The Tools of Government

JOHNS HOPKINS UNIVERSITY CENTER FOR CIVIL SOCIETY STUDIES

WORKBOOK #4

Tort Liability

By Peter Schuck

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Overview

This workbook is a companion to Chapter 15 on tort liability written by Peter H. Schuck in The Tools of Government: A Guide to the New Governance, edited by Lester M. Salamon. This workbook includes original source documents, in the form of litigation documents and state and federal statutes, that illustrate the operation of tort liability as a tool of government. It is designed to help the reader better understand the process for implementing and managing a tort liability-based program or policy.

Tort liability, as a tool of government, is the liability established when persons or other entities successfully sue in court for monetary compensation (or less commonly, injunctive relief) for harm that they have suffered and that was caused by the conduct of other persons or entities. Whereas administrative regulations establish legal prohibitions or restrictions on certain actions before they occur and then impose penalties for failure to comply, tort law relies on court actions brought by injured parties to seek redress for harms that they have already suffered. Tort liability is thus an alternative governmental mechanism for preventing harm.

Because tort liability results from lawsuits that are privately initiated and administered, it is the most decentralized policy instrument of all. Tort law is a relatively non-coercive tool because it relies on the deterrent effect of prospective liability; it is relatively indirect because its force comes from litigants and their attorneys; and it is generally a very low-visibility policy tool. Tort liability, however, relies entirely on existing institutions -- the court system, the jury, and lawyers -- rather than having to create new ones.

The legislative and executive branches of government also play significant roles in the operation of this tool. They enact statutes that directly affect the jurisdiction of the court, venue, size of financial awards, time within which complaints must be filed, and other aspects of tort case procedures. The statutes also authorize certain government officers to settle some tort claims before final court action on the complaint.

The basic mechanics of operation for the tort liability tool include the following steps in a case that goes all the way to trial, verdict, and appeal:

- Filing of a complaint in a court that possesses personal and subject matter jurisdiction;
- Further pleadings to identify and narrow the factual and legal issues in dispute;
- "Discovery" in order to acquire factual information that supports the parties' claims or defenses;
- Pre-trial dispositive motions asking the court to enter judgment without the need for a trial;
- Pre-trial settlement or jury selection (if there is to be a jury trial);
- Submission to the jury (if there is a jury trial);
- Verdict by the jury (if a jury trial) or judge (if a bench trial);
- Post-trial motions and appeals;
- Execution of judgment (i.e., obtaining the money that the court ordered the defendant to pay the plaintiff); and
- Litigation of subsequent cases involving similar or even identical claims.

Document Listing and Description

This workbook includes excerpts from eight state or federal statutes related to the operation of the courts in tort liability cases. It also includes 17 documents related to *The State of Texas v. The American Tobacco Co., et al.,* a suit filed in 1996 by Dan Morales, Attorney General for the State of Texas, on behalf of the State. In this tort liability case, the State sought to recover money from cigarette manufacturers for the sums that the State had paid out under its Medicaid, retirement, and other programs for tobacco-related illnesses and deaths.

The documents are grouped into various categories. This section of the workbook first lists the documents in a category and then briefly describes those documents. The next section is a listing of study questions that could be used to enhance learning about the various aspects of tool operations. The documents dealing with *The State of Texas v. American Tobacco Co., et al*. Information about *United States v. Philip Morris, Inc.,* including copies of relevant documents, can be found at the Department of Justice's official website.

A. Tort Liability Statutes

1. Texas Statutes 82.001-006: Products Liability
2. Texas Statutes 16.001-045: Limitations of Personal Actions
3. Texas Statutes 41.001-013: Exemplary Damages
4. Federal Statutes 28 U.S. Code 1331: Judiciary and Judicial Procedure, Jurisdiction and Venue, District Courts: Jurisdiction and Federal Statutes 28 U.S. Code 1658: Judiciary and Judicial Procedure, Procedure, General Provisions, Time Limitations
5. Federal Statutes 28 U.S. Code 2672: Judiciary and Judicial Procedure, Particular Proceedings, Tort Claims Procedure, Administrative Adjustment of Claims
6. Federal Statutes 42 U.S. Code 2651: The Public Health and Welfare, Third Party Liability for Hospital and Medical Care
7. Federal Statutes 18 U.S. Code 1961: Crimes and Criminal Procedure, Racketeer Influenced and Corrupt Organizations, Definitions and Federal Statutes, 18 U.S. Code 1962: Crimes and Criminal Procedure, Racketeer Influenced and Corrupt Organizations, Prohibited Activities
8. Federal Statutes 18 U.S. Code 1964: Crimes and Criminal Procedure, Racketeer Influenced and Corrupt Organizations, Civil Remedies

The legislative and executive branches of government may employ the tool of tort liability in the policy process. They enact or amend statutes regarding substantive and procedural matters such as jurisdiction, limits on awards, and other matters and statutes regarding government as a party to a tort liability action. In A1 Texas placed certain limitations on the consumer's right to sue for damages caused by unsafe products. A2 is a statute that establishes the amount of time within which a plaintiff is allowed to file a claim. In A3 the state statute limits the amounts that can be awarded by the court as penalty or as punishment and defines certain standards of proof. Items A4 and A5 are federal laws that give the district court jurisdiction in civil matters, set time limits on the commencement of civil actions under federal laws, and grant authority to certain government officers to settle tort cases out of court. A7 contains two statutes that prohibit any enterprise, or part thereof, from engaging in actions which constitute racketeering. The statutes in A6 and A8 were important in the Texas case against the tobacco companies.

B. Complaint

1. The State of Texas v. The American Tobacco Co., et. al (first amended complaint) (5/96)

A party who believes that another has caused her legally compensable harm may file a complaint with a court with subject matter jurisdiction (i.e., the power to adjudicate that kind of dispute) and serve the defendant with a copy. This process formally initiates the use of the tort liability tool. The complaint may, at various times, be amended to include new counts or remove previous ones. B1 is a copy of the first amended complaint filed by the State of Texas in May 1996.

C. Discovery

1. Plaintiff's Initial Disclosure (6/5/96)
2. Plaintiff's Motion to Compel Disclosure (7/3/96)
3. Plaintiff's Memorandum in Support of its Motion to Compel Disclosure (9/20/96)
4. Court Order Compelling Disclosure (11/13/96)
5. Confidentiality Order (11/13/96)
6. Plaintiff's Request for Documents to Philip Morris, Inc. (2/25/97)
7. Plaintiff's Motion to Deem Privileges Waived for Failure to Produce Privilege Logs (3/13/97)
8. Court Order Granting Plaintiff's Motion to Deem Privileges Waived for Failure to Produce Privilege Log
9. Plaintiff's Motion to Compel Disclosure of Ingredient, Formula, and Manufacturing Processes (3/13/97)
10. Court Order Compelling Disclosure of Ingredient, Formula, and Manufacturing Processes
11. Plaintiff's Motion for a Temporary Restraining Order Enjoining Defendants from Interfering with Discovery Orders (3/24/97)
12. Court Order Granting a Temporary Restraining Order Enjoining Defendants from Interfering with Discovery Orders (3/24/97)

Both parties may engage in extensive "discovery" in order to acquire factual information that they can use as evidence to support their claims or defenses. Some of the most common methods of discovery include examining documents and databases in the custody of others, deposing and physically examining witnesses, and obtaining admissions of fact. Discovery is orchestrated by the attorneys; the court is only called in to resolve disagreements. In some instances, however, court intervention becomes necessary to compel disclosure from one or more of the parties.

Document C1 is the State of Texas' initial disclosure to the defendants. C2 is Texas' motion to compel an initial disclosure from the defendant tobacco companies. C3 is Texas' memorandum in support of its motion to compel adequate disclosure from defendants.

Documents C4 and C5 are court orders compelling disclosure from defendants and mandating confidentiality amongst the parties, respectively. C6 is Texas' request for certain documents from Philip Morris, Inc. C7 and C8 are Texas' motion to deem defendants' privileges for certain documents waived for failure to produce the relevant privilege logs, and the court's order granting the motion. Likewise, C9 and C 10 are Texas' motion to compel the disclosure of ingredients, formulas, and manufacturing processes and the court's order compelling such disclosure.

C11 is Texas' motion for a temporary restraining order enjoining defendants from interfering with discovery orders. C12 is the court order granting the restraining order and preventing defendants from interfering with discovery orders.

The period of discovery addressed in these documents began in June 1996 and lasted through March 1997.

D. Dispositive Motions

1. Memorandum Opinion and Order Regarding Defendants' Motions to Dismiss (9/8/97)

After discovery, one or both parties may file a motion asking the judge to enter judgment in their favor on the theory that no genuine, material issues of fact are in dispute and the judge can therefore decide the case purely as a matter of law, without any necessity for a trial. Such motions often take the form of motions for "summary judgment" or motions for dismissal of one or more of the counts in the complaint. Document D1 is the court's memorandum opinion and order regarding defendants' motions to dismiss counts 1-3 and counts 4-17 of Texas' second amended complaint, granting the defendants' motion in part, and denying it in part.

E. Further Pleadings

1. Memorandum Opinion and Order Regarding the Issue of Bifurcation (9/29/97)

The initial complaint filed by the plaintiff(s) triggers a sequence of formal pleadings and responses by both parties designed to identify and narrow the factual and legal issues in dispute. In very complex cases, such pleadings serve to simplify, and in some instances separate, the various issues involved. The court, in furtherance of convenience, to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim or of any separate issue of any number of claims. Because of the complexity of The State of Texas v. American Tobacco Co., et al., the plaintiff requested that the trial be bifurcated (divided) into separate phases, each dealing with distinct issues.

Document E1 is the court's memorandum opinion and order regarding the issue of bifurcation.

F. Pre-Trial Settlement

2. The State of Texas' Settlement with Tobacco (1/16/98)

Most disputes involving tort liability are resolved informally, and approximately 95 percent of the tort cases that are filed are settled before the trial with little or no judicial involvement. The attorneys serve as third- parties through which this tool delivers its benefits to citizens. When necessary, however, the judge urges the parties to negotiate a settlement of the dispute and may even actively participate herself and/or through a special master in settlement discussions. Settlements are often comprehensive and resolve with finality all claims against all parties to an action relating to the subject matter which has been or could have been asserted by any of the parties. Document F1 is the January 1998 settlement agreement between the State of Texas and the tobacco companies and other defendants. At the time it was signed it was the largest settlement in the history of U.S. litigation.

G. Subsequent Cases

3. Initial Complaint for United States v. Philip Morris, Inc. et al. (9/22/99)

Many legal and factual issues that have been litigated must sometimes be litigated over and over again in subsequent tort cases. Even a defendant who prevails at trial is ordinarily subject to having to defend similar or even identical claims against new plaintiffs if they did not have an opportunity to be heard in the earlier case. This same principle applies when there is a pre-trial settlement: typically "settlements only affect the claims of parties to the action, and thus exclude other potential plaintiffs who did not have an opportunity to be heard. This is particularly true for the defendants in The State of Texas v. American Tobacco Co., et al. who were involved in similar lawsuits both before and during the course of this litigation, and have settled with most states.

G1 is the complaint filed against the tobacco companies by the United States Department of Justice in September 1999, thereby formally initiating another use of the tort liability tool.

to prove by a preponderance of the evidence that:
(1) there was a safer alternative design; and
(2) the defect was a producing cause of the personal injury, property damage, or death for which the claimant seeks recovery.
(b) In this section, "safer alternative design" means a product design other than the one actually used that in reasonable probability:
(1) would have prevented or significantly reduced the risk of the claimant's personal injury, property damage, or death without substantially impairing the product's utility; and
(2) was economically and technologically feasible at the time the product left the control of the manufacturer or seller by the application of existing or reasonably achievable scientific knowledge.
(c) This section does not supersede or modify any statute, regulation, or other law of this state or of the United States that relates to liability for, or to relief in the form of, abatement of nuisance, civil penalties, cleanup costs, cost recovery, an injunction, or restitution that arises from contamination or pollution of the environment.
(d) This section does not apply to:
(1) a cause of action based on a toxic or environmental tort as defined by Sections 33.013(c)(2) and (3); or
(2) a drug or device, as those terms are defined in the federal Food, Drug, and Cosmetic Act (21 U.S.C. Section 321).
(e) This section is not declarative, by implication or otherwise, of the common law with respect to any product and shall not be construed to restrict the courts of this state in developing the common law with respect to any product which is not subject to this section.

§ 82.006. Firearms and Ammunition
(a) In a products liability action brought against a manufacturer or seller of a firearm or ammunition that alleges a design defect in the firearm or ammunition, the burden is on the claimant to prove, in addition to any other elements that the claimant must prove, that:
(1) the actual design of the firearm or ammunition was defective, causing the firearm or ammunition not to function in a manner reasonably expected by an ordinary consumer of firearms or ammunition; and
(2) the defective design was a producing cause of the personal injury, property damage, or death.
(b) The claimant may not prove the existence of the defective design by a comparison or weighing of the benefits of the firearm or ammunition against the risk of personal injury, property damage, or death posed by its potential to cause such injury, damage, or death when discharged.

Tex. Civ. Prac. & Rem. Code 16.001-0045: Limitations of Personal Actions

CHAPTER 16. LIMITATIONS
SUBCHAPTER A. LIMITATIONS OF PERSONAL ACTIONS

§ 16.001. Effect of Disability
(a) For the purposes of this subchapter, a person is under a legal disability if the person is:
(1) younger than 18 years of age, regardless of whether the person is married; or
(2) of unsound mind.
(b) If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period.
(c) A person may not tack one legal disability to another to extend a limitations period.
(d) A disability that arises after a limitations period starts does not suspend the running of the period.

§ 16.002. One-Year Limitations Period
(a) A person must bring suit for malicious prosecution, libel, slander, or breach of promise of marriage not later than one year after the day the cause of action accrues.
(b) A person must bring suit to set aside a sale of property seized under Subchapter E, Chapter 33, Tax Code, not later than one year after the date the property is sold.

§ 16.003. Two-Year Limitations Period
(a) Except as provided by Sections 16.010 and 16.0045, a person must bring suit for trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury, forcible entry and detainer, and forcible detainer not later than two years after the day the cause of action accrues.
(b) A person must bring suit not later than two years after the day the cause of action accrues in an action for injury resulting in death. The cause of action accrues on the death of the injured person.

§ 16.004. Four-Year Limitations Period
(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:
(1) specific performance of a contract for the conveyance of real property;
(2) penalty or damages on the penal clause of a bond to convey real property;
(3) debt;
(4) fraud; or
(5) breach of fiduciary duty.
(b) A person must bring suit on the bond of an executor, administrator, or guardian not later than four years after the day of the death, resignation, removal, or discharge of the executor, administrator, or guardian.
(c) A person must bring suit against his partner for a settlement of partnership accounts, and must bring an action on an open or stated account, or on a mutual and current account concerning the trade of merchandise between merchants or their agents or factors, not later than four years after the day that the cause of action accrues. For purposes of this subsection, the cause of action accrues on the day that the dealings in which the parties were interested together cease.

§ 16.0045. Five–Year Limitations Period
(a) A person must bring suit for personal injury not later than five years after the day the cause of action accrues if the injury arises as a result of conduct that violates:
(1) Section 22.011, Penal Code (sexual assault); or
(2) Section 22.021, Penal Code (aggravated sexual assault).

(b) In an action for injury resulting in death arising as a result of conduct described by Subsection (a), the cause of action accrues on the death of the injured person.
(c) The limitations period under this section is tolled for a suit on the filing of a petition by any person in an appropriate court alleging that the identity of the defendant in the suit is unknown and designating the unknown defendant as "John or Jane Doe." The person filing the petition shall proceed with due diligence to discover the identity of the defendant and amend the petition by substituting the real name of the defendant for "John or Jane Doe" not later than the 30th day after the date that the defendant is identified to the plaintiff. The limitations period begins running again on the date that the petition is amended.

Tex. Civ. Prac. & Rem. Code 41.001-013: Exemplary Damages

CHAPTER 41. EXEMPLARY DAMAGES

§ 41.001. Definitions

In this chapter:

(1) "Claimant" means a party, including a plaintiff, counterclaimant, cross-claimant, or third-party plaintiff, seeking recovery of exemplary damages. In a cause of action in which a party seeks recovery of exemplary damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of exemplary damages.

(2) "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

(3) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief with respect to exemplary damages.

(4) "Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.

(5) "Exemplary damages" means any damages awarded as a penalty or by way of punishment. "Exemplary damages" includes punitive damages.

(6) "Fraud" means fraud other than constructive fraud.

(7) "Malice" means:

(A) a specific intent by the defendant to cause substantial injury to the claimant; or

(B) an act or omission:

(i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

§ 41.002. Applicability

(a) This chapter applies to any action in which a claimant seeks exemplary damages relating to a cause of action.

(b) This chapter establishes the maximum exemplary damages that may be awarded in an action subject to this chapter, including an action for which exemplary damages are awarded under another law of this state. This chapter does not apply to the extent another law establishes a lower maximum amount of exemplary damages for a particular claim.

(c) Except as provided by Subsections (b) and (d), in an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.

(d) Notwithstanding any provision to the contrary, this chapter does not apply to Section 15.21, Business & Commerce Code (Texas Free Enterprise and Antitrust Act of 1983), an action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) except as specifically provided in Section 17.50 of that Act, or an action brought under Chapter 21, Insurance Code.

§ 41.003. Standards for Recovery of Exemplary Damages

(a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:

(1) fraud;

(2) malice; or

(3) willful act or omission or gross neglect in wrongful death actions brought by or on behalf of a

surviving spouse or heirs of the decedent's body, under a statute enacted pursuant to Section 26, Article XVI, Texas Constitution. In such cases, the definition of "gross neglect" in the instruction submitted to the jury shall be the definition stated in Section 41.001(7)(B).
(b) The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.
(c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.

§ 41.004. Factors Precluding Recovery
(a) Except as provided by Subsection (b), exemplary damages may be awarded only if damages other than nominal damages are awarded.
(b) A claimant may recover exemplary damages, even if only nominal damages are awarded, if the claimant establishes by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from malice as defined in Section 41.001(7)(A). Exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute.

§ 41.005. Harm Resulting From Criminal Act
(a) In an action arising from harm resulting from an assault, theft, or other criminal act, a court may not award exemplary damages against a defendant because of the criminal act of another.
(b) The exemption provided by Subsection (a) does not apply if:
(1) the criminal act was committed by an employee of the defendant;
(2) the defendant is criminally responsible as a party to the criminal act under the provisions of Chapter 7, Penal Code;
(3) the criminal act occurred at a location where, at the time of the criminal act, the defendant was maintaining a common nuisance under the provisions of Chapter 125, Civil Practice and Remedies Code, and had not made reasonable attempts to abate the nuisance; or
(4) the criminal act resulted from the defendant's intentional or knowing violation of a statutory duty under Subchapter D, Chapter 92, Property Code, and the criminal act occurred after the statutory deadline for compliance with that duty.
(c) In an action arising out of a criminal act committed by an employee, the employer may be liable for punitive damages but only if:
(1) the principal authorized the doing and the manner of the act;
(2) the agent was unfit and the principal acted with malice in employing or retaining him;
(3) the agent was employed in a managerial capacity and was acting in the scope of employment; or
(4) the employer or a manager of the employer ratified or approved the act.

§ 41.006. Award Specific to Defendant
In any action in which there are two or more defendants, an award of exemplary damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.

§ 41.007. Prejudgment Interest
Prejudgment interest may not be assessed or recovered on an award of exemplary damages.

§ 41.008. Limitation on Amount of Recovery
(a) In an action in which a claimant seeks recovery of exemplary damages, the trier of fact shall determine the amount of economic damages separately from the amount of other compensatory damages.

(b) Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of:
(1)(A) two times the amount of economic damages; plus
(B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or
(2) $200,000.
(c) Subsection (b) does not apply to a cause of action against a defendant from whom a plaintiff seeks recovery of exemplary damages based on conduct described as a felony in the following sections of the Penal Code if, except for Sections 49.07 and 49.08, the conduct was committed knowingly or intentionally:
(1) Section 19.02 (murder);
(2) Section 19.03 (capital murder);
(3) Section 20.04 (aggravated kidnapping);
(4) Section 22.02 (aggravated assault);
(5) Section 22.011 (sexual assault);
(6) Section 22.021 (aggravated sexual assault);
(7) Section 22.04 (injury to a child, elderly individual, or disabled individual);
(8) Section 32.21 (forgery);
(9) Section 32.43 (commercial bribery);
(10) Section 32.45 (misapplication of fiduciary property or property of financial institution);
(11) Section 32.46 (securing execution of document by deception);
(12) Section 32.47 (fraudulent destruction, removal, or concealment of writing);
(13) Chapter 31 (theft) the punishment level for which is a felony of the third degree or higher;
(14) Section 49.07 (intoxication assault); or
(15) Section 49.08 (intoxication manslaughter).
(d) In this section, "intentionally" and "knowingly" have the same meanings assigned those terms in Sections 6.03(a) and (b), Penal Code.
(e) The provisions of Subsections (a) and (b) may not be made known to a jury by any means, including voir dire, introduction into evidence, argument, or instruction.

§ 41.009. Bifurcated Trial
(a) On motion by a defendant, the court shall provide for a bifurcated trial under this section. A motion under this subsection shall be made prior to voir dire examination of the jury or at a time specified by a pretrial court order issued under Rule 166, Texas Rules of Civil Procedure.
(b) In an action with more than one defendant, the court shall provide for a bifurcated trial on motion of any defendant.
(c) In the first phase of a bifurcated trial, the trier of fact shall determine:
(1) liability for compensatory and exemplary damages; and
(2) the amount of compensatory damages.
(d) If liability for exemplary damages is established during the first phase of a bifurcated trial, the trier of fact shall, in the second phase of the trial, determine the amount of exemplary damages to be awarded, if any.

§ 41.010. Considerations in Making Award
(a) Before making an award of exemplary damages, the trier of fact shall consider the definition and purposes of exemplary damages as provided by Section 41.001.
(b) The determination of whether to award exemplary damages and the amount of exemplary damages to be awarded is within the discretion of the trier of fact.

§ 41.011. Evidence Relating to Amount of Exemplary Damages
(a) In determining the amount of exemplary damages, the trier of fact shall consider evidence, if any, relating to:
(1) the nature of the wrong;

(2) the character of the conduct involved;
(3) the degree of culpability of the wrongdoer;
(4) the situation and sensibilities of the parties concerned;
(5) the extent to which such conduct offends a public sense of justice and propriety; and
(6) the net worth of the defendant.
(b) Evidence that is relevant only to the amount of exemplary damages that may be awarded is not admissible during the first phase of a bifurcated trial.

§ 41.012. Jury Instructions
In a trial to a jury, the court shall instruct the jury with regard to Sections 41.001, 41.003, 41.010, and 41.011.

§ 41.013. Judicial Review of Award
(a) Except as provided for in Subsection (b), an appellate court that reviews the evidence with respect to a finding by a trier of fact concerning liability for exemplary damages or with respect to the amount of exemplary damages awarded shall state, in a written opinion, the court's reasons for upholding or disturbing the finding or award. The written opinion shall address the evidence or lack of evidence with specificity, as it relates to the liability for or amount of exemplary damages, in light of the requirements of this chapter.
(b) This section does not apply to the supreme court with respect to its consideration of an application for writ of error.

28 U.S. Code 1331: District Courts; Jurisdiction

Title 28, Part IV, Chapter 85, Section 1331

§ 1331. Federal question
The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S. Code 1658: Time Limitations

Title 28, Part V, Chapter 111, Section 1658

§ 1658. Time limitations on the commencement of civil actions arising under Acts of Congress
Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S. Code 2672: Administrative Adjustment of Claims

Title 28, Part VI, Chapter 171, Section 2672

§ 2672. Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: Provided, That any award, compromise, or settlement in excess of $ 25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5 [5 USCS §§ 571 et seq.], to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $ 2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $ 2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter [28 USCS §§ 2671 et seq.].

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

42 U.S. Code 2651: Recovery by the United States

Title 42, Chapter 32, Section 2651

§ 2651. Recovery by United States

(a) Conditions; exceptions; persons liable; amount of recovery; subrogation; assignment. In any case in which the United States is authorized or required by law to furnish or pay for hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 322 of the Act of July 1, 1944 (58 Stat. 696), as amended (42 USC 249)) to pay damages therefore, the United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person, or that person's insurer, the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for and shall, as to this right be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

(b) Recovery of cost of pay for member of uniformed services unable to perform duties. If a member of the uniformed services is injured, or contracts a disease, under circumstances creating a tort liability upon a third person (other than or in addition to the United States and except employers of seamen referred to in subsection (a)) for damages for such injury or disease and the member is unable to perform the member's regular military duties as a result of the injury or disease, the United States shall have a right (independent of the rights of the member) to recover from the third person or an insurer of the third person, or both, the amount equal to the total amount of the pay that accrues and is to accrue to the member for the period for which the member is unable to perform such duties as a result of the injury or disease and is not assigned to perform other military duties.

(c) United States deemed third party beneficiary under alternative system of compensation.

(1) If, pursuant to the laws of a State that are applicable in a case of a member of the uniformed services who is injured or contracts a disease as a result of tortious conduct of a third person, there is in effect for such a case (as a substitute or alternative for compensation for damages through tort liability) a system of compensation or reimbursement for expenses of hospital, medical, surgical, or dental care and treatment or for lost pay pursuant to a policy of insurance, contract, medical or hospital service agreement, or similar arrangement, the United States shall be deemed to be a third-party beneficiary of such a policy, contract, agreement, or arrangement.

(2) For the purposes of paragraph (1)--

(A) the expenses incurred or to be incurred by the United States for care and treatment for an injured or diseased member as described in subsection (a) shall be deemed to have been incurred by the member;

(B) the cost to the United States of the pay of the member as described in subsection (b) shall be deemed to have been pay lost by the member as a result of the injury or disease; and

(C) the United States shall be subrogated to any right or claim that the injured or diseased member or the member's guardian, personal representative, estate, dependents, or survivors have under a policy, contract, agreement, or arrangement referred to in paragraph (1) to the extent of the reasonable value of the care and treatment and the total amount of the pay deemed lost under subparagraph (B).

(d) Enforcement procedure; intervention; joinder of parties; state or Federal court proceedings. The United States may, to enforce a right under subsections (a), (b), and (c)[,] (1) intervene or join in any

action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable for the injury or disease or the insurance carrier or other entity responsible for the payment or reimbursement of medical expenses or lost pay; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished or paid for by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable for the injury or disease or the insurance carrier or other entity responsible for the payment or reimbursement of medical expenses or lost pay, in a State or Federal court, either alone (in its own name or in the name of the injured person, his guardian, personal representative, estate, dependents, or survivors) or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors.

(e) Veterans' exception. The provisions of this section shall not apply with respect to hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) furnished by the Department of Veterans Affairs to an eligible veteran for a service-connected disability under the provisions of chapter 17 of title 38, United States Code [38 USCS §§ 601 et seq.].

(f) Crediting of amounts recovered.

(1) Any amount recovered under this section for medical care and related services furnished by a military medical treatment facility or similar military activity shall be credited to the appropriation or appropriations supporting the operation of that facility or activity, as determined under regulations prescribed by the Secretary of Defense.

(2) Any amount recovered under this section for the cost to the United States of pay of an injured or diseased member of the uniformed services shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned at the time of the injury or illness, as determined under regulations prescribed by the Secretary concerned.

(g) Definitions. For the purposes of this section:

(1) The term "uniformed services" has the meaning given such term in section 101 of title 10, United States Code.

(2) The term "tortious conduct" includes any tortious omission.

(3) The term "pay", with respect to a member of the uniformed services, means basic pay, special pay, and incentive pay that the member is authorized to receive under title 37, United States Code, or any other law providing pay for service in the uniformed services.

(4) The term "Secretary concerned" means--

(A) the Secretary of Defense, with respect to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard (when it is operating as a service in the Navy);

(B) the Secretary of Transportation, with respect to the Coast Guard when it is not operating as a service in the Navy;

(C) the Secretary of Health and Human Services, with respect to the commissioned corps of the Public Health Service; and

(D) the Secretary of Commerce, with respect to the commissioned corps of the National Oceanic and Atmospheric Administration.

18 U.S. Code 1961: Racketeer Influenced and Corrupt Organizations, Definitions

Title 18, Part 1, Chapter 96, Section 1961

§ 1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.]--

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 USCS § 802]), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1588 (relating to peonage and slavery), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) an act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act [21 USCS § 802]), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, or (F) any act which is indictable under the Immigration and Nationality Act, section 274 [8 USCS § 1324] (relating to bringing in and harboring

certain aliens), section 277 [8 USCS § 1327] (relating to aiding or assisting certain aliens to enter the United States), or section 278 [8 USCS § 1328] (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter [18 USCS §§ 1961 et seq.];

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter [18 USCS §§ 1961 et seq.] or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter [18 USCS §§ 1961 et seq.];

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter [18 USCS §§ 1961 et seq.]. Any department or agency so designated may use in investigations authorized by this chapter [18 USCS §§ 1961 et seq.] either the investigative provisions of this chapter [18 USCS §§ 1961 et seq.] or the investigative power of such department or agency otherwise conferred by law.

18 U.S. Code 1962: Racketeer Influenced and Corrupt Organizations, Prohibited Activities

Title 18, Part 1, Chapter 96, Section 1962

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S. Code 1964: Racketeer Influenced and Corrupt Organizations, Civil Remedies

Title 18, Part I, Chapter 96, Section 1964

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

THE STATE OF TEXAS V. THE AMERICAN TOBACCO CO., ET AL. (first amended complaint) (5/96)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

JURY

FIRST AMENDED COMPLAINT

The State of Texas, by Dan Morales, Attorney General of the State of Texas ("The State"), complains against the Defendants as follows:

PRELIMINARY STATEMENT

The health, welfare and property of Texas citizens have been damaged by the tobacco industry's unlawful conduct and their addictive, injurious, and unreasonably dangerous products. The tobacco companies have placed corporate profits above any concern for the health and property of the consumers of their products. The toll of human misery from the mass addiction, disease and death caused by their products has not been sufficient to deter the tobacco companies from their unified campaign of disinformation and denials regarding the dangerousness of their products. The tobacco companies have unlawfully shifted the financial responsibility for their tortious and illegal conduct and for their unreasonably dangerous products to State of Texas.

This lawsuit seeks to have the tobacco companies' liability to the State judicially recognized and to restore to the State's treasury those funds spent for tobacco-attributable costs by the Medicaid Program, the State Employee Retirement System, the State Employee Group Insurance Program, charity care, tobacco cessation programs and related wellness and health care programs. This suit also seeks other damages to be determined by a jury and appropriate injunctive relief.

. . . .

. . . Every day, another 3,000 children become regular smokers. Eighty-two percent of adult smokers had their first cigarette before age 18, and more than half of them had already become regular smokers by that

age. . . . Of those 3,000 children who do become current regular users of tobacco products, 1,000 will die prematurely as a result of their tobacco use.

The tobacco industry has been successful in planning, implementing and executing the largest public health crisis in U.S. history. The industry has also orchestrated the largest and most distinctive campaign of corporate misinformation in U.S. history. The Executive Officers and Board of Trustees of the American Medical Association (AMA) stated that recently disclosed internal tobacco industry documents "... show us how this industry has managed to spread confusion by suppressing, manipulating, and distorting the scientific record.... The evidence is unequivocal - the U.S. public has been duped by the tobacco industry. No right-thinking individual can ignore the evidence. [Todd, S.T., et al., The Brown and Williamson Documents: Where Do We Go From Here? Journal of the American Medical Association , July 19, 1995 - Vol. 274, No. 3, pp. 256-258.] "

It is the duty and obligation of the Attorney General as the chief law enforcement officer for the State of Texas to bring this suit to seek reimbursement to the State of those funds expended because of the Defendants' illegal conduct and unreasonably dangerous products, to halt tobacco marketing aimed at children, to restrain the Defendants' unlawful conduct and to dispel any illusion of a scientific controversy regarding tobacco and health.

NATURE OF THE CASE

1. This is an action to recover funds expended by the State to provide medical treatment to citizens suffering from tobacco-related illnesses and to seek appropriate injunctive relief against the Defendants' continuing and illegal conduct. The reimbursement sought includes funds expended by Texas pursuant to the Medicaid program created by Title XIX of the Social Security Act. The Medicaid program is a cooperative endeavor in which the Federal Government provides financial assistance to participating States to aid them in furnishing health care to needy persons. For every dollar spent on Medicaid assistance by the State, the Federal Government provides approximately two dollars in matching funds. . . .

2. The State is required to take all reasonable measures to ascertain the legal liability of third parties to pay for care and services available under the Medicaid Act, and to seek reimbursement to the public fund to the extent of such legal liability. The State has discovered that the Defendants have been engaged in a protracted and willful course of corporate misconduct and misrepresentation in violating numerous federal and state laws, and in the actionable breach of the duties owed to the State and its citizens.

3. The Defendants are cigarette and tobacco product manufacturers and/or their trade associations that control virtually the entire cigarette industry in Texas and the Nation. For decades, the State has incurred significant expenses associated with the provision of necessary health care and other such necessary assistance under various State programs to citizens who suffer, or who have suffered, from tobacco-related injuries, diseases or sickness.

4. This action is based on the deliberate and willful misconduct by Defendants toward the Nation, the State and its citizens. . . . The Defendants' misconduct, actions and statements are violations of the following areas of law:

A. **Federal Racketeer Influenced and Corrupt Organizations Act:** Since the 1950s, the tobacco manufacturing Defendants have conducted or participated, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity, in violation of the federal RICO statute. The RICO enterprise is an association-in-fact composed of the Council for Tobacco Research (CTR), the Tobacco Institute (TI), Hill & Knowlton, and the Tobacco Companies' law firms and related entities. The Tobacco Companies participated in the conduct of this enterprise's affairs through a pattern of public fraud, via wire and mail fraud on a nationwide basis, and through a pattern of other racketeering injuries. . . .

B. **Federal and State Antitrust Acts:** Beginning at least as early as the 1950s, and continuing to the present, Defendants entered into a contract, combination, or conspiracy in restraint of trade in the market for cigarettes and other tobacco products in the United States and Texas. The Defendants have agreed to restrain and eliminate competition in that market . . . The Defendants' conspiracy had the purpose and effect of unreasonably restricting the quality of the tobacco products manufactured and sold in the U.S. by retarding the research, development, production, and sale of alternative products. . . . [T]o perpetuate the unregulated and unfettered sale of nicotine in their products -- thereby creating and maintaining a stabilized market demand through nicotine dependency in consumers.

C. **Equitable Principles of State Common Law:** The State of Texas is entitled to assert its own claims for restitution, unjust enrichment and public nuisance against the Defendants under equitable principles of Texas law. These claims reside in the State itself and are wholly independent of any claims that individual smokers may have against the Defendants. . . . This is not a case involving only tobacco companies and smokers. Here, an innocent third party -- the State, together with all those it represents -- has been forced to pay enormous sums which should in equity have been borne by Defendants. Accordingly, the State can assert independent and separate claims . . . that do not depend on the State's ability to show that Defendants would be liable to individual smokers in product liability actions.

D. **Product Liability Law:** The Defendants, at all pertinent times, manufactured, tested, designed, promoted, marketed, packaged, sold, distributed, and/or placed into the stream of commerce in and into the State, numerous brands of defective, unreasonably dangerous and hazardous tobacco products. In addition, the Defendants were negligent in that they fail to exercise reasonable care in the manufacture, sale, and distribution of tobacco products. Furthermore, the Defendants breached express and implied warranties relative to tobacco products. These wrongful acts and breaches of duty have caused the State cognizable harm to its finances and property that is wholly separate from the claims of individual smokers for their health injuries. Accordingly, none of the State's claims depends on its ability to show that individual smokers would be able to recover damages against the Defendants.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331, § 1367; 15 U.S.C. § 1331, § 1367; 15 U.S.C. § 15 and 18 U.S.C. § 1964.

6. Venue is proper in this District pursuant to 28 U.S.C. § 1391. Defendants advertised in this District, received substantial compensation and profits from the sales of tobacco products in this District, and made material misrepresentations and breached warranties in this District. Further, significant health care services were provided in this District to qualified citizens under the Medicaid Act whose necessary health care services and the expense therefore were attributable to smoking-related disease and illness.

PARTIES

PLAINTIFF

7. Dan Morales, Attorney General for the State of Texas, is authorized to bring this action on behalf of the State by the Texas Constitution, Art. 4 § 22; the Texas Government Code, Section 402.021, et seq.; the Texas Free Enterprise and Antitrust Act of 1983, Business and Commerce Code, Chapter 15; 42 U.S.C. 1396, et seq., also known as the Social Security Act, Chapter 7, subchapter XIX, Grants to States for Medical Assistance Programs; the Texas Medical Assistance Act, Texas Human Resources Code § 32.001, et seq.; the Sherman Antitrust Act, 26 Stat. 209(1890), codified as amended 15 U.S.C. §§ 1-7; The Clayton Antitrust Act, 38 Stat. 730(1914), codified as amended 15 U.S.C. §§ 12-27; and, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964.

DEFENDANTS

8. **The American Tobacco Company** is a Delaware corporation whose principal place of business is located at 1700 E. Putnam Avenue, Greenwich, Connecticut, and upon whom process may be served. The American Tobacco Company (ATC) manufactured, advertised and sold Lucky Strike, Pall Mall, Tareyton, Malibu, American, Montclair, Newport, Misty, Barkeley, Iceberg, Silk Cut, Silva Thins, Sobrania, Bull Durham and Carlton cigarettes throughout the United States. On information and belief, the American Tobacco Company was purchased by Brown & Williamson who has succeeded to the liabilities of ATC by operation of law or as a matter of fact.

9. **R.J. Reynolds Tobacco Company** is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with an agent for service in the State of Texas, to-wit: Prentice-Hall Corporation System, 400 North St. Paul Street, Dallas, Texas 75201. R. J. Reynolds is a wholly-owned subsidiary of RJR Nabisco Holdings Corp. R.J. Reynolds Tobacco Company manufactures, advertises and sells Camel, Vantage, Now, Doral, Winston, Sterling Magna, More, Century, Bright Rite and Salem cigarettes throughout the United States.

10. **Brown & Williamson Tobacco Corporation** is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an agent for service in the State of Texas, to-wit: C.T. Corporation Systems, 350 North St. Paul Street, Dallas, Texas 75201. Brown & Williamson Tobacco Corporation is a subsidiary division of Batus, Inc. Brown & Williamson Tobacco Corporation manufactures, advertises and sells Kool, Barclay, Belair, Capri, Raleigh, Richland, Laredo, Eli Cutter and Viceroy cigarettes throughout the United States.

11. **B.A.T. Industries P.L.C. ("B.A.T. Industries")** is a British corporation with its principal place of business at Windsor House, 50 Victoria St., London, England. Through a succession of intermediary corporations and holding companies, B.A.T. Industries is the sole shareholder of Brown & Williamson. Through Brown & Williamson, B.A.T. Industries has placed cigarettes into the stream of commerce with the expectation that substantial sales of cigarettes would be made in the United States and in Texas. B.A.T. Industries has also conducted, or through its agents, subsidiaries, associated companies, and/or co-conspirators, conducted significant research for Brown & Williamson on the topics of smoking, disease and addiction. On information and belief, Brown & Williamson also sent to England, research conducted in the United States on the topics of smoking, disease and addiction, in order to remove sensitive and inculpatory documents from United States jurisdiction, and such documents were subject to B.A.T. Industries' control. B.A.T. Industries is a participant in the conspiracy described herein both individually and throught its agent and alter ego, Defendant Brown & Williamson Tobacco Corporation and has caused harm in Texas.

12. **British American Tobacco Co., Ltd. ("BATCO")** is a British corporation whose principal place of business is Millbank, Knowle Green, Staines, Middlesex, England TW181DY. Brown & Williamson Tobacco Corporation is or was a subsidiary or division of British American Tobacco Co., Ltd. and has participated in the manufacture and distribution of cigarettes and other tobacco products both individually and through its agents and alter ego, Defendant Brown & Willaimson Tobacco Corporation.

13. **Philip Morris, Inc.** (Philip Morris U.S.A.), a subsidiary of Philip Morris Companies, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Virginia, with an agent for service in the State of Texas, to-wit: C.T. Corporation Systems, 350 North St. Paul Street, Dallas, Texas 75201. Philip Morris, Inc. manufactures, advertises and sells Philip Morris, Merit, Cambridge, Marlboro, Benson & Hedges, Virginia Slims, Alpine, Dunhill, English Ovals, Galaxy, Players, Saratoga and Parliament cigarettes throughout the United States.

14. **Liggett Group, Inc.,** a subsidiary of the Brooke Group, Ltd. and operating successor of Liggett & Myers Tobacco Co. (Liggett & Myers), is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an agent for service in the State of Texas, to-wit: Corporations Service Company, 100 Congress Avenue, Suite 1100, Austin, Texas 78701. Liggett Group, Inc. manufactures,

advertises and sells Chesterfield, Decade, L&M, Pyramid, Dorado, Eve, Stride, Generic and Lark cigarettes throughout the United States.

15. **Lorillard Tobacco Company, Inc.** is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with an agent for service in the State of Texas, to-wit: Prentice-Hall Corporation System, 400 North St. Paul Street, Dallas, Texas 75201. Lorillard Tobacco Company, Inc. is a subsidiary of Loews Corporation. Lorillard Tobacco Company, Inc. manufactures, advertises and sells Old Gold, Kent, Triumph, Satin, Max, Spring, Newport and True throughout the United States.

16. **United States Tobacco Company** is a Delaware corporation whose principal place of business is located at 100 West Putnam Avenue, Greenwich, Connecticut, and upon whom process may be served. United States Tobacco Company manufactures, advertises and sells Sano cigarettes and smokeless tobacco products throughout the United States.

17. **Hill & Knowlton, Inc.** is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, with an agent for service in the State of Texas, to-wit: United Corporation Services, Inc., 466 Lexington Avenue, New York, New York. Defendant Hill & Knowlton, Inc. is an international public relations firm. Defendant Hill & Knowlton, Inc. played an active and knowing role in the conspiracy complained of, aiding the circulation and/or publication of many false statements of the tobacco industry attributable to the Tobacco Institute Research Committee (TIRC) and the Council for Tobacco Research. Hill & Knowlton, Inc. has been the primary advertising agency responsible for dissemination of the false and misleading information in question in its capacity as the advertising and public relations agency for the Tobacco Institute, Inc. and the Tobacco Companies.

18. **The Council for Tobacco Research -- U.S.A., Inc.** (successor in interest to the Tobacco Institute Research Committee) is a non-profit corporation organized under the laws of the State of New York with its principal place of business located at 900 3rd Avenue, New York, New York 10022, and upon whom process may be served.

19. **The Tobacco Institute, Inc.** is a non-profit corporation organized under the laws of the State of New York whose agent for service of process in New York is C.T. Corporation, 1633 Broadway, New York, New York 10019, with its principal place of business located at 1876 "I" Street N.W., Suite 800, Washington, D.C. 20006.

