



A Law Synopsis by
The Public Health Advocacy Institute

**Potential Master Settlement Agreement Violations
Evidenced in Judge Kessler's Findings in *USA v.
Philip Morris USA, Inc., et al.***

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Introduction

Ignoring everything but the goal of selling as many cigarettes as possible, the major American cigarette manufacturers designed and implemented one of the most extensive disinformation campaigns in this country's history. This campaign, aimed at convincing the public that smoking's link to disease was an "open controversy" despite the industry's knowledge to the contrary, was carried out "with zeal, with deception, with a single-minded focus on [the industry's] financial success, and without regard for the human tragedy or social costs that success exacted."¹ Meanwhile, cigarette smoking remains the single most preventable cause of premature death in the United States, with more than 400,000 Americans dying from cigarette smoking each year.²

After seven years of litigation, the United States Department of Justice has proven in a landmark case that the industry members are racketeers under the civil provisions of the Racketeering and Corrupt Organizations Act. Judge Gladys Kessler, who presided over the trial, wrote a lengthy opinion that opens a window into the industry as it operates today, with nearly 1,500 pages of findings of fact meticulously documenting the industry's racketeering activities. Over 235 pages alone, for example, provide a detailed description of the industry's youth marketing activities. One of Judge Kessler's most significant findings is that the industry is likely to continue its wrongdoing if substantial steps are not taken to change the manner in which it is overseen.

The requirement that the DOJ prove ongoing malfeasance led it to investigate – and Judge Kessler to review – ongoing conduct that potentially violates the 1998 Master Settlement Agreement. The MSA resolved the Medicaid reimbursement lawsuits brought by forty-six states against the industry in the mid-1990s. It resulted in a set of marketing restrictions on cigarette manufacturers within those states. Although limited, the MSA equips state attorneys general with regulatory-like tools that, among other requirements, prohibit cigarette marketing that targets children. Some of the MSA's marketing restrictions are also part of consent decrees entered by each settling state's court, which allow for even more robust enforcement than does the MSA.

Our analysis reveals that many of the industry's racketeering actions documented in Judge Kessler's opinion potentially constitute ongoing violations of the MSA. We have assembled this synopsis to cull and highlight the major potential MSA violations found in the opinion. We have focused on the following major areas of potential violation: youth targeting; material misrepresentations; dissolution of tobacco-related organizations; and youth smoking prevention programs. We quote directly from the opinion and document conduct by each manufacturer. Citations to the paragraph or page number of the opinion are given.

It is important to note that both the industry and the DOJ have filed appeals. We believe, however, that the case's current status does not affect the accuracy of Judge Kessler's findings of

fact, which are “the formal, deliberate statement of a court’s determination of facts.”³ Unless “clearly erroneous,” an appellate court may not set aside such findings, according to the Federal Rules of Civil Procedure.⁴ Judge Kessler oversaw the exchange of millions of documents and a trial that lasted approximately nine months with eighty-four witnesses testifying in open court. Nearly 1,500 pages of her opinion include findings of facts, with each fact attributed to a particular witness or trial exhibit. Furthermore, many of specific acts Judge Kessler documented have formed the basis for verdicts against the industry in private litigation.

Section I - Overview of the Department of Justice Case and Judge Kessler's Opinion

On September 22, 1999, the United States Department of Justice (“DOJ”) filed a complaint against the major American cigarette manufacturers (“industry” or “Defendants”) in the United States District Court for the District of Columbia.⁵ The DOJ alleged that Defendants violated the civil provisions of the Racketeer Influenced and Corrupt Organizations Act⁶ (“RICO”) by engaging in a massive conspiracy to defraud the public by knowingly producing dangerous and addictive products and misleading the public about the risks associated with these products. The DOJ sought remedies including disgorgement of the industry’s ill-gotten gains, protecting the public from the continuing consequences of the conspiracy, and preventing the industry from continuing its wrongdoing.

The trial began on September 21, 2004, nearly five years after it was filed, and continued with closing arguments June 7 through 9, 2005. Judge Kessler issued her final opinion⁷ and remedial order⁸ on August 17, 2006. All told, the case involved “the exchange of millions of documents, the entry of more than 1,000 Orders, and a trial which lasted approximately nine months with 84 witnesses testifying in open court.”⁹ The findings of fact in the opinion document industry wrongdoing over the past half century through the present. Judge Kessler devotes 1,493 pages of her opinion to the findings of facts. The findings detail her conclusions that the industry has devised and executed a scheme to defraud the public with regard to: the adverse health consequences of smoking; the addictive properties of nicotine; the manipulation of nicotine and nicotine delivery; the use of light/low tar brand indicators; youth marketing; environmental tobacco smoke; and research suppression and document destruction. One of the most important findings made by Judge Kessler was that the

industry racketeering conduct would likely “continue in most of the areas in which they have committed violations in the past.”¹⁰

Despite this proof of racketeering, Judge Kessler’s ability to change industry conduct through court order has been limited in two ways. First, an appeals court order obtained by the Defendants during the course of the trial narrowly construed RICO’s remedy provision, specifically prohibiting the judge from ordering the industry members to “disgorge” their past ill-gotten gains – a remedy that the DOJ had specifically requested.¹¹ Judge Kessler was nonetheless able to order several key remedies, including a prohibition of misleading brand descriptors such as “light” and “low tar,” a requirement that the industry publish corrective statements about key areas in which they have misled the public, the disclosure of documents and disaggregated marketing data, and general injunctive provisions.¹² However, other potential remedies, which Judge Kessler felt would “unquestionably serve the public interests,” were blocked by the appeals court order.

The second manner in which injunctive relief has been limited stems from the ongoing appeals. Both the Defendants and the DOJ have filed notices of appeal to the United States Court of Appeals for the District of Columbia Circuit. That Court has granted Defendants’ motion to stay enforcement of the remedies that Judge Kessler ordered, pending resolution of the appeals process.¹³ The delay, which is expected to last over two years, means that the industry’s racketeering conduct will continue unabated for the immediate future.

Section II - Overview of the Master Settlement Agreement

The Master Settlement Agreement (“MSA”) provides state attorneys general with a means to oversee certain aspects of industry marketing.¹⁴ The MSA was entered into in November 1998 between the state attorneys

general and the major domestic cigarette manufacturers.ⁱ The MSA resolved lawsuits brought by states to recover costs for public medical expenditures incurred as a result of the industry wrongdoing. By signing the MSA, the states released their claims against these companies (alleging violation of state antitrust and consumer protection laws) and the manufacturers agreed to pay partial restitution and to abide by a set of marketing restrictions. Most notably, the MSA forbids the manufacturers from targeting youth in their marketing.

The intent of the MSA is to reduce the impact of tobacco industry marketing on youth. Although limited in its breadth and depth, the MSA has aided several states in stopping some recent cigarette industry marketing activities and campaigns that were found to be particularly attractive to children. Examples include a reduction of cigarette advertising by all cigarette manufacturers in magazines with high youth readership, a reduction in brand name sponsorships at sporting events, and more. A more detailed summary of enforcement activities is provided in the Appendix to this synopsis.¹⁵

Ensuring industry compliance with the MSA is solely the responsibility of the state attorneys general or the Participating Manufacturers; the agreement does not allow for individuals to bring enforcement actions. The attorney generals alone have authority to enforce the terms of the MSA or to seek declaratory judgment construing its terms.

If a court finds that a manufacturer has violated the MSA, the state may request a court order to restrain such violation or breach. If an issue arises as to whether a

manufacturer has failed to comply with such an order, the state may seek an order for interpretation or for monetary, civil contempt or criminal sanctions to enforce compliance with the enforcement order. If the court finds that a good-faith dispute exists as to the meaning of the terms of the MSA or related order, the court may enter a declaratory order rather than an enforcement order.

The MSA has detailed enforcement protocols. Before launching an enforcement initiative, the state must provide thirty-days' written notice to each state attorney general, to the National Association of Attorneys General, and to each manufacturer that has signed the MSA declaring its intent to initiate proceedings. This period may be shortened should compelling time-sensitive public health and safety concerns require more immediate action. The notice requirement is intended to facilitate resolution of any disagreements or to provide the manufacturer time to cease the activity in question.¹⁶

Section III – Methodology

Our investigation was limited to searching for potential Master Settlement Agreement violations within Judge Kessler's opinion only. We did not conduct an external investigation into other violations that may be ongoing, nor did we inquire into any current enforcement actions being undertaken by the state Attorneys General. Additionally, we limited our search to the text of the opinion itself. We did not review the actual motions, pleadings, trial transcripts, exhibits and documents cited in the opinion. These sources likely provide important additional information on industry conduct.

To avoid confusion regarding whether a potential violation occurred before or after the Master Settlement Agreement was signed in the year 1998, we have examined violations occurring from January 1, 1999

ⁱ The original Participating Manufacturers were: Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated and R.J. Reynolds Tobacco Company, and their respective successors.

onward. Note that we have focused only on Judge Kessler’s opinion. Certain statements made therein, such as quotes from company websites, may have changed since the opinion was written. Nevertheless, we have included the original statements as they appear in the opinion. It is thus possible that some of the industry behaviors described herein have ceased, either as a result of an enforcement action or by a company’s own volition. However, such past violations can evidence a pattern of violation and thus be relevant to current enforcement actions.

Section IV – Potential Master Settlement Agreement Violations Evidenced in the Findings of Fact

The findings of fact evidence potential violations of at least four sections of the MSA. These include the MSA’s provisions regarding: (1) prohibition of youth targeting;¹⁷ (2) prohibition of material misrepresentations;¹⁸ (3) dissolution of tobacco-related organizations;¹⁹ and (4) youth smoking prevention programs.²⁰ Below are direct quotes from the findings of fact that evidence potential violations in each of these areas.

A. YOUTH TARGETING

MSA Section III(a) states:

No Participating Manufacturer may take any action, directly or indirectly, to target Youthⁱⁱ within

ⁱⁱ Judge Kessler defined the term “youth” as those twenty-one and under. She stated that although “no uniform and consistent definition of the term was used by any party to define the age parameters,” twenty-one and under is the definition “used most frequently by the parties.” Opinion, pp. 972-973. This differs from the MSA’s definition of “youth” as “any person or persons under 18 years of age.” MSA Section II(bbb).

any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of Youth smoking within any Settling State.

