Tobacco—Health Costs

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Mealey's Litigation Reports:
Tobacco

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HEADLINE: Newly Released Documents Appear In Minnesota Trial As Plaintiffs Cross-Examine

DATELINE: ST. PAUL, Minn.

BODY:

Once-secret tobacco industry documents continue to dominate Minnesota's tobacco trial inside and outside the courtroom with the release of almost all of the 39,000 formerly privileged documents on a U.S. House Commerce Committee Web site on April 22.

Rep. Tom Bliley, R-Va., House Commerce committee chairman, held back some of the documents, claiming they were subject to trade secrets and attorney work product privileges.

Bliley's action angered Minnesota trial Judge Kenneth Fitzpatrick, who demanded that tobacco companies provide him with a written explanation of the events surrounding the documents' Internet release during a hearing Wednesday morning. The court had ordered that the documents be kept sealed until they were introduced at court.

"I am more than just casually interested in what the defendants are doing with the documents from this case," Fitzpatrick said, demanding that tobacco attorneys turn over to plaintiffs' attorney Michael Ciresi all communications between them and Bliley's office.

"This is a strange way to try a lawsuit," Judge Fitzpatrick added.

This marked the second time in two weeks that defense attorneys have run afoul of the judge regarding the hotly contested documents, which were ordered released on April 6 after the U.S. Supreme Court refused to hear arguments on the matter. Earlier this month, Judge Fitzpatrick demanded to know why defendants had provided Bliley's office with CD-ROMs of the documents and only continuous paper copies (which filled 102 banker's boxes) to the State of Minnesota and Blue Cross and Blue Shield of Minnesota, the plaintiffs in this trial.

Witnesses Shown Documents

The first dozen documents were entered into evidence on April 15, during

Ciresi's cross-examination of defense witness Scott Appleton, a toxicologist for Brown & Williamson, who testified about various toxicological testing methods and efforts to develop safer cigarettes.

Appleton's direct testimony was largely ignored as Ciresi entered document after document written by tobacco industry attorneys regarding the suppression of smoking and health research.

They included:

A 1969 memorandum, entitled "Invalidation of Some Reports in the Research Department," from R.J. Reynolds' scientific research director, Dr. Murray Senkus, to an RJR attorney recommending the "removal" of certain reports from RJR 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," it states.

(Text of Exhibit 26,228 (Senkus) in Section I. Mealey's Document #04-980424-110.)

A 1966 memorandum from Brown & Williamson General Counsel Addison Yeaman outlining his concern about animal testing at England's Harrogate laboratory. "We would hope to be afforded the opportunity of consulting with the people on your side concerning the way Harrogate's work is presented, admittedly with the hope of 'slanting' the report," it says.

A 1980 memorandum from Philip Morris scientist William Dunn stating that any research on the psychopharmacology of nicotine could be regarded as a "tacit acknowledgement that nicotine is a drug." Wrote Dunn, "Our attorneys, however, will likely continue to insist upon a clandestine effort in order to keep nicotine the drug in low profile."

(Text of Exhibit 26,227 (Dunn) in Section H. Mealey's Document #04-980424-108.)

A 1979 Brown & Williamson memorandum in which then Assistant General Counsel J. Kendrick Wells discusses "alternatives for handling . . . scientific reports in a way that would afford some degree of protection against discovery."

Appleton acknowledged that some of the memos appeared to reflect improper conduct, but said he never saw communications like those at Brown & Williamson, or with his former employer, R.J. Reynolds.

Defense Witnesses

As plaintiffs attorneys continued to review the documents and match them up against upcoming witnesses, the defense put several witnesses on the stand in quick succession.

On April 17, Peter Rowell, a nicotine researcher at the University of Louisville, testified that nicotine provides as much pleasure as coffee and chocolate, but far less than sex, marijuana or alcohol.

During cross-examination, Rowell acknowledged that funding for most of his published studies came from The Council for Tobacco Research and the Kentucky Tobacco and Health Research Institute.

On April 20, R.J. Reynolds' marketing executive Lynn Beasley testified about the creation of the "Joe Camel" campaign, which was her idea.