20. The American Tobacco Company, R.J. Reynolds Tobacco Company; B.A.T. Industries, P.L.C.; Brown & Williamson Tobacco Corporation; Philip Morris, Inc. (Philip Morris U.S.A.); Liggett Group, Inc.; Lorillard Tobacco Company, Inc.; and United States Tobacco Company are referred to hereinafter as the "Tobacco Companies."

21. The Council for Tobacco Research-U.S.A., Inc., (successor to the Tobacco Institute Research Committee) and the Tobacco Institute, Inc., collectively, are referred to hereinafter as the "Tobacco Trade Associations."

22. At all pertinent times, Defendants acted through their duly authorized agents, servants, and employees who were then acting in the course and scope of their employment, and in furtherance of the business of said Defendants. At all pertinent times, the Tobacco Trade Associations and Hill & Knowlton, Inc. were the agents, servants, and/or employees of the Tobacco Companies - and acted within the scope of said agency, servitude and/or employment.

23. The Defendants listed above, and/or their predecessors and successors in interest, did business in the State of Texas; made contracts to be performed in whole or in part in Texas; and/or manufactured, tested, sold, offered for sale, supplied or placed in the stream of commerce, or, in the course of business, materially participated with others in so doing, tobacco products which the Defendants knew to be defective, unreasonably dangerous and hazardous, and which the Defendants knew would be substantially certain to cause injury to the State, and to persons within the State, thereby negligently and intentionally

causing injury to persons within Texas and to the State, and as described herein, committed and continue to commit tortious and other unlawful acts in the State of Texas.

24. The Defendants and/or their predecessors and successors in interest, performed such acts as were intended to, and did, result in the sale and distribution of tobacco products in the State of Texas.

25. The term "addictive" used in this complaint is synonymous and interchangeable with the term "dependence - producing"; both terms refer to the persistent and repetitive intake of psychoactive substances despite evidence of harm and a desire to quit. . . .

FACTUAL BACKGROUND: EVENTS LEADING TO

DECEMBER 15, 1953 CONSPIRACY MEETING

. . . .

30. Cigarette smoking increased dramatically in the first half of the 20th century. With the increase of cigarette smoking came an increase in lung cancer. Dr. Alton Ochsner, a New Orleans surgeon and regional medical director of the American Cancer Society, told an audience at Duke University on October 23, 1945, that "there is a distinct parallelism between the incidence of cancer of the lung and the sale of cigarettes...the increase is due to the increased incidence of smoking and that smoking is a factor because of the chronic irritation it produces."

31. In 1946, Tobacco Company chemists themselves reported concern for the health of smokers. A 1946 letter from a Lorillard chemist to its manufacturing committee states that "Certain scientists and medical authorities have claimed for many years that the use of tobacco contributes to cancer development in susceptible people. Just enough evidence has been presented to justify the possibility of such a presumption."

32. . . . [T]he Tobacco Companies chose sales over public health and safety. In the 1930s through the 1950s, in response to what industry spokesmen referred to as "the health scare", the Tobacco Companies made express claims and warranties as to the healthiness of their products with reckless disregard to the falsity of their claims and the consequential adverse impact on consumers. Examples of these health warranties include the following: Old Gold - "Not a cough in a Carload"; Camel - "Not a single case of throat irritation due to smoking Camels"; Philip Morris - "The Throat-tested cigarette."

33. In 1942, Brown and Williamson claimed that Kools would keep the head clear and/or give extra protection against colds.

34. In 1952, Liggett & Myers conducted a test for advertising purposes to demonstrate the absence of harmful effects of smoking Chesterfields on the nose, throat, and affected organs. The test was conducted by Arthur D. Little, Inc. and was designed so as to have no real scientific value. Nonetheless, its conclusion that smoking Chesterfields had no harmful effect on the organs in question was widely publicized and the purported results used to assure the general public that Chesterfields were harmless.

35. During the 1950s, Liggett & Myers sponsored the nationally popular Arthur Godfrey radio and television show wherein health claims were made based on the alleged scientific studies assuring "smoking Chesterfields would have no adverse effects on the throat, sinuses or affected organs." Arthur Godfrey subsequently died from lung cancer caused by smoking cigarettes.

36. Earlier consumer-oriented ads from the 1930s and 1940s often carried wide-ranging medical claims that placed cigarette-touting physicians in the company of endorsers such as Santa Claus ("Luckies are easy on my throat"), movie stars, sports heroes, and steady-nerved circus stars. Similar ads even appeared in medical journals, where ads were directed solely at physicians. . . . They often carried claims such as, "Just as pure as the water you drink... and practically untouched by human hands."

38. The Tobacco Companies sponsored cigarette ads in the *New England Journal of Medicine, Journal of the American Medical Association ("JAMA"), and The Lancet* from the 1930s through the 1950s.

39. For 15 years, Philip Morris used various claims … In 1935, Philip Morris ran an ad in the *New York State Medical Journal* touting studies that purportedly showed Philip Morris cigarettes were less irritating. An ad by the company in a 1943 issue of the *National Medical Journal* read: " . . . Tests showed three out of every four cases of smokers' cough cleared on changing to Philip Morris. Why not observe the results for yourself?"

40. . . . Some companies hired attractive women to deliver cigarette samples to physicians and the patients in their waiting rooms.

. . . .

42. The health-claim advertising campaigns by Defendants were patently false, misleading, deceptive and/or fraudulent. These campaigns were disseminated nationally in popular magazines, press, radio and television and were calculated to induce non-smokers to begin smoking and to induce smokers to continue in their addiction to their harm and injury and to the damage of the State.

43. During the 1950s the Tobacco Companies . . . manufactured filtered cigarettes that were advertised with explicit and/or implicit warranties of tar/nicotine content and health claims. The Tobacco Companies' health claims and claims as to the effectiveness of the filters in removing tar and nicotine were knowingly deceptive when made, and/or were made with reckless disregard for the health risks to the cigarette smokers.

. . . .

45. . . . In the 1930s and 1940s, ATC, Liggett & Myers and R.J. Reynolds, at that time the so-called "Big Three," had combined to restrain competition in order to control prices of leaf tobacco. The methods employed were 1) limitations and restrictions on the prices their buyers were permitted to pay for tobacco; 2) maintenance of price ceiling agreements among them; 3) stabilization and fixing of prices through percentage buying; 4) formulation of certain grades of tobacco so as to construct barriers to competition and 5) combining to manipulate and raise the price of lower-grade tobaccos in order to eliminate competition from manufacturers of low-priced cigarettes.

46. By the 1950s, the Defendants had known for decades of the lethal dangers of smoking their cigarettes and consuming their smokeless tobacco products.

47. The course of history for the tobacco industry was forever changed in 1953. A 1953 report by Dr. Ernst L. Wynder disclosed to the scientific community and to the Tobacco Companies a definitive link between smoking and cancer. . . . Dr. Wynder's study demonstrated a direct biological link between smoking and cancer. (Although Defendants have sought to discredit the Wynder findings, recently disclosed documents include a 1962 letter from Lorillard to Dr. Wynder regarding his work establishing smoking to be a carcinogen and the principal cause of lung cancer, which stated that Lorillard "considered [Dr. Wynder's] work above reproach, as usual.")

THE MODERN CONSPIRACY ERA-

DECEMBER 15, 1953 TO PRESENT

48. In response to the publication of Dr. Wynder's study in 1953, the presidents of the leading tobacco manufacturers, including American Tobacco Co., R.J. Reynolds, Philip Morris, U.S. Tobacco Co., Lorillard, and Brown & Williamson Tobacco Corporation, conspired with the public relations firm of Hill and Knowlton, Inc. to form a monopolistic trust to deal with the "health scare" presented by smoking. Acting in concert at an industry strategy meeting on December 15, 1953 at the Plaza Hotel in New York, the participants agreed to form a committee to orchestrate a public relations campaign to protect their

cigarette market from the perceived threat posed by the adverse medical reports. This committee was designed to promote an offensive, pro-cigarettes stance to counter reports of health dangers caused by cigarettes. As a result of these efforts, the Tobacco Institute Research Committee (TIRC), an entity later known as the Council for Tobacco Research (CTR), was established.

49. . . . Defendants knowingly conspired to conceal illegal antitrust activity by avoiding the incorporation of a formal association; instead, they would work in informal committees within a front organization to be established and designated the Tobacco Institute Research Committee (later the CTR). The purpose of their meeting and conspiracy was to protect the cigarette market structure

. . . .

51. The TIRC immediately ran a full-page promotion in more than 400 newspapers aimed at an estimated 43 million Americans. That piece was entitled "A Frank Statement To Cigarette Smokers" and contained the following language:

RECENT REPORTS on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked to lung cancer in human beings.

Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research. . . .

At the same time, we feel it is in the public interest to call attention to the fact that eminent doctors and research scientists have publicly questioned the claimed significance of these experiments.

Distinguished authorities point out:

1. That medical research of recent years indicates many possible causes of lung cancer.

2. That there is no agreement among the authorities regarding what the cause is.

3. That there is no proof that cigarette smoking is one of the causes.

4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists.

We accept an interest in people's health as a basic responsibility . . . We believe the products we make are not injurious to health.

. . . .

. . . [T]he fact that cigarette smoking today should even be suspected as a cause of serious disease is a matter of deep concern to us.

. . . .

1. We are pledging aid and assistance to the research effort into all phases of tobacco use and health. . . .

. . . .

52. In this advertisement, the participating Tobacco Companies recognized their "special responsibility" to the public and promised to learn the facts about smoking and health. The participating Tobacco Companies promised to sponsor independent research on the subject, claiming they would make health a basic responsibility, paramount to any other consideration in their business. The participating Tobacco Companies also promised to cooperate closely with public health officials. At the time these promises were made, Defendants had no intent to honor their promises. In fact, these promises so publicly and dramatically made to the public, the citizens of Texas and government regulators, have been breached over and over again.

53. . . . A coordinated, industry-wide strategy was designed to actively mislead and confuse the public about the true dangers associated with smoking cigarettes. Rather than work for the good of the public health and sponsor independent research, as it had promised, the Tobacco Companies, acting through the TIRC/CTR, concealed, undermined and distorted information coming from the scientific and medical community.

54. The Defendants, in their December 15, 1953 and subsequent meetings in forming, operating and maintaining the TIRC/CTR, knowingly replicated the framework of the "Big Three" combination in restraint of trade from the 1930s and 1940s by conspiring, agreeing and attempting to stabilize and protect their commodity's pricing structure from the "health scare" threat by, *inter alia*, 1) limiting and restricting scientific research and public dissemination of adverse product information or data from within the industry; 2) forming Ad Hoc Committees comprised of company lawyers to control jointly sponsored scientific research funded by and based upon market share percentages in order to further conspiratorial objectives and self-policing; 3) conducting an extensive disinformation campaign to contradict or neutralize legitimate science and health reports linking smoking or tobacco use with cancer and disease in order to stabilize and protect the tobacco market demand structure; 4) formulating combined and monopolistic opposition to any development and/or marketing of safer and/or alternative non-tobacco, non-nicotine, smoking devices by the conspirators or outsiders/non-conspirators; and 5) conspiring and combining to manipulate public and governmental awareness and responses to science adverse to the tobacco industry by a knowing, extensive and combined course of misrepresentation, deception and disinformation conducted via mail, wire, press, radio and television mediums, among others.

55. For purposes of this action, cigarettes and other tobacco products constitute one relevant product market. . . . The market for health care, including provisions of medical treatment and payment for such treatment, and medical and scientific research bearing upon the diagnosis, prevention and treatment of disease, constitutes another relevant market for the purposes of this action. Relevant geographic markets are the United States and the State of Texas.

56. . . . Six tobacco companies dominate and control the market for cigarettes and other tobacco products in the United States and Texas. These six tobacco companies -- American Tobacco, R.J. Reynolds, Brown & Williamson, Philip Morris, Liggett, and Lorillard -- have a combined market share of nearly 100% of the market.

57. This market concentration and lack of significant price competition has long enabled the tobacco industry to be one of the most profitable businesses in the United States.

58. The concentration in the industry has also benefited the Tobacco Companies and the Tobacco Trade Associations in their combination and conspiracy to control and maintain the market for cigarettes and other tobacco products.

59. All of the Defendants herein have acted pursuant to their conspiracy and agreement from 1953 without interruption until the present. The most recent example of Defendants' acts in furtherance of their conspiracy is the combined response of Brown and Williamson, Liggett, Lorillard, Philip Morris, and the Tobacco Institute in their January 1996 joint submission of twelve volumes in opposition to the 1995 proposed regulations of cigarettes and nicotine by the FDA. In this joint submission, Defendants perpetuate their disinformation campaign by denying that nicotine is a drug, by denying that cigarettes or smokeless tobacco are drug delivery devices, and by denying that nicotine in tobacco products is addictive.

60. The public disinformation strategy employed by the Tobacco Companies and the Tobacco Trade Associations was a strategy best described as "see no evil, hear no evil, and speak no evil" concerning the health effects of cigarette smoking. A publication called *Tobacco and Health* (later, *Tobacco and Health Research)* was created by the Tobacco Companies and the Tobacco Trade Associations and was used by

them to disseminate false information and create confusion over the causal connection between cigarette smoking and disease. It was distributed to the press, doctors, and health officials. . . .

61. The January 15, 1968 issue of *True Magazine* contained an article written by Stanley Frank called, "To Smoke or not to smoke--that *is still* the Question." The article dismissed the evidence against smoking as "inconclusive and inaccurate', and claimed that "Statistics alone link cigarettes with lung cancer... it is not accepted as scientific proof of the cause and effect." . . . It was subsequently disclosed that author Frank had been paid $500 to write the article by Joseph Field, a public relations professional working for Brown and Williamson. Brown and Williamson reimbursed Field for that amount.

62. Other public statements by the Defendants over the years have repeated the misrepresentations that the industry was dedicated to the pursuit and dissemination of the scientific truth regarding smoking and health.

63. For example, the Tobacco Institute in 1970 ran an advertisement captioned "A Statement About Tobacco and Health," which stated:

a. "We recognize that we have a special responsibility to the public--to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use."

b. "We accepted this responsibility in 1954 by establishing the Tobacco Industry Research Committee, which provides research grants to independent scientists. We pledge continued support of this program of research until all the facts are known."

c. "Scientific advisors informs us that until much more is known about such diseases as lung cancer, medical science probably will not be able to determine whether tobacco or any other single factor plays a causative role -- or whether such a role might be direct or indirect, incidental or important."

d. "We shall continue all possible efforts to bring the facts to light."

64. Also, in 1970, the Tobacco Institute ran an advertisement captioned, "The question about smoking and health is still a question." In this advertisement, the Tobacco Institute stated:

a. "[A] major portion of this scientific inquiry has been financed by the people who know the most about cigarettes and have a great desire to learn the truth... the tobacco industry."

b. "[T]he industry has committed itself to this task in the most objective and scientific way possible".

c. "In the interest of absolute objectivity, the tobacco industry has supported totally independent research efforts with completely non-restrictive funding."

d. "Completely autonomous, CTR's research is directed by a board of ten scientists and physicians...This board has full authority and responsibility for policy, development and direction of the research effort."

e. "The findings are not secret."

f. "From the beginning, the tobacco industry has believed that the American people deserve objective, scientific answers."

65. Again, in 1970, the Tobacco Institute stated, "The Tobacco Institute believes that the American public is entitled to complete, authenticated information about cigarette smoking and health." The Tobacco Institute further stated that, "The tobacco industry recognizes and accepts a responsibility to promote the progress of independent scientific research in the field of tobacco and health."

66. In direct contrast to what the Defendants were telling the public, a memo from Tobacco Institute vice president Fred Panzer to president Horace Kornegay dated May 1, 1972, acknowledges that the industry had employed a single strategy for nearly 20 years to defend itself on three major fronts: litigation, politics, and public opinion. This strategy consisted of "creating doubt about the health charge without

actually denying it-- advocating the public's right to smoke, without actually urging them to take up the practice--encouraging objective scientific research as the only way to resolve the question of health hazard." . . . To remedy the public-opinion problem, he proposed that the industry supply the public with "ready-made credible alternatives" to the prevalent view that smoking causes cancer, such as genetic and environmental explanations for smoking-related diseases.

67. The Tobacco Companies, through the Tobacco Trade Associations, intentionally breached their promises to the American public, to the citizens of Texas and to the State to study and report independently and honestly on the health effects of smoking and the use of smokeless tobacco products. Defendants caused the cancellation of press conferences where their scientists sought to inform the public, actively and wrongfully suppressed the publishing of reports concerning the health dangers presented by cigarette smoking, attacked research linking smoking to disease, and threatened professionally the researchers themselves. Their scientists were not allowed to "freely publish what they find as they choose" as a CTR director once claimed.

68. Numerous scientists formerly employed by the Tobacco Companies and the Tobacco Trade Associations have spoken out against the suppression of scientific data and the practice of deception known to exist in the tobacco industry generally. For example, in April of 1994, Dr. Victor DeNoble, a former research scientist for Philip Morris, Inc., testified before the United States House of Representatives Health & Environment Subcommittee that the Philip Morris Company in 1983 suppressed and refused to allow him or his colleague, Dr. Paul Mele, to publish or to talk publicly about the research that they had conducted with respect to nicotine tolerance in rats, the potentially addictive nature of nicotine in rats, and research with respect to synthetic nicotine substances. Dr. DeNoble testified that his research demonstrated that the animals would administer nicotine to themselves and that this fact indicated that nicotine had the potential to be addictive. . . . He further testified that his laboratory was closed and his research was terminated following the filing of a lawsuit by Rose Cipollone against Philip Morris and other tobacco companies.

69. In a similar vein, Liggett & Myers, while publicly refusing to acknowledge the validity of Dr. Wynder's tests, hired the consulting firm of Arthur D. Little, Inc. to duplicate Dr. Wynder's tests. Defendant Lorillard Corporation also duplicated Dr. Wynder's mouse tests. The results of the duplicated tests were essentially the same as Dr. Wynder's, and both Liggett & Myers and Arthur D. Little became aware by 1954 of the cancer-causing propensity of cigarettes. A Liggett & Myers researcher requested that the results of this testing be published, but Liggett & Myers would not allow it. In furtherance of the conspiracy objectives of the TIRC, the results of these additional tests were never made public.

70. The vast body of credible medical and scientific evidence identifies smoking as the leading cause of lung cancer. Tobacco industry scientific consultants also have accepted the causal association between smoking and disease.

SAFER CIGARETTES SUPPRESSED

71. The Tobacco Companies could have designed and manufactured a safer cigarette, but refused to do so. The need for a "safer" tobacco product results from the harmful chemical compounds occurring in tobacco products and/or formed as a result of burning. . . . More than forty (40) known carcinogens are found in cigarette tobacco. The Tobacco Companies artificially add chemicals and flavorings to their products that increase toxicity and/or carcinogenicity.

72. At Liggett & Myers, Dr. James Mold conducted tests to divide the components of cigarette smoke into separate entities and to interrupt the process that produces carcinogens by using a catalyst. Liggett & Myers researchers were able to produce a so-called "safer" cigarette, designated as the "XA Project" . . .

73. . . . The "safer" cigarette was never marketed.

74. Liggett abandoned its XA Project for two apparent reasons. One was that Liggett feared that the marketing of a "safer" cigarette would be, in essence, a concession that its -- and the industry's -- other cigarettes were not safe. Second, industry leader Philip Morris threatened to retaliate against Liggett if it broke ranks with the industry conspiracy.

. . . .

76. A memorandum authored by an attorney at the firm of Shook, Hardy & Bacon, long-time lawyers for the cigarette industry, confirmed the industry-wide position regarding the issue of a safer cigarette.

77. The 1987 memorandum was written in the context of the marketing by R.J. Reynolds of a smokeless cigarette, Premier, that heated rather than burned tobacco. The Shook, Hardy attorney wrote that the smokeless cigarette could "have significant effects on the tobacco industry's joint defense efforts" and "(t)he industry position has always been that there is no alternative design for a cigarette as we know them." The attorney also noted that, "Unfortunately, the Reynolds announcement... seriously undercuts this component of industry's defense."

TOBACCO, NICOTINE AND DEPENDENCY

78. The tobacco products manufactured and sold by the Tobacco Companies contain nicotine, a highly addictive substance. The Defendants know of the difficulties smokers experience in quitting smoking and of the tendency of addicted individuals to focus on any rationalization to justify their continued smoking. The Defendants exploit this weakness and capitalize upon the known addictive nature of nicotine. An internal tobacco industry memo acknowledged in 1972: "(w)ithout nicotine...there would be no smoking...the cigarette (is) a dispenser for a dose unit of nicotine." Nicotine addiction guarantees a market for cigarettes. The addictive nature of the nicotine in cigarettes virtually eliminates personal choice in those who become addicted.

79. The industry's recognition of the extent to which nicotine -- and not tobacco -- defines its product is illustrated in a 1972 Philip Morris report on a CTR conference, which stated:

As with eating and copulating, so it is with smoking. The physiological effect serves as the primary incentive; all other incentives are secondary. The majority of the conferees would go even further and accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking.

. . . .

The cigarette should be conceived not as a product but as a package. The product is nicotine. . . . Think of the cigarette as a dispenser for a dose unit of nicotine.

80. Accordingly, the industry has developed sophisticated technology to control the levels of nicotine in cigarettes in order to maintain its market. David A. Kessler, M.D., Commissioner of Food and Drugs, recently testified before a congressional committee that cigarette manufacturers can manipulate precisely nicotine levels in cigarettes, manipulate precisely the rate at which the nicotine is delivered in cigarettes, and add nicotine to any part of cigarettes.

81. Dr. Kessler testified that "the cigarette industry has attempted to frame the debate on smoking as the right of each American to choose. The question we must ask is whether smokers really have that choice."

. . .

. . . .

[T]he public thinks of cigarettes as simply blended tobacco rolled in paper. But they are much more than that. Some of today's cigarettes may, in fact, qualify as high technology nicotine delivery systems that

deliver nicotine in precisely calculated quantities -- quantities that are more than sufficient to create and to sustain addiction in the vast majority of individuals who smoke regularly.

. . . .

82. In a subsequent appearance before Congress, Dr. Kessler testified that one manufacturer, Brown & Williamson, had developed a tobacco plant, code-named Y-1, with perhaps twice the nicotine content of regular tobacco. Brown & Williamson manufactured and marketed cigarettes with Y-1 tobacco in the United States in 1993.

83. The story of Brown & Williamson's development of Y-1 is one of the more egregious examples of the cigarette industry's concealment of its control and manipulation of the nicotine levels in its products.

84. On June 21, 1994, Dr. Kessler told the Waxman Subcommittee that FDA investigators had discovered that Brown & Williamson had developed a high nicotine tobacco plant, which the company called Y-1. This discovery followed Brown & Williamson's flat denial to the FDA on May 2, 1994, that it had engaged in "any breeding of tobacco for high or low nicotine levels."

85. When four FDA investigators visited the Brown & Williamson plant in Macon, Georgia on May 3, 1994, Brown & Williamson officials denied that the company was involved in breeding tobacco for specific nicotine levels. Only after the FDA had learned of the development of Y-1 in its investigation and confronted company officials with the evidence, did the company admit that it was growing and using the high-nicotine plant.

86. In fact, in a decade-long project, Brown & Williamson secretly developed a genetically-engineered tobacco plant with a nicotine content more than twice the average found naturally in flue-cured tobacco. Brown & Williamson took out a Brazilian patent for the new plant, which was printed in Portuguese. Brown & Williamson and a Brazilian sister company, Souza Cruz Overseas, grew Y-1 in Brazil and shipped it to the United States where it was used in five Brown & Williamson cigarette brands sold in Texas, including three labeled "light." When the company's deception was uncovered, company officials admitted that close to four million pounds of Y-1 were stored in company warehouses in the United States.

87. As part of its cover-up, Brown & Williamson even went so far as to instruct the DNA Plant Technology Corporation of Oakland, California, which had developed Y-1, to tell FDA investigators that Y-1 had "never [been] commercialized." Only after the FDA discovered two United States Customs Service invoices indicating that "more than a half-million pounds" of Y-1 tobacco had been shipped to Brown & Williamson on September 21, 1992, did the company admit that it had developed the high-nicotine tobacco.

88. Y-1 is one example of an overall trend in the tobacco industry to increase the nicotine content and/or impact of its products.

89. As a result of the industry's actions, as many as 74% to 90% of smokers are addicted. Eight out of ten smokers say they wish they had never started smoking. Two-thirds of adults who smoke say they wish they could quit. Seventeen million try to quit each year, but fewer than one out of ten succeed. A high percentage of the smokers who have had surgery for lung cancer or heart attacks return to smoking, as do 40% of smokers who have had their larynxes removed.

90. Beyond its addictive qualities, nicotine is believed to contribute to cardiovascular disease and death -- a fact known to the cigarette industry for many years.

DECEIT AND FRAUD-A CONTINUING CONSPIRACY

AND COMBINATION IN RESTRAINT OF TRADE

91. The general counsel of the major cigarette manufacturers, through joint meetings to review and direct proposals for scientific research for the entire industry, aided in the conspiracy of the tobacco industry to defraud the public on the issue of tobacco and health.

92. The tobacco industry's combination in restraint of trade was also referred to as the "gentlemen's agreement." The "gentlemen's agreement" among the manufacturers was to suppress independent research on smoking and health. This agreement was referenced in a 1968 internal Philip Morris draft memo, which states, "We have reason to believe that in spite of gentlemens (sic) agreement from the tobacco industry in previous years that at least some of the major companies have been increasing biological studies within their own facilities." . . .

93. . . . This secret agreement included restraining, suppressing and concealing research on the health effects of smoking, including the addictive qualities of nicotine, and restraining, concealing and suppressing the research and marketing of safer cigarettes.

94. The Defendants designed a litigation strategy over the years to conceal, delay and to run up consumers' expenses in a war of attrition. For example, a memo written by J. Michael Jordan, an attorney for Defendant R.J. Reynolds Tobacco Company, noted:

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

95. Additionally, corporate officials of the Tobacco Companies and the Tobacco Trade Associations have attempted wrongfully to create a privilege for various documents that they wish to conceal by sending such documents through their legal departments and law firms in order that they might claim the documents to be protected by the attorney-client or attorney work-product privileges. A "Special Projects" division within CTR was set up to conceal research that was harmful to the tobacco industry and to promote and develop research and expert witnesses needed for the defense of tort litigation. Incriminating reports and documents contained within this division were passed through attorneys and are now claimed by the Defendants to be privileged.

96. The industry has congratulated itself on a brilliantly conceived and executed strategy to create doubt about the charge that cigarette smoking is deleterious to health without actually denying it. . . .

97. Not content with the holding strategy employed by the TIRC and the CTR, the Tobacco Companies advocated a more offensive role through their lobbying arm, the Tobacco Institute (TI). This tobacco industry-supported group actively seeks to increase doubt about the negative health effects of smoking by suggesting that there are alternative explanations to the data. One "theory" detailed how individual genetic makeups predisposed individuals to illness. Another, the "multi-factorial hypothesis," asserted that multiple factors should be blamed, i.e., food additives, viruses, occupational hazards, air pollution or stress, for causing cancer. The tobacco industry financed, supported and encouraged the manufacture of fraudulent science.

98. However, evidence began to surface concerning the Defendants' illegal scheme. On February 6, 1992, United States District Court Judge H. Lee Sarokin for the District of New Jersey issued an opinion in Haines v. Liggett Group. Inc., Civ. Action 84-678. . . . Judge Sarokin concluded:

Despite the industry's promise to engage independent researchers to explore the dangers of cigarette smoking and to publicize their findings, the evidence clearly suggests the research was not independent; that potentially adverse results were shielded under the caption of "special projects;" that the attorney-client privilege was intentionally employed to guard against such unwanted disclosure; and that the promise of full disclosure was never meant to be honored, and never was.

As a result of this finding, Judge Sarokin went on to note:

A jury might reasonably conclude that the industry's announcement of proposed independent research into the dangers of smoking and its promise to disclose its findings was nothing but a public relations ploy -- a fraud -- to deflect the growing evidence against the industry, to encourage smokers to continue and non-smokers to begin, and to reassure the public that adverse information would be disclosed.

. . . .

100. On February 25, 1994, David A. Kessler, M.D., Commissioner of the FDA, sent a letter to Scott D. Ballin, Chairman of the Coalition on Smoking Or Health, asserting:

. . . The possible inference that cigarette vendors intend cigarettes to achieve drug effects in some smokers is based on mounting evidence we have received that: (1) the nicotine ingredient in cigarettes is a powerfully addictive agent and (2) cigarette vendors control the levels of nicotine to satisfy this addiction.

101. In response to Kessler's letter, on March 15, 1994, in a letter to *The New York Times*, James W. Johnston, Chairman and Chief Executive Officer of R.J. Reynolds, continued to assert that nicotine was not addictive. Johnston based his assertion upon the success rate of American adults who had quit smoking.

102. The Chief Executive officers of The American Tobacco Company, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Philip Morris, Inc., Lorillard and Liggett Group, Inc. all testified under oath before the same Subcommittee in April of 1994 that they believed nicotine is not addictive.

103. The recent disclosures of the sworn testimony of a former research chief for Brown & Williamson Tobacco Corporation, Dr. Jeffrey S. Wigand, and former Philip Morris scientists Jerome Rivers, Dr. Ian L. Uydess and Dr. William A. Farone, directly contradict the Tobacco Companies' CEOs' testimony regarding addiction, as well as the industry's denial of nicotine manipulation.

TARGETING CHILDREN

104. For many years, the Defendants have engaged in a vast and misleading promotional, public relations and sham lobbying blitz that had as its goal increasing the numbers of people addicted to nicotine in cigarettes and/or smokeless tobacco products and decreasing the number of people who attempt or succeed in quitting. Their efforts have been and continue to be directed toward children. They have done so and continue to do so in contravention of their duty not to make false statements of material fact and their duty not to conceal such true facts from the public. At the cost of countless lives, the Defendants spend billions of dollars every year misleading the public and promoting the myth that smoking cigarettes and using smokeless tobacco products does not cause cardiovascular disease, lung and other cancers, emphysema and other diseases and that smokers live healthy and vital lives. The Defendants have at all pertinent times presented and promoted smoking as an attractive, glamorous, youthful and relaxing pastime, associating it with movie stars, athletes and successful professionals.

105. Every day more than 1,200 cigarette smokers die of cigarette-related diseases. Others manage to break their addiction to nicotine and quit. In order to prevent a precipitous decline in cigarette sales, the Tobacco Companies must attract more than 3,000 new smokers each day. Children and teenagers have become the main target, and as a result of the Tobacco Companies’ fraudulent and false advertising, more than 3,000 of them begin the habit every day.

106. The Defendants specifically target children. By way of example, the Joe Camel campaign waged by Defendant R.J. Reynolds Tobacco Company is intended to and has had great appeal to children. More than one million new underage smokers become addicted in the United States each year. Such efforts by the Defendants create more sales for the tobacco industry and more resulting health care costs for the State.

107. As previously alleged, the Defendants have engaged in a concerted effort to circumvent and violate the laws of the State of Texas by targeting children with sophisticated promotional schemes designed to create successive generations of addicted customers. As a result of Defendants' campaigns, it is virtually impossible for parents or law enforcement resources to control the efforts of the Defendants to make children the users of tobacco products.

108. Despite the best efforts of parents, educators and the medical profession, smoking among young people has remained alarmingly constant since the late 1970s. Tobacco Companies use advertising to create a mental image associating smoking with health, glamorous and athletic lifestyles and with success and sexual attractiveness. Their advertising and marketing campaigns increase demand for tobacco products among young people. The ease with which children and teenagers can obtain cigarettes from vending machines assures that there is a ready supply to meet this demand. Results of a Texas state-wide vending machine survey show children are successful in their attempts to purchase cigarettes 90% of the time. It has been shown repeatedly that cigarette vending machines (even those located in bars and other supposedly adult locations) are readily available to children. Within a short period of time, the young smoker becomes physiologically and emotionally dependent, i.e., addicted to tobacco. Later, as the maturing smoker begins to wish he or she could quit, advertising reinforces the practice and seeks to minimize health concerns, create doubt and confusion, which are used by smokers as an excuse to avoid the pain and discomfort of attempting to break their addiction to nicotine.

109. . . . For many young people, the precipitating factor is being given a free pack of cigarettes by a tobacco company representative, or purchasing cigarettes in order to obtain an attractive t-shirt, baseball cap, or other gimmick used to promote cigarette smoking.

110. One of the best examples of this was the transformation of Marlboro cigarettes from a red-tipped cigarette for women to the cigarette for the 'macho cowboy'. . . . The wild spirit of the Marlboro Man captured the adolescent imagination. The children who started smoking Marlboro became tenaciously loyal customers. Soon, Marlboro became the "gold standard" of cigarettes among teenagers. Through the year 1988, nearly three-fourths of teenage smokers used Marlboro.

111. . . . R.J. Reynolds has positioned its cigarette advertising campaigns to younger and younger audiences using a succession of advertising images of men engaged in extraordinary feats of physical and athletic achievements.

112. . . . During the mid-1980s, this advertising campaign featured young, successful professionals (including architects, fashion designers, lawyers, etc.) with the slogan "The Taste of Success." These ads promoted the implication that smoking is helpful-if not essential-to success or prominence. In the late 1980s, the advertising theme for Vantage cigarettes began to feature professional-caliber athletes and auto racers. These advertisements depict physical activity requiring strength or stamina beyond that of everyday activity. The obvious implication is that smoking does not harm you.

113. During the 1980s . . . Salem ads became populated by muscular surfers and bikini-clad women, fun-loving party animals and other attractive adolescent role models. . . . Newport ads frequently show men and women in sexually suggestive positions always having fun, using the slogan "Alive With Pleasure."

114. . . . By associating smoking with women's liberation, Philip Morris intended to create in the minds of teenage girls the vision of smoking as a symbol of autonomy and independence. Ads for Virginia Slims and other "feminine" cigarettes prey upon the natural and common insecurity and sense of inferiority experienced by adolescents by portraying the cigarette as a crutch and a symbol of superiority and sophistication.

115. In today's culture many teenage girls perceive that a prerequisite to popularity is to be thin. Philip Morris and other Tobacco Companies capitalize upon this perception by presenting cigarette smoking as a suitable alternative to a diet for being thin. Virtually every "feminine" cigarette includes words like slim,

light, super slim, ultra light, etc. The photographic imagery in cigarette advertising that targets young females universally portrays attractive young women in glamorous outfits. Smoking is thus associated with being sexy and beautiful. In cigarette ads, the air is fresh and clear; magical things happen. The reality is that cigarette smoking causes addiction, disease and death.

116. . . . In its campaign to attract adolescent boys to become smokers, the R.J. Reynolds Tobacco Company has made extensive use of risk-taking and danger in its advertising. By glorifying risk-taking, these ads have a more insidious purpose. How a person estimates the magnitude and likelihood of a risk can be significantly affected by what it is compared against. By portraying dangerous activities like hang-gliding, mountain climbing, and stunt motorcycle riding in tobacco advertising, R.J. Reynolds minimizes the dangers of smoking in adolescent minds.

. . . .

118. When R.J. Reynolds began the Joe Camel cartoon campaign, Camel’s share of the children's market was only O.5%. In just a few years, Camel's share of this illegal market has increased to 32.8%, representing sales estimated at $476 million per year. Another indication of the phenomenal success of this marketing campaign is the fact that in a recent survey of six year olds, 91% of the children could correctly match Joe Camel with a picture of a cigarette, and both the silhouette of Mickey Mouse and the face of Joe Camel were nearly equally well-recognized by almost all children surveyed.

119. . . . During the decade of the 1980s, there was a steady migration of cigarette advertising into youth-oriented publications. Magazines with sexually-oriented themes and those concerning entertainment and sporting activities had the highest concentration of cigarette ads. For many of these magazines, teenagers comprise a quarter or more of the total readership. . . . News magazines, like *Time* and *Newsweek,* which have older audiences, had few cigarette ads and those tended to emphasize implicit health promises concerning tar and nicotine rather than glamorous images.

120. The Tobacco Companies sell more than one billion packs of cigarettes per year to children under the age of 18. In 1988, the tobacco industry reaped $221 Million in profits from $1.25 Billion in sales to children under the age of 18. Marlboro and Camel cigarettes dominate the teenage smoking market.

121. In late 1990, the Tobacco Institute, on behalf of the industry, inaugurated a public relations campaign designed to convince the public that the Tobacco Companies wished to discourage young people from smoking. Several Tobacco Companies began their own campaigns at the same time. In fact, these programs are just a continuation of the Defendants' ongoing fraud and conspiracy. While these programs call for age 18 as the national standard for tobacco sales to children, and for requiring "adult supervision" of cigarette vending machines, in fact, the Institute and Tobacco Companies hope to maintain the status quo with regard to children's access to tobacco as most states already have a minimum age of 18 or older. Brochures, like "Tobacco: Helping Youth Say No", are being distributed by the Institute and Tobacco Companies. In reality, this is a pro-smoking subterfuge. The brochure presents smoking as a permissible "adult" decision and smoking as something an "adult" can safely do. The only reason given to children for not smoking is that - like getting married or driving a car - smoking is for grown ups. Of course, that message really makes the smoking more desirable to kids. An R.J. Reynolds' brochure even tells parents to tell their children that the parents smoke "because they enjoy it." None of these brochures disclose that smoking is highly addictive and harmful to human life.

122. Perhaps the most vicious element of this advertising campaign has been advertising aimed at young girls. Nearly every issue of magazines for young girls, like *Teen* and *Young Miss,* includes an advertisement by Reynolds urging children not to smoke. But the reasons given for refraining are not that smoking is addictive, that it can harm or kill the infants of pregnant women or that it causes cancer and other lethal diseases; rather, the reason given is that it is an "adult decision."

123. The likely effect of these ads is that, rather than discouraging children from smoking, they plant in impressionable young girls' minds the notion that smoking is something to do to show one's independence, to act grown-up. This notion is, of course, reinforced by the ubiquitous cigarette ads depicting glamorous young adult women smoking as a way of demonstrating their independence.

. . . .

125. The targeting of children, while unquestionably wanton, reckless, and unethical and cynically denied by the industry, was and continues to be, vitally important to the tobacco industry. Children enticed into smoking provide a guaranteed future market for a product that kills the industry's customers by the hundreds of thousands.

126. The reckless disregard by the Defendants for the health risks for the youth and minorities of America, is reflected in the response of an R. J. Reynolds' executive to the question of a former "Winston Man", David Goerlitz, when he asked why the R.J. Reynolds executives did not smoke: "We don't smoke the s---, we just sell it. We reserve that for the young, the black, the poor and the stupid."

FRAUDULENT ADVERTISING OF

TAR/NICOTINE CONTENT

127. The campaign of deception in advertising by the Defendants regarding filters and tar/nicotine content that began in the 1950s has continued unabated through the present. Although an "FTC Method" has been developed that measures the amount of tar and nicotine in a cigarette with a "smoking machine" (measurements the Tobacco Companies advertise for their brands), the FTC method is not a valid or reliable method to measure tar/nicotine intake by "human smokers". In fact, the Tobacco Companies have specifically designed their products to deceive the public into thinking they are getting a low tar/nicotine cigarette, when in fact they are getting significantly higher deliveries of tar/nicotine in their smoke.

. . . .

129. In the 1980s and 1990s, the Tobacco Companies have continued the "tar/nicotine reduction" deception by increasing bioavailability of nicotine through pH manipulation and use of additives, such as acetaldehyde to boost the reinforcer pharmacological impact of nicotine, while still publishing "FTC Method" measurements and advertising their products as "Light" or "Ultra-light".

OTHER TOBACCO PRODUCTS

130. Defendants Brown & Williamson and R.J. Reynolds also manufacture and distribute loose tobacco used in the "roll your own" process of cigarette-making.

. . . .

132. Even though the medical evidence regarding the hazards of cigarette smoking and addiction have been known to these Defendants for many years, the packages and containers of the "roll your own" tobacco bear no warning regarding such hazards.

133. The fact that nicotine delivered by tobacco products is highly addictive was carefully and comprehensively documented in the 1988 Surgeon General's Report, "The Health Consequences of Smoking: Nicotine Addiction." . . . Likewise, in a 1988 report addressing the health effects of smokeless tobacco, the World Health Organization concluded:

"There is ample evidence that the blood nicotine levels of smokeless tobacco users were as high as or even higher than those found in many cigarette smokers. Its continued use therefore, does cause addiction and dependence in humans."

. . . .

135. Despite their knowledge that cigarette smoking and the use of smokeless tobacco is, as a result of nicotine, extremely addictive, the Tobacco Companies to this day deny that smoking, "dipping" or "chewing" tobacco is addictive. Through their individual advertising and public relations campaigns, and collectively, through the Tobacco Institute, the Tobacco Companies have successfully promoted and sold tobacco products by concealing and misrepresenting the highly addictive nature of cigarettes and smokeless tobacco.

136. Defendant United States Tobacco Company makes approximately 90 percent of the oral snuff and chewing tobacco sold in the United States. As alleged above, smokeless tobacco delivers a similar amount of nicotine as cigarettes and is equally as addictive. Plaintiff is informed and believes that smokeless tobacco manufacturers intend to cause nicotine dependence among consumers through a strategy that involves promoting the use of lower nicotine brands with the intent of moving users up to higher, more addictive brands over time. . . . This graduation strategy is supported by the manufacturers' advertising practices which indicate the manufacturers' intent to have consumers experiment with low-nicotine brands and graduate to higher-nicotine brands over time.

RECENT DEVELOPMENTS AND DISCLOSURES

137. After an extensive investigation, in August, 1995, the FDA published its report and proposed regulations of cigarettes and nicotine. The results of that inquiry and analysis support a finding that nicotine in cigarettes and smokeless tobacco is a drug, and that these tobacco products are drug delivery devices within the meaning of the Federal Food, Drug and Cosmetic Act.

. . . .

139. On May 12, 1994, Stanton A. Glantz, Ph.D., a professor of medicine in the Division of Cardiology at the University of California, San Francisco (UCSF) and a scholar interested in the field of tobacco and the public health, received from an unknown source, "Mr. Butts," approximately 4000 pages of memoranda, reports, and letters, covering a 30-year period, from the Brown and Williamson Tobacco Corporation (B&W) and its parent company, the British American Tobacco Company (now BAT Industries). In the subsequent months, Glantz received several thousand additional pages of documents from Congressman Henry Waxman's House Subcommittee on Health and the Environment and another few hundred pages of documents from the estate of the chief scientist of BAT. Glantz ultimately put all the documents into the library at UCSF. The July 19, 1995 *Journal of the American Medical Association* is largely devoted to an analysis by Glantz and his colleagues of these three sets of documents.