The scope of section III (a) was examined in the case *Lockyer v. R.J. Reynolds Co.*²¹ In that case, the Attorney General of California, with the support of several other states, initiated an enforcement action against R.J. Reynolds for advertising cigarettes in magazines with high levels of youth readership. The trial court agreed that the advertisements violated section III (a) of the MSA, ordered R.J. Reynolds to stop the advertisements and fined the company \$20 million in sanctions.

R.J. Reynolds filed an appeal, which focused on the evidentiary requirements for showing that marketing “targets” youth. The court decided that if the Attorney General could prove that the company either actually intended to target youth or that it “knew to a substantial certainty” that the cigarette marketing in question would reach youth to the same extent it reaches young adults, then R.J. Reynolds had violated the MSA. The case eventually settled, resulting in specific guidelines regarding the company’s advertisement placement in magazines.ⁱⁱⁱ

Additionally, a manufacturer cannot defend itself by simply ignoring the evidence. That a manufacturer excluded youth from its marketing focus groups, for example, does not necessarily show that the manufacturer meant to target only adults. The manufacturer must consider, according to the court, other reasonably accessible information. For the state seeking to enforce this provision, it is sufficient to show that the manufacturer should have known that youth would be exposed, based

ⁱⁱⁱ See Appendix for a more complete description of this and other past MSA enforcement actions.

on the available evidence. Whether that evidence comes from the manufacturer's own research or whether it comes from marketing research that is accessible to the public should be of no consequence.

Judge Kessler made numerous findings regarding additional youth targeting activities, many of which constitute potential MSA violations. Among them, she discussed the Defendants' use of: (1) advertising campaigns; (2) price promotions; (3) direct mail marketing; (4) retail promotions; (5) promotional events; (6) sponsorships; and (7) promotional items. Enforcement actions based on these potential violations may force additional changes in industry behavior, decreasing or eliminating the Defendants' targeting of youth.

The findings state the following regarding each of the areas of potential violation:^{iv}

1. Advertising Campaigns

- The advertising campaigns of the three leading youth brands, Marlboro, Newport, and Kool, for youth have not changed since the MSA. For example, Lorillard has not changed its principal "Pleasure" advertising campaign for Newport, the second-leading brand smoked among youth ages twelve to seventeen. (¶ 4087)

2. Price Promotions

- Defendants recognize that youth and young adults are more responsive to increases in cigarette and other tobacco prices, and will not try smoking

or continue to smoke if cigarette prices rise. (¶ 2991)

- Despite that recognition, Defendants continue to use price-based marketing efforts as a key marketing strategy. As a result, price reductions, initiated by the cigarette company Defendants, such as sharply dropping the wholesale price of cigarettes most popular with young people, have reduced the rate of decline in overall cigarette smoking and contributed to the increases in youth smoking incidence and prevalence observed during much of the 1990s. (¶ 2991)
- Given the impact of price on youth initiation, a fact fully recognized by Philip Morris and the other Defendants, there is no question that this enormously successful marketing technique had a significant effect on youth smoking incidence. (¶ 2996)
- Defendants have not lowered their total marketing and promotion expenditures in response to the MSA's prohibition on billboard advertising and its restrictions on print advertising. To the contrary, they have both increased their marketing expenditures and shifted those increased expenditures towards price-based promotions. (¶ 4083)
- Since signing the MSA, Defendants have increased the list price of their cigarettes. At the same time, they have enormously increased their promotions, thereby, in effect, decreasing the real price of cigarettes to consumers. Defendants continue to oppose cigarette taxes that would raise cigarette prices and deny that such tax increases will affect youth initiation. (¶ 2997)
- There has, as noted, been a dramatic increase in Defendants' use of price promotions in recent years. In its Report to Congress for 1999 Pursuant to Federal Cigarette Labeling and Advertising Act, issued in 2001 ("2001 FTC Report"), the FTC reported that in 1999 (the year after the MSA went into effect), \$3.54 billion, or 43% of the

^{iv} All quotes appear as they do in the findings, with a few exceptions. First, minor language modifications are indicated by the use of italicized language in square brackets. Square brackets containing non-italicized language indicates use of such bracketed language in the original. Additionally, all internal citations have been omitted. However, following each quote is a cite to the paragraph or page number in which that quote appears in the findings.

tobacco industry's advertising and promotion expenditures, were devoted to trade promotions, up from \$856 million in 1987. (¶ 2998)

- According to the 2001 FTC Report, in the year after the MSA was implemented, spending on retail value added offers (e.g., buy one, get one free) rose 64.6% to \$2.56 billion. (¶ 2998)
- The following examples of internal company documents, testimony, and admissions, demonstrate that although Defendants have long recognized young people's price sensitivity, they still continue to offer lower priced cigarettes which contribute to an increase in youth smoking. (¶ 2999)

Philip Morris

- Carolyn Levy, Senior Vice-President and Director of the Youth Smoking Prevention Department from its inception in April 1998 to approximately March 2002, admitted that Philip Morris was aware that "the price of cigarettes for some kids appears to be an important variable in preventing them from smoking." (¶ 3011)
- She also acknowledged that "Philip Morris was aware that youth smoking behavior was price sensitive as a result of data in the Philip Morris TABS [Teenage Attitudes and Behavior Study] survey," which concluded that "[f]or children who do not smoke, the percentage of 11 to 14 year olds who agree that smoking is expensive is around 33 percent." (¶ 3011)
- Philip Morris Companies' CEO Geoffrey Bible said that he "assumes that young people are sensitive to prices," so smoking incidence would decrease due to price increases. (¶ 3013)

B&W

- Since approximately 2000, B&W has spent more on discounting or reducing the price of Kool cigarettes than any of its other brands, according to Paul

Wessel, the Current Divisional Vice President at B&W in charge of value for money premium niche brand and new product development. (¶ 3017)

- Wessel claimed that he was unaware of whether youths were price sensitive and whether B&W had ever taken a position on the price sensitivity of youth. That statement is not credible in light of his corporate responsibilities and B&W's oft-claimed sensitivity to avoiding the marketing of its products to youth. (¶ 3018)

3. Direct Mail Marketing

- Defendants have made extensive use of direct mail marketing to many millions of individuals to send them coupons, t-shirts, sporting goods, mugs, and magazines, all promoting their brand of cigarettes. These mailings were sent to millions of young people for whom Defendants had nothing more than an unverified representation that s/he was over the age of twenty-one. (¶ 3089)

Philip Morris

- Philip Morris keeps a database of names, collected in various way, to whom it sends mailings and promotional materials. (¶ 3090)
- Marlboro Unlimited is a glossy, color magazine created by Philip Morris and sent to individuals on Philip Morris's Direct Mail Marketing Database. It contains full color, glossy Marlboro advertisements which are either identical to, or are very similar to, those that Philip Morris has placed in magazines such as Rolling Stone and Sports Illustrated. (¶ 3092)
- Millions of copies of the magazine have been sent to individuals for whom Philip Morris has no age information beyond the individual's own unverified representation that he or she is twenty-one or over. In 1999 alone, Philip Morris sent 8,264,645 copies of Marlboro Unlimited to individuals who

had only a signature on record to “verify” that they were twenty-one or above. Use of such a procedure raises obvious reliability concerns, because people under twenty-one can provide a false signature. (¶ 3094)

- Philip Morris has sent Marlboro Unlimited to many individuals who Philip Morris knew were under the age of twenty-one at the time they received it. For example, in 1999 alone, Philip Morris sent Marlboro Unlimited to 37,826 individuals who were under the age of twenty-one, according to Philip Morris’s own records. (¶ 3094)
- Philip Morris has also sent marketing mailings other than Marlboro Unlimited, such as products and coupons, to individuals who had only a “signature” on record – and no identification such as a drivers license – to “verify” that they were twenty-one or above. Between 1989 and 2003, Philip Morris sent at least 813,905,702 marketing mailings to such individuals. In 1999 alone, Philip Morris sent at [least] 69,170,720 cigarette coupons to such individuals. (¶ 3095)
- Many individuals whose records are contained on Philip Morris’s Direct Mail Marketing Database and who had a “signature” on record to “verify” that they were age twenty-one or above were in fact under the age of eighteen at the time they received marketing mailings from Philip Morris. (¶ 3096)
- Despite its policy which prohibits it from sending mailings to individuals under age twenty-one, Philip Morris still sends marketing mailings to individuals for whom it has no identification (such as a driver’s license) and has no “signature” verifying their age on record. From 1989 to 2003, Philip Morris sent to mailings to 18,847,776 such individuals, including 60,973,164 marketing mailings. (¶ 3098)
- According to Philip Morris’s “2003-2007 Five Year Plan” dated April 3, 2003, Philip Morris planned to “improve the vibrancy and reach” of its Direct Mail

Marketing Database in 2003 with a newly launched website titled www.smokersignup.com that currently allows people to add their names to the database over the internet. (¶ 3099)

- As further stated in its “2004 Original Budget & Five Year Plan Presentation,” in order to address the “Critical Issue” of the “Loss of mass marketing” that it faces ahead in 2004-2008, Philip Morris plans a short-term strategy of marketing through packaging onserts, expanded direct mail, and a rewards card that is preloaded with a fixed dollar amount for cigarette purchases and a long-term strategy of controlled internet access, or “internet sites marketing cigarettes” to include selling cigarettes on-line, or by phone, fax or mail orders. (¶ 3099)

Brown & Williamson

- As of August 31, 2004, B&W had no government-issued identification age verification or third-party age verification for approximately half of the [25,765,23] individuals contained in its direct mail database. (¶ 3106)
- In 2000, B&W sent mailings to 12,306,748 individuals whose age had only been self-certified. (¶ 3107)
- In 2003, B&W sent mailings to 3,687,547 individuals whose age had not been verified either through government-issued identification or third-party verification. (¶ 3107)
- As of August 31, 2004, B&W in 2004 had sent mailings to 2,061,714 individuals whose age had not been verified either through government-issued identification or third-party verification. In 2004, B&W also sent mailings to individuals under twenty-one whose age had not been verified through government-issued identification. (¶ 3107)
- B&W [sent] premium items to individuals whose age had not been verified either through government-issued identification or third-party

verification. In 2004, B&W also sent cigarettes through the mail to individuals whose age had not been verified through government-issued identification or third-party verification. (¶ 3108)

