh

Docket #1320

STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT

CASE TYPE: OTHER CIVIL

Court File No. C1-94-8565

The State of Minnesota,
By Hubert H. Humphrey, III,
Its Attorney General

and

Blue Cross and Blue Shield of Minnesota,

Plaintiffs,

vs.

Philip Morris Incorporated,
R.J. Reynolds Tobacco Company,
Brown & Williamson Tobacco Corporation,
B.A.T. Industries, p.l.c.,
British-American Tobacco Company Limited,
BAT (U.K. & Export) Limited,
Lorillard Tobacco Company,
The American Tobacco Company,
Liggett Group, Inc.,
The Council for Tobacco Research - U.S.A., Inc.
and The Tobacco Institute, Inc.,

Defendants.

SUMMARY OF RECOMMENDATIONS TO JUDGE FITZPATRICK

Hearings on the above-named matter took place on July 16, 1997 through July 18, 1997, before Special Master Mark W. Gehan. Roberta Walburn, Esq., appeared and argued on behalf of Plaintiffs. Noel Clinard, Esq., William Allinder, Esq., David Bernick, Esq., William Plesec, Esq.,

Thomas Reynolds, Esq., James Goold, Esq. and Leslie Wharton, Esq., appeared and argued on behalf of all Defendants with the exception of Liggett Group, Inc. The following also were present at one or all of the hearing dates and identified themselves as appearing on behalf of the party or parties set forth opposite their names:

Name	Party
Gary Wilson	State of Minnesota and Blue Cross and Blue Shield of Minnesota
Tara Sutton	State of Minnesota and Blue Cross and Blue Shield of Minnesota
David Klatasake	State of Minnesota
Anne McBride Walker	Philip Morris Incorporated
Peter Sipkins	Philip Morris Incorporated
Paul Dieseth	Philip Morris Incorporated
Cheryl Grissom Ragsdale	Philip Morris Incorporated
Jonathan Redgrave	R.J. Reynolds Tobacco Company
Ram Padmanabhan	Brown & Williamson Tobacco Corporation
Michael Lieber	Brown & Williamson Tobacco Corporation
Gerald Svoboda	B.A.T. Industries, p.l.c.
Jeffrey Nelson	Lorillard Tobacco Company
Craig Proctor	Lorillard Tobacco Company
Denise Talbert	Lorillard Tobacco Company
David Martin	Lorillard Tobacco Company
Connie Iversen	Lorillard Tobacco Company
Philip Cohen	The American Tobacco Company
Kirk Kolbo	The Council for Tobacco Research - U.S.A., Inc.
R. Lawrence Purdy	The Council for Tobacco Research - U.S.A., Inc.
Hal Shillingstad	The Tobacco Institute, Inc.

Members of the public and media also attended and observed the proceedings.

I. **Report of Special Master.**

The full Report of the Special Master, Findings of Fact, Conclusions of Law and Recommendations, is being filed this date on a confidential basis.

The Recommendations set forth below are the recommendations which are contained within the full Report.

I. **Recommendations of Special Master.**

A. **Category 1:** Recommendation that claim of privilege should not be sustained.

B. **Category 2:** Recommendation that claim of privilege should be sustained.

C. **Category 3:** Recommendation that claim of privilege should not be sustained.

D. **Category 4a:** Recommendation that claim of privilege should be sustained.

E. **Category 4b:** Recommendation that claim of privilege should not be sustained.

F. **Category 4c:** Recommendation that claim of privilege should be sustained.

G. **Category 5.** Recommendation that claim of privilege should not be sustained.

H. **Category 6:** Recommendation that claim of privilege should be sustained.

I. **Category 7:** Recommendation that claim of privilege should not be sustained.

J. **Category 8:** Recommendation that claim of privilege should be sustained.

K. **Category 9:** Recommendation that claim of privilege should be sustained.

L. **Category 10:** Recommendation that claim of privilege should be sustained.

M. **Category 11:** Recommendation that claim of privilege should be sustained.

N. **Category 12:** Recommendation that claim of privilege should be sustained.

Dated: September 10, 1997

/s/
Mark W. Gehan
Special Master

STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

102 STATE CAPITOL
ST. PAUL, MN 55155-1099
TELEPHONE: (612) 296-6196

FOR IMMEDIATE RELEASE
Wednesday, September 10, 1997

CONTACT: Leslie Sandberg (612) 296-2069

STATEMENT BY ATTORNEY GENERAL HUBERT H. HUMPHREY, III REGARDING THE RECOMMENDATION OF THE MINNESOTA SPECIAL MASTER TO RELEASE HUNDREDS OF HIDDEN DOCUMENTS

PREFACE: Today, the Special Master in Minnesota's landmark case against the tobacco industry issued an order recommending the release of an estimated 834 secret tobacco industry documents that the industry sought to shield under the attorney-client privilege. Put in context, the order calls for disclosure of 100 times the number of privileged documents released in the recent Florida case.

"This ruling is a monumental step in our effort to uncover the truth about the tobacco cartel's 40 years of lies, fraud and conspiracy. We've long contended that the tobacco cartel has abused the legal system by hiding its secrets behind the attorney-client privilege. This ruling pries open their lawyers vaults and requires the companies to turn over hundreds of secret documents never before seen outside the industry. Today's ruling calls for releasing more secret privileged documents than have ever been uncovered in the history of the tobacco wars. And, this is just round one in this momentous battle. In the coming rounds, we'll make even greater progress in exposing the cover-up."

--30--

Tobacco industry might have to turn over internal documents

A Ramsey County court special master said about 800 reports and memos should be given the state for use in its lawsuit.

By David Phelps
Star Tribune Staff Writer

A special master in Ramsey County District Court determined Wednesday that about 800 internal industry documents, most never before seen by non-tobacco interests, should be turned over to the state for use in its Medicaid suit.

Special Master Mark Gehan determined that claims of attorney-client privilege were not appropriate for one-third of about 2,500 documents that defendants in the suit wanted protected from attorneys for the state and co-plaintiff Blue Cross and Blue Shield of Minnesota.

The documents that Gehan recommended to be turned over include reports and memos regarding scientific research, internal discussions about public comments on smoking and material relating to minors and smoking.

Defendants in the state's suit have 10 days to respond to Gehan's report to Judge Kenneth Fitzpatrick. Maurice Leiter, a Los Angeles attorney who represents Philip Morris, said the industry will appeal Gehan's recommendation to Fitzpatrick and, if necessary, to appellate courts in Minnesota. That process could take months.

On the other hand, Leiter said he was pleased that Gehan had "found that the vast majority of privilege claims made by the defendants were proper."

Gehan sustained the industry's claims of privilege on nine of the 14 categories in question, a total of nearly 1,700 documents.

Attorney General Hubert Humphrey III noted that Wednesday's recommendation considerably exceeded the eight privileged documents that recently were released in a similar Florida suit.

Earlier this summer, after rulings by five judges in Florida, eight of the documents were made public. Soon thereafter, the industry entered into an $11.3 billion settlement with Florida.

"We've long contended that the tobacco cartel has abused the legal system by hiding its secrets behind the attorney-client privilege," Humphrey said. "This ruling pries open their lawyers' vaults and requires the companies to turn over hundreds of secret documents never before seen outside the industry."

Gehan's recommendation is likely to add fuel to the debate in Washington concerning the importance of document disclosure as the White House and Congress consider the proposed $368.5 billion national tobacco settlement.

"That's good news," said Tom Harkin, D-Iowa, one of the senators who has taken the position that the Senate should not take any action on the settlement until it has obtained thousands of industry documents that have not been made public.

The documents in question were turned over to the court in March by the Liggett Group Inc., as a key element of a settlement the company made with 22 states. The industry immediately objected to any of that material being made public, saying that it was entitled to confidentiality under the well-established privilege governing confidential communications between attorneys and their clients.

Lawyers for Minnesota contended that they were entitled to the documents under an exception to the rule, which comes into play when there is evidence of crime or fraud.

A 160-page log of the 2,500 Liggett documents obtained by the Los Angeles Times is replete with summaries of letters, memos and notes made by Liggett attorneys during meetings of "The Committee of Counsel," a group composed of attorneys from all the major tobacco companies who conferred regularly on strategy and tactics.

Gehan now will turn to the task of making recommendations to Fitzpatrick about 150,000 more documents that the industry claims are privileged.

Over industry objection, Fitzpatrick said that Gehan did not have to read all 2,500 Liggett documents or all of the 150,000 other documents before making his recommendations. Rather, he said that based upon legal precedents Gehan could make recommendations after reviewing representative documents in each of 14 categories.

— The Los Angeles Times contributed to this report.

Document disclosure urged in suit

P. Press 9/11/97

■ Minnesota court officer's finding a blow to tobacco

DAVID SHAFFER STAFF WRITER

A judicial officer in Minnesota has concluded that 834 research reports and other documents once held by tobacco industry lawyers no longer should be kept secret.

The finding, issued Wednesday by Special Master Mark Gehan, is a major victory for Minnesota lawyers suing the tobacco industry. The documents eventually could be used as evidence in the lawsuit to recoup the cost of smokers' medical treatment.

Yet the reasons behind the finding, which must be reviewed by Ramsey County District Judge Kenneth Fitzpatrick, remained as cloaked in mystery as the documents. Only a brief summary of the special master's conclusions was made public.

Gehan also wrote a confidential, 60-page report to the judge about his review of 7,500 documents from the Liggett Group, the smallest U.S. cigarette maker. It is not clear whether the report later will be released.

Never before has the tobacco industry seen its claims of attorney-client privilege declared invalid on so many documents. The privilege of attorney confidentiality is a fundamental protection of the U.S. legal system and is rarely breached.

"This is a hundred times more documents than have been released anywhere else," said Thomas Gilde, an attorney for Blue Cross and Blue Shield of Minnesota, which is suing the industry in partnership with Minnesota Attorney General Hubert Humphrey III.

Humphrey said the ruling "is a monumental step in our effort to uncover the truth about the tobacco cartel's 40 years of lies, fraud and conspiracy."

None of the documents immediately will be released. If the judge endorses the findings, the documents likely would surface at the trial scheduled for Jan. 19 in St. Paul.

Tobacco companies still have the right to challenge the conclusions. Michael York, a Washington, D.C.-based attorney for Philip Morris Cos., said lawyers will file objections to the special master's recommendations.

Although the 2,500 documents came from the files of Liggett, which settled its litigation with state attorneys general, the four other major U.S. cigarette makers claimed the documents were protected by a joint attorney-client privilege.

"What this demonstrates is that the tobacco companies greatly overused claims of attorney-client privilege to protect documents where there was no such privilege or it was improperly invoked," said Richard Daynard of the Boston-based Tobacco Products Liability Project, an organization that assists lawyers suing the industry.

In his finding, Gehan said that claims of lawyer-client confidentiality shouldn't be permitted for documents relating to scientific research, smoking and health, special research projects by an industry group, public statements and positions taken by the industry relating to smoking, and documents relating to young people.

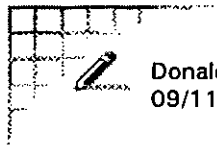
Gehan upheld the cigarette makers' confidentiality claims on more than 1,600 other documents, including those relating to ingredients, advertising and marketing, warning labels and a group of top industry lawyers known as the Committee of Counsel.

"Obviously we are pleased that the special master sustained our position on most of the categories, but we still think that the entire category system is legally inadequate and fatally flawed," said York of Philip Morris. "It is absolute black-letter law that assertions of privilege must be determined on a case-by-case, document-by-document basis."

The secrecy surrounding the special master's report left unclear one of the central issues in the case — whether industry lawyers used claims of attorney-client privilege to cover up crimes or fraud.

In an unusual move approved by the judge, Gehan is reviewing only a random sample of the privileged documents.

Tobacco-settlement - documents



Donald H. Gips @ OVP
09/11/97 04:58:41 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Doument Disclosure

I am way out of my area of expertise here but I thought I would throw out a suggestion of an alternative that is not Waxman but is pretty close. Feel free to use or discard as you choose.

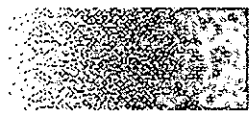
Option on Documents

1) Industry must turn over all documents to the FDA on a non-disclosure basis.

2) Industry must immediately (prior to a settlement) make public all non-privileged, non-trade secret documents.

3) Also all non-privileged, trade secret documents that do not relate to formula or current advertising campaigns should be made public.

4) Disclosure process as outlined in your proposal for privileged documents (question as to whether that process should begin before or after the settlement).



Jerold R. Mande

07/07/97 07:10:57 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:

Subject: FYI... Business Week Article on Document Disclosure Provisions

So Much For Smoking Out Big Tobacco's Secrets
The deal may let companies keep documents under wraps

Business Week
July 14, 1997

When Mississippi Attorney General Mike Moore announced the proposed $368 billion tobacco settlement on June 20, he claimed that it would force the industry to turn over a treasure trove of previously secret internal documents. "We wanted to make sure that every single person, not only in America but this entire world, knows the truth about what the tobacco industry has done.... And we are satisfied that we have done that," Moore exulted.

Critics of the deal now charge that Moore's declaration is an empty boast. In fact, they say, the pact may actually prevent the disclosure of documents that would have come to light through litigation. When the settlement was announced, tobacco foes immediately pounced on how the pact limits nicotine regulation and treats company liability. But Minnesota Attorney General Hubert H. Humphrey III has said that document disclosure is an issue of equal importance: "This fight was supposed to be about lies and cover-ups, but this deal allows the and cover-ups to live on."

The fight over disclosure threatens to create another major hurdle for the proposed settlement. Alan Morrison, the attorney analyzing the deal for the review committee chaired by former Food & Drug Administration Chief David A. Kessler and former Surgeon General C. Everett Koop, says that as the deal stands, "the most significant documents will still be withheld...for many years, and possibly forever." And Representative Henry A. Waxman (D-Calif.) on June 12 introduced a bill that would require the companies to surrender far more paperwork than is required under the pact.

The main criticism of the deal's disclosure provisions is that they let the industry continue shielding incriminating papers behind attorney-client privilege. Last month, for example, Waxman

revealed that Liggett Group Inc. had used attorney-client privilege to keep confidential a memorandum in which attorneys told the company not to market a safer cigarette because "it may incite accelerated tobacco litigation."

"WOEFULLY DEFICIENT." Tobacco's antagonists have no way of knowing exactly what information the industry may have hidden. But Stanton A. Glantz, a professor at the University of California at San Francisco and a longtime tobacco critic, believes that companies may have used privilege to avoid releasing market research, information on plans to recruit teenagers, studies of the dangers of tobacco, and memos on political strategy. He says such revelations would be highly valuable to Congress--especially as members consider how the industry should be punished and weigh how nicotine should be regulated.

The tobacco papers can be unsealed under the proposed settlement--but in each case a panel of three federal judges must rule on whether the privilege protection should be waived. Morrison calls that "woefully deficient." Jacksonville (Fla.) plaintiffs' attorney Norwood S. Wilner, who has more than 100 private personal-injury claims against the industry, says companies could stall the panel by insisting on line-by-line review of mountains of paperwork. "It will take years to get stuff resolved," says Wilner. "I don't have the resources to deal with [that]."

Wilner, Waxman, and Morrison all want the companies to abandon any claim to attorney-client privilege, as Liggett did in its March settlement. But one tobacco lawyer says this demand is unfair and has never been imposed on an industry before--"nothing close."

