



STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
BILL LOCKYER
ATTORNEY GENERAL

September 29, 2006

Regents of the University of California
Office of the Secretary
1111 Franklin St., 12th Floor
Oakland, CA 94607

RE: Tobacco Industry Funding for Academic Research

Dear Regents:

I have learned that Regent Cruz Bustamante has asked the Board of Regents to consider adopting a policy against accepting research funding from the tobacco industry. I also understand that at your most recent meeting, you referred this issue to the Academic Senate for a recommendation. As you and others inside and outside the University of California debate these momentous issues, I write from my perspective as the state's chief law enforcement official to provide you with a brief summary of how tobacco industry funding of scientific research has advanced the industry's illegal activities.

As you undoubtedly know, in the mid- to late 1990s, over 40 state attorneys general, including my predecessor, sued all the major U.S. cigarette makers, along with their public relations organization, the Tobacco Institute, and their jointly-funded research arms, the Council for Tobacco Research and the Center for Indoor Air Research. The states alleged a decades-long conspiracy of deception and fraud perpetrated on the public at large, which included suppressing in-house research and discounting independent research showing a link between smoking and disease or the addictiveness of nicotine, on the one hand, and funding independent research that the tobacco companies thought would obfuscate, confuse, and prolong "the debate" about these issues, on the other hand. These activities, the attorneys general claimed, violated state antitrust and consumer protection laws, in numerous ways.

The states resolved their litigation in November 1998 by entering into the Tobacco Master Settlement Agreement. That agreement, and the consent decree that accompanied it, restricted the companies' marketing, advertising and promotion of cigarettes and required them to pay billions of dollars to the states each year in perpetuity. The settlement also mandated the immediate dissolution of the defendant tobacco-related organizations and prohibited the tobacco companies from "[e]ntering into any contract, combination or conspiracy with any other Tobacco Product Manufacturer that has the purpose or effect of: (1) limiting competition in the production or distribution of information about health hazards or other consequences of the use of their products; (2) limiting or suppressing research into smoking and health; or (3) limiting or suppressing research into the marketing or development of new products . . .," and from "[m]aking any material misrepresentation of fact regarding the health consequences of using any Tobacco Product, including any tobacco additives, filters, paper or other ingredients." (Consent Decree, § V.H & I; Master Settlement Agreement, § III (q) and (r).)

Soon after assuming my duties as Attorney General in January 1999, I formed what is still the largest unit in any state dedicated to monitoring the tobacco companies' compliance with the consent decree and settlement and enforcing their terms in court, if necessary. To cite just one example, attorneys and paralegals from my office are right now working with the Attorney General of Vermont in litigation to force R.J. Reynolds to stop making unsubstantiated health claims for its Eclipse brand cigarette.

In 1999, the federal government filed its own suit against the tobacco industry, including claims that the industry was violating the Racketeer Influenced and Corrupt Organizations (RICO) statute. This August, following a trial that lasted six months, U.S. District Judge Gladys Kessler concluded that ". . . there is overwhelming evidence to support most of the Government's allegations" and that the tobacco companies "conspired together to violate the substantive provisions of RICO . . . and . . . in fact violated those substantive provisions." (*U.S. v. Philip Morris et al.*, Civil Action 99-2496, Final Opinion, issued Aug. 17, 2006, p. 2, 2006 U.S. Dist. Lexis 61412.)

Judge Kessler's 1653-page decision meticulously and overwhelmingly confirms the factual basis for the states' lawsuits that led to the Master Settlement Agreement. Even though the tobacco companies will appeal, none of the trial court's 4088 findings of fact will be set aside unless the tobacco companies can demonstrate that they are "clearly erroneous." (Fed. Rules of Civ. Proc., rule 52(a))—a tough standard. In addition, the remedial measures imposed on the tobacco companies will not be overturned on appeal unless the companies can show that Judge Kessler abused her discretion—also a tough standard. (*Commonwealth of Massachusetts v. Microsoft Corp.* (D.C. Cir. 2006) 373 F.3d 1199, 1207.)

Summing up her factual findings, Judge Kessler said “[p]ut more colloquially, and less legalistically, over the course of more than 50 years, defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as ‘replacement smokers,’ about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal—to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.” (*Id.*, pp. 1500-1501.)