140. As reported in JAMA, the documents show: 1) that research conducted by Tobacco Companies into the deleterious health effects of tobacco was often more advanced and sophisticated than studies by the medical community; 2) that executives at B&W knew early on that tobacco use was harmful and that nicotine was addictive and debated whether to make the research public; 3) that the industry decided to conceal the truth from the public; 4) that the industry hid its research from the courts by sending the data through its legal departments, and that its lawyers asserted that the results were immune to disclosure in litigation because they were the privileged product of the lawyer-client relationship; and, 5) that despite knowledge to the contrary, the industry's public position was (and continues to be) that the link between smoking and ill-health was not proven, that they were dedicated to determining whether there was such a link and revealing this to the public, and that nicotine was not addictive.

. . . .

THE IMPACT OF DEFENDANTS'

ACTIONS ON THE STATE OF TEXAS

144. Tobacco-caused disease has killed, and continues to kill, millions of Americans. The Centers for Disease Control (CDC) has estimated that, currently, more than 400,000 Americans die each year from

smoking; that is 26 times more deaths than result from illegal drugs and indicates that approximately one in five deaths is attributable to smoking. Thousands of Texas citizens die each year as a result of smoking cigarettes. According to the Texas Bureau of Vital Statistics, 25,900 Texans died in 1993 as a result of tobacco use.

145. The economic consequences of smoking cigarettes are equally staggering. In May of 1993, the Office Of Technology Assessment advised the United States Congress that in 1990 smoking-related illnesses cost United States taxpayers a total of approximately $50 billion in direct health care costs; $68 billion in indirect costs for morbidity; and $40.3 billion in direct costs for mortality.

. . . .

147. The State of Texas has suffered damages from the Defendants' illegal and tortious conduct and as a result of their unreasonably dangerous products. Those damages include, but are not limited to, costs and expenditures from the public fund in the following areas: the Medicaid Program, the State Employees Group Insurance Program, the State Employees Retirement System, charity care and related health and wellness programs.

148. The State of Texas, as an employer which provides health coverage for its approximately 500,000 employees, retirees and their dependents pursuant to statutory and contractual obligations, is mandated by law to offer comprehensive and major medical health coverage and benefits that include coverage for treatment of smoking-caused diseases. The State of Texas, through a combination of self-insured plans and contractual agreements with certain health care service providers and plans, makes available to its employees, retirees and their respective dependents health coverage that includes these mandated benefits. In fiscal year 1995, the State paid more than $820 million in claims and premium payments to insurance carriers for such benefits. The State of Texas has paid and will pay substantial sums of money pursuant to these statutory and contractual obligations due to the increased cost of providing health care services for treatment of smoking-caused diseases. These increased expenditures have been caused by the unlawful actions of the Defendants.

. . . .

150. The State of Texas has expended and will expend substantial sums of money to fund and promote wellness and healthy lifestyle programs, including smoking cessation, in order to reduce health care costs. In addition, the State of Texas operates a program of preventive health services for state employees. These expenditures have been and will be increased by the unlawful actions of the Defendants.

CONSPIRACY AND CONCERT OF ACTION

151. >From the 1950s and continuing through the filing of this suit, the Tobacco Companies have entered into agreements to suppress, distort and/or obfuscate scientific and medical information relating to the use of tobacco products and the resulting diseases.

. . . .

155. The TI and the CTR, acting on behalf of the Tobacco Companies, monitored research and literature in the scientific and medical communities regarding cigarette smoking and/or smokeless tobacco products and actively attempted to suppress and/or undermine any negative reports.

156. When TI and CTR were unsuccessful in suppressing negative reports regarding cigarette smoking, the two organizations acted to challenge, dilute and diminish the influence of such reports.

157. As a result of the conspiracy, the Tobacco Companies were able to continue selling tobacco products to an unsuspecting and confused public, including the Texas citizens who had relied on their misrepresentation to their detriment.

l58. As a result of the conspiracy, government regulators were mislead and deceived; thereby distorting perceptions and understanding of regulators whose task was to properly assess and control the hazards presented by tobacco products.

159. As a direct and proximate result of the Defendants' actions, the consumers of tobacco products became ill and required medical care paid for by the State.

AIDING AND ABETTING LIABILITY

. . . .

161. All of the Defendants, individually and collectively, aided and abetted the fraud perpetuated on the State of Texas, government regulators and the citizens of Texas.

162. All of the Defendants, individually and collectively, aided and abetted the sale of tobacco products that they knew to be hazardous and defective.

CAUSES OF ACTION

COUNT ONE

[Against all Defendants except Hill & Knowlton, the

Council for Tobacco Research and

the Tobacco Institute]

VIOLATION OF 18 U.S.C. 1962(c) and (d),

FEDERAL RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT

163. The State of Texas incorporates and adopts by reference the allegations contained in this Complaint.

164. The Defendants are "persons" within the meaning of 18 U.S.C. § 1961(3).

165. At all relevant times, Hill & Knowlton, Inc., The Council for Tobacco Research - USA, The Tobacco Institute, Inc., the law firms of Shook, Hardy & Bacon; Covington & Burling; Jones, Day, Reavis & Pogue; Jacob & Medinger; and related entities, including the Ad Hoc Committee of the CTR and the Committee of Counsel of the Tobacco Institute, have constituted an "enterprise" within the meaning of 18 U.S.C. § 1961(4). The enterprise is an ongoing organization whose constituent elements function as a continuing unit in maximizing the sales of tobacco products, misleading the public and regulators as to the health hazards of tobacco, suppressing the truth concerning the addictive properties of nicotine and of the Defendants' manipulation of nicotine levels, and carrying out other elements of Defendants' scheme. The enterprise has an ascertainable structure and purpose beyond the scope of the Defendants' predicate acts and their conspiracy to commit such acts. The enterprise has engaged in, and its activities have affected, interstate and foreign commerce. The enterprise continues to date through the concerted activities of the Defendants actively to disguise the nature of their wrongdoing, to conceal the proceeds thereof, and to conceal the Defendants' participation in the enterprise in order to avoid and/or minimize their exposure to criminal and civil penalties and damages.

166. Each Defendant has been associated with this enterprise. Moreover, each Defendant participated, directly or indirectly, in the conduct of the affairs of the enterprise. Each Defendant helped to direct the enterprise's actions and manage its affairs.

167. Each Defendant "conduct[ed] or participate[d], directly or indirectly, in the conduct of [the] enterprise's affairs through a pattern of racketeering activity," in violation of 18 U.S.C. § 1962(c). The Defendants' pattern of racketeering activity dates from December 15, 1953 through the present and threatens to continue in the future.

168. The Defendants' multiple predicate acts of racketeering include:

a. Wire and mail fraud, in violation of 18 U.S.C. §§ 1341 and 1342. The Defendants engaged in schemes to defraud members of the public and other regarding their tobacco products and health issues. Those schemes have involved fraudulent misrepresentations and/or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. Defendants executed or attempted to execute those schemes through the use of the U.S. mails and through transmissions by wire, radio and television communications in interstate commerce.

i. For example, numerous Brown & Williamson Tobacco Corp. documents were disseminated and/or transmitted by the Defendants and their agents as part of a fraudulent scheme to mislead the public and others about the health risks of tobacco. . . .

ii. Chief executive officers and/or representatives of the Defendants made false and fraudulent statements under penalty of perjury in hearings before the House Subcommittee on Health and the Environment, convened on March 25, April 14, April 28, May 17, May 26, June 21 and June 23, 1994, and televised nationwide. The witnesses affirmatively denied that Tobacco Companies manipulate the amount of nicotine contained in cigarettes; denied that using tobacco products causes cancer; and denied that there any correlation between the amount of nicotine in tobacco products and the incidence of cancer. The chief executive officers and representatives giving false testimony were:

William I. Campbell, President, Philip Morris U.S.A.

Edward A. Horrigan, Jr., Chairman, Liggett Group, Inc.

James W. Johnston, Chairman, R.J. Reynolds Tobacco Co.

Donald S. Johnston, President, American Tobacco Co.

Stephen Raffle, Tobacco Institute

Tilford F. Riehl, Vice-President, Brown & Williamson Tobacco Corp.

Thomas E. Sandefur, Jr., Chairman and Chief Executive Officer, Brown & Williamson Tobacco Corp.

Andy Schindler, Head of Manufacturing, R.J. Reynolds Tobacco Co.

Alexander W. Spears, III, Vice-Chairman, Lorillard Tobacco Co.

Joseph Taddeo, President, U.S. Tobacco Co.

Andrew H. Tisch, Chairman, Lorillard Tobacco Co.

Charles O. Whitley, Senior Consultant, The Tobacco Institute.

. . . .

b. Bribery, through attempts to influence the testimony of "any person" under oath "upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom." 18 U.S.C. § 201(b)(3). These violations include attempts to influence the testimony of whistleblowers and also payments to tobacco company officials who have knowingly made false statements before Congress.

c. Sending tobacco products through the mails in a manner calculated to place them in the hands of minors, and/or using the mails to promote and advertise cigarettes to children, in violation of 18 U.S.C. § 1461, which prohibits use of the mails to deliver any "article or thing designed, adapted, or intended . . . for any indecent or immoral use" and use of the mails to circulate any "paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can be used or

applied . . . for any indecent or immoral purpose" and any "description calculated to induce or incite a person to so use or apply any such article, instrument, substance, drug, medicine, or thing."

d. Attempting to intimidate one or more witnesses in pending or prospective legal proceedings, in violation of 18 U.S.C. § 1513, and 18 U.S.C. § 1951(a), including threats against Jeffrey Wigand, former research chief of Brown & Williamson Tobacco Corporation, to discourage him from providing testimony to the Mississippi Attorney General in connection with *Mike Moore, Attorney General, ex rel., State of Mississippi v. The American Tobacco Co.*, No. 94-1429 (Ch. Ct. Jackson Co.).

e. Use of facilities in interstate or foreign commerce to distribute the proceeds of unlawful activity and otherwise to promote, manager, establish, carry on or facilitate the promotion, management, establishment, or carrying on of unlawful activity, in violation of 18 U.S.C. § 1952.

f. Engaging in monetary transactions involving the proceeds of crime in violation of 18 U.S.C. § 1957, which prohibits "knowingly engag[ing] or attempt[ing] to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specific unlawful activity," including mail and wire fraud. 18 U.S.C. §§ 1957(f)(3) and 1956 (c)(7)(A).

. . . .

170. Each Defendant also conspired to violate 18 U.S.C. § 1962(c), in violation of § 1962(d).

171. The State of Texas was injured in its property by reason of these violations of § 1962(c) and (d) because, in administering the State's health programs, it has been required to incur significant costs and expenses attributable to tobacco-related diseases. In the absence of the Defendants' violation of § 1962(c) and (d), these costs and expenses would have been substantially reduced.

COUNT TWO

[Against all Defendants]

VIOLATION OF 18 U.S.C. § 1962(a) and (d).

FEDERAL RACKETEER INFLUENCED

AND CORRUPT ORGANIZATION ACT

172. The State of Texas incorporates and adopts by reference the allegations contained in this Complaint.

173. Each Defendant is a "person" within the meaning of 18 U.S.C. § 1961(3).

174. At all relevant times, there has existed an "enterprise" for purposes of 18 U.S.C. § 1961(4) composed of a group of individuals associated in fact as potential witnesses and government investigators, prosecutors (civil and criminal), legislators and regulators concerned with the health risks of cigarette smoking.

175. The enterprise is an ongoing organization whose constituent elements function as a continuing unit. The enterprise has engaged in, and/or its activities have affected, interstate or foreign commerce.

176. The Defendants have generated income through a pattern of racketeering activity, part of which they have "use[d] or invest[ed], directly or indirectly, ... in acquisition of an interest in, or the establishment or operation of" this enterprise. The Defendants have used their illicit products to make campaign contributions, pay lawyers and lobbyists and otherwise influence the political and legal processes in Texas and elsewhere.

177. Alternatively and/or in addiction, at all relevant times, there has existed an "enterprise" for purposes of 18 U.S.C. § 1961(4) composed of a group of individuals associated in fact as those who advertise, promote, distribute and/or retail tobacco products to adults and children.

178. The enterprise is an ongoing organization whose constituent elements function as a continuing unit. The enterprise has engaged in, and/or its activities have affected, interstate or foreign commerce.

179. The Defendants have generated income through a pattern of racketeering activity part of which they have "use[d] or invest[ed], directly or indirectly, ... in acquisition of an[] interest in, or the establishment or operation of" this enterprise. The Defendants have used their illicit profits to buy advertising, to fund marketing promotions, to pay incentives to advertisers, promoters and retailers and in other ways that have constituted acquisition of an interest in, or the establishment or operation of, the enterprise.

180. In addition, the Defendants have conspired to violate 18 U.S.C. § 1962(a), in violation of § 1962(d).

181. The State of Texas was injured in its property by reason of these violations of § 1962(a) and (d) because, in administering the State's health programs, it has been required to incur significant costs and expenses attributable to tobacco-related diseases. In the absence of the Defendants' violation of § 1962(a) and (d), these costs and expenses would have been substantially reduced.

. . . .

COUNT FOUR

FEDERAL ANTITRUST LAW

[Against all Defendants]

A. RESTRAINT OF TRADE IN MARKET FOR CIGARETTES

AND OTHER TOBACCO PRODUCTS TO RESTRICT

PRODUCT QUALITY AND CHOICE

188. The State of Texas incorporates and adopts by reference the allegations contained in this Complaint.

189. Beginning at a time uncertain, but at least as early as the 1950s, and continuing until the present date, Defendants entered into a contract, combination, or conspiracy in unreasonable restraint of trade and commerce in the market for cigarettes and other tobacco products in the United States, including the State of Texas, in willful and/or flagrant violation of 15 U.S.C. § 1.

190. The Defendants entered into a contract, combination, or conspiracy to eliminate competition, including the dissemination of product information, regarding the quality, safety and composition of cigarettes and tobacco products, thereby eliminating alternative products from the market, restricting consumer choice and causing consumers to suffer tobacco-related illnesses and health-care costs. These health care costs are inextricably intertwined with, and flow directly from, the anticompetitive restriction of product choice and suppression of product information.

191. In furtherance of Defendants' contract, combination, or conspiracy to eliminate competition, including the dissemination of product information regarding the quality, safety and composition of cigarettes and tobacco products, Defendants restrained and suppressed research on the harmful effects of cigarettes and tobacco products; restrained and suppressed the dissemination of information on the addictive properties of nicotine and other harmful effects of cigarettes and tobacco products; and restrained and suppressed the competition, research, development, production and marketing of alternative, higher quality and safer cigarettes and tobacco products.

192. In furtherance of their conspiracy, the Defendants entered into an agreement to undertake joint funding and control of studies regarding the effect of tobacco products on human health, and to undertake joint funding and control over trade publications and promoting and marketing efforts. Through these and other agreements, understandings, and joint undertakings, the Defendants conspired to suppress and

withhold information on the true causal relationship between tobacco products and various diseases from consumers, state and federal governments, medical and health care entities and the public at large.

193. The Defendants further entered into an agreement to suppress and withhold information on the addictive properties of nicotine and to manipulate the level of nicotine in tobacco products.

194. The Defendants also conspired to eliminate competition among themselves in the research, development, production and marketing of alternative, higher quality and safer cigarettes and tobacco products.

195. The Defendants' contract, combination, or conspiracy has had the purpose and effect of restraining competition in the market for cigarettes and tobacco products in the United States, including the State of Texas; of preventing the sale of alternative, higher quality and safer cigarettes and tobacco products; of artificially inflating the price of and demand for Defendants' cigarettes and tobacco products; of erecting barriers to competition and entry into the market and protecting the structure of the market; of causing the suppression of information that would otherwise have affected consumer and regulatory behavior; and of causing millions of persons to purchase cigarettes and tobacco products when they otherwise would not have done so. The natural effect of the conspiracy has been to raise and stabilize prices, wrongfully increase the Defendants' profits, restrain and suppress competition in the research, development, production and sale of alternative products and standardize the tobacco products manufactured and sold in the United States.

196. The contract, combination, or conspiracy also increased tobacco-related illnesses and associated health care costs and artificially suppresses research into and treatment of tobacco-related illnesses. A foreseeable and necessary consequence of the Defendants' contract, combination, or conspiracy has therefore been the cost of medical care for users of the Defendants' products suffering from tobacco-related illnesses. These medical care costs are inextricably intertwined with the injury the Defendants sought to inflict on competition in the market for tobacco products and flow directly from the conspiracy to suppress and withhold product information and suppress competition for alternative, higher quality and safer cigarettes and tobacco products.

197. The Defendants' contract, combination, or conspiracy has accordingly resulted in a substantial injury to the business and property of Texas consumers, who would not have purchased cigarettes for the same price and in the same quantity in the absence of Defendants' contract, combination, or conspiracy and would not have suffered tobacco-related illnesses and associated health care costs.

198. The Defendants' contract, combination, or conspiracy has also caused a substantial injury to the business and property of the State of Texas, for the Defendants' conduct has resulted in a substantial increase in the cost of medical care for Texans. The State has been required to bear many of these increased costs.

199. Unless enjoined from doing so, Defendants will continue to engage in a contract, combination, or conspiracy in violation of 15 U.S.C. § 1, and the State will continue to suffer substantial injuries to its businesses and property as a direct result of the Defendants' anticompetitive activity.

B. RESTRAINT OF TRADE IN MARKET FOR HEALTH CARE

TO WITHHOLD NECESSARY MEDICAL INFORMATION

200. The State of Texas incorporates and adopts by reference the allegations contained in this Complaint.

201. Beginning at a time uncertain, but at least as early as the 1950s, and continuing until the present date, Defendants entered into a contract, combination, or conspiracy in unreasonable restraint of trade and commerce in the market for health care in the United States, including the State of Texas, in willful and/or flagrant violation of 15 U.S.C. § 1.

202. The Defendants entered into a contract, combination, or conspiracy to restrain and suppress research and other scientific and medical information on tobacco-related illnesses and the addictive properties of nicotine and other harmful effects of cigarettes and tobacco products by agreeing to undertake joint funding and control of studies regarding the effect of tobacco products and alternative tobacco products on human health and to undertake joint funding and control of the publication, and promotion of the results of these studies. Defendants also agreed to suppress, distort and neutralize valid independent scientific and medical research into the cause and treatment of tobacco-related illness.

203. Through these and other agreements, understandings and joint undertakings, the Defendants suppressed and withheld information on the true causal relationship between tobacco products and various diseases, the addictive properties of nicotine and Defendants' manipulation of the level of nicotine in tobacco products from medical researchers, state and federal governments and medical and health care providers and payors.

204. The Defendants' contract, combination, or conspiracy had the express purpose and effect of restraining, suppressing and withholding information necessary to medical care researchers, providers and payors so that the costs of health care for tobacco-related illnesses continued to be borne by health care providers and payors, such as the State, and to prevent assumption of these costs by Defendants.

205. As a direct and proximate result of the Defendants' agreement, combination, or conspiracy, health care providers and payors, such as the State of Texas, were injured in their business and property by, among other things, having to provide or pay for the health care costs of persons with smoking-related diseases without being reimbursed by Defendants.

206. Unless enjoined from doing so, Defendants will continue to engage in a contract, combination, or conspiracy in violation of 15 U.S.C. § 1, and the State will continue to suffer substantial injuries to its business and property as a direct result of the Defendants' anticompetitive activity.

C. RESTRAINT OF TRADE IN MARKET FOR CIGARETTES

AND OTHER TOBACCO PRODUCTS WITH PURPOSE

TO AFFECT MARKET FOR HEALTH CARE

207. The State incorporates and adopts by reference the allegations contained in this Complaint.

208. Beginning at a time uncertain, but at least as early as the 1950s and continuing until the present date, Defendants entered into a contract, combination, or conspiracy in unreasonable restraint of trade and commerce in the market for cigarettes and tobacco products to eliminate competition among themselves and to suppress or eliminate competition from others in the research, development, production and marketing of alternative, higher quality and safer cigarettes and tobacco products.

209. In furtherance of this contract, combination, or conspiracy, and as a necessary step in effectuating its anticompetitive ends, Defendants suppressed, distorted, neutralized and opposed dissemination of valid scientific and medical information and research concerning the health effects and addictiveness of tobacco products necessary to health care providers and payors, such as the State of Texas as well as information necessary to judges, legislators and regulators.

210. Such actions were taken with the express purpose and effect of imposing payment of the costs of medical care for tobacco-related illnesses on health care payors such as the State and preventing the assumption of those costs by Defendants.

211. As a direct result of this contract, combination, or conspiracy, health care providers and payers, such as the State of Texas, were injured in their business and property by, among other things, having to provide or pay for the health care costs of persons with smoking-related diseases without being

reimbursed by Defendants through the civil justice system, the tax system or other regulatory mechanisms.

212. Unless enjoined from doing so, Defendants will continue to engage in a contract, combination, or conspiracy in violation of 15 U.S.C. § 1, and the State will continue to suffer substantial injury to its business and property as a direct result of Defendants' anticompetitive activity.

. . . .

COUNT SIX

[Against all Defendants]

NEGLIGENCE

238. The State of Texas realleges and incorporates herein the foregoing allegations of this Complaint.

239. The Defendants had a duty to exercise reasonable care in the manufacture, sale and/or distribution of Defendants' cigarettes and/or smokeless tobacco products.

240. The Defendants breached that duty by the conduct alleged above.

241. As a foreseeable and proximate result of Defendants' breach of duty, citizens of the State of Texas became addicted to tobacco products, contracted tobacco-related diseases and required medical care. The State was required to provide medical and other assistance to these tobacco consumers.

242. At all pertinent times, the Defendants knew, or should have known, that the smoking of cigarettes and/or use of smokeless tobacco products was and is hazardous to human health.

. . . .

245. As a direct and proximate result of the defective design, testing, manufacturing, marketing, and assembly choices and practices of the Tobacco Companies, the Tobacco Companies' cigarettes, "roll your own" tobacco and smokeless tobacco products were and are themselves defective and unreasonably dangerous.

. . . .

247. The defective condition of the Tobacco Companies' tobacco products directly and proximately caused thousands of Texans to suffer various tobacco-related diseases, injuries and sicknesses, and directly and proximately caused the State to expend millions of dollars in order to provide necessary health care to these citizens, thereby damaging the State.

248. At all pertinent times, it was foreseeable by the Tobacco Companies that certain of the Texas residents who used the Tobacco Companies, tobacco products would become ill and suffer injury, disease and sickness as a direct result of using the tobacco products as the Tobacco Companies intended. It was further foreseeable by the Tobacco Companies that the State would be required, in the past and in the future, to expend millions of dollars each year to provide necessary medical treatment and facilities to those citizens so injured.

. . . .

251. In breaching their duties to the consumers, as described above, the Tobacco Companies acted intentionally, recklessly, maliciously and wantonly in that each Tobacco Company knew or-should have known, through information available exclusively to them, that their tobacco products were defective and unreasonably dangerous. The Tobacco Companies further knew or should have known that their breach of duty would result in the injuries complained of herein.

COUNT SEVEN

[Against all Defendants except Hill & Knowlton, the

Council for Tobacco Research and

the Tobacco Institute]

STRICT LIABILITY FOR DEFECTIVE AND

UNREASONABLY DANGEROUS PRODUCT

. . . .

253. Each Defendant sold or aided and abetted in the sale of cigarettes and other tobacco products, which products were and are defective and unreasonably dangerous.

254. The Tobacco Companies' tobacco products are designed, manufactured, marketed and/or sold by the Defendants to be smoked, chewed or dipped by the consuming public.

. . . .

256. The Tobacco Companies' cigarettes and other tobacco products (including "roll your own" tobacco) were [un]reasonably [sic] dangerous due to their design in that:

a. The cigarettes and other tobacco products failed to perform as safely as an ordinary consumer would expect when used as intended; and

b. The risk of danger in the design of cigarettes and other tobacco products outweighed any benefits associated with their use.

257. The Tobacco Companies have deliberately manipulated the level of nicotine in their cigarettes and other tobacco products; have deliberately added numerous dangerous substances to their cigarettes and tobacco products as "flavor enhancers" and for other purposes; and have directly refused to adopt known, feasible and practicable design improvements that would produce a safer cigarette.

COUNT EIGHT

[Against all Defendants except Hill & Knowlton, the

Council for Tobacco Research and

the Tobacco Institute]

STRICT LIABILITY FOR CONDUCT OF

AN ABNORMALLY DANGEROUS ACTIVITY

. . . .

259. The Defendants' conduct alleged above in the manufacture, marketing, promotion and sale of their cigarettes and other tobacco products constitutes an abnormally dangerous activity.

260. The Defendants consequently are responsible for the harm caused by the use of the cigarettes and other tobacco products manufactured, marketed, promoted and sold by them.

. . . .

262. As required by law and by public necessity, the Plaintiff State of Texas has paid medical and other expenses relating to the treatment of and care for many of those with smoking-related injury, illness and disease wrought by the use of cigarettes and other tobacco products manufactured, marketed, promoted and sold by Defendants.

263. The Defendants are liable to the State for that portion of State expenditure for such medical and other expenses attributable to the use of cigarettes manufactured, marketed and sold by them.

COUNT NINE

[Against all Defendants except Hill & Knowlton, the

Council for Tobacco Research and

the Tobacco Insitute]

BREACH OF EXPRESS AND/OR IMPLIED WARRANTIES

. . . .

265. The Tobacco Companies made affirmations or promises regarding the health effects of their products to the public. The Tobacco Companies affirmed or promised through their "Frank Statement" in 1954 and subsequent representations through the present to study the health effects of their products and fully disclose the results of this research to the residents of the State of Texas.

266. These affirmations, as well as the extensive advertising of the industry, became the basis of the bargain for many individuals, both in beginning to use tobacco or continuing to use tobacco. The residents of the State of Texas, including Medicaid recipients, relied on these continuing affirmations in buying and using the Tobacco Companies' products. The residents of Texas relied on the Tobacco Companies' skill or judgment in manufacturing a product fit for human consumption.

267. The Tobacco Companies' products are unmerchantable and are unfit for safe use when sold and consumed as intended. The Tobacco Companies have breached their implied warranty of merchantability because their products are not fit for their intended purposes. The Tobacco Companies had reason to know that the particular purposes for which their products are intended are unreasonably dangerous.

268. The Tobacco Companies have breached both the express and implied warranties described above.

269. As a direct result of the Tobacco Companies' breach of express and implied warranties of merchantability, the State has been damaged because it has incurred medical expenses under the Medicaid Program and other programs in the treatment of sickness, disease or injury caused by the Defendants' conduct.

COUNT TEN

[Against all Defendants]

RESTITUTION-UNJUST ENRICHMENT

. . . .

271. The Defendants have unjustly retained benefits to the loss of the State and against the fundamental principles of justice and equity. The Defendants have wrongfully failed to pay costs attributable to tobacco-related illnesses and disease that have afflicted citizens of Texas. To the extent that these costs, including those for medical and other care, have been borne by the State of Texas rather than Defendants, the Defendants have been unjustly enriched.

272. Many of the State's citizens who are afflicted with tobacco-related diseases are poor and unable to provide for their own medical care and thus rely on the State to provide for their care. This reliance results in an extreme burden on the taxpayers and the financial resources of this State. Yet, these very citizens, along with our youth, are targeted by the Defendants for the sale of cigarettes and other tobacco products. Texas taxpayers have thus expended billions of dollars in caring for their fellow citizens who have suffered from tobacco-related illness.

273. The State has performed the Defendants' manifest duty in caring for the victims of smoking in Texas. The State's actions were immediately necessary to satisfy the requirements of public health and safety. In performing a duty that in equity and good conscience should have been performed by the Defendants, the State has enriched the Defendants.

274. The State has also enriched the Defendants by saving them from expense and loss by relieving them of the possibility of immense liability and litigation expenses from suits for medical expenses by the victims of smoking.

. . . .

280. It is the Defendants, not the tax payers of Texas, who should bear the costs of tobacco-related diseases. By avoiding their own duties to stand financially responsible for the harm done by their cigarettes and other tobacco products, the Defendants wrongfully have forced the State of Texas to perform such duties and to pay the health care costs of tobacco-related illness and disease. As a result, the Defendants have been unjustly enriched to the extent that the State of Texas has had to pay these costs.

COUNT ELEVEN

[Against all Defendants]

COMMON LAW PUBLIC NUISANCE

. . . .

282. The Defendants have intentionally interfered with the public's right to be free from unwarranted injury, disease and sickness and have caused damage to the public health, the public safety and the general welfare of the citizens of Texas. The massive public health crisis caused by Defendants constitutes a public nuisance. The Defendants have thereby wrongfully caused the State to expend millions of dollars in support of the public health and welfare.

COUNT TWELVE

[Against all Defendants]

NEGLIGENT PERFORMANCE OF A

VOLUNTARY UNDERTAKING

. . . .

284. The Defendants voluntarily assumed the duty and responsibility to report honestly and completely on all research regarding cigarette smoking and/or use of smokeless tobacco products and health based upon their public pronouncements to do so.

285. The Defendants breached this duty by not only failing to report on such research but also knowingly and actively publishing and publicizing fraudulent science.

. . . .

288. The Defendants knew or should have known that such reliance would and did in fact result in injury.

COUNT THIRTEEN

[Against all Defendants]

FRAUD, INTENTIONAL

MISREPRESENTATION

. . . .

290. Defendants have conspired together . . . for the purpose of fraudulently misleading the public, including Texas citizens, the State and government regulators, with regard to the health risks of smoking, all for the purpose of enhancing the Defendants' profits from the sale of their cigarettes.

291. . . . Defendants affirmatively and actively concealed information that clearly demonstrated the dangers of using tobacco products and affirmatively misled the public with regard to the material and clear risks of using tobacco products. The Defendants knowingly engaged in these activities with the intent that the public would continue to purchase the Defendants' tobacco products. The Defendants knew that the public, particularly children, would not be in a position reasonably to discover and understand the true risks of the use of tobacco products, and the public relied upon the misleading information that the Defendants promulgated to their detriment.

. . . .

294. At all pertinent times, these Defendants, individually and collectively, had a duty not to deceive or mislead government regulators or the public. Defendants intentionally breached their duty not to deceive or mislead the public and governmental regulators by their individual and collective activities.

. . . .

298. The Defendants knowingly and intentionally lied and deceived the government regulators who sought to investigate the hazards of tobacco products and control those hazards through regulations.

. . . .

301. The consumers of tobacco products relied on Defendants' advertising, purchased Defendants' tobacco products and consumed the tobacco products to their harm and detriment.

302. As a result, the tobacco consumers became ill and required medical care for which the State was required to pay.

COUNT FOURTEEN

[Against all Defendants]

FALSE, MISLEADING OR DECEPTIVE ACTS OR PRACTICES

. . . .

304. Beginning at least as early as the 1950s, and continuing until the present date, Defendants . . . knowingly engaged in and continued to engage in, false, misleading or deceptive acts or practices which are declared unlawful and violate the Deceptive Trade Practices and Consumer Protection Act, TEX. BUS. & COM CODE SEC. 17.41 et seq. (hereinafter "DTPA").

. . . .

306. . . . Defendants knew, but unlawfully denied and concealed that their tobacco products caused injury and sickness, including cancer, emphysema, heart disease and other illnesses causing disability and death.

307. The Defendants have misrepresented and concealed from the consumers the fact that they have controlled and manipulated the amount of nicotine and/or its bioavailability in their tobacco products for the purpose and with the intent of creating and sustaining addictions to their products.

308. The Defendants have misrepresented that the tobacco industry discouraged young people from smoking when, in fact, the Defendants have engaged in a vast and sophisticated promotional campaign designed, directed and intended to target children and teenagers as new smokers.

309. The Defendants have misrepresented and continue to misrepresent that their tobacco products are of a particular standard, quality or grade when they are of another in violation of Section 17.46(a) and Section 17.46(b)(7) of TEX.BUS.& COM.CODE.

. . . .

Defendants' failure to disclose information regarding the health risks of tobacco products, which was known by Defendants at that time was intended to induce the Texas consumers into transactions which they would not have entered had that information been disclosed in violations of Sections 17.46(a) and Section 17.46(b)(23) of TEX. BUS. & COM. CODE.

. . . .

PRAYER FOR RELIEF

The State of Texas prays for relief and judgment against the Defendants, jointly and severally, as follows:

a. Declaring that Defendants have violated the provisions of the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C.A. § 1962;

b. Enjoining the Defendants and their respective agents, servants, officers, directors and employees from any further violations of the provisions of 18 U.S.C.A. § 1962;

c. Awarding the State actual damages, in an amount to be determined at trial, and threefold the damages it has sustained, and will sustain, as a result of the Racketeering Influenced and Corrupt Organizations Act violations alleged herein;

d. Declaring that Defendants have engaged in unreasonable restraints of trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 and § 15.05(a), Tex. Bus. & Com. Code;

e. Awarding the State actual damages, in an amount to be determined at trial, and threefold the damages it has sustained, and will sustain, as a result of the antitrust violations alleged herein;

f. Ordering the Defendants to dissolve the Council for Tobacco Research and the Tobacco Institute;

g. Enjoining the Defendants and their respective agents, servants, officers, directors and employees from unreasonable restraints of trade and commerce in violation of Section 1 of the Sherman Antitrust Act and Section 15.05 (a) of the Texas Free Enterprise and Antitrust Act of 1983;

h. Awarding the State recovery under § 15.20(a) of the Texas Free Enterprise and Antitrust Act of 1983 against each Defendant in the sum of One Million Dollars ($1,000,000.00) for each violation of said Act;

i. Awarding the State money damages for an amount that is sufficient to compensate, and provide restitution to, the State for the sums it has spent or will spend, past and present, and such other monetary damages as provided by law on account of the Defendants' wrongful conduct, which amount is to be determined at trial by a jury;

j. Awarding the State prejudgment interest, the State's reasonable attorneys' fees, expert witness fees, and costs of this action;

k. Awarding the State punitive money damages against the Defendants for their intentional wrong-doing in an amount that will sufficiently punish the Defendants for their conduct and that will deter such conduct in the future;

l. Declaring that the Defendants, now and in the past, use and did use marketing and advertising campaigns that target and/or encourage children to purchase and consume tobacco products;

m. Enjoining the Defendants from using marketing or advertising campaigns that target and/or encourage children to purchase and consume tobacco products;

n. Awarding the State such other extraordinary equitable, declaratory and/or injunctive relief as permitted by law as necessary to assure the State has an effective remedy;

o. Civil penalties in the amount of Two Thousand dollars per violation of the DTPA up to the amount permissible by law;

p. Enjoining the Defendants from engaging in false, misleading and/or deceptive acts, practices and representations, directly or by implication, orally or in writing, regarding their tobacco products; and such other relief to which the Attorney General may show itself to be entitled; and

q. For such other and further relief, as the Court deems just and proper, that the State is entitled to receive.

JURY DEMAND

The State demands a trial by jury.

Respectfully Submitted,

DAN MORALES
Attorney General of Texas
Tx. Bar No.: 14417450

[Additional Plaintiff's attorneys omitted]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing First Amended Complaint has this the ____ day of May, 1996 been properly forwarded to all known counsel of record as attached hereto as Exhibit "A" by certified mail, return receipt requested.

HAROLD W. NIX

PLAINTIFF'S INITIAL DISCLOSURE (6/5/96)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

JURY

PLAINTIFF'S INITIAL DISCLOSURE

Pursuant to Fed.R.Civ.P. 26(a)(1) and Article Two (1)(a) of the Courts Civil Justice Expense and Delay Reduction Plan, Plaintiff, The State of Texas, makes the following Initial Disclosure:

I. PERSONS WITH KNOWLEDGE

[Article (1)(a)(I)]

The following are persons who are likely to have information that bears significantly on claims and defenses raised in this case:

1. Mary Sapp, Executive Director
Texas Department on Aging
1949 IH-35 South, 3rd Floor
Austin, Texas 78741
(512)444-2727

Texas Department of Aging is likely to have information that bears significantly on Plaintiff's damages calculations. Mary Sapp is the Executive Director of this agency and is working to identify agency employees who may have knowledge of specific information relevant to this issue.

2. Agency Representative and/or Custodian of Record
Texas Department of Agriculture
9th Floor, Stephen F. Austin Bldg.
P. O. Box 12847
Austin, Texas 78711
(512)463-7541

Texas Department of Agriculture is likely to have information that bears significantly on Plaintiff's damages calculations and claims regarding Defendants' alleged wrongful conduct in the State of Texas.
3. Terri Blier, Executive Director
Texas Commission on Alcohol and Drug Abuse
710 Brazos
Austin, Texas 78701
(512)867-8751
Texas Commission on Alcohol and Drug Abuse is likely to have information that bears significantly on Plaintiff's damages calculations and claims regarding Defendants' alleged wrongful conduct in the State of Texas. Terri Blier is the Executive Director of this agency and is working to identify agency employees who may have knowledge of specific information relevant to this issue.
4. Agency Representative and/or Custodian of Record
State Auditor's Office
206 E. 9th Street, Suite 1900
Austin, Texas 78701
(512)479-4700
The State Auditor's Office is likely to have information that bears significantly on Plaintiff's damages calculations.
5. Emily Untermeyer, Executive Director
Texas Cancer Council
211 East 7th, Suite 710
Austin, Texas 78701
(512)463-3190
The Texas Cancer Council is likely to have information that bears significantly on Plaintiff's damages calculations. Emily Untermeyer is the Executive Director of this agency and is working to identify agency employees who may have knowledge of specific information relevant to this issue.
6. Agency Representative and/or Custodian of Record
Texas Department of Commerce
1700 N. Congress
P. O. Box 12728
Austin, Texas 78701
(512)936-0101
Texas Department of Commerce is likely to have information that bears significantly on Plaintiff's damages calculations and claims regarding Defendants' alleged wrongful conduct in the State of Texas.
7. Agency Representative and/or Custodian of Record
Comptroller of Public Accounts
L.B.J. State Office Bldg.
Austin, Texas 78701
(512)475-0412
Comptroller of Public Accounts is likely to have information that bears significantly on Plaintiff's damages calculations and claims regarding Defendants' alleged wrongful conduct in the State of Texas.
8. Jerry Ann Robinson, Project Director
Texas Office for Prevention of Developmental Disabilities
4900 N. Lamar, Room 2552
Austin, Texas 78751-2399
(512)483-5042
Texas Office for Prevention of Developmental Disabilities is likely to have information that bears significantly on Plaintiff's damages calculations. Jerry Ann Robinson is the Project Director of this agency and is working to identify agency employees who may have knowledge of specific information relevant to this issue.
9. Mary Elder, Executive Director

Interagency Council on Early Childhood Intervention
4412 Spicewood Springs Road, Suite 600
Austin, Texas 78759
(512)502-4900
Interagency Council on Early Childhood Intervention is likely to have information that bears significantly on Plaintiff's damages calculations. Mary Elder is the Executive Director of this agency and is working to identify agency employees who may have knowledge of specific information relevant to this issue.
10. Agency Representative and/or Custodian of Record
Texas Education Agency
1701 Congress Avenue
William B. Travis Bldg.
Austin, Texas 78701-1494
(512)463-9720
Texas Education Agency is likely to have information that bears significantly on Plaintiff's damages calculations.
11. Jim W. Sarver, Director of the Group Insurance Division
Employees Retirement System of Texas
P. O. Box 13207
18th and Brazos
Austin, Texas 78701
(512)867-3217
Employees Retirement System of Texas is likely to have information that bears significantly on Plaintiff's damages calculations. Jim W. Sarver is the Director of this agency and is working to identify agency employees who may have knowledge of specific information relevant to this issue.
12. Agency Representative and/or Custodian of Record
General Services Commission
1711 San Jacinto, Central Services Bldg.
P. O. Box 13047
Austin, Texas 78701
(512)463-3960
General Services Commission is likely to have information that bears significantly on Plaintiff's damages calculations.
13. Tom Harrison, Executive Director
Texas Ethics Commission
1101 Camino La Costa
P. O. Box 12070
Austin, Texas 78752
(512)463-5800
Texas Ethics Commission is likely to have information that bears significantly on Plaintiff's damages calculations and claims regarding Defendants' alleged wrongful conduct in the State of Texas. Tom Harrison is the Executive Director of this agency and is working to identify agency employees who may have knowledge of specific information relevant to this issue.
14. Agency Representative and/or Custodian of Record
Health and Human Services Commission
P. O. Box 13247
Austin, Texas 78711-3247
(512)424-6500
Health and Human Services Commission is likely to have information that bears significantly on Plaintiff's damages calculations.
15. Agency Representative and/or Custodian of Record
Department of Human Services

701 W. 51st Street
Austin, Texas 78751
(512)438-3114
Department of Human Services is likely to have information that bears significantly on Plaintiff's damages calculations.
16. Agency Representative and/or Custodian of Record
Department of Health
1100 West 49th Street
Austin, Texas 78756
(512)458-7236
Department of Health is likely to have information that bears significantly on Plaintiff's damages calculations.
17. Terri Chaney, Program Administrator
Texas Incentive and Productivity Commission
E.O. Thompson Bldg., Room 401
Austin, Texas 78701
(512)475-4812
Texas Incentive and Productivity Commission is likely to have information that bears significantly on Plaintiff's damages calculations. Terri Chaney is the Program Administrator of this agency and is working to identify agency employees who may have knowledge of specific information relevant to this issue.
18. Mary Keller, Senior Associate Commissioner
Texas Department of Insurance
333 Guadalupe
P. O. Box 149104
Austin, Texas 78714-9104
(512)475-1821
Texas Department of Insurance is likely to have information that bears significantly on Plaintiff's damages calculations. Mary Keller is the Senior Associate Commissioner of this agency and is working to identify agency employees who may have knowledge of specific information relevant to this issue.
19. Agency Representative and/or Custodian of Record
Texas Department of Criminal Justice
Price Daniel, Sr. Bldg.
209 West 14th Street, Suite 500
Austin, Texas 78701
(512)463-9988
Texas Department of Criminal Justice is likely to have information that bears significantly on Plaintiff's damages calculations.
20. Agency Representative and/or Custodian of Record
Texas Department on Licensing and Regulation
E.O. Thompson State Office Bldg.
P. O. Box 12157
Austin, Texas 78711
(512)463-3306
Texas Department on Licensing and Regulation is likely to have information that bears significantly on Plaintiff's claims regarding Defendants' alleged wrongful conduct in the State of Texas.
21. Agency Representative and/or Custodian of Record
Mental Health and Mental Retardation
909 W. 45th Street
P. O. Box 12668
Austin, Texas 78711-2668

(512)206-4591
Mental Health and Mental Retardation is likely to have information that bears significantly on Plaintiff's damages calculations.
22. Agency Representative and/or Custodian of Record
Texas Rehabilitation Commission
Central Office
4900 N. Lamar
Austin, Texas 78751-2316
(512)483-4055
Texas Rehabilitation Commission is likely to have information that bears significantly on Plaintiff's damages calculations.
23. Agency Representative and/or Custodian of Record
Secretary of State
Capitol, 1st Floor, Room 1E.8
Austin, Texas 78701
(512)463-5763
The Secretary of State is likely to have information that bears significantly on Plaintiff's damages calculations.
24. Agency Representative and/or Custodian of Record
Texas State Treasury
State Treasury Bldg.
200 E. 10th Street
Austin, Texas 78701-2436
(512)463-5971
Texas State Treasury is likely to have information that bears significantly on Plaintiff's damages calculations and claims regarding Defendants' alleged wrongful conduct in the State of Texas.
25. Agency Representative and/or Custodian of Record
Office of the Governor
P. O. Box 12428
Austin, Texas 78711
(512)463-1788
Office of the Governor is likely to have information that bears significantly on Plaintiff's damages calculations.
26. Agency Representative and/or Custodian of Record
Texas Natural Resource Conservation Commission
P. O. Box 13087
Austin, Texas 78711-3087
(512)239-5525
Texas Natural Resources Conservation Commission is likely to have information that bears significantly on Plaintiff's damages calculations.
27. Robert E. Molloy, Director of Employee Group Insurance
University of Texas System
702 Colorado Street, Suite 6.600
Austin, Texas 78701
(512)499-4616
The University of Texas System is likely to have information that bears significantly on Plaintiff's damages calculations. Robert R. Molloy is the Director of Employee Group Insurance for the University of Texas System and is working to identify agency employees who may have knowledge of specific information relevant to this issue.
28. Steve Hassel, Associate Executive Director of System Human Resources
University of Texas A&M System

301 Tarrow, 5th Floor
College Station, Texas 77843
(409)845-2026
The University of Texas A&M System is likely to have information that bears significantly on Plaintiff's damages calculations. Steve Hassel is the Associate Executive Director of System Human Resources for the Texas A&M University System and is working to identify agency employees who may have knowledge of specific information relevant to this issue.