Matt Myers, executive vice-president of the Campaign for Tobacco-Free Kids and a negotiator of the pact, argues that the agreement furthers disclosure. "This system moves the ball in terms of document disclosure way ahead of where we would be if we just continued to pursue the litigation," he says. But that may not be enough.

By Mike France in New York, with Gail DeGeorge in Miami and John Carey in Washington

Document Disclosure Issues Affecting FDA

Authority under the FDCA to review documents

FDA has authority under the FDCA to inspect medical device manufacturers. FDA has additional authority pursuant to the Medical Device Amendments of 1976 to inspect records, files, papers, processes, controls, and facilities to determine whether restricted devices are adulterated or misbranded. (Section 704 of the FDCA, 21 U.S.C. 374). The 1976 Amendments also provided FDA with authority to inspect and copy records required under reporting and records requirements, including records concerning compliance with Good Manufacturing Practice (GMP) regulations.

There is no exclusion in the FDCA for documents containing trade secret, confidential, or privileged information. FDA has regulations to protect trade secrets as well as commercial or financial information that is confidential or privileged (21 C.F.R. 20.61).

The inspectional authority for restricted devices does not encompass: (1) financial data, (2) sales data other than shipment data, (3) pricing data, (4) personnel data (other than data as to qualifications of technical and professional personnel performing functions subject to this chapter), and (5) "research data," except for "data" subject to reporting and inspection under regulations issued pursuant to the provision of the FDCA that requires reports and records of deaths and serious injuries that device may have caused or contributed to. (Section 360i, 21 U.S.C. 519). As part of the 1996 Tobacco Rule, FDA issued an amendment to the relevant regulation that provides that tobacco product manufacturers are required to submit reports under these provisions "only for serious adverse events that are not well-known or well-documented by the scientific community, including events related to contamination, or a change in any ingredient or any manufacturing process." Thus, the tobacco companies could argue that under the current provisions, FDA is not entitled to research data, except for data relating to serious adverse events that are not already well-known.

Documents that FDA needs to have in the future

To effectively evaluate how nicotine in tobacco products should be regulated, regulate the ingredients in tobacco products, and evaluate less hazardous products, FDA needs to have access to a range of documents and sources. Although some of these documents could be obtained under existing FDA authority, others may not be easily obtainable under the FDCA. FDA is continuing to look into the scope of its authority under the FDCA with respect to these documents. Based on preliminary analysis, FDA needs access to documents related to the following issues:

Nicotine Regulation

-the interaction between nicotine and tobacco product components (including both tobacco and smoke)

-nicotine as it relates to product design and manufacturing, tobacco blend, filters, papers used in cigarettes, and pouches or other apparatuses used in smokeless tobacco products

-nicotine descriptions in the context of tobacco leaf purchasing (e.g., breeding

tobacco, methods of producing nicotine, buying practices)
-nicotine in the context of reverse-engineering work (e.g., analyses of a competitor's product)
-analyses of nicotine delivery (e.g., evaluations of how nicotine deliveries can be most accurately measured)
-technology or chemicals that affect the concentration or delivery of nicotine from tobacco products
-biology and psychopharmacology of nicotine

Ingredient Regulation
-identification of constituents in tobacco products and ingredients in smoke
-additives used in products, including the filters, papers, and pouches
-the toxicity and possible adverse effects of ingredients
-research and information on products that result when these ingredients are heated and interact

Less Hazardous Products
-research and development activities involving "safer" products, including law tar, low nicotine, and di-nicotinized products.

Subpoena authority: To have full benefit of the documents described above, FDA should also have access to the people who worked on the relevant research. Expanded subpoena authority would permit this.

Settlement Proposal Provisions

The relevant provisions are extremely vague. The proposed settlement lacks any express provision that would provide FDA with access to the documents that would be needed to effectively regulate tobacco products in the future. To the extent that there are relevant provisions, they are vague and/or drawn very narrowly. Specific concerns:

Research Disclosure Generally: The proposal (page 26) provides penalties of up to $10 million per violation for failure to disclose to FDA "research about tobacco-product health effects," but the relevant provisions (pages 67-68) are narrowly limited to disclosure of "original laboratory research relating to the health or safety of tobacco products" or "relating to ways to make tobacco products less hazardous." This provision encompasses little that would be of use to FDA. To effectively regulate nicotine and tobacco product ingredients, and address issues related to safer products, FDA would also need access to documents that reflect internal discussions and analyses concerning nicotine and tobacco products.

The timing and process for the disclosure of research to FDA is unclear. One sentence further narrows the scope of the provision by providing that manufacturers must provide research "results" to FDA.

The relevant provisions (page 68) also appear to permit companies to withhold "original laboratory research" from FDA based on trade secret privilege. Moreover, the provision for the authority of the 3 judge panel (page 66) appears to contemplate that the federal government will be making "privilege or trade secret" challenges. As

noted, under the FDCA's inspectional authority, documents cannot be withheld from the agency based on trade secret or other privilege.

Review of Previously Unproduced Documents: The proposal directs the companies, TI, and CTR to produce previously unproduced documents related to a number of specific categories (page 64), and to do a good-faith, de-novo, document-by-document review of previously withheld documents (page 65-66). FDA is particularly interested in older documents relating to nicotine research. These provisions appear too narrow, and may not encompass all of the documents FDA would need. In addition, it appears that the companies may withhold from FDA any documents that they deem ""legitimately privileged against disclosure." The proposal later contains provisions that mandate the disclosure of documents relating to certain subjects, irrespective of attorney-client or work product privilege, but these provisions appear to affect future action and documents only.

Safer Products: The proposal (page 14) requires manufacturers to "notify FDA of any technology that they develop or acquire and that reduces the risk from tobacco products," but wording not clear as to what stage in the development process this obligation would start. FDA should have routine inspectional access to all documents relating to the possible and actual development of reduced risk products.

Ingredients: Both the scope of the information concerning ingredients that FDA would have access to and when FDA would have that access are unclear. The proposal (page 19) requires manufacturers to submit, within 5 years of enactment of the proposal, a "safety assessment" for each ingredient currently added to the tobacco product. The proposal (page 20) states that it would "[p]rovide for record keeping regarding ingredients," and "[a]llow FDA access to such records, with protection of proprietary information," but contains only these vague statements. FDA should have access to all information involving ingredients irrespective of when a manufacturer submits the assessment.

Subpoena Authority: The proposal (page 19) provides that the subpoena authority FDA has with respect to manufacturers of medical devices generally would also apply to tobacco product manufacturers. FDA's existing authority is limited to use in proceedings involving civil money penalties. Expanded authority would be appropriate with respect to tobacco products.

FDCA Inspectional Authority: The proposed settlement is vague as to whether existing FDCA inspectional authority would exist. As noted above, however, FDA may not have the authority under existing provisions to obtain all of the documents needed to effectively regulate tobacco products in the future. Because of the unique circumstances and concerns of tobacco product regulation, however, it would be appropriate to adopt provisions that enhance FDA's inspectional authority with respect to tobacco products.

Issues Regarding Provisions for Public Disclosure of Documents

The relevant provisions are on pages 18, 26, 64-68 (appendix VIII).

Documents outside the scope of the proposal

The proposal establishes perimeters for what documents the tobacco industry must disclose, either by making the document public or by including it on a privilege log. In evaluating these provisions, there are two overriding issues: (1) are the proposal's provisions too limited in scope in terms of what they require the companies to disclose, and (2) because the proposal imposes specific obligations on the industry to disclose documents on particular subjects, the companies' view will be that they need not do more; as a result, we may not be able to obtain potentially important documents that we do not currently have any knowledge of.

Vagueness

This portion of the proposed settlement is quite vague and contains internal inconsistencies. The major areas of vagueness are: the subject matter of documents encompassed by the proposal, the timing of the various obligations on the industry, and enforcement mechanisms and penalties.

Undefined terms

The proposal does not define many terms and phrases. Most significantly, it does not define "privileged," "trade secret," and "confidential." In the context of the controlling law for the three judge panel, the proposal refers to the ABA/ALI Model Rules and principles of federal law as well as the Uniform Trade Secrets Act, 18 U.S.C. 1905. The ABA/ALI Model Rules may not contain adequate definitions. Section 1905 is the provision that makes release of confidential information by a federal employee a federal crime; it does not provide a definition of the terms used in this proposal.

Limiting words and terms

The proposal contain many words and terms that limit the scope of provisions. For example, under the proposal, "corporate records" "from the files of the tobacco industry" would be disclosed (pp. 18, 64). Relevant documents could be in a range of locations and forms. Of particular interest to FDA are documents from the 50s, 60s, and 70s. These documents could be in the possession of associations, companies, or individuals, in the United States and elsewhere, that are no longer directly connected to a tobacco company.

The proposal also uses lists of examples rather than descriptive terms to define a class or category. For example, the proposal names specific groups that can view the records that will be placed in the depository. An alternative would be to simply say "individuals and groups."

The proposal limits the class of affected documents by naming categories of documents or using qualifying terms. The proposal uses different qualifying terms interchangeably. For example, in some places, the proposal refers to documents

related to "smoking and health, addiction or nicotine dependency, safer or less hazardous cigarettes and underage tobacco use and marketing." In other places, the proposal refers only to "smoking and health" documents. Beyond vagueness issues, the listed categories appear too narrow. "Smoking and health" could, for example, exclude certain documents involving nicotine.

The proposal variously uses the terms "privileged," "trade secret," "confidential," and "non-public." In certain provisions, the selected term seems intentional (and unduly restrictive), but the interchangeability of terms in other provisions creates vagueness as to the proposal's meaning.

Oversight of search for previously unproduced documents

The proposal (page 65-66) directs the companies, TI, and CTR to do a good-faith, de-novo, document-by-document review of previously unproduced documents. They are to create a comprehensive privilege log of all documents that they deem to be "legitimately privileged against disclosure." This provision grants them wide discretion to determine whether a document should be withheld. It is not clear what would happen if the companies fail to provide a privilege log that meets the standards set out by the Minnesota court.

The timing of this review is unclear. The provision is contingent on the settlement of all the State Attorney General actions, and does not anticipate the possibility that one or more states might opt not to settle.

One issue is whether only documents that contain confidential trade secret information should be permitted to be withheld from public disclosure, or whether other categories of documents can also be withheld.

Another issue is whether a special master should be involved in the evaluation of some privilege claims at this stage, instead of waiting for a challenge and utilizing the three judge panel to evaluate all claims. (In Minnesota, a special master is currently reviewing 550,000 pages of documents for which attorney-client privilege has been asserted. The plaintiff State of Minnesota invoked the criminal fraud exception to attorney-client privilege, and believes that many of these documents will be made public. They anticipate that the special master's review will be done in August.)

National tobacco document depository: form and oversight

The proposal would require tobacco manufacturers, CTR and TI to establish and finance a national depository of documents in the Washington, D.C. area that is open to the public. The provision is vague. The relationship between this provision and the section that requires CTR and TI to be disbanded is unclear. Also, it is not clear when the depository will be established.

One issue is whether a government or independent entity should have oversight over the Depository's creation and running. Another issue is whether an electronic depository, accessible through the Internet, would be preferable.

National adjudication of privilege claims

The proposal's goal is to have national, "binding, streamlined and accelerated judicial determinations" of privilege and trade secret claims. One issue is whether this is an appropriate goal.

The mechanism proposed also raises many issues:

-It is not clear how long the court will be in existence (i.e., is there any point at which privilege issues related to tobacco documents would again be made in individual state and federal courts)

-Is this an appropriate use of Article III judges

-The appointment process is unclear (the Judicial Conference has only administrative responsibilities)

-Tenure of judges is unclear (would they rotate, have other judicial responsibilities, or be life-appointees); the multi-district litigation scheme may provide a model

-Because decisions are appealable only through *cert.*, the panel's decisions would, as a practical matter, be the final word

-Timing of when "national adjudication" would begin, and the affect on pending cases is unclear

-Unclear is whether a privilege that has already been decided on by a state or federal court can be re-litigated

-Applicable law is unclear (e.g., what case law would apply)

-Appointment and role of special masters is unclear

-Scope of authority is extremely broad: "the panel's adjudications shall be binding on all federal and state courts *in all litigation* in the United States"--this could encompass anti trust and other litigation

-Standard for refusing attorney fees (to be paid by manufacturers only) would probably be easily met by the companies

-High potential for a large volume of cases. Because there appears to be no standing requirements, and no prima face showing is required for *in camera* review, it is likely that every document for which a privilege has been claimed would be reviewed by the court

-Unclear whether proceedings would be *in camera*, public, or some combination

Disclosure of laboratory research

One issue is that this may discourage research into safer products. Another issue this that there may be takings concerns if research is made public. The companies will have the incentive to shield research from public disclosure by tailoring their research to the trade secrets exception (e.g., do formula-based research). In addition, the companies will likely contract more research in foreign countries. Further, it is not clear at what point in the research process the research is to be released to FDA or the public.

July 1, 1997

TO: John Dwyer & Alexa Verveer

FROM: Anne Weismann

RE: Comments on Appendix VIII to Tobacco Settlement

We have taken a quick look at the settlement provision that would, through legislation, establish a three-judge panel to resolve conclusively all privilege claims over documents that would otherwise be required to be placed in the national tobacco document depository and have the following comments. As a general matter, we think the proposal creates a judicial entity with an uncertain status, and represents a fairly unwieldy attempt to resolve discrete issues that are better resolved either through the existing judicial system, or a less cumbersome method.

First, we question whether there would be "cases or controversies" over which this panel would have jurisdiction under Article III of the Constitution. It is far from clear that the legislation would create a right for which judicial review would be available to redress an alleged denial of that right. Moreover, while the agreement speaks generally about "disputes," the scope of the disputes covered by the proposed legislation is unclear. For example, paragraph 4 purports to create a process of accelerated judicial review for "any public or private person or entity" to challenge "any claims of privilege or trade secrecy before the three-judge panel."

Second, it is unclear whether the ruling of the three-judge panel would have a preclusive effect. Paragraph 3 provides that the adjudications of the panel "shall be binding upon all federal and state courts in all litigation in the United States." It is unclear whether the intent was to make the panel's rulings have a collateral estoppel effect, or to make them non-appealable.

Third, the Department has historically opposed the creation of three-judge panels as clumsy procedures that only generate more litigation about whether a particular action is properly heard by the panel in question. I understand that most recently the Department opposed the creation of a three-judge panel in the Judicial Reform Act. We see no reason to deviate from this position here.

As to alternatives, we know of no other statute that creates an alternative scheme to resolve comparable issues. The JFK Assassination Records Collection Act of 1992 establishes an Assassination Records Review Board that is empowered to collect government records, as defined therein. Disclosure of particular records or portions of records may be postponed based on certain enumerated grounds (e.g., personal privacy interests, classified information), and the Board is empowered to "consider and render decisions on a determination by a Government office to seek to postpone the disclosure of assassination records." In the tobacco litigation, by contrast, the documents to be placed in the repository are expressly non-governmental; i.e., "the tobacco industry's corporate records."

The Department's concerns with the creation of a three-judge panel could be alleviated if,

alternatively, the legislation created a special court, made up of three to five district judges, designated by the Chief Justice, to hear cases individually raising claims of privilege. Such a court could be similar in concept to the Temporary Emergency Court of Appeals, and would have the advantage of creating a unified body of law. A single judge of the court could hear and decide any case, although the court could sit en banc to resolve significant or recurring issues. Even such an approach strikes us as a fairly extreme solution, given that claims of privilege are hardly unique to the current judicial system.