Lorillard

- Lorillard currently maintains two databases, both of which contain names of smokers whose ages have not been verified through a copy of government-issued identification or public records database. (¶ 3100)
- Lorillard, through its CEO Martin Orlowsky, admitted that “at times” it has sent mailings to individuals for whom it has no government-issued identification, and that it does not have third-party verification for every person to whom it mails. (¶ 3101)
- In 2000, Lorillard sent 4,181,593 mailings that included coupons for cigarettes to 2.6 million individuals for whom Lorillard has no third-party age verification and no government-issued identification on file. (¶ 3102)
- In 2003, Lorillard sent promotional mail to 2,261,881 different individuals for whom it had no third-party age verification and no government-issued identification on file. (¶ 3103)
- As of August 16, 2004, Lorillard had sent promotional mailings to more than 1.7 million individuals for whom it had no third-party age verification and no government-issued identification on file. These 1.7 million persons were sent 4.9 million total mailings. (¶ 3105)
- [A]s of August 16, 2004, Lorillard had no government-issued identification or third-party age verification for approximately 2,341,622 individuals contained in [one of its two] direct mail database[s]. (¶ 3105)

4. Retail Promotions

- The retail store has become one of Defendants’ central vehicles for communication of brand imagery and promotional offers. At retail stores, Defendants use retail promotion techniques including cash/rebates, free products, display cases to dealers, and special value added offers such as “two-for-one” to consumers, to encourage retailers to create tobacco friendly environments containing enticing displays, competitive prices, and visible point-of-sale advertising. (¶ 3110)
- The result of offering an array of marketing techniques is that convenience stores and gas stations frequented by teenagers are more likely to be tobacco friendly environments because they contain such a profusion of tobacco messages. (¶ 3110)
- A recent study funded by the Robert Wood Johnson Foundation examined the use of advertising and promotion in such stores and concluded that retail environments, such as convenience stores and gas retailers frequented by teenagers heavily promote tobacco use. (¶ 3110)
- Defendants compete with one another to obtain what they consider prime placement of their products in retail stores in order to achieve high consumer visibility. To ensure such placement, tobacco companies offer a variety of incentive programs (such as volume discounts and buydowns) to retailers. (¶ 3112)
- Defendants have engaged in a large post-MSA spending increase on various forms of promotion at the retail level. In 2000, tobacco companies spent \$9.57 billion dollars to market their products, the overwhelming majority of which was spent on marketing aimed at retail locations such as convenience stores. In those retail locations in 2000, tobacco companies spent \$4.26 billion on point of sale

advertising (e.g., in-store signs) and promotional allowances (payments to retailers for prime shelf space and in-store displays, as well as volume discounts and buydowns or rebates) and \$3.52 billion on retail value added items such as purchase-related gifts and multi-pack discounts. Combining the figures for point of sale advertising and promotional allowances, tobacco companies spent approximately 81.2% of their marketing expenditures at retail locations. (¶ 3126)

Philip Morris

- A September 1994 Philip Morris USA document, titled "POS [Point of Sale] Visibility Strategy," emphasized the importance of visibility at retail to drive Marlboro performance. The strategy's objective was "[t]o obtain & maintain leadership presence commensurate with Marlboro's market position. In other words, Marlboro should look like the 'BIGGEST BRAND' at retail on an ongoing basis." (¶ 3113)
- Philip Morris's Retail Leader program is a "merchandising program that helps ensure . . . visibility at retail." Over 85% of cigarettes are sold in stores which participate in the Retail Leaders program. For retailers who participate in this program, Marlboro will have the number one visibility spot at retail. If a participating store plans to have any cigarettes on the counter, then Marlboro cigarettes must be on the counter and in the number one position. If a retailer chooses to have outdoor signage, then Marlboro signage must be in the number one position. This program has been a major contributor to Marlboro being the number one brand. (¶ 3116)
- Philip Morris research found that its Retail Visibility Programs, in conjunction with its Retail Masters Program, made Marlboro the leading brand in visibility at convenience stores -- not only ahead of all other cigarette brands, but ahead of any other products carried at these stores. (¶ 3117)
- Philip Morris's Retail Leaders program will suspend retail stores only after three criminal convictions for underage sales. Philip Morris obtains information about convictions in retail stores from only about nineteen states. It does not require the retailer to provide this information. There is no evidence that Philip Morris has ever suspended a retailer for underage sales. Even if suspended, a retailer would remain free to sell Philip Morris cigarettes apart from participating in the program. Permanent termination from the Retail Leaders program is never authorized under any circumstances; a suspended retailer may re-enter a Retail Leaders contract at the start of the next twelve-month contract period. (¶ 3118)
- According to its "2003-2007 Five Year Plan," dated April 3, 2003, Philip Morris planned to "test concepts for a new wallet-sized Marlboro rewards card among young adult smokers in the fall of 2003 . . . to reinforce our equity messages and use an innovative approach to deliver incremental value that will continue to set our brands apart from those of our competitors." The proposed card would be preloaded with a fixed dollar amount that allows Marlboro smokers to make purchases wherever a major credit card is honored. (¶ 3128)

RJR

- Post-MSA, RJR has also increased its promotional spending and discounting. (¶ 3129)

Lorillard

- Under Lorillard's Excel merchandising program, retailers are provided with monetary incentives in exchange for agreements to provide Lorillard cigarettes with visibility of promotional signage equal to or exceeding that of competitors' brands. The number of stores under the Excel program has risen in the last several years. (¶ 3122)
- Lorillard has approximately 79,000 retail stores which participate in Excel.

Lorillard does not require retailers to report convictions for underage sales to the company. At present, only four states report convictions to Lorillard. In the four states reporting, more than 1,000 retailers have been convicted of underage sales. In November 2, 2001, Ron Milstein, Lorillard's General Counsel and Vice President, emailed Steve Watson, the executive level manager designated to reduce youth smoking and access to cigarettes under the MSA, asking him whether he was going to share Lorillard's information about these retailers' convictions for illegal sales with the National Association of Attorneys General or the individual state attorneys general. Watson responded: "Unless you think there is legal reasons [sic] to do so, I would be inclined not to share this info." Watson "was not inclined to share the information at this time with NAAG." (¶ 3123)

- Even if a retailer is convicted of selling to a minor, the Excel program only requires that she obtain training in the We Card Program. Upon the second conviction, the retailer is suspended for six months, and upon the third conviction, the retailer can be suspended indefinitely from participating in the Excel program. Such a retailer would, however, continue to be able to sell Lorillard cigarettes, apart from participation in the program. (¶ 3124)
- Lorillard has opposed bans or limitations on self-service display advertising in retail stores in the past and has not changed its position on this issue. Lorillard continues to oppose legal restrictions on self-service merchandising despite its stated support in its Corporate Principles of "further legislative efforts to curb youth access to tobacco." (¶ 3125)

5. Promotional Events

- Defendants continue to hold and advertise events such as "Bar Nights" that reach youth. (¶ 3130)

- The cigarette company Defendants have increased their event budgets since signing the MSA. (¶ 3131)
- Defendants often promote their events – and therefore their cigarette brands – in free newspapers available to anyone. (¶ 3132)

B&W

- In 2000, B&W sponsored the "Band to Band" 2000 Music Competition, "a rock oriented, nationwide band-based talent search" which offered over \$100,000 in cash and prizes and promoted one of B&W's flagship brands, Lucky Strike. B&W support for the program, which began in 1996, included "promotions, posters and media buys for the bands." In 2000, "Band to Band" program events were scheduled to take place in major cities such as Washington D.C., Chicago, Miami, Los Angeles, and Houston. (¶ 3134)
- The age of individuals attending [*promotional*] events was not always verified. An internal Lorillard document describes how David Desandre, a Lorillard marketing employee, and Beth Crehan, an employee of a marketing promotion firm, were able to attend a Lucky Strike "Band to Band" event held at Park West Concert Hall in Chicago on November 11, 2000 without being asked for any identification. Inside the Concert Hall were "pole banners with the Lucky Strike Band to Band tag-line" as well as additional banners and signs. Desandre described how, while he was filling out a form to receive a free CD, a Lucky Strike staff member "threw me a pack of Lucky Strike cigarettes . . . she did not ask me if I was 21 or a smoker. She also did not ask for my id. Beth Crehan was also not asked if she was 21 or a smoker. Beth was also not asked for id." (¶ 3135)

6. Sponsorships^v

- Defendants sponsor televised racing events which have great appeal with youth. As a result, millions of youth watching these events are exposed to Defendants' cigarette marketing imagery. (¶ 3136)
- The cigarette company Defendants have increased their sponsorship budgets since signing the MSA. In 1999, Defendants spent \$267.4 million on sponsorships, an increase of 7.6 % from 1998. (¶ 3137)
- Sponsorships allow the cigarette company Defendants to garner national television exposure, despite the broadcast ban on televised cigarette advertising. Races are broadcast on television and radio, and are covered in newspapers and magazines; each of these types of media coverage mention the cigarette brand that sponsors the race itself or the individual race car and driver. For example, the Winston Cup NASCAR race series with over thirty races annually was broadcast on radio and television; race highlights were also shown on television news programs and in newspapers and were featured in magazine sports columns. Often, broadcast coverage of Defendant-sponsored races is required under the broadcast contract. (¶ 3138)
- Cigarette brand names are reinforced not only on the race cars themselves, but also on drivers' uniforms, team uniforms, hats, and the large transporters used to move cars from event to event. The events themselves offer marketing opportunities for trackside billboards, sampling, hospitality tents, and promotional

giveaways, like hats, sunglasses, and programs. (¶ 3140)