Plaintiff also believes the following individuals may have information pertaining to the Defendants' lobbying activities, government relations, legislative tracking, campaign contributions and non-governmental organizational contributions:

[131 individuals' names omitted]

The Plaintiff believes that the following individuals and/or firms may have information regarding the alleged misconduct by Defendants:

Shook, Hardy & Bacon
1200 Main Street
Kansas City MO 64105

Jones, Day, Reavis & Pogue
1450 G. Street, N.W.
Washington DC 20005

Covington & Burling
P. O. Box 7566
Washington DC 20044-7566

Jacob, Medinger & Finnegan
New York NY

[32 individuals' names omitted]

See also individuals listed on the attached list incorporated herein as Exhibit "A."
Plaintiff continues to work to obtain additional information and will supplement this disclosure in accordance with Article Two (5). Additionally, as discovery progresses, Plaintiff shall reveal additional information as it is discovered.

II. DOCUMENTS
[Article (1)(a)(ii)]

Enclosed are copies of documents (Bates Numbers DOCS00000-000723; HHSC000001-4624; HHSC005562-6081; HHSC006082-6562; HHSC006563-7044; HHSC007045-7226; HHSC004625-4964; HHSC004965-5561; and UCSF00001-1545) that are likely to bear significantly on claims and defenses raised in this case. Additional documents will be made available as soon as practicable as efforts are continuing to locate, identify and copy documents for purposes of disclosure.
Plaintiff has information stored in the form of computer data and data tapes that is likely to bear on claims and defenses raised in this case. Counsel for Plaintiff have notified counsel for the Defendants that they will provide this information subject to applicable confidentiality laws as soon as a mutually agreeable method for production of the data can be worked out.
Plaintiff also possesses or has access to various publicly available documents that may bear on claims and defenses raised in this case including:

a. U.S. Surgeon General Reports.
b. Reports and data published by agencies of the United States Government, such as the U.S. Department of Health Education and Welfare, the National Institutes of Health, the Department of Health and Human Services, the Center for Disease Control and Prevention, the Public Health Service, and the Census Bureau.
c. Publications of the American Cancer Society.
d. Print and broadcast media reports regarding the tobacco industry and the health-effects of smoking.
e. Publications in scientific and medical journals regarding cigarettes and the health-effects of smoking.
f. The Brown & Williamson Collection, Tobacco Central Archives, University of California San Francisco Library and Center for Knowledge Management (accessible via the Internet @ HTTP:\\www.library.UCSF.edu\tobacco).
Because this information is readily obtainable from other sources and because Defendants in all likelihood already possess this information, Plaintiff has not provided copies as part of this disclosure. Plaintiff continues to work to identify documents that fall within the scope of Article Two(1)(a)(ii) and will supplement this disclosure in accordance with Article Two (5).

III. DAMAGES
[Article (1)(a)(iii)]

This suit is intended to recover damages suffered by the State of Texas for the conduct set forth in the First Amended Complaint. The damages to the State generally fall into the following categories:
A. Medicaid damages
B. Damages to the employee insurance and retirement system
C. Damages resulting from health care provided by State funded health care providers that are not included in the Medicaid damages.
These initial computations are subject to continuing analysis and will be revised or supplemented if and as necessary. . . .
Additionally, the damages pursuant to the antitrust laws, consumer protection laws and RICO provide for the award of attorney's fees and other costs.
A. Medicaid Damages
Damages to the State of Texas begin with the inception of the Medicaid program in Texas in September 1967. The Medicaid Act itself was established by Title XIX of the Social Security Amendments Act of 1965.
Medicaid functions in two major ways: (1) as a kind of basic health insurance program; and (2) as a funding source for service to the aged and people with disabilities or with chronic long-term care needs. Medicaid is financed jointly by the Federal government and the states. Texas' matching rate for federal fiscal year 1994 is 64.18%. That is, the state must pay 35.82% of most Medicaid costs. Documents being provided to the Defendants provide this ratio for each year that it is available.
Under Texas law, the Texas Health and Human Services Commission (HHSC) has acted as the single agency for the Medicaid program since January 1993. Within HHSC, the Medicaid program is administered by the State Medicaid Director, Linda Wertz.
The number of Texans covered by Medicaid may be stated in several ways. One way is the "unduplicated count" which for the federal fiscal year 1993 was 2,308,443. Another way to state the Medicaid case load is the "monthly average" number of clients, which for federal fiscal year 1993 was 1,917,479.
Additionally, in federal fiscal year 1993 there were about 358,000 "eligibles", which are persons enrolled in Medicaid, but who never actually incurred any claims. Documents being produced to the Defendants will provide this information for each available year.
The Center for Disease Control (CDC) has developed a computer model for estimating health care costs attributable to smoking. The latest version is called SAMMEC 2.1. The details of SAMMEC 2.1 are set forth in government documents that are being provided to the Defendants in the initial disclosure documents. . . . Recently the CDC has begun developing a different model for estimating a smoking attributable fraction (SAF) that indicates the percentage of direct health care expenditures due to smoking. This method was described in the July 8, 1994 edition of CDC's Morbidity and Mortality Weekly Report,

Volume 43, No. 26. A copy of this article has been produced to the Defendants. . . . The article is entitled "State Estimates of Publicly Funded Direct Medical-Care Expenditures Attributable to Cigarette Smoking, Results for Mississippi, 1980-1993."

The CDC team of experts has calculated damages to the State of Texas for the years 1980-1993 . . . The CDC team has put a present value on these past damages at $3,054,390,000. When 1994, 1995, and 1996 damages are added, the total will likely exceed $4 billion for past damages.

Future damages are believed to exceed $400 million per year. . . .

Punitive damages will be determined by the jury.

The State has asked for the recovery of attorney's fees and costs, which will be calculated as the case progresses.

These damage figures will undoubtedly be revised and fine tuned before the trial of this case. Plaintiff believes that the amounts disclosed are extremely conservative and that these numbers will be revised upward.

B. Damages to the employee insurance and retirement system

The State seeks damages for past and future State funds spent for tobacco attributable health care costs incurred by the State in providing health-benefits to its retirees, employees, and their dependents. All State employees are provided health benefits by the State through the Employees Retirement System of Texas, the University of Texas System, or the Texas A&M University System. All three systems provide to their employees self funded health care plans and insured health care plans. For the most recent year, the cost incurred by the State in providing health care benefits through the Employees Retirement System of Texas, the University of Texas System, and the Texas A&M University System was approximately 1.2 billion, although a portion of the number includes premiums paid by employees for dependents. A significant amount of this number, is attributable to tobacco use. The State seeks damages for many years in the past and future. The underlying documents concerning this element of damages are being provided as part of the disclosure. Additionally, Exhibit "B" addresses the computations given as an example using the State of Mississippi.

C. Damages resulting from health care provided by State funded health care providers that are not included in the Medicaid damages.

The State seeks damages for past and future State funds spent for tobacco attributable medical costs incurred by certain State funded hospitals. The principle State funded hospitals include, among others, the University of Texas Medical Branch-Galveston, the University of Texas M.D. Anderson Cancer Center, the University of Texas Health Science Center-Tyler, and two hospitals operated by the Texas Department of Health: the South Texas Hospital in Harlingen, Texas and the Center for Infectious Disease in San Antonio, Texas. The amount of funds expended by the hospitals for unreimbursed medical care is not known at the time of this disclosure. The State will supplement its disclosure with this information when it is available. However, a significant portion of the amount is attributable to tobacco related medical care. The underlying documents concerning this element of damages are being provided as part of the disclosure.

IV. INSURANCE AGREEMENTS

[Article (1)(a)(iv)]

Not applicable.

V. PRIVILEGED DOCUMENTS

[Article (1)(a)(v)]

The computer data and data tapes identified in Section II contain privileged medical information regarding individuals not a party to this case and therefore must be redacted prior to production. To date, Plaintiff has identified no other privileged documents. In the event additional privileged documents are identified, Plaintiff will supplement this disclosure in accordance with Article Two (5).

For purposes of compliance with Section (1)(a)(v) of Article Two, Plaintiff contends that the employees of state agencies of the State of Texas identified in this disclosure should be considered as clients and/or client representatives for purposes of Rule 26(b)(1), Fed.R.Civ.P. Defendants are hereby notified that, prior to contacting, communicating or attempting to conduct discovery by any other means from state

employees, Defendants must notify Plaintiff's counsel of their intent to do so and are prohibited from contacting said State employee directly.

VI. MEDICAL AND EARNINGS RECORDS
[Article (1)(a)(vi)]
Not applicable.

Respectfully submitted,

DAN MORALES
Attorney General of Texas
TX. Bar No.: 14417450

[Additional Plaintiff's attorneys omitted]

CERTIFICATE OF SERVICE
I hereby certify that a true and correct copy of the foregoing Plaintiff's Initital Disclosure has this the 5th day of June, 1996 been properly forwarded to all known counsel of record as attached hereto as Exhibit "A" by hand delivery and/or facsimile and/or first class mail.
HUGH E. MCNEELY
[Attorney for Plaintiff]

EXHIBIT "A"
[Defendants' attorneys omitted]

THE STATE OF TEXAS' MOTION TO COMPEL (7/3/96)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

JURY

THE STATE OF TEXAS' MOTION TO COMPEL

TO THE HONORABLE JUDGE DAVID FOLSOM:

COMES NOW, THE STATE OF TEXAS, Plaintiff herein, and makes this Motion to Compel the Defendants to comply with their disclosure obligations under this Court's Civil Justice Expense and Delay Reduction Plan (the "Plan"), and to impose appropriate sanctions on Defendants Liggett Group, Inc.("Liggett"); Hill & Knowlton, Inc.("H&K"); Lorillard Tobacco Company("Lorillard"); United States Tobacco Company ("UST"); The Tobacco Institute, Inc.("TI"); Brown & Williamson Tobacco Corporation("B&W"); The American Tobacco Company("ATC"); The Council for Tobacco Research-USA, Inc.("CTR"); R.J. Reynolds Tobacco Company("RJR"); Philip Morris, Inc.("PM"); and B.A.T. Industries, P.L.C. ("BAT")(hereinafter collectively referred to as the "Defendants") in support thereof shows the following:

DISCLOSURE REQUIREMENTS

Article Two §§ (1)(a),(1)(a)(I),(1)(a)(ii) and (1)(a)(iv) of this Court's Plan requires that each party tender to opposing parties, without awaiting discovery requests: (1) the names, addresses, telephone numbers and summary of information known by persons and (2) copies of documents, [both (1) and (2) are those persons and documents that "significantly bear on" the issues of the case]; and (3) access to copies of insurance agreements which may cover liability incurred due to the case. [According to Article Two (1)(a), (1)(a)(I), (1) (a)(ii), (1)(a)(iv) of the Plan, [e]ach party shall , without awaiting a discovery request, provide to every other party ¼ (I)[the name and, if known, the addresses and telephone number of each person likely to have information that bears significantly on any claim or defense, identifying the subjects of the information and a brief, fair summary of the substance of the information known by the person; ¼ (ii)[a] copy of all documents, data compilations, and tangible things in the possession, custody, or control of the party that are likely to bear significantly on any claim or defense ¼ (iv)[for inspection and copying

as under Rule 34, any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of the judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment (emphasis added).] Article Two § (1)(a)(v) provides: "There is no duty to disclose privileged documents. Privileged documents or information shall be identified and the basis for the claimed privilege shall be disclosed."

No Defendant has complied with, or even made a reasonable, good faith attempt to comply with its disclosure obligations under the Plan. The "non-disclosure" effected by the Defendants demonstrates an agenda to abrogate the provisions of the Plan and an intent to disregard the Court's Order of April 19, 1996. . . . Defendants have not complied with the requirements set out under the Plan regarding the identification of privileges nor have any Defendants provided a privilege log containing the specific information as mandated under the Plan. . . . Specifically, Defendants have not provided a privilege log identifying any document, (by Bates stamp number or other identification), the date such document(s) were generated, the date such document(s) were produced, the present custodian of said document(s), the name of individual(s), the name or identification of the entity or related entities from which the document(s) emanated and/or generated, the privilege asserted and a material description of the document(s).

PERSONS

Although all the Defendants, except ATC, BAT and UST, submitted lists of persons who may have information that may "significantly bear on" the issues of this case, these lists fall short of the Plan's Initial Disclosure requirements. The degree by which each Defendant failed to comply with the Plan varies.

ATC-B&W, as successor to ATC, did not file any disclosure on behalf of ATC.

RJR-Out of RJR's long list of names submitted, only four (4) persons are arguably properly identified according to the requirements of the Plan. The list of these four persons is not accompanied with a "brief, fair summary of the substance of the information known by the person" as required by the Plan. . . .

B&W-Although B&W provided an extensive list of persons gathered from their organizational charts dating back from 1964 to 1993, the list is incomplete because: (1) B&W failed to provide a list of current persons [B&W's list of persons ends in 1993 and does not indicate any changes in corporate structure which may have occurred since 1993 to the present.] and (2) B&W failed to identify the subjects of information, and provide a brief, fair summary of the substance of the information known by the persons listed. . . .

PM-Like RJR, PM provided a list of names but only four (4) persons are arguably properly identified according to the requirements of the Plan. The list of these four persons is not accompanied with a "brief, fair summary of the substance of the information known by the person" as required by the Plan. . . .

LIGGETT-Liggett only provided the names of five (5) persons; four (4) of whom are identified to have knowledge regarding product research and one (1) to have knowledge of marketing. Besides grossly failing to comply with initial disclosure, Liggett did not provide a "brief, fair summary" of the knowledge of the witnesses identified. . . .

LORILLARD-Lorillard submitted a list of persons who testified in previous smoking and health litigation and persons selected solely by virtue of their job title. Lorillard did not separate these two types of persons nor submit a "brief, fair summary" of those persons' knowledge. . . .

H&K-Although H&K submitted a list of persons who "performed any services in connection with either the Tobacco Industry Research Committee or the Tobacco Institute", H&K failed to identity the subject of each person's information or a "brief, fair summary" of their knowledge. . . .

CTR-CTR provided a list of persons subdivided into nine categories, eight of the categories identified groups of persons by positions held at CTR. Only one category identified persons by information known to those persons. [Although CTR submitted nine categories of persons with knowledge, category seven, "Special Projects Recipients", did not contain any names of persons even though any individuals who may fall into this category would necessarily have knowledge which "significantly bears on" this case.] None of the listed persons' knowledge was identified by issue or accompanied by a "brief, fair summary" of the person's knowledge. . . .

TI-TI failed to comply with the Plan and merely submitted a list of persons who gave testimony in previous smoking and health litigation. No attempt was made to identify the subject of information known by the persons nor was a "brief, fair summary" of the persons' knowledge submitted. . . .

TOTAL FAILURE OF DEFENDANTS

TO ADDRESS SPECIFIC ISSUES

The Amended Complaint (hereinafter referred to as the "complaint") filed by the State of Texas raises several issues where the information and knowledge are solely within the control of the Defendants. For example, paragraph 103 of the complaint alleges the Defendants targeted children and teenagers in an advertising campaign. The witness disclosure statements filed by the Defendants wholly ignore the subject of youth-targeting, which is squarely within the companies' knowledge.

A list of additional important subjects raised by the amended complaint, but ignored by the Defendants includes the following:

1. Attempts to influence witnesses. [See ¶ 167(d)].

2. Nicotine addiction. (See ¶¶ 77-89).

3. Manipulation of nicotine levels. (See ¶¶ 82, 128, 142, 164, 202, and 227).

4. Suppression of evidence concerning the development of safer cigarettes. (See ¶¶ 70-89).

5. Attorney involvement in controlling and suppressing scientific research. (See ¶¶ 70-89).

The disclosure of the identity of the persons involved in these activities is within the knowledge of Defendants. Their failure to disclose this information appears to be part of their apparent ongoing scheme to suppress all information adverse to the tobacco industry.

DOCUMENTS

According to Article Two of the Plan, each party must provide to every other party a **copy** of all documents that "significantly bear on" the issues of the case. None of the Defendants attempted good faith compliance with this requirement. Two Defendants, UST and BAT, did not comply whatsoever.

LIGGETT-Liggett did not provide the State of Texas with copies of documents as required by the Plan, or even a description by category and location as allowed under the looser requirements of F.R.C.P.26(a)(1)(B). . . . Instead, Liggett stated that non-privileged documents likely to bear on this case, and a list of documents as to which privilege is claimed, are available for inspection and copying at its attorneys' New York offices. The Plan requires Liggett to provide the Plaintiff with copies of all documents likely to bear significantly on a claim or defense. It does not require the Plaintiff to go to New York and sift through documents. . . .

H&K-H&K offered nothing more than to produce for inspection and copying non-privileged documents relating to the Tobacco Industry Research Committee and the Tobacco Institute, and discussing services rendered to H&K by those organizations. . . . H&K did not provide the State of Texas with copies of any documents, nor did it identify privileged documents and disclose the basis for the privilege claimed.

Further, there is no authority under the Plan whereby a Defendant can, without Court intervention, withhold production of non-privileged documents pending entry of a protective order. The Plan expressly requires H&K provide Plaintiff with copies of all non-privileged documents likely to bear significantly on a claim or defense. [See Plan, Article Two § 1(a)(v)].

LORILLARD, TI, B&W, ATC, CTR, RJR and PM-Rather than provide Plaintiff with copies of documents likely to "bear significantly on a claim or defense" as required under the Plan, Defendants Lorillard, TI, B&W, ATC, CTR, RJR and PM have merely referred Plaintiff to a document depository in Minnesota, and purport to condition Plaintiff's access to those documents on Plaintiff's agreement to the terms of a protective order entered into in the Minnesota action. . . . The Minnesota court's protective order would require, among other things, that the State of Texas and its attorneys submit to the jurisdiction of the Minnesota State Court that established the depository. . . .

The protective order in the Minnesota case would also require the State of Texas and its attorneys to be bound by the Defendants' designations of "confidential" documents . . . There are numerous reasons why the Minnesota discovery is not an adequate substitute:

1. The State of Texas should not, and will not, subject itself to the jurisdiction of a Minnesota trial court.

2. Minneapolis/St. Paul, Minnesota is 969 miles from Texarkana.

3. Discovery in this case should be conducted pursuant to the Federal Rules of Civil Procedure, the Federal case law interpreting such rules, The United States District Court Civil Justice Expense and Delay Reduction Plan, and the Federal Rules of Evidence. The Minnesota Rules of Civil Procedure and Evidence have no bearing on this case.

4. Minnesota law is appropriate for citizens of Minnesota, but should not be applied to the State of Texas. None of the lawyers representing the State of Texas are experts in the laws of Minnesota, nor hold licenses to practice law in Minnesota.

5. The Minnesota case is based on a narrower set of legal theories and does not allege RICO violations.

6. The Defendants' have participated in the Minnesota proceedings and have benefitted from the opportunity to provide input to the Minnesota Court. The State of Texas has been deprived of any input as to what has happened in Minnesota.

7. Policy considerations militate against Plaintiff abandoning the provisions of the Plan and submitting to the jurisdiction of the State Court in Minnesota to accomplish pre-trial document discovery. First, the Plan's goal of reducing cost is thwarted by forcing attorneys located in the State of Texas to travel 969 miles to St. Paul, Minnesota to review documents. Second, such "disclosure" relieves defense counsel of their obligation to determine which documents "bear significantly upon" the case filed by the State of Texas.

8. Upon information and belief, as of July 1, 1996, Defendants have placed 5,079,320 pages of documents in the Minnesota repository. Defendants intend to produce approximately another 7,000,000 pages by December 31, 1996. BAT has produced 5,000,000 pages of documents in the England repository and expect to produce another 7,000,000 pages by the end of the year.

9. The methodology in the Minnesota case for document production was generated by specific production requests made on behalf of the attorneys representing the State of Minnesota. The documents were not produced in Minnesota under the comprehensive and carefully crafted requirements of the Plan. Furthermore, the State of Texas seeks relief under different theories of liability and recovery . . . which the Minnesota attorneys never included in their discovery requests.

In essence, Defendants are attempting to relinquish their affirmative duty of document identification and disclosure contained under the Plan by forcing the State of Texas to rely on the legal judgment of Minnesota attorneys.

INSURANCE

According to Article Two (1)(a)(iv) of the Plan, the Defendants do not have to provide actual copies of their insurance agreements to the State of Texas, but they must provide Plaintiff access to copy those insurance agreements. All the Defendants, except Liggett, are in breach of their duty to make available for inspection and copying insurance agreements. . . .

DOCUMENT DATABASE NOT DISCLOSED

Defendants have compiled, reviewed, analyzed, indexed, and cataloged millions of pages of documents on computerized databases in other litigation. Defendants currently have at their disposal databases that would assist them to meet their disclosure obligations but instead they opt to employ "hide the ball" tactics in complete abrogation of the Plan. . . . An example of this latter tactic is Defendants' offer to make available their The State of Minnesota case production logs. Defendants fail to mention, never mind disclose, the computer databases ordered by that court and made available to the plaintiffs in Minnesota that significantly bear on the issues relevant in the instant action. . . .

SANCTIONS

. . . .

Article II Section (1)(d)-No Excuses of the Eastern District Civil Justice Expense and Delay Reduction Plan is absolutely clear and states in pertinent part:

A party is not excused from disclosure because it has not fully completed its investigation of the case, or because it challenges the sufficiency of another party's disclosures, or because another party has not made its disclosures.

This is a critical provision of the Plan and the Judges of the Eastern District have been steadfast in upholding the parties' obligation of mandatory disclosure. . . .

. . . .

. . . The primary purpose of making initial disclosures under the Plan is to avoid unnecessary expense and delay such as the filing of burdensome discovery and motions to compel. . . .

. . . .

By failing to make the mandatory disclosures under the Plan the Defendants have substantially increased the delays and costs of the litigation.

. . . .

In the present case, the Defendants have caused delays, increased the costs, and disregarded their affirmative duty under the Plan. Documents required to be disclosed in the present action have been disclosed in other tobacco/health-related litigation. Accordingly, the State of Texas believes there is a substantial cache of documents and materials that bear significantly on Plaintiff's claims asserted in this case that have not been disclosed. Furthermore, Defendants have not certified to this Court that all documents and materials bearing significantly on the claims in the present action have been disclosed to the State of Texas. The State of Texas is entitled to all the materials that bear significantly on the claims and defenses in the action. Defendants are without an excuse for non-compliance with the mandatory disclosure provisions of the Plan.

These Defendants' blatant refusal to make a good faith effort to comply with this Court's Civil Justice and Expense Reduction Plan warrants sanctions under Rule 37 of the Federal Rules of Civil Procedure. Such sanctions should include, pursuant to Rule 37, requiring Defendants to pay Plaintiff's expenses in making this motion, including attorney's fees.

Accordingly, the State of Texas requests the Court enter an order compelling Defendants to comply with the disclosure requirements set out in this Court's Civil Justice Expense and Delay Reduction Plan, and, further, that the Court impose appropriate sanctions for Defendants' discovery abuse.

CERTIFICATE OF ATTEMPTED RESOLUTION

I certify that Plaintiff has in good faith conferred or attempted to confer with each of the Defendants listed in this motion in an effort to secure disclosure without Court action, and those efforts have failed. Plaintiff's counsel met with Defendants' counsel on June 3, 1996 to discuss their respective disclosure obligations. At that time, Defendants expressed their intent not to produce to Plaintiff any document database indices as ordered in the Minnesota case. Defendants further expressed their intent not to produce documents to Plaintiff in Texarkana in accordance with the Plan. Despite Plaintiff's counsels' objection to Defendants' proposed actions, Defendants have contumaciously implemented their intentions not to make disclosure under the Plan.

Respectfully submitted,

DAN MORALES
Attorney General of Texas
Tx. Bar No.: 14417450
[Additional Plaintiff's attorneys omitted]

By: HAROLD W. NIX

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **THE STATE OF TEXAS' MOTION TO COMPEL** has this the 3rd day of July, 1996 been properly forwarded to all known counsel of record as attached hereto as Exhibit "1" by hand delivery and/or facsimile and/or first class mail.

HAROLD W. NIX

EXHIBIT "1"

[Defendants' attorneys omitted]

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL DISCLOSURE (9/20/96)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

JURY

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL DISCLOSURE

Plaintiff, The State of Texas, files this Memorandum in Support of Its Motion to Compel Disclosure and renews it [sic] request that the Court compel Defendants to comply with the mandatory disclosure requirements of this Court's Civil Justice Expense and Delay Reduction Plan ("the Plan").

1. Introduction

The purpose of this Memorandum is to educate this Honorable Court, to the extent it is not common knowledge, about the tobacco industry's long history of discovery and other litigation abuses in the hope that this Court will take all necessary steps to ensure that continued abuses do not occur in this Court.

. . . .

Through the efforts of courageous former employees of the tobacco industry, important documents and information have come to light about the industry's knowledge of its products' morbidity and mortality, knowledge of addictiveness, manipulation of nicotine levels and the blatant, unabashed targeting of children.

. . . .

2. The Tobacco Industry As "King of Concealment"

Nothing tells us more forcefully that the tobacco industry has long concealed internal company documents from plaintiffs than the relatively recent disclosure of the "Brown & Williamson Collection" from "Mr. Butts" and the Philip Morris documents from Dr. Merrill Williams. For these documents and other information not to have been produced in the many years of litigation, without the industry being

guilty of discovery abuse, necessarily depends on the improbable suggestion that these documents were never requested.

The State of Texas refuses to accept this improbable premise, especially in light of recent disclosures. As a result, Plaintiff respectfully requests that this Court be aware of the dilatory and devious tactics of the tobacco industry to obstruct the quick and fair resolution of this matter.

From these recent disclosures, however, we find concrete evidence of industry concealment of truthful and damaging documents. The most recent example is a Philip Morris handwritten note discussing the routing of certain documents to Inbifo, the company's German research facility. The note was produced from the files of Philip Morris' Director of Research's files, Thomas S. Osdene, in the State of Minnesota's claim against the tobacco industry. The Wall Street Journal, September 18, 1996, at B11, col. 1 (attached as Exhibit 1). The note states in part:

1. Ship all documents to Cologne . . .
2. Keep in Cologne.
3. OK to phone & telex (these will be destroyed).

The memo also states:

1. If important letters or documents have to be sent, please send to home - I will act on them & destroy.

Another famous example is the "deadwood" memorandum (attached as Exhibit 2). The deadwood memorandum was written by Brown & Williamson General Counsel J. Kendrick Wells and dated January 17, 1985. Referencing "document retention" of "engineering and scientific reports," Wells wrote about how "biological studies" and mouse skin painting studies should be considered "deadwood", shipped overseas and that no one should make any notes about the documents:

I explained [to Earl Kohnhorst] I had marked certain of the document references with an X. The X designated documents which I suggested were deadwood in the behavioral and biological studies area. I said that the "B" series are "Janus" [mouse skin painting] series studies and should also be considered as deadwood.

. . .

I suggested that Earl have the documents indicated on my list pulled, put into boxes and stored in the large basement storage areas. I said that we would consider shipping the documents to BAT [in England] when we had completed segregating them. I suggested that Earl tell his people that this was part of an effort to remove deadwood from the files and that neither he nor anyone else in the department should make any notes, memos or lists.

Memorandum at 2 (emphasis added).

In 1986, Mr. Wells again counsels that certain scientific documents not be sent to B&W because they could "serve as road maps for a plaintiff's lawyer." In his words:

. . . I counselled (sic) Gil and David that we should approach these projects on the basis of whether the reports are limited to the information from good science and whether the information is useful in the United States market. Our market is a "tar" and nicotine market, and information pertaining to other constituent delivery levels and biological effects will not be helpful.

. . . While the brevity of the reports will reduce the potential for receipt by B&W of information useful to a plaintiff, disadvantageous information could be included and the reports could serve as road maps for a plaintiff's lawyer.

Wells Memorandum at 1 . . . Wells wrote further, regarding "Project 453" dealing with Nicotine Within the Smoker":

[I]f the reports include discussions of pharmacological effects of nicotine, the information will *not* be interesting and would be helpful to the plaintiff. RD&E will begin receiving reports from

this activity and be prepared to inform BAT to cease sending the data to B&W if the science is not *interesting*.

. . . .

Another telling letter which the author never intended to see the light of day refers to concealing information known to be harmful to the tobacco industry and helpful to plaintiffs. The letter is from David R. Hardy to DeBaun Bryant, General Counsel for Brown & Williamson and dated August 20, 1970 (attached as Exhibit 5). Of course, Mr. Hardy is a principal of Shook, Hardy & Bacon. While Shook, Hardy was then advising BAT, it is presently counsel for the United States Tobacco Company in the case before this Court.
Hardy's letter discusses BAT's involvement in future litigation in the United States and expresses concern about documents in BAT's possession that would pose problems in future cases. Mr. Hardy wrote:
It would, no doubt, be virtually impossible to determine to what extent statements have been made which would be damaging to defendant's position in a smoking and health case, but I have seen sufficient documentation from you to conclude that the dangers I describe in this letter have a very real foundation. . . .

. . . .

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

Fundamental to my concern is the advantage which would accrue to a plaintiff able to offer damaging statements or admissions by persons employed by or whose work was done in whole or in part on behalf of the company defending the action. A plaintiff would be greatly benefited by evidence which tended to establish actual knowledge on the part of the defendant that smoking is generally dangerous to health, that certain ingredients are dangerous and should therefore be removed, or that smoking causes a particular disease. This would not only be evidence that would substantially prove a case against the defendant company for compensatory damages, but could be considered as evidence of willfulness or recklessness sufficient to support a claim for punitive damages. The psychological effect on judge and jury would undoubtedly be devastating to the defendant.
. . .
In conclusion, I would like to emphasize that, in our opinion, the effect of testimony by employees or documentary evidence from the files of either BAT or B&W which seems to acknowledge or tacitly admit that cigarettes cause cancer or other disease would likely be fatal to the defense of either or both companies in a smoking and health case. . . . Certainly such evidence would make B&W the most vulnerable cigarette manufacturer in the [U]nited States to smoking and health suits.
. . . Therefore, employees in both companies should be informed of the possible consequences of careless statements on this subject.
Letter, David R. Hardy to DeBaun Bryant, dated August 20, 1970 (emphasis added).

. . . .

Evidence other than internal industry documents establishes a pattern of failure to produce documents. . . . During the trial of *Cippolone v. Liggett*, plaintiffs counsel learned of a "special projects" division of the industry created and supported research organization, the Council for Tobacco Research ("CTR"). *Haines v. Liggett Group, Inc*., 140 F.R.D. 681, 688 (D. N. J. 1992). . . . In the "special projects" division, industry attorneys directed which scientific research would be done. Defendants insisted that the "special projects" documents were attorney-client privileged.

In response, plaintiffs presented evidence supporting the "furtherance of crime or fraud" exception to the attorney-client privilege to the effect that the "special projects" program was not truly an independent research organization as represented. Rather, CTR was an organization tantamount to a public relations firm designed to discredit the causal links between smoking and disease and to further the industry's misrepresentation of the risks of smoking to the public. The trial court, Judge Sarokin presiding, held that plaintiff's theory of fraud is supported by "compelling" evidence and that all of the remaining "special projects" documents be produced to plaintiff. 140 F.R.D. at 696. In doing so, Judge Sarokin stated:

[O]ne wonders when all industries will recognize their obligation to voluntarily disclose risks from the use of their products. All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. . . . *Haines v. Liggett*, 140 F.R.D. at 681 (emphasis added).

The *Maddox v. Williams*, U. S. District Court, District of Columbia, Misc. No. 94-0171 [ ] case is another example of the lengths the tobacco industry will go to hide their dirty secrets. The defendant, Dr. Merrill Williams, was formerly a paralegal with the tobacco industry defense firm of Wyatt, Tarrant & Combs, whose job it was to review and isolate "sensitive" documents from the files of Brown & Williamson Tobacco Company. Dr. Williams culled between 4000 and 5000 significant papers documenting the industry cover-ups, the addictive qualities of nicotine, industry failure to disclose its knowledge of smoking hazards prior to the Surgeon General's 1963 report, work on "safer" cigarettes, and pursuit of the legal strategy of admitting nothing. Realizing the documents reviewed directly contradicted the industry's representations, Dr. Merrill Williams decided to direct copies of key documents to governmental officials. Soon after the April 14, 1994, Waxman hearings wherein the chief executives of the top seven tobacco companies appeared before Congress and testified that nicotine was not addictive, Dr. Williams directed delivery of the documents.

Dr. Williams was then rewarded by a suit by the tobacco industry seeking return of the documents. In denying the industry the relief it sought, Judge Green stated:

This is a seemingly arcane dispute over subpoenas and motions to quash them. But what is involved at the bottom is not arcane at all: it is a dispute over documents which may reveal that the Brown & Williamson tobacco company (sic) concealed for decades that it knew its products to be both health hazards and addictive. The subpoenas are the means by which the company is seeking to intimidate, and in a sense to punish, both Dr. Williams, the discoverer of evidence of this possible concealment, and the national legislators who are seeking to investigate the subject further and bring the results to the attention of the Congress and the public.

Maddox v. Williams, U. S. District Court, District of Columbia, Misc. No. 94-0171, [ ] at 23-25 (emphasis added).

Not only has the tobacco industry concealed documents for the last 40 years, it has consistently refused to answer proper discovery directed to it. For example, in *Thayer v. Liggett & Myers*, 1.2 T.P.L.R., 2.63, 2.65 (1986)(W. D. Mich. 1970), [ ] Judge Fox found:

In the instant case, certain aspects of defendant's conduct during the discovery process indicated an attempt to impede otherwise proper discovery. First, defendant answered an interrogatory as to whether it was a member of the Tobacco Institute as "not applicable." It was later revealed that Liggett & Myers was indeed a member of the Institute. Second, defendant denied the existence of any agency relationship between itself and the Institute. This denial was in the face of testimony

that letters from a public health official addressed to the major tobacco companies had been answered by the Institute's president. Subsequent production of the letters confirmed this to be the case.

Thayer, at 2.65 (emphasis added).

In *Dunn v. RJR Nabisco Holding Co.*, 19 D01-9305-CT-06, currently pending in the State of Indiana, defendants are playing word games over the meaning of "relating to" and using their feigned inability to understand the phrase as justification for failing to make discovery. Mind you, this debate is being waged by the firm of Shook, Hardy & Bacon, national counsel for United States Tobacco Company in the instant case. . . . [T]obacco industry lawyers are failing to respond to appropriate discovery and, instead, lodging unmeritorious objections in bad faith. The tobacco industry's failure to make even a modest disclosure of documents in the present case is strong evidence the industry wishes to play the same games in this Court.

1. The Tobacco Industry's Improper Assertions of Privileges and Requests for Protective Orders

To further delay the diligent prosecution of tobacco cases, the tobacco industry routinely asserts privileges and requests protective orders it knows to be unwarranted, apparently for the sake of delay. For example, in *Horton v. American Tobacco Company*, 1995 WL 65911 (Miss. 1995), a case tried in January 1988, plaintiff sought a list of cigarette ingredients. A simple enough request some would think; a thorough understanding of the product in question is customarily sought in similar litigation.

American Tobacco vigorously sought to protect this "magic list", characterizing it as a closely guarded secret, apparently akin to Colonel Sander's "secret" Kentucky fried chicken recipe. American Tobacco represented that disclosure of the magic formula would be disastrous to the company. The trial court disagreed and ordered production but the dispute did not end there. American Tobacco appealed to the circuit court and then applied to the Mississippi Supreme Court for a Writ of Prohibition seeking reversal of the disclosure order. *American Tobacco v. The Honorable Craig Evans and Ella Mae Horton*, 508 So. 2d 1057 (Miss. 1987). The Mississippi Supreme Court ordered that the secret formula be produced, but subject to a stringent protective order. 508 So.2d at 1061.

During the *Horton* trial, an American Tobacco company representative, during his testimony, handed the "confidential and sensitive" list of ingredients to the jury members, saying, "[w]hy not, there is nothing secret about this list of ingredients." It is not known how many man-hours and dollars this industry game cost.

Presently, the other tobacco industry defendants are suing the State of Massachusetts attempting to enjoin new legislation requiring the industry to simply state "[t]he identity of any added constituent other than tobacco, water or reconstituted tobacco sheet made wholly from tobacco, to be listed in descending order according to weight, measure, or numerical count . . . ." *Philip Morris, Inc. et al. v. Harshbarger, et al;* (D. Mass. 1996).

A similar strategy was used by the industry in *Thayer v. Liggett & Myers, supra*. There, Liggett sought to restrict plaintiff's flexibility in trial preparations by insisting on a sweeping protective order. . . . After trial began, however, it became clear to Judge Fox that certain factors hidden during pretrial proceedings made the granting of the protective order inappropriate. Judge Fox stated: "As the total picture developed during the trial, it appeared that the protective order was serving defendant well in areas unrelated to the protection of its trade secrets or legitimate procedural rights. . . ."

Plaintiff's attorneys were prohibited from disclosing, discussing or referring to, with any other person, any material, privileged or not, which was furnished by defendant. Fruitful consultation between plaintiff's attorneys with similar cases in other areas was thus effectively throttled. . . . Defendant thus succeeded, to a very significant degree, in isolating plaintiff from outside assistance and advice.

Second, the court was somewhat puzzled by the failure of either the discovered material in the court's file or the evidence presented to reveal anything approaching a trade secret. . . .

. . . .

To recapitulate, the court was witness to a *spectacle* wherein defendant, rich in resources, maintained complete freedom of association and consultation, including courtroom conferences with other attorneys experienced in the trial of similar cases, while plaintiff's counsel, already disadvantaged by the limited resources available to them, were prohibited from doing likewise by a blanket protective order obtained by defendant early in the case on grounds which later proved largely illusory.

Thayer at 2.677 - 2.69 [ ].

The same strategy of insisting on overly broad protective orders was again put on display in *Dunn v. RJR Nabisco Holding Co*., *supra*. The defendant in *Dunn* has refused to produce any discovery until or unless the plaintiffs agree to the overly broad and abusive protective order. Defendant's failure to produce documents has persisted for over one and one half years. . . . [To]bacco industry lawyers directed scientific research so that bogus attorney-client or work product privileges could be later asserted. . . .

. . . .

. . . [A]ccording to a September 21, 1981, memorandum from general counsel J. Kendrick Wells to E. Peeples regarding the "Committee of Counsel Meeting, September 23" on cigarette "additives," legal counsel from RJR, PM, American, Lorillard and Liggett & Myers met to determine future scientific research into additives." . . . Mr. Wells wrote:

. . . If company testing began to show adverse results pertaining to a particular additive, the company control would enable the company to terminate the research, remove the additive, and destroy the data. Memorandum at 3 (emphasis added).

Based on the above, it seems clear that the evidence establishes a systematic manipulation and abuse of the discovery rules by the tobacco industry whenever it is brought before a court to answer complaints such as this. That pattern continues in the case at hand since not one document has been produced to date.

4. The Tobacco Industry As Intimidator

The tobacco industry has also demonstrated a strong and continued desire to intimidate any person who might place himself between it and its ill-gotten gains. For example, one need only look to Brown & Williamson's attempted intimidation of Congressman Henry Waxman. Representative Waxman had previously held Congressional hearings on the health issues of tobacco. After receiving the documents from Dr. Merrill Williams, Congressman Waxman received a subpoena *in Maddox v. Williams*, No. 93-CI-04806, AR52547, seeking to require Congressman Waxman to return the documents to B&W. According to papers filed by Congressman Waxman and others in D. C. District Court:

[T]he documents at issue suggest that B&W may have known as long ago as 1963 that tobacco smoking might be responsible for serious health hazards and was addictive, but that it may nevertheless have denied the existence of such problems even in the face of a major report of the Surgeon General of the United States and the conclusions of various scientific panels.

Maddox v. Williams, U.S. District Court, District of Columbia, Misc. No. 94-0171, (Exhibit 8) at 2-3.

District Judge Green granted the motions to quash the subpoenas. *Id*. at 23-25. In so doing, Judge Green stated:

The subpoenas are the means by which the company [B&W] is seeking to intimidate, and in a sense to punish, both Dr. Williams, the discoverer of evidence of this possible concealment, and

the national legislators who are seeking to investigate the subject further and bring the results to the attention of the Congress and the public.

Id.

The tobacco industry has also sought to intimidate judges who have ruled against it. The industry has attacked Judge Fox in *Thayer*, *supra*, and Judge Sarokin in *Haines*, supra, claiming that their rulings granting admission or requiring production of documents somehow showed a bias against it. The tobacco industry was not successful against Judge Fox. They were successful, however, in the second attempt to have Judge Sarokin removed from *Haines. Haines v. Liggett Group*, 975 F.2d 81 (3rd Cir. 1992).

The multiple attempts to harass and intimidate Dr. Merrill Williams, who dared to expose the tobacco industry's decades of deception, are also well known. Judge Green wrote:

Dr. Williams is being proceeded against in a Kentucky state court for an alleged theft, and the Congressmen have been brusquely summoned by subpoena to the offices of the tobacco company's lawyers, with an explicit direction from a Kentucky judge that only those lawyers and none others may ask questions.