Another alternative would be to limit, through legislation, the privileges that can be claimed with respect to these documents. Anticipating that the bulk of the privileges claimed would be attorney work product, the legislation could provide explicitly that such privileges cannot be asserted with respect to any document that is required to be placed in the repository. While such legislation will not eliminate entirely disputes that may arise over privileges, it will limit their volume and scope considerably. In addition, the legislation could provide that disputes over privilege claims (in the context of litigation) must first be presented to mediators for attempted resolution. Again, while such an approach will most likely not eliminate all disputes requiring judicial resolution, it will help limit their volume and scope.

Alternatively, the settlement could adopt the approach used in multi-district litigation, where discovery disputes are transferred to one judge for resolution.

Let me stress that these are our preliminary thoughts only. We understand you are under a tight time-frame for response. Given more time, we would be happy to explore these and other alternatives more fully.

Tobacco settlement –

document disclosure

Mtg w/ MN AG + others

1,000,000 pp of prev docs

ind. w/in These – formula docs

categ-by-categ review of docs – 12 categs

docs w/ cnt atty

" re sci research

CTR

advert docs

youth mktng docs

etc.

tobacco - settlement - document disclosure

Date: 08/06/97 Time: 11:07
Fconspiracy

WEST PALM BEACH, Fla. (AP) The tobacco industry today released sealed documents that the state of Florida says shows cigarette makers conspired to hide the dangers of smoking. One urges that the industry deny any link to health problems.

Eight documents dating back to 1964, some of them handwritten, were released after cigarette makers said they had exhausted their legal appeals to keep them secret. Industry lawyers distributed the documents before the official release of the records set for later today.

The state said the documents should be considered in its lawsuit seeking to recover the costs of treating sick smokers on Medicaid.

One undated document from R.J. Reynolds Tobacco Co. said the industry should deny that the ingredients of cigarettes caused health problems.

``There has been no scientific proof that any ingredients as used in cigarettes poses a health hazard to humans or increases the risk, if any, of cigarette smoking,'' it said.

Earlier today, the tobacco industry had announced they would no longer fight the release of the documents.

``The defendants have no intent of making any further appeals in this matter,'' said Peter Bleakley, the lead attorney for the industry in the case.

The 4th District Court of Appeal ruled Tuesday that the documents from Liggett Group showed evidence of industry fraud and should be considered in Florida's lawsuit seeking to recover the costs of treating sick smokers on Medicaid.

Florida Attorney General Bob Butterworth, asked what the state expected to find in the Liggett documents, said, ``I have no idea, but they've been fighting really hard to keep them.''

Earlier, Butterworth said he hoped the documents ``tell us ... something about just how the industry was using lawyers to hide documents.''

The Liggett documents were supposed to be released as part of its settlement this spring with 22 states, including Florida. But other tobacco companies went to court and argued the documents were protected by attorney-client privilege.

Five judges have examined the documents and said they found reason to believe they were used to help cigarette makers perpetrate a fraud.

Billions of dollars are at stake in Florida's lawsuit, although the state has not set a specific figure. Mississippi settled a similar suit for $3.4 billion after the industry agreed to a $368 billion national settlement that would require congressional approval.

Jury selection for the trial began Friday and was expected to take a month.

In a related decision released Tuesday, a ``special master'' a person appointed by a court to make findings on special questions concluded that the Tobacco Institute, the industry's lobbying and public relations arm, used attorneys to hide information on smoking's dangers and industry plans to target young people.

The special master, attorney R. William Rutter Jr. said the documents showed the Tobacco Institute ``sought to create a public perception of not wanting youth to smoke'' in order to obtain a public relations benefit and ``prevent or delay further regulation of the tobacco industry.''

Rutter included six brief excerpts. One internal document from a cigarette maker said ``the base of our business is the high school student.'' Another said: ``The smoking patterns of teen-agers are particularly important to Philip Morris.''

The tobacco industry is likely to appeal Rutter's report, said Jim Goold, an attorney for the institute.

``They've taken isolated documents that do not reflect industry policy or practice,'' Goold said. ``The industry's policy and programs have been well-known and aggressive in trying to deal with (young smokers) for years.''

APNP-08-06-97 1106EDT

Tobacco settlement - document disclosure

Submitted to Special Master
In Camera Under Seal

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR THE COUNTY OF PALM BEACH, STATE OF FLORIDA

CIVIL DIVISION
CASE NO. 95-1466AH

THE STATE OF FLORIDA, et al.,

Plaintiffs,

v.

THE AMERICAN TOBACCO COMPANY, et al.,

Defendants.
_____/

IN CAMERA MEMORANDUM OF SETTLING DEFENDANTS LIGGETT GROUP INC., LIGGETT & MYERS, INC. AND BROOKE GROUP, LTD. CONCERNING ALLEGEDLY JOINT DEFENSE PRIVILEGED DOCUMENTS

Settling Defendants Liggett Group Inc., Liggett & Myers, Inc. and Brooke Group, Ltd. (collectively, "Liggett"), file this in camera memorandum concerning allegedly joint defense privileged documents, including certain of the twenty documents submitted to Special Master Rutter on March 27, 1997 (the "Selected Documents").[1]

[1] Pursuant to its settlement with plaintiffs and Judge Cohen's March 26, 1997 Order, Liggett has filed with the Court for in camera review three boxes and one redweld of allegedly joint defense privileged documents. Of the twenty documents submitted to the Special Master, the following have been identified as allegedly subject to a joint defense privilege: LG 2008121 - 2008141; LG 2006318 - 2006330; LG 2000741 - 2000750; LG 2000149 - 2000171; LG 2006235 - 2006240; LG 2008203 - 2008210; LG 2008243 - 2008247; LG 2008248 - 2008255; LG 2000788 - 2000791; LG 2005509 - 2005510; LG

Submitted to Special Master
In Camera Under Seal

As shown below, the allegedly joint defense privileged Selected Documents raise serious concerns as to whether some or all of these documents should be protected from disclosure or discovery. In fact, those documents raise similar concerns with respect to some or all of the remaining three boxes of allegedly joint defense privileged documents filed by Liggett with the Court, as well as with respect to similar documents in the possession of other defendants.

ARGUMENT

That the Selected Documents and other similar documents should not be protected from disclosure or discovery stems from, among other things, four interrelated general concerns: (a) whether the documents relate to public health and safety issues; (b) whether the documents evidence improper concealment or fraud with respect to such issues or other matters; (c) whether plaintiffs have a substantial need for otherwise protectable work product; and (d) whether and to what extent allegedly privileged documents relate to bona fide confidential legal advice and not business decisions or other matters. Set forth below are several examples of allegedly joint defense privileged Selected Documents that raise one or more of these concerns:

2008157 - 2008164; LG 2006143 - 2006143; LG 2006048 - 2006050; and LG 2008230 - 2008232. The remainder have been identified as Liggett-only privileged documents. Under Liggett's settlement with plaintiffs, Liggett has waived its own privilege claims with respect to the allegedly joint defense privileged documents, and, pursuant to a limited waiver, to the Liggett-only privileged documents.

Submitted to Special Master
In Camera Under Seal

1. Document LG 2008121 - 2008141

This memorandum by R.J. Reynolds' counsel regarding cigarette ingredients raises all four categories of concerns. In particular, for example, the document, on page 7, discusses "corporate misconduct" on the part of the tobacco companies and their Committee of Counsel (a committee consisting of the companies' general counsels). The document states that there is at least "some evidence which could be marshalled" to show the particular corporate misconduct at issue -- i.e., "that the industry used untested ingredients in disregard of the safety of consumers."

In fact, the document refers to evidence showing that the industry (particularly through the Committee of Counsel) prevented adequate safety testing of cigarette ingredients, while at the same time concealing what those ingredients were. See, e.g., page 7, footnote 2:

> A corporate misconduct test premised upon ingredients would consist of claims of testing which was both belated and inadequate, failure to make adequate inquiry into the composition of flavors produced by outside flavor houses, and the failure to remove ingredients known or shown to be harmful. There are memoranda in the RJRT files which reflect a desire by R & D personnel to test ingredients and which document the policies which the Company has followed. A recent memo by a Lorillard employee (Alex Spears) to Dr. Hayes at RJRT suggests that in 1984 the Committee of Counsel thwarted the industry scientists' desires to assure the safety of the product by testing ingredients adequately. (emphasis added.)

Given the above statements -- as well as the doubts as to ingredient safety and adequacy of testing and the industry's concealment efforts referred to repeatedly in the document -- plaintiffs' need for the document seems particularly clear.

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2. Document LG 2006318 - 2006330

There are a number of Selected Documents that relate to what appear to be improper efforts to conceal information, including information relating to issues of public health and safety. Among these documents is a letter from Philip Morris's counsel enclosing a memorandum regarding a proposed opinion survey concerning supposed public awareness of health issues involving cigarette smoking.

Concerns regarding the discoverability of this document stem from, among other things, the last paragraph on page 3 of the memorandum, wherein it states:

> The question has been raised of possible adverse use of a survey. Specifically, Mr. Austern has suggested that should the results of the survey prove unfavorable, they may be subpoenaed or otherwise may fall into the hands of the FTC, a Congressional Committee, or a plaintiff in pending cancer litigation. There is no question that some risk exists. We have been assured

Submitted to Special Master
In Camera Under Seal

> by both Elrich & Lavidge and by Professor Steiner that they would transmit to us every interview and every copy of the analysis. Thus, when it is completed, there will be nothing in the records of Elrich & Lavidge or Professor Steiner to subpoena. The danger of a successful subpoena would be reduced (though not entirely eliminated) if the survey were in an attorney's files. In any event, if the returns were unfavorable they could be destroyed and there would be no record in any office of the nature of the returns. The possibility of compelling oral testimony from Steiner, of course, always exists. (emphasis added.)

See also the following two documents.

3. Document LG 2000741 - 2000750

This document includes a cover letter from Liggett's counsel with notes from a meeting of the Committee of Counsel concerning the status of pending litigation and scientific research projects.

In Haines v. Liggett Group, Inc., 140 F.R.D. 681 (D.N.J.), vacated, 975 F.2d 81 (3rd Cir. 1992), the court found as to this document that the notes from the Committee of Counsel meeting were not protectable from disclosure. The court stated that the document made clear that the tobacco companies and their supposedly independent research arm, the Council for Tobacco Research, engaged in improper concealment:

> In this court's opinion, no evidence could be more damning. These minutes explicitly acknowledge that the supposedly 'independent' scientific director of CTR channelled research into 'special projects' for defendants' litigation efforts. But even more disturbing is defendants' announced practice of using the 'special projects' division in order to shield damaging research results from the public *and* the FTC.

140 F.R.D. at 695.

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4. <u>Document LG 2000149 - 2000171</u>

This letter, and the attachments thereto, from counsel for the tobacco companies concerning funding of certain research projects was also held to be discoverable by the court in Haines, 140 F.R.D. at 695:

> This statement supports plaintiff's hypothesis that 'special projects' and the CTR in general, as well as the Tobacco Institute, coordinated and commingled their efforts in defendants' public relations campaign to create doubt about links between smoking and disease. This is exactly the type of evidence which defense counsel concedes could link 'special projects' activities to plaintiff's fraud claim, giving rise to the crime/fraud exception.

See also

; Document LG 2008157 - 2008164, which consists of a memorandum from Liggett's counsel regarding a meeting of counsel for the tobacco companies ("[i]t was recommended that The Tobacco Institute not distribute any new health material without clearing first with the Special Lawyers Committee in the first instance") (page 3); Document LG 2006048 - 2006050, a letter from counsel for Lorillard concerning efforts to maintain research efforts behind lawyers, as well as efforts to find favorable researchers.

Submitted to Special Master
In Camera Under Seal

Submitted to Special Master
In Camera Under Seal

7. Document LG 2008243 - 2008247

This document consists of the handwritten notes of Liggett's in-house counsel regarding a meeting of the Committee of Counsel during which critical public safety and health, advertising and warning issues were discussed, including "[c]igarettes kill people beyond a reasonable doubt" (see page 3), and industry efforts to rebut facts regarding these issues.

8. Document LG 2005509 - 2005510

This document is a letter from counsel for Brown & Williamson to counsel for the other tobacco companies concerning FTC analysis of carbon monoxide in cigarettes. The document relates to industry efforts to obstruct public health and safety research: "No action should be taken which would in any way expedite the Commission's consideration of CO" (page 1).

Submitted to Special Master
In Camera Under Seal

* * * *

Again, it should be noted that the Selected Documents represent only a small sample of allegedly privileged joint defense documents which raise concerns similar to those outlined above. If the Court were to find that some or all of the Selected Documents should not be protected from disclosure or discovery, production of other allegedly privileged documents in the possession of the tobacco companies may -- and, indeed, should -- be compelled. See In re Vargas, 723 F.2d 1461, 1467 (10th Cir. 1983) ("the scope of the exception to the attorney-client privilege in the case at bar would be sufficiently broad to cover all of the documents requested if the trial court determines that the government has made a prima facie showing as stated above"); Stirum v. Whalen, 811 F. Supp. 78, 83 (N.D.N.Y. 1993) (fraud finding "is sufficient to remove the protective shield of the attorney-client privilege from all documents confidentially conveyed between" the parties).

Respectfully submitted,

KASOWITZ, BENSON, TORRES
& FRIEDMAN L.L.P.

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Counsel for Settling Defendants
Liggett Group Inc., Liggett &
Myers, Inc. and Brooke Group, Ltd.

tobacco settlement - document disclosure

8-1-97 Document Disclosure

DOT: Art II POR.
Assertion of priv under oath.
System of privilegization
Req of detailed priv. log.
Determ of priv — not binding on other litigants
Two-track system - also could do w/in litigation
Sanctn authority - civil $ penalties

Mitch: Documents - (that we believe to be out there)
(1) on advtsing objectives - incl. to kids
(2) smoking + health
(3) nicotine - (so we can understand addiction issues)
→ incl. nicotine analogues (substitutes)
(4) product development - key out parameters of design.
(5) Philip Morris - Richmond meetings - presentations.

Deal - crim. law research exempted from AC privilege.

HR + I + DOT point out that most of above would not be privileged - what's the problem?
Harden - mtgs among lawyers - notes, etc.
Gene - these should be priv'ed sometimes.

DOT - Maybe keep using current case
Point here: no p.h. case - CT sees things automatically
(could have this in normal suits too)

No need to make a PF case – do in depository scheme and in normal listing and in FDA ext procedures

Abrogation of priv? Or preemption?
Gene: Really a problem – many of them really are privileged
Ann: Also a GA pt to counsel problem.

Gene: Move the timetable up.

[redacted]

Preemp may cause probs in crim proc's.

What's the body??
DABB would wk/new will anything else HHS has.

tobacco settlement - document disclosure

7-16-97 Document Disclosure

Talked w/ FDA MN AG — Ambiguity - What law?

I. Settlement

Concerns:

1. 3-party ct problematic = doesn't help. often
2. Art III problem - case or controversy not
3. Practical diffics -
   a. Forces them only to turn over non-priv.
      more access to in camera review - That's only change
      but not likely to wk - no one really likes doing this.
   b. FDA - retain current auth - unclear.
      must be made clear
   c. MN AG - valid - req all by this panel - maximum may not be timely as to any particular litigation.

      appt special masters? helps
      but ct dealing w/ own schedule - has real advant.
      should be allowed too

→ Proposal does relieve phys y necessity to make p.C. case.
that's very good.

   d. preclusive effect - fundamentally unchain - That future parties are bound.