- The television exposure gained by Defendants' sponsorship of racing events is obviously extremely valuable – especially in light of the ban on broadcast advertising. For example, in 1999, for the three main tobacco-sponsored auto racing series – NASCAR Winston Cup, CART FedEx Championship (where Marlboro and Kool sponsor racing teams and Philip Morris offers the Marlboro Pole Award), and NHRA Winston Drag Racing -- the tobacco industry received over \$120 million of television exposure in the United States alone. (¶ 3142)
- Races continue to be very popular televised programs. Millions of young people under the age of eighteen watch Defendants' racing events. In April 2000, NASCAR television ratings were double those of an NBA playoff game in a competing time slot. (¶ 3148)

7. Promotional Items

- Defendants' marketing reaches youth by providing promotional items – gifts such as t-shirts, mugs, or lighters – at retail and via direct mail. (¶ 3153)
- A 1992 Gallup survey revealed that almost half of adolescent smokers and one quarter of nonsmoking adolescents had received promotional items from tobacco companies. (¶ 3154)
- Defendants currently continue to provide individuals with promotional items that appeal to youth. For example, on May 7, 2003, B&W issued a press release titled "Kool Connects Consumers with Free Motorola Pager Offer." The press release described an opportunity for consumers to purchase specially marked packs of Kool and receive coupons redeemable for a Motorola pager. The press release quoted Ledo Cremers, Divisional Vice President for Kool brand marketing, as stating: "Kool celebrates urban living . . . [t]he Motorola pager promotion fits

^v MSA Section III places specific restrictions on brand-name sponsorships. Among other things, it prohibits brand name sponsorship consisting of events "in which the intended audience is comprised of a significant percentage of Youth" and "events in which any paid participants or contestants are Youth."

into the lifestyle [sic] of Kool consumers who want to be connected.” The press release indicated that the Motorola pager promotion would “be supported by advertising in newspapers, national magazines, and alternative media.” (¶ 3155)

B. Material Misrepresentations

MSA Section III(r) states:

No Participating Manufacturer may make any material misrepresentation of fact regarding the health consequences of using any Tobacco Product,^{vi} including any tobacco additives, filters, paper or other ingredients. Nothing in this subsection shall limit the exercise of any First Amendment right or the assertion of any defense or position in any judicial, legislative or regulatory forum.

Evidence of tobacco company misrepresentations regarding the health consequences of Tobacco Product use abounds in the findings. The major areas in which such misrepresentations have occurred concern: (1) environmental tobacco smoke (“ETS”); (2) nicotine addiction; (3) nicotine manipulation; (4) health effects/causation; and (5) low tar/light cigarettes. The findings establish that in each of these areas, the companies were internally aware of certain key facts yet publicly made misleading statements about them.

Note that MSA Section III(r) provides an exception for statements made in judicial, legislative or regulatory forums. Thus, any material misrepresentation made in this or other court cases – for example, in a deposition or in-court testimony – cannot be

^{vi} The MSA defines “Tobacco Products” as “cigarettes and smokeless tobacco products.”

considered an MSA violation. However, if a witness testified in court that a tobacco company previously made a statement that constitutes a material misrepresentation, the exception does not apply to that statement; it only applies to those statements made *in* a judicial, legislative or regulatory forum.

1. Environmental Tobacco Smoke

On June 26, 2006, the U.S. Surgeon General issued a report entitled “The Health Consequences of Involuntary Exposure to Tobacco Smoke.”²² The report, which expanded the conclusions reached in a 1986 Surgeon General’s report,²³ concluded the following regarding ETS (referred to in the report as “secondhand smoke”):

- Secondhand smoke causes premature death and disease in children and in adults who do not smoke.
- Children exposed to secondhand smoke are at an increased risk for sudden infant death syndrome (SIDS), acute respiratory infections, ear problems, and more severe asthma. Smoking by parents causes respiratory symptoms and slows lung growth in their children.
- Exposure of adults to secondhand smoke has immediate adverse effects on the cardiovascular system and causes coronary heart disease and lung cancer. The scientific evidence indicates that there is no risk-free level of exposure to secondhand smoke.
- Many millions of Americans, both children and adults, are still exposed to secondhand smoke in their homes and workplaces despite substantial progress in tobacco control.
- Eliminating smoking in indoor spaces fully protects nonsmokers from exposure to secondhand smoke. Separating smokers from nonsmokers, cleaning the air, and ventilating

buildings cannot eliminate exposures of nonsmokers to second-hand smoke.

Additionally, the findings state the following regarding ETS:

- The consensus of the public health community is that ETS causes disease in nonsmokers. (p. 1211)
- Internally, Defendants recognized that ETS is hazardous to nonsmokers. (p. 1239)

ETS's harmful nature, and Defendants' undisputable recognition of such, is thus abundantly clear. Any post-MSA representations that Defendants made denying the dangers of ETS therefore may constitute material misrepresentations in violation of the MSA. This is especially true of any statements made after the Surgeon General's report was issued in June 2006. Judge Kessler's statements regarding post-MSA misrepresentations appear in the findings as follows:

- Despite the positions of the public health authorities and despite their own internal recognition of the link between ETS and disease in nonsmokers, Defendants made numerous public statements denying the linkage. (¶ 3793)
- Despite the fact that Defendants' own scientists were increasingly persuaded of the strength of the research showing the dangers of ETS to nonsmokers, Defendants mounted a comprehensive, coordinated, international effort to undermine and discredit this research. (¶ 3861)
- Defendants poured money and resources into establishing a network of interlocking organizations. They identified, trained, and subsidized "friendly" scientists through their Global Consultancy Program, and sponsored symposia all over the world from Vienna to Tokyo to Bermuda to Canada featuring those "friendly" scientists, without revealing their substantial

financial ties to Defendants. They conducted a mammoth national and international public relations campaign to criticize and trivialize scientific reports demonstrating the health hazards of ETS to nonsmokers and smokers. (¶ 3861)

- Defendants still continue to deny the full extent to which ETS can harm nonsmokers and smokers. Some Defendants, such as . . . R. J. Reynolds . . . and Lorillard, flatly deny that secondhand smoke causes disease and other adverse health effects; some, such as Brown & Williamson, claim it's still "an open question"; and others, such as Philip Morris, say that they don't take a position and that the public should follow the recommendations of the public health authorities. To this day, no Defendant fully acknowledges that the danger exists. (¶3862)

Philip Morris

- When Philip Morris Companies originally established the Philip Morris website in October 1999, its public position on passive smoking was that while "many scientists and regulators have concluded that ETS poses a health risk to nonsmokers," Philip Morris did not agree with these conclusions. (¶ 3839)
- From 1999-2001, the Philip Morris website publicly stated its disagreement with the scientific consensus as well:

Many scientists and regulators have concluded that ETS poses a health risk to nonsmokers. Even though we do not agree with many of their conclusions, below we have provided some links so you can access some of their views. (¶ 3844)
- While this case was pending, Philip Morris revised its position on ETS to delete its disagreement with the conclusions of "scientists and regulators." Philip Morris now states: "Public health officials have concluded that secondhand smoke from cigarettes

causes disease, including lung cancer and heart disease in nonsmoking adults” as well as a number of adverse health effects in children. (¶ 3845)

RJR

- Reynolds continues to publicly and directly deny that secondhand smoke causes diseases and other adverse health effects in nonsmokers. Reynolds’s position on its website is that it believes “that there are still legitimate scientific questions concerning the reported risks of secondhand smoke.” Reynolds’s website further states:

Considering all of the evidence, in our opinion, it seems unlikely that secondhand smoke presents any significant harm to otherwise healthy nonsmoking adults at the very low concentrations commonly encountered in their homes, offices and other places where smoking is allowed. We recognize that exposure to high concentrations of secondhand smoke may cause temporary irritation, such as teary eyes, and even coughs and wheezing in some adults. In addition, there is evidence that secondhand smoke, like other airborne irritants, or allergens such as pollen and dust may trigger attacks in asthmatics. (¶ 3830)

- Mary Ward, an in-house attorney for Reynolds until 2004, testified that the Reynolds position on passive smoking has not changed since she joined the company in 1985, with the exception of admitting that ETS “may trigger attacks in asthmatics.” (¶ 3830)

B&W

- B&W also continues to publicly deny that secondhand smoke causes diseases and other adverse health effects in nonsmokers. The company’s 2003 website stated: “It is, therefore,

our view that the scientific evidence is not sufficient to establish that environmental tobacco smoke is a cause of lung cancer, heart disease, or other chronic diseases.” (¶ 3834)

- In 2004, the B&W public corporate position was revised to state its disagreement in slightly different terms: “In our opinion and in the opinion of others, however, there are legitimate scientific questions concerning the extent of the chronic health risks of ETS.” (¶ 3834)

Lorillard

- Lorillard also continues to dispute publicly and directly disagree with the scientific consensus. On October 14, 2003, Lorillard issued a press release announcing a favorable verdict in the Miami case of a former flight attendant who alleged her chronic sinusitis and bronchitis were caused by ETS exposure over 27 years of working for airlines. After stating the trial result and providing a summary of the allegations, the press release stated: “Jurors are increasingly seeing through the transparent body of evidence in these types of cases, and we will continue our vigorous defense against any and all such future claims.” The press release was picked up and run in the Los Angeles Times the next day. (¶ 3832)
- Lorillard general counsel Ron Milstein testified that his company has never admitted in any forum that ETS exposure causes disease, and that the October 2003 press release was in line with the company’s position that ETS is not a proven health hazard. (¶ 3833)
- Lorillard’s current website does not admit that ETS causes disease in nonsmokers. Instead Lorillard directs consumers to the findings of public health authorities on ETS. (¶ 3833)

2. Nicotine Addiction

The findings state the following regarding the addictive properties of nicotine:

- Cigarette smoking is addictive and nicotine is the primary element of that addiction. (p. 333)
- Defendants were well aware that smoking and nicotine are addictive. (p. 350)

The MSA prohibits only “material misrepresentations” about smoking’s health effects. A Defendant’s failure to admit that nicotine is addictive likely would not qualify as such an affirmative misrepresentation. However, given their knowledge about addiction, any post-MSA representations that Defendants made confusing or distorting the truth about addiction, such as statements minimizing the strength of nicotine addiction or the difficulty of quitting, may constitute material misrepresentations in violation of the MSA. Judge Kessler’s statements regarding such misrepresentations appear in the findings as follows:

RJR

- A May 4, 1999 draft RJR document denied the addictiveness of smoking, stating that “the word addiction means different things to different people and to some people it is a very emotive word. It’s true that some smokers may find it very difficult to stop smoking and there are some smokers who believe that they are addicted to cigarettes. But the fact is that cigarettes do not have the addictive qualities of hard drugs such as heroin.” (¶ 1180)
- In a May 2002 RJR document titled “Guiding Principles,” the company stated its position regarding addiction in a section called “Quitting and Addiction.” In this section, the company again demonstrated the cigarette industry’s refusal to make an unqualified admission that cigarette smoking is addictive: “Many people

believe that smoking is addictive, and as that term is commonly used today, it is. Many smokers find it difficult to quit and some find it extremely difficult.” RJR later added that “[h]owever, we disagree with characterizing smoking as being addictive in the same sense as heroin, cocaine or similar substances.” In addition, there was no mention of RJR’s knowledge of the role of nicotine in maintaining addiction to smoking. (¶ 1182)

B&W

- In 1999, B&W posted on its website a document called “Hot Topics: Smoking and Health Issues.” While this document did admit that “by some definitions, including that of the Surgeon General in 1988, cigarette smoking would be classified as addictive,” it went on to state that: Brown & Williamson believes that the relevant issue should not be how or whether one chooses to define cigarette smoking as addictive based on an analysis of all definitions available. Rather, the issue should be whether consumers are aware that smoking may be difficult to quit (which they are) and whether there is anything in cigarette smoke that impairs smokers from reaching and implementing a decision to quit (which we believe there is not.) (¶ 1198)
- On its current website, B&W recites its new public position that it “agrees that, by current definitions of the term ‘addiction,’ including that of the Surgeon General in 1988, cigarette smoking is addictive.” Two paragraphs down from this, however, B&W reverts to its former denials, omitting any reference to nicotine and stating the following: Although smoking can be very difficult to quit, we do not believe that the term “addiction” should be used to imply that there is anything in cigarette smoke that prevents smokers from reaching and implementing a decision to quit. Smoking may indeed be difficult to quit, but people can quit and do so in large numbers. The scientific literature demonstrates that

smokers who believe they can quit, and who believe that the benefits of quitting outweigh the enjoyment of continuing to smoke, can do so. (¶ 1250)

- B&W's current Nicotine and Addiction section does not even discuss nicotine or its effects on the human body. In sum, the B&W current, post-MSA position continues to deny that any aspect of smoking "prevents" a smoker from quitting. Moreover, this position continues to confuse and distort the facts on addiction, namely that smoking is very difficult to quit primarily because of nicotine and that quitting is not simply a question of willpower and motivation. At the same time, the position refers to "the enjoyment of continuing to smoke," suggesting that smokers smoke simply for continued "enjoyment," as opposed to a physiological craving or need for nicotine. (¶ 1251)

3. Nicotine Manipulation

The findings state the following regarding nicotine manipulation:

- For decades, Defendants have recognized that controlling nicotine delivery, in order to create and sustain smokers' addiction, was necessary to ensure commercial success. (p. 517)
- Defendants researched, developed, and utilized various designs and methods of nicotine control to ensure that all cigarettes delivered doses of nicotine adequate to create and sustain addiction. (p. 567)

Manipulating the nicotine in cigarettes can increase their addictiveness and further damage the health of the smoker. Accordingly, any post-MSA industry denials that they manipulate nicotine may constitute material misrepresentations regarding the health effects of smoking in violation of the MSA. Judge Kessler's statements regarding such misrepresentations appear in the findings as follows:

- Defendants' public denials of nicotine manipulation continue. (¶ 1751)
- As of 2004, Philip Morris's current public Internet website states that: "[S]ome have alleged that we use specific ingredients to affect nicotine delivery to smokers. That is simply not true." (¶ 1751)
- As of 2004, RJR's public Internet website states that RJR "do[es] not add nicotine or any nicotinic compounds to any of our cigarettes, nor do we do anything to enhance the effects of nicotine on the smoker." This statement has been on RJR's website for several years. (¶ 1752)
- As of 2004, B&W's current public Internet website states that: "Brown & Williamson does not in any way control the level or nature of nicotine in cigarettes to induce people to start smoking or to prevent people from quitting." (¶ 1953)

4. Health Effects/Causation

The findings state the following regarding the significant adverse health consequences of smoking:

- Cigarette smoking causes disease. (p. 219)
- Before 1964, Defendants internally recognized the growing evidence demonstrating that smoking causes significant adverse health effects. (p. 251)
- Defendants' internal documents and research from the 1960s, 1970s and beyond reveal their continued recognition that smoking causes serious adverse health effects[.] (p. 279)

Thus, given their knowledge about causation, any post-MSA representations that Defendants made denying the adverse health effects of smoking may constitute material misrepresentations in violation of

the MSA. Judge Kessler's statements regarding such misrepresentations appear in the findings as follows:

- From at least 1953 until at least 2000, each and every one of these Defendants repeatedly, consistently, vigorously – and falsely – denied the existence of any adverse health effects from smoking. Moreover, they mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an “open question.” Finally, in doing so, they ignored the massive documentation in their internal corporate files from their own scientists, executives, and public relations people that, as Philip Morris's Vice President of Research and Development, Helmut Wakeham, admitted, there was “little basis for disputing the findings [of the 1964 Surgeon General's Report] at this time.” (¶ 824)
- For more than forty years after issuance of the Frank Statement in 1954, and for more than thirty years after issuance of the Surgeon General's first Report on smoking and health, Defendants maintained their position denying the causal relationship between smoking and disease. Finally, in 1999, Philip Morris launched a corporate website acknowledging the “overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema, and other serious disease in smokers.” Despite this acknowledgment of the “overwhelming medical and scientific consensus,” Philip Morris could not bring itself to clearly state its agreement with that consensus until October 2000. Philip Morris still does not include the information on its cigarette packaging that it agrees that smoking causes cancer and other diseases in smokers. (¶ 826)

- Neither RJR, Lorillard, nor B&W, have openly admitted that smoking causes cancer. Indeed, in 2000, two years after the effective date of the Master Settlement Agreement, B&W was putting the following message on its website: “We know of no way to verify that smoking is a cause of any particular person's adverse health or why smoking may have adverse health effects on some people and not others.” (¶ 827)

Philip Morris

- Prior to October 1999, Philip Morris's public position on disease causation was that smoking cigarettes was a risk factor for many diseases, but may or may not cause them. Steve Parrish admitted that Philip Morris's “risk factor” position was at odds with the position of the public health authorities who had stated for decades that smoking was not merely a risk factor for certain diseases, but caused these diseases as well. (¶ 809)
- Finally, on October 13, 1999, when Philip Morris launched a corporate website, it changed its public position on smoking and health issues. The website stated: “There is an overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema, and other serious disease in smokers.” Steve Parrish, Senior Vice President of Corporate Affairs for Altria Group, acknowledged that the overwhelming scientific consensus referenced in the October 1999 statement had existed for decades. Parrish further conceded that Philip Morris's refusal to acknowledge prior to October 1999 that smoking caused disease had damaged the company's credibility because there was no support for Philip Morris's view outside of the tobacco industry. (¶ 810)
- Although Philip Morris recognized the “overwhelming medical and scientific consensus,” regarding the causation of disease by cigarette smoking in 1999, it did not state its agreement with that

consensus until October 2000. Parrish acknowledged that Philip Morris changed its position on causation in 2000 because of criticism from the public health community, and that Philip Morris's decision to state its agreement with the "overwhelming medical and scientific consensus" was not based on any new scientific evidence. The scientific basis for the "overwhelming medical and scientific consensus" had existed for decades prior to Philip Morris's decision to state its agreement with it. (¶ 811)

- Although Philip Morris is free to voluntarily change the information it includes on its cigarette warning labels, it has chosen not to change those labels even though in October 2000, the company changed its public position to admit that smoking causes disease and is addictive. (¶ 812)
- Philip Morris has never told its customers on its cigarette packaging or in inserts that it agrees that smoking causes cancer and other diseases in smokers. Its packages merely direct smokers to its website address. (¶ 813)

RJ Reynolds

- RJR's website...does not admit that smoking is a cause of disease. Instead, it states: "We produce a product that has significant and inherent health risks for a number of serious diseases and may contribute to causing these diseases in some individuals." (¶ 814)

B&W

- Two years after the effective date of the Master Settlement Agreement, in 2000, B&W told visitors to its website: "We know of no way to verify that smoking is a cause of any particular person's adverse health or why smoking may have adverse health effects on some people and not others." (¶ 821)

5. Low tar/light Cigarettes

The findings state the following regarding low tar/light cigarettes:

- Low tar/light cigarettes offer no clear health benefit over regular cigarettes. (p. 742)
- Based on their sophisticated understanding of compensation, Defendants internally recognized that low tar/light cigarettes offer no clear health benefit. (p. 786)
- Defendants internally recognized that smokers switch to low tar/light cigarettes, rather than quit smoking, because they believe they are less harmful. (p. 819)
- Defendants internally recognized that smokers rely on the claims made for low tar/light cigarettes as an excuse/rationale for not quitting smoking. (p. 843)

Thus, given their knowledge about low tar/light cigarettes, any post-MSA representations that Defendants made claiming that low tar/light cigarettes offer health benefits over conventional cigarettes may constitute material misrepresentations in violation of the MSA. Additionally, in light of the companies' internal recognition that smokers use low tar/light cigarettes instead of quitting because they believe the product are less harmful, claims the companies made asserting that they used "low tar/light" labels merely to differentiate between brands of cigarettes in terms of taste may also be considered material misrepresentations. Judge Kessler's statements regarding such misrepresentations appear in the findings as follows:

Philip Morris

- As recently as 2003 and 2004, the Board of Directors of Altria (formerly known as Philip Morris Companies), publicly made misleading statements to its shareholders and to the U.S.