Maddox v. Williams, U.S. District Court, District of Columbia, Misc. No. 94-0171 (Exhibit 8) at 23-25. According to Mr. Philip J. Hilts, the former New York Times reporter covering the Brown & Williamson papers release:

[Dr. Williams] was hiding somewhere along the Mississippi coast between Biloxi and Pascagoula. He had fled from Louisville . . . Teams of lawyers from the tobacco company were pursuing him, and hoped to put him in jail. Public relations officers were vilifying him, sending out press releases on his thievery and violation of the law, their equivalent of wanted posters, suggesting he was a crazed employee who had been fired and wanted to retaliate.

Smoke Screen, The Truth Behind the Tobacco Industry Cover-up, Hilts, Philip J., at 143 (Exhibit 14; emphasis added).

Innocent bystanders such as Dr. Paul M. Fischer are also the subject of the tobacco industry's intimidation tactics. In 1991, Dr. Fischer published an article in JAMA, December 11, 1991 -Vol. 266, No. 22, page 3145, entitled, "Brand Logo Recognition by Children Aged 3 to 6 Years" (Exhibit 15). In that study, it was proven that 91.3% of children aged 6 correctly matched "Old Joe" or "Joe Camel" (the cartoon character promoting Camel cigarettes) with a cigarette. The study also proved that "Old Joe" is just as recognizable as Mickey Mouse among 6-year-olds. One of Dr. Fischer's conclusions was:

While cigarette companies claim that they do not *intend* to market to children, their intentions are irrelevant if advertising *affects* what children know. R. J. Reynolds Tobacco Company is as effective as The Disney Channel in reaching 6 year-old children. Given this fact and the consequences of smoking, cigarette advertising may be an important health risk for children. JAMA, December 11, 1991 -Vol. 266, No. 22, at 3148 (Exhibit 15).

For Dr. Fischer's admirable effort to improve the health of children, the tobacco industry rewards him with years of harassment. In early 1992, R. J. Reynolds issues a "Notice of Out-of-State Deposition on Oral Examination and Request for Production of Documents and Things," . . . This subpoena was issued in a case brought by Janet Mangini (a private citizen) against RJR for its failure to place health warnings on promotional literature such as caps and T-shirts; Dr. Fischer had no involvement in the case, as a party, witness or otherwise. The subpoena ordered Dr. Fischer to produce:

. . . .

3. All notes, memos, videotapes (sic) pertaining to the study;
4. All draft and fill copies of questionnaires;
5. Names, addresses, telephone numbers, background, and current occupation of interviewers;
6. Hard copy tabulations and data tape containing date obtained from each respondent who participated in the study, together with data tape record layout and/or coding format;

. . . .

8. Names and telephone numbers of all respondents and parents;
9. All correspondence relating to the research and the publication of the results;
10. All video and audio recordings relating to conduct of the research;
11. All documentation, questionnaires and recordings pertaining to any validation or verification conducted for the study;

. . . .

Because Dr. Fischer had entered into a written agreement with the parents of the children in the study to keep their names and other information confidential, he was forced to retain an attorney to quash the subpoena. The Georgia Court of Appeals in Atlanta held, on February 9, 1993, that the documents sought are beyond the bounds of discovery and the subpoena is quashed. Undeterred, RJR issued an Open Records Act request for the same documents and the Medical College of Georgia released certain documents. The final result of the entire ordeal (not detailed here), was that Dr. Fischer resigned from the college in disgust and entered private practice.
If more evidence of tobacco industry harassment were needed, one need only to look at all the preemptive suits filed by the industry against states contemplating filing suits to get reimbursement for Medicaid expenses. On November 28, 1995, industry suits were filed against the states of Texas and Massachusetts. "Tobacco Goes on the Offensive", Claudia McLachlin, The National Law Journal, December 11, 1995, at A6 (attached as Exhibit 17).
Since those filings, it has been customary for the industry to file preemptive suits against every state that considers filing in an effort to intimidate the state officials from pursuing the cases. . . . Additionally, the tobacco industry has successfully intimidated two of the largest networks in the United States, ABC and CBS. ABC aired an investigation entitled "Smoke Screen" on February 28, 1994. The second installment was broadcast on March 7, 1994. Seventeen days later, Philip Morris sued ABC for libel in Circuit Court for the City of Richmond. Overwhelmed by negative rulings in Philip Morris' "hometown" and a request for over $10 billion in damages, ABC settled. CBS was due to air a 60 Minutes segment on November 12, 1995. Corporate counsel for CBS ordered the interview pulled for fear the B&W would embroil it too in expensive and time-consuming litigation.
5. The Tobacco Industry As King of the Mountain
While the purpose of Federal Rules of Civil Procedure, Rule Number 1 is "to secure the just, speedy and inexpensive, determination of every action," the tobacco industry's goal has always been the exact opposite. The tobacco industry's position was succinctly stated by Michael Jordan, chief outside counsel for RJR in 1988. . . . “To paraphrase General Patton, the way we won these cases was not by spending all of Reynold's money, but by making that other son of a bitch spend all his.” Memorandum from Jordan to S & H Attorneys, dated April 29, 1988. . . . Lorillard and Liggett & Myers are on the record voting to "stall" disclosure of additives to Congress according to a Wells memorandum . . . It is apparently not enough for the tobacco industry to refuse, consciously, to follow Rule 1; it boasts about its disregard for an efficient, cost-effective system of justice.
An example of the industry's unlimited resources is represented by the experience in *Cippolone v. Liggett Group, Inc*., et al., no 83-2864 (D.N.J.). In *Cippolone*, more than one hundred motions, four interlocutory appeals, one final appeal and two petitions for certiorari were filed. One plaintiff expert, Dr. Harris, was deposed for twenty-two days. His trial testimony lasted nine days. The verdict was $400,000, yet plaintiffs had spent an estimated $2.5 million in out-of-pocket expenses and attorney time.

What did the tobacco industry spend? According to The National Law Journal, reporting a statement of Calvert Crary, a tobacco litigation analyst for Martin Simpson, the industry spent at least $50 million. Andrew Blum, "Will Next Round of Smoking Challenges Be Worth Pursuing," The National Law Journal, June 21, 1988.
After the reversal and remand of *Cippolone*, plaintiffs' counsel Budd Larner voluntarily dismissed the case as it had already done in the cases *Barnes, Berko, Dewey* and *Flynn*. Budd Larner also sought to withdraw from *Haines* on the basis that the firm had been financially exhausted by the tobacco industry.

. . . .

In the trial of Cippolone, the industry spared no expense. According to The Washington Post: During most of the court room sessions, six to nine attorneys sit at the defense counsel tables of the three tobacco companies . . . Behind them is a phalanx of additional defense attorneys; sometimes about two dozen show up. Combined, this staff outnumbers the three plaintiffs' lawyers 8 to 1. Working with the [defense] attorneys is a large contingent of public-relations officials who serve Philip Morris Inc. and Lorillard Inc., and a smaller group for co-defendant, Liggett Group, Inc. Mintz, "Defense Deploys an Army of Lawyers," The Washington Post, May 1, 1988 (Exhibit 22). An early example of the industry litigating to financial exhaustion is *Pritchard v. Liggett & Myers Tobacco Co*., a lung cancer case filed in the Western District of Pennsylvania in 1954. Thirteen years after filing, in 1967, the plaintiff apparently gave up after two trials, two appeals to the Third Circuit and two petitions for certiorari.
7. Conclusion
A critical question is before this Court. Can a multi-billion dollar industry, because of its wealth, power and influence, continue to addict and kill millions of Americans, manipulate the legal system in such a way to preclude an honest look at the industry, and continue to have the taxpayers foot the medical bills for all the suffering caused by the intended use of its products? The forty year history of tobacco litigation is filled with sickness, death and delay. The hazards of tobacco use have caused a public health crisis. The evasive and deceptive behavior of the tobacco industry has been compounded by its evasive and obstructive behavior in litigation. The gross disparity between the resources of the parties and the tobacco industry's willingness to wield its great wealth to obstruct plaintiffs' legitimate discovery attempts has made many legitimately question whether our system of justice can work in this situation.
Beginning early and through today, the tobacco industry has never flinched at spending whatever amount necessary, and doing whatever necessary, to stifle adverse litigation. The State of Texas respectfully submits that the time to enforce Fed. R. Civ. P. 1 against the tobacco industry is now.

Respectfully submitted:

DAN MORALES
ATTORNEY GENERAL OF TEXAS
Texas Bar No.: 14417450

[Additional Plaintiff's attorneys omitted]

By: _____
GRANT KAISER
State Bar No.: 11078900

CERTIFICATE OF SERVICE

I hereby certify compliance with Fed. R. Civ. P. 5; a true a correct copy of the foregoing document has been made on Friday, September 20, 1996, by delivering or mailing to the following attorneys:

[Defendants' attorneys omitted]

Respectfully submitted,

_____
Grant Kaiser

ORDER COMPELLING DISCLOSURE (11/13/96)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

November 13, 1996

ORDER COMPELLING DISCLOSURE

Judge: David Folsom

Magistrate: Wendell C. Radford

The Motion of the State of Texas to Compel Defendants' compliance with the provisions of the Eastern District's Civil Justice Expense and Delay Reduction Plan (the "Plan") and Defendants [All Defendants except B.A.T. Industries, p.l.c. (BAT) and United States Tobacco Company.] Motion to Compel Plaintiff to comply with the Plan were heard on September 27, 1996. After considering all filings related to the motions, arguments of counsel and applicable law, the Court makes the following findings of fact and order:

The Court finds that both moving parties are entitled to disclosure under the Plan beyond that which has already been made. It is of great concern to the Court that several Defendants have made little or no meaningful attempt to comply with the Plan. As set forth below in detail, the Court orders compliance with the Plan by *all* parties. [By order of this Court on October 7, 1996, BAT was ordered to make initial disclosure to Plaintiff on the issue of personal jurisdiction. This order supplements the October 7, 1996 order relative to production of documents and information that significantly bear on the issue of personal jurisdiction of this Court over B.A.T.] In ordering the parties to comply with the Plan, the Court is mindful of the countervailing arguments of the parties, the complexity of the issues and the tremendous volume of records that must be reviewed and disclosed.

However, out of the myriad issues, complexities and voluminous document production requirements that have been addressed so thoroughly by both parties in memoranda and argument, there are several considerations that rise to prominence against the procedural backdrop framed by the Plan and the Federal Rules' stated objectives for the just, speedy, and inexpensive determination of every action.

. . . .

. . . The initial disclosure requirement under the Plan is the best tool to initiate meaningful discovery that will later be supplemented by the discovery provided for in the Case Management Order.

Finally, in fashioning this order, both parties have impressed the Court with the absolute need to utilize existing computer database indices, as well as indices to be provided with document production, in order to have meaningful access to the millions of pages of documents or electronic data that constitute the universe of relevant information. Counsel for Defendants, particularly, argued convincingly that the use of existing indices was the quickest way to make available documents, both as a matter of paper and as a matter of computers. Counsel for Plaintiff took the Defendants' point further and argued that preexisting databases, prepared by Defendants or their counsel in anticipation of or in preparation for litigation and produced in the *Minnesota Case* [The State of Minnesota et al v. Philip Morris et al., File #C1-94-8565, 2 nd Judicial District Court, County of Ramsey, State of Minnesota.] should be produced in this case. Plaintiff asserts that the 4(a) and 4(b) indices are necessary to fulfill the intent of the Plan. Defendants are agreeable to produce the 4(b) indices but argue that the 4(a) indices constitute work-product protected from production under the doctrine outlined in *Hickman v. Taylor*,329 U.S. 495 (1947).

The work-product doctrine is a qualified immunity under the applicable rules of the FRCP and *Hickman*. The standard for the production of "work- product" material to an opposing party is set forth in FRCP Rule 26(b)(3). It is abundantly evident from the affidavits and exhibits submitted by all parties, and it is a finding of fact by this Court, that the Plaintiff has substantial need of both the 4(a) and 4(b) indices in order to prepare its case for the September, 1997 trial date. The Court finds that it would create an undue, if not impossible, hardship on Plaintiff to process, review and recreate the databases indices for the millions of pages of documents in the possession of Defendants. . . . [T]here does not exist a substantial equivalent to the 4(a) indices that Plaintiff can reasonably use considering the time and expense factors. To withhold production of the 4(a) indices from Plaintiff, would run directly counter to the objectives of the Plan. The latter consequence is especially avoidable as this Court has, as does the state court in Minnesota, the ability to order production of the indices and protect against disclosing the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of any Defendant concerning the litigation.

Accordingly,

IT IS THEREFORE ORDERED. that:

1. Plaintiff and Defendants shall produce computerized or electronic indices [For purposes of this Order, production of indices shall be in the form of ASCII or WordPerfect 5.0/5.1 documents on 3.5 inch disk only.] for all documents produced to other parties in this litigation. Said indices shall be produced contemporaneously with document production and shall include the following fields:

1. Begin Bates/Document No.

2. End Bates/Document No.

3. Year - (of the document)

4. Month

5. Day

6. Document Type

7. Title/Reference

8. Author

9. Recipient

10. CC's

For those documents already produced the parties shall provide computer or electronic indices within twenty (20) days of this order.

2. Plaintiff shall produce to Defendants all documents bearing significantly on the models and/or methods used in calculating damages when the Center for Disease Control damage model has been finalized or within ninety (90) days from the signing of this order, whichever is sooner. This production shall include all software programs and user manuals to the extent production is not prohibited by licensing agreements or copyright laws.

3. Plaintiff shall produce to Defendants all documents bearing significantly on the computations of its alleged damages for each of the three categories of damages identified in Plaintiff's Amended and Supplemental Disclosure, dated July 24, 1996, at 44, as soon as the Center for Disease Control damage model has been finalized and applied to the State of Texas' Medicaid data or within ninety (90) days from the signing of this order, whichever is sooner. This production shall include all data used in calculating damages and data generated from data calculations.

4. Plaintiff shall produce on or before December 15, 1996, organizational charts from 1967 to present for all State agencies and commissions administrating or operating the Medicaid, State employee insurance and retirement program and State-funded health care providers (the "Programs").

5. Plaintiff shall produce on or before December 15, 1996, all documents that bear significantly on the State's awareness of the health risks associated with tobacco, including documents relating to the State's efforts to educate Texas residents about or discourage Texas residents from using tobacco."

. . . .

8. Defendants shall produce the following:

1. On or before December 15, 1996, Defendants [Excluding B.A.T. Industries, p.l.c.] shall produce copies of all documents, data compilations or tangible items that bear significantly on any claim or defense of the parties. Documents to be produced include documents produced by Defendants in current or past litigation or otherwise in their possession and/or control that bear significantly on any of the Plaintiff's claims.

2. In addition to paper copies of the documents set forth in item 1, to the extent Defendants have optically scanned, or otherwise stored electronically the documents or data compilations, Defendants are ordered within twenty (20) days to provide Plaintiff with that data and information in the identical format.

3. Within twenty (20) days of this order, Defendants shall produce the database indices identified as the 4(a) and 4(b) indices produced in *The State of Minnesota. et al v. Philip Morris. et al.* File #Cl-94-8565, 2nd Judicial District Court, County of Ramsey, State of Minnesota case pursuant to Chief Judge Kenneth J. Fitzpatrick's November 1, 1995 order, specifically, as follows:

A. Philip Morris Incorporated shall release the following fields:

SHB Database: Document ID, Master ID, Other Number, Document Date, Primary Type, Other Type, Person Author, Person Recipient, Person Copied, Person Mentioned, Person Attending,

Person Noted, Organization Author, Organization Recipient, Organization Copied, Organization Mentioned, Organiza-tion Attending, Organization Noted, Mentioned Brand File Name, Site, Area, Verbatim Title

ABC Database: Starting and Ending Bates Numbers, Date Title, Document Type, Author, Addressee, Copyee, Source, File

A&P

Database: Source, Document Number, Attachment Range, Document Date, Document *Types 05 through l 5 only,* Title, To/Addressee - Personal Names, To/Addressee - Organizational Names, From/Author - Personal Names, From/Author - Organizational Names, Copyee - Personal Names, Copyee - Organizational Names

B. R.J. Reynolds Tobacco Company shall release the following fields:

Litigation

Database: Addressee, Attachments, Author, Brand Names, Copyee, Doc Date, Doc ID X, Doc Type, Mentioned Names, Page Length, Referenced Doc, RJR Intnl Docs, Source, Split Record, Title

Additives

Database: Release Additive Brands, Addictive Name, Pesticide Name, and Other Brands in addition to those fields listed for Litigation Database, above.

Premier Database: 75% of the documents in this database are included in the Litigation Database, thus of the 25% which is not included, the following shall be released: Addressees AFF, Attachment(s), Authors AFF, Brand(s), Copyees, Doc ID #, Document Type, Item Date, Other Names, Source, Title.

Outside Attorney

Database: Addressee, Attachments, Author, Brand Names, Copyee, Doc ID #, Doc Type, Item Date, Other Name, Source, Title.

C. Brown & Williamson Tobacco Corporation shall release the following fields:

Litigation

Database: Document Identification Number, Document Date, Objective Date, Document Type, Primary Docu-ment Type, Secondary Document Type, Personal Names/Organiza-tions, Recipient, Organizer, Copyee, Mentioned, Forwarded To, Owner of Document, Attendee, File Folder Name, Area/Sub-Area Names, Brand Names, Verbatim Title, Substan-ces, Substances No Code, Diseases

Stolen Database: DocID, Date, File, Type, To, From, Orig, Title (Verbatim only, i.e., may redact Title Inferred)

D. Lorillard Tobacco Company shall release its document database showing the following fields:

Document ID, Master ID, Other Number, Document Date, Primary Type, Other Type, Person Author, Person Recipient, Person Copied, Person Mentioned, Person Attending, Person Noted, Organization Copies, Organization Mentioned, Organization Attending, Organization Noted, File Names, Site, Area, Verbatim Title, Mentioned Brand

E. The American Tobacco Company shall release the following fields [The following database indices referred to as "Exhibit A", etc., are those referred to in Judge Fitzpatrick's November 1, 1995 Order in Minnesota, supra .] **:**

Exhibit A: DOCNO**,** DATE, TITLE, TYPE, AUTHOR**,** RECIP, COPIES, PERSONS**,** BRANDS, PAGES, ATTACH, DRAFT, COMPS, ORGS

Exhibit B: DOC_TYPE, BEGIN_DOC, END_DOC, TITLE, DESCRIPTION,AUTHOR, ADDRES-SEE**,** COPIED, MENTIONED, DOC_DATE, ATTACHMENT, DRAFT __

Exhibit C: BEGIN_BATE, END_BATE, RENUMBERED, DOCNO, DATE, TITLE, TYPE, AUTHOR, RECIP, COPIES, PER-SONS, BRANDS, PAGES**,** ATTACH, DRAFT, COMPS, ORGS

Exhibit D: BOXNO, BARCHNO, PAGESTART, PAGEEND, YRSTART, YREND, BLUESTART, BLUEEND, DATE, AUTHOR, RECIPIENT, PAGECOUNT

Exhibit E: PAGENO, PAGE-START, PAGEEND, BLUESTART, BLUEEND, PAGECOUNT, YRNUM-BER

Exhibit F: BOX_NUMBER, BATCH_NO, START_PAGE, END_PAGE, BLUE_START, BLUE_END, DATE, AUTHOR, RECIPIENT, PAGE_COUNT, LOOSE

Exhibit G: START_DATE, END_DATE, DOC_TYPE, AUTHOR, RECIPIENT, TITLE, PERS COPIED, COMP_COPIED, NUMBER_PAGES, ATTACHMENT, PERSONS. COMPA-NIES, SUBJECTS, ATCO_FILES

F. Liggett may redact from its index or database all information contained in columns or fields EXCEPT that information contained in the fields identified below, and it shall then produce its index, as redacted, to plaintiffs:

Document Number, End Number, Date, Type, Author, Recipient, Ccs, Title/Reference, Name Mentioned

G. CTR may redact from its indices or databases all information contained in columns or fields EXCEPT that information contained in the fields identified below and shall then produce its indices, as redacted, to plaintiffs:

Debevoise

Database: Authors, Recipients, Copyees, Document Date and Date Qualifier, Title, Primary Doc, Primary Doc and Secondary Doc, Attendee, Mentioned Names, Brand Names and Reference Brands, Doc Range, Original Doc ID, Custodian, Doc ID

Special Projects Publications

Database: Publ, Recip

H. The Tobacco Institute may redact from its index or database all information contained in columns or fields EXCEPT that information contained in the fields identified below and shall then produce its index, as redacted, to plaintiffs:

PREFIX, BPROD, BSUFFIX, E PROD, QPROD, DATE, AUTHOR, ADDRES-SEE, COPY, PLACE, TYPE, NAMES, COPY

I. Within ten (10) days, Defendants, Hill & Knowlton ("H&K") and United States Tobacco Company ("US&C") shall identify to Plaintiff all existing databases relating to documents in its possession or control. On or before December 15, 1996, H&K and USTC shall provide

Plaintiff with a copy of all document databases, however, H&K and USTC may redact portions of their databases to delete attorney subjective comments.

9. Defendants producing documents into the Minneapolis depository in the *Minnesota Case*, *supra*, shall immediately allow Plaintiff access to their documents in Minneapolis for inspection and copying.

10. The parties are ordered to meet and confer in good faith on other matters that bear significantly on the claims and defenses.

11. It is further provided that nothing in this Order shall be construed to require a party to create a document for production. Except for the creation of production indices, this Order requires production of only those documents to the extent they exist and are within the actual or constructive possession, custody and/or control of that party.

12. The use and dissemination of any and all documents produced in this case in accordance with this Order Compelling Disclosure or subsequent orders or discovery requests shall be governed by the "Confidentiality Order" attached hereto as Exhibit "A." The "Confidentiality Order" reflects this Courts' finding that this action is of great public interest as it involves important public health and welfare concerns. Accordingly, and until further orders of this Court, the attached Confidentiality Order" is controlling and supersedes any other order concerning the documents produced in this action.

CONFIDENTIALITY ORDER (11/13/96)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

November 13, 1996

CONFIDENTIALITY ORDER

Judge: David G. Folsom

Magistrate: Wendell C. Radford

IT IS HEREBY ORDERED:

1. This order (“Confidentiality Order") shall govern the use and dissemination of all Confidential Material produced within this action.

2. The term "document" or "documents" shall have the same meaning as "writings and recordings" as defined in Rule 1001(1) of the Federal rules of Evidence.

3. "Trade Secret" means documents or information not in the public domain that constitute information so proprietary or competitively sensitive that its disclosure to a competitor would cause competitive injury.

4. Any party to this action or other person who produces or supplies information, documents or other tangible items for use in this action in the course of discovery (hereinafter the "designating party" or the "producing party") may designate as "confidential" any such material that it reasonably and in good faith believes constitutes or contains true trade secret material; provided, however, documents that have been or are hereafter produced in other litigation; and that either are not designated as confidential in that litigation or that otherwise are not subject to restrictions on use or disclosure in that litigation, may not be designated as confidential in this action.

5. "Non-competitor" means a person or entity who is a party to this or other litigation who would not obtain a competitive or commercial advantage resulting from the receipt of trade secret material from a producing party.

6. Documents, information or other tangible items shall be designated as Confidential by marking the words:

on the face of the original or photocopy of the document, information, or other tangible item, and upon each page so designated if practicable.

7. Any party may, at any time after production of material designated as confidential, object to its designation by notifying the designating party in writing of that objection and specifying the designated material to which the objection is made. The parties shall, within ten (10) days of service of the written objections, confer concerning the objection. If the objection is not resolved, the party designating the material as confidential shall, within five (5) days of the conference, file and serve a noticed motion to resolve the dispute over the designation of the material and shall bear the burden of proof on the issue. If no such motion is filed within the stated time period, the material will cease to be subject to the protection of this Order. Further, documents determined not to be confidential by any of the courts designated in paragraph 7(a) below shall, by reason of such ruling, cease to be subject to the protection of this Order. The designating party shall, at its expense, provide additional copies to each party who so requests without the stamped designation ' confidential" of any material which ceases to be subject to the protection of this order either by operation of the foregoing provisions or by order of the court.

8. Confidential Material shall be disclosed only to:

a. The Courts and their personnel in this action and in any other action, litigation or lawsuit relating to the manufacture, marketing, sale or distribution, or effects of the use, of tobacco products to which any of the named defendants is a party, provided that, in the case of other actions, a confidentiality order substantially conforming to the terms of this order has been entered in that action.

b. Counsel of record and the respective personnel of the law firms and government law offices representing non-competitor parties in the lawsuits referenced in paragraph 8(a).

c. Investigators, expert and consultants retained or consulted by non-competitor parties or by counsel of record on behalf of non-competitor parties to the lawsuits referenced in paragraph 8(a).

d. Persons who have had previous access to the designated material or the information contained therein.

e. Witnesses and potential witnesses.

f. Any local, state or federal governmental or law enforcement agency, including but not limited to the Centers for Disease Control, the Food and Drug Administration, the Federal Trade Commission, the Federal Bureau of Investigation, the United States Justice Department, states' attorney [sic] general, and counsel for units of local government.

9. If a party wishes to disclose any material designated as Confidential to any person not described in paragraph 8 of this Confidential Order, permission to so disclose must be requested from the designating party in writing. If the designating party objects to the proposed disclosure, no such disclosure shall be made unless this Court, upon application by the party requesting such permission, orders otherwise. However, each party may disclose its own Confidential Material without regard to this Confidentiality Order unless otherwise prohibited under an existing order or duty not to do so.

10. Any person to whom the Confidential Material may be shown pursuant to paragraphs 8(d), 8(e), and 8(f) and paragraph 9 hereof shall first be shown and shall read a copy of this Confidentiality Order and shall agree in writing to be bound by its terms by signing a copy of the

Confidentiality Agreement attached hereto as Exhibit A." The party obtaining the person's signature on the Confidentiality Agreement will retain the original signed agreement.

11. Where any Confidential Material or information derived from confidential material is included in any papers filed with the Court or in a deposition, such papers or depositories shall be marked "CONFIDENTIAL-PROTECTIVE ORDER" and placed in a sealed envelope marked with the caption of the case and held under seal in accordance with the local rules and practices of this court for such pleading and documents.

12. This Confidentiality Order does not affect any party's rights to object to discovery on grounds other than the information sought contains trade secrets.

13. This Confidentiality Order is not intended to govern the use of Confidential Material at any trial of this action. Questions of the protection of Confidential Material during trial will be presented to the Court prior to or during trial as each party deems appropriate.

14. If another court or administrative agency subpoenas or orders production of Confidential Material that a party has obtained under the terms of this Confidentiality Order, or such material is the subject of a public records request to a government party, such party shall promptly notify the party or non-party designating the material as confidential of the pendency of the subpoena, public records request, or order and shall not produce the Confidential Material until the designating party or person has had reasonable time to object or otherwise to take appropriate steps to protect the Confidential Material, unless otherwise ordered by a court.

15. This Confidentiality Order shall not prevent any of the parties from moving this Court for an order that Confidential Material may be disclosed other than in accordance with this Order. This Confidentiality Order is without prejudice to the right of any party to seek modification of it from the Court. It shall remain in effect until such time as it is modified, amended or rescinded by the Court. The Court shall have continuing jurisdiction to modify, amend or rescind this stipulation and order notwithstanding the termination of this action.

PLAINTIFF'S FEBRUARY 25, 1997, REQUEST FOR PRODUCTION OF DOCUMENTS TO PHILIP MORRIS, INC. (2/25/97)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

JURY

PLAINTIFF'S FEBRUARY 25, 1997, REQUEST FOR PRODUCTION OF DOCUMENTS TO PHILIP MORRIS, INC.

Pursuant to Fed. R. Civ. P. 34, Plaintiff, The State of Texas, submits the following Request for Production of Documents to Philip Morris, Inc., ("Requests") to be answered by you under oath within thirty (30) days of the date these Requests were served on you. All documents being produced in response to these Requests shall be made available for inspection and copying at the office of Plaintiff’s Liaison Counsel; or at another location mutually agreed to by the parties.

For purposes of these Requests, including the sections "Definitions" and "General Procedures," the following terms shall have the meanings or shall be construed as set forth below:

I. DEFINITIONS

(1) The words: "and," "or," "each," "every," "any," "all," "refer," "discuss" shall be construed in their broadest form and the singular shall include the plural and the plural shall include the singular whenever necessary so as to bring within the scope of these Requests all Documents (defined below) that might otherwise be construed to be outside their scope.

(2) "Advertising, marketing or promotion" of cigarettes includes public relations activities involving smoking and health.

(3) "Damages," means any form of monetary relief, including compensatory damages, punitive damages and restitution and any other form of judicial relief.

(4) "Defendant," includes the entity responding to these requests and any related entity (whether by common ownership, operation, or control).

(5) "Document" means those documents as identified and/or defined and required to be produced in accordance with Rule 34 of the Federal Rules of Civil Procedure. All non-identical copies, including drafts, of the same Document are Documents within the meaning of that term and must be produced as well.

(6) "Health Risks" means all diseases, illnesses, injuries (including mortality and morbidity), or conditions (including addiction, habituation or dependency-producing) that are caused by, or that have been reported by governmental bodies, voluntary health organizations or the medical or public health communities to be caused by, or statistically associated with, the substance, condition or activity that is the subject of the specific request herein.

(7) "Incidence" means the frequency of occurrence of any event or condition over a period of time and in relation to the population in which it occurs, as incidence of a disease.

(8) "Include" or "including" means including, but not limited to.

(9) "Nicotine level" refers to the levels or concentration of nicotine as measured in any manner, including but not limited to the level or concentration in tobacco or the level or concentration in smoke.

(10) "Person" or "Individual" means natural persons, sole proprietorships, corporations, firms, partnerships, unincorporated associations, trusts and any other legal entity.

(11) "Prevalence" means the number of persons within a given population with a specified condition, disease, illness, injury, use, habit or addiction.

(12) "Research director" refers to the person with that designated title, or, if there is no such title at your company, the top scientist at your company or the person with the ultimate responsibility for scientific issues at your company.

(13) "Safer cigarette" refers to a cigarette which would, possibly, or allegedly reduce the Health Risks or adverse consequences of smoking cigarettes.

(14) "Tobacco" means any consumer product containing tobacco and tobacco plants.

(15) "Tobacco Consumption" means the consumption of any product containing Tobacco, including cigarette smoking.

II. GENERAL PROCEDURES

1. Produce all Documents described below, including Documents that are in the possession, custody or control of the Defendants, its directors, consultants, contractors, insurance companies, officers, employees, attorneys, accountants, or agents, or other Persons that are otherwise subject to your custody or control. All Documents that respond, in whole or in part, to any portion of these Requests must be produced in their entirety, including all attachments and enclosures.

Documents shall be produced in compliance with Rule 34 of the Federal Rules of Civil Procedure and the November 5, 1996, Case Management Order and all other orders of the Court.

2. If you contend that any Document responsive to these Requests is privileged or otherwise protected from production, in whole or in part, or if you otherwise object to any of these Requests, you are required by Local Court Rules of the United States District Court for the Eastern District of Texas and the Civil Justice Expense and Delay Reduction Plan for the Eastern District of Texas, Article Two (1)(a)(v), to provide a privilege log. The privilege log is required to (1) identify the documents or information claimed to be privileged, (2) detail the basis for the privilege in a manner that will enable other parties to assess the applicability of the asserted privilege or protection. This log should include author, date, intended and other recipients, the

subject matter and detailed information so that Plaintiff may determine whether the privilege is applicable.

3. For purposes of these requests, the words utilized are considered to have, and should be understood to have, their ordinary, every day meaning. Plaintiff refers Defendants to any collegiate dictionary such as Webster's New World Dictionary, Second College Edition by Prentice Hall Press, in the event Defendants assert that the wording of a request is vague, ambiguous, unintelligible, confusing.

III. REQUESTS FOR PRODUCTION

1. The October 19, 1977, paper entitled "Smoker Psychology Program Review."

2. All May 17, 1972, Philip Morris, Inc., memoranda regarding research data on physiological arousal and caffeine.

3. All June 1954 Philip Morris memoranda regarding proposed experimental research through the U.S. Testing Co.

4. Patent 3,046,997.

5. All April 23, 1963, memos to Dr. A. Bavley from W.L. Dunn discussing nicotine.

6. All 1964 research and development pamphlets produced by Philip Morris.

7. All March 1, 1973, memos to the Philip Morris, Inc. Research Department from Dunn regarding addiction.

8. All 1969 memos from Jay Faberman to Al Udow discussing reasons for smoking.

9. All July 29, 1969, memoranda to Wakeham from Dunn, entitled "Stating the Risk Study Problem."

10. All August 1, 1969, memoranda from Dunn to Wakeham regarding discussions with Professor Lazarsfeld.

11. The document entitled "Fall 1969 Ryan/Dunn Alternative - Third Version of Board Presentation."

12. All November 26, 1969, reports from Dr. Helmut Wakeham to Philip Morris, Inc.’s board of directors on the activities of the Philip Morris Research Center.

13. All November 1970 documents from Schori to Dunn with attached research proposals for tar, nicotine and smoking behavior.

14. All summaries of a 1972 paper entitled "Motives and Incentives in Cigarette Smoking," by Philip Morris researcher William L. Dunn Jr.

15. A January 1972 Philip Morris Research Center study entitled "Tar, Nicotine and Cigarette Consumption," by T.R. Schori and W.L. Dunn Jr.

16. The April 4, 1972, memo from Dunn to P.A. Eichorn regarding Quarterly Report - February-March 1972.

17. The January 1 to January 31, 1973, Smokers’ Psychology Monthly Report by Dunn entitled "Smoking and Rate of Learning Alpha Control."

18. The Dunn’s Smokers’ Psychology Monthly Report dated February 9, 1973.

19. All August 22, 1973, letters from Dr. Tom Osdene to BAT’s Dr. Felton.

20. All March 25, 1974, memos from W. Dunn to R. Fagan.

21. All May 8, 1974, speeches by W. Dunn.

22. A November 1, 1974, "Behavioral Research Annual Report, Part II," approved by T.S. Osdene and distributed to Wakeham.

23. The February 1976 Smoker Psychology Monthly Report.

24. William L. Dunn Jr.'s paper entitled "Smoking is a Possible Inhibitor of Arousal," presented at the International Workshop on the Behavioral Effects of Nicotine in Zurich, Switzerland on September 17, 1976.

25. The June 2, 1976, memorandum from Al Udow to J.J. Morgan on "Why People Start to Smoke."

26. The December 1, 1976, memo from William L. Dunn, Jr. to Dr. T.S. Osdene regarding "Plans and Objectives - 1977."

27 All December 22, 1976, memorandums from W.L. Dunn to Dr. T.S. Osdene regarding a proposed EEG facility in 1977.

28. All Philip Morris employee newsletters (including February 1977) entitled or having information on Smoking and Health News.

29. The October 5-7, 1977, presentation by Wakeham before the 31st Tobacco Chemist Research Conference in Greensboro, North Carolina.

30. An October 19, 1977, document entitled Smoker Psychology Program Review.

31. The November 11, 1977, Smoker Psychology Monthly Report by Ryan entitled, Habit and Need Cigarettes.

32. The December 19, 1977 Dunn to Osdene memorandum regarding Behavioral Research Accomplishments - 1977.

33. All January 23, 1978, memorandums from William L. Dunn to Al Udow.

34. All February 3, 1978, memorandums from Jeffrey I. Seeman, Carolyn J. Levy and Edward V. Sanders to Dr. T.S. Osdene regarding nicotine.

35. The March 10, 1978 Smoker Psychology Monthly Report regarding hyperkinetic children.

36. All March 15, 1978, documents from Seeman to Osdene regarding nicotine.

37. All March 21, 1978, memorandums from Jeffrey I. Seeman, Carolyn J. Levy and Edward V. Sanders to Dr. T.S. Osdene regarding nicotine**.**

38. All March 31, 1978, memorandums from Seeman to Osdene regarding the Nicotine Program: Specific Implementation.

39. The Behavioral Research Laboratory's 1978 Annual Review -- Part II written by F.J. Ryan and W.L. Dunn dated August 18, 1978.

40. The September 1978 Philip Morris USA "Research and Development Five Year Plan, 1979-1983."

41. The December 6, 1978 Dunn to Osdene memo entitled "Plans and Objectives - 1979";

42. All February 22, 1979, memorandums from Helmut Wakeham to Dr. R.B. Seligman.

43. All January 7, 1980, memorandums from Dunn to Osdene entitled APlans and Objectives - 1980."

44. All January 15, 1980, memorandums from Osdene to Seligman, et al.

45. All January 21, 1980, memorandums from W.L. Dunn to Dr. T.S. Osdene regarding Behavioral Research Accomplishments -- 1979.

46. All March 5, 1980, memorandums from Seligman to Osdene regarding the Nicotine Receptor Program - University of Rochester."

47. All March 18, 1980, memorandums from J.L. Charles to Dr. R.B. Seligman regarding nicotine and Dr. Abood.

48. All March 21, 1980, memorandums from Sanders to Seligman entitled "Nicotine Receptor Program - University of Rochester."

49. All November 26, 1980, memorandums from Dunn to Osdene entitled Plans and Objectives, 1981."

50. All memorandums dated February 23, 1982, from Jim Charles to T.S. Osdene.

51. All Behavioral Pharmacology Annual Reports (including 1983) by DeNoble, Mele and Charles.

52. All October 6, 1970, memorandums authored by Dr. Seligman regarding nicotine gum.

Respectfully submitted:

DAN MORALES
Attorney General of Texas
Tx. Bar No.: 14417450
[Additional Plaintiff's attorneys omitted]

WALTER UMPHREY, P.C. [Signed by Grant Kaiser, by permission of Walter Umphrey, attorney-in-charge]

CERTIFICATE OF SERVICE

I hereby certify compliance with Fed. R. Civ. P. 5 and Case Management Order of November 5, 1996, that a true a correct copy of the foregoing document has been sent by overnight delivery service (with diskette) on February 25, 1997, to the following:

Administrative Liaison Counsel for All Defendants:
Howard Waldrop
Atchley, Russell, Waldrop & Hlavinka, L.L.P.
1710 Moores Lane
P. O. Box 5517
Texarkana, TX 75505-5517

Respectfully submitted,

_____

Grant Kaiser

PLAINTIFF'S MOTION TO DEEM PRIVILEGES, IF ANY, WAIVED FOR FAILURE TO PRODUCE PRIVILEGE LOGS (3/13/97)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

PLAINTIFF'S MOTION TO DEEM PRIVILEGES, IF ANY, WAIVED FOR FAILURE TO PRODUCE PRIVILEGE LOGS

Plaintiff, the State of Texas, respectfully requests that this Court order that any privileges allegedly attached to documents and things are waived by certain Defendants' [United States Tobacco Co. and Hill & Knowlton, Inc.] failure to produce any privilege logs.

Article Two of the Civil Justice Expense and Delay Reduction Plan of the Eastern District of Texas requires disclosure of a privilege log. Article Two states, in part:

There is no duty to disclose privileged documents. Privileged documents or information shall be identified and the basis for the claimed privilege shall be disclosed.

Judge Folsom, in his January 3, 1997, "Order Modifying Magistrates Discovery Order," reiterated and clarified the requirement to disclose privilege logs. In that Order, Judge Folsom specifically ordered:

Privileged documents or information shall be identified and the basis for the claimed privilege … disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

January 3, 1997 Order Modifying Magistrates Discovery Order, at 2-3.

Nevertheless, without excuse, two Defendants have not identified in any sort of privilege log, a single document to which they claim a privilege. They have further objected to and refused to produce privilege logs from other smoking and health litigation.

Documents that are likely to bear significantly on any claim or defense in this case should have been produced by June 5, 1996, the original Court ordered disclosure date. Defendants should have either produced the documents then or, if they claimed they some privilege, they should have produced a privilege log identifying these documents and the basis for the privilege.

Defendants' refusals to produce documents and a privilege log are flagrant abuses of discovery and openly contemptuous of this Court's Order. Plaintiff conferred with Defendants' Liaison counsel requesting compliance with the Court's orders in the letters attached as exhibits "A" and "B," all to no avail.

Defendants, United States Tobacco Company and Hill & Knowlton, Inc. have failed to provide any privilege log for documents. Hill & Knowlton has apparently filed something *in camer*a related to "document indices databases." This filing does not meet the requirements discussed above.

If this filing is a privilege log, it is inadequate for two separate reasons. First, the filing does not, "enable other parties to assess the applicability of the privilege or protection," [Order Modifying Magistrates Discovery Order of January 3, 1997, at p.2-3.] because it was submitted to the Court under seal. The State therefore cannot determine the validity of any assertion of privilege. Second, the description supplied by Hill & Knowlton suggests that this is not a document privilege log, but rather concerns the *in camera* inspection of their "4A" type document indices.

For Defendants' failure to identify any privileged documents or the basis of any claim of privilege, the State respectfully requests that this Court order that these Defendants have waived any claims of privilege concerning documents and information, pursuant to Fed. R. Civ. P. 37(b)(2) and that Defendants be ordered to disclose all documents that are likely to bear significantly on any claim or defense in this case, as well as all documents responsive to the State of Texas' Requests for Production of Documents. And, failing complete production as required by the Plan and this Court's prior Orders, the State of Texas respectfully requests an appropriate sanction of striking Defendants' pleadings.

Respectfully submitted:

DAN MORALES
Attorney General of Texas
Texas Bar No.: 14417450

[Additional Plaintiff's attorneys omitted]

WALTER UMPHREY, P.C. [By Grant Kaiser with the permission of Walter Umphrey.]
490 Park
P. O. Box 4905
Beaumont, Texas 77074
409.835.6000
409.838.8888 Fax
Texas Bar No.: 20380000
ATTORNEY-IN-CHARGE

CERTIFICATE OF SERVICE

I hereby certify compliance with Fed. R. Civ. P. 5 and Case Management Order of November 5, 1996, that a true a correct copy of the foregoing document and diskette has been sent by overnight delivery service and filed on March 13, 1997, to the following:

Administrative Liaison Counsel for All Defendants:

Howard Waldrop
Atchley, Russell, Waldrop & Hlavinka, L.L.P.
1710 Moores Lane
P. O. Box 5517
Texarkana, TX 75505-5517
903.792.8246
903.792.5801 Fax
Respectfully submitted,

_____
Grant Kaiser

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

ORDER GRANTING PLAINTIFF'S MOTION TO DEEM PRIVILEGES WAIVED FOR FAILURE TO PRODUCE PRIVILEGE LOGS

Plaintiff's Motion to Deem Privileges Waived for Failure to Produce Privilege Logs was considered by the Court today. After considering all filings related to this motion, arguments, if any, of counsel and applicable law, the Court is of the opinion the Motion should be granted.

IT IS THEREFORE ORDERED that all privileges as to documents and information that may have been asserted in this action by Defendants United States Tobacco Company and Hill & Knowlton, Inc., are hereby deemed waived. It is further,

ORDERED that Defendants United States Tobacco Company and Hill & Knowlton, Inc., shall produce all documents likely to bear significantly on any claim or defense in this cause and all documents responsive to the State of Texas' Requests for Production of Documents within ___ days of this order. It is further

ORDERED, given Defendants United States Tobacco Company and Hill & Knowlton, Inc., failure to comply with the Plan and prior Court orders, that their failure to comply with this Order, appropriate sanctions, including striking of their pleadings, will be ordered.

