Lawyer Control of Internal Scientific Research to Protect Against Products Liability Lawsuits

The Brown and Williamson Documents

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Objective.—To understand how attorneys for the tobacco industry in general, and Brown and Williamson Tobacco Corporation (B&W) in particular, have responded to the threat of products liability litigation arising from smoking-induced diseases.

Data Sources.—Documents from B&W, the British American Tobacco Company (BAT), and other tobacco interests provided by an anonymous source, obtained from Congress, or received from the private papers of a former BAT officer.

Study Selection.—All available materials, including confidential reports regarding research and internal memoranda exchanged between tobacco industry lawyers.

Conclusions.—The documents demonstrate that the tobacco industry in general, and B&W in particular, were very concerned about the threat of products liability lawsuits, and they illustrate some of the steps taken by lawyers at one company to avoid the discovery of documents that might be useful to a plaintiff in such a lawsuit. These steps included efforts to control the language of scientific discourse on issues related to smoking and health, to bring all potentially damaging internal scientific documents under attorney work product and attorney-client privilege to avoid discovery, to remove “deadwood” documents, and to insulate B&W from knowledge of potentially damaging scientific information from other BAT companies.

UNDER products liability law, the manufacturer of a product may be held liable for injuries sustained by the consumer because of some defect in the product caused by negligent manufacture or design. There have been two waves of products liability litigation against the tobacco industry.1 The first wave, which began in the mid 1960s after the first evidence that smoking causes lung cancer was published, lasted for about a decade. The second wave began in the mid 1980s, when public concern over health and the environment increased and products liability law regarding toxic substances took on a new significance. The Brown and Williamson Tobacco Corporation (B&W) documents2 illuminate the concerns facing B&W and the British American Tobacco Company (BAT), particularly during the second wave of litigation, and the tactics they developed to avoid liability. These tactics generally involved efforts to avoid having damaging statements about the scientific evidence on the health dangers of smoking attributed to the company, and avoiding discovery of company research documents.*

*We indexed the documents as part of our analysis and assigned each one a six-digit number. Documents are cited in this article using these numbers enclosed in brackets [e.g., [1234 56]] and listed at the end of the article after the regular reference section. The complete indexed document set has been deposited in the Archives and Special Collections Department of the University of California, San Francisco, Library and Center for Knowledge Management. As of this writing, these documents are being made available via the Internet at http://www.library.ucsf.edu/tobacco through the World Wide Web.

THE DISCOVERY PROCESS AND PROTECTIONS FROM IT

Discovery is the process by which a party to a lawsuit obtains information from the opposing party to prepare for the trial. Discovery is generally permitted with respect to any matter that is relevant to the pending lawsuit, but the court may refuse to allow discovery with respect to particular documents, such as documents that are protected under the attorney work product rule or the attorney-client privilege. The work product rule protects the work of an attorney in preparing for litigation from discovery. The rule provides that when a court orders discovery of documents prepared in anticipation of litigation or for trial by or for another party, the court is required to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of the party concerning the litigation.3 While the work product rule bars the disclosure of certain work of an attorney in preparation for litigation, the attorney-client privilege bars the disclosure of documents that contain confidential communications between an attorney and his or her client, and neither the attorney nor the client may be compelled to disclose them.4 The attorney-client privilege applies not only to pretrial discovery, but also to testimony at trial. Thus, an attorney is not permitted, and cannot be compelled, to testify as to communications made by a client to the attorney in his or her professional character, unless the client consents.5

LAWYER CONCERNS ABOUT STATEMENTS BY BAT AND B&W SCIENTISTS

The tobacco industry has actively sought over the years to develop a “safe” cigarette, and it has directed much of its
research toward that goal. This research requires discussions among industry scientists regarding the constituents of tobacco smoke that cause disease and how they might be eliminated. This research, in turn, has led to concerns by industry lawyers as to how statements by those scientists, if discovered by a plaintiff's attorney, might be used against the industry in products liability lawsuits.

Toward the end of the first wave of products liability litigation, on August 20, 1970, one of the tobacco industry's principal outside counsels, David R. Hardy of Shook, Harden, Ottman, Mitchell & Bacem, wrote a lengthy "Confidential, for Legal Counsel Only" letter to De-Baun Bryant, general counsel at B&W, giving his observations and opinion as to BAT's possible involvement in US smoking and health litigation. He warned:

It would, no doubt, be virtually impossible to determine to what extent statements have been made by [B&W or BAT scientists] which would be damaging to defendant's [tobacco company's] position in a smoking and health case, but I have seen sufficient documentation from you to conclude that the documentation has a very solid, real foundation. For example, the minutes of a [BAT research] conference at Kronberg, Germany, held from June 2 to June 6, 1969 and attended by numerous personnel of both BAT and B&W, [116:00] reflect statements such as the following:

(i) "...a mouse-skin caner cigarette is a worthless objective..." (mouse-skin painting was a bioassay for cancer caused by tobacco tar; the tobacco industry publicly criticized its use).