II. Waxman

Abrogate AC priv / wk product priv.
Potential const prob - kill by carve-out
It goes to pub health - Then this falls away.
Rt to counsel problem? - in criminal context.
No abrogation of AC priv. even done

policy concerns too. At least has to be narrowly tailored.
where do you draw line?

III. Proposal - DOJ

Article II panel (no case/controversy prob)

Mfrs. have to submit all docs (Tho don't lose priv)

Auth panel to do in camera rev. (no p.f. case)

Produce priv log -

involve priv under penalty of perjury - more effective

also civil $ remedies. sanctions to ensure compliance

Mechanism not adversary - tho other side can weigh in.

No preclusive effect - JR w/ de novo on law / clly erron on facts

Judgment - not priv'd - is binding.

Not exclusive - pending litig. can proceed. ~~Ct can~~ Person can ~~decide to do~~ ask ct to do.

Mfrs. want certainty - prob would want single panel.

Fed priv law applies

Still fairly clumsy vehicle

GS - should have one venue on appeal.

Mitch - Any further presump? - potential 6A problem.

certain docs get presump of no priv -

OR

such docs get 1st in line ~~tr~~ treatment appropriate

ES - Repository very imp't even leaving aside all privilege questions

→ Option in between DOT + Settlement —
allows both Liky + This scheme now.
Pour for all future suits - use only this scheme (pr only one site)

takes care of MN.

Tobacco - settlement - document disclosure

DISCOVERY ABUSE:

How Defendants in Products Liability Lawsuits Hide and Destroy Evidence

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David Halperin

Congress Watch
July 1997

Public Citizen is a non-profit membership organization in Washington, D.C., representing consumer interests through lobbying, litigation, research and publications. Since its founding by Ralph Nader in 1971, Public Citizen has fought for consumer rights in the marketplace, for safe and secure health care, for fair trade, for clear and safe energy sources, and for corporate and government accountability. Public Citizen has six divisions and is active in every public forum: Congress, the courts, governmental agencies and the media.

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DISCOVERY ABUSE:

How Defendants in Products Liability Lawsuits Hide and Destroy Evidence

Table of Contents

DISCOVERY ABUSE:
How Defendants in Products Liability Lawsuits Hide and Destroy Evidence

Summary

For nearly two decades, the world's biggest corporations have relentlessly lobbied the U.S. Congress and state legislatures to restrict the ability of consumers to obtain relief through the legal system for severe or fatal injuries caused by defective products. These corporations approach lawmakers with wild claims about a "litigation explosion." They frequently complain about the expense of defending themselves from lawsuits and the delays that occur in our legal system. But the record shows that, in fact, expense and delay in product liability litigation is often the result of deliberate attempts by corporate defendants -- the very entities urging "tort reform" -- to avoid disclosure of critical information revealing knowledge of design defects that can kill and maime. Product liability defendants have repeatedly abused the pre-trial discovery process, ignoring the obligations imposed on them by plaintiffs' discovery requests and by orders of presiding trial judges. Among the abuses:

- Product liability defendants have provided misleading responses to discovery requests -- responses that obscure the fact that the defendant is deliberately withholding documents sought by the plaintiff.

- Product liability defendants have sought to shield mountains of documents behind the attorney-client privilege, without demonstrating or even confirming that all such documents are subject to the privilege.

- Even when they have provided documents to plaintiffs, product liability defendants have often sought elaborate protective orders aimed at hiding damaging product information from the public, the media, and government agencies -- as well as from others who claim injury from the same product. And where defendants face likely defeat at trial, they sometimes demand, as the price for settlement, agreements by plaintiffs to seal for all time the records of a case -- including, sometimes, the transcripts of a public trial.

- Product liability defendants often refuse to provide important information until ordered to do so by the presiding judge -- and often fail to comply even after such judicial orders are issued.

- Product liability defendants have blatantly concealed and destroyed documents relevant to their defective products -- often while denying that such records ever existed.

Judges around the country have identified and condemned these tactics. For example:

• In a case involving alleged defects in a Samurai four-wheel-drive vehicle, a federal judge in Georgia found that Suzuki Motor Co. had provided false information and withheld key documents. He concluded that Suzuki deserved "the most severe sanction available." A federal appeals court affirmed the decision, concluding that Suzuki "engaged in an unrelenting campaign to obfuscate the truth."

• A two-year-old girl died after taking asthma medication. When the girl's parents sued, the manufacturer, Fisons Corp., used a misleading discovery response to avoid disclosing company memos that revealed corporate knowledge of the risks posed by the medication. The Washington state Supreme Court found that Fisons' misleading answers were "contrary to the purposes of discovery and ... most damaging to the litigation process."

• DuPont's Benlate 50DF was supposed to kill funguses, but instead it appeared to be killing the plants it was supposed to protect. Faced with mounting legal claims by growers, DuPont deliberately withheld testing data that suggested contamination of the Benlate by powerful weedkilling chemicals. A Georgia federal judge held that DuPont had "engaged in a continuous scheme and pattern of bad faith and discovery abuse." DuPont, he wrote, "cheated consciously, deliberately, and with purpose. DuPont has committed a fraud on this court." In another Benlate case, a Florida state judge found that DuPont had deliberately acted "in utter disregard for orders of the court, and for the rules of evidence and ethics." In a third case, a Hawaii state judge concluded that DuPont had made "fraudulent" statements and engaged in "abusive litigation tactics" and "intentional misconduct."

• In a suit brought by the survivors of a lung cancer victim, a New Jersey federal judge found evidence that major tobacco companies created a research organization that was "a fraud -- to deflect the growing evidence against the industry." Rejecting the cigarette makers' claims of attorney-client privilege, he wrote, "The tobacco industry may be the king of concealment and disinformation."

• General Motors' efforts to delay disclosure of corporate records to plaintiffs claiming automobile defects have been repeatedly criticized by courts. A South Carolina federal judge found "a substantial likelihood" that General Motors had engaged in "perhaps perjury and systematic destruction of documents involving gross misconduct." An Oklahoma federal judge found that GM had repeatedly violated discovery orders, engaging in misconduct that was "both willful and intentional." A federal judge in Missouri concluded that "General Motors' discovery practices as a whole are conducted with complete disregard" for federal court rules. He found "a deliberate, willful policy on the part of General Motors to stonewall discovery as much and as long as the patience of the court would tolerate."

Some of these cases are still in litigation, and the final decisions as to penalties for the discovery misconduct are not yet determined. Nevertheless, the facts demonstrate the need for genuine reform of the tort system -- reform that addresses discovery abuse by litigants rather than, as industry groups urge, arbitrarily weakening the rights of injured persons. What are needed are reforms to make the resolution of tort claims more fair and more efficient, so that

frivolous claims can be quickly identified and dismissed and legitimate claims can be promptly resolved. Reforms aimed at curbing abuse of the pre-trial discovery process would help ensure that cases are decided on their actual merits -- on the truth -- and not on the ability of one side to outspend the other on legal fees and expenses, or the willingness of one side to bend and break ethical and legal standards. Specific measures would include:

- Tougher sanctions imposed by judges for discovery abuse.

- Stronger court rules to provide for direct punishment of attorneys who violate court discovery orders and related ethical rules.

- More criminal investigations of lawyers and parties who lie or destroy documents during litigation.

- Increased recognition of an independent tort action for deliberate destruction of relevant evidence.

- Sharp restrictions on the use of pre-trial secrecy orders and confidential case settlements.

The Increasing Abuse of Litigation Discovery Rules

It was a rare public glimpse at internal deliberations within one of the world's largest corporations: A tape, secretly recorded by a Texaco executive, of an August 1994 meeting in which company officials discussed how to handle an ongoing lawsuit charging Texaco with racial discrimination. When the tape was released to the media, public outrage focused on indications of racial animosity among the Texaco executives overheard. But just as shocking was clear evidence of a deliberate scheme by corporate executives to manipulate and destroy evidence relevant to a pending lawsuit.

On the tape, discussing a request for documents by the plaintiffs, Texaco treasurer Robert Ulrich says, "We're gonna purge the [expletive deleted] out of these books, though. We're not going to have any damn thing that we don't need to be in them." The officials discuss the fact that two sets of meeting minutes exist. As to one set, apparently unadulterated, Ulrich says, "You have that someplace, and it doesn't exist... I just don't want anybody to have a copy of that." But then Ulrich goes even further: "You know, there is no point in even keeping the restricted version anymore. All it could do is get us in trouble. That's the way I feel. I would not keep anything." Another executive, Robert Lundwall, responds: "Let me shred this thing and any other restricted version like it.... because it comes back to haunt us." At another point, a third Texaco official appears to urge his colleagues to be sure to retain information helpful to Texaco's position in the case; he says, "If it was a favorable chart, you'd want to retain it."

According to federal officials, Lundwall, who made the tape recording, has admitted that he did indeed participate in the destruction of documents sought by the plaintiffs in the case. In addition, information obtained by federal investigators reportedly indicates that a Texaco lawyer advised that a draft internal memorandum not be disseminated "to avoid it becoming part of the 'discovery' process in the [discrimination] litigation." Federal authorities have indicted Lundwall and Ulrich for obstruction of justice in connection with the alleged concealment and destruction of documents sought by the plaintiffs. (The executives deny the charges.)[1]

The Texaco lawsuit concerned claims of discrimination, but many, many other examples of blatant corporate abuse of the pre-trial discovery process come from another area of hotly-contested litigation: suits arising from personal injuries alleged to be caused by defective products.

Product liability suits have been the subject of sustained public and media scrutiny in recent years, mainly as the result of heavily-orchestrated public relations and lobbying campaigns by product manufacturers aimed at limiting the rights of injured persons. Among other things, these corporate lobbying efforts have sought to place arbitrary caps on damage awards and to abolish the traditional rules of "joint-and-several" liability, which help ensure recovery for victims harmed by multiple defendants by requiring such defendants jointly to pay the full damages even if one or more fail to pay.

In arguing that the tort litigation system, particularly as applied to claims of personal injury from defective products, is in need of drastic change, advocates of so-called "tort reform" repeatedly point to the fact that product liability lawsuits today are often lengthy and expensive. Victor Schwartz, a Washington attorney paid by industry groups to lead the charge for restrictions on the legal rights of injured persons, complains that "the cost of responding to litigation is very expensive and takes resources away from job creation and research and development."[2] The Health Industry Manufacturers Association, in a statement to Congress urging product liability restrictions, speaks of "prohibitively costly legal expenses," of companies spending "millions of dollars defending themselves in lawsuits."[3] The Insurance Information Institute notes "the growing number of lawsuits, especially unnecessarily prolonged lawsuits."[4] Congressman Jim Ramstad, Republican of Minnesota, who chaired the task force that drafted the legal reforms section of the "Contract with America," says the legal system is overloaded by "skyrocketing costs and mind-boggling delays." [5]

But the evidence shows that very often the actual cause of delay and expense is not the claims brought by the victims but the deliberate strategy of defendants, particularly defendants in product liability cases, to abuse the pre-trial discovery process in hopes of wearing down the plaintiff or keeping the plaintiff from obtaining information harmful to the defense case. Indeed, the public record is replete with examples of defense conduct so outrageous that trial judges have been pushed to impose severe sanctions. But such conduct persists, apparently because product liability defendants and their attorneys still consider such unethical strategies to be worth the gamble.

Business Week's legal affairs editor recently concluded, "Corporate foul play in high-stakes cases appears to be increasing.... Of course, destroying evidence, striking secret deals, and stonewalling opponents aren't new tactics in the world of hardball corporate litigation. But it is difficult to recall a time when so many respectable companies have been hit with court sanctions." He added, "By refusing to play by the rules, these companies have undercut their moral authority to criticize the U.S. tort system."[6] An anonymous "veteran defense attorney," quoted in the *Wall Street Journal*, says, "It makes me sick how some companies I've worked with treat discovery requests. They think litigation is a game."[7]

What have corporate defendants done to merit such condemnation? The following pages will make that clear. There you will read many, many more strong words condemning abusive conduct by product liability defendants. And those words won't come from Public Citizen but from federal and state trial judges -- dedicated public servants who witnessed the misconduct first-hand.

How the System Is Supposed to Work

The rules governing civil discovery -- the disclosure of documents, physical evidence, witness testimony, and other information prior to the trial of a civil lawsuit -- have been carefully crafted by judges and legislators at the state and federal level to ensure that parties have extensive access to relevant information possessed by their opponents.

It was not always this way. Until the late 1930s, a "sporting theory of justice" dominated. There was no right to discover facts and evidence in the other side's possession. Thus, trials were often an unpredictable game of chance, rather than a search for the facts.

The modern rules of discovery were based on the assumption, as the Supreme Court put it in 1947, that "mutual knowledge of all relevant facts gathered by both parties is essential to proper litigation."[8] Instead of "a game of blind man's bluff," the Court has said, the modern rules promote "a fair contest with the basic issues and facts disclosed to the fullest practicable extent."[9] The facts must come out, even if they hurt the case of the party who possesses them. Damaging documents, like those in the Texaco vaults, or evidence that a personal injury plaintiff has repeatedly filed phony claims, must be disclosed to the other side.

In general, discovery rules governing both federal and state courts provide for broad disclosure prior to trial. Litigants must act in timely fashion in response to discovery requests by opponents. Parties must respond to *requests for production of documents* -- written demands to make available specific records or categories of records relevant to the case. Parties must answer, in writing, *interrogatories and requests for admissions* -- written questions about issues in the case. Parties must make themselves and their officials available for *depositions* -- oral, transcribed interviews by opposing attorneys. Litigants must even provide their opponents with information that, because of some rule of law, would not be admissible at trial, so long as the information could reasonably lead to the discovery of admissible evidence. Recent reforms in discovery rules have further supported this principle of openness: In many jurisdictions parties must disclose relevant documents at the outset, before an opponent has even requested them.

There are exceptions to the principle of openness, but they are narrow and tightly drawn. If a party seeks information not possibly relevant to the dispute -- if it seeks to go on an extensive "fishing expedition" that improperly burdens the other side -- or if the information sought is protected by a legally-recognized privilege, such as confidential communications between a lawyer and client or husband and wife, the opponent can object. If the parties cannot resolve their differences, they can submit their dispute to the presiding judge.

When the parties play by these rules, the system has a chance to work. Both sides become promptly aware of the available evidence and the strengths and weaknesses of their cases. This promotes settlement of valid claims on reasonable terms. Frivolous claims can be quickly identified and dismissed. Where the parties cannot agree on an appropriate settlement, at least surprises at trial are minimized, and the process is more efficient. And the policy of openness helps level the playing field, providing less wealthy parties with genuine hope that their cases will be resolved on the merits.

How Product Liability Defendants Subvert the System

Unfortunately, as case after case in the product liability area demonstrates, defendants often do not play by the rules. They fail to fulfill discovery requests from opposing parties and

even disobey discovery orders issued by judges. Why? Because such tactics can exhaust the opposition and help keep damaging information from coming to light.

How do these litigants bend and violate the rules? The techniques, by now, are well-known. Below we will see these tactics come alive in a number of actual cases. But first, a quick catalogue of the tools of the trade:

1. *The open-ended response*

Product liability defendants frequently respond to document requests by indicating that their initial document production may be supplemented if additional documents are found. This stance sounds reasonable, but in practice it is sometimes used as license to deliberately withhold relevant records. If the plaintiff obtains a document from another source and confronts the defendant with it, asking why it had not been produced in the litigation, the defendant can say, "We told you we were still looking."