SIGNED THIS DAY OF , 1997.

_____

MAGISTRATE JUDGE WENDELL C. RADFORD
UNITED STATES DISTRICT COURT

THE STATE OF TEXAS' MOTION TO COMPEL DISCLOSURE OF INGREDIENT, FORMULA AND MANUFACTURING PROCESSES (3/13/97)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

THE STATE OF TEXAS' MOTION TO COMPEL DISCLOSURE OF

INGREDIENT, FORMULA AND MANUFACTURING PROCESSES

Plaintiff, the State of Texas, respectfully requests this Court compel Defendants [All Defendants except B.A.T. Industries, P.L.C.] to disclose the ingredients, formulas and manufacturing processes for their cigarettes and other tobacco products. The Eastern District Plan and at least two orders from this Court require disclosure of this information.

Background

The State of Texas filed its original complaint against Defendants on March 28, 1996. In its complaint, the State alleged, in part, that Defendants' products were defective and unreasonably dangerous and that Defendants "have deliberately added numerous dangerous substances to their cigarettes . . .." (First Amended Complaint, Para. 256 at 111).

This Court thereafter ordered that Defendants disclose all documents and things that are likely to bear significantly on any claim or defense in this case by June 5, 1996. Given the State's allegations concerning the ingredients and additives of Defendants' products, one might reasonably expect that Defendants would produce information about the ingredients and additives for their products for the pertinent time period. They did not.

On December 18, 1996, counsel for the State sent a letter to Defendants' Administrative Liaison Counsel advising him of Defendants failure in this regard. . . . Defendants' Liaison Counsel replied, without substance, refusing disclosure . . . Undaunted, the State served Defendants [All Defendants except B.A.T. Industries, P.L.C.] the following requests for production on December 24, 1996:

1. All documents sufficient for the State to identify all (1) specifications, (2) ingredients, (3) formulas, and (4) smoke constituents for each brand of cigarettes marketed in Texas by Defendants, and their corporate affiliates, for the time period January 1, 1954, to the present.
1. All documents to which Defendants have referred to as "the ingredients in and the formulas for manufacturing Defendants' cigarettes" [Defendants' Memorandum in Support of Their Motion for Protective Order Governing Disclosure of Ingredient and Formula Trade Secret Information at 1-2.] for the time period January 1, 1954, to the present.
1. All documents sufficient for the State to identify all manufacturing processes for each of Defendants' products, by brand, marketed in Texas by Defendants, and their corporate affiliates, for the time period January 1, 1954, to the present.
Defendants objected to each and every request and failed to produce even a single sheet of paper or one iota of information.

Basis for Relief **Basis for Relief**

. . . Defendants cannot credibly argue that the requested documents do not bear significantly on the claims and defenses in this case.
Defendants had two choices with respect to the requested documents. First, Defendants could (and should) have produced the documents. Second, if Defendants claimed some privilege, they could (and should) have produced a privilege log identifying relevant documents and the basis for any claimed privilege. . . . Preferring to stall legitimate disclosures in this case, Defendants chose neither of the only viable choices and have produced not one responsive document or a privilege log. Simply put, these documents should have been produced by June 5, 1996, the original disclosure date ordered by the Court.
Defendants' failure to disclose the documents seriously handicaps the State's position in this case. For example, Defendants presently seek dismissal of counts 4 through 14 partially on the basis that their products are "inherently dangerous" pursuant to Tex. Civ. Prac. & Rem. Code § 82.004. However, adulterated and impure products such as those produced by Defendants do not fall within the purview of § 82.004. . . . Thus, Defendants seek dismissal of the State's claims while at the same time withholding important evidence directly on point. The State respectfully suggests that this Court should not sanction Defendants' tactic of "hide the ball."

. . . .

The State is mindful that it agreed, effective January 15, 1997, for the Defendants to defer disclosure of "highly confidential" information pending the Court's consideration of Defendants' motion to revise the Confidentiality Order presently in place. [Order signed by Judge Folsom dated January 15, 1997.] Defendants have, however, demonstrated a strong propensity to delay disclosure of this and other important information.
Given this fact, the State files this Motion so that when the Confidentiality Order issue is resolved by Judge Folsom, an order requiring disclosure of the requested information within a certain number of days will be in place and Defendants can occasion no further delay.

Request for Relief

For the foregoing reasons, Plaintiff, the State of Texas, respectfully requests the Court to order Defendants to produce the requested information and documents.

Respectfully submitted:

DAN MORALES
Attorney General of Texas

Texas Bar No.: 14417450

[Additional Plaintiff's attorneys omitted]

WALTER UMPHREY, P.C. [By Grant Kaiser, with permission.]
490 Park
P. O. Box 4905
Beaumont, Texas 77074
409.835.6000
409.838.8888 Fax
Texas Bar No.: 20380000
ATTORNEY-IN-CHARGE

CERTIFICATE OF SERVICE

I hereby certify compliance with Fed. R. Civ. P. 5 and Case Management Order of November 5, 1996, that a true a correct copy of the foregoing document and diskette has been sent by overnight delivery service and filed on Thursday, March 13, 1997, to the following:

Administrative Liaison Counsel for All Defendants:
Howard Waldrop
Atchley, Russell, Waldrop & Hlavinka, L.L.P.
1710 Moores Lane
P. O. Box 5517
Texarkana, TX 75505-5517
903.792.8246
903.792.5801 Fax
Respectfully submitted,

_____
Grant Kaiser

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

ORDER COMPELLING DISCLOSURE OF
INGREDIENT, FORMULA AND MANUFACTURING PROCESSES

The Court considered plaintiff's Motion to Compel Disclosure of Ingredient, Formula and Manufacturing Processes today. After considering all filings related to this motion, arguments, if any, of counsel and applicable law, the Court is of the opinion the Motion should be granted.
IT IS THEREFORE ORDERED that all Defendants, except B.A.T. Industries, P.L.C., produce to Plaintiff the following:
1. All documents sufficient for the State to identify all (1) specifications, (2) ingredients, (3) formulas, and (4) smoke constituents for each brand of cigarettes marketed in Texas by Defendants, and their corporate affiliates, from 1954 to the present.
1. All documents to which Defendants have referred to as "the ingredients in and the formulas for manufacturing Defendants' cigarettes." [Defendants' Memorandum in Support of Their Motion for Protective Order Governing Disclosure of Ingredient and Formula Trade Secret Information at 1-2.]
1. All documents sufficient for the State to identify all manufacturing processes for each of Defendants' products, by brand, marketed in Texas by Defendants, and their corporate affiliates, from 1954 to the present.
SIGNED THIS DAY OF , 1997.

_____

MAGISTRATE JUDGE WENDELL C. RADFORD
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS,
Plaintiff,
v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

TEMPORARY RESTRAINING ORDER

The State of Texas' Motion for Temporary Restraining Order was heard today. After reviewing all pertinent pleadings, briefs and other filings and arguments of counsel, the Court determines that the State's Motion should be in all things granted. The Court therefore makes the following findings and orders:

The Court finds that this Motion for Temporary Restraining Order is "necessary in aid of its jurisdiction" and "to protect or effectuate its judgments" as provided in 28 U.S.C.A. Sec. 2283. If the Motion were not granted, this Court being deprived of its jurisdiction over the matters properly before it.

The Court finds that the Stipulation and Order of Confidentiality should be entered so as to preserve all rights and privileges, if any, pending review by this Court.

The Court finds that no bond shall be required since the State of Texas is hereby engaged in public interest litigation.

IT IS THEREFORE ORDERED, that all Defendants, including R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and Philip Morris Incorporated (hereinafter "Defendants"), are hereby immediately enjoined from taking any action that is calculated to, or may cause, Brooke Group Ltd., Liggett Group, Inc., and Liggett & Myers, Inc. (hereinafter "Liggett"), from complying with the disclosure requirements of the Plan for the Eastern District of Texas and this Court's prior, outstanding disclosure orders. Specifically, Defendants are precluded from in any way seeking to prohibit or hinder Liggett from filing with this Court, under seal, any and all documents presently sought to be enjoined by Defendants' action in Forsyth County Superior Court, North Carolina, or any other action.

IT IS FURTHER ORDERED that Defendants are precluded from taking any action, including seeking to hold in contempt of any purported court order, Liggett, its agents and attorneys, for the purpose of preventing, limiting or discouraging submission by Liggett of any documents for in camera review by this Court for a determination of claimed privileges or protections.

Tex. Civ. Prac. & Rem. Code 82.001-006: Products Liability

CHAPTER 82. PRODUCTS LIABILITY

§ 82.001. Definitions

In this chapter:

(1) "Claimant" means a party seeking relief, including a plaintiff, counterclaimant, or cross-claimant.

(2) "Products liability action" means any action against a manufacturer or seller for recovery of damages arising out of personal injury, death, or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theory or combination of theories.

(3) "Seller" means a person who is engaged in the business of distributing or otherwise placing, for any commercial purpose, in the stream of commerce for use or consumption a product or any component part thereof.

(4) "Manufacturer" means a person who is a designer, formulator, constructor, rebuilder, fabricator, producer, compounder, processor, or assembler of any product or any component part thereof and who places the product or any component part thereof in the stream of commerce.

§ 82.002. Manufacturer's Duty to Indemnify

(a) A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

(b) For purposes of this section, "loss" includes court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages.

(c) Damages awarded by the trier of fact shall, on final judgment, be deemed reasonable for purposes of this section.

(d) For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product in accordance with the manufacturer's instructions shall be considered a seller.

(e) The duty to indemnify under this section:

(1) applies without regard to the manner in which the action is concluded; and

(2) is in addition to any duty to indemnify established by law, contract, or otherwise.

(f) A seller eligible for indemnification under this section shall give reasonable notice to the manufacturer of a product claimed in a petition or complaint to be defective, unless the manufacturer has been served as a party or otherwise has actual notice of the action.

(g) A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorney fees, and any reasonable damages incurred by the seller to enforce the seller's right to indemnification under this section.

§ 82.004. Inherently Unsafe Products

(a) In a products liability action, a manufacturer or seller shall not be liable if:

(1) the product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and

(2) the product is a common consumer product intended for personal consumption, such as sugar, castor oil, alcohol, tobacco, and butter, as identified in Comment i to Section 402A of the Restatement (Second) of Torts.

(b) For purposes of this section, the term "products liability action" does not include an action based on manufacturing defect or breach of an express warranty.

§ 82.005. Design Defects

(a) In a products liability action in which a claimant alleges a design defect, the burden is on the claimant

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

THE STATE OF TEXAS,
Plaintiff,
v.

THE AMERICAN TOBACCO COMPANY; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; B.A.T. INDUSTRIES, P.L.C.; PHILIP MORRIS, INC.; LIGGETT GROUP, INC.; LORILLARD TOBACCO COMPANY, INC.; UNITED STATES TOBACCO COMPANY; HILL & KNOWLTON, INC.; THE COUNCIL FOR TOBACCO RESEARCH - USA, INC. (Successor to Tobacco Institute Research Committee); and THE TOBACCO INSTITUTE, INC.

Defendants.

Civil Action No. 5:96CV91

JUDGE: DAVID G. FOLSOM

MAGISTRATE JUDGE: WENDELL C. RADFORD

TEMPORARY RESTRAINING ORDER

The State of Texas' Motion for Temporary Restraining Order was heard today. After reviewing all pertinent pleadings, briefs and other filings and arguments of counsel, the Court determines that the State's Motion should be in all things granted. The Court therefore makes the following findings and orders:

The Court finds that this Motion for Temporary Restraining Order is "necessary in aid of its jurisdiction" and "to protect or effectuate its judgments" as provided in 28 U.S.C.A. Sec. 2283. If the Motion were not granted, this Court being deprived of its jurisdiction over the matters properly before it.

The Court finds that the Stipulation and Order of Confidentiality should be entered so as to preserve all rights and privileges, if any, pending review by this Court.

The Court finds that no bond shall be required since the State of Texas is hereby engaged in public interest litigation.

IT IS THEREFORE ORDERED, that all Defendants, including R. J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company and Philip Morris Incorporated (hereinafter "Defendants"), are hereby immediately enjoined from taking any action that is calculated to, or may cause, Brooke Group Ltd., Liggett Group, Inc., and Liggett & Myers, Inc. (hereinafter "Liggett"), from complying with the disclosure requirements of the Plan for the Eastern District of Texas and this Court's prior, outstanding disclosure orders. Specifically, Defendants are precluded from in any way seeking to prohibit or hinder Liggett from filing with this Court, under seal, any and all documents presently sought to be enjoined by Defendants' action in Forsyth County Superior Court, North Carolina, or any other action.

IT IS FURTHER ORDERED that Defendants are precluded from taking any action, including seeking to hold in contempt of any purported court order, Liggett, its agents and attorneys, for the purpose of preventing, limiting or discouraging submission by Liggett of any documents for in camera review by this Court for a determination of claimed privileges or protections.

IT IS FURTHER ORDERED that Liggett immediately file all documents contemplated and encompassed by the Attorneys General Settlement Agreement into this Court, under seal, for in camera inspection.

The hearing on the preliminary injunction is set for the _____ day of _____, 1997, at _____ o'clock __.m.

Dated: March 24, 1997, at _____ o'clock __.m.

_____

DAVID FOLSOM

Federal District Judge

MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS TO DISMISS COUNTS 1-3 AND COUNTS 4-17 OF THE STATE'S SECOND AMENDED COMPLAINT (9/8/97)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiffs,

v.

THE AMERICAN TOBACCO COMPANY, et al.

Defendants.

Case No. 5-96CV-91

September 8, 1997

MEMORANDUM OPINION AND ORDER RE DEFENDANTS' MOTIONS TO DISMISS COUNTS 1-3 AND COUNTS 4-17 OF THE STATE'S SECOND AMENDED COMPLAINT

David Folsom

United States District Judge

CAME ON TO BE CONSIDERED this day Defendants' Motions to Dismiss Counts 1-3 (docket entry # 50) and Counts 4-17 (docket entry # 194) of the State's Second Amended Complaint. [Defendants filed two motions to dismiss. The first motion seeks to dismiss the R.I.C.O. allegations in counts 1-3 of the First Amended Complaint. The second motion seeks dismissal of the balance of the State's claims, being counts 4-14 of the First Amended Complaint. Subsequent to their filing these motions, the State filed its Second Amended Complaint on April 7, 1997. At the hearing on these motions, Defendants addressed their argument to the Second Amended Complaint.] The Court held oral argument on April 14, 1997. After reviewing the motions, the responses, and the replies, the Court finds the motions are well taken in part as explained in the following opinion.

I.

BACKGROUND

The State of Texas ("State") brought this suit seeking to recover costs incurred in providing medical care and other benefits to its citizens, including costs associated with the Medicaid program, as the result of the citizens' use of cigarettes and smokeless tobacco products. Defendants are tobacco companies and public relations firms. [Specifically, the defendants are The American Tobacco Company; R.J. Reynolds Tobacco Company; Brown & Williamson Tobacco Corporation; B.A.T. Industries, p.l.c.; Philip Morris, Inc.; Liggett Group, Inc.; Lorillard tobacco Company, Inc.; United States Tobacco Company; Hill & Knowlton, Inc.; The Council for Tobacco Research-USA, Inc. (Successor to Tobacco Institute Research Committee); and The Tobacco Institute, Inc.] The State's Second Amended Complaint seeks to impose liability against Defendants for their manufacturing, advertising, distributing and selling tobacco products in the

United States. In response to the allegations, Defendants filed motions to dismiss the complaint contending the State's claims fail for several reasons.

II.

LEGAL STANDARD

A motion under Rule 12(b)(6) seeks dismissal of a plaintiff's cause of action for failure to state a claim upon which relief may be granted. A motion to dismiss for failure to state a claim admits the facts alleged in the complaint but challenges the plaintiff's right to relief based upon the facts. *Crowe v. Henry*, 43 F.3d 198, 203 (5th Cir. 1995). . . .

The Supreme Court has held that "[i]n appraising the sufficiency of the complaint . . . the accepted rule [is that] a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of this claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957). In determining whether a complaint withstands a 12(b)(6) motion to dismiss, the court "must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. Also, the court may not look beyond the pleadings in ruling on a motion." *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).

III.

ARGUMENT

Before moving for the dismissal of individual claims, Defendants put forth several arguments advocating dismissal of the action as a whole. Defendants claim the suit cannot proceed as a direct action because the State's exclusive remedy is through assignment/subrogation pursuant to § 32.033 of the Texas Human Resource Code. Defendants also contend that the State's suit, arising from personal injuries or death allegedly caused by the consumption of tobacco products, has been barred by the Texas legislature with its enactment of the Product Liability Act in 1993. Defendants further contend that the State has not suffered a direct injury, and thus cannot recover because its injury is too remote. Finally, Defendants assert that the State's direct action violates fundamental principles of due process. The Court rejects these arguments based on the following analysis.

A. SUBROGATION AS THE STATE'S EXCLUSIVE REMEDY

The State is seeking in this suit to recover payments made through its Medicaid program for health care provided to recipients for injuries allegedly caused by the consumption of tobacco products. In order to participate in the Medicaid program, a state must submit for approval a plan dealing with how to provide medical assistance under the program. *See* 42 U.S.C. § 1396. Each plan must include certain provisions that are mandated by the federal government. One of these provisions requires that a state "take all reasonable measure to ascertain the legal liability of third parties . . . to pay for care and services available under the plan. . . ." 42 U.S.C. § 1396a(a)(25)(A). In addition, the statute requires that if "liability is found to exist[,] . . . the State or local agency will seek reimbursement . . . to the extent of such legal liability." 42 U.S.C. § 1396a(a)(25)(B). Finally, Congress has required the states to "provide for mandatory assignment of rights of payment for medical support or other care owed to recipients. . . ." 42 U.S.C. § 1396a(a)(45).

In accordance with these provisions, the State of Texas has enacted a provision entitled "Subrogation" that provides that "[t]he filing of an application for or receipt of medical assistance constitutes an assignment of the applicant's . . . right of recovery from . . . another person for personal injury caused by the other person's negligence or wrong." TEX. HUM. RES. CODE ANN. § 32.033(a)(1). In addition, the statute provides:

A separate and distinct cause of action in favor of the state is hereby created, and the department may, without written consent, take direct civil action in any court of competent jurisdiction. A suit brought under this section need not be ancillary to or dependent upon any other action.

TEX. HUM. RES. CODE ANN. § 32.033(d).

Defendants argue that the provisions of § 32.033 provide the State with its exclusive remedy to recover Medicaid expenses. . . . The State argues that its authority to bring this suit is rooted in the common law and that this authority has not been supplanted by § 32.033. . . .

The Court must start with the question of whether the State could maintain this action at common law in the absence of any statutory provision. In other words, if the Medicaid statute did not require the states to seek reimbursement, could a state proceed as the State of Texas has in this matter? Based on the Supreme Court's decision in *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982), the Court concludes that the State could bring such an action.

In *Snapp*, the Supreme Court was faced with the question of whether Puerto Rico had standing to maintain an action that alleged its citizens had been discriminated against in contravention of various federal employment laws. *Id.* at 594. In finding that such an action could be maintained, the Court discussed in depth "quasi-sovereign" interests and the utilization of these interests as a basis for states to bring suit in the absence of statutory authority.

Quasi-sovereign interests are to be distinguished from a state's general sovereign or proprietary interests. "They consist of a set of interests that the State has in the well-being of its populace." *Id*. at 602. . . . The only hard and fast rule set forth by the Court is that a State may not invoke this doctrine when it is only a nominal party asserting the interests of another. *Id*.

. . .[I]t is without question that the State is not a nominal party to this suit. The State expends millions of dollars each year in order to provide medical care to its citizens under Medicaid. Furthermore, participating in the Medicaid program and having it operate in an efficient and cost-effective manner improves the health and welfare of the people of Texas. [It should be noted that Texas state courts have also recognized that quasi-sovereign interest allow states to bring actions where the health and welfare of its people are at stake. See Bachvnsky v. State , 747 S.W.2d 868 (Tex. App. 1988, denied) (discussing the principles enunciated in Snapp).] If the allegations of the complaint are found to be true, the economy of the state and the welfare of its people have suffered at the hands of the Defendants. *See Georgia v. Pennsylvania R. Co*., 324 U.S. 439 (1945)(quasi-sovereign interest of state in economic prosperity and welfare provided grounds to maintain antitrust action). It is clear to the Court that the State can maintain this action pursuant to its quasi-sovereign interests found at common law. . . .

. . .[T]he Court must next address whether the State's common law action has been supplanted by a statutory remedy that should be deemed exclusive. The crux of the Defendants' argument is that any common law action the State may have had . . . can no longer be pursued, because the Texas legislature has provided the State with its exclusive remedy which is found in § 32.033 of the Texas Human Resources Code. *See State v. Rubion*, 308 S.W.2d 4 (Tex. 1957) (holding that when a statute provides a cause of action, the action is exclusive). This principle derives from the rule of statutory construction *expressio unius est exlusio alterius*. In other words, if one thing is implied, it is implied to the exclusion of all others. *See Quarles v. St. Clair*, 711 F.2d 691, 699 (5th Cir. 1983). In further support of this position, Defendants cite the Court to *Wiseman v. State*, 94 S.W.2d 265 (Tex. Civ. App. 1936, writ refused).

. . . .

The State asserts that the rule laid down in *Wiseman* should not apply in this case essentially for two reasons. First, it argues that the case is distinguishable, because the State attempted to recover

funds from an "innocent" party, the estate of an insane individual, rather than a tortfeasor. The State argues that because no negligent or intentional harm was inflicted upon the state, *Wiseman* should not apply. Second, the state points to the rule of statutory construction which states that a "legislative grant of a new right does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect." *Marine Terminals v. Burnside Shipping Co*., 394 U.S. 404 (1969). This statement, it is argued, directly contravenes the Defendants' position that *Wiseman* and *expressio unius* govern this case.

Although the Court recognizes and agrees that there are important factual distinctions between this case and *Wiseman*, the focus for purposes of deciding the exclusivity issue must center on the utilization of *expressio unius* in this case. The Supreme Court has instructed that *expressio unius* must be abandoned when it would frustrate the general purpose of a statute or its provisions. . . . Upon reading 42 U.S.C. § 1396a(a)(25)(A) and (b); 42 U.S.C. § 1396a(a)(45); the applicable regulations; and § 32.033 of the Texas Human Resources Code, it is without question that their purpose is to require states such as Texas to recover money spent that can be attributed to the wrongs of third-parties in an efficient and cost effective manner. [See 42 C.F.R. § 433.139(f) (stating that reimbursement must be pursued but may be suspended or terminated only if the efforts are not cost effective).] The Court is convinced that an application of *expressio unius* would frustrate this purpose.

As noted above, the Defendants would have this Court direct that the State bring individual subrogation claims pursuant to § 32.033. Although this approach may be preferred in situations where a single tortfeasor inflicts a one-time harm against a single individual who receives Medicaid benefits, the practical consequences of the Defendants' position would be to prohibit a state from ever instituting a suit that alleges a broad based harm to millions of citizens. It would be impractical, if not impossible, for the states to follow the mandates of the Medicaid statute's reimbursement provisions, because proceeding on a claim-by-claim basis would be cost prohibitive and inefficient.

. . . .

The court began its analysis by reading the federal and state provisions together. The court found instructive the fact that the federal government was allowed to pursue a direct action to recover funds expended pursuant to programs such as Medicaid. [See 42 U.S.C. § 2651.] Also, it looked at the mandatory nature of the federal statute that directed the State to seek reimbursement. Based on these two points, the court held that the subrogation portion of the New Jersey statute was merely a "precauctionary measure" instituted by the legislature that did not replace or limit in any way the manner in which the State could otherwise proceed. In this Court's opinion, the *Hedgebeth* decision is consistent with and furthers the purpose of the Medicaid reimbursement provisions.

Based on the foregoing discussion, the Court rejects the application of *expressio unius* to § 32.033 of the Texas Human Resources Code. Because this maxim was the basis for the court's decision in *Wiseman*, that case is also rejected.

To summarize, the Court concludes that the manner in which the State seeks to proceed is rooted in the common law. To prevent the State from proceeding in the present manner does not further the purpose of the Medicaid reimbursement provisions, rather it hinders it. . . . The State's position that the presence of a statutory right normally does not extinguish nonstatutory rights is more consistent with the spirit of the reimbursement provisions of the Medicaid statute. The Texas legislature has not clearly evidenced an intent to create an exclusive remedy in § 32.033. Therefore, the Court finds that the statute does not provide the State with its exclusive remedy. . . .

B. TEXAS PRODUCT LIABILITY ACT

Defendants contend that the State's attempt to create a direct action fails because the Texas Product Liability Act ("the Act") bars lawsuits arising from personal injuries or death allegedly caused by the consumption of tobacco products. Under the Act, a manufacturer or seller is not liable for a marketing or design defect claim if the product in question is a common consumer product that is inherently unsafe and the consumer knows it to be inherently unsafe. This argument rests on the premise that the State's alleged injuries are derivative of the claims of the individual smokers' claims and as such are barred by the language of the Act. [TEX. CIV. PRAC. & REM. CODE ANN. § 82.001-.006 (West Supp. 1997). . . . Defendants claim that the Act establishes a broad prohibition against tobacco-related suits. Section 82.004(a) of the Texas Civil Practice and Remedies Code states that "in a products liability action, a manufacturer or seller shall not be liable" if:

(1) the product is inherently unsafe and the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community; and

(2) the product is a common consumer product intended for personal consumption, such as sugar, caster oil, alcohol, tobacco and butter as identified in Comment I to section 402A of the Restatement (Second) of Torts.

TEX. CIV. PRAC. & REM. CODE ANN. § 82.004(a).

The Act defines "product liability action" as

any action against a manufacturer or seller for recovery of damages arising out of personal injury, death or property damage allegedly caused by a defective product whether the action is based in strict tort liability, strict products liability, negligence, misrepresentation, breach of express or implied warranty, or any other theories or combination of theories. . . .

TEX. CIV. PRAC. & REM. CODE § 82.001(2).

Defendants contend that because the State's claim for damages arise out of personal injuries or death allegedly caused by tobacco products, the "inherently unsafe" product defense found in § 82.004 bars the claims the State is asserting here. In response, the State cites three reasons for the Act's not barring the instant case. . . . The Court finds two of the reasons persuasive and denies Defendants' motion to dismiss based on the Act.

The State contends that the Act does not apply to any of its direct claims against Defendants, such as fraud and misrepresentation, because those claims are not product liability claims within the meaning of the Act as they do not arise out of personal injury, death or property damage but out of an infringement against the sovereign. As stated in Section I(A), *supra*, the Court finds that the State may maintain this action in its quasi-sovereign capacity to protect the physical and economic well-being of its citizenry. The claims are not brought by the injured consumer. As such, the Court is not persuaded that this action is a "product liability action" within the meaning of the Act, and thus is not barred by the Act.

The State argues, alternatively, that even if the State's claims did arise out of the personal injury allegedly sustained by individual smokers, the "inherently unsafe" product defense does not apply when a manufacturer or seller has suppressed material information relevant to a product's safety, so that the ordinary consumer does not possess full knowledge of the product's inherent dangerousness. According to the allegations in the Second Amended Complaint, Defendants suppressed information that establishes the addictive nature of cigarettes and engaged in a conspiracy to spread disinformation about the ill effects of cigarette smoking. . . .

To come within the purview of the Act, Defendants must establish (1) that the product is inherently unsafe and (2) that the product is known to be unsafe by the ordinary consumer who consumes the product with the ordinary knowledge common to the community. . . . The State has alleged that the public was not provided the facts, because the Defendants suppressed relevant safety information to the point that consumers could not know as a matter of common knowledge the full extent of health risks associated with smoking and the alleged addictiveness of tobacco use.

Accepting the allegations in the Plaintiff's Second Amended Complaint as true, the Court finds that while the health risks of tobacco consumption are generally known . . . the addictive nature of tobacco consumption is not generally known due to the concealment and misrepresentation by Defendants of its products as alleged by the State. Because the State has pled that Defendants misrepresented and concealed the addictive nature of its tobacco products, the State has taken its claim outside the purview of the Act, and the Act does not bar the State's claims. To hold otherwise would be stating beyond doubt that the State can prove no se of facts in support of its claims which would entitle it to relief in light of the Act. . . .

This ruling is not inconsistent with the Act's legislative history, which evidences an intent on the part of the legislature not to release those manufacturers or seller from liability that conceal or misrepresent a product's characteristics. [See Comments of Rep. Seidlits, the House sponsor of the legislation, Hearing on Tex. S.B. 4 Before the House State Affairs Comm ., 73 rd Leg., R.S. (Feb. 15, 1993).] Moreover, if the legislature had intended to give a blanket exemption to tobacco products, the two prong qualifier would not have been place [sic] in § 82.004 of the Act, and the Act would have included an express exemption. *See* William D. Farrar, Comment, *The Product Liability Act of 1993: How It Changes Texas Law*, 45 Baylor L. Rev. 633, 645-46 (1993).

C. PROXIMATE CAUSE AND DIRECT INJURY

. . . .

In order to establish liability for alleged injuries, a plaintiff must establish proximate cause. *Travis v. City*, 830 S.W.2d 94 (Tex. 1992). . . . Embodied in the concept of proximate cause is the notion that a plaintiff must assert a direct relationship between the injury it claims to have suffered and the allegedly injurious conduct. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). It has generally been held that such a relationship cannot be established when "a plaintiff . . . complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's act. . . ." *Id.* at 268-269. Such an injury is considered to be too remote.

In the *Holmes* opinion, the Supreme Court discussed three concerns that must be addressed when determining whether a plaintiff's injury is too remote. First, the less direct an injury is, the more difficult it will be to attribute damages to the conduct of the defendant as opposed to other factors. Second, allowing "indirect claims" to proceed creates a risk of multiple recoveries, because the potential plaintiffs are not parties to a particular action may someday sue in their own right. Finally, these remoteness concerns generally do not arise when those directly injured bring suit, because they can be counted on to "vindicate the law as private attorneys general." *Id.* at 269-270.

At the outset, the Court notes that the definition of "proximate cause" cited above could be satisfied by the State. In addition, a finding that the injury allegedly suffered by the State is foreseeable is also a distinct possibility. Therefore, the Court must focus its attention on the three concerns outlined in *Holmes* to decide whether the injuries asserted in this matter are too remote.

It is clear to the Court that the second and third concerns addressed in *Holmes* are not problematic in this case. With respect to multiple recovery, there can be none in this type of action. As the

State points out in its brief, the State of Texas is the only party that can recover Medicaid benefits that have been paid as a result of the wrongful conduct of a third party. . . . [T]he third concern discussed in *Holmes* is also absent. As discussed in the previous section, the State brings this action based on its quasi-sovereign interests in protecting the health, welfare, and well-being of the populace of the State. This common law concept provides the state with an independent cause of action to recover the damages it has allegedly incurred. It is clear that because the State is proceeding under this theory, there can be no better party to prosecute this matter. In fact, no other party is empowered to bring this type of action.

With respect to the difficulty in determining damages, the Court first notes that under the quasi-sovereign interest asserted by the State, damages will be inherently more difficult to determine than if the matter was brought on a claim-by-claim basis. . . . Although the Court is not completely apprised on the manner in which the State seeks to prove damages, the basic damage allegations provided thus far in the litigation counsel against a finding that this plaintiff is too remote. The State will attempt at trial to prove damages through the use of statistical evidence presented by way of a "damage model." In general, the use of such evidence has been deemed permissible in this type of action. *See In re Chevron*, 109 F.3d 1016, 1020 (5th Cir. 1997); *see also Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (use of statistical data to prove damages permissible when number of individual claims would be impossible to resolve). As will be addressed in another section in this opinion, this is not to say that the manner in which the State seeks to prove damages will satisfy all legal requirements. The Court only holds that at this stage in the litigation damages are not sufficiently difficult to calculate to warrant dismissal of this action.

Therefore, having considered the concerns of *Holmes*, the policy underlying the requirement of proximate cause, and the nature of this suit as a whole, the injury allegedly incurred by the State is not sufficiently remote to warrant dismissal. The Defendants' motion in this respect shall be denied.

D. DUE PROCESS

The Court is of the opinion that it is premature to address Defendants' contention that the State's proposed direct action violates fundamental principles of due process. At this time, the State has not fully developed and has not presented to the Court a final version of its damages model. Thus, the Court is reluctant to render a decision that the use of such a damages model to prove aggregate damages violates fundamental principles of due process. Accordingly, the Court denies this aspect of the Defendants' motion at this time subject to renewed argument once the State presents its completed damage model and its case in chief is completed.

IV.

STATUTORY CLAIMS

A. RICO

Counts 1-3 of the Second Amended Complaint allege Defendants violated 18 U.S.C. § 1962(a), (b), (c) and (d), the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Generally, the State alleges Defendants engaged in a pattern of racketeering from December 15, 1953 through the present through multiple predicate acts including, *inter alia*, wire and mail fraud, bribery, sending tobacco products through the mails in a manner calculated to place them in the hands of minors, intimidating witnesses in prospective legal proceedings, and obstruction of justice. Defendants move to dismiss the allegations for several reasons.

First, Defendants contend that private civil suits under RICO are available only to plaintiffs who have suffered injury to their "business or property," and does not apply to claims for medical

treatment for personal injuries. Second, Defendants contend the proximate cause standard is not satisfied under RICO. Finally, Defendants argue that the complaint does not allege the existence of a viable "enterprise" or the necessary relationship between the "enterprise" and the alleged predicate acts. The Court rejects Defendants' arguments at this time.

The Court is not denying Defendants' contentions on the basis of a strong showing by the State on its RICO claim. In fact, the Court is not convinced the State can make a prima facie showing of the essential elements of RICO at trial. However, taking the State's allegations of RICO violations as true, the Court will refrain from ruling on the RICO claims until after Plaintiff has completed its case in chief, at which point the Court will hear an offer of proof of Plaintiff's RICO claims outside the presence of the jury. At this point, the Court will either allow Plaintiffs to pursue its RICO claims or it will grant a judgment as a matter of law under Fed. R. Civ. P. 50.

Additionally, pending further ruling by this Court, the Plaintiff, in presenting evidence on its claims, shall not refer to the Defendants' conduct as constituting "criminal acts," "racketeering activity," or any other similar characterization. The danger of unfair prejudice which may result from any such conclusory characterizations far outweighs any probative value they may have. In addition, pending further ruling by this Court, the Plaintiff shall make no mention of any potential claims for alleged violations of RICO in the jury's presence. With the above conditions, the Court denies Defendants' motion to dismiss the RICO counts of the Second Amended Complaint.

B. FEDERAL AND STATE ANTITRUST CLAIMS

Counts Four and Five of the Second Amended Complaint allege that Defendants have violated federal and state antitrust laws by unreasonably restraining markets for tobacco and health care. [Specifically, the State alleges Defendants violated 15 U.S.C. § 1 and TEX. BUS. & COM. CODE § 15.05(a). Texas antitrust law is harmonized with federal antitrust law, and the same analysis will apply to both federal and state claims. Abbott Labs, Inc. v. Segura , 907 S.W.2d 503 (Tex. 1995).] Defendants contend that these claims must fail because (1) the State has not suffered an antitrust injury; (2) the State is not suing as a consumer, competitor, or other participant in the Texas cigarette market; and (3) the State is not a direct purchaser as required by *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The Court finds Defendants' first and second arguments persuasive for the following reasons and dismisses Counts Four and Five of the Second Amended Complaint.

The Court finds that the State has not suffered the type of injury the antitrust laws were designed to prevent. Antitrust injury, a component of the standing inquiry, is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' conduct unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). . . .

. . . .

The State's alleged injuries are increased medical care costs caused by Medicaid recipients' consumption of tobacco products. Assuming *arguendo* the State has alleged unlawful acts, the State has not alleged an antitrust injury of the type the antitrust laws were designed to protect. "[I]njury, although causally related to an antitrust violation, nevertheless will not qualify as 'antitrust injury' unless it is attributable to an anti-competitive aspect of the practice under scrutiny…" *Atlantic Richfield Co., supra*, at 334. The State's loss must be "the type of loss that the claimed violations … would be likely to cause." *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969). Thus, the Court finds that the State has not sufficiently alleged an antitrust injury of the type the antitrust laws were intended to prevent.

The Court finds that the State's antitrust claims also fail for the reason that the State is not a participant in the relevant market, being the cigarette and tobacco market. Consumers and

competitors are the parties that have standing to sue. *Bell v. Dow Chemical Co.*, 847 F.2d 1179, 1183 (5th Cir. 1988). The State may be a competitor in the health care market, but that is not the market in which trade was restrained. . . .

C. DTPA CLAIMS

In Count Fourteen of the Second Amended Complaint, the State alleges Defendants violated the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"). [TEX. BUS. & COM. CODE §17.41-.63 (West 1987).] The State alleges that Defendant's "knowingly engaged in and continued to engage in, false, misleading or deceptive acts or practices which are declared unlawful," [Second Amended Complaint, par. 330.] and that said activity began at least as early as the 1950s and continues to the present. Defendants argue that because the State is not a "consumer" within the meaning of the DTPA, it has no standing to assert a claim under the DTPA. The Court agrees.

Section 17.50(a) of the Texas Business and Commerce Code provides that "[a] consumer may maintain an action … [for] economic damages or damages for mental anguish …." To recover under the DTPA, the plaintiff must be a "consumer" within the meaning of the DTPA. *Meineke Discount Muffler v. Jaynes*, 999 F.2d 120, 125 (5th Cir. 1993). To qualify as a consumer under the DTPA, the plaintiff must have sought or acquired goods or services by purchase or lease. Tex. Bus. & Com. Code Ann. §17.45(4). The goods or services purchased or leased must be the basis of the complaint. *McDuffie v. Blassingame*, 883 S.W.2d 329 (7th App. Dist. 1994, error denied). . . .

. . . .

In the instant case, the transaction at issue is the purchase of tobacco products by the citizens of the State. The State does not allege a nexus between the State and the purchase of tobacco products by the citizens of the State. . . . [T]he complaint does not describe the transaction the State was allegedly induced to enter, thus there are insufficient allegations regarding any transactions to which the State may have been a party. Second, the complaint does not describe how the State was to benefit from the purchase of tobacco products, the transaction between the citizen/consumers and Defendants. . . . Absent any type of nexus between the State and the transaction at issue, the State cannot qualify as a consumer. The Court dismisses Count 14 of the Second Amended Complaint.

IV.

LEGISLATIVE VERSUS JUDICIAL DETERMINATION

A final point raised by the Defendants is that because tobacco is a highly regulated product, the courts should leave the questions to be resolved by this suit to the legislature. In the first sentence of their argument, the Defendants state, "[t]he Attorney General asks this Court to step into the shoes of the Texas legislature and rewrite state law." [Defendants Brief in Support at 36.] The Court disagrees with this proposition. By allowing this case to proceed, the Court is not rewriting any law. To the contrary, it is only allowing a claim that is based on quasi-sovereign interests to proceed. In the Court's opinion, such a basis for suit has long been available to the State. Therefore, this is not the type of radical departure from traditional theories of liability that the Fifth Circuit frowns upon. *See Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581, 583 (5th Cir. 1983), *cert. denied,* 465 U.S. 1102 (1984). In this case, the State has simply dusted off a long recognized legal theory and seeks to use it to further the purposes of the statutes in question and right the alleged wrongs involved in this matter.

. . . .

V.

COMMON LAW PLEADING DEFECTS

A. RESTITUTION/UNJUST ENRICHMENT

Defendants assert that the State's claim for recovery under theories of restitution and unjust enrichment must fail because the State did not plead that it conferred any benefit upon Defendants. The Court agrees, and grants Defendants' motion to dismiss the State's claim of restitution and unjust enrichment.

. . . . The State alleges in its Second Amended Complaint that Defendants have retained benefits to the loss of the State, because the State has paid medical costs attributable to smoking related disease rather than the Defendants. However, it is the individual smokers and not the Defendants who have received the primary and direct benefit of the payment of their medical expenses. Moreover, the State's expenditure cannot be said to have enriched Defendants. The Court finds that the alleged benefit enjoyed by Defendants is too attenuated and indirect to find support under the theory of unjust enrichment as enunciated in Texas.

In support of its contention that Defendants have received a benefit to the State's detriment, the State further alleges that in caring for the victims of smoking in Texas, which was immediately necessary to satisfy the requirements of public health and safety, it has performed the Defendants' manifest duty. . . . The Court has found no case, nor has the State cited any, in which a Texas court has addressed or adopted this theory of restitutionary recovery. Assuming that this doctrine is cognizable under Texas law, the Court is in doubt whether Defendants are subject to a manifest duty to provide medical care to individual smokers while the State concedes that it is under a legal duty to do so. Yet, in the absence of any recognition of this theory of recovery in Texas law, the Court declines to find that it is available as a cause of action to the State in this action. Accordingly, the Court dismisses Count Nine of the Second Amended Complaint.

B. PUBLIC NUISANCE

The State alleges in Count Ten of the Second Amended Complaint that Defendants have intentionally interfered with the public's right to be free from unwarranted injury, disease, and sickness and have caused damage to the public health, the public safety, and the general welfare of the citizens of the State of Texas. Defendants argue that the State has not pled a proper claim for public nuisance because it has failed to plead essential allegations under Texas public nuisance law, namely that the Defendants improperly used their own property, or that the State itself has been injured in its use or employment of its property.

The Attorney General in Texas is authorized to bring suit to enjoin or abate a public nuisance. TEX. CIV. PRAC. & REM. § 125.022. A public nuisance is defined in § 125.021 as the use of any place for certain, specific proscribed activities such as gambling, prostitution, and the manufacture of obscene materials. "Where an action to enjoin a nuisance is brought under statutory authority, the case is limited to the provisions of the statute. The only activities which may be enjoined are those which fall within the provisions of the statute upon which the application for injunction is based." *Benton v. City of Houston*, 605 S.W.2d 679 (Tex. Civ. App. 1980, no writ). Because none of the proscribed activities defined under this statutory scheme are implicated under the allegations made in the present case, the State may not maintain an action for injunctive relief pursuant to § 125.022.

Neither may the State maintain an action for damages under a public nuisance theory. . . . The overly broad definition of the elements of public nuisance urged by the State is simply not found in Texas case law and the Court is unwilling to accept the State's invitation to expand a claim for

public nuisance beyond its grounding in real property. Accordingly, the Court dismisses Count Ten for public nuisance.

C. NEGLIGENT PERFORMANCE OF A VOLUNTARY UNDERTAKING

In Count Eleven the State alleges that Defendants voluntarily assumed a duty to report honestly and completely on all research regarding cigarette smoking and health based upon their public pronouncements to do so. The State further pleads that by failing to report on such research, by publishing and publicizing fraudulent science, and failing, in general, to comply with the promises made in the "Frank Statement" and the industry's voluntary code, Defendant's breached this duty. Finally, the State alleges that Defendants knew or should have known that the State would rely on their pronouncements and that this reliance would and did in fact proximately cause injury and damages to the State.