(ii) "...it was necessary to set up some hypothetical model of how smoke aerosol could cause cancer in the basal cells of the human lung epithelium."

(iii) "...there is a possibility that the experiments taking place at R. & D. Easthampton, with the membrane of the chicken embryo might be showing genuine carcinogenic effects in days; and

(iv) "The conclusion of the Conference was that the present time the industry had to recognize the possibility of adverse health reaction to smoke aerosol: (a) Lung Cancer (b) Emphysema and bronchitis..." [emphasis added] (184:01, p 2)

Hardy continues:

At the St. Ives Conference, May 8-12, 1970, an opening statement was made which included an acknowledgment that tobacco manufacturers are not competent to give authoritative medical opinions and stating that "causation" is still an open question. In the minutes of this Conference, however, we note a number of statements or expressions which could be most damaging, notwithstanding the disclaimer in the opening statement. For example: (i) reference is made on page 6 to the fact that research "will continue in the search for a safer product"; (ii) on page 14 a product is characterized as "attractive" because less biologically active; (iii) on page 15 the phrase "biologically attractive" is used; and (iv) on page 18 reference is made to a "healthy cigarette." [184:00, pp 3-4] "Biologically active" is a tobacco industry euphemism for "causing cancer and other diseases." Hardy explained why the types of statements quoted from the two conference summaries were worrisome:

It is our opinion that statements such as the above constitute a real threat to the continued success in the defense of smoking and health litigation. Of course, we would make every effort to "explain" such statements if we were confronted with them during a trial, but I seriously doubt that the average juror would follow or accept the subtle distinctions and explanations we would be forced to urge. [184:00, p 3]

In elaborating as to why the statements posed a danger, Hardy pointed out how the statements, if admitted into court, could convince a jury as to where the balance of the scientific evidence lies:

As you know, with the testimony of independent and well-informed doctors and scientists, it has been repeatedly demonstrated in court to the satisfaction of impartial juries that cigarette smoking has not been scientifically proved to cause disease. This is certainly one very good reason that the industry has attained a one hundred percent record of victories in its health litigation. Jurors are, however, aware that a substantial segment of the medical and scientific community has accepted smoking as a cause of disease notwithstanding the deficiencies in the proof. This group includes many well-intentioned but inadequately informed doctors and scientists who operate on a philosophy that if smoking may be hazardous to health no further inquiry is necessary. In other words, they are willing to settle for suspicion in lieu of proof in condemning cigarettes. We have been able to show this to be the case when such suspicion has been claimed by our known enemies to be established fact. Obviously our problem becomes entirely different and far more serious when agents and employees of the defendant cigarette company or its parent become the spokesman against us.

Fundamental to my concern is the advantage which would accrue to a plaintiff's attorney to offer damaging statements or admissions by persons employed by or whose work was done in whole or in part on behalf of the (tobacco) company defending the action. A plaintiff would be greatly benefited by evidence which tended to establish actual knowledge on the part of the defendant that smoking is generally dangerous to health, that certain ingredients are dangerous and should be removed, or that smoking causes a particular disease. This would not only be evidence that would substantially prove a case against the defendant company for compensatory damages, but could be considered as evidence of willfulness or recklessness sufficient to support a claim for punitive damages. The psychological effect on judge and jury would undoubtedly be devastating to the defendant. To be more specific:

(1) It would certainly be difficult for a defendant to effectively contest or question the work of some particular "anti-cigarette" scientists if such work had been labeled as "valid" by defendant's own people. Here, for example, would our position that "mouse-skin painting does not provide data which can be extrapolated to human stand up if the reference to mouse-skin painting as "the ultimate court of appeal for carcinogenic effects" from page 3 of the Kronberg minutes [116:00, p 4] was offered in evidence by a plaintiff?

(2) The testimony of outstanding and independent doctors and scientists of the type who have enabled us to win a number of cancer cases on the causation issue would be nullified or weakened by our own people's statements. Furthermore, after one experience of being duped by statements of our own employees, it is doubtful that such independent experts would agree to testify again.