2. *The clever response*

Another variation of the cat-and-mouse game sometimes played by product liability defendants is to respond to a discovery request by providing only a subset of the documents requested or an answer to only part of the question asked. But instead of expressly objecting to providing the rest of the information sought, the defendant subtly slips the limitation into its response. For example, in a case where the issue is whether Mechanism A, a component of Vehicle X, caused an injury, the plaintiff gives the defendant this request: "Provide all documents concerning defects or potential defects in Mechanism A." The defendant has documents indicating defects with respect to Mechanism A, but they concern Vehicles Y and Z, not Vehicle X. Instead of providing those documents or objecting to the scope of the request, defendant simply responds, "There are no documents regarding Vehicle X concerning the risk of Mechanism A." If the busy plaintiff's lawyer fails to notice that the defendant has unilaterally limited the scope of the discovery request, the documents will remain hidden.

For a real-world example, see the case of *Pollock v. Fisons Corp.*, discussed below.

3. *Claims of attorney-client privilege*

Product makers often hide damaging documents behind the broad banner of attorney-client privilege and its cousin, the attorney work-product doctrine (which shields from disclosure the strategies and conclusions of lawyers). Defense lawyers know that plaintiffs' attorneys are reluctant to spend time and energy trying to force the trial judge to entertain detailed motions to compel discovery, and that trial judges don't have the time to pore over thousands of pages to determine the validity of assertions of privilege. The system instead depends on the integrity of lawyers, who are supposed to assert the privilege only as to records covering genuine attorney-client communications. Unscrupulous companies and their lawyers have taken advantage of this

doctrine. They simply assert the privilege, sometimes as to numerous documents and often without elaboration or adequate inspection, and hope that will be the end of the matter.

4. *Protective orders*

Product liability defendants, claiming that public disclosure of product information will reveal essential business secrets to competitors, frequently insist on elaborate secrecy agreements -- called protective orders -- prior to providing discovery to the plaintiff. These complicated orders assist defendants by delaying the release of crucial documents, requiring plaintiffs' attorneys to spend time negotiating the orders and complying with their sometimes complex provisions, and -- often most importantly -- keeping harmful information out of the hands of attorneys representing other persons claiming injuries from the same product -- and keeping it away from govenment regulatory officials. Often there are no genuine trade secrets in need of protection, but plaintiffs' lawyers, anxious to move forward on behalf of their clients, accept the restrictions anyway. Judges, normally too busy to question agreements worked out by parties, approve them.

Consider a typical protective order sought by the General Motors Corp. and approved by a California Superior Court judge. A man named Milton Green sued GM after his wife was killed when her Chevrolet Chevette was rear-ended and caught fire. Green alleged that the Chevette was defectively designed with an extremely vulnerable fuel tank located at the back of the vehicle. In discovery, his lawyer asked GM for safety documents and crash test results that might prove his claim. Such information might have been of interest to other persons injured in Chevette fires or their survivors, as well as others who had purchased or were considering purchasing a Chevette. But GM crafted an agreement that conditioned turning over the records to Green's lawyers on their promise not to provide them to anyone else. The agreement added that failure to maintain confidentiality would put Green or his lawyer "in contempt of court ... subjecting the violating party to fine and imprisonment." Not satisfied with this dramatic warning, GM felt it necessary to specifically mention what was likely its biggest concern: "Under no circumstances shall any such information be disclosed or otherwise conveyed to parties, counsel or witnesses (including expert witnesses) in other actions (or claims which have not yet resulted in suit) against General Motors Corporation."[10]

When a number of persons claim injury from the same product, the manufacturer can establish a centralized defense strategy, with in-house corporate counsel or a large outside law firm coordinating efforts, while local attorneys handle day-to-day tasks. What members of the corporate defense team learn in one state -- in terms of facts or legal strategy -- can be passed on to colleagues in another. This approach makes sense; it makes litigation more efficient. Unfortunately, the use of broad secrecy orders can prevent such efficiency on the plaintiff's side; with such orders in place, plaintiffs' lawyers may be unable to pool their knowledge effectively. Often a lawyer bringing a product liability claim must start at square one, making all the discovery requests and dealing with all the same discovery obfuscation faced by lawyers for earlier claimants. Thus, there is delay and expense -- the very features of the tort system about which many corporations complain -- resulting directly from deliberate defense tactics.

One person who recognized this problem was Illinois federal district judge Robert J. Kauffman. He had been assigned a case that arose when an Illinois couple was killed in a fire resulting from a rupture in the fuel tank of their Ford Galaxie after a collision. The defendant, Ford Motor Co., presented Judge Kauffman with a protective order, but Judge Kauffman refused to sign it. He concluded that Ford had not demonstrated that any confidential business secrets were at issue and that Ford simply feared that the information could be used in future lawsuits. He found that the information Ford aimed to keep concealed -- regarding product design and Ford's knowledge of possible defects -- should, in fact, be publicly available in future cases. "The availability of such discovery," Judge Kauffman wrote, "may reduce time and money which must be expended to prepare for trial in those cases and may allow for effective, speedy and efficient representation."[11]

Judge Kauffman issued his decision in 1978, but, nearly twenty years later, product liability defendants continue to press for broad protective orders as the price for disclosure of information to plaintiffs.

5. *Failure to comply with discovery requests until plaintiffs complain to the judge*

Product liability defendants often respond incompletely or not at all to plaintiffs' discovery requests. They will wait until plaintiffs go to court asking the presiding judge to order the disclosure or to impose sanctions. Or a corporate defendant will refuse to hand over documents until the court actually rules on the plaintiff's motion and orders the defendant to do so. Sometimes defendants will release some of the requested documents to create the appearance of cooperation. Sometimes they will bury relevant documents within huge stacks of irrelevant documents the plaintiff never requested. Often they will fail to produce document indexes that might assist plaintiffs in reviewing the documents, even though such indexes have already been prepared for internal use. Sometimes they will inform the plaintiff that the requested documents are available for inspection at a corporate building hundreds of miles away from the courthouse. And sometimes the defendant will serve a discovery request on the plaintiff, asking for copies of each of defendant's own internal documents already in the plaintiff's possession; some speculate that the purpose of such a request is to permit the defendant to withhold records not previously obtained by plaintiff without fear of getting caught.

6. *Failure to comply with court orders compelling discovery*

It gets worse. There are many cases where judges have determined that a product liability defendant not only failed to comply with a plaintiff's discovery request but also violated direct court orders compelling the defendant to hand over documents. Often a defendant will explain, if caught in violation, that, without conferring with the judge or the plaintiff, it "interpreted" the discovery order in a manner that limited its response. Or that it misunderstood the judge's order. Or that it had done its best to comply and was sincerely sorry for any errors. But if the defendant is not caught, it can keep damaging documents out of court -- and perhaps win a case where, on the merits, it deserved to lose.

7. *Blatant concealment or destruction of documents*

Sometimes, in lieu of all the clever artifices described above, corporate defendants and their blue-chip law firms appear to have resorted to the simplest discovery abuse tactic of all: hiding or destroying documents, often while flatly denying that they ever existed.[12]

8. *Seeking refuge in the appellate courts*

Sometimes all of these strategies fail -- sometimes the discovery lapses are exposed, and the presiding trial judge does not accept the various explanations for them. Outraged by the perceived misconduct, the judge orders the release of closely-guarded corporate records and/or imposes substantial sanctions. Sanctions can include high monetary penalties, punitive evidentiary rulings, such as denying a party the right to present evidence on a matter related to the discovery abuse, or, the ultimate sanction: the ordering of a default judgment, a verdict in favor of one side on the issue of liability.

But when that is the result -- when the exasperated trial judge has been pushed too far -- there is still one more weapon in the obstructionist's arsenal: appeal. Defendants turn to high-priced and well-connected appellate advocates, such as Griffin Bell, Attorney General under President Carter, and Kenneth Starr, the former appeals judge who also serves as Whitewater independent counsel. These respected orators can sometimes convince an appeals panel to direct the trial judge to reconsider a decision to disclose corporate records. Or they will reduce or cancel sanctions imposed by trial judges. Even where the appeals court affirms the lower court's sanctions, an appeal of a strong sanction can sometimes delay final resolution of a case for months or years.

9. *The confidential settlement*

If they cannot win at trial or on appeal, and they face the imminent disclosure of harmful evidence -- evidence that could be used in cases brought by other victims of a dangerous product -- corporate defendants often agree to settle. But, frequently, they will insist on confidentiality as the price of settlement. Confidentiality usually means that the plaintiff and the trial judge agree that the records of the case -- including all of the information obtained in discovery regarding the defendant's product and sometimes even the transcripts of the public trial[13] -- are sealed and shielded from public disclosure. The defendant sometimes takes possession of the vehicle or other product that caused the plaintiff's injury.[14] Sometimes, corporate defendants have gone as far as to seek an agreement from the plaintiff's lawyer not to represent other clients who claim injury from the same product.[15] Plaintiffs, relieved to finally have the opportunity to obtain compensation for their injuries, often agree to defendants' terms. Overworked judges, anxious to clear cases from their dockets, generally approve the deals. But confidential settlements not only prevent the public and government authorities from learning more about product hazards, they also increase the likelihood that the next trial involving the same product will be prolonged and expensive.

But enough generalities. Let's see some of these tactics in operation.

Malautea v. Suzuki Motor Co.

Fati F. Malautea was driving his 1988 Suzuki Samurai four-wheel-drive vehicle. After a collision with another car, the Samurai rolled over, and Malautea suffered severe head and spinal cord injuries.[16]

Malautea's wife Gayle believed the rollover was caused by a defect in the Samurai. She sued Suzuki in federal court in Georgia. When her lawyer requested documents and answers to interrogatories, Suzuki offered repeated objections and incomplete responses.

Malautea filed a motion to compel Suzuki to be more forthcoming. At a hearing, the trial judge, B. Avant Edenfield, warned Suzuki to comply or face severe sanctions. But six months later, in December 1991, after Judge Edenfield had warned Suzuki's lawyers a second time, the parties were back in court. This time, after another hearing, Judge Edenfield granted a default judgment and ordered Suzuki and, out of their own pockets, lawyers for Suzuki to pay Malautea's court costs and attorney fees. He also fined Suzuki $5000 and fined each defense lawyer $500.

What had Suzuki and its lawyers done to merit the severe sanction? Key information that Malautea's lawyers wanted concerned the proposed marketing of the Samurai by General Motors. Malautea had information that GM had refused to participate in marketing the Suzuki because its own safety testing showed the vehicle was subject to rolling over. This was important evidence for Malautea because it would support her allegation that the Samurai was defectively designed and manufactured.

At first, Suzuki's attorneys refused to answer the interrogatories, arguing that certain words and phrases were undefined. "The Defendants and their lawyers ... have managed to inject ambiguity into . . . ordinary words," Judge Edenfield ruled. These words included, "tests, research or other investigation," "risk of rollover," "risk of personal injury," "substantially similar," "change, alteration or modification," and "engineer."

In attempting to justify Suzuki's evasive answers, Suzuki attorney Joe Freeman told Judge Edenfield that a vehicle test was, in fact, not a test: "When we say that General Motors did not do any testing with rollover, there are tests that are done like the circle test and the S-turn, and all of those sorts of things, and impact tests that in some instances will ... be more predictive of the road stability of the vehicle." But such an exercise, according to Freeman, "is not a test. It is simply a calculation ...."

Another Suzuki tactic was to answer a general question by pretending it was a limited one. Thus, when Malautea asked about rollover problems with the Samurai over several model years, Suzuki limited its answer to the 1988 model year. Judge Edenfield concluded, "By restricting their answers in this manner, the Defendants avoided revealing a great deal of

discoverable information." Suzuki also failed to turn over deposition transcripts taken in other cases, although the court specifically ordered it to do so.

But Suzuki and its lawyers went beyond refusing to answer. When Malautea asked for information about General Motors' refusal to market the Samurai, Suzuki answered that it was "unaware of any decision by General Motors not to market the Samurai." As at least some Suzuki officials well knew, this was untrue.

Unable to get information he was entitled to discover from Suzuki, Malautea's lawyer subpoenaed documents directly from GM. After a court battle, he received GM documents indicating that Suzuki had not been truthful when it professed to be unaware that GM refused to market the Samurai. For example, a 1984 memo from GM to Suzuki stated that tests of the Samurai, indicating the vehicle's "perceived rollover tendencies," led to GM's decision to decline to market the vehicle. After the documents were disclosed, the head of Suzuki's legal department admitted to Judge Edenfield that Suzuki executives must have known about the 1984 memo. And Suzuki's lead outside counsel admitted knowing of the memo at least since 1989.

Judge Edenfield concluded that Suzuki and its lawyers were guilty of committing discovery abuses willfully and in bad faith. "If the Court," he wrote, "allowed the Defendants their way in this litigation, the Plaintiff would be completely unable to find the truth.... If the Defendants do not deserve the most severe sanction available, then no one does." Having entered a default judgment, Judge Edenfield ordered a proceeding before a jury to determine the Malauteas' damages.

However, Suzuki delayed a jury proceeding by appealing to the Eleventh Circuit Court of Appeals. When the appeal was argued, Suzuki continued the process of obfuscation. Its appellate lawyer told the appeals panel that Suzuki was unable to meet discovery deadlines with respect to the material relating to General Motors because of the time required to translate Japanese documents and ship them to the United States. In its April 1993 decision, the three-judge appeals court, acting unanimously, concluded that it was "difficult to believe that this highly relevant information has not already been translated and provided to Suzuki's defense counsel in the United States." And, the court added, "If our suspicions regarding the General Motors information are true, then counsel's oral argument statement regarding Suzuki's inability to comply was a bold falsity. Of course, the defendants' appellate counsel may have fully believed his representation to this court; he may have just been the innocent lamb which the defendants led to slaughter."

The Court of Appeals upheld Judge Edenfield's decision in all respects. Writing for the three-judge panel, Judge Peter Fay concluded that Suzuki "richly deserved the sanction of a default judgment" because the company and its lawyers "engaged in an unrelenting campaign to obfuscate the truth." Judge Fay added:

> [W]e feel compelled to remark on the disturbing regularity with which discovery abuses occur in our courts today.... The discovery rules ... were intended to

> promote the search for truth that is the heart of our judicial system. However, the success with which the rules are applied toward this search for truth greatly depends on the professionalism and integrity of the attorneys involved. Therefore, it is appalling that attorneys, like defense counsel in this case, routinely twist the discovery rules into some of 'the most powerful weapons in the arsenal of those who abuse the adversary system for the sole benefit of their clients.'

Undeterred, Suzuki claimed it had done nothing wrong, and the company hired Kenneth Starr, who sought review in the United States Supreme Court. But in October 1993, the high court rejected Suzuki's petition to hear the case. Facing a proceeding on damages before a jury in Judge Edenfield's court, Suzuki settled the case.[17]

Pollock v. Fisons Corp.

Jennifer Pollock, two years old, suffered from asthma. James Klicpera, her pediatrician, prescribed Somophyllin Oral Liquid, marketed by Fisons Corporation, a British pharmaceutical firm. On January 18, 1986, after taking the medication, Jennifer suffered seizures that produced permanent and irreversible brain damage. The seizures were caused by theophylline, the key ingredient in Somophyllin.