Beasley said that the campaign was not targeted at children, but at the 30 million smokers of rival brands. During cross-examination, attorney Ciresi made much of the absence of Beasley's name from the numerous Joe Camel-related memoranda introduced during her testimony. Beasley said such memoranda weren't necessary because, "I am here to talk about them."

Philip Morris scientist A. Clifton Lilly took the stand on April 21 to testify about his company's unsuccessful efforts to create reduced-nicotine cigarettes. Lilly testified that, during his 33 years with the company, he estimated that Philip Morris had spent some $440 million on four nicotine-removal projects one of them involving the same technology used to decaffeinate coffee. The resulting cigarette, Lilly said, "tasted bad."

He also described in detail Philip Morris' latest low-nicotine product, Accord, which utilizes lithium batteries, semi-conductor chips and "heating blades" to heat, rather than burn, tobacco as the cigarette is puffed.

On cross examination, Lilly said "cigarettes carry a big risk factor" and, he thought, caused lung cancer in some cases. Lilly also stated that he didn't think low tar cigarettes were safer.

Former Philip Morris President and Chief Executive Officer James Morgan took the stand April 22 for his first live appearance at trial. During the plaintiffs' case, a videotaped deposition Morgan gave in the Florida flight attendants' secondhand smoke lawsuit was shown to the jury. As he reviewed marketing campaigns for most major Philip Morris brands, Morgan repeated his assertion that Philip Morris never targeted underage smokers.

Death Benefits

An appearance by Harvard University economist Kip Viscusi was scratched after plaintiffs raised objections over his planned use of a survey commissioned by the Jones, Day, Reavis & Pogue law firm, which represents R.J. Reynolds.

Viscusi, a risk analysis expert, is expected to testify about public perception of the risks of smoking, but is best known as the father of the so-called "death benefit" theory. The theory, which holds that there are economic benefits from the early deaths of smokers, was deemed "morbid" by Judge Fitzpatrick, who has forbidden its use in trial.

Defendants have also decided not to call Nicholas Brooks, CEO of Brown & Williams. They still expect to finish presenting their case by May 1.

Minnesota and Blue Cross/Blue Shield are seeking $1.7 billion in damages from treating smoking-related illnesses.

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U.S. News & World Report

July 7, 1997

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LENGTH: 1360 words

HEADLINE: Clean lungs at a price

BYLINE: By Matthew Miller

HIGHLIGHT:
Do smoking-related deaths save the nation money?

BODY:
At a Winnipeg, Manitoba, conference on tobacco and public health in the 1980s, an antismoking crusader regaled the audience with data showing that smoking-related illnesses cost the United States more than $ 50 billion a year in medical bills and lost productivity. An economist raced to the lectern afterward and said the figure couldn't be right--it didn't include the offsetting amounts society saved because dead smokers weren't around to collect Social Security or private pensions. "You know that, I know that, and the tobacco industry knows that," snapped the smoking foe. "But I'm not going to say it. The tobacco industry can't say it, because it means admitting they're killing their customers. Are you going to say it?"

For some economists today, the answer is "Yes." As the recent tobacco settlement heads for review by Congress and the White House, attention has turned to a long-running but obscure debate over the cost that smoking imposes on society. The ugly truth, say some economists, is that by causing millions of premature deaths, tobacco saves the country more than it costs. While practitioners of such ghoulish math say this shouldn't be the last word in shaping policy, the debate offers fresh insight into the ways smoking affects us--and speaks to the limits of fancy analysis in an ultimately unfathomable world.

Hidden costs. To trace the duel between economists and public health advocates, start with a more conventional 1994 study by the U.S. Centers for Disease Control and Prevention. The CDC reported that 48 million American smokers buy 24 billion packs of cigarettes a year. Given an estimated $ 50 billion in smoking-related hospital charges, doctor fees, drugs, and nursing home bills, says CDC, each pack carries with it just over $ 2 in hidden health costs. Meanwhile, the economy sees an additional $ 47 billion go up in smoke, as tobacco-related illnesses mean time off the job and smoking-related deaths rob the economy of up to 400,000 workers yearly.