Off a plaintiff's contention as to causation of a disease by cigarettes seems to be supported by statements and opinions of our own scientific employees, this important issue on which we have prevailed in the past would be undercut against us, despite our best efforts to explain them. [emphasis added] (184:00, pp 3-4)

As discussed below, Hardy also explained how the existence of the BAT/B&W research and development (R&D) cost- and risk-avoiding agreement added to the problem created by the scientists' statements, and he attempted in some detail how a plaintiff's attorney might use various discovery procedures to obtain the statements, and why more liberal court rules have made it more likely that the statements would be subject to discovery. Hardy concludes his letter:

In conclusion, I would like to emphasize that, in our opinion, the effect of testimony by employees or documentary evidence from the files of either BAT or B&W which seems to acknowledge or tacitly admit that cigarettes cause cancer or other disease would likely be fatal to the defendant tobacco companies in a smoking and health case. I am afraid that any attempted explanation to a jury that such statements were made only in the context of a "workable" research program for the further development of our products would fail on deaf ears. Clearly, the admission of such evidence would cause a plaintiff's case to attain a posture of strength and danger as never before approached in cigarette litigation. It could even be the basis for an assessment of punitive damages if it were deemed to indicate a reckless disregard for the health of the smoker. Certainly such evidence would make B&W the most vulnerable cigarette manufacturer in the United States to smoking and health suits.

Of course, know that the position of BAT, as well as B&W, that disease causation by smoking is still very much an open question. Cigarettes have not been proved to cause any human disease. Thus, any state-
ment by responsible and informed employees subject to a contrary interpretation could only result from carelessness. Therefore, employees in both companies should be informed of the possible consequences of careless statements on this subject. [emphasis added] (1830.01, p 7)

In other words, "careless" scientific discussion of the health effects of smoking by industry scientists, such as those made at the Kronberg and St Ives scientific meetings, must stop.

THE BLACKMAN PAPER: REWRITING SCIENTIFIC DOCUMENTS

The extent to which lawyers for R&W were concerned about having damaging scientific statements linked to the company is conveyed in a letter written on October 25, 1984, by J. Kendrick Wells III, B&W's corporate counsel, to H. A. Morini, a lawyer at BAT (1833.01). The letter contains Wells' comments on a draft paper entitled "The Controversy on Smoking and Health-—Some Facts and Anomalies," which had been written by Dr L. C. F. Blackman, executive director of R&D for BAT. The paper presents the industry's view on the "controversy" over the health effects of smoking and was evidently intended to be a primer for BAT executives on issues relating to smoking and health (1833.02). As it was originally written, the paper contained a reasonably complete presentation of the evidence that smoking causes disease and then used quotations from various scientists and scientific reports to support the claim that a causal link between smoking and disease had not been proved. Even merely acknowledging the evidence that smoking causes disease, however, was unacceptable to Wells.

A draft of Blackman's paper, with Wells' comments written in the margins, is included in the documents (1833.02) Wells made a total of 45 specific comments on Blackman's 13-page paper, including line-by-line recommendations regarding items that he thought should be deleted or included in the final report. (Wells made comments on virtually every page of Blackman's paper, but most of them were too long to be written in the margins and were instead enumerated in his letter to Morini.) Wells' comments on the draft paper were prefaced with the following caution:

Recent developments have reaffirmed the need for the attention we customarily have given to proposed BAT publications. The smoking and health litigation in the U.S. has demonstrated that plaintiffs' lawyers are aggressive in questioning tobacco CEOs about published company statements, so we would predict they would be. Peter Taylor's __Smoke Ring__ demonstrated that BAT publications which may be intended for limited distribution can be obtained and scrutinized by our most articulate adversaries. (1833.01, p 1)

This comment suggests that attorneys for B&W routinely reviewed BAT documents prior to publication, even if they were only intended for "limited distribution" within BAT.

Among the revisions that Wells recommended were changes in chapter titles to reinforce the idea that there was a "controversy" regarding the dangers of smoking. For example, he suggested changing the chapter "Background to the Medical Concerns" to "Background to the Scientific Dilemma." [emphasis added] Other suggestions were for rewriting material to make Blackman's paper conform to the company's stated positions, rather than the scientific evidence.