As Jennifer's parents and Dr. Klicpera learned much later, Fisons had known for years about the dangers of using Somophyllin, the very dangers that attacked Jennifer Pollock. As Fisons knew, if a child had a viral infection with an accompanying fever, as Jennifer did, the medication would become more powerful, causing the equivalent of an overdose, leading to convulsions and brain damage.

Jennifer's parents sued Dr. Klicpera for medical malpractice and Fisons for product liability in an Everett, Washington, state court. Dr. Klicpera responded by suing Fisons. Fisons, in turn, claimed that Klicpera had misprescribed the medication. One of Seattle's largest corporate law firms, Bogle & Gates, represented Fisons.

In 1989, after three years of discovery, the Pollocks settled their claim against Dr. Klicpera. Klicpera and the Pollocks continued the legal battle against Fisons.

In 1990, the Pollocks' attorneys received an envelope in the mail from an anonymous source. Inside was a Fisons document, a 1981 "Dear Doctor" letter sent by Cedric F. Grigg, Fisons' Manager of Marketing and Medical Communications. The letter had been sent to a limited number of what the company called "influential physicians." It warned of the very side effect suffered by Jennifer Pollock. It noted a recent study that confirmed reports "of life-threatening theophylline toxicity when pediatric asthmatics on previously well-tolerated doses of theophylline contract viral infections." Grigg wrote that if theophylline "is not to fall into disrepute as it did formerly, the physician needs to understand that it can be a capricious drug."

Dr. Klicpera had never received this warning from Fisons, nor was there a warning in the medication's box insert. He prescribed the medication to Jennifer more than four years after the letter had been sent. The letter proved that Fisons knew its medication had a potential lethal defect that could disable or kill children and yet continued to market the drug anyway without warning most doctors of the danger.

But there was more. One of the Pollocks' 1986 discovery requests to Fisons had stated: "Produce genuine copies of any letters sent by your company to physicians concerning theophylline toxicity in children." The 1981 letter fell squarely within this request, yet Fisons had not produced it. The Pollocks and Klicpera filed a motion for sanctions against Fisons for discovery abuse. At the hearing on the motion, the trial court ordered Fisons to produce all documents the other parties had requested related to theophylline. Fisons responded by turning over 10,000 additional documents.

Among these documents was a 1985 Fisons memo, also written by Grigg, that noted "a dramatic increase in reports of serious toxicity to theophylline in 1985 medical journals." The memo called the traditional recommended dosage of the ingredient "a significant 'mistake.'" The memo also noted that the relevant toxicity reports had not been reported in the medical journal read by doctors who most often prescribed the drug and concluded that those doctors might not know of the "alarming increase in adverse reactions such as seizures, permanent brain damage and deaths." In light of these risks, Grigg wrote, "I find it absolutely incredible that theophylline is still widely recommended as the first-line drug for the treatment of asthma...."

Fisons had continued to sell theophylline drugs after the date of the memo. Indeed, Jennifer Pollock took her tragic dose six months afterwards. Nor did there appear to be a good excuse for failing to produce the Grigg memo in response to previous discovery requests.

Following these disclosures, Fisons settled with the Pollocks for $6.9 million. But Dr. Klicpera and his insurance company, outraged by Fisons' behavior, pressed on and sought sanctions for abuse of the discovery process.

In answering Dr. Klicpera's charges, Fisons acknowledged that its own internal searches turned up the smoking gun documents, and Bogle & Gates later admitted to having reviewed them by 1987. They argued, however, that those documents did not directly concern the specific product Somophyllin, but instead only concerned Somophyllin's primary ingredient, theophylline. When the plaintiffs in 1986 had asked for materials related to *theophylline* toxicity, Fisons had replied that no such documents existed "regarding Somophyllin Oral Liquid." Fisons and Bogle & Gates contended that by referring in their answer to Somophyllin they were signaling to the plaintiffs that Fisons objected to producing documents, like the Grigg memos, that were not filed in Fisons' Somophyllin files. In sum, Fisons and its lawyers insisted that the plaintiffs had simply failed to ask and pursue the precise questions needed to elicit the documents. Fisons enlisted fourteen specialists in legal ethics as expert witnesses for the proposition that this conduct was permissible.

The trial judge agreed with Fisons and denied the motion for sanctions. However, on review, the Washington state Supreme Court unanimously denounced Fisons and its lawyers for their tactics.[18] The court found that Fisons had carried out a prolonged shell game, replete with "misleading" answers that were "contrary to the purposes of discovery and ... most damaging to the litigation process." The Court added, "Having read the record herein, we cannot perceive of any request that could have been made to this drug company that would have produced the smoking gun documents."

The court sent the case back to the trial court with directions to impose sanctions "severe enough to deter these attorneys and others from participating in this kind of conduct in the future." Bogle & Gates then agreed to settle by paying $325,000 and admitting that its attorneys advised Fisons not to produce the smoking gun documents and that such advice violated court discovery rules.

Writing in *The American Lawyer*, commentator Stuart Taylor, Jr., lamented the astonishing show of support Fisons had managed to place before the trial court. He wrote, "I fear [that] the discovery process has been clogged by a culture of evasion and deceit that accounts for much of its grotesque wastefulness, and the adversary system has been perverted from an engine of truth into a license for lawyerly lies."[19]

DuPont and the Benlate files

The giant chemical manufacturer DuPont Co. made a substance called Benlate 50DF.[20] It was supposed to aid plant growth by killing funguses. But nurseries began complaining of stunted growth in plants treated with the chemical. Then other nurseries reported rotting plants and dead roots. Fruit and vegetable growers using Benlate reported fields of dead plants. A DuPont executive who investigated reported that many growers faced the loss of their businesses. "Lives are being shattered," he wrote. He expressed concern that Benlate had been contaminated by new, powerful DuPont weedkillers called sulfonylureas, or SUs, which were made in the same DuPont plant as Benlate. An internal DuPont memo found "overwhelming circumstantial evidence that Benlate is likely responsible for the damage in some way." DuPont took Benlate off the market and began compensating growers.

Soon thereafter, however, the company reversed course and claimed that further testing showed that Benlate was, in fact, safe. In response, about 500 growers sought recovery from DuPont. One lawsuit was filed in a Georgia federal court by four nursery owners. Their attorney, C. Neal Pope, sought access to DuPont tests concerning SUs. DuPont's lawyers refused to provide the information. In October 1992, the presiding judge, J. Robert Elliot, found that DuPont had invoked attorney-client protections for over a million documents without inspecting them. Judge Elliot accused DuPont and its lawyers, from the Atlanta firm Alston & Bird, of stonewalling "under the guise of attorney-client privilege and work-product protection." When DuPont continued to drag its feet, the judge threatened to hold the company in contempt. Following further delay by DuPont, Judge Elliot concluded that the company had "engaged in a continuous scheme and pattern of bad faith and discovery abuse." He fined the company

$500,000, to be waived if the company at last fulfilled its discovery obligations. Two months later, he doubled the fine, concluding, "I haven't found a case where the deliberate actions on the part of a defendant to obstruct the discovery process approach what has happened here." He subsequently concluded that DuPont had withheld information about herbicide contamination of Benlate.

As trial approached, the two sides agreed that the key issue was whether soil from the plaintiffs' properties contained SUs. DuPont hired Alta Analytical Laboratories Inc. of El Dorado Hills, California to test soil samples. The results were to be shared with the plaintiffs. The lab found low-level amounts of SUs in the samples. It conveyed these results to DuPont's lawyers. But instead of passing on the results to Pope, DuPont's lawyers ordered more testing. Still more SUs were found in the samples. Alta's lead scientist, acting, as he later said, at his own initiative, then doubled the threshold for a positive SU finding, but that still didn't eliminate positive tests in some samples. So these samples were retested. This time, finally, they came up "clean."

All that Pope received was a report showing no SUs at all. The underlying test records, with repeated references to suspected SUs, were withheld from Pope, as well as from the expert witness who was hired to support DuPont at trial. At the conclusion of the evidence at trial, DuPont's lawyer, Dow N. Kirkpatrick, rose and told the jury, "The evidence shows that sulfonylureas are not present in the plaintiffs' Benlate soil ... The scientific evidence supports our position."

Concerned about the possible outcome, Pope's clients settled with DuPont during jury deliberations for $4.25 million -- less than one percent of their claimed damages. DuPont's chairman called the result "a victory for DuPont, our employees and our science."

There the matter might have rested, if not for separate Benlate litigation in Hawaii state court. There, attorneys pursued the question of whether there was underlying data relating to the Alta lab tests. There was, but DuPont refused to disclose it, and the company fought the issue all the way to the Hawaii Supreme Court. The plaintiff prevailed, however, and the records were disclosed. The Hawaii trial judge, Ronald Ibarra, slapped DuPont with a $1.5 million sanction for intentionally misleading the court concerning the testing records. "The issues are complex enough without misconduct in discovery by counsel," Judge Ibarra said.

This development sent attorney Pope, from the Georgia case, back to Judge Elliot, who ordered a hearing. DuPont responded by seeking to disqualify Judge Elliot and by filing an emergency appeal. When the appeal was denied, Judge Elliot commenced hearings, after which, in August 1995, he issued an opinion finding "a pattern of concealment and misrepresentation" by DuPont and its lawyers. "It is clear," he wrote, "that DuPont continues to evidence an attitude of contempt for the court's orders and processes and to view itself as not subject to the rules and orders affecting all other litigants." He continued: "Put in layperson's terms, DuPont cheated. And it cheated consciously, deliberately, and with purpose. DuPont has committed a fraud on

this court, and this court concludes that DuPont should be, and indeed must be, severely sanctioned if the integrity of the court system is to be preserved."

Judge Elliot fined DuPont $115 million for its misconduct, but added that $101 million of the fine would be canceled if DuPont published full-page advertisements in the *Wall Street Journal* and three local newspapers acknowledging the wrongdoing. (DuPont had taken out an ad in the *Journal* denying any discovery misconduct.) DuPont, represented by Edward Warren, a law partner of Kenneth Starr at the Washington, D.C., office of the firm Kirkland & Ellis, appealed.[21]

Back in Hawaii, Judge Ibarra, revisiting his case in the wake of Judge Elliot's findings, concluded that George Frank, a DuPont in-house lawyer, and an outside firm representing the company, Washington D.C.'s Crowell & Moring, made fraudulent representations in his court. Mr. Frank, Judge Ibarra ruled, had told the court in July 1993 that DuPont had no "ongoing" Benlate testing and that the company had turned over all documents sought by the plaintiffs. These statements, the judge said, were "fraudulent by clear and convincing evidence." Crowell & Moring, meanwhile, had assured the court that the Alta test data was confidential attorney work-product, without mentioning that the test summaries had already been disclosed in the Georgia trial. Judge Ibarra found that DuPont's lawyers had engaged in "abusive litigation practices" and "intentional misconduct." DuPont appealed Judge Ibarra's $1.5 million fine, as well as a jury verdict awarding plaintiffs in that case $23.9 million for Benlate damage.

In October 1996, a federal appeals court reversed the $115 million penalty imposed by Judge Elliot in the Georgia case. The Court held that a reasonable fact-finder "could conclude beyond a reasonable doubt" that DuPont "willfully failed to obey" Judge Elliot's discovery order. And it added, "In light of the serious nature of the allegations against DuPont and its counsel, we assume the appropriate U.S. Attorney will shortly begin an investigation into this matter (if he or she has not already done so)." (In fact, soon after Judge Elliot's ruling, federal prosecutors in Georgia launched a criminal investigation of DuPont's conduct.) However, the appeals court concluded that the sanctions Judge Elliot imposed were criminal in nature, in that they were designed to punish the company rather than to convince it to comply with court rulings. Thus, the appeals court sent the case back to Judge Elliot to conduct formal criminal contempt proceedings.[22]

In another Benlate case in Florida, Dade County Circuit Court Judge Amy Steele Donner considered evidence that DuPont had destroyed data from testing conducted in Costa Rica. In June 1996, Judge Donner granted a default judgment in favor of the plaintiffs and fined DuPont $20,000. Her conclusion: "DuPont and its lawyers have participated and continue to participate in utter disregard for orders of the court, and for the rules of evidence and ethics .... This is a pattern, it is willful, it is deliberate, and it is intended to thwart the orders of this court." DuPont quickly settled the case on a confidential basis. The records of the case were ordered sealed.

DuPont continues to deny that it engaged in improper conduct.

Tobacco Litigation

In recent years, the newspapers have been full of revelations suggesting that tobacco companies have sought to obscure the harmful effects of cigarettes. One of the key developments in opening the tobacco files was discovery in a lawsuit brought against four major cigarette makers in federal court in New Jersey by Susan Haines, the daughter of a smoker who died from lung cancer. Haines' lawyers sought documents concerning the Council for Tobacco Research (CTR), an organization that presented itself to the public as an independent research institute studying the health effects of smoking but that was funded by the tobacco companies. Haines' lawyers contended that CTR had established a special section, directed by attorneys, where data considered damaging to tobacco company interests would be filed and protected from disclosure through claims of attorney-client privilege, while evidence suggesting tobacco's safety would be released by CTR.

When lawyers for the tobacco companies *did* assert the privilege in response to Haines' request for the CTR documents, Haines' lawyers responded that the documents should be disclosed under the "crime/fraud exception" to this privilege. The crime/fraud exception permits the release of attorney-client communications where the client obtained the attorney's advice for the purpose of furthering an ongoing criminal or fraudulent scheme. Haines' lawyers argued that the CTR lawyers group functioned precisely to hide evidence of the harmful effects of smoking from the public.

On February 6, 1992, after lengthy, heavily-contested proceedings over the tobacco defendants' refusal to release the documents, the trial judge, H. Lee Sarokin, ruled that the crime-fraud exception did compel the release of certain CTR documents he had reviewed. In support of his ruling, Sarokin quoted from some of the documents the industry had fought so hard to keep concealed. Minutes of a 1981 meeting of top tobacco industry lawyers quoted one participant as saying: "When we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers' special project.... We wanted to protect it under the lawyers. We did not want it out in the open."

"No evidence," Judge Sarokin concluded, "could be more damning." He also cited a CTR memorandum recounting an industry presentation. It said that CTR "was set up as an industry shield" and that CTR "has acted as a front." Judge Sarokin concluded that there was evidence that CTR was "nothing but a public relations ploy -- a fraud -- to deflect the growing evidence against the industry, to encourage smokers to continue and non-smokers to begin, and to reassure the public that adverse information would be disclosed." Clearly angry at what he had learned, Judge Sarokin stated that "the tobacco industry may be the king of concealment and disinformation."

The tobacco makers subsequently convinced a federal appeals court that Judge Sarokin had committed procedural errors and had failed to maintain an "appearance of impartiality." It sent the case back for further review by a new trial judge. The case is still pending.[23]

Thousands of leaked documents from the files of tobacco maker Brown & Williamson seem to confirm that there were repeated efforts to use the attorney-client privilege to shield from disclosure damaging internal studies about the health effects of smoking.[24] And in September 1996, Minnesota Attorney General Hubert H. Humphrey III filed court papers citing "clear, unmistakable evidence, and repeated references to document destruction" in the files of tobacco companies Philip Morris and RJR Nabisco.[25]

Beyond what may have been a systematic effort to conceal unfavorable research results, the tobacco makers, who continue to state that they have not misled the public, have over the years used their superior resources to wage discovery battles that wear out lawyers representing individual tobacco plaintiffs. In an April 1988 speech, Michael Jordan, an attorney for tobacco giant R.J. Reynolds, bragged[26]:

> The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making the other son of a bitch spend all of his.