The State's cause of action is premised on the rule that whoever voluntarily undertakes an affirmative course of action for the benefit of another has a duty to exercise reasonable care that the other's person or property will not be injured thereby. *Colonial Sav. Ass'n v. Taylor*, 544 S.W.2d 116 (Tex. 1976). This rule is embodied in the Restatement (Second) of Torts § 323 (1965) that instructs:

One who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Defendants have argued that no Texas court has extended a cause of action under this section of the Restatement to create a "duty" based only on an advertisement. . . . Because the Court finds that Defendants' first argument is valid, the Court need not address its subsequent contentions.

Although Texas courts have adopted § 323 of the Restatement as a basis of liability, they have not extended it to create a duty based upon corporate statements or advertising. As with the two common law claims discussed above, without recognition of such a duty by the Texas Supreme Court under this theory of tort liability, the Court is loathe to find that the Defendants' statements created a duty. . . . Accordingly, the Court dismisses Count Eleven of the Second Amended Complaint.

D. FRAUD/MISREPRESENTATION

The State alleges in Counts Twelve and Thirteen actual and constructive common law fraud as well as simple and gross negligent misrepresentations. Defendants argue that the State has failed to adequately allege that Defendants made any material representations that induced the State to act.

The elements of fraud under Texas law are (1) a material representation; (2) the representation was false; (3) when it was made the speaker knew that it was false or made it recklessly without any knowledge of the truth but as a positive assertion; (4) he made it with the intention that it should be acted upon by the party; (5) the party acted in reliance upon the representation; (6) the party thereby suffered injury. *Crawford Painting & Drywall Co. v. J.W. Bateson Co.*, 857 F.2d 981, 985 (5th Cir. 1988) *cert. denied*, 488 U.S. 1035 (1989).

In assessing this challenge to the sufficiency of the State's pleading of fraud, the Court bears in mind the Supreme Court's admonition that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley*, 335 U.S. at 45. Under this standard, the Court is

not convinced that the State can prove no set of facts that would constitute a material representation on the part of Defendants that would entitle the State to recover. Therefore, the Court denies Defendants' Motion to Dismiss with respect to Counts Twelve and Thirteen.

VI.

CONCLUSION

The Court dismisses the State's claims for violation of the federal and state antitrust laws; the Texas Deceptive Trade Practices-Consumer Protection Act; restitution/unjust enrichment; public nuisance; and, negligent performance of a voluntary undertaking. Defendants' motions to dismiss in al [sic] other respects are denied.

MEMORANDUM OPINION AND ORDER REGARDING THE ISSUE OF BIFURCATION (9/29/97)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS,

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiffs,

v.

THE AMERICAN TOBACCO COMPANY, ET AL.,

Defendants.

Case No. 5:96cv91

September 29, 1997

MEMORANDUM OPINION AND ORDER REGARDING THE ISSUE OF BIFURCATION

Before the Court is the Plaintiff's Motion to Birfurcate Trial (docket # 888) pursuant to Federal Rule of Civil Procedure 42(b). After considering the Motion, the extensive arguments and briefing, the complexity of this case, and the underlying principles of Rule 42(b), the Court finds that this case should be tried in various phases.

I. BACKGROUND

This issue was first raised by the plaintiff in an informal status conference on July 17, 1997. Since that time, the parties have debated the propriety of trying this suit in separate phases. It was discussed on August 15, 1997 at a subsequent status conference. The issue was extensively briefed and discussed at an August 25, 1997, meeting with representatives from both sides that dealt with the related issue of the plaintiff's damage model. Both sides have been ordered by the Court to submit plans regarding their views on the type of evidence to be presented should the case be bifurcated on the issues of "wrongful conduct," causation, and damages and time estimates for each phase. See Court's Order, dated September 3, 1997. The parties have complied with these requests and extensively addressed the various issues presented by the September 3 Order. The defendants requested oral argument directed specifically at the bifurcation issue, and the hearing was held on September 23, 1997. The issue is ripe for decision and must be addressed so that the parties are able to adequately prepare for the impending trial.

II. RULE 42(b) AND ITS POLICY

Rule 42(b) provides in relevant part:

Separate Trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . or of any separate issue or any number of claims . . . always preserving inviolate the right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States.

FED.R.CIV.P. 42(b). This rule provides the trial court with a tool that is greatly needed in the modern age of complex litigation. As the Fifth Circuit has recognized, "in appropriate cases . . . issues impacting upon general liability or causation may be tried standing alone." *In re Chevron U.S.A., Inc*., 109 F.3d 1016 (5th Cir. 1997). In addition, the Fifth Circuit has recognized that Rule 42(b) is sufficiently broad to allow a trial court to exercise its discretion to separate issues for trial in appropriate circumstances. . . . Finally, the Fifth Circuit has recognized that cases involving complex civil RICO allegation may many times merit separate trials. *See Conkling v. Turner*, 18 F.3d 1285 (5th Cir. 1994). The Court believes that this case fits perfectly within the confines of Rule 42(b) and its underlying policies. . . .

First and foremost, the Court is concerned with the potential length of this trial should all issues be tried together. . . . [T]his matter could take from four to six months to try to conclusion. Based on these estimations, the Court has allotted 225 hours for each side to present its case. . . . In addition, the parties have designated a combined list of over 1,500 witnesses. Also, the parties have submitted proposed exhibit lists that include in excess of 50,000 documents to be submitted at trial from approximately 23 million that have been disclosed by both sides.

As the parties are aware, this Court has over 350 cases currently pending on its docket. . . . Cases are pending that range from complex antitrust class actions and individual smoker cases to securities fraud class actions and complicated patent infringement actions. These cases are currently languishing substantially untouched on the Court's docket due, in large part, to the present litigation. In addition, this Court's obligation to try criminal matters and comply with the terms of the Speedy Trial Act cannot be ignored and will certainly affect the ebb and flow of the present action. . . .

. . . Both sides to this action have expended a great amount of resources, financially and by way of time. The Court believes that trying this matter in phases will conserve these resources. If a finding in favor of the defendants occurs after the first and second phases of trial, the Court believes approximately half of the trial time will be conserved.

Finally, the Court is convinced that the plan delineated below will allow jurors to better understand the nature of this case. The issues will be considered in a more pedestrian manner which will allow the jurors to reach more informed and considered verdicts. Furthermore, the arguments outlined above dealing with convenience and economy apply equally to the citizens of East Texas that may be selected to judge the facts of this case. This plan will allow them to fulfill their duty as citizens in a less confusing and potentially less time consuming manner at no expense to the search for justice.

. . . [T]he Court finds that this plan will ensure that the issues are not confused and sound verdicts will be reached. Also, the Court finds that the mandates of the Seventh Amendment will not be disturbed nor due process violated by this decision. Based on these findings and concerns, the Court is of the opinion that the issues in this case must be tried separately.

III. FORMAT OF TRIAL

The Court believes that potentially three phases of trial are appropriate, and all phases shall be considered by the same jury. . . . The phases shall encompass the following issues:

Phase I: A separate trial will be conducted and the jury will consider the issue of whether the defendants have engaged in conduct prohibited by the RICO statute, and any defenses that may be applicable to the initial liability elements of civil RICO. [The Court is persuaded that trying the liability issues associated with the civil RICO claim will greatly simplify issues for the jury and will decrease the likelihood of confusion. . . . The allegations in this case span almost 50 years. . . .

Phase II: A second separate trial will be conducted and the jury will consider issues that relate to any duties imposed upon the parties, any breach of those duties, whether any misrepresentations have been made, whether elements of conspiracy have been satisfied, and any defenses that may be applicable to the initial elements of these various claims. [The parties should be perfectly clear on this point. Certain claims presented and the defenses thereto raise issues regarding the conduct of the plaintiff as well as the defendants. The conduct of both parties must be decided in the second phase.]

Phase III: If the plaintiff is successful in either Phase I or Phase II, a third separate trial will be conducted, and the jury will consider the issues that relate to cause in fact and proximate/producing cause, whether misrepresentations were material, if any are found to have occurred, reliance, and the amount of damages, if any, resulting from the events or occurrences in question.

IV. CONCLUSION

The Court will address any concerns on the types of evidence to be presented during Phases I and II, and if necessary the causation/damages phase, via motions in limine and rulings during the course of trial. In addition, the parties can rest assured that the Court will give the jury detailed instructions prior to trial, during the course of the necessary phases, and before submission of the various issues to the jury regarding the use of certain evidence when considering the various claims and defenses presented. The Court is confident that these actions coupled with the manner in which the jury charge can be structured will help to educate the jurors, protect the rights of the parties, and insure consistent verdicts on all issues.

. . . .

This case is filled with difficult issues, both legal and factual in nature. . . . [T]he trial plan outlined above embodies a sense of fairness, guards against prejudice, protects the parties' Seventh Amendment rights, and provides a vehicle to potentially bring this matter to a conclusion on a more expedient basis. Therefore, this matter shall proceed to trial in a manner consistent with the trial plan outlined above, and the Plaintiff's Motion to Bifurcate is GRANTED IN PART. It is further ORDERED that the Plaintiff shall be given until 5:00 p.m. on October 3, 1997, to amend its Complaint in a manner consistent with its "Proposed Trial Plan," the representations made at the hearing on this issue, and with this Court's Order. It is further

ORDERED that the parties file with the Court their Motions In Limine by 5:00 p.m. on October 6, 1997.

IT IS SO ORDERED.

Signed this 29th day of September, 1997.

X (signed)

DAVID FOLSOM

UNITED STATES DISTRICT JUDGE

STATE OF TEXAS' SETTLEMENT WITH TOBACCO (1/16/98)

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS,

TEXARKANA DIVISION

THE STATE OF TEXAS,

Plaintiff,

vs. No. 5-96CV-91

THE AMERICAN TOBACCO COMPANY, et al.,

Defendants.

COMPREHENSIVE SETTLEMENT AGREEMENT AND RELEASE

THIS COMPREHENSIVE SETTLEMENT AGREEMENT AND RELEASE ("Settlement Agreement") is made as of the date hereof, by and among the parties hereto, as indicated by their signatures below, to settle and resolve with finality all claims against all parties to this action relating to the subject matter of this action which have been or could have been asserted by any of the parties to this action.

WHEREAS, the State of Texas, through its Attorney General, Dan Morales, commenced this action on March 28, 1996, asserting various claims for monetary and injunctive relief on behalf of the State of Texas against certain tobacco manufacturers and others as Defendants;

WHEREAS, the Defendants have denied each and every one of the State of Texas's allegations of unlawful conduct or wrongdoing and have asserted a number of defenses to the State of Texas's claims, which defenses have been contested by the State of Texas;

WHEREAS, the State of Texas, through its Attorney General, the Honorable Dan Morales, and Private Counsel, have had a significant leadership role among the various states in maintaining civil litigation against the tobacco industry and in seeking to forge an unprecedented national resolution of the principal issues and controversies associated with the manufacture, marketing and sale of tobacco products in the United States;

WHEREAS, through the efforts of the State of Texas, Attorney General Morales, Private Counsel and others, a June 20, 1997 Memorandum of Understanding and Proposed Resolution (the "Proposed Resolution") (attached as an Appendix hereto) has been agreed to by members of the tobacco industry, state attorneys general, private litigants and representatives of public health groups, which Proposed Resolution would provide for unprecedented and comprehensive regulation of the tobacco industry while preserving the right of individuals to assert claims for compensation;

WHEREAS, the Proposed Resolution contemplates action by the United States Congress and the President to enact and sign a new federal law with respect to the tobacco industry, which action the tobacco industry has agreed to support and which will require study and analysis by Congress and the President; and

WHEREAS, trial of this action was scheduled to commence on January 12, 1998 and a continuance of such trial could have prejudiced the State of Texas, the State of Texas and the undersigned Defendants (the "Settling Defendants") have agreed to settle independently the litigation commenced by Attorney General Morales pursuant to financial terms comparable to those contained in the Proposed Resolution, which terms will achieve for Texas immediately and with certainty the financial benefits it would receive pursuant to the Proposed Resolution, should it become law, as well as funding for a pilot program to reduce the use of Tobacco Products by children under 18 years of age;

NOW, THEREFORE, BE IT KNOWN THAT, in consideration of the payments to be made by the Settling Defendants, the dismissal and release of claims by the State of Texas and such other consideration as described herein, the sufficiency of which is hereby acknowledged, the parties hereto, acting by and through their authorized agents, memorialize and agree as follows;

I. Jurisdiction. Settling Defendants and the State of Texas acknowledge that this Court has jurisdiction over the subject matter of this action and over each of the parties hereto, and that this Court shall retain jurisdiction for the purposes of implementing and enforcing this Settlement Agreement. The parties hereto agree to present any disputes under this Settlement Agreement, including without limitation any claims for breach or enforcement of this Settlement Agreement, exclusively to this Court.

2. Applicability. This Settlement Agreement shall be binding upon all Settling Defendants and their successors and assigns in the manner expressly provided for herein and shall inure to their benefit and to that of their respective directors, officers, employees, attorneys, representatives, insurers, suppliers, distributors and agents, and to that of any of their present or former parents, subsidiaries, affiliates, divisions or other organizational units of any kind; and the predecessors, successors and assigns of any of the foregoing. This Settlement Agreement shall be binding on and inure to the benefit of the State of Texas, its administrators, representatives, employees, officers, agents, Private Counsel, counsel and legal representatives; all agencies, departments, commissions and divisions of the State; all subdivisions, public entities, public corporations, instrumentalities and educational institutions over which the State has control; and the predecessors, successors and assigns of any of the foregoing. None of the rights granted or obligations assumed under this Settlement Agreement by the parties hereto may be assigned or otherwise conveyed without the express prior written consent of all of the parties hereto.

3. Voluntary Agreement of Parties. The State of Texas and Settling Defendants acknowledge and agree that this Settlement Agreement is voluntarily entered into by all parties hereto as the result of arms length negotiations during which all such parties were represented by counsel. Settling Defendants understand and acknowledge that certain provisions of this Settlement Agreement impose specific requirements on them that could give rise to challenges under various federal and State constitutional provisions if the State of Texas unilaterally imposed such requirements. None of the parties hereto will seek to challenge this Settlement Agreement based on any such constitutional challenge to the provisions contained herein.

4. Definitions. For the purposes of this Settlement Agreement, the following terms shall have the meanings set forth below:

(a) *"State"* or *"State of Texas"* means the State of Texas, all of its officers acting in their official capacities and any department, subdivision or agency of the State, regardless of whether a named plaintiff;

(b) *"Seating Defendants"* means those Defendants in this action that are signatories hereto;

(c) *"Market Share"* means, for each year, a Settling Defendant's respective share of sales of cigarettes by unit for consumption in the United States;

(d) *"Tobacco Industry"* means cigarettes and smokeless tobacco as those terms are defined in the Food and Drug Administration Rule;

(e) *"Billboards"* includes billboards, as well as all signs and placards in arenas and stadia, whether open-air or enclosed; *"Billboards"* does not include: (1) any advertisements placed on or outside the premises of retail establishments licensed to sell Tobacco Products or any retail point-of-sale; and (2) billboards or advertisements in connection with the sponsorship by Settling Defendants of any transient entertainment, sporting or similar event, such as NASCAR, that appears in the State of Texas as Part of a national or multi-state tour;

(f) *"Private Counsel"* means Walter Umphrey, John M. O'Quinn, P.C., John Eddie Williams, Jr., Reaud, Morgan & Quinn, and The Nix Law Firm, each of whom is defined and identified as "counsel" in the Outside Counsel Agreement executed by Attorney General Dan Morales on March 22, 1996, and Ness, Motley, Loadholt, Richardson &

Poole;
(g) *"Transit Advertisements"* means advertising on private or public vehicles and all advertisements placed at, on or within any bus stop, taxi stand, transit waiting area, train station, airport or any similar location; *"Transit Advertisements"* does not include any advertisements placed on or outside the premises of retail establishments licensed to sell Tobacco Products or any retail point-of-sale; and
(h) *"Final Approval"* means the date on which all of the following shall have occurred:

(1) The Settlement Agreement is approved by the Court;
(2) Entry is made of an order of dismissal of claims or a final judgment as provided herein; and
(3) The time for appeal or to seek permission to appeal from the Court's approval as described in (1) hereof and entry of final judgment or order of dismissal as described in (2) hereof has expired or, in the event of an appeal, the appeal has been dismissed or the approval described in (1) hereof and the judgment or order described in (2) hereof have been affirmed in all material respects by the court of last resort to which such appeal has been taken and such dismissal or affirmance has become no longer subject to further appeal or review.

5. Settlement Receipts: Use of Funds. The payments to be made by Settling Defendants under this Settlement Agreement during the year 1998 constitute reimbursement for public health expenditures of the State of Texas, including without limitation expenditures made by the State's Employees' Health Insurance Program and Charity Care programs. All other payments made by Settling Defendants pursuant to this Settlement Agreement are in satisfaction of all of the State of Texas's claims for damages incurred by the State in the year of payment or earlier years, including those for reimbursement of Medicaid expenditures and punitive damages, except that no part of any payment under this Settlement Agreement is made in settlement of an actual or potential liability for a fine, penalty (civil or criminal) or enhanced damages. Accordingly, subject to the orders of this Court and the operation of applicable law, the parties hereto anticipate that funds due to the State of Texas under this Settlement Agreement, other than funds dedicated for legal expense reimbursement, will be allocated as follows, or for such other purposes as the State of Texas may determine:

- $151 million to the general revenue fund of the State of Texas, to be used for the exclusive purpose of providing funding, in conjunction with the federal government, for the Children's Health Insurance Program, pursuant to Title XXI of the Social Security Act.
- $200 million to the general revenue fund of the State of Texas to be used for the exclusive purpose of supporting smoking cessation programs, enforcement of juvenile smoking laws, counter-marketing promotional efforts directed toward youth, general anti-tobacco educational programs and other similar initiatives.
- $200 million to the University of Texas Health Science Center at San Antonio for the exclusive purpose of establishing, maintaining and operating the Texas Children's Cancer Institute.
- $428 million to the Texas Foundation for Children and Public Health to be used in accordance with Texas law for providing grants to organizations and programs which promote and protect the interest of Texas children and the public health, including but not limited to the following:

  (1) Tobacco counter-marketing promotional efforts directed toward youth;
  (2) General anti-tobacco education;
  (3) Cigarette smoking and smokeless tobacco use cessation programs;
  (4) Children's health screening;
  (5) Childhood immunization;

(6) Childhood nutrition;
(7) Children's hospice;
(8) Pre-natal care;
(9) Health education programs;
(10) Rural health care initiatives;
(11) Mammography screening programs;
(12) Physical/sexual child abuse;
(13) Adult domestic violence;
(14) Substance abuse/mental health; and
(15) Physical/mental disabilities.

- $100 million to the M.D. Anderson Cancer Center in Houston for an endowment for research and for reimbursement of indigent health-care costs.
- $50 million to the Texas Tech Health Sciences Center for border health initiatives, including the establishment and operation of the Institute of Border Health.
- $50 million to the University of Texas Southwestern Medical Center at Dallas for research, endowments and other programs that benefit the public health.

All remaining amounts, including any amounts due to be paid by Settling Defendants after December 31, 1998, are to be allocated to the general revenue fund of the State of Texas to be used for such purposes as the State of Texas may determine.

6. Elimination of Billboards and Transit Advertisements. Settling Defendants agree to discontinue all Billboards and Transit Advertisements of Tobacco Products in the State of Texas. Settling Defendants agree to exercise their best efforts in cooperation with the State of Texas to identify all Billboards that are located within 1000 feet of any public or private school or playground in the State of Texas. Settling Defendants will remove such Tobacco Products advertisements (leaving the space unused or used for advertising unrelated to Tobacco Products) or, at the option of the State of Texas, will allow the State of Texas, at its expense, to substitute for the remaining term of the contract alternative advertising intended to discourage the use of Tobacco Products by children under the age of 18. Settling Defendants agree to provide the State of Texas with preliminary lists of the locations of all Billboards and stationary Transit Advertisements within 30 days from the date of execution of this Settlement Agreement, such lists to be finalized within an additional 15 days, and to remove all Billboards and Transit Advertisements for Tobacco Products within the State of Texas at the earlier of the expiration of applicable contracts or 4 months from the date the final lists are supplied to the State of Texas. Settling Defendants also agree to cooperate to secure the expedited removal of up to 50 Billboards or stationary Transit Advertisements designated by the State of Texas, within 30 days after their designation.

Each Settling Defendant shall provide the Court and the Attorney Central, or his designee, with the name of a contact person to whom the State of Texas may direct inquiries during the time such Billboards and Transit Advertisements are being eliminated, from whom the State of Texas may obtain periodic reports as to the progress of their elimination and who will be responsible for ensuring that appropriate action is taken to remove any Billboards or Transit Advertisements that have not been eliminated in a timely manner.

7. Support of Legislation and Rules. Following Final Approval of this Settlement Agreement, the Settling Defendants will not challenge existing or proposed legislative or administrative initiatives insofar as they effectuate the following:

(a) The prohibition of the sale of cigarettes in vending machines, except in adult-only locations and facilities;
(b) The strengthening of civil penalties for sales of Tobacco Products to children under the age of 18 years, including the suspension or revocation of retail licenses; and

(c) The strengthening of civil penalties for possession of Tobacco Products by children under the age of 18 years.

8. Initial Payments. Each Settling Defendant severally shall cause to be paid into the registry of the Court in accordance with paragraph 11 of this Settlement Agreement, the respective amounts listed for such Settling Defendant in Schedule A hereto, such amounts representing its share of the following payments: $204 million to be paid on or before February 1, 1998; $73 million to be paid on or before July 1, 1998; $146 million to be paid on or before October 1, 1998; and $302 million to be paid on or before November 1, 1998; the aggregate amount of such payments ($723 million) being the State of Texas's good faith estimate of the portion Texas would receive of the $10 billion payment provided for in Paragraph A on page 34 of the June 20, 1997 Proposed Resolution.

9. Pilot Program Payments. In support of the State of Texas's demonstrated commitment to the meaningful and immediate reduction of the use of Tobacco Products by children under the age of 18 years, Settling Defendants agree to support a pilot program, the elements of which shall be aimed specifically at the reduction of the use of Tobacco Products by children under the age of 18 years. Accordingly, each Settling Defendant severally shall cause to be paid into the registry of the Court in accordance with paragraph 11 of this Settlement Agreement, the respective amounts listed for such Settling Defendant in Schedule B hereto, such amounts representing its share of the following payments: $74 million to be paid on or before February 1, 1998; $27 million to be paid on or before July 1, 1998; $54 million to be paid on or before October 1, 1998; and $109 million to be paid on or before November 30, 1998.

The pilot program shall commence within a reasonable period after Final
Approval of this Settlement Agreement, and shall last for a period of no less than 24 months. The amounts paid by Settling Defendants pursuant to this paragraph 9 in support of the pilot program shall be used for general enforcement, media, educational and other programs directed to the underage users or potential underage users of Tobacco Products, but shall not be directed against any particular tobacco company or companies or any particular brand of Tobacco Products.

10. Annual Payments. Each of the Settling Defendants agrees that, on the dates specified in this paragraph 10 with regard to 1998, and annually thereafter on December 31st of each year after 1998 (subject to final adjustment within 30 days), it shall severally cause to be paid into the registry of the Court in accordance with paragraph 11 of this Settlement Agreement, pro rata in proportion to its respective Market Share, its share of 7.25% of the following amounts (in billions):

Year	1998	1999	2000	2001	2002	2003	thereafter
	1	2	3	4	5	6	
Amount	$4B	$4.5B	$5B	$6.5B	$6.5B	$8B	$8B

The above amounts represent the amounts contemplated under the Proposed Resolution to be paid to the several States, without regard to the possibility of any claims for reimbursement or credit by any other person or entity including any federal government agency. The payments made by Settling Defendants pursuant to this paragraph 10 shall be adjusted upward by the greater of 3% or the Consumer Price Index applied each year on the previous year, beginning with the first annual payment. Such payments will also be decreased or increased, as the case may be, in accordance with decreases or increases in volume of domestic tobacco product volume sales as provided in Paragraph B.5 on pages 34-35 of the Proposed Resolution.

Settling Defendants shall make their first annual payment pursuant to this paragraph 10, without adjustment, and without regard to any first annual payment date provided for under any legislation implementing the Proposed Resolution (or a substantially equivalent federal program), as follows. Each Settling Defendant severally shall cause to be paid into the registry of the Court, in accordance with

paragraph 11 of this Settlement Agreement, its respective share of the following payments; $89 million to be paid on or before November 1, 1998; and $201 million to be paid on or before December 31, 1998. The payments to be made by Settling Defendants in 1998 in the manner described above shall be credited against any first annual payment due before February 28, 1999 under legislation implementing the Proposed Resolution (or a substantially equivalent federal program).

11. Payment of Settlement proceeds. Any payment made pursuant to this Settlement Agreement shall be made to the registry of the Court; provided, that any such payments due to be made before Final Approval shall be paid into a special escrow account (the "Escrow Account"), to be held in escrow pending Final Approval pursuant to the terms of a mutually acceptable escrow agreement (the "Escrow Agreement"), and shall be disbursed only as provided by the terms of the Escrow Agreement. Upon Final Approval and pursuant to the terms of the Escrow Agreement, the amounts held in escrow pursuant to this paragraph 11 and the terms of the Escrow Agreement shall be transferred into the registry of the Court. Any funds held in the registry of the Court shall be disbursed only in accordance with the orders of the Court.

12. Adjustments in Event of Federal Resolution. In the event that legislation implementing the Proposed Resolution (or a substantially equivalent federal program) is enacted into law, the settlement provided herein shall remain in place, but the terms of such legislation shall supersede the Settling Defendants' obligations under this Settlement Agreement, except such provisions as relate to the pilot program and except to the extent that the parties hereto have otherwise expressly agreed. The Settling Defendants agree that they will advocate the passage of the federal legislation contemplated by the Proposed Resolution, including the funding to the States contemplated therein. In order to provide Settling Defendants with a full credit for all payments made hereunder pursuant to paragraphs 8 and 10 of this Settlement Agreement in the event of such legislation, and to the extent that the payments made pursuant to paragraphs 8 and 10 of this Settlement Agreement differ from the amounts to be received by the State of Texas pursuant to such legislation, the State of Texas and the Settling Defendants shall take whatever steps are necessary to ensure that the principal amount of payments received by the State of Texas will be the same as the amounts it would receive pursuant to such legislation.

13. State of Texas's Dismissal of Claims. Upon approval of this Settlement Agreement by the Court, the State of Texas shall dismiss, with prejudice as to Settling Defendants (including their parents and affiliates), and without prejudice as to Defendant Hill & Knowlton, all claims in this action.

14. State of Texas's Waiver and Release. Upon Final Approval, the State of Texas shall release and forever discharge all Defendants and their present and former parents, subsidiaries, divisions, affiliates, officers, directors, employees, representatives, insurers, suppliers, agents, attorneys and distributors (and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing), from any and all manner of civil claims, demands, actions, suits and causes of action, damages whenever incurred, liabilities of any nature whatsoever, including civil penalties, as well as costs, expenses and attorneys' fees (except as to Settling Defendants' obligations under paragraph 17 of this Settlement Agreement), known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable or statutory ("Claims") that the State of Texas (including any of its past, present or future agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions, divisions, subdivisions (political and otherwise), public entities, corporations, instrumentalities and educational institutions, and whether or not any such person or entity participates in the settlement), whether directly, indirectly, representatively, derivatively or in any other capacity, ever had, now has or hereafter can, shall or may have, as follows:

> (1) for the past, as to any Claims that were or could have been made in this action or any comparable federal or state action; and
>
> (2) for the future, only as to Claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without limitation any future claims for reimbursement for health care costs allegedly associated with use of or exposure to Tobacco Products (such past and future Claims hereinafter referred to as the "Released Claims").

The State of Texas hereby covenants and agrees that it shall not hereafter sue or seek to establish civil liability against any person or entity covered by the release provided under this paragraph 14 based, in whole or in part, upon any of the Released Claims, and the State of Texas agrees that this covenant and agreement shall be a complete defense to any such civil action or proceeding; provided, however, that Defendant Mill & Knowlton shall be entitled to the foregoing release and covenant not to sue only upon its assent, whenever given, to comply with the non-economic provisions of this Settlement Agreement, including waiver of claims, if any.

15. Settling Defendants' Waiver, Dismissal and Release of Claims. Upon Final Approval of this Settlement Agreement by the Court, Settling Defendants shall waive any and all claims against the State of Texas and any of its officers, employees, agents, Private Counsel, counsel, witnesses (fact or expert), whistleblowers or contractors, relating to or in connection with this litigation and shall dismiss, with prejudice, any pending claims or actions against such persons or entities, including but not limited to *Philip Morris, Inc. v. Morales*, Cause No. 95-14807 (120th Judicial Dist., Tex.).

In addition, upon Final Approval Settling Defendants shall release and forever discharge the State of Texas and any of its employees, Private Counsel, counsel, witnesses (fact or expert), whistleblowers or contractors, divisions, officers, employees, agents, officials acting in their official capacities, legal representatives, agencies, departments, commissions, divisions, subdivisions (political and otherwise), public entities, corporations, instrumentalities and educational institutions and insurers and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing, from any and all manner of civil claims, demands, actions, suits and causes of action, damages whenever incurred, liabilities of any nature whatsoever, including costs, expenses, penalties and attorneys' fees, known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable or statutory, arising out of or in any way related to, in whole or in part, the litigation of this lawsuit, that Settling Defendants (including any of their present and former parents, subsidiaries, divisions, affiliates, officers, directors, employees, witnesses (fact or expert), representatives, insurers, agents, attorneys and distributors and the predecessors, heirs, executors, administrators, successors and assigns of each of the foregoing, and whether or not any such person participates in the settlement), whether directly, indirectly, representatively, derivatively or in any other capacity, ever had, now has or hereafter can, shall or may have.

16. Most-Favored Nation. Settling Defendants agree that if they enter into any future pre-verdict settlement agreement of other litigation brought by a non-federal governmental plaintiff on terms more favorable to such governmental plaintiff than the terms of this Settlement Agreement (after due consideration of relevant differences in population or other appropriate factors), the terms of this Settlement Agreement will be revised so that the State of Texas will obtain treatment at least as relatively favorable as any such non-federal governmental entity. In addition, Settling Defendants agree that, in the event of any future settlement or final judgment with respect to the claims for non-economic injunctive relief pending in the lawsuit entitled *State of Florida v. American Tobacco Co*., Civ. Action No. 95-1466 AH (15th Judicial Cir., Palm Beach County, Fla.), the terms of this Settlement Agreement will be revised so that the State of Texas will receive benefits comparable to the terms of any such settlement or final judgment (after due consideration of relevant differences in population or other appropriate factors).

17. Costs, Expenses and Fees. *(a) Reimbursement of Costs and Expenses*. Settling Defendants will reimburse the Office of the Attorney General and other appropriate State agencies and Private Counsel for reasonable costs and expenses incurred in connection with this litigation, provided that such costs and expenses are of the same nature as costs and expenses for which Settling Defendants would reimburse their own counsel or agents. Within 30 days after the date of this Settlement Agreement, each Settling Defendant shall severally cause to be paid to the Attorney General the respective amount listed for such Settling Defendant in Schedule C hereto. The sum of such payments shall equal $5 million; such amount being the Attorney General's best estimate of such costs and expenses (with costs for public employees to be fixed at prevailing market rates). In addition, within 30 days after the date of this Settlement Agreement, Settling Defendants shall, pursuant to the terms of Exhibit 1 hereto, pay to Walter Umphrey as representative of Private Counsel an amount equivalent to Private Counsel's best estimate of their

reasonable costs and expenses consistent with the criteria set forth above. The Attorney General (for his office and for other appropriate State entities) and Private Counsel shall provide Settling Defendants with an appropriately documented statement of their costs and expenses. Settling Defendants shall promptly pay the amount of such costs and expenses in excess of the amounts already paid, or shall receive a refund if the total of such costs and expenses is less than amounts already paid. Any dispute as to the nature or amount of reimbursable costs and expenses shall be decided with finality by the persons selected to award fees, as provided below.

(b) Payment of Fees. Pursuant to the terms of Exhibit 1, Settling Defendants will pay reasonable attorneys' fees to Private Counsel and any other counsel retained by the State of Texas for their representation of the State of Texas in connection with this action. The State of Texas has retained Private Counsel to represent it in connection with this Action, and has advised Settling Defendants that it has entered into an agreement dated March 22, 1996 regarding the payment of attorneys' fees to Private Counsel.

(c) Exclusive Obligation of Settling Defendants as to Fees. The provisions for payment of fees set forth in this Settlement Agreement and Exhibit I hereto constitute the entire obligation of Settling Defendants with respect to attorneys' fees in connection with this action and the exclusive means by which Private Counsel or other counsel representing the State of Texas in connection with this action may seek payment of fees by the Settling Defendants. Settling Defendants shall have no other obligation to pay fees or otherwise compensate Private Counsel or any other counsel or representative of the State of Texas.

(d) Additional Compensation for State in Event of National Legislation. If legislation implementing the Proposed Resolution (or a substantially equivalent federal program) is enacted, Settling Defendants and the State of Texas contemplate that the State of Texas and any other similar state which has made an exceptional contribution to secure the resolution of these matters may apply to the national panel of independent arbitrators described in section 2(h) of Exhibit I for reasonable compensation for its efforts in securing enactment of such legislation. Any amount awarded to the State of Texas by such panel shall be paid in conjunction with awards to other governmental entities and shall be paid in proportion to the respective unpaid amounts of such awards, subject to a separate annual cap of $1OO million on the total of all such payments to be made by Settling Defendants.

18. Representations of Parties. The respective parties hereto hereby represent that this Settlement Agreement has been duly authorized and, upon execution, will constitute a valid and binding contractual obligation, enforceable in accordance with its terms, of each of the parties hereto. The State represents that all of the State's outside counsel that have represented the State of Texas in connection with this action are, by and through their authorized representatives, signatories to this Settlement Agreement.

19. Court Approval. If the Court refuses to approve this Settlement Agreement or any material provision hereof, or if such approval is modified in any material respect or set aside on appeal, or if the Court does not enter an order of dismissal of claims or final judgment as provided for in paragraph 13 of this Settlement Agreement, or if the Court enters the order of dismissal of claims or final judgment and appellate review is sought, and on such review such order of dismissal or final judgment is not affirmed in its entirety as to all material aspects of such order or final judgment, then this Settlement Agreement shall be canceled and terminated and it and all orders issued pursuant hereto shall become null and void and of no effect.

20. Headings. The headings of the paragraphs of this Settlement Agreement are not binding and are for reference only and do not limit, expand or otherwise affect the contents of this Settlement Agreement.

21. No Determination or Admission. This Settlement Agreement having being executed prior to the taking of any testimony, no final determination of violation of any provision of law has been made in this action. This Settlement Agreement and any proceedings taken thereunder are not intended to be and shall not in any event be construed as, or deemed to be, an admission or concession or evidence of any liability or any wrongdoing whatsoever on the part of any party hereto or any person covered by the releases provided under paragraphs 14 and 15 hereof. The Settling Defendants specifically disclaim and deny any liability or wrongdoing whatsoever with respect to the allegations and claims asserted against them in this

action and enter into this Settlement Agreement solely to avoid the further expense, inconvenience, burden and uncertainty of litigation.
22. Non-Admissibility. The settlement negotiations resulting in this Settlement Agreement have been undertaken by the parties hereto in good faith and for settlement purposes only, and neither this Settlement Agreement nor any evidence of negotiations hereunder shall be offered or received in evidence in this action, or any other action or proceeding, for any purpose other than in an action or proceeding arising under this Settlement Agreement. In addition to the foregoing, notwithstanding the conclusion of the settlement provided for herein, any restrictions imposed by any protective order in this action governing treatment of discovery materials during the pendency of this action shall remain in effect, and existing confidentiality designations shall remain undisturbed until the earlier of the enactment of legislation implementing the Proposed Resolution (or a substantially equivalent federal program) or December 31, 1999. Thereafter, any party to the action may make any motion with respect to such discovery materials; provided, however, that nothing in this paragraph 22 shall preclude undersigned counsel from seeking disclosure of such materials in other actions or Settling Defendants from agreeing otherwise in any other action.
23. Amendment: Waiver. This Settlement Agreement may be amended only by a written instrument executed by the Attorney General, Private Counsel and the Settling Defendants. The waiver of any rights conferred hereunder shall be effective only if made by written instrument executed by the waiving party. The waiver by any party of any breach of this Settlement Agreement shall not be deemed to be or construed as a waiver of any other breach, whether prior, subsequent or contemporaneous, of this Settlement Agreement.
24. Notices. All notices or other communications to any party to this Settlement Agreement shall be in writing (and shall include telex, telecopy or similar writing) and shall be given to the respective parties hereto at the following addresses. . . .

. . . .

25. Cooperation. The parties hereto agree to use their best efforts and to cooperate with each other to cause this Settlement Agreement to become effective, to obtain all necessary approvals, consents and authorizations, if any, and to execute all documents and to take such other action as may be appropriate in connection therewith. Consistent with the foregoing, the pasties hereto agree that they will not directly or indirectly assist or encourage any challenge to this Settlement Agreement by any other person. All parties hereto agree to support the integrity and enforcement of the terms of this Settlement Agreement.
26. Governing Law. This Settlement Agreement shall be governed by the laws of the State of Texas.
27. Construction. None of the parties hereto shall be considered to be the drafter of this Settlement Agreement or any provision hereof for the purpose of any statute, case law or rule of interpretation or construction that would or might cause any provision to be construed against the drafter hereof.
28. Severability. In the event that any non-material provision of this Settlement Agreement is found to be invalid, the remainder of this Settlement Agreement shall be fully enforceable. The proposed allocations of amounts received by the State of Texas set forth in paragraph 5 of this Settlement Agreement shall not be considered material for purposes of this paragraph 28 or any other provision of this Settlement Agreement.
29. Intended Beneficiaries. This action was brought by the State of Texas, through its Attorney General, to recover certain monies and to promote the health and welfare of the people of Texas. No portion of this Settlement Agreement shall provide any rights to, or be enforceable by, any person or entity that is not a party hereto, or a person coveted by the releases provided in paragraphs 14 and 15 of this Settlement Agreement, and no portion of this Settlement Agreement shall bind any non-party or determine, limit or prejudice the rights of any such person or entity.
30. Counterparts. This Settlement Agreement may be executed in counterparts. Facsimile or photocopied signatures shall be considered as valid signatures as of the date hereof, although the original signature pages shall thereafter be appended to this Settlement Agreement

IN WITNESS WHEREOF, the parties hereto, through their fully authorized representatives, have agreed to this Comprehensive Settlement Agreement and Release as of this 16th day of January, 1998.

STATE OF TEXAS,
acting by and through
Dan Morales, its duly
elected and authorized
Attorney General

By:_____
_____
_____
Dan Morales,
Attorney General

[names and signatures of Plaintiff's attorneys omitted]

[names and signatures of Defendants' attorneys omitted]

UNITED STATES V. PHILIP MORRIS, INC., ET AL. (complaint) (9/22/99)

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

Plaintiff,

v.

PHILIP MORRIS, INC.; R.J. REYNOLDS TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; LORILLARD TOBACCO COMPANY; THE LIGGETT GROUP, INC.; AMERICAN TOBACCO COMPANY; PHILIP MORRIS COMPANIES, INC.; BRITISH AMERICAN TOBACCO, P.L.C.; BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD.; THE COUNCIL FOR TOBACCO RESEARCH—U.S.A., INC.; THE TOBACCO INSTITUTE, INC.,

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF**

PLAINTIFF DEMANDS A TRIAL BY JURY

COMPLAINT

The United States of America, plaintiff herein, by and through its undersigned attorneys, for its complaint herein, alleges as follows:

INTRODUCTION

This is an action to recover health care costs paid for and furnished, and to be paid for and furnished, by the federal government for lung cancer, heart disease, emphysema, and other tobacco-related illnesses caused by the fraudulent and tortious conduct of defendants, and to restrain defendants and their co-conspirators from engaging in fraud and other unlawful conduct in the future, and to compel defendants to disgorge the proceeds of their unlawful conduct. This action is brought pursuant to the Medical Care Recovery Act, 42 U.S.C. §§ 2651, et seq. (Count One), and the Medicare Secondary Payer provisions of Subchapter 18 of the Social Security Act, 42 U.S.C. § 1395y(b)(2)(B)(ii) &(iii) (Count Two), and the civil provisions of Chapter 96 of Title 18, United States Code, codified at 18 U.S.C. §§ 1961 through 1968, entitled Racketeer Influenced and Corrupt Organizations ("RICO"), that authorize the United States to seek a judicial order preventing and restraining certain unlawful conduct (Counts Three and Four). Defendants, who manufacture and sell almost all of the cigarettes purchased in this country, and their co-conspirators have for many years sought to deceive the American public about the health effects of smoking. Defendants have repeatedly and consistently denied that smoking cigarettes causes disease, even though they have known since 1953, at the latest, that smoking increases the risk of disease and death. Defendants have repeatedly and consistently denied that cigarettes are addictive even though they have long understood and intentionally exploited the addictive properties of nicotine. Defendants have repeatedly and consistently stated that they do not market cigarettes to children while using advertising and marketing techniques to make their products attractive to children. Even though they have long understood the hazards caused by smoking and could have developed and marketed less hazardous

cigarette products, defendants chose and conspired not to do so. Instead, they have knowingly marketed cigarettes -- called "low tar/low nicotine" cigarettes -- that consumers believed to be less hazardous even though consumers actually receive similar amounts of tar and nicotine as they receive from other cigarettes; and therefore these cigarettes are in fact not less hazardous than other cigarettes. In all relevant respects, defendants acted in concert with each other in order to further their fraudulent scheme.
Beginning not later than 1953, defendants, their various agents and employees, and their co-conspirators, formed an "enterprise" ("the Enterprise") as that term is defined in 18 U.S.C. § 1961(4). That Enterprise has functioned as an organized association-in-fact for more than 45 years to achieve, through illegal means, the shared goals of maximizing their profits and avoiding the consequences of their actions. Each defendant has participated in the operation and management of the Enterprise, and has committed numerous acts to maintain and expand the Enterprise.
In order to avoid discovery of their fraudulent conduct and the possibility that they might be called to account for their conduct, defendants engaged in a widespread scheme to frustrate public scrutiny by making false and deceptive statements and by concealing documents and research that they knew would have exposed their public campaign of deceit. This scheme included making false and deceptive statements to the public and in congressional, judicial, and federal agency proceedings.
Defendants' tortious and unlawful course of conduct has caused consumers of defendants' products to suffer dangerous diseases and injuries. As a consequence of defendants' tortious and unlawful conduct, the Federal Government spends more than $20 billion annually for the treatment of injuries and diseases caused by defendants' products. The effect of defendants' fraudulent scheme and wrongful conduct continues to this day . . .