Wells also seemed particularly interested in removing references to researchers who had done certain research work that did not agree with the tobacco industry's position, even if that work was not cited in Blackman's paper. For example, the original document contained a quotation from Sir Richard Doll and Richard Peto. Doll had conducted one of the first epidemiologic studies showing that smoking was associated with lung cancer. In the draft paper, Doll and Peto were quoted as stating:

To say that these conditions [lung cancer and heart disease] were related to smoking does not necessarily imply that smoking caused (or prevented) them. The relation may have been secondary in that smoking was associated with some other factor, such as alcohol consumption or a feature of the personality, that caused the disease. (1833.02)

Wells suggested that this reference should be deleted:

Delete Doll and Peto reference. Doll and Peto have published a table which shows "cancer of the lung" is "caused by cigarette smoking" and have concluded that "much of the excess mortality in cigarette smoking can be attributed with certainty to the habit." (1830.01, p 2)

Later in his comments, Wells noted that any mention of Doll should be handled with care:

Parenthetically, any reference to Doll must be crafted carefully because he is a dedicated advocate of the causal hypothesis. (1833.01, p 6)

The editorial changes suggested by Wells effectively removed any reasonable presentation of the then-current state of the scientific information from the paper and turned it into a purely propaganda piece. We do not know which, if any, of Wells' 45 recommended changes were incorporated into the final document.

LAWYER INVOLVEMENT IN SCIENTIFIC RESEARCH

On May 29 and 30, 1984, shortly after the Cipollone case was filed (Cipollone v Liggett Group, Inc, filed in 1983 in the US District Court for New Jersey, docket 83-2864SA), attorneys from B&W and BAT held a conference on US products liability litigation. The Cipollone case, which would wind its way through the courts for several years, is the only products liability case in which the tobacco industry has been held liable for damages (an award to the husband of the plaintiff, who had died during the litigation), although even that award was subsequently overturned on appeal. The conference was summarized in a June 12, 1984, memo to the file by J. K. Wells, B&W's corporate counsel. After discussion of the attribution problem (see below), the memo discusses "Project Rio, Project Slap and other biological testing programs." Project Rio was a major effort to organize "safe cigarette" research that would develop cigarettes with less "biological activity" (1184.06).

Such studies required explicit evaluation of the carcinogenicity of tobacco smoke. Project Rio was extremely sensitive.

Within the limited time available, we were able to hold significant discussions about implications for U.S. products liability litigation only regarding Project Rio. BAT Legal acknowledged the need for lawyer involvement in the project and for possible restructurings, but there was not enough time to plot a course of action. Also (Morini, a lawyer at BAT) said that he had not been aware of Project Rio until about two weeks prior to the meeting when he heard it mentioned briefly in a description of Southampton work. (1830.01)

After noting the success of the discussions, Wells proposed some follow-up activities:

[We should arrange a meeting in London with BAT Legal ... to delineate more specific counsel to the BAT, including proposals for the structure and organization of BAT programs and statements which would hold to the minimum feasible level their potential impact upon U.S. products liability litigation. Topics would include proposals for organizing programs already on the table and generating a procedural guide for lawyer counseling of ongoing and future programs. For example, if Project Rio must continue, restructurings probably will be required to control the risk of generating adverse evidence admissible in U.S. lawsuits.

Direct lawyer involvement is needed in all BAT activities pertaining to smoking and health from conception through every step of the activity.

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The problem posed by BAT scientists and frequently used consultants who believe cause is proven [i.e., that smoking causes disease] is difficult. A sound recommendation must be based upon consideration of several factors, including the basis upon which senior management relies in concluding that the opinion of the scientist is incorrect: the overall reliance of senior management on opinions of the scientist; the responsibilities assigned to the scientist; and the company's duty to encourage scientific inquiry, [emphasis added] (1830.01)

The memo ends with a reference to the question of whether BAT or BATUS (the US-based holding company of BAT, owner of B&W and other major assets) could be held as a party in a US products liability lawsuit based on consumption of B&W products by the plaintiff (1830.01). This document suggests that the B&W attorneys saw the need for themselves and the BAT attorneys to become totally involved in the research process to prevent potentially damaging research information from being developed or distributed. A major point was that the attorneys in England, where products liability law was not as well developed as it was in the United States, were reluctant to become so intimately involved in scientific work. The B&W attorneys also recognized that at least some BAT scientists and consultants were convinced that smoking causes disease (1830.01). This fact was all the more reason to keep BAT scientific information away from the United States, even though some BATUS lawyers believed that documents in the possession of BAT Industries or BAT would be discoverable by a plaintiff in a US lawsuit (1836.02).