The tobacco companies furthered their illegal racketeering by creating organizations such as the Tobacco Industry Research Committee, later renamed the Council for Tobacco Research, which was “. . . a sophisticated public relations vehicle—based on the premise of conducting independent scientific research—to deny the harms of smoking and reassure the public” (*id.*, p. 26), and the Center for Indoor Air Research which was “. . . publicly billed as an independent scientific entity organized to support research projects addressing indoor-air issues, [but] its funding was controlled by the tobacco industry, and projects were sought for the purpose of establishing industry-favorable science and potential expert witnesses.” (*id.*, p. 1330.)

As noted above, these organizations, which were funded jointly by the major tobacco companies, were dissolved as result of the Master Settlement Agreement. Nonetheless, as Judge Kessler found, in November 1998 the companies were already formulating a plan to replace the Center for Indoor Air Research and continue the scientific research of that organization. (*Id.*, pp. 1402-1403.) Indeed, just a few months after the Center was dissolved, Philip Morris, by far the largest player in the U.S. tobacco market, established an External Research Program, in the same offices, with the same phone numbers, employing many of the same people, using many of the same peer reviewers, and continuing to fund many of the same researchers, as the Center for Indoor Air Research. (*Id.*, pp. 1403-1404.) The former director of the Center now heads the management group, also established by Philip Morris, whose sole job is to manage this research program. (*Ibid.*)

The court compared the tobacco industry to an “amoeba . . . chang[ing] its shape to fit its current needs, adding organizations when necessary and eliminating them when they became obsolete . . . [but] . . . again like an amoeba, its core purpose remained constant; survival of the industry.” (*Id.*, p. 1532.) The industry’s jointly funded “research” organizations helped the industry achieve its goal, because they “sponsored and funded research that attacked scientific studies demonstrating the harmful effects of smoking cigarettes but did not itself conduct research addressing the fundamental questions regarding the adverse health effects of smoking.” (*Id.*, pp.

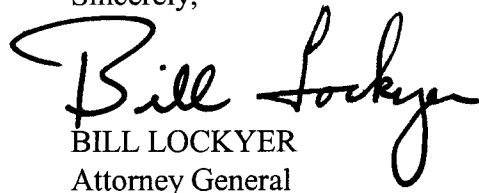
1532-1533.) Citing Philip Morris's External Research Program as an example of the industry's ability to adapt and change, the court found "unpersuasive" the companies' claim that "all of the organizational vehicles for the '[RICO] enterprise' no longer exist," and concluded that "these organizations can be resurrected, recreated, or reincarnated at any time as [the tobacco companies] wish." (*Id.*, p. 1534.)

In a similar vein, the federal court soundly rebuffed the argument, advanced by Altria, the recently renamed parent of Philip Morris USA, that Altria had not participated in the illegal RICO enterprise. (*Id.*, p. 1545.) The court found that Altria "participated in the Enterprise both directly, by joining many of the Enterprise's organizations and by supporting its objective, and indirectly, by controlling the policies and public positions of Philip Morris, the only subsidiary of Altria which manufactures cigarettes." (*Ibid.*)

Lastly, the court rejected the defendants' claims that they are "new" companies and concluded that "[t]here is a reasonable likelihood that [the companies's] RICO violations will continue in most areas in which they have committed violations in the past. [Their] practices have not materially changed in most of the [RICO] Enterprise activities, including: denial that [environmental tobacco smoke] causes disease, denial that [the companies] marketed to youth, denial of the addictiveness of nicotine, denial of manipulation of the design and content of cigarettes, suppression of information and research, and claims that light and low tar cigarettes are less hazardous than full flavor cigarettes." (*Id.*, pp. 1606-1607.) The court went on to permanently enjoin the companies, among other things, from making, or causing to be made in any way, any material false, misleading, or deceptive statement or representation, or engaging in any public relations or marketing endeavor that is disseminated to the United States public and that misrepresents or suppresses information concerning cigarettes." (Final Judgment and Remedial Order, p. 3; 2006 U.S. District Lexis 57759.)

As you continue to deliberate about whether to adopt a policy of not accepting funding from tobacco companies and tobacco company-funded organizations, I hope the foregoing information is helpful. If you have questions or want further information, please contact Senior Assistant Attorney General Dennis Eckhart. Dennis heads the Tobacco Litigation and Enforcement Section and can be reached in Sacramento at (916) 323-3770 or Dennis.Eckhart@doj.ca.gov. Thank you for the opportunity to share my perspective with you.

Sincerely,


BILL LOCKYER
Attorney General

Regents of the University of California
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cc: Robert Dynes, President
John Oakley, Chair, Academic Senate
Lieutenant Governor Cruz Bustamante