The tobacco industry legal teams, according to the *Wall Street Journal*, "resemble an army perpetually on red alert." In addition to making it difficult for plaintiffs to obtain industry documents, tobacco defense lawyers employ investigators who, says the *Journal*, "comb plaintiffs' neighborhoods and workplace for gossipy tidbits that might be useful to the lawyers."[27] Dolly Root, who sued General Cigar & Tobacco Co. after her husband, a pipe smoker, died of heart failure and lung cancer in 1983, dropped her case when she could no longer bear the oppressive litigation tactics of General Cigar. The company's attorneys questioned Root for days about topics like her infertility, her son's 1986 suicide, and the possibility that her daughter-in-law was pregnant at the time of her wedding. (General Cigar's lawyer on the case, Charles Breyer, said it was "entirely proper" to ask about such matters because stress resulting from them could have been the cause of Mr. Root's death.)[28] High-stakes tobacco appeals are handled by attorneys like Kenneth Starr and Griffin Bell.[29]

General Motors Pickup Truck Litigation

More than 1300 people have been killed in fiery crashes in a line of pickup truck models that General Motors manufactured between 1973 and 1987. In about half of those cases, the person in the truck survived the crash but died in the subsequent fire. GM placed the fuel tank in these models outside of the truck's steel frame, thus increasing their vulnerability to rupture and explosion.

While GM continues to insist that the trucks are safe, Secretary of Transportation Federico Pena initially determined in October 1994 that a recall was in order. GM averted the recall by suing to prevent a federal hearing on the trucks' safety and then reaching a last-minute

settlement with the Departments of Justice and Transportation, in which the automaker pledged tens of millions of dollars for vehicle safety programs.[30]

More than 300 accident victims or their survivors have sued over the alleged defect in the pickups. Only eight cases have gone to trial, with GM winning five and losing three. However, the non-profit Center for Auto Safety estimates that GM has paid out more than $200 million to settle other claims, always on the condition that the settlement be confidential.

Judges overseeing these lawsuits have repeatedly criticized General Motors for discovery abuse, particularly for failing to disclose documents requested by plaintiffs, often after being ordered to do so by the court. Why does GM fight so hard to keep the facts under wraps?

One might begin to search for the answer in a 1994 decision of the Georgia state Court of Appeals, in a case arising from the 1989 death of a 17-year-old boy, Shannon Moseley, in a GM pickup fire in Georgia. Although the court reversed a verdict against GM because it found that certain evidence and statements should not have been presented to the jury, it nevertheless concluded that there was "evidence that GM was aware of the problems inherent with the placement of fuel tanks outside the frame on its full-size pickup trucks, which exposure could have been significantly reduced .... yet it did not implement such modifications because of economic considerations." The appeals court concluded that "this evidence of a knowing endangerment of all who may come in contact with one of the 5,000,000 GM full-size pickup trucks still on the road, motivated by economic benefit, was sufficient to support an award of punitive damages."[31] Facing a retrial following the appellate decision, GM, which was represented in the Moseley case by both Griffin Bell and Kenneth Starr, settled the claim for an undisclosed amount in September 1995.

Here are some examples of GM's approach to discovery in the pickup truck litigation:

• Mark and Steven Cameron were severely burned in 1990 following a GM pickup collision. The Camerons' attorneys claimed that, in the early 1980's, GM had systematically destroyed files that suggested the company's knowledge of defects in their pickups. South Carolina federal judge G. Ross Anderson, Jr., vowed to "get to the bottom of the dispute." He warned GM that, if the charges of document destruction were true "the whole world would know about it."[32] At the same time, he warned the Camerons' attorneys that, if the charges were false, they would regret having made them. In January 1994, Judge Anderson ruled that the Camerons were entitled to additional discovery on the issue of document destruction. GM, represented not only by Griffin Bell and Kenneth Starr, but also by William Barr, Attorney General under President Bush, responded by demanding that Judge Anderson recuse himself from the case for appearing in public at a December 1993 lawyers' conference on the same program as the Camerons' lawyer and poking fun at corporate defense lawyers.[33]

In February 1994, Judge Anderson issued a ruling that recounted "a discovery war of unprecedented magnitude." He added that "hardly a document has been produced without a claim of privilege." And he found, after reviewing thousands of GM documents in his chambers,

"a substantial likelihood that perhaps perjury and systematic destruction of documents involving gross misconduct by General Motors regional counsel occurred." Evidence of such misconduct, Judge Anderson wrote, would defeat claims of attorney-client privilege and require the disclosure of documents to the Camerons. Judge Anderson, however, agreed to GM's demand that he recuse himself in order, he said, to uphold "public confidence in the impartiality and fairness of the judiciary."[34] When the new judge assigned to the case substantially reinstated Judge Anderson's discovery orders, GM settled the case, on condition of confidentiality.[35]

• In a lawsuit brought by the family of Shawn Bishop, a 22-year old Oklahoma man who burned to death in 1993 after his GM pickup hit the side of a bridge, federal judge Michael Burrage, after presiding over numerous discovery disputes, ruled in September 1995 that GM had repeatedly violated his discovery orders, making it difficult for the plaintiff to prepare for trial, and that GM's misconduct "was both willful and intentional." As a strong sanction, he barred GM from introducing any exhibits at trial.[36] GM settled the case, again confidentially, on the day trial was to begin.[37]

• In a number of cases, GM has sought to prevent Ronald Elwell from testifying. Elwell is a former GM safety engineer who worked for the company for 28 years. While at GM, he had frequently testified on the company's behalf in products liability cases. As part of a settlement of a dispute over Elwell's pension, GM demanded an agreement from Elwell preventing him from testifying in future products liability suits against the company. A Michigan state judge approved this settlement, but most courts have nevertheless refused GM's demand to block Elwell's testimony. A federal judge in Georgia held that the Michigan gag order on Elwell went "far beyond" any legitimate concern about corporate trade secrets or attorney-client privilege. Similarly, a Missouri federal judge held that barring Elwell's testimony "amounts to concealment of relevant evidence." But with Kenneth Starr representing GM, the Missouri ruling was reversed -- and the Michigan judge's order barring Elwell's testimony upheld -- by a federal appeals court. (In March 1997, the Supreme Court agreed to hear the Missouri case.)[38]

What is GM so afraid of? In the trial of the case brought by Shannon Moseley's family, GM was unable to prevent Elwell's testimony, and he testified under oath: that, in cases where he served as an expert witness on GM's behalf, GM failed to disclose crucial pickup truck safety testing results not only to plaintiffs' lawyers but also to him; that when he confronted his supervisor with his fear that he had "committed perjury," the supervisor told him not to worry about it; that he had warned his superiors that modifications aimed at reducing fuel tank fires "were dangerous"; and that key safety information was withheld from plaintiffs because GM kept these materials in engineering files, files that GM did not search when faced with document requests by plaintiffs' lawyers.[39]

Other litigation involving GM vehicles suggests similar discovery misconduct. For example:

• A Georgia man was a passenger in a 1987 Pontiac Grand Am when he was thrown out of an open door and killed. His parents sued GM in state court, alleging that the Grand Am's

door latch was defectively designed and manufactured. They asked GM to provide documents concerning that type of door latch.

GM sought extensions of time, claimed attorney-client privilege, at first without any supporting evidence, moved for protective orders, and repeatedly failed to provide documents on the schedules ordered by the court. The trial judge, Andy Prather, concluded that GM "has abused the discovery process," and he ordered a default judgment in favor of the plaintiff on the issue of liability.

GM, represented by Griffin Bell, appealed. Although the Georgia Court of Appeals concluded in March 1997 that "GM's failure to fully and timely respond to the requests to produce has delayed the resolution of this case" and that "the failure to comply, and the efforts made to force compliance, have resulted in a significant imposition on the resources of the court," it held that Judge Prather's sanction was "too severe." The appeals court sent the case back to the trial judge for a new hearing on appropriate sanctions.[40]

• In litigation concerning an alleged defect in the fuel pump of a 1985 Chevrolet S-10 Blazer, Chief Judge Joseph E. Stevens, Jr., of the U.S. District Court for the Western District of Missouri, found in November 1994 that GM had failed to produce customer complaint records as he had ordered. Judge Stevens held that "General Motors' discovery practices as a whole are conducted with complete disregard for both the letter and the spirit" of the federal court rules governing discovery. According to Judge Stevens, "The struggle over every discovery issue in this case is the result of General Motors refusing to produce discovery in the way it was requested by plaintiffs." He found "an intentional and systematic discovery policy whereby General Motors reads discovery requests impermissibly narrowly to avoid production until the requesting party or the Court forces such production." There was, he wrote, "a deliberate, willful policy on the part of General Motors to stonewall discovery as much and as long as the patience of the Court would tolerate."[41]

"Discovery in this case has been extraordinarily expensive," Judge Stevens wrote, "and we do not have to look very far to explain that fact.... General Motors clearly believed that it should do all in its power to wear the plaintiffs out." He would not, he said, "allow such tactics to tip the scales of justice." He ruled that the jury would be instructed at trial that the Chevy Blazer's fuel pump was defective and that GM had been aware of the defect for many years.

GM again escaped on appeal. With Kenneth Starr now handling the matter for GM, in June 1996 the Court of Appeals for the Eighth Circuit reversed Judge Stevens' sanction; the appeals court held that GM's conduct "clearly justified the imposition of ... sanctions" but that the sanction imposed was "simply too severe." It sent the case back to Judge Stevens for "imposition of a lesser sanction."[42]

More Discovery Abuse

Here are still more examples of product liability defendants abusing the discovery process:

• In March 1973, William Rozier burned to death on a Georgia highway when his Ford Galaxie was rear-ended and burst into flames. His widow claimed the Galaxie was defectively designed and sued Ford in federal court. The jury found in favor of Ford. But while the case was on appeal, Mrs. Rozier's lawyers learned of a Ford document regarding fuel tank design that fell within a category of records that the court had ordered Ford to release. A Ford attorney then admitted he had learned about the document a week before trial but chose not to disclose it. In June 1978, a federal appeals court ordered a new trial, stating, "Through its misconduct in this case, Ford completely sabotaged the federal trial machinery, precluding the 'fair contest' which the [federal court rules] are intended to assure."[43] Ford then settled the case for an undisclosed sum.

• Miguel Korzeniewicz, a 38-year-old professor at the University of New Mexico was left quadriplegic after an accident involving his 1992 Honda Prelude. Alleging defective seat belt design, he sued Honda. His lawyers subsequently claimed that Honda, ignoring court orders, was withholding key internal documents. In April 1996, New Mexico trial judge Robert Thompson agreed, concluding that Honda had "violated every Discovery Order entered by the Court." Citing Honda's "pattern of misstatements" and "willful defiance" of his orders, he added that Honda's conduct was "highly prejudicial to Plaintiff who was injured in their vehicle and now wants to investigate the alleged causes of his injuries." He ordered a default judgment in favor of Professor Korzeniewicz. Honda admitted mistakes but denied any intent to disobey court orders; the company filed an appeal.[44]

• Judges have frequently criticized the discovery tactics of Remington Arms Co. in lawsuits alleging that the company's Model 700 bolt action rifle is defectively designed and can fire without pulling the trigger. In one suit, after Remington officials failed to appear for a deposition, California Superior Court Judge Karen Varni held the company in contempt and cited "arrogance and disrespect [by] Remington which finally exceeds the limits of tolerance of this court" and Remington's "flagrant disregard of the law which have caused a waste of judicial and legal time, has been obstructive and offensive to the administration of justice and unfair to the other litigants."[45] Illinois Circuit Court Judge Frank Orlando imposed sanctions on Remington after concluding that the company had "unjustifiably and purposefully failed to comply with its obligations to produce relevant documents."[46] Texas state District Judge Neil Caldwell fined Remington after holding that the company had "acted in bad faith and ... abused the discovery process."[47]

• The case of *Carlucci v. Piper Aircraft Corp.* arose when three men died in the crash of a Piper Cheyenne II off Shannon, Ireland. Their survivors filed suit in federal court in Florida. They claimed that the plane was defectively designed. Plaintiffs, with the assistance of the presiding judge, William J. Campbell, made repeated efforts to obtain documents from Piper. In

January 1984, Judge Campbell noted the "unexplained disappearance of some of Piper's documents, which coincidentally are the records dealing with the testing and development of the specific component claimed to be defective in this case." A court-appointed special master subsequently reported to Judge Campbell that Piper had "demonstrated an attitude of indifference in responding to requirements in the discovery process." Judge Campbell concluded that Piper "had delayed and obstructed discovery to the extent that the case was five years old and nowhere near ready for trial." The judge credited the testimony of two former Piper employees who said that Piper had a policy of destroying records that might be damaging in a lawsuit. He concluded that this policy "continued after the commencement of this lawsuit and that documents relevant to this lawsuit were intentionally destroyed." As a sanction for Piper's discovery abuse, in March 1984, Judge Campbell entered judgment for the plaintiffs on the issue of liability.[48]

• A 1987 Westinghouse Corp. memo, disclosed in 1993 court proceedings, expressly advocated the destruction of what the author, an in-house attorney with the company, called "smoking gun" documents, i.e., records that might hurt Westinghouse in future litigation. It also called for retention of documents that supported Westinghouse's position in lawsuits. Westinghouse denied the destruction policy was carried out, although there was evidence to the contrary. At least two judges rejected Westinghouse's efforts to shield this document under attorney-client privilege; one of them, Texas state district judge Paul R. Davis, said that the Westinghouse memo outlined "a plan to commit fraud on the courts of this nation."[49]

Preventing Abuse of the Discovery Process

The cases discussed above are just a handful of the many instances in which some of the world's largest corporations were found to have abused the pre-trial discovery process. Many of these companies are lead lobbyists in the campaign for federal legislation to limit injured consumers' access to the courtroom. To make litigation more efficient, less expensive, and more fair -- to streamline and improve civil justice in the United States by protecting against discovery abuses -- reforms are needed:

1. *Judges should be fair but tough.*

The rules governing pre-trial discovery in federal and state courts already grant judges the power to impose strong sanctions on discovery violators. Where litigants fail to comply with opponents' discovery requests, and particularly where they violate court orders enforcing those requests, judges should carefully consider the facts and order sanctions that are tailored to the misconduct and sufficiently strong to deter future misconduct. For example, if the aggrieved party can show no prejudice from the violation -- if, say, documents are disclosed late but still far in advance of trial -- the judge can make the violator pay the opponent's attorney fees incurred in connection with proceedings to obtain the discovery. But courts should be cognizant of the fact that such penalties may be little more than wrist-slaps -- an acceptable cost of doing business -- for wealthy corporations. If violations prejudice the other side only as to a small issue in the case, the court can decide that particular issue in that side's favor, leaving other issues for the jury. And if the record demonstrates that discovery violations are prejudicial, substantial,

persistent, and deliberate, judges should not hesitate to impose the ultimate sanction of default judgment -- and appellate courts should affirm such rulings.

2. *Attorneys should pay for their own misconduct.*

Sometimes judges slap litigants with sanctions for misconduct but do little or nothing directly to punish the attorney misbehavior involved. Where there is proof that attorneys have been knowing parties to deception -- whether wrongful assertions of privilege, destruction of documents, intentional delays, or the presentation of false or misleading statements -- the court should impose separate and substantial punishments. Individual attorneys should be personally fined. Congress, which shares authority with the Supreme Court over the rules governning federal court litigation, should consider a new rule requiring judges who impose discovery sanctions to punish culpable attorneys or explain why such punishment is not warranted. States should consider similar rules.

