

# Department of Justice Lawsuit Update

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## Resources

- Campaign for Tobacco-Free Kids website – [Department of Justice lawsuit reports](#) (contains timeline, FAQ, and press releases)
- [Tobacco on Trial blog](#)
- [Tobacco.org Department of Justice case headlines](#)
- [Tobacco Control Legal Consortium PowerPoint slides](#)
- Tobacco Control Legal Consortium law synopsis – [The United States Government's Racketeering Lawsuit against the Cigarette Industry \(April 2005\)](#)
- [Department of Justice case website](#) – includes all documents and filings, including an executive summary of the Government's case

## Upcoming Deadlines

**August 15th** - Deadline for parties to file simultaneous post-trial proposed findings of fact (up to 2,500 pages per side)

**August 24th** - Government & six public health groups must file their opening briefs

**September 7th** - Defendants must file their combined opposition to the Government's & public health groups' opening brief

**September 19th** - Government & public health groups must file their reply briefs

**September 29th** - Defendants must file their reply brief on affirmative defenses and government must file a one-page summary of the significant areas covered during witness testimony

**October 9th** - Industry must file a one-page brief summarizing the significant areas covered during witness testimony

**Mid-October** – The Supreme Court will likely rule whether it will review the “disgorgement” question in mid-October to mid-November

Judge Kessler may or may not rule on part or all of the case while issues are before the Supreme Court

*This overview summarizes information from the Tobacco Control Network conference call on the DoJ lawsuit on July 29, 2005, the Campaign for Tobacco-Free Kids DoJ field call on August 4, 2005, the Tobacco Control Legal Consortium's presentation at the OSH Partners Meeting on July 28, 2005, and additional resources from the Campaign for Tobacco-Free Kids, the Tobacco Control Legal Consortium, and the Center for Tobacco Cessation.*

## Overview of the Case

In **September 1999**, the Department of Justice filed a lawsuit against major tobacco companies to hold the industry accountable for a fifty-year conspiracy to mislead the United States. The case was filed under the **Racketeer Influenced Corrupt Organizations Act (RICO)**, which is a federal law used to pursue ongoing conspiracies that involve federal felonies—in this case, mail fraud and wire fraud. It has been used against organized crime families, drug cartels and complex corporate frauds.

Judge Kessler [ruled](#) that the case could move forward under RICO law, although reimbursement for tobacco-related medical expenses could not be sought under Medicare and other federal government health care programs.

The defendants were accused of **six forms of fraud** –

- misleading America about the effects of smoking and secondhand smoke
- illegally marketing to youth
- manipulating the levels of nicotine to maintain addiction
- using “light and low” advertising to deceive the public
- suppressing the promotion of safer cigarettes
- generally concealing information pertinent to the public

In a RICO case the Government is allowed to suggest penalties for the abuses they claim have occurred, called “remedies”. If the judge decides the DoJ’s case is valid, she may choose any, all or none of these as punishment. The government is seeking several [remedies](#):

- A five year, \$10 billion cessation quitline
- A ten year, \$4 billion countermarketing campaign
- Youth smoking reduction targets
- Corrective communications
- Document disclosures
- Review of business policies and practices
- Prohibitions against certain marketing and sales practices

In February 2005, the U.S. Court of Appeals for the D.C. Circuit [ruled](#) 2-1 that disgorgement, or forfeiture, of illegal profits is not an allowable remedy. **Disgorgement** would require the defendant to give back or “disgorge” the profits made from the fraudulent acts (in this case, \$280 billion in illicit tobacco industry profits). The Court of Appeals ruled that the remedies sought must be those which will prevent new frauds, not those that punish defendants for their past wrongdoing. This could potentially affect some of the other remedies proposed, such as the cessation services and countermarketing campaign.

On March 4<sup>th</sup>, the government filed an [appeal](#) asking the full U.S. Court of Appeals to reconsider the ruling. On April 20<sup>th</sup>, the Court denied this request.

Closing arguments in the case were presented on June 7<sup>th</sup>-9<sup>th</sup>. On June 8<sup>th</sup>, the DoJ told the court it is seeking a smoking cessation remedy of \$10 billion over five years instead of \$130 billion over 25 years as recommended by its expert witness on cessation (Michael Fiore, University of Wisconsin) Critics suspect that this cut was instigated by the tobacco industry and was a political decision, rather than one based on the ruling of the Court of Appeals.

# Overview of the Case Continued

The Department of Justice filed a [proposed remedy order](#), providing detailed information on each potential remedy, on June 27<sup>th</sup>. As a result of the government's decision to alter the nature of the remedies proposed, on June 29<sup>th</sup>, six public health groups filed a [motion](#) in the U.S. District Court for the District of Columbia seeking to intervene in the federal government's lawsuit against the major tobacco companies. On July 22<sup>nd</sup>, Judge Kessler granted the groups their motion to intervene (see section on Page 5 for more information).