Securities and Exchange Commission (“SEC”) in documents filed with the SEC. In a March 17, 2003 Proxy Statement, a group of Altria shareholders proposed to the Altria Board of Directors that “the Board find appropriate ways of informing our customers about the actual health risks of smoking ‘light and ultra light’ cigarettes to disassociate them from any belief that such products are safer and deliver less tar and nicotine.” The shareholder proposal cited [*National Cancer Institute*] Monograph 13²⁴ which found that “most smokers believe ‘Lights’ and ‘Ultra Lights’ are less harsh and deliver less tar and nicotine,” and that, “on average, smokers believe that Lights afford a 25% reduction in risk, and Ultra Lights a 33% reduction in risk;” the Canadian Government’s conclusion that the terms low tar, light and ultra light are deceptive to the consumer; and the World Health Organization’s recommendation that the terms light and ultra light be banned as misleading. The Board of Directors of Altria recommended that shareholders vote against this proposal, stating: “for those adults who choose to smoke, PM USA and PMI believe descriptors such as ‘low-tar,’ ‘mild,’ and ‘light’ serve as useful points of comparison for cigarette brands regarding characteristics such as strength of taste and reported tar yield.” (¶ 2480)

- In May 2004, Philip Morris placed the following statement on its website: “Philip Morris USA does not imply in its marketing, and smokers should not assume, that lower-yielding brands are safe or safer than full-flavor brands. There is no safe cigarette.” (¶ 2481)
- Philip Morris further states on its website:

Because smokers have varying preferences, Philip Morris USA offers products with differing yields of tar and nicotine, as measured by machine methods. We believe that it is appropriate to continue to differentiate our

brands on this basis and that descriptors such as “lights,” “ultra-lights,” “medium” and “mild” help communicate these differences to adult smokers. (¶ 2482)

- Philip Morris[’s *June 2003*] website stat[ed the] same and further stat[ed] “we believe that [low tar brand] descriptors serve as useful points of comparison for cigarette brands regarding characteristics such as strength of taste and reported tar yields . . .”) (¶ 2482)

RJR

- [*In May 2004,*] RJR’s website . . . stated: Our company, like other cigarette manufacturers, uses brand descriptors such as “full flavor,” “lights” and “ultra lights” to differentiate cigarette brand-styles in terms of such characteristics as strength of taste, and reported “tar” and nicotine yield. These terms do not, and are not meant to, imply that any cigarette brand-style or any category of cigarettes is safer than any other. (¶ 2514)
- A March 21, 2003 RJR statement to stockholders presented a proposal “to find appropriate ways of informing our customers about the actual health risks of smoking ‘light and ultra light’ cigarettes to disassociate them from any belief that such products are safer and deliver less tar and nicotine.” This proposal cited the conclusions of NCI Monograph 13 that low tar cigarettes present no significant reduction in harmfulness relative to full-flavor cigarettes, and that “many smokers choose these products as an alternative to cessation” out of a mistaken belief that they are less harmful. The proposal also referenced several pending lawsuits against one or more of the Defendants alleging fraudulent marketing of low tar cigarettes as less harmful. The Board of Directors of RJR recommended a vote against this proposal. One of the reasons given by RJR for rejecting this proposal was that, “if implemented, this

proposal could significantly interfere with RJR's defense of pending litigation." (¶ 2515)

B&W

- Susan Ivey, President and CEO of B&W, admitted at trial that B&W "has been aware for many years" that some smokers compensate when smoking low tar cigarettes. B&W takes a different position on its website, which states that "[t]he question of why compensation occurs is still the subject of scientific research, and the relative importance of tar versus nicotine in determining compensation is unclear." The website also states that "how much smokers alter their behavior when they switch to lower tar products, and for how long, is still unclear." The website also states that "our studies show that, as actually smoked by consumers, lower tar cigarettes will generally deliver less tar and nicotine than higher tar cigarettes, and cigarette deliveries generally align with the ranges associated with the descriptors: ultra lights, lights, and full flavor." (¶ 2372)
- Despite the substantial evidence already referred to, supra, that B&W was aware that consumers interpreted its low tar brand descriptors to be indicative of a less harmful cigarette, in May 2004, B&W stated on its website that brand descriptors were intended only to communicate taste:

Cigarette brands in the U.S. are usually identified on packs, cartons and advertising as belonging to the following categories: "Ultra Lights" or "Ultra Low Tar," "Lights" or "Low Tar," and "Full Flavor. . . ." Recent published studies suggest that the majority of smokers use descriptors to guide their product selection based on taste. . . . It is not Brown & Williamson's intention to suggest that any individual brand, regardless of the category descriptor terminology

used, or tar yield, is safer than any other. (¶ 2556)

C. Dissolution of Tobacco-Related Organizations

MSA Section III(o) states, in part:

....
(3) Within 45 days after Final Approval, the Center for Indoor Air Research, Inc. ("CIAR")^{vii} shall cease all operations and be dissolved...
....

The findings evidence the fact that CIAR continued some activity after it dissolved. Additionally, it reconstituted in the form of Philip Morris's External Research Program (PMERP). Although the MSA only prohibited the reconstitution of the Council for Tobacco Research specifically,²⁵ the reformation of CIAR demonstrates that the organization was never genuinely dissolved and its operations did not cease. This is especially true in light of the fact that Defendants were discussing the formation of CIAR's replacement prior to its dissolution.

^{vii} The tobacco industry formed CIAR in 1988

to carry out industry-funded research related to passive smoking; the original charter members were Defendants Philip Morris, Reynolds, and Lorillard. Although CIAR had a Scientific Advisory Board to review the merit of project proposals, only the CIAR Board of Directors had authority to approve a project for funding. Moreover, a large number of industry-favorable CIAR projects were approved directly by the CIAR Board of Directors without any review by its SAB.

Opinion, ¶ 362.

The findings state the following as to this issue:

Continued CIAR Activity

- As one example of CIAR's continued activities, in 2000, the second edition of the CIAR text by ETS consultant Roger Jenkins was published, with [*CIAR executive director*] Max Eisenberg listed as editor. The publication, titled "The Chemistry of Environmental Tobacco Smoke: Composition and Measurement," continues to dispute the known health effects of passive smoking and trivializing its role as an indoor air pollutant. According to Jenkins's introduction to his book: (1) "The degree to which ETS exposure represents a health hazard remains a point of contention"; and (2) "The contribution of ETS to the concentration of indoor air contaminants in commonly encountered environments is much less than is implied by the extreme values included in many tabulations of ranges observed." (¶ 3568)

CIAR Reconstituted

- Prior to CIAR's dissolution, Defendants were already forming a plan to establish a replacement. On November 25, 1998, Lorillard general counsel Arthur Stevens wrote a letter to Philip Morris general counsel Denise Keane with copies to Charles Blixt at Reynolds and Ernie Pepples at B&W. Stevens wrote: "Please call me later in the morning on Monday, November 30, 1998, so that we can discuss the status of the plan to reinstate CIAR. The matter seems to be 'dragging' without direction toward a positive resolution." The CIAR Board of Directors had a similar intent in 1998 to reconstitute CIAR. (¶ 3849)
- After entering into the MSA, Philip Morris continued its efforts to jointly fund industry research through structures that existed prior to the MSA, undertaking joint funding of external research with BATCo through Philip

Morris's Scientific Research Review Committee [*"SRRC"*]. (¶ 3857)

- On October 11, 1999, [*former CIAR executive director*] Eisenberg faxed Philip Morris a proposal to form an "External Research Program" to administer research with a Scientific Advisory Board, a research agenda, and peer reviewers. (¶ 3850)
- Philip Morris established the PMERP in early 2000, using the same offices in Linthicum, Maryland, that formerly housed CIAR, employing many of the same individuals who were employed by CIAR, and even using the same phone numbers as CIAR had used. The program is administered by an entity called Research Management Group (RMG), set up in 2000 solely to manage the PMERP. RMG has never managed any other program. RMG is headed by Max Eisenberg, the former executive director of CIAR. (¶ 3851)
- Eisenberg and Philip Morris established a "Research Focus" and Request for Applications for PMERP in the same way that the Research Agenda and Request for Applications were established for CIAR. The PMERP utilized a number of former CIAR peer reviewers and grantees . . . All told, 44 out of the 105 peer-reviewers listed by PMERP in its 2000 Request for Applications were drawn from the peer reviewer list in the 1998 CIAR Request for Applications. Moreover, 53 of the peer reviewers were former recipients of CIAR funding. Many researchers funded through CIAR have continued to receive funding through the PMERP. Through the PMERP, Philip Morris continues to manage projects conducted by . . . CIAR researchers . . . (¶ 3852)
- Eisenberg also organized the formation of a Scientific Advisory Board (SAB), similar in structure to the CIAR SAB. The PMERP SAB was originally staffed with two former members of the CIAR SAB. (¶ 3853)

- The subject matter of the research funded through the PMERP is very similar to that funded through CIAR. The first research topic area in the PMERP Research Agenda is “Exposure/Biomarkers/Dosimetry,” a subject that includes the very same types of work that were funded as Applied Projects by CIAR. For example, PMERP funds work investigating “area and personal monitoring,” “biological monitoring with biomarkers,” and exposure assessment. (¶ 3854)
- The PMERP also solicits epidemiological research proposals to study risk factors and confounders in the development of cancer. (¶ 3855)

D. Youth Smoking Prevention Programs

In addition to prohibiting youth targeting, the MSA also contains a provision through which each participating manufacturer stated a commitment to reducing underage tobacco use by discouraging such use and by preventing youth access to tobacco products.²⁶ Additionally, each manufacturer pledged to: create or affirm corporate principles expressing and explaining its commitment to the reduction of youth tobacco usage; clearly and regularly communicate its commitment to assist in such reduction to its employees and customers; designate an executive level manager to identify methods to reduce youth access to and consumption of tobacco; and encourage its employees to identify additional methods to achieve such reduction and consumption.²⁷

Despite these commitments, however, the Defendants’ youth smoking prevention (“YSP”) programs have been underfunded and understaffed, and “no efforts have been made to validate their effectiveness amongst the total population.”²⁸ Judge Kessler cited four strategies with a proven record of effectiveness in preventing youth smoking,²⁹ then stated that Defendants have not adopted these strategies. Instead, she stated,