Deliberate misconduct should also be referred to state attorney ethics boards. And such state boards, which have traditionally been timid and particularly reluctant to take on attorneys at big corporate law firms, must begin to take seriously and to actively pursue charges of discovery abuse. Finally, where a member of a law firm has engaged in serious misconduct, ethics boards in appropriate circumstances should consider action against the entire firm for failure to promote responsible and ethical conduct.

3. *Prosecutors should pursue criminal investigations.*

Where courts conclude that parties and/or their attorneys and other agents have lied under oath or hidden or destroyed relevant evidence in the course of civil proceedings, criminal investigations should be pursued. Recent examinations by prosecutors of the conduct of tobacco companies and the actions of DuPont in the Benlate matter, and indictments against two Texaco officials for obstruction of justice in the race discrimination suit against the company, indicate the seriousness with which some prosecutors are now addressing these matters.

4. *More states should recognize a cause of action for deliberate document destruction.*

Courts in many states are beginning to recognize a cause of action in tort for spoliation, i.e., the deliberate destruction of documents relevant to ongoing lawsuits. Judges and legislatures in all states should acknowledge that intentional document destruction should be considered an independent civil wrong, punishable by compensatory and punitive damages in the same way as other forms of fraud or misrepresentation are. The availability of such a cause of action should help deter parties from destroying evidence in the first place.

5. *Pre-trial secrecy orders and confidential settlements should be heavily restricted.*

As noted above, pre-trial secrecy orders -- where the plaintiff obtains documents from the defendant in exchange for agreeing not to share them with others -- and confidential settlements

-- where the plaintiff accepts cash in exchange for agreeing to the sealing of case records -- have often kept evidence of product defects away from product users, government authorities, the media, and the public at large. In response, courts in several jurisdictions, including Texas, Idaho, Georgia, Michigan and Delaware, have adopted rules creating a presumption that court records are not to be sealed, unless the proponent of secrecy can prove that a serious and substantial interest outweighs any adverse effect on health and safety that secrecy might cause. Florida, Washington, and Louisiana have enacted state laws prohibiting courts from entering orders that hide a health or safety hazard from public view. *Business Week* has editorialized, "All judges should disavow secrecy pacts except on narrow points involving legitimate trade secrets. Disclosure should be the rule, not the exception."[50] *USA Today* agrees: "Consumers clearly need federal and state laws so judges will forbid secrecy if safety or health is at stake."[51]

Unfortunately, corporate lobbying interests -- including many of the same entities lobbying to restrict victims' rights -- have opposed and prevented such reforms in other states and at the federal level. But even where legal reform has not created specific guidelines, judges should exercise their existing authorities requiring them to protect the public interest and reject secrecy agreements and settlements that shield important consumer information from public view.

Conclusion

Genuine legal reforms as described above would make the system at once more equitable *and* more efficient. All Americans should support such efforts to promote honesty, openness, and fundamental fairness in the litigation process. If Congress genuinely wishes to improve and reform the tort system, attacking discovery abuse is the crucial place to start.

Notes

[1]A Texaco spokesperson said that the conduct that authorities attributed to Lundwall would violate company policy. On November 15, 1996, Texaco agreed to settle the discrimination case by paying its minority employees more than $140 million. On January 8, 1997, the company announced it was firing another Texaco executive heard on the tape, J. David Keough, and cutting off retirement benefits to Ulrich and Lundwall. *See* "Texaco Executives, On Tape, Discussed Impeding a Bias Suit," *New York Times*, Nov. 4, 1996; "Records Signal Lawyer's Role in Texaco Suit," *New York Times*, Nov. 15, 1996; "Texaco to Make Record Payout In Bias Lawsuit," *New York Times*, Nov. 16, 1996; "Charge of Impeding Justice Filed Against Former Texaco Executive," *New York Times*, Nov. 20, 1996; "Texaco Fires Executive, Disciplines 3 Others," *Los Angeles Times*, Jan. 9, 1997; "Ex-Treasurer of Texaco Is Indicted," *Washington Post*, June 28, 1997.

[2] Victor Schwartz and Mark Behrens, "Liability 'overkill' threatens lives, wallets," *Las Vegas Review-Journal*, Mar. 30, 1997. In the article's tag line, Schwartz and Behrens describe themselves as "co-counsel to the Product Liability Coordinating Committee, the principal coalition of the business community seeking federal product liability reform." Among the members of the group are Exxon, Monsanto, General Motors, Ford, TRW, Aetna, the National Association of Manufacturers, the United States Chamber of Commerce, and the Chemical Manufacturers Association. In 1995 it was reported that Schwartz, a partner at the Washington, D.C. law firm Crowell & Moring, whose lawyers were reprimanded for discovery abuse in the Dupont Benlate litigation as discussed in the text, received $18,000 per month from PLCC. Schwartz also serves as general counsel to the American Tort Reform Association, another industry group, whose members include Dow Chemical, Eli Lilly, Exxon, Johnson & Johnson, Mobil, Monsanto, Pfizer, Union Carbide, Philip Morris, Anheuser-Busch, Miller Brewing, Aetna, GEICO, General Electric, Boeing, Honeywell, Rockwell International, Humana, Inc., the Chemical Manufacturers Association, the Beer Institute, the Sporting Arms and Ammunition Manufacturers Association, and the American Medical Association. "Proponents of Reform," *Legal Times*, Apr. 17, 1995.

[3] Prepared Testimony of Health Industry Manufacturers Association of America, before the Senate Commerce, Science, and Transportation Committee, S.5, Product Liability Reform Act of 1997, Mar. 4, 1997.

[4] "The Liability System," Insurance Information Institute Reports, Mar. 1997.

[5] Jim Ramstad, "Reform the Legal System Now," *Washington Times*, Aug. 28, 1996.

[6] Mike France, "Corporate Litigation: Playing Hardball Is One Thing..." *Business Week*, July 1, 1996. France is Business Week's legal affairs editor.

[7] Max Boot, "Discovering a Cure for Discovery Abuse," *Wall Street Journal*, Nov. 20, 1996.

[8] *Hickman v. Taylor*, 329 U.S. 495 (1947).

[9] *United States v. Procter & Gamble*, 356 U.S. 677 (1958).

[10] *Green v. Isaacs*, No. SCC 04568 (Cal.Super.Ct. 1981). The case was later settled on confidential terms.

[11] *Sieracki v. Ford Motor Co.*, slip opinion (S.D.Ill. June 6, 1978).

[12] See, for example, in addition to cases subsequently discussed in the text of this report, *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 90 F.R.D. 613 (N.D.Ill. 1981) (American Airlines destroyed internal report concerning crash and subsequently sought to conceal that destruction); *McGuire v. Sigma Coatings, Inc,* slip op. (E.D.La. Aug. 19, 1993), *id.*, slip op. (E.D.La. Oct. 29, 1993), *id.*, slip op. (E.D.La. Oct. 29, 1993), *id.*, 48 F.3d 902 (5th Cir. 1995) (in suit alleging toxic chemical contamination, in-house attorney of division of Fina Oil Co. ordered the destruction of company records relevant to the case).

[13] See *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985) (appeals court reversed decision of trial judge, who agreed to seal the entire record of trial of case alleging defects in AMC Jeep); Ralph Nader and Wesley J. Smith, *No Contest* (1996), at 73 (in 1983, General Motors convinced a Kansas judge to seal the records of public trial as part of confidential settlement).

[14] See Nader and Smith, *No Contest*, at 88-89 (confidential settlement of case alleging brain damage from General Motors Corvair heater included GM purchase of the plaintiff's Corvair).

[15] See Nader and Smith, *No Contest*, at 206-07 (discussing evidence of proposals to buy off plaintiffs' lawyers).

[16] This discussion is drawn from the judicial opinions in the case: *Malautea v. Suzuki Motor Co., Ltd.*, 148 F.R.D. 362 (S.D.Ga. 1991), *aff'd*, 987 F.2d 1536 (11th Cir.), *cert. denied*, 114 S.Ct. 181 (1993).

[17] See also *Chudasama v. Mazda Motor Corp.*, C.A. No. 4:93-CV-61, slip op., (M.D.Ga. June 27, 1995) (ordering default judgment on issue of liability where the defendant, Mazda, engaged in "an obvious pattern of delay, deception and obfuscation designed to obstruct and undermine the discovery process," committed "continuing and egregious ... premeditated violations of the discovery rules" and court orders, and was guilty of "willful misconduct which evinces an intent to manipulate the judicial process to defeat the full disclosure objectives of the discovery rules and preclude fair resolution of the case on the merits").

[18] *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*, 858 P. 2d 1054 (Wash. 1993).

[19] Stuart Taylor, Jr., "Sleazy in Seattle," *The American Lawyer*, April, 1994.

[20] The following account is based on these sources: "DuPont Draws Fire For Stonewall Defense of a Suspect Fungicide," *Wall Street Journal*, May 3, 1995; "DuPont Is Fined $101 Million by Judge," *Wall Street Journal*, Aug. 23, 1995; "DuPont Faces U.S. Probe of Benlate DF," *Wall Street Journal*, Oct. 18, 1995; "DuPont Faces New Allegations It Withheld Data on Benlate DF," *Wall Street Journal*, April 24, 1996; "DuPont Lawyer, Outside Firm Rebuked," *Wall Street Journal*, Sept. 6, 1996; Joel Cohen, "'Obstruction': Can Civil Litigants Afford the Texaco Price Increase," *New York Law Journal*, Mar. 3, 1997.

[21] *In re E.I. duPont de Nemours & Co. -- Benlate Litigation*, 918 F.Supp. 1524 (M.D.Ga. 1995), reversed and remanded, 99 F.3d 363 (11th Cir. 1996).

[22] *In re E.I. duPont de Nemours & Co. -- Benlate Litigation*, 99 F.3d 363 (11th Cir. 1996).

[23] See *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J. 1992), *vacated*, 975 F.2d 81 (3rd Cir. 1992).

[24] See, e.g., "Details of Tobacco Executive's Assertions Are Disclosed," *New York Times*, Jan. 27, 1996.

[25] "The Ugly Talk on the Texaco Tape," *Business Week*, Nov. 18, 1996.

[26] Nader and Smith, *No Contest*, at 27.

[27] "Tobacco Firms Defend Smoker Liability Suits with Heavy Artillery," *Wall Street Journal*, Apr. 29, 1987.

[28] Ibid.

[29] *See, e.g., Castano v. The American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (Bell represented defendant Brown & Williamson and Starr represented all tobacco defendants in successful effort to block nationwide class action suit brought by smokers); *Brown & Williamson v. Williams*, 62 F.3d 408 (D.C.Cir. 1995) (Starr represented Brown & Williamson in unsuccessful effort to subpoena company documents allegedly possessed by Members of Congress).

[30] "Cost of Saving Lives," *New York Times*, Dec. 5, 1994.

[31] *General Motors Corp. v. Moseley*, 447 S.E.2d 302 (Ga.Ct.App. 1994).

[32] Nader and Smith, *No Contest*, at 215.

[33] "Judge Sees Likelihood GM Papers Destroyed," *Washington Post*, March 3, 1994.

[34] *Cameron v. General Motors*, No. 93-1278-07, slip op. (D.S.C. Feb. 23, 1994).

[35] *Cameron v. General Motors*, 158 F.R.D. 581 (D.S.C.1994); Nader and Smith, *No Contest*, at 218.

[36] "Judge Imposes a Rare Sanction on GM in Upcoming Pickup Truck Trial," *Washington Post*, Sept. 10, 1995.

[37] "G.M. Settles 4 Lawsuits Over Safety of Pickup Trucks," *New York Times*, Sept. 12, 1995.

[38] Trisha Renaud, "Silenced GM Engineer Still in Great Demand," *Texas Lawyer*, Sept. 27, 1993; *Baker v. General Motors Corp.*, 159 F.R.D. 519 (1994), *reversed and remanded*, 86 F.3d 811 (8th Cir. 1996), *cert. granted*, 117 S.Ct. 1310 (1997).

[39] S. Richard Gard, Jr., ed., *Side Impact: How a Jury Slammed General Motors for $105 Million* (1993).

[40] *General Motors Corp. v. Conkle*, slip op. (Ga.Ct.App., Mar. 14, 1997).

[41] *Baker v. General Motors Corp.*, 159 F.R.D. 519 (1994), *reversed and remanded*, 86 F.3d 811 (8th Cir. 1996), *cert. granted*, 117 S.Ct. 1310 (1997).

[42] See also *Stump v. General Motors Corp.*, No. 91-C-09, slip op. (Kan.Dist.Ct., May 27, 1993) (finding that GM "has repeatedly and willfully refused to provide or permit discovery and ... has repeatedly and without justification disobeyed the discovery orders of the court" and inviting plaintiffs to seek monetary sanctions against GM); *Wolhar v. General Motors Corp.*, C.A. No. 93C-04-024 (Del.Super.Ct., Apr. 8, 1996) (plaintiff's motion for sanctions granted where GM provided "confusing and misleading" and "inaccurate and evasive" answers to interrogatories and where GM conduct caused "delay, frustration and expense [that] undermines the integrity of the discovery system and obstructs the Court's management of civil cases"); *Coleman v. General Motors Corp.*, No. 88-53419-02, slip op. (Fla.Cir.Ct., April 15, 1993) (finding that GM "either intentionally, or through callous indifference to the Florida Rules of Civil Procedure and this Court's orders, systematically and repeatedly engaged in conduct during the discovery process calculated to thwart Plaintiff's legitimate discovery, render this Court's Orders ineffectual and abuse the Florida Rules of Civil Procedure").

[43] *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978).

[44] "Legal Battle Has Honda Fighting Mad," *Washington Post*, May 11, 1996.

[45] *Thomsen v. Messer*, No. 10718, slip op. (Cal.Super.Ct. Nov. 4, 1983).

[46] *Seyferth v. Offenwanger*, No. 83-L-17606. slip op. (Ill.Cir.Ct. Dec. 14, 1989).

[47] *Craig v. Remington Arms Co.*, No. 87C2042, slip op. (Tex.Dist.Ct., Feb. 2, 1989). Having heard further allegations of discovery abuse, a second judge presiding in the case subsequently granted a default judgment against Remington, but the Texas Supreme Court reversed that decision. "'Death Penalty' Sanction Overturned," *Texas Lawyer*, Feb. 15, 1993. The high court ruled that the plaintiff waived any objections to Remington's conduct when his attorney certified to the trial judge that discovery was complete.

[48] *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D.Fla. 1984). Piper then settled the case, and the trial judge fined one of its attorneys for misconduct. See *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440 (11th Cir. 1985).

[49] See Andrew Blum, "Westinghouse Loses on Papers," *The National Law Journal*, March 22, 1993; "New Jersey Judge Releases Westinghouse Memo Advising Destruction of Harmful Documents," *BNA Occupational Safety & Health Daily*, March 12, 1993. The cases in which judges rejected Westinghouse's claim were *Cerka v. A.C.&S., Inc.*, docket number L 13639-81 (Superior Ct., Middlesex Co., N.J.) and *Dashko v. Fibreboard Corp.*, docket number 91-14798 (District Ct., Travis Co., Tx.)

[50] *Business Week*, Feb. 24, 1992.

[51] *USA Today*, Jan. 15, 1992.