On July 18<sup>th</sup>, the Department of Justice sought to appeal to the Supreme Court a decision by the U.S. Court of Appeals that Judge Kessler cannot seek disgorgement as a potential remedy. The Supreme Court will decide whether to hear the case once it reconvenes, likely not before mid-October. Experts believe it is likely that the Court will hear the case because the ruling has a large scope that would affect how all RICO cases, and not just the case against the tobacco industry, are decided in the future. If the Supreme Court chooses to take the case, it will likely not rule until Spring, which means that Judge Kessler will probably delay writing her opinion on the remedies to be imposed. It is hoped that the Judge will still move forward in writing her opinion that the industry is indeed guilty of violating RICO law.

On July 21<sup>st</sup>, advocates for communities of color and the LGBT communities filed an amicus brief to urge the court to hold the tobacco industry accountable for the disproportionate damage it has caused to minorities (see section on Page 6 for more information).

This has been a huge case in every sense of the word – with over six years of preparation, nine months of testimony, over 78 witnesses, and over 11,000 exhibits. The government has spent more than \$100 million on the case to date. Any outcome of the case does NOT alter the need for continued work on the state level (in terms of taxes, smoke-free air policies, etc.) or on the federal level (in terms of FDA regulation, regulation of internet sales, etc.).

## Proposed Remedies

**A five year, \$10 billion cessation quitline** – This remedy would provide \$2 billion per year for five years for the administration of a national cessation program that would provide:

- Free, universal access to telephone counseling and cessation medications for a minimum of the first 2,500,000 smokers requesting treatment each year
- A national media campaign to encourage cessation and publicize the availability of cessation therapies
- If funding permits, grant funds for research to develop new smoking cessation counseling and medication therapies and for training and education of clinicians to help smokers quit tobacco use

Potential problems with this remedy:

- The coverage could be extended beyond 5 years only if the tobacco companies violate the court's order by engaging in activities to prevent quitting during the 5 year period, which would be difficult to prove.
- If the \$10 billion is not enough to serve the need for cessation services, there is no possibility to obtain additional funds.

**A ten year, \$4 billion countermarketing campaign** – This remedy would provide \$400 million per year for 10 years to the American Legacy Foundation to:

- Continue its youth prevention media campaign funded until the Master Settlement Agreement (MSA)
- Develop a nationwide campaign to educate smokers and nonsmokers of all ages about the comparative disease risks of low and ultra-low tar cigarettes
- Develop a nationwide campaign to educate smokers and nonsmokers of all ages about the disease risks associated with secondhand smoke

# Proposed Remedies Continued

**Youth smoking reduction targets** – Starting in 2007 and continuing through 2013, each individual tobacco company is required to reduce their share of youth age 12-20 who smoke its products by 6% each year (for a total of 42% over the 7 years). A smoker is considered an individual who has smoked at least one cigarette per day for the previous 30 days. If a given company does not meet this target in 2007, it must pay \$3,000 per smoker over the target, which is equivalent to the future profits the company would make from that individual being a lifetime smoker. This amount will be adjusted for inflation for subsequent years.

**Corrective communications** – For a period of 2 years, the tobacco companies will be required to make corrective communications concerning:

- the adverse health effects of smoking
- the addictiveness of smoking and nicotine
- “low tar” cigarettes
- the adverse health effects of exposure to secondhand smoke
- the impact of tobacco marketing on youth

Communications will be placed on tobacco company websites, in mailed brochures, on retailer countertop displays, as inserts on cigarette packages, and as periodic advertisements in several named newspapers. The development of the communications will be coordinated by a court-appointed Independent **Investigations Officer (IO)** in consultation with experts in the field.

Potential problems with this remedy:

- There is no requirement for the communications to be graphic
- The remedy only requires 2 years of corrective communications
- The remedy doesn't address new forms of communication, such as e-mail

**Document disclosures** – This remedy extends the document disclosure requirements (Internet Documents Website) established in the MSA to the year 2030. The remedy also requires that documents from legal proceedings and disaggregated marketing data be made available to the public.

**Review of business policies and practices** – This remedy calls for independent monitoring of the industry's behavior by the court-appointed IO. Areas of review include, but are not limited to:

- Eliminating economic incentives for defendants to sell cigarettes to youth
- Changing compensation and promotion policies and oversight arrangements to produce outcomes inconsistent with misconduct
- Requiring subcontracting of certain research to independent third parties monitored by the Court
- Requiring the tobacco companies to stop their research and development on less hazardous cigarettes
- Requiring the institution of programs to educate managers in such a way to address bias in decision making
- Creating internal mechanisms for employees, agents and contractors to report misconduct without fear of retribution

# Motion to Intervene

As a direct result of the Department of Justice substantially altering the nature of the remedies it is seeking, six groups petitioned the Court to allow them to “intervene” by offering advice to Judge Kessler on the necessary and appropriate “remedies”, as outside experts on public health. Because the government had reversed itself on several key remedies, possibly due to political interference, the organizations were able to argue that the government was no longer representing the interests of their members (i.e. “the people”).

The six public health groups filing the motion were Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers’ Rights, and National African American Tobacco Prevention Network.

Judge Kessler **granted** the motion, stating that the government no longer shares the public’s views about the severity of the remedies necessary and therefore does not adequately represent their interests.