Defendants’ youth smoking prevention programs have focused on: “(a) school-based and community prevention programs; (b) media campaigns; and (c) programs targeting parents.”³⁰ Additionally, Judge Kessler noted, “[p]ersonnel assigned to these YSP Programs by the Defendants are often given impressive sounding titles but lack experience or skills relevant to the task of preventing youth smoking and face an inherent conflict of interest.” The findings state the following regarding these points:

School-based and community prevention programs

- Philip Morris continues to increase its marketing expenditures in grossly disproportionate amounts to its spending on youth smoking prevention. Philip Morris’s 2003 Financial Forecast Budget includes a budget of \$110 million for youth smoking prevention, \$8.9 million greater than its 2002 spending, “primarily due to increased spending for adult cessation programs.” In contrast, in that year, Philip Morris spent more than \$7.1 billion on sales incentives and product promotions. (¶ 3160)
- Although Philip Morris, RJR, and B&W have each supported the implementation of school-based youth smoking prevention programs, they are often not effective because of the failure to implement the program as rigorously as the research study justifying it calls for. (¶ 3161)
- Lorillard also funded a school based program, “Making it H.I.P. Not to Smoke” which consisted of scholarship programs and other cash awards. A randomized control trial on the Lorillard program found that it did not deter adolescent smoking. (¶ 3161)
- Of greater concern is the fact that Philip Morris, RJR, Lorillard, and B&W direct their youth smoking prevention efforts towards early adolescents and ignore older adolescents. About 1,250 young people per day become established

smokers (defined as smoking more than 100 cigarettes lifetime) at ages fifteen through seventeen, while about 725 per day become established smokers at ages eleven through fourteen. Thus, nearly two thirds of adolescents who smoke become established smokers in the later age range of fifteen through seventeen. The Philip Morris media campaign targeted youth ten to fourteen years old. Lorillard targets ten to fifteen year olds. RJR targets twelve to fifteen year olds. Several of B&W's activities target children and early adolescents. (¶ 3162)

- Lorillard's expenditures for the We Card Program decreased significantly in 1999 and 2000 over its pre-MSA funding level; they decreased from \$9.5 million in 1996 to \$6.1 million in 1997 and then to \$5.05 million in 1998. In 1999, the total program spending decreased to \$4.2 million. This reduction in funding significantly limited distribution of We Card materials and training sessions. (¶ 3164)
- There is no evidence that any Defendant has evaluated whether tobacco outlets participating in the We Card Program were actually not selling tobacco to young people or whether the program reduced the overall adolescent smoking prevalence rate. (¶ 3165)
- In fact, according to the Philip Morris commissioned 2003 TABS (Teenage Attitude and Behavior Survey), almost 70% of adolescent eleven to seventeen year old smokers who had bought cigarettes in the previous month purchased their cigarettes directly from the retail clerk where the clerk handed them the pack of cigarettes. Specifically, 43.8% of these eleven to fourteen year-olds, and 72.9% of these fifteen to seventeen year old smokers purchased their cigarettes from a retail clerk who handed them cigarettes. (¶ 3165)

Media campaigns

- Defendants also utilize media campaigns in their youth smoking prevention programs. Lorillard, RJR and Philip Morris have run televised national youth smoking prevention media campaigns. Lorillard ran the "Tobacco is Whacko – If You're a Teen" campaign, which included both print and broadcast advertising. Philip Morris has run the "Think. Don't Smoke." campaign, which began in 1998. RJR ran print ads as part of its "Right Decisions. Right Now" campaign. (¶ 3166)
- [B]oth Lorillard's and Philip Morris's media campaigns promote the message that smoking is an adult decision. Emphasizing that smoking is an adult activity underscores the desirability of engaging in adult behavior for adolescents who are particularly motivated to appear mature. Most of Lorillard's and Philip Morris's youth smoking prevention advertisements do not promote the social disapproval of youthful smoking which available research indicates is critical to their effectiveness. (¶ 3168)
- Although they have conducted focus groups on public reactions to the campaigns, no Defendant has evaluated whether its media campaigns are actually effective in reducing adolescent smoking or intentions to smoke. (¶ 3169)
- On April 13, 2001, California Attorney General Lockyer wrote a letter to Denise Keane, Philip Morris Senior Vice President and General Counsel, requesting immediate discontinuation of the "Think, Don't Smoke" campaign on the basis of research demonstrating that its message was ineffective and in fact diluted the effective anti-smoking messages of the states and the American Legacy Foundation which was created pursuant to the MSA. Philip Morris continued to air the "Think, Don't Smoke" advertisements for nine months after receiving this letter. (¶ 3171)

- Lorillard utilized the slogan “Tobacco Is Whacko – If You’re a Teen” in its youth smoking prevention media campaign. According to a February 2000 Lorillard report on the results of focus groups that were done with ten to fifteen year olds to get their reactions to Lorillard’s youth smoking prevention advertisements:
 - Respondents remembered the tag line, but had negative responses to it.
 - They complained that it was very young (younger than they are) and “cheesy.”
 - They particularly disliked the if you’re a teen part of “Tobacco is Whacko – If You’re a Teen.” They complained that this singled them out and that they believe it should apply to all ages. (¶ 3172)

Programs targeting parents

- Philip Morris, Lorillard, B&W, and RJR have also directed a variety of communications concerning youth smoking prevention to parents, including television advertisements, brochures, and workshops. Philip Morris started out with television ads and now distributes youth smoking prevention brochures to approximately one million parents who are on the Philip Morris mailing list. The RJR website describes, and includes the text of, three youth smoking prevention brochures intended for parents. As part of its “Take 10” campaign, Lorillard has placed youth smoking prevention print advertisements directed at parents in a number of magazines. The advertisements emphasize that by the teenage years, young people are often alienated from their parents and encourage parents to talk to their children. B&W has information for parents and an available video on its website. (¶ 3174)
- Beginning in June 2003, Philip Morris USA began to run television commercials directing viewers to its website, where it addresses smoking

and disease, addiction, quitting, and talking to kids about smoking.). While some of the ads may grab the viewers’ attention, the fact remains that those ads have never been evaluated to see if they are actually achieving their intended results, namely, impacting youth smoking incidence. The fact that parents or other adult viewers may find the ads persuasive casts no light on whether the seventeen to twenty-one year olds do. (¶ 3175)

- The evidence is mixed on whether such efforts to mobilize parents actually affect adolescent smoking prevalence. For example, one study randomly assigned parents to receive or not receive a set of four messages designed to encourage parents to set rules about tobacco use. There was no evidence that the messages deterred smoking. Moreover, research has found that flooding a community with pamphlets urging parents to talk to their children about not using tobacco had no discernible effect. (¶ 3176)
- Youth smoking prevention campaigns targeting parents should be routinely evaluated in terms of: (a) their efficacy in getting parents to talk to their children about not using tobacco or otherwise set limits around smoking; and (b) their actual impact on youth smoking. Defendants have not undertaken any such evaluations. (¶ 3177)
- Despite the fact that most smokers want to quit, RJR advises parents who smoke that, “[i]f you are like most smokers, you smoke because you enjoy it.” The B&W website advises, “[t]ell your children that laws exist to enforce smoking as a choice made by informed adults.” (¶ 3178)
- Defendants never recommend that parents inform their children that smoking kills more than 400,000 people each year, involves an addiction that most smokers desire to end, and will harm those around the smoker. Nor do Defendants ever suggest that parents,

as role models for their children, stop smoking. (¶ 3179)

Staffing of YSP Programs

- Defendants have failed to staff their YSP programs with individuals with experience or background in smoking prevention, prevention generally, or even youth issues. While it is understandable, as Defendants suggest, that YSP programs must be led by long-time employees with corporate credibility, that is no excuse for the total failure to hire persons with skills relevant to identifying and developing effective, empirically validated programs to prevent youth smoking. (¶ 3180)
- For example, Carolyn Levy, former Director of Youth Smoking Prevention at Philip Morris and a former research scientist, had no experience or background in prevention or youth smoking or youth issues and was unaware of even the basic prevention journals relied upon by prevention experts. Her successor and the current Senior Vice President for Youth Smoking Prevention, Howard Willard, had served previously as Senior Vice President of Quality and Compliance for Philip Morris, with no background in youth smoking prevention. (¶ 3180)
- Neither Claudia Newton, B&W Tobacco Corporation's Vice President, Corporate Responsibility and Youth Smoking Prevention, nor Theresa Burch, the head of B&W Tobacco Corporation's youth smoking prevention programs, had any experience in youth smoking prevention. (¶ 3181)
- Brennan Dawson, the longtime industry spokeswoman for the Tobacco Institute, had been B&W's Vice President for External Affairs (which includes YSP) and MSA Section III(1) designee, after Claudia Newton. Dawson had no college degree, no formal educational background in science or medicine, and no experience with youth smoking prevention or teen

behavioral research prior to taking the position. (¶ 3182)

- Steven Watson, Vice President of External Affairs for Lorillard, prior to joining Lorillard with responsibility for the oversight of Lorillard's Youth Smoking Prevention Program, had never done any research on risk perception or any work that required him to develop programs for youth. Nor was he asked if he had such experience when he was interviewing for the position at Lorillard. Interestingly, Watson did not even apply for the position of Vice President of External Affairs, but was contacted by Lorillard regarding the position. (¶ 3183)

Conclusion

Judge Kessler's opinion is a positive gain for public health in many important ways. It serves as valuable tool for plaintiffs' attorneys in future claims against the industry in that it supplies a roadmap to successful litigation, provides a wealth of documents, depositions, and trial testimony (much of which is available publicly) and has the potential to preclude future defense arguments through the doctrine of collateral estoppel. Moreover, the case has brought widespread attention to the fact that tobacco industry wrongdoing continues, and likely will continue into the future, despite some public perception that the companies have changed their behavior completely and are no longer bad actors.

Despite these positive aspects of the opinion, Judge Kessler was restrained in her ability to order remedies by an interlocutory appeals court decision narrowly interpreting RICO's remedies provision to allow only those remedies considered "forward-looking."³¹ Thus, for example, Judge Kessler was not able to meet the DOJ's request for the adoption of a national smoking cessation program as well as a public education and counter marketing

campaign.^{viii} She stated that such remedies would “unquestionably serve the public interest” and that the counter marketing campaign would “combat Defendants’ seductive appeals to the youth market.” However, she refrained from ordering them because under the appeal’s court’s narrow standard they are “not specifically aimed at preventing and restraining future RICO violations.”