AVOIDING DISCOVERY

The attorneys at B&W and BAT routinely labeled many of the documents as "work product" or "privileged," apparently to prevent them from being subject to discovery by an opposing party in litigation or from being admitted as evidence in a trial. They also developed special procedures for handling documents sent to B&W from BAT and affiliated companies so that they would become privileged, although the documents do not indicate whether these procedures were ever implemented. And apparently there were efforts to remove certain documents and all traces of their existence.

Sharing Information Between B&W and BAT

Among the many concerns of the attorneys at B&W was the extent to which information should be exchanged, both within and outside BAT-associated companies. The documents indicate that this concern was a long-standing one, preceding the second wave of products liability litigation by many years. On December 11, 1968, Ed Finch wrote a letter to R.P. Dobson at BAT, discussing the difficulties in exchanging information between individual BAT companies:

I am in complete agreement with your statement that the subject of the exchange of information [on smoking and health] between individual companies within BAT is full of difficulty. As you know, I have been and still am concerned about the problems that might arise as a result of individual companies corresponding with each other on this matter. From this information, it seems to me you would know best how the information should be used and whether or not it should be transmitted to other companies. In addition, I also agree with your thought that there should be personal visits between the major companies to discuss the health matters whenever possible. (1809.03)

This letter appears to suggest that the sensitive issues of smoking and health should only be discussed in person rather than being committed to paper.

Special Procedures for Handling Documents Sent to B&W

Toward the end of the 1970s, B&W's attorneys developed special procedures for handling internal scientific documents so that, to avoid discovery by plaintiffs, it could be claimed that they came within the attorney-client privilege. If implemented, these procedures might have been an abuse of the attorney-client privilege insofar as they would have been aimed at making otherwise unprivileged documents subject to the privilege. The purpose for which the procedures were designed is explicitly spelled out in the memorandum that established them. The June 15, 1979, memo, from J.K. Wells, the corporate counsel, to Ernest Pepples, vice president, Law, summarizes how scientific materials from BAT were to be received at B&W:

The [scientific] material should come to you under a policy statement between you and [BAT's research laboratory in] Southampton which describes the purpose of developing the documents for B&W and sending them to you as use for defense of potential litigation. It is possible that a system can be devised which would exempt the Engineering reports [which Wells previously stated were almost never concerned with smoking and health] because it might be difficult to maintain a privilege for covering such reports under the potential litigation theory.

Continued Law Department control is essential for the best argument for privilege. At the same time, control should be exercised with flexibility to allow access of the R&D staff to the documents. The general policy should be clearly stated that access to the documents and storage of the documents is under control of the Law Department and access is granted only upon approval of request. A secured storage area of the documents should be arranged, perhaps in the R&D library [as opposed to the law library], and the policy statement would designate the same terms and conditions of storage for the documents as were spelled out for the literature retrieval service files. [emphasis added] (1824.02)

After suggesting that the documents might be divided into different categories according to how sensitive they are, the memo continues:

The abstracts of the documents should be circulated only for the less sensitive categories and then only to a list given prior approval by the Law Department. The policy should explicitly make Dr. R.A. Sanford [director, R&D] the agent of the Law Department with regard to these procedures. (1824.02)

These procedures would have put the Law Department in control of the dissemination of internal scientific reports. Five months later, on November 9, 1979, Wells sent another "privileged" memorandum to Pepples on the same subject. It may be that the proposal in the June memo had not been adopted, because this memo discusses the problem as if it had just arisen:

I have discussed with Gil Estlerle [International and External Technical Services Department (R&D)] various alternatives for handling BAT scientific reports which come to B&W in a way that would afford some degree of protection against discovery. . . . One alternative discussed was that all BAT scientific reports would be sent to you. [emphasis added] (1824.01)

Wells noted that this procedure would be cumbersome because the vast majority of the documents were routine, and then stated:

The cost sharing agreement between B&W and BAT, under which B&W pays for BAT scientific research and receives reports, is an obstacle because as presently written it would probably contradict the position that you were acquiring the reports for purposes of litigation. . . .