I. JURISDICTION

Jurisdiction in this action is predicated upon 28 U.S.C. §§ 1331, 1345, and 2201, and 18 U.S.C. §§ 1964(a) and (b).

II. VENUE

Venue for this action is predicated upon 18 U.S.C. § 1965 and 28 U.S.C. §§ 1391(b) and (c). . . . Each defendant cigarette company, or its predecessor or successor, has marketed cigarettes for sale in the District of Columbia and elsewhere from at least 1953 to the present. In addition, the Departments of Health and Human Services and Veterans Affairs and the Office of Personnel Management, federal agencies with their headquarters in Washington, D.C., among others, have paid for and provided health care to millions of smokers whose smoking related injuries were caused by defendants.

III. THE PARTIES

Plaintiff UNITED STATES OF AMERICA (the "United States"), is a sovereign and body politic.

A. Cigarette Company Defendants

Defendant PHILIP MORRIS, INC. ("Philip Morris") is a Virginia corporation with its principal place of business at 120 Park Avenue, New York, New York. Philip Morris is a subsidiary of PHILIP MORRIS COMPANIES, INC. At relevant times, Philip Morris has manufactured, advertised, and sold cigarettes . . . throughout the United States, including in the District of Columbia. . . . At times pertinent to this Complaint, Philip Morris, individually and through its agents, alter egos, subsidiaries, divisions, or parent companies, materially participated in the Enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other defendants in the unlawful, misleading, and fraudulent conduct alleged herein, and has affected foreign and interstate commerce in the United States, including the District of Columbia.
Defendant R.J. REYNOLDS TOBACCO COMPANY ("Reynolds" or "RJR") is a New Jersey corporation with its principal place of business at 401 North Main Street, Winston-Salem, North Carolina. . . . Defendant BROWN & WILLIAMSON TOBACCO CORPORATION ("Brown & Williamson") is a Delaware corporation with its principal place of business at 1500 Brown & Williamson Tower, Louisville, Kentucky. Brown & Williamson is a wholly owned subsidiary, directly or indirectly, of BATUS Holdings, Inc., a Delaware corporation, and its ultimate parent company is defendant BRITISH AMERICAN TOBACCO P.L.C. . . . Defendant LORILLARD TOBACCO COMPANY, INC. ("Lorillard") is a Delaware corporation with its principal place of business at 1 Park Avenue, New York,

New York. . . . Defendant LIGGETT GROUP, INC. ("Liggett") is a Delaware corporation with its principal place of business at 700 West Main Street, Durham, North Carolina. Defendant the AMERICAN TOBACCO COMPANY ("American") is or was a Delaware corporation with its principal place of business at 1500 Brown Williamson Tower, Louisville, Kentucky.

Defendants PHILIP MORRIS, REYNOLDS, BROWN & WILLIAMSON, LORILLARD, LIGGETT, and AMERICAN are referred to herein collectively as the "Cigarette Companies," each of which marketed cigarettes for sale in the District of Columbia and elsewhere.

B. The Parent Company Defendants

. . . Philip Morris Companies is the parent corporation of Philip Morris and Philip Morris International, Inc., and has participated in the manufacture and distribution of cigarettes and tobacco products both individually and through its agents defendant Philip Morris and Philip Morris International, Inc. . . . At times pertinent to this Complaint, Philip Morris Companies, individually and through its agents, alter egos, subsidiaries, or divisions, materially participated in the Enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other defendants in the unlawful, misleading, and fraudulent conduct alleged herein, and has affected foreign and interstate commerce in the United States, including the District of Columbia.

Defendant BRITISH AMERICAN TOBACCO, P.L.C. (“BAT p.l.c.”) . . . is sued directly and as successor to B.A.T. INDUSTRIES, P.L.C. ("B.A.T. Industries"). (This Complaint will refer to this defendant alternatively as “BAT p.l.c” and "BAT Industries"). Defendant Brown & Williamson is the agent of defendant BAT p.l.c. . . . Defendant BRITISH AMERICAN TOBACCO (INVESTMENTS) LTD. ("BAT Investments") is a British corporation. . . . BAT Investments is sued directly and as successor to BRITISH AMERICAN TOBACCO COMPANY, LTD. ("BAT Co."). (This Complaint will refer to this defendant generally as “BAT Co.”). . . . BAT Co. was a parent corporation of defendant Brown & Williamson and BATUS Holdings. . . .

Defendants PHILIP MORRIS COMPANIES, BAT P.L.C., and BAT INVESTMENTS are referred to herein collectively as the "Parent Companies."

C. The Industry "Research," Public Relations, and Lobbying Defendants

Defendant COUNCIL FOR TOBACCO RESEARCH -- U.S.A., Inc. ("CTR"), is or was a New York non-profit corporation with its principal place of business at 900 Third Avenue, New York, New York. CTR is the successor in interest to the Tobacco Industry Research Committee ("TIRC"). TIRC and CTR were not primarily "research" organizations but they were established by the Cigarette Companies to carry out their fraudulent course of conduct beginning in January 1954. At all relevant times, TIRC and CTR operated as public relations and lobbying arms of the Cigarette Companies and as agents and employees of the Cigarette Companies. They also acted as facilitating agencies and co-conspirators in furtherance of the Cigarette Companies' combination and conspiracy as described in this Complaint. . . .

At times pertinent to this Complaint, TIRC and CTR, individually and through their agents, materially participated in the Enterprise, and materially participated, conspired, assisted, encouraged, and otherwise aided and abetted one or more of the other defendants in the unlawful, misleading, and fraudulent conduct alleged herein, and have affected foreign and interstate commerce in the United States, including the District of Columbia.

Defendant THE TOBACCO INSTITUTE, INC. ("Tobacco Institute" or "TI") is or was a New York non-profit corporation with its principal place of business at 1875 I Street N.W., Suite 800, Washington, D.C. At all relevant times, the Tobacco Institute has operated as a public relations arm of the Cigarette Companies, and as an agent and employee of the Cigarette Companies. . . .

At all relevant times, each defendant was a "person" within the meaning of 18 U.S.C. §1961(3), because each defendant was "capable of holding a legal or beneficial interest in property."

The Cigarette Companies, the Parent Companies, CTR, and the Tobacco Institute are referred to herein collectively as "defendants."

. . . .

. . . [D]efendants:

- made false and misleading statements to the public through press releases, advertising, and public statements, such as before Congress, that were intended to be heard by the consuming public.
- adhered to their common scheme of deception and falsehood in lawsuits, including, among other things, destroying and concealing documents.

. . . .

- sought to create false doubt about the health effects of smoking because they knew that such doubt would influence consumers to begin or to continue smoking;
- falsely denied that nicotine was addictive and controlled the nicotine delivery of cigarettes so that they could addict new users and make it more difficult for addicted cigarette smokers to quit;
- suppressed research, destroyed documents, and took steps to prevent discovery of such documents;
- aggressively targeted children as new smokers because children fail to appreciate the hazards of smoking and the addictiveness of nicotine and are more easily induced to start an addiction that would lead to a lifetime of cigarette purchases; and
- knew that use of their product was unreasonably and unnecessarily dangerous to the lifelong customers that they sought to addict.

C. False Statements About Smoking and Disease

. . . .

. . . [A]lthough the Cigarette Companies refrained from doing much of the basic biological research related to the effects of their products, by January, 1954, the Companies had identified the presence of carcinogenic substances in tobacco smoke. Thus, defendants were well aware of the health hazards posed by smoking.

Despite their knowledge, which only increased in the ensuing years, at no time did defendants disclose to the public that smoking caused disease or make public their own analyses which confirmed the published literature. Instead, over the last forty-five years, defendants have made false and misleading statements to persuade the American public that there was an "open question" as to whether smoking caused disease. In every available regulatory, judicial, and

congressional proceeding, as well as in every public forum, including through press releases and advertisements, defendants denied that smoking caused disease or claimed that there was insufficient proof that smoking caused disease.

The Cigarette Companies went so far as to claim that they would cease selling tobacco if they determined that smoking was harmful or would change the product in order to make certain that it was no longer harmful. . . . Defendant Liggett, which joined TIRC/CTR in 1964, maintained the same false and misleading public positions as the other Cigarette Companies until 1997, when Liggett admitted that smoking is harmful, nicotine is addictive, and that the Cigarette Companies have marketed to children.

The Parent Company defendants also acted in furtherance of the Enterprise and conspiracy by committing acts as described in the Appendix to this Complaint (which Appendix is essential to determination of this action, see LCvR 5.1(g)) and by using their corporate families, particularly overseas, to keep documents and research out of reach of courts and others in the United States. . . .

In contrast to defendants, who long knew and understood the adverse health effects of cigarette smoking, many members of the public did not fully appreciate the risk to their health posed by cigarettes. At all times, defendants made such false and misleading statements with the express purpose of deceiving the public and inducing smokers and non-smokers to minimize the health risks and continue or start smoking. Defendants also had full knowledge that, as their fraud succeeded, more Americans would suffer from tobacco-related disease. Because they failed to warn consumers and lied about the health effects of smoking, many Americans, including millions of children, became addicted to cigarettes, and many people who were already smoking had more difficulty quitting, with resulting damage to their health.

D. The Myth of Independent Research

. . . .

Contrary to their repeated promises, the Cigarette Companies had a "gentleman's agreement" -- so called by defendants themselves -- not to perform or commission internal research designed to investigate the relationship between smoking and health. . . . [I]n the rare instances that the companies did conduct such

research internally, they did so in secret and suppressed the results, in some cases by destroying documents and in other cases by taking other steps to shield documents and materials from discovery.
. . . .
The biological research that the Cigarette Companies did perform was closely controlled to ensure that, if it resulted in additional evidence that smoking causes disease, it would not become public or subject to discovery in court proceedings. This control included performing much of the research outside the United States in order to keep documents and witnesses hidden and out of the reach of State and Federal courts, and by taking other steps to shield documents and materials from discovery.
Philip Morris, for example, conducted in-house research in Europe in order to avoid disclosure of unfavorable results to the public. . . . Brown & Williamson sent sensitive research documents to London to avoid production in litigation, stamped scientific documents "attorney/client, work product," and edited and suppressed the minutes of scientific meetings to remove references to topics that might be the subject of litigation. . . .
Defendants also enforced the conspiracy by stopping inconsistent research efforts by any member of the group. For example, in the 1960's Reynolds established a facility in Winston-Salem, North Carolina, to research the health effects of smoking using mice. In the facility that Reynolds nicknamed the "Mouse House," Reynolds scientists researched a number of specific areas, including studies of the actual mechanism whereby smoking causes emphysema. Internally, a Reynolds-commissioned report favorably described the Mouse House work as the most important of the smoking and health research efforts because it had come close to determining the underlying mechanism of emphysema.
In 1970, Philip Morris' president complained to Reynolds about the work going on in the Mouse House. Despite the progress made there, Reynolds responded to the complaint by closing the Mouse House -- disbanding in one day, without notice to the staff, the entire research division, firing all 26 scientists working there, and destroying years of smoking and health research. Reynolds also sought to prevent documents containing research reports contrary to the company's public positions regarding smoking and health from being disclosed in smoking and health litigation in which Reynolds was a defendant or witness. In December 1969, the Reynolds Research Department reported that it did "not foresee any difficulty in the event a decision is reached to remove certain reports from Research files. Once it becomes clear that such action is necessary for the successful defense of our present and future suits, we will promptly remove all such reports from our files. . . . As an alternative to invalidation [of adverse reports], we can have the authors rewrite those sections of the reports which appear objectionable."

2. The Lack of Independence of CTR

Rather than perform relevant research in-house, the Cigarette Companies claimed that they would fulfill their promise to research and publish their findings about smoking and health by funding independent research through the Tobacco Industry Research Committee ("TIRC"), which was later renamed the Council for Tobacco Research ("CTR"). . . .
. . . .
TIRC/CTR's true purpose, as acknowledged by Cigarette Company executives, was to provide a cover for defendants' efforts to conceal the truth about smoking and health. While TIRC/CTR served as a front for the Cigarette Companies' claim that they were committed to independent research, TIRC/CTR funds were actually funneled into research controlled by defendants and designed to advance defendants' interests in litigation. TIRC/CTR's purported independence derived from the Scientific Advisory Board ("SAB"), which defendants claimed controlled TIRC/CTR's research priorities. By directing attention to the SAB, defendants were able to appear to be furthering research efforts while their true aim was to preserve and foster false doubt about the adverse health effects of smoking in order to dissuade existing smokers from quitting and to encourage non-smokers to start.
Defendants and their agents falsely represented in public and in court that the SAB grant process functioned independently . . . [A]nd even that process was closely controlled by the Cigarette Companies through their agents and attorneys, who helped to screen proposals, to ensure that the SAB did not approve research that might suggest a link between smoking and disease.

. . . TIRC/CTR Special Projects were initiated and developed by the Cigarette Companies through their agents, including outside counsel, who used them to provide research funding for scientists and doctors who might be willing to provide testimony favorable to the Cigarette Companies on smoking and health matters. . . . When researchers funded by TIRC/CTR reached conclusions that threatened to confirm the link between smoking and disease, the companies, at times, terminated the research and concealed the results. . . . In fact, counsel for Lorillard suggested in an internal document that using Special Projects to "purchase favorable judicial or legislative testimony. . . [was] perpetrating a fraud on the public." . . .

E. Misrepresentations about Nicotine's Addictiveness and Manipulation of Nicotine Delivery

. . . .

Defendants and their agents have long known that nicotine is an addictive drug and have sought to hide its addictive and pharmacological qualities. They also have long recognized that getting smokers addicted to nicotine is what preserves the market for cigarettes and ensures their profits. In contrast, the average consumer has not been fully aware of the addictive properties of nicotine, and most beginning smokers — particularly children — falsely believe that they will be able to quit after smoking for a few years and thereby avoid the diseases caused by smoking. By hiding their knowledge of nicotine and making false and misleading statements concerning nicotine, defendants have induced existing smokers to continue using their products, and induced others to begin to smoke, particularly children, who believe, usually mistakenly, that they will be able to quit and avoid the diseases caused by smoking.

. . . .

. . . The Cigarette Companies control the nicotine content of their products through selective breeding and cultivation of plants for nicotine content and careful tobacco leaf purchasing and blending plans, and control nicotine delivery (i.e., the amount absorbed by the smoker) with various design and manufacturing techniques. . . . Cigarette Companies' use of certain ingredients in their products has been predicated on the belief that they increased the potency, absorption, or effect of nicotine. The Cigarette Companies have repeatedly (and falsely) denied that they manipulate the nicotine levels and nicotine delivery in their products. For example, the Cigarette Companies have sought to mislead the public about whether they manipulate nicotine by maintaining that nicotine levels follow tar levels. . . .

. . . .

By falsely denying that the Cigarette Companies manipulate the delivery of nicotine levels in cigarettes, defendants furthered their common efforts to deceive the public concerning the addictive nature of nicotine and consequently of cigarettes that contain nicotine.

F. Deceptive Marketing to Exploit Smokers' Desire for Less Hazardous Products

The Cigarette Companies have misled consumers by marketing products that consumers believe are less harmful, even though they are not.

. . . .

The Cigarette Companies have advertised for "low tar/low nicotine" cigarettes through misleading advertising that emphasizes the health of those pictured without expressly making health claims. The Cigarette Companies know and intend that these advertisements mislead consumers into believing that the products pictured are less hazardous than other cigarettes.

Despite their knowledge that "low tar/low nicotine" cigarettes were in fact not significantly less hazardous than other cigarettes, the Cigarette Companies expressly marketed such cigarettes as a viable alternative to quitting smoking from a health standpoint. . . . The Cigarette Companies are continuing to advertise their products in the national news media in such a manner as to lull smokers into believing that they can, by using so-called "low tar/low nicotine" cigarettes, reduce their exposure to the harmful constituents of cigarette smoke, despite knowledge on the part of the Cigarette Companies that most smokers do not substantially reduce their tar and nicotine exposure by switching to them.

G. Targeting the Youth Market

. . . .

Despite the illegality of sales to children, and despite denying that they do so, the Cigarette Companies have engaged in a campaign to market cigarettes to children. The Cigarette Companies have long known that recruiting new smokers when they are teenagers ensures a stream of profits well into the future

because these new smokers will become addicted and continue to smoke for many years, and the young smokers are "replacements" for older smokers who either reduce or cease smoking or die. . . . [D]efendants have long known that young people tend to begin smoking for reasons unrelated to the presence of nicotine in cigarette smoke, but then become confirmed, long-term smokers because they become addicted to nicotine. . . . Cigarette Companies' advertising glamorizes smoking and its content is intended to entice young people to smoke, for example, as a rite of passage into adulthood or as a status symbol. Among the techniques used by the Cigarette Companies to attract underage smokers were advertising in stores near high schools, promoting brands heavily during spring and summer breaks, giving cigarettes away at places where young people are likely to be present in large numbers, paying motion picture producers for product placement in motion pictures designed to attract large youth audiences, placing advertisements in magazines commonly read by teenagers, and sponsoring sporting events and other activities likely to appeal to teenagers.

. . . Reynolds developed the Joe Camel campaign — based on a cartoon character — to appeal to the youngest potential smokers. . . . The advertising was effective in attracting adolescents and, as a result of the campaign, the number of teenage smokers who smoked Camel cigarettes rose dramatically.

Despite the overwhelming evidence that they have deliberately sought to target young people for the sale of cigarettes, defendants have denied such activities in false and misleading communications to the public, to legislative and regulatory bodies, and in judicial proceedings. . . . To avoid full disclosure of its practices regarding Joe Camel, in 1991, while the Federal Trade Commission was investigating Reynolds' practices of advertising and marketing to children, Reynolds instructed its advertising agency to destroy documents in the advertising agency's possession related to the Joe Camel campaign.

. . . .

The Cigarette Companies actively targeted their marketing to children with full knowledge that sales to children were illegal, that children would not appreciate the dangers of the product or its addictiveness, that most of the children who began to smoke would become addicted, and that a significant percentage would develop smoking-related diseases or suffer premature death as a result. They denied doing so with full knowledge that such denials were false and misleading.

H. Defendants' Concerted Plan Not To Make Cigarettes Less Hazardous

. . . .

Despite their demonstrated ability to design cigarettes that they believed were less hazardous, defendants have refused to test and/or actively promote such products, and have suppressed the marketing of such products by others, and have refused to acknowledge the possibility of a less hazardous product. The Cigarette Companies' refusal to acknowledge the possibility of a less hazardous product is in part a result of their efforts to avoid liability for, among other things, negligence and product liability claims. To state that a less hazardous product could be — or has in fact been — developed would constitute an admission that the products they currently sell are hazardous, or unreasonably so. Just as they suppressed information about the health effects and addictive nature of smoking, defendants also suppressed any information they developed about less hazardous design.

. . . .

Another reason why some of defendants did not produce and market a less hazardous cigarette was because other defendants threatened retribution in the event the company proceeded. For example, Liggett's assistant research director, Dr. James Mold, said that Liggett's president had reported that he was "told by someone in the Phillip Morris Company that if we tried to market such a product [as XA] that they would clobber us."

. . . .

V. DEFENDANTS' LIABILITY FOR THE UNITED STATES' HEALTH CARE COSTS

A. Count One: Liability Under The Medical Care Recovery Act

. . . .

The Medical Care Recovery Act, 42 U.S.C. § 2651, et seq., authorizes the United States to recover the reasonable value of certain hospital, medical, surgical, or dental care and treatment. Pursuant to the Medical Care Recovery Act, the United States is entitled to recover for such care or treatment under

circumstances creating a tort liability upon a third person. Each year, the United States, pursuant to various statutory entitlement programs, furnishes and pays for hospital, medical, surgical, and dental care (hereinafter collectively referred to as "health care services") for numerous current and former consumers of the Cigarette Companies' products. . . . [T]he United States furnishes and pays for, and will in the future be authorized and required to continue to furnish and pay for, hospital, medical, surgical and dental care for diseases, illnesses, and injuries resulting from cigarette smoking. Care provided for the diseases, illness, and injuries caused by cigarette smoking and furnished or paid for by the United States has a reasonable value of more than $20 billion per year.

The cigarette smokers on whose behalf the United States furnishes or pays for hospital, medical, surgical, and dental care have been injured or suffer disease under circumstances that create a tort liability upon defendants. That tort liability arises as follows:

1. Defendants' Liability for Fraud (Fraudulent Misrepresentation, Concealment, and Nondisclosure)

Defendants and their co-conspirators have engaged in a consistent course of conduct through which they have fraudulently misled past, present and prospective smokers, governmental authorities, and other members of the public. Defendants and their co-conspirators have made false and misleading statements that there is no causal connection between cigarette smoking and adverse health effects or that there is an open question as to whether smoking causes disease. They have made false promises to conduct and disclose objective research on the issue of smoking and health, and they have fraudulently concealed information relating to the issue of smoking and health.

Defendants and their co-conspirators have made affirmative material misrepresentations, have omitted material facts, and have concealed material information concerning the health risks associated with smoking cigarettes, particularly "light" or "low tar/ low nicotine" cigarettes. They have made false and misleading statements and concealed material information concerning both the addictiveness of nicotine and their own manipulation of the nicotine delivery in cigarettes. They have falsely denied marketing cigarettes to children.

. . . .

Members of the public believed in the truth and completeness of the statements made by defendants and their co-conspirators. They relied upon the statements by defendants and their co-conspirators, including statements that created a false controversy about smoking and disease, and demonstrated that reliance by purchasing and smoking cigarettes, and by refraining from trying to quit or reduce their consumption of cigarettes. . . .

As a direct and proximate result of the fraudulent misrepresentations, omissions, and concealment by defendants and their co-conspirators, individually and collectively, members of the public began to smoke and continued smoking and, as a result, they suffered harm. Among other things, smokers experienced diminished overall health and an increased risk of disease and illness and endured smoking-related diseases, and injuries. Among those who suffered injury as a result of defendants' and their co-conspirators' fraudulent conduct are persons for whom the United States was authorized and required to furnish and pay for, has furnished and paid for, and will furnish and pay for, hospital, medical, surgical, or dental care and treatment under various federal programs . . .

2. Defendants' Liability for Violations of State Consumer Protection Statutes (Unfair, Unconscionable, and Deceptive Acts or Practices)

All of the states and the District of Columbia have consumer protection statutes that prohibit unfair, unconscionable, deceptive and misleading trade practices directed toward consumers, and private consumers may recover damages for conduct that violates these statutes. . . .

. . . .

The conduct of defendants and their co-conspirators, as set forth above, violated their duty imposed upon them by the above-cited statutes to refrain from engaging in unfair, deceptive, and unconscionable trade practices. In particular, the knowingly fraudulent misrepresentations, fraudulent omissions, and fraudulent concealment of material facts . . . had the capacity, tendency, or effect of deceiving or misleading

consumers and constituted unfair, deceptive, and unconscionable trade practices for which defendants were and are subject to tort liability under the [consumer protection] statutes.
. . . .
Defendants and their co-conspirators further engaged in unconscionable conduct prohibited by the state consumer protection statutes by knowingly and intentionally causing cigarettes to be marketed and sold to the vulnerable population of children, in part by: (a) designing their marketing campaigns with the intent that children be induced by defendants' advertisements to smoke cigarettes . . . [and] concealing that their products are addictive and harmful, and defrauding and misleading the public, including children, on these subjects. . . .
Consumers relied upon defendants' and their co-conspirators' misleading and deceptive statements to their detriment . . . Among those who suffered injury as a result of defendants' and their co-conspirators' tortious and unlawful conduct are persons for whom the United States has furnished or paid for, and will furnish and pay for, hospital, medical, surgical, or dental care and treatment under various federal programs . . .

3. Defendants' Liability for Breach of Manufacturers' Duties, Including Failure to Warn, Failure to Test, Sale of Defective and Unreasonably Dangerous Products (Strict Liability, Negligence, and Breach of Implied Warranty)

All states and the District of Columbia impose duties on manufacturers and suppliers of products intended for human use and consumption, to exercise reasonable care and to refrain from selling products that are defective or unreasonably dangerous when used as intended by foreseeable users of the product. The Cigarette Companies' duties included the duty to test their products adequately to determine that they were safe for their intended use; to design their products so that, when used as intended, they were reasonably fit and safe for their foreseeable users; and to warn foreseeable users of dangers related to their products' use. The Cigarette Companies have also impliedly warranted that their products had been adequately tested and were not defective or unreasonably dangerous when used as intended by foreseeable users.
In breach of their duty and implied warranty, the Cigarette Companies manufactured and supplied products that were defective and unreasonably dangerous when used as intended by foreseeable users of their product. The Cigarette Companies' products were defective, unreasonably dangerous, and not fit for ordinary use when they left the possession of the Cigarette Companies.
. . . .
The Cigarette Companies manufactured and sold cigarettes that, when used as intended, caused a large percentage of users to become addicted and to develop often fatal diseases, including lung cancer, emphysema, stroke, and heart disease. . . . [T]he Cigarette Companies, along with their co-conspirators, deliberately designed a research program so as to avoid determining the full scope of the dangers posed by their products, and acted to suppress and terminate research that threatened to expose the health dangers and addictiveness of smoking.
. . . Despite the feasibility of less hazardous alternative designs for their products, the Cigarette Companies failed to research or adopt such less hazardous alternatives . . .
. . . [T]he Cigarette Companies, along with their co-conspirators, actively sought to stifle or contradict, and thereby, neutralize any such warnings that might be issued by other entities and further intentionally directed their marketing toward children and adolescents, who would be less likely to be aware of cigarettes' dangerous and addictive properties or able to appreciate the risks of smoking. . . .
. . . .
The Cigarette Companies' breach of their duties and implied warranty was done in reckless and wanton disregard of the safety of cigarette smokers, and with actual knowledge of the fact that the conduct of the Cigarette Companies would cause serious illness or death to large numbers of cigarette smokers.
. . . Among other things, smokers experienced diminished overall health and an increased risk of disease and illness, and endured smoking-related diseases, injuries, and death. Among those who suffered injury as a result of Defendants' tortious conduct are persons for whom the United States has furnished or paid

for, and will furnish and pay for, hospital, medical, surgical, or dental care and treatment under various federal programs . . .

. . . .

5. Defendants' Liability for Civil Conspiracy

At all times material to this action, defendants participated in a civil conspiracy among themselves, and with other persons known and unknown, the purposes of which were, *inter alia:* (a) to conceal knowledge of the harmful effects of cigarette smoking from the public, the medical and scientific community, and governmental authorities . . . to mislead the general public, the
medical and scientific community, and governmental authorities concerning the addictive properties of nicotine; (e) to mislead the general public, the medical and scientific community, and governmental bodies about the actual nicotine and tar delivery of supposedly "low tar" and "low nicotine" cigarettes as they are actually smoked . . . to suppress research into smoking and health; (g) to prevent development and marketing of less hazardous products; (h) to market cigarettes to minors . . .

. . . .

Each act of the conspiracy was ratified by the other co-conspirators, who acted as each other's agents in carrying out the conspiracy.

. . . .

B. Count Two: Liability under The Medicare Secondary Payer Provisions

. . . .

Each year, the United States, through the Health Care Financing Administration ("HCFA") of the United States Department of Health and Human Service ("HHS"), expends extraordinary amounts, pursuant to the Medicare Program, 42 U.S.C., § 1395 et seq., paying for the care and treatment of Medicare beneficiaries inflicted with and suffering from diseases, illnesses, injuries, and diminished health caused by defendants' acts and omissions.

. . . Where the Medicare Program does reimburse the beneficiary's health care costs, it does so "conditioned on reimbursement" to HHS by the responsible third party. 42 U.S.C. § 1395y(b)(2)(B)(i).

. . . [D]efendants are required and responsible to make payment for the health care costs of Medicare beneficiaries that were caused by defendants' tortious and unlawful conduct, which costs have been and will be unlawfully shifted to the United States.

VI. DEFENDANTS' LIABILITY FOR VIOLATIONS OF THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS STATUTE

A. Count Three: Violation of Title 18, United States Code, Section 1962(c) Conducting the Affairs of the Enterprise Through a Pattern of Racketeering Activity

. . . .

From at least the early 1950's and continuing up to and including the date of the filing of this complaint, in the District of Columbia and elsewhere, defendants, PHILIP MORRIS, REYNOLDS, BROWN & WILLIAMSON, LORILLARD, LIGGETT, AMERICAN, PHILIP MORRIS COMPANIES, BAT PLC, BAT INVESTMENTS, COUNCIL FOR TOBACCO RESEARCH, and TOBACCO INSTITUTE, and others known and unknown, being persons employed by and associated with the Enterprise described in Section VI. B., below, did unlawfully, knowingly, and intentionally conduct and participate, directly and indirectly, in the conduct, management, and operation of the affairs of the aforementioned Enterprise, which was engaged in, and the activities of which affected, interstate and foreign commerce, through a pattern of racketeering activity consisting of numerous acts of racketeering in the District of Columbia and elsewhere, indictable under 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud), including, but not limited to, the acts of racketeering alleged in the Appendix to this Complaint which are incorporated by reference and realleged as if fully set forth herein, in violation of 18 U.S. C. § 1962 (c).

B. The Enterprise Manner and Means

. . . [D]efendants, collectively have constituted an "enterprise," as that term is defined in 18 U.S.C. § 1961(4), that is, a group of business entities and individuals associated in fact, which was engaged in, and the activities of which affected, interstate commerce and foreign commerce. Each defendant participated

in the operation and management of the Enterprise. The Enterprise functioned as a continuing unit for more than 45 years to achieve shared goals through unlawful means . . .

. . . .

. . . Defendants and their co-conspirators used the Enterprise to make these material fraudulent representations to induce public acceptance of their representations, to avoid civil liability, and to conceal their efforts to misrepresent, suppress, distort, and confuse the facts about the health dangers of tobacco products, including nicotine addiction. . . .

. . . .

. . . The constituent members of the Enterprise were aware that, unless they agreed to act and acted as an enterprise, their sales of tobacco products would substantially decrease, and accordingly, the profits of the Cigarette Companies would substantially diminish. . . . The Enterprise has an ascertainable structure and purpose beyond the scope and commission of defendants' predicate acts. It has a consensual decision making structure that is used to coordinate strategy, manipulate scientific data, suppress the truth about the consequences of smoking, and otherwise further defendants' fraudulent scheme.

The Enterprise is an ongoing organization whose constituent elements function as a continuing unit in maximizing the sales of the products of all of the Cigarette Companies, misleading the public, the Congress, federal agencies, and the courts as to the health hazards of cigarettes, concealing and suppressing the truth concerning the addictive properties of nicotine and of the Cigarette Companies' control of nicotine delivery, marketing to children, and carrying out other elements of defendants' scheme.

. . .

In order to further the conspiracy and as part of their Enterprise that was engaged in a pattern of racketeering activity, defendants formed the TIRC (later CTR) and the Tobacco Institute. Each of these organizations furthered the goals of the Enterprise in numerous ways:

- They served as a principal channel of communication among defendants to ensure that the companies continued to espouse the party line and to react to new threats to the industry.
- They served to provide a uniform voice to propagate defendants' and their co-conspirators' false and misleading material statements about smoking and health, defendants' commitment to research, and other issues.
- They provided an "independent" front for defendants' activities. CTR, for example, was used by defendants to claim falsely that they were funding independent research into smoking and health. Similarly, the Cigarette Companies were able to market to youth and to deny doing so under the cover of TI's print campaign which purported to discourage children from smoking.
- They were mechanisms for enforcing the conspiracy and ensuring that all defendants continued to participate in the Enterprise. Defendants and/or their attorneys were in constant contact with each other through CTR and TI. The numerous committees and boards that exercised control over TI and CTR provided regular opportunities for defendants' agents to meet and to ensure that defendants were continuing to act in concert.

At all times, CTR and TI were controlled by the Cigarette Companies and their agents and employees. Defendants controlled each organization directly and through the web of committees made up of representatives of the Cigarette Companies and outside counsel. . . .

. . . .

D. THE PATTERN OF RACKETEERING ACTIVITY

Racketeering Acts Related to The Mail And Wire Fraud Scheme Racketeering Acts 1 through 116:

The following sub-paragraphs a. through n. are realleged as a part of each of Racketeering Acts Nos. 1 through 116 relating to mail fraud and wire fraud set forth in the Appendix to the Complaint.

a. From at least as early as December 1953, and continuing until the time of filing of this complaint, in the District of Columbia and elsewhere, defendants and others known and unknown did knowingly and intentionally devise and intend to devise a scheme and artifice to defraud, and obtain money and property from, members of the public by means of material false and fraudulent pretenses, representations, and promises, and omissions of material facts, knowing that the pretenses, representations, and promises, were false when made.

. . . .
n. For purposes of executing and attempting to execute that scheme and artifice, defendants and their co-conspirators would and did knowingly transmit and cause to be transmitted in interstate and foreign commerce by means of wire, radio and television communication writings, signs, signals, pictures and sounds (collectively "transmissions") in violation of 18 U.S.C. § 1343 . . .
. . . .
VII. PRAYER FOR RELIEF
WHEREFORE, the United States of America prays for relief and judgment against all defendants, jointly and severally, as follows:
A. Remedies at Law:
. . . .
1. Under Count One, awarding the United States money damages for an amount that is sufficient to provide restitution and repay the United States for the sums it has spent or will spend . . . to or on behalf of beneficiaries of various federal programs . . . as a result of the wrongful conduct of defendants, which amount is to be determined at trial by a jury. . . .
2. Under Count Two, awarding the United States money damages . . . to recover compensation for the costs that the United States has paid, pursuant to the Medicare Program, to reimburse health care providers for treating Medicare beneficiaries suffering from diseases and other health problems as a result of defendants' wrongful and unlawful conduct . . .
3. Awarding the United States the costs of this suit, together with such other and further relief as may be necessary and appropriate.
B. Equitable Remedies:
Pursuant to the provisions of 18 U.S.C. § 1964, that this Court issue an Order and Judgment, jointly and severally, against defendants, providing the following relief:
1. That this Court order that all of the defendants who are found to have violated 18 U.S.C. § 1962, disgorge all proceeds derived from any violation of 18 U.S.C. § 1962.
2. That this Court issue a permanent injunction that will do the following:
a. Prohibit each defendant and its successors, officers, employees, and all persons acting in concert with each defendant, from committing any act of racketeering, as defined in 18 U.S.C. § 1961(1), and from associating directly or indirectly, with any other person known to them to be engaged in such acts of racketeering or with any person in concert or participation with them.
b. Enjoin and restrain each defendant and all other persons in concert with each defendant from participating in any way, directly or indirectly, in the management and/or control of any of the affairs of CTR and TI . . . any successor entities of CTR and TI . . . known to them to be engaged in acts of racketeering.
c. Enjoin each defendant and persons in concert with each defendant from making false, misleading or deceptive statements or representations concerning cigarettes.
. . . .
e. Order each defendant to disclose, disseminate, and make available to the Department of Justice and such public health and regulatory authorities as the Court may select, all documents relating to research previously conducted directly or indirectly by themselves and their respective agents, affiliates, servants, officers, directors, employees, and all persons acting in concert with them, that relate to the health consequences of cigarette smoking and nicotine addiction, and the ability to develop less hazardous cigarettes.
f. Order each defendant to fund, but have no part of or influence over the control of or decision making relating to, a legitimate and sustained corrective public education campaign, administered and controlled by an independent third party, relating to the public health issues of cigarette smoking and nicotine addiction.
. . . .

h. Order each defendant to make corrective statements regarding the health risks of cigarette smoking and the addictive properties of nicotine in future advertising, marketing, and promotion of their tobacco products.
i. Order each defendant to fund, but have no part of or influence over the control of or decision making relating to, sustained cessation programs including the provision of medically approved nicotine replacement therapy for dependent smokers.
j. Order each defendant to fund, but have no part of or influence over the control of or decision making relating to, a sustained educational campaign devoted to the prevention of smoking by children.
3. That this Court award the United States the costs of this suit, together with such other and further relief as may be necessary and appropriate to prevent and restrain further violations of 18 U.S.C. § 1962, and to end the ongoing wrongful conduct of defendants.

C. DECLARATORY RELIEF:

Pursuant to 28 U.S.C. § 2201, that this Court declare that defendants are liable, jointly and severally, for future costs of hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to be furnished, or to paid for, by the United States resulting from the past tortious and wrongful conduct of defendants.

VIII. DEMAND FOR JURY TRIAL

The United States of America demands a trial by jury on all issues so triable under Counts One and Two in this action.

DATED: September 22, 1999

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Discussion questions

1. Why might one use the tort liability tool rather than one of the other tools of public action, such as administrative regulation? In which instances do you think the tool of tort liability is superior to its alternatives? In which might it be inferior?

State and Federal Statutes

1. The legislative and executive branches exercise significant authority over some aspects of the tort liability tool. In what ways do the statutes at (A1, A2, A3, A4, A5, A6, A7, and A8) permit a broad functioning of the tort liability tool? In what ways do they limit the use of the tort liability tool?

2. Are the complaints in The State of Texas v. American Tobacco Co., et al. (B1) and United States v. Philip Morris, Inc., et al. (G1) consistent with the intent of the statutes (see A1-A8)? Do you think the alleged actions of the tobacco companies are the sort of crimes that the legislature envisioned? Why or why not?

3. Review items A1, A2, and A3. For each document, classify the key provisions in terms of "who benefits." The options are the plaintiff, the defendant, and neither (i.e., the provision is neutral). What do your findings reveal about the relative influence the potential tort action parties have in the legislative process that defines some of the characteristics of this tool? Are potential plaintiffs or potential defendants more influential?

4. Compare the statutes in A7 and A8, counts 1 and 2 of the complaint (B1), and the court's decision on counts 1 and 2 (D1). Was the decision of the court consistent with the intent of the statutes? Do you agree with the decision ? Why?

5. Compare the Texas Statute on product liability (A1), counts 6-8 of the complaint (B1), and the decision of the court on those counts (D1, III B). Was the decision of the court consistent with the statutes? Do you agree with the decision? Why or why not?

The Complaint

1. The filing of a complaint with a court of jurisdiction initiates the operation of the tort liability tool. In crafting the complaint, the plaintiff must keep in mind her audience and her objectives.
    a. Who were the potential readers of the The State of Texas v. American Tobacco Co., et al. complaint (B1)? How do you think the composition of the audience affected the manner in which the complaint was drafted? Do you think the tone of the document is equally effective in the district court and the "court" of public opinion?
    b. Do you think that, overall, the plaintiff's complaint is an effective document? Why or why not?

2. The complaint clearly separates its claims on behalf of the State of Texas from those of individual smokers and any other potential plaintiffs that may be involved in other suits. How does this benefit the State? Why is it important that Texas not tie its claims to those of other plaintiffs?

3. The plaintiff's complaint is rather lengthy. Do you think that a shorter complaint, perhaps without the "Preliminary Statement" and "Factual Background" sections, would have been as effective with its different target audiences? Why or why not?

Discovery

1. Discovery is typically orchestrated by the attorneys. In some instances, however, court intervention becomes necessary to compel disclosure from one or more of the parties. As you read the discovery materials (C1, C2, C3, C4, C5, C6, C7, C8, C9, C10, C11, and C12), observe Judge Folsom and Magistrate Radford's level of involvement. In what ways does the court attempt to regulate the discovery process in Texas v. American Tobacco Co.? Do you think there is too much or too little control of discovery by the court?

2. Parties generally have the right to obtain information about any matter that is relevant to the subject matter of the lawsuit (as long as the information is admissible as evidence or is "reasonably calculated" to lead to admissible evidence). There are limitations, however, on what kind of information must be provided. For example, "privileged matters" and attorneys' "work product" are typically protected from discovery. How do the defendants use these limitations? What is the plaintiff's response? Is the State of Texas successful in overcoming these limitations? (see items C2, C3, C4, C5, C6, C7, C8, C9, C10, C11, and C12)

3. How might the Confidentiality Order (C5) work to the advantage or disadvantage of each party in court proceedings? In the "court" of public opinion?

4. A key issue in the discovery phase of the case was the disclosure of documents related to ingredients, formulas, and manufacturing processes. Review the documents in section C and summarize the actions of the state and the court in the state's effort to secure access to the documents.

5. Overall, does the discovery process facilitate the plaintiff's effective use of the tort liability tool, or does it hinder the tool's effectiveness?

Dispositive Motions

1. A party may file a motion asking the judge to enter judgment in its favor on the theory that no material facts are in dispute and the judge can therefore decide the case purely as a matter of law. In The State of Texas v. American Tobacco Co., et al., the defendants moved to dismiss various counts from the complaint. What are the justifications given by the court in D1 for the dismissal of the following claims:

    a. violation of the federal and state antitrust laws
    b. violation of the Texas Deceptive Trade Practices-Consumer Protection Act
    c. restitution/unjust enrichment
    d. public nuisance
    e. negligent performance of a voluntary undertaking

2. How successful was this strategy for the defense? How did the court's decision shape the plaintiff's ability to use the tort liability tool?

Further Pleadings

1. In very complex cases, formal pleadings serve to simplify, and sometimes separate, the various issues in dispute. In The State of Texas v. American Tobacco Co. et al., the plaintiff requested that the trial be divided into separate phases, each dealing with distinct issues. Summarize the court's decision on this issue (E1). Did the ruling favor the plaintiff or the defendant? Explain your response.

2. Would a unified trial have offered any advantage to the plaintiff? Does the division of the trial into various phases strengthen the State's use of the tort liability tool? Why or why not?
3. Pre-Trial Settlement

1. More than nine out of ten suits alleging tort liability end in settlement. As you read the terms of the settlement for The State of Texas v. American Tobacco Co., et al. (F1), think about the goals of each party. How favorable are the terms to each party? Does either side get what it wants? Do both?

2. Is the settlement between Texas and "Big Tobacco" comprehensive? Does it resolve with finality all claims against all parties to the action? What are the remaining issues, if any? (review B1 and F1)

3. How successful is Texas' use of the tort liability tool? Are there any other tools, such as administrative regulation, which would be more effective? What are the relative advantages and disadvantages of each?

Subsequent Cases

1. Many legal and factual issues that have already been litigated must sometimes be litigated over and over again in subsequent tort cases. Typically, settlements only affect the claims of parties to the action, and exclude potential plaintiffs who did not have an opportunity to be heard. In United States v. Philip Morris, Inc., et al. (G1), the federal government also seeks to recover money from cigarette manufacturers for the sums that it has paid out under various programs for tobacco-related illnesses and deaths. In what ways are the federal claims similar to those in The State of Texas v. American Tobacco Co., et al. (B1)? In what ways are they different?

2. This complaint separates its claims from those of individual smokers and the states. How does this benefit the federal government? Why is it important that the United States not tie its claims to those of previous plaintiffs?

3. Is the United States' complaint a persuasive document? Why or why not? Is the case presented by the United States as strong as that put forth by Texas?