MSA enforcement actions can help to counterbalance the chilling effect of the appeals court’s decision and can serve as another powerful way of using Judge Kessler’s opinion. Such enforcement actions can result in changes to industry behavior in many key areas that Judge Kessler discussed, such as youth access to cigarettes. In this way, the opinion can be used to change industry behavior in ways that Judge Kessler could not, thus maximizing the impact of the decision and its ability to effect positive changes to the health of the public.

^{viii} Judge Kessler did order some remedies – such as a ban on the use of “health descriptors” (light, low tar, etc.) for cigarettes. For a complete description of the remedies ordered, and not ordered, see: *USA v. Philip Morris USA, Inc., et al.*, Analysis of Judge Kessler’s Final Opinion and Order, available at: http://tobacco.neu.edu/litigation/cases/DOJ/doj_opinion_summary.pdf. The ordered remedies are stayed pending the case’s appeal to the United States Supreme Court.

APPENDIX

EXAMPLES OF PAST MSA ENFORCEMENT ACTIONS

Philip Morris

- State attorneys general have complained to Philip Morris that more than forty types of activities violate the MSA, including: anti-smoking billboards; brand names on third-party billboards; cartoon advertisements; coupon promotions; magazine advertisements; brand name merchandise; product placement in movies; and sponsorships.³²
- In 2001, Philip Morris entered its Marlboro brand race cars into two different racing leagues (MSA Section III(c) limits each Defendant to just one brand name sponsorship per year). Washington State Attorney General Christine Gregoire notified the company of the violation, and it removed Marlboro brand names from race cars and uniforms for one of the two racing leagues (though the brand's color and images remained).³³

RJ Reynolds

- On July 26, 2005, the State of Vermont with the support of several other states filed a complaint and petition for contempt alleging that RJR has violated MSA Section III(r), which prohibits Defendants from making “any material misrepresentation of fact regarding the health consequences of using any tobacco product.” The Complaint alleges that R.J. Reynolds mislead consumers into thinking that its potential reduced exposure cigarette was less risky than other cigarette brands without having credible scientific evidence to back up the claim.
- On December 30, 2004, the Ohio Supreme Court (affirming the court of appeals) held that RJR had violated MSA Section III(f)'s prohibition on distributing tobacco branded “merchandise” when it distributed paper matchbooks containing brand names of its products. The court stated that the MSA intended “to put an end to subtle but ubiquitous marketing of tobacco products . . . [such as] matchbooks[,] . . . key chains, pens, and clothing-items that, because of their usefulness, become tempting billboards for marketers. The MSA prohibition eliminates their availability for tobacco-product advertisement.”³⁴
- On November 4, 1999, state attorneys general met with RJR and voiced concern about its targeting youth in magazine advertising placement. Informal discussions failed to resolve the issue, and the California Attorney General filed a complaint on March 19, 2001. That same day, RJR announced a new policy of not placing advertisements in magazines with more than 25 percent youth readership; this move, however, eliminated only one magazine. The case proceeded to trial, where the court found that RJR had violated MSA Section III(a)'s “Prohibition on Youth Targeting,” and ordered the company to adopt measures to reduce youth exposure to RJR tobacco advertising to a level “significantly lower than the level of exposure to targeted groups of adult smokers” and to employ means to measure its success in reaching this goal. The court also ordered awarded sanctions of \$20 million. On February 25, 2004, the California Court of Appeal affirmed the trial court's decision in part and agreed that sanctions were justified, but it reversed the decision as to the amount of sanctions.³⁵ A settlement agreement was reached that laid down specific guidelines regarding the company's advertisement placement in magazines.

- On July 10, 2000, the Attorney General of California entered an “Application for Enforcement Order for Violation of the Consent Decree and Final Judgment.” This was based on the state’s allegations regarding RJR’s “massive, nationwide program to distribute free cigarettes through the United States mail, including to California residents” in violation of Section V.E of MSA’s Consent Decree.³⁶
- In 2003, courts of appeal in both Arizona and California found that RJR had violated the MSA’s prohibition of outdoor advertising (Section III(d)) and its limitations on the length of time that advertisements for brand name sponsored events can be posted at event sites (MSA Section III(c)(3)(E)(ii)).³⁷

Brown & Williamson

- Illinois, New York, and Maryland filed actions against Brown & Williamson alleging that its “Kool Mixx” marketing campaign violated the MSA’s prohibition against youth targeting (Section III(a)). On October 5, 2004 (two weeks after trial began), B&W settled the actions, agreeing to restrictions on future Kool Mixx promotions and monetary payments to support youth smoking prevention.³⁸
- Susan Ivey, current President and CEO of Reynolds American and Chairman and CEO of RJR, and former CEO of B&W, acknowledged receiving complaints about B&W’s “B Kool” advertising campaign from Governor Chiles of Florida. The company voluntarily discontinued the campaign in June 2000,³⁹ yet, according to Governor Chiles, it did not do so as a result of NAAG’s concerns.⁴⁰

About the Public Health Advocacy Institute

The Public Health Advocacy Institute (PHAI) is a public health law research and advocacy organization. PHAI is dedicated to protecting the health of the public. Our goal is to support and enhance public health understanding and commitment among law teachers and students, legislators and regulators, the courts, and others who shape public policy through the law.

Endnotes

- ¹ See *U.S. v. Philip Morris* (Final Opinion) (August 17, 2006) [hereinafter, “Opinion”] at p. 4, available at: <http://www.tplp.org/doj>.
- ² Centers for Disease Control and Prevention, Fact Sheet, Cigarette Smoking-Related Mortality (Updated September 2006), available at: http://www.cdc.gov/tobacco/data_statistics/Factsheets/cig_smoking_mort.htm.
- ³ 75B Am. Jur. 2d Trial Section 1968.
- ⁴ Federal Rule of Civil Procedure 52(a).
- ⁵ See *U.S. v. Philip Morris* (Complaint for Damages and Injunctive and Declaratory Relief) (September 22, 1999), available at: <http://www.usdoj.gov/civil/cases/tobacco2/complain.pdf>.
- ⁶ 18 U.S.C §§ 1961 *et seq.*
- ⁷ Opinion, *supra* note 1.
- ⁸ See *U.S. v. Philip Morris* (Order #1015 – Final Judgment and Remedial Order) (August 17, 2006) [hereinafter, “Order”], available at: <http://www.tplp.org/doj>.
- ⁹ Opinion, *supra* note 1, at p. 3.
- ¹⁰ *Id.* at p. 1606.
- ¹¹ See *U.S. v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005), available at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200502/04-5252a.pdf>.
- ¹² See Order, *supra* note 8.
- ¹³ *U.S. v. Philip Morris*, Nos. 06-5267 (D.C. Cir.) (Oct. 31, 2006) (Order Granting Defendants’ Emergency Motion to Stay).
- ¹⁴ See Master Settlement Agreement, available at: http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf. Four states – Minnesota, Mississippi, Florida and Texas – settled independently with provisions similar to the MSA.
- ¹⁵ For a very useful summary of enforcement actions regarding MSA marketing restrictions, see Dennis Eckhart (Tobacco Control Legal Consortium), *The Tobacco Master Settlement Agreement: Enforcement of Marketing Restrictions*, April 2004, p. 5. Available at: <http://www.wmitchell.edu/tobaccolaw/resources/eckhart.pdf>.
- ¹⁶ MSA VII(c)(6).
- ¹⁷ See MSA Section III(a).
- ¹⁸ See MSA Section III(r).
- ¹⁹ See MSA Section III(o).
- ²⁰ See MSA Section I (Recitals) and MSA Section III(l) (regarding corporate culture commitments related to youth access and consumption).
- ²¹ *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, No. GIC 764118, 2002 WL 1292994, at *4 (Cal. Superior Ct. June 6, 2002); *People, ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 116 Cal.App.4th 1253 (2004).
- ²² June 27, 2006. *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*. Available at: <http://www.surgeongeneral.gov/library/secondhandsmoke/report>.
- ²³ 1986. *The Health Consequences of Involuntary Smoking*. Available at: http://profiles.nlm.nih.gov/NN/B/C/P/M/_nncbpm.pdf.
- ²⁴ National Cancer Institute, *Monograph 13: Risks Associate with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine*, available at: http://cancercontrol.cancer.gov/tcrb/monographs/13/m13_complete.pdf.
- ²⁵ MSA Section III(o)(5).
- ²⁶ MSA Section I (“Recitals” Section).
- ²⁷ MSA Section III(f).
- ²⁸ Opinion, *supra* note 1, at ¶ 3157.
- ²⁹ *Id.* at ¶ 3158.
- ³⁰ *Id.* at ¶ 3159.
- ³¹ See *U.S. v. Philip Morris USA, Inc.*, 396 F.3d 1190 (D.C. Cir. 2005), available at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200502/04-5252a.pdf>.
- ³² *Id.* at ¶ 4065.
- ³³ *Id.* at ¶¶ 4066, 4067.
- ³⁴ See *Ohio ex rel. Petro v. R.J. Reynolds Tobacco Co.*, 104 Ohio St.3d 559 (2004).
- ³⁵ See Opinion, *supra* note 1, at ¶ 4071; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, No. GIC 764118, 2002 WL 1292994, at *4 (Cal. Superior Ct. June 6, 2002); *People, ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 116 Cal.App.4th 1253 (2004).

³⁶ See *People, ex rel. Lockyer v. Philip Morris, Inc., R.J. Reynolds Tobacco Co., et al.*, Sacramento Superior Court Case No. 97AS03031, 2000 WL 34016276.

³⁷ See *State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117 (2003); *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.*, 107 Cal.App.4th 516 (2003).

³⁸ Opinion, *supra* note 1, at ¶ 4063.

³⁹ Dennis Eckhart (Tobacco Control Legal Consortium), *The Tobacco Master Settlement Agreement: Enforcement of Marketing Restrictions*, April 2004, p. 5. Available at: <http://www.wmitchell.edu/tobaccolaw/resources/eckhart.pdf>.

⁴⁰ Opinion, *supra* note 1, at ¶ 4063.