I recommend a second alternative, which would be that all BAT scientific reports be shipped directly to Dr. Estlerle under a formal arrangement that Dr. Estlerle was assigned to be your agent for the acquisition of scientific materials in anticipation of litigation. Dr. Estlerle would separate the reports which were relevant to smoking and health, or otherwise sensitive, for special handling as described below and place the routine reports into regular R&D circulation. [emphasis added] (1824.01)

After discussing how this procedure would provide work product coverage for sensitive documents under federal and Kentucky law, Wells continued:

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There would still be the matter of the cost sharing agreement. Regardless of the initial recipient of the documents, in order to be covered by the rules of civil procedure they must be produced in anticipation of litigation. Appropriate paper work should be established with B&W, including any amendments to the cost sharing agreement to establish that documents of a certain nature are prepared for B&W in anticipation of litigation. I have in mind paper work which would make the statement as a policy between the parent and sibling, but that in the operational context B&W would send documents without attempting to distinguish which were and were not litigation documents. [emphasis added] [1824.01]

More than 6 years later, on February 17, 1986, Wells sent another memo to Peoples that dealt with the question of whether B&W should receive certain scientific reports from affiliated companies generally, and how B&W would receive such reports without receiving information that would be useful to a plaintiff. The memo included references to specific projects and notations as to whether B&W was interested in them. Wells stated that he had counseled Esoterie and David Gordon, controller in the B&W R&D administration, as follows:

We should approach these projects on the basis of whether the reports are limited to the information from good science and whether the information is useful in the United States market. Our market is a "var" and nicotine market, and information pertaining to other constituent delivery levels and biological effects will not be helpful.

B&W will receive concise reports, evaluated to be about one-half page in length, twice each year for each project it wishes to follow. While the brevity of the reports will reduce the potential for receipt by B&W of information useful to a plaintiff, disadvantageous information would be included and the reports would serve as road maps for a plaintiff.

I have advised that we can receive reports from some of these projects notwithstanding the risk. The reason is that we cannot shut out the flow of information: the B&W will find ways to get information into R&W from the scientific projects it is running in its laboratory worldwide. The only way B&W can avoid having information useful to plaintiff found at R&D is to obtain good legal counsel and cease producing information in Canada, Germany, Brazil and other places that is helpful to plaintiffs. [emphasis added] [1824.03]

The memo goes on to summarize the discussions among Wells, Esoterie, and Gordon about eight specific projects in which the scientific staff had expressed initial interest. The criterion for projects not being "interesting" to the B&W R&D & E staff seems to have been the potential usefulness of the results to plaintiffs in product liability cases against the company. Research results from elsewhere in B&W that were aimed at cosmetic improvements (less visible sidestream smoke), reduced irritation (which makes smoking easier), and customer satisfaction were of interest to B&W, but results that might delineate the toxicity of tobacco smoke or the pharmacological properties of nicotine were to be avoided.

'Deadwood' Documents

At one point, J. K. Wells, B&W's corporate counsel, decided that certain documents should simply be removed offshore. Thus, what a plaintiff's attorney might have wished to discover, Wells determined was "deadwood." This plan was outlined in a January 17, 1986, memo to file, memorializing a conversation with Earl Kohlhorst, vice president of R&D&E, during which Wells explained how he had marked various documents in the behavioral and biological studies area as deadwood:

I said that the "B" series were "Janus" series studies [which were BAT mouse skin painting studies that demonstrated that tobacco tar was carcinogenic] and are also deadwood. I said in the course of my review of scientific documents stored by R&D&E, a great deal of deadwood had appeared, such as studies of the chemical composition of Canadian tobacco leaf in 1966. [1835.01]

Wells went on to say that he had suggested that R&D&E should remove the deadwood from its files in the context of moving R&D&E to a new building and building a reference set for smoking and health materials. I suggested that Earl [Kohlhorst] have the documents indicated on my list pulled, put into boxes and stored in the large basement storage area. I said that we would consider shipping the documents to BAT when we had completed segregating them. I suggested that Earl tell his people that this was part of an effort to remove deadwood from the files and that neither he nor anyone else in the department should make any notes, memos or lists. [emphasis added] [1835.01]

Wells concluded:

I mentioned that Carol Lincoln [a B&W librarian] had said that offshore research and engineering data was sent to B&W in care of Earl and Bob Sanford [vice president, R&D] during roughly last one year period had not been sent to her for logging in and that most of those documents may be in the offices of Earl and Bob and would not be reflected on the list which I had received. Earl said he would send all of the studies in his possession to Carol, who would make a list of the documents and send it to me for review. Earl suggested that I should ask Sanford to do the same. [emphasis added] [1835.01]

Evidently there was to be no written record of the existence or fate of the deadwood documents, much less the documents themselves.

B&W AND BAT RESEARCH COLLABORATION

While B&W attorneys were busy trying to conceal the fact that the company was aware of certain information obtained from research conducted by BAT, the documents themselves tell us that B&W was actually an active partner in much of the BAT group research and, therefore, must have known of the scientific results. Personnel from B&W actively participated in BAT research, and there were formal R&D cost- and risk-sharing agreements between the two companies from at least as far back as 1968 and continuing at least into the 1980s.