So tobacco is unbelievably costly, right? Not so fast. The problem with CDC-style analyses, says Harvard economist Kip Viscusi, is that "you need a lifetime approach, not a point-in-time approach." Viscusi says that by leaving out long-term "savings" from the deaths that smoking causes, antismoking forces skew the debate, particularly when it comes to their real agenda: increasing tobacco taxes to levels reflecting their lopsided view of costs.

A 1989 Rand Corp. study led by Willard Manning of the University of Minnesota pioneered this "lifetime" approach. It found that smokers imposed higher medical costs, group life insurance rates, and fire damage on nonsmokers; smokers also shortchanged the rest of us by never paying taxes on the wages they didn't live to earn. But the costs that were avoided when dead smokers didn't need nursing homes or pensions offset most of that. The bottom line, Manning figured, was that smokers' net cost to society was 33 cents a pack--well below today's average 57-cent-per-pack excise tax. In other words, smokers are probably already "paying their way." Viscusi says the nursing home and pension savings from tobacco-related deaths may now reach $ 30 billion yearly--enough to make smoking a net financial gain to society.

Thank you for smoking. At this rate, Viscusi quips, maybe politicians should be applauding smokers instead of persecuting them. Why face elderly reprisals over needed steps to cut Medicare costs when you can get the same result by cutting down on seniors? Such gruesome logic explains why MIT economist (and physician) Jeffrey Harris says the lifetime approach "is not the kind of calculation that a civilized society engages in." When Congress boosts funding for breast cancer diagnosis and treatment, he argues, it doesn't ask whether extra breast cancer survivors will pose burdens for Social Security. Instead, it's a matter of health. He's right, of course, but that still isn't an argument for counting smoking's financial downside while ignoring its awkward fiscal "benefits." A more valid worry is what University of Michigan economist Kenneth Warner calls "an innate weakness in the practice of economics--we tend to measure the measurable and forget that which can't be measured." In tobacco's case, Warner says, the result is an odd emphasis on easy-to-reckon "savings" from uncollected pensions, while dimly understood costs of secondhand smoke go ignored.

It's true that early studies on smoking's social costs ignored environmental tobacco smoke, as it's known in the trade. But Viscusi's recent work does consider ETS, which has been linked in recent studies to lung cancer (persuasively) and heart disease (more ambiguously). According to Viscusi's separate estimate, secondhand smoke costs society about 25 cents per pack, bringing down the net financial gain from smoking to 7 cents a pack. But that's still a gain. Other experts, meanwhile, say the link between ETS and disease is still too murky to warrant inclusion in such studies at all.

At this point, critics of lifetime costing pull out the Gatling guns. Economists don't consider the costs of low birth weight babies resulting from prenatal smoking, they say. Nor do they include the sheer annoyance faced by nonsmokers who would no doubt gladly pay to be in smoke-free environments (If nonsmokers were willing to pay $ 50 a year for this privilege, it would add up to $ 10 billion. That in turn could justify a 42-cent-per-pack tax, forcing smokers to pay for their annoying habit.). What's more, critics charge, economists can't value the pain, suffering, and other intangible costs faced by friends of dying smokers (to which the bean counters reply: that's why they call them "intangibles").

Who's right? It may be the wrong question. Rivals in today's debate too often talk past each other or miss the point. Believing, for example, that smokers already "pay their way" doesn't undermine the best arguments for discouraging smoking through higher taxes: the fact that nicotine has addictive properties and that many Americans get hooked while they're kids. Meanwhile, there's no contradiction in acknowledging that while annual tobacco-related medical costs are huge, smokers' early demise also saves the country money. It's just a fact--nothing to be afraid of. And certainly nothing to base overall policy on.

In the end, the fight over the true cost of smoking holds as many lessons on the limits of social science as it offers directions for health policy. Rational man (especially when seeking tenure) can cook up many more "interesting" questions than the real world can answer. The result is an academic literature that often tilts public discussion despite brimming with such surreal gems as, "What is the cost to a person and his or her family of losing 28 discounted minutes [of life expectancy] for each pack of cigarettes smoked?" Or Viscusi of Harvard's acrobatic analytics showing that the trend toward lower tar content "makes cigarettes perform less well from a societal standpoint, because you don't get the savings that result from the fatalities." As politicians reviewing today's tobacco industry settlement no doubt realize, rival reckonings of the cost of smoking, taken with a grain of salt, will help inform the moral judgments and public health goals that finally shape policy.