This means that these six groups are now able to file suggestions for appropriate “remedies” should the Judge decide for the Department of Justice in the case. Their ability to intervene is limited to this purpose only. Serving as an intervenor means that the groups will have the opportunity to submit briefs on the issue and that their opinion regarding the remedies will be taken seriously. It means that our voice will be heard, but not that the court must agree nor that the groups would necessarily be privy to any sort of settlement negotiations.

The purpose of the groups’ intervention will be to fill in the blanks where the Department of Justice cut back certain remedies. They are currently reviewing the transcripts of the trial (which are over 20,000 pages) and whatever exhibits they are able to obtain. Based on the evidence presented, the groups will file a brief (due August 24<sup>th</sup>), that will detail the remedies appropriate to restrain the tobacco industry from future wrongdoing.

The brief will focus on the following broad categories:

1. Reinvigorating the **cessation remedy**, which was reduced from a 25 year, \$130 billion program to a 5 year, \$10 billion program
2. Placing **restrictions on tobacco industry marketing**, which were not asked for by the Department of Justice in their proposed remedies brief
3. Reinforcing the need for a **public education campaign** through the American Legacy Foundation, as proposed, and making the case for an even larger campaign
4. Calling for further **document disclosure**
5. Strengthening and streamlining the **role of the IO** in monitoring industry behavior
6. Examining whether the **youth targets** proposed can be strengthened
7. Focusing attention on those **populations most affected** and deceived by the industry in order to complement the amicus brief submitted by advocates representing these minority communities (see below for more information)

The parties believe that the Judge and the Department of Justice have been influenced by the intervention of the public health community since the closing arguments were made and that we have had a positive influence on the case.

Several partners will be writing complementary briefs which will provide Judge Kessler with a comprehensive picture of appropriate remedies to prevent future wrongdoing. Among these briefs are a Friend of the Court brief to be submitted by the Tobacco Control Legal Consortium representing a large range of public health organizations and a brief to be submitted by the University of California’s Stan Glantz regarding document disclosure.

# Amicus Brief

Tobacco use and its harmful effects disproportionately impact minorities, including the African American, Asian, Latino, American Indian and LGBT communities. For years, tobacco companies have targeted minority communities through concerted, long term initiatives that include the overconcentration of billboards in minority communities, sponsorship and influence of minority organizations, hip hop oriented promotions and specially flavored tobacco products.

As a result, minority groups suffer disproportionately from tobacco related death and disease – in some communities such as Native American, African American and LGBT communities, use, morbidity and mortality rates are much higher than that of whites. Often these same groups have fewer resources to address the health concerns that result.

A coalition of Asian American Pacific-Islander, African American, Latino, American Indian/Alaska Native and LGBT organizations are working to guarantee that money is provided to help address some of the damages these communities have suffered. These advocates have filed an amicus brief to urge the court to hold the tobacco industry accountable for the damage it has caused to these communities. The brief is currently under the Judge's review for acceptance. This is a historic effort in that representatives from various communities have come together to call attention to this issue.

The coalition filing the brief consists of the following organizations:

- *National Tribal Tobacco Prevention Network (NTTPN)* - a national alliance of tribal governments, advocates and organizations committed to improving the wellness of American Indian and Alaska Native people by working to reduce commercial tobacco use.
- *National African American Tobacco Prevention Network (NAATPN)* – an organization representing a broad coalition of more than 200 members and organizations and which develops and implements comprehensive and community competent tobacco control programs to benefit communities and people of African descent.
- *Asian Pacific Partners for Empowerment and Leadership (APPEAL)* - a national organization of over 500 network members working toward tobacco-free Asian American and Pacific Islander (AAPI) communities.
- *The Praxis Project/PATH* - a national network of local, grassroots, multi cultural coalitions working to advance tobacco control policy in low income communities and communities of color.
- *National Latino Council on Alcohol and Tobacco Prevention (LCAT)* - the only Latino national organization dedicated solely to reducing the harm caused by tobacco in the Latino community through research, advocacy, policy analysis, community education, training and information dissemination.
- *National Coalition for LGBT Health* - a broad coalition of 65 organizations representing hundreds of thousands of individuals committed to improving the health and well-being of lesbian, gay, bisexual and transgender people through public education, coalition building and advocacy that focuses on research, policy, education and training.
- *The Center on Race, Healthcare and the Law* – a project at the University of Dayton Law School dedicated to improving the health status of persons who are discriminated against based on race and/or ethnicity (with specific attention on African Americans, Asian Americans, Latino (a) Americans, Native Americans, and Pacific Americans).

The brief demonstrates how these populations have been targeted by the tobacco industry and makes suggestions for targeted remedies that amount to approximately \$50 billion. Proposed remedies include further disclosure of documents, funds to create a database, funds to create an entity to conduct research on tobacco use and prevention in minority communities, and quarterly payments for targeted cessation and prevention efforts.

## Tobacco Control Network

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*The Tobacco Control Network (TCN) consists of the tobacco control program manager and additional staff from each state, territory, and district in the U.S. The TCN seeks to improve the public's health by providing education and state-based expertise for tobacco prevention and control at the state and national levels.*



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