Scientists from B&W regularly attended BAT R&D meetings and conferences, including meetings on the direction of the biological testing programs, such as Project Janus, a large series of mouse skin painting studies that BAT completed in the 1970s to assess tobacco smoke carcinogenicity as part of the effort to design a "safer" cigarette. B&W scientists read the documents to Project Janus [1112.04;1116.03], and a B&W scientist was a member of the Biological Testing Committee.

At least one delegate from B&W took part in each of the 17 BAT worldwide Group Research Conferences that are described in the documents. In several instances B&W scientists made comments on proposed agendas of research conferences and edited drafts of minutes that resulted from these meetings. For example, Dr. Alan Heard of BAT Southampton sent Dr. R. A. Sanford of B&W a questionnaire about the draft agenda for the 1980 Sea Island research conference; Dr. Sanford responded with a number of comments about areas of research such as inhalation that should not be further pursued [1132.01]. In July 1983, the director of R&D at BAT's Millbank laboratory, Dr. L. C. F. Blackman, sent Earl Kohlhorst of R&D at B&W the proposed agenda for the 1983 research conference in Rio de Janeiro, Brazil, and asked him to comment on it [1180.05]. Likewise, draft minutes of the 1983 Rio meeting were sent to B&W for comment and feedback. Edite appearing in handwriting in the draft from B&W's file [1180.09] were incorporated into the final set of minutes [1180.07]. For example, in a discussion of research at the BAT German affiliate, the draft minutes contain the following paragraph about cigarette filters:

A description was given of a number of filter designs capable of directing smoke to specific areas of the mouth. This technology, which is an extension of the B&W Acton concept, has led to patent applications. Results with other novel filters which make use of the
principles of "smoke elasticity" were given. [1180.09, p 14]

The phrase "which is an extension of the B&W Astron concept" is lined out in the draft, and the final version of the minutes reflects this edit [1180.09, p 14]

Handwritten notes made sometime in 1980, probably by J. Kendrick Wells, B&W's corporate counsel, describe the cost- and risk-pooling agreement they had existed since at least 1968 until that time [1880.01]. In 1961, the 1958 agreement was ended, and a new arrangement was made whereby B&W and other BAT units bore the cost of their own research, with free sharing of all results. However, the two companies focused on different areas of concern: B&W was "best suited for work on processing, smoking, and [alcohol] effects" [1883.01, p 1]. The agreement was revised several times over the years, but the research consistently included biological, product, smoker, process, and new smoking material areas. These cost- and risk-pooling agreements created a liability problem for B&W according to the letter written on August 20, 1970, by David R. Hardy of Shoek, Hardy, Ottman, Mitchell & Baker to DeSautel Bryant, general counsel at B&W [1840.01]. After explaining how "careless" statements made by BAT and B&W scientists could be used by a plaintiff (see above), Hardy noted that the then-existing cost- and risk-pooling agreement exacerbated the problem:

Also adding to the need for recognition of the problem created by statements such as those I have described is the existence of the "BAT/B&W Cost and Risk Pooling Agreement" executed in July, 1969. This document creates an inter-relationship (or confirms a relationship which already existed) that would assist a plaintiff's attorney greatly in obtaining information from B&W about BAT research and development work. [1840.03, p 4]

Later, Hardy pointed out:

The findings and opinions of persons engaged in work covered by the "BAT/B&W Cost and Risk Pooling Agreement" are available to both BAT and B&W. Carefully framed discovery would certainly force disclosure of the Agreement as well as other documents bearing on smoking and health issues. [1840.01, p 5]

**ATTRIBUTION OF STATEMENTS BY SUBSIDIARIES**

Another problem facing BAT was the possible attribution to the group's tobacco companies of statements regarding the dangers of smoking made, or decisions taken, by other non-tobacco subsidiaries. This issue was the topic of several memos between corporate attorneys. A memo entitled "Legal Considerations on Smoking and Health Policy," [1828.01] which was unsigned and undated, summarized the policy of BAT Industries Group in relation to smoking and health issues, and then warns that non-tobacco companies must be aware of their statements, because the spread of "no fault" liability may result in the future attribution to the group's tobacco companies of statements made or decisions taken by other non-tobacco subsidiaries:

For this reason it is essential that statements about cigarette smoking or the smoking and health issue generally must be factually and scientifically correct. The issue is controversial and there is no case for either condemning or encouraging smoking. It may be responsible for the alleged smoking related diseases or it may not. No conclusive scientific evidence has been advanced and there is no statistical association does not amount to proof of cause and effect. Thus a genuine scientific controversy exists.