Where smokers impose costs

Medical bills. A higher incidence of illness raises insurance premiums throughout the health care system.

Group life insurance. When policies are not tailored to individual habits, smokers' mortality raises insurance rates for everybody else.

Fire damage. Smokers inflict more property damage than nonsmokers, mainly from falling asleep while smoking in bed.

Where smokers bring savings

Social Security. Smokers pay into the system, but may never draw benefits.

Private pensions. Smokers accrue job benefits they may never collect, in effect subsidizing the retirement of longer-lived nonsmokers.

Nursing home bills. Premature death due to smoking obviates the need for costly warehousing in old age.

GRAPHIC: Drawing, No caption (Illustration by Nathan T. Ota for USN&WR)

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American Health Line

December 5, 1994

SECTION: FOCUS

LENGTH: 720 words

HEADLINE: TOBACCO: SMOKERS' CASE MAY BECOME A CLASS ACTION

BODY:

"Five people could soon end up representing tens of millions of allegedly addicted smokers in a suit that for the first time would pit cigarette makers against a powerful bloc of plaintiffs' lawyers," W.S. JOURNAL reports (see AHL 10/31). Federal Court Judge Okla Jones II will decide 12/14 whether or not the lawsuit "can be turned into a national class action." Plaintiffs' attorneys "say that all the clients present similar legal questions: Is nicotine addictive, did tobacco companies see it as addictive and did they manipulate nicotine levels?" The attorneys say that a class action lawsuit is "far more efficient to take on these questions at once in a single case." If the judge "doesn't certify a class and his decision holds up on appeal, plaintiffs' lawyers may follow through on a threat to sue on behalf of hundreds of thousands of individual plaintiffs." Plaintiff attorney John Coale: "I don't think the judge or the court of appeals wants to unleash this monster on the legal system." The plaintiffs intend to use "newly released" Brown & Williamson Tobacco Corp. documents that were used in the House Energy & Commerce health subcmte. hearings last summer. The documents "detail the proceedings of a Smoking-Behavior Marketing Conference held in Montreal" 7/84 at which participants, including Brown & Williamson, "discussed topics that include the central role nicotine plays in smoking behavior."

SIGNIFICANCE: "The addiction claim attempts to strike at the cigarette industry's most potent argument -- that people choose to smoke in spite of health risks. ... Plaintiffs' lawyers are now arguing that smokers don't really make a choice, because they are addicted." JOURNAL: "A lot is clearly at stake for the tobacco companies." According to 10/94 Sanford Bernstein estimates, a "jury award for the plaintiffs in a class action could wipe out the $63(B) combined market capitalizations of" Philip Morris Cos. and RJR Nabisco Holdings Corp.

MISSISSIPPI UPDATE: JOURNAL also reports that a Mississippi judge will hear arguments 12/19 "on whether to bar cigarette makers from using many of their traditional defenses to fight a suit by the attorney general," to recoup Medicaid expenses (see AHL 5/24). The state will argue that the tobacco companies cannot use the defense that smokers choose to smoke "because smokers aren't the plaintiffs -- the government is." The state also plans to "argue that the case should remain in a special kind of Mississippi court in which judges, not juries, hear all proceedings" (Woo, 12/5).

COST ANALYSIS: "The American Cancer Society may not like it, but a new study shows that smoking doesn't impose higher costs on all Americans," NEWSWEEK reports. According to Duke Univ.'s Kip Viscusi, "smokers actually save us money ... by dying younger." Smoking-related lung cancer and heart disease cost an average of $.55/pack in extra medical care, and "drive up" life insurance premiums by $.14/pack. But Viscusi found that "each pack smoked saves America $1.19 in pension and Social Security payments," and $.22 in nursing home costs (12/12 issue).

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