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A GUIDE FOR PLAINTIFFS' ATTORNEYS:
Using Findings and Resources from *USA v. Philip Morris
USA, Inc., et al.* in Future Claims Against Big Tobacco

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

After seven years of litigation, the United States Department of Justice has proven in a landmark case (“DOJ case”) that the industry members (“defendants”) are racketeers under the civil provisions of the Racketeering and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-1968. Judge Gladys Kessler, who presided over the trial in the United States District Court for the District of Columbia, wrote a lengthy opinion that opens a window into the industry as it operates today, with nearly 1,500 pages of findings of fact meticulously documenting the industry’s racketeering activities. Over 235 pages alone, for example, provide a detailed description of the industry’s youth marketing activities. One of Judge Kessler’s most significant findings is that the industry is likely to continue its wrongdoing if substantial steps are not taken to change the manner in which it is overseen. Although the remedies Judge Kessler ordered are stayed pending appeal, the case remains an important statement in favor of public health.

Litigation against the tobacco industry can be a powerful public health tool. Courts can, for example, order manufacturers to change their practices or can order damage awards that cause increases in cigarette prices and, in turn, a reduction in youth smoking. Even suits that result in verdicts for the defendants can raise public awareness of the tobacco industry’s wrongdoing and can unearth valuable documents through the discovery process. Despite these positive aspects of litigation, individual plaintiffs in tobacco-related lawsuits traditionally have faced uphill battles against industry defendants, who often possess far superior resources. The industry defendant often has been able to use such resources to conduct “scorched earth” litigation campaigns, crippling plaintiffs both financially and emotionally. However, class actions and government lawsuits have helped balance the scales and have resulted in outcomes such as the Master Settlement Agreement³ (between forty-six states and the major United States tobacco manufacturers) and now Judge Kessler’s decision in the DOJ case. Using a decision such as Judge Kessler’s to aid future plaintiffs, especially individual plaintiffs in smoking and health cases, can extend the usefulness of that decision and can help balance the inequity of resources between the plaintiff and the industry defendant.

In this regard, Judge Kessler’s opinion can be used in several ways. First, the case provides plaintiffs’ attorneys with a “roadmap” to bringing a successful case on many prominent tobacco control issues. Second, there is a potential that the opinion may be used to preclude tobacco industry defendants from re-litigating certain issues in future cases through the doctrine of collateral estoppel. Finally, the case is a valuable source of information for plaintiffs’ attorneys as it is rich with citations to documents and transcripts of depositions and trial testimony, many of which are publicly available on the internet.

Roadmap to a Successful Case

Judge Kessler’s opinion concluded that the defendants are racketeers who “repeatedly, consistently, and vigorously – and falsely – denied the existence of any adverse health effects from smoking” and that they “mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an ‘open question.’”⁴ The opinion touched on many key issues that are common in tobacco litigation. Specifically, Judge Kessler made the following major conclusions regarding defendants’ scheme to defraud consumers and potential consumers of cigarettes:

- Defendants Have Falsely Denied, Distorted and Minimized the Significant Adverse Health Consequences of Smoking for Decades⁵
- [Various Industry Wrongdoings Regarding] The Addictive Properties of Nicotine⁶
- Nicotine “Manipulation”: Defendants Have Falsely Denied that They Can and Do Control the Level of Nicotine Delivered In Order to Create and Sustain Addiction⁷
- Defendants Falsely Marketed and Promoted Low Tar/Light Cigarettes as Less Harmful than Full-Flavor Cigarettes in Order to Keep People Smoking and Sustain Corporate Revenues⁸
- From the 1950s to the Present, Different Defendants, at Different Times and Using Different Methods, Have Intentionally Marketed to Young People Under the Age of Twenty-One

in Order to Recruit “Replacement Smokers” to Ensure the Economic Future of the Tobacco Industry⁹

- Defendants Have Publicly Denied What They Internally Acknowledged: that ETS [Environmental Tobacco Smoke, or secondhand smoke] Is Hazardous to Nonsmokers¹⁰
- At Various Times, Defendants Attempted to and Did Suppress and Conceal Scientific Research and Destroy Documents Relevant to Their Public and Litigation Positions¹¹

Plaintiffs’ attorneys who base a claim against an industry defendant on one or more of the above issues can greatly benefit from Judge Kessler’s clear, articulate arguments. For example, in her section on low tar/light cigarettes, Judge Kessler laid out her argument as follows:

- (1) Low Tar/Light Cigarettes Offer No Clear Health Benefit over Regular Cigarettes
- (2) Based on Their Sophisticated Understanding of Compensation, Defendants Internally Recognized that Low Tar/Light Cigarettes Offer No Clear Health Benefit
 - (a) Defendants Internally Recognized that Low Tar Cigarettes Are Not Less Harmful Than Full-Flavor Cigarettes
 - (b) Internally, Defendants Had an Extensive and Sophisticated Understanding of Smoker Compensation
- (3) Defendants Internally Recognized that Smokers Switch to Low Tar/Light Cigarettes, Rather than Quit Smoking, Because They Believe They Are Less Harmful
 - (a) Defendants Recognized that Smokers Choose Light/Low Tar Cigarettes for a Perceived Health Benefit