The group's position is that causation has not been proved and that we do not make health claims for tobacco products. Consequently the group cannot participate in any campaigns stressing the benefits of a moderate level of cigarette consumption, of agencies to encourage or to discourage the use of cigarettes or any other positive aspects of smoking except those concerned with the dissemination of objective information and the right of individuals to choose whether or not they smoke. However, the group encourages constructive dialogue with the authorities, the dissemination of information about the smoking and health controversy and research and new product development.

Non-tobacco companies in the Group must particularly beware of any commercial activities or conduct which could be construed as discrimination against tobacco or tobacco manufacturers (whether or not involving companies within the Group), since this could adversely affect the position of Brown & Williamson in current US product liability litigation. If in doubt, companies should not hesitate to consult their in house counsel, or BAT Industries Legal Department, who have up-to-date information on the legal situation affecting the tobacco companies. [Italic emphasis added] [1828.01]

The recommendation against participating in the promotion of health claims for low-tar cigarettes is in sharp contrast with the industry's active promotion of such cigarettes during the "tar derby" of the late 1960's. However, the principal point being made here is that the companies in the BAT group were not to pursue any dialogue concerning the health aspects of smoking.

On May 29 and 30, 1984, attorneys from B&W and BAT held a conference on US products liability litigation. This conference was summarized in a June 12, 1984, memo to file by J. K. Wells, B&W's corporate counsel. The conference placed particular emphasis on the problem of the attribution to the tobacco companies of statements and actions by affiliated companies:

Trial counsel described evidence rulings in United States courts pertinent to the admissibility of statements (made herein to include written and oral statements and actions whether made in statements to B&W. A prudent lawyer in a U.S. products liability action must assume that any damaging statement will be admitted into the evidence and will be discussed by the plaintiff. It is likely that statements by a tobacco affiliate of B&W would be admitted and smoking and health research done "in-house" or by contract by any company owned by the BAT certainly would be admissible. Statements by a non-tobacco affiliate would be admissible where control or close functional relationship, either on a general line of business or a specific project basis, was shown. [Emphasis added] [1850.01]

A February 4, 1985, letter from R. G. Baker, a senior scientist at BAT's Southampton Laboratory to D. A. Schechter, an attorney at BATUS, Inc, in Louisville, Ky, labeled as an "Attorney Work Product," discussed the need to set up guidelines for affiliated companies outside the United States to follow when making written statements with regard to the attribution problem. The letter suggests six issues to be addressed:

(1) Does this particular statement amount to an admission [of anything that could be compromising in a lawsuit]?

(2) Does this particular statement amount to product assurance which can be attributed to an affiliated US defendant?

(3) Is this statement admissible in cross examination of defendants' witnesses?

(4) Are statements of this type by non-US affiliates discoverable?

(5) What are the risks of overseas companies becoming parties of US cases? Is their public posture relevant to this question?

(6) Given the range of company activity in the Group, what are the risks associated with expert status being attributed to employees of certain companies in the Group? [1829.01]

Included with the letter is a two-page legal analysis of the attribution issue put together by Baker, with an introduction stating:

A substantial discussion took place about the risks of statements and positions of affiliates of Brown & Williamson being attributed to it. The intention is, so far as possible, to conduct matters so that no connection can be shown. [1829.02]

**CONCLUSION**

The documents demonstrate that the tobacco industry in general, and B&W in particular, were very concerned about the threat of products liability lawsuits, and they illustrate some of the steps taken by lawyers at one company to
avoid the discovery of documents that might be useful to a plaintiff in such a lawsuit. These steps included efforts to control the language of scientific discourse on issues related to smoking and health, to bring all potentially damaging internal scientific documents under attorney work product and attorney-client privilege to avoid discovery, to remove "deadwood" documents, and to insulate B&W from knowledge of potentially damaging scientific information from other BAT companies.

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Finally, in an era in which public institutions are increasingly held in disfavor, we would like to thank the University of California for providing an environment committed to academic freedom and the public interest. It would have been simpler—and cheaper—for the university to simply walk away from this project. After all, the history of the tobacco issue is one in which many institutions have followed the path of least resistance and failed to confront the issues raised in those documents. No administrator or other official ever told us to stop. Quite the contrary, we were encouraged and protected in our work. This behavior is what makes the University of California a great public institution.

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