- (b) Defendants Internally Recognized that Smokers Rely on the Claims Made for Low Tar/Light Cigarettes as an Excuse/Rationale for Not Quitting Smoking
- (4) Despite Their Internal Knowledge, Defendants Publicly Denied that Compensation Is Nearly Complete and that the FTC Method¹ is Flawed
- (5) Despite Their Internal Knowledge, Defendants' Marketing and Public Statements About Low Tar Cigarettes Continue to Suggest that They Are Less Harmful than Full-Flavor Cigarettes¹²

Voluminous documents and deposition and trial transcripts, most of which are available publicly, supported each of these points. Judge Kessler similarly distilled her arguments for each of the other key areas in which she found that Defendants had engaged in fraud. The opinion's Table of Contents provides a useful outline of these arguments for each issue. Attorneys bringing a case on one or more of these issues are advised to consult the Table of Contents as a starting point to understanding the layout of Judge Kessler's successful argument in that area.

Potential Collateral Estoppel Effect of Judge Kessler's Decision

In addition to its usefulness as a roadmap to a successful lawsuit, Judge Kessler's opinion may provide plaintiffs' attorneys with another, and perhaps more powerful, weapon in the war against big tobacco. The doctrine of preclusion works to prevent repeat litigation by maintaining the finality

¹ The "FTC Method" refers to the Federal Trade Commission's method of testing a cigarette's tar and nicotine content using a machine.

of an earlier judgment. Issue preclusion, known as collateral estoppel, maintains that a "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action . . . , whether on the same or a different claim."¹³ The doctrine bars a party from relitigating an issue "even if the second action differs significantly from the first one."¹⁴

In many jurisdictions, the doctrine applies to both mutual and nonmutual parties.¹⁵ Thus, a plaintiff (such as a smoking and health plaintiff) may seek to estop a defendant (such as a tobacco company) from re-litigating those issues that the defendant previously litigated and lost against a different plaintiff.

Because only those issues that were essential to Judge Kessler's decision will have a preclusive effect, it is necessary to examine carefully the essential elements of a plaintiff's current or future claim as well as the material issues Judge Kessler addressed in finding the defendants in the DOJ case liable under RICO. Such a determination will need to be made on a case-by-case and issue-by-issue basis. Future suits that may benefit from collateral estoppel include those claiming a RICO violation, misrepresentation, fraud/fraudulent concealment, negligence, or breach of warranty.

It is important to note some potential limitations to using Judge Kessler's decision to preclude future relitigation of the same issues. First, the decision is currently being appealed to the United States Supreme Court by both parties. Because the use of issue preclusion is dependent upon the status of the original judgment, it may seem premature to raise such an argument while reversal remains possible. However, the DOJ case was litigated over a period of seven years and tried over a period of almost nine months, with both sides having ample opportunity to present their cases and with the resulting language of the judicial opinion and determination of issues being far from tentative. Additionally, according to Section 16 of the Restatement (Second) of Judgments, "a judgment based on an earlier judgment is not

nullified automatically by reason of setting aside, or reversal on appeal, or other nullification of that earlier judgment . . .”¹⁶ The comments to Section 16, however, do make it clear that if the earlier judgment is set aside, there is a strong basis for arguing that any subsequent judgment based on that judgment should be set aside as well. Thus, the case’s appeal status does leave open the possibility that the finality requirement will not be met.

Next, some states do not allow non-mutual collateral estoppel – i.e., they require that *both* parties in the present action were also parties in (or in privity with parties in) the earlier litigation. Attorneys are advised to check the rule in their particular jurisdiction. Federal law has no mutuality requirement.¹⁷

Finally, despite the logical possibility of asserting collateral estoppel in the wake of Judge Kessler’s opinion, at least one court has been unwilling to entertain it in the realm of tobacco litigation. In a civil RICO class action suit brought in a federal court in New York by private citizens seeking \$200 billion on behalf of a class of “light cigarette” smokers, the plaintiffs asserted an estoppel argument on the issue of defendants’ misleading and harmful marketing strategies for the sale of such cigarettes.¹⁸ Because this case was subsequent to Judge Kessler’s opinion in the DOJ case, and because it raised identical issues regarding the defendants’ deceptive conduct with respect to light cigarettes, plaintiffs attempted to bar defendants from relitigating their liability for fraud and intentional misrepresentation of the health effects of light cigarettes.¹⁹

Judge Weinstein, however, declined to apply collateral estoppel in this particular case. He found that given a number of procedural nuances facing the defendants,ⁱⁱ the court

ⁱⁱ Such issues were: (1) one of the defendants, Liggett, was a prevailing party in the DOJ case; (2) estoppel based on a single recent victory would be inappropriate; and (3) application of

must decline the application for preclusion as “the fairness of its application in the present instances is questionable.”²⁰ He indicated, however, that the doctrine may be available in other cases. For example, he agreed that apart from the procedural reasons he outlined, “there is a strong argument for offensive collateral estoppel in this case. Present plaintiffs make identical allegations to those made in *United States v. Philip Morris* and bring their suit under the identical statute.”²¹ He also found that the posture of the previous action was identical to the one before him, as was the “extent of the litigation, the competence and experience of defense counsel, and the availability of evidence . . .”²² He also found that “[a]t least some of the issues in the previous case – e.g., the existence of defendants’ enterprise, the deception of the public – were necessary to support the verdict.”²³ Judge Weinstein actually went so far as to outline the matters “in direct issue” in both cases, as follows:

- (1) Defendants devised and executed a scheme to defraud consumers by falsely denying, distorting, and minimizing the significant adverse health consequences of smoking.
- (2) Despite their knowledge that “light” cigarettes provide no clear health benefit, defendants falsely marketed and promoted “light” cigarettes as less harmful than regular cigarettes in order to keep their customers smoking and sustain corporate revenues. This plan was successful.
- (3) Defendants attempted to and did suppress and conceal scientific research and destroy documents relevant to their public and litigation positions.²⁴

Thus, while Judge Weinstein would not allow collateral estoppel due to questions of fairness in that particular case, he did not find it to be an impossible or meritless claim to raise. His decision thus should not necessarily preclude the possibility of plaintiffs using the doctrine under appropriate circumstances.

collateral estoppel would not increase judicial efficiency in this particular case.

Online Resources

The following are online sources of valuable information related to the trial. They provide copies of: trial exhibits; transcripts of depositions, testimony and opening and closing statements; key filings, brief and orders; and trial summaries.

Tobacco Documents Online

US v PM , U.S. and Joint Accepted & Offered Trial Exhibits Overview Database (http://tobaccodocuments.org/pm_ex)
This is a set of both the offered and accepted U.S. and joint trial exhibits. The documents are not titled or indexed, but they have been coded using OCR (optical character recognition) and thus can be searched for key words or phrases. A document can also be found using its document code, which is cited in Judge Kessler's opinion. The database contains complete search instructions. Users need to register to search for documents.

DATTA: Deposition and Trial Testimony Archive

(<http://tobaccodocuments.org/datta>)
This data set contains numerous depositions, trial testimony and opening and closing statements from the trial. Note that some transcripts are rough copies and others may be marked as "confidential" although they no longer retain that status. Users need to register to search for documents.

United States Department of Justice

(<http://www.usdoj.gov/civil/cases/tobacco2>)
This website contains links to key filings, brief and orders and well as to the direct written testimony of all the Department of Justice's witnesses.

Tobacco Products Liability Project

Special Web Supplement
(<http://www.tplp.org/doj>)
This site contains a succinct law synopsis and analysis of Judge Kessler's opinion and order. It also contains a useful pre-trial

backgrounder as well as a backgrounder and commentary on the court of appeal's interlocutory decision in this case that eliminated the potential remedy of disgorgement.

Tobacco On Trial Blog

(<http://www.tobacco-on-trial.com>)
This is the personal blog of Gene Borio, a tobacco control advocate who attended the trial on a daily basis. It contains fascinating accounts of in-court happening and also provides links to many court filings, documents, depositions and trial transcripts. Note: you must scroll down to the end of the page to view the blog's table of contents.

Campaign for Tobacco Free Kids

(<http://www.tobaccofreekids.org/reports/doj>)
This website contains links to trial-related documents and background materials, including documents filed by public health interveners, a lawsuit timeline and a Frequently Asked Questions section.

Endnotes

¹ *United States v. Philip Morris USA, Inc., et al.*, 449 F.Supp.2d 1, 28 (D.D.C. Aug. 17 2006).

² Centers for Disease Control and Prevention, Fact Sheet, Cigarette Smoking-Related Mortality (Updated September 2006), available at: http://www.cdc.gov/tobacco/data_statistics/Factsheets/cig_smoking_mort.htm

³ See National Association of Attorneys General, Master Settlement Agreement, available at: http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf

⁴ *United States v. Philip Morris*, 449 F.Supp.2d at 208.

⁵ *Id.* at 146.

⁶ *Id.* at 208.

⁷ *Id.* at 308.

⁸ *Id.* at 430.

⁹ *Id.* at 561.

¹⁰ *Id.* at 692.

¹¹ *Id.* at 801.

¹² *Id.* at 430-561.

¹³ Restatement (Second) of Judgments § 27 (1982).

¹⁴ *Black's Law Dictionary* (8th ed. 2004), collateral estoppel.

¹⁵ See M.J. Waggoner, *Fifty years of Bernhard v. Bank of America is Enough: Collateral Estoppel Should Require Mutuality But Res Judicata Should Not*. 12 REV. LITIG. 391, 392 (1993).

¹⁶ Restatement (Second) of Judgments §16 (1982).

¹⁷ See 18A Fed. Prac. & Proc. Juris.2d § 4464 (2007).

¹⁸ *Schwab v. Philip Morris, USA Inc.*, 449 F.Supp.2d 992, 1076 (E.D.N.Y. 2006).

¹⁹ *Id.* at 1077.

²⁰ *Id.* at 1079.

²¹ *Id.* at 1078.

²² *Id.* at 1079.

²³ *Id.*

²⁴ *Id.* at 1078.