



## Lawsuit Against Tobacco Companies Joined by Public Health Intervenors

Legal support for public health plaintiff intervenors in the appeal of the Department of Justice tobacco suit

### SUMMARY

From November 2005 through March 2010, the [Tobacco-Free Kids Action Fund](#) led a coalition of six tobacco-control groups named as "public health intervenors" in a U.S. Department of Justice lawsuit against tobacco companies. The suit—tried under the Racketeer Influenced and Corrupt Organizations Act (RICO)—alleged that the defendants had engaged "in a lengthy, unlawful conspiracy to deceive the American public about the health effects of smoking and environmental smoke."

On August 31, 2006, the U.S. District Court for the District of Columbia ruled that the industry had defrauded the American people and imposed remedies designed to prevent further fraud. However, the court decided that case law prevented it from imposing significant financial penalties sought by the Justice Department and the public health intervenors. The court's judgment was upheld on appeal, and allowed to stand after the Supreme Court refused to hear the case in June 2010.

### Key Results

- With legal guidance from outside counsel, the Tobacco-Free Kids Action Fund and five other public health intervenors filed multiple legal briefs and other supporting documents during the trial and appeals phases of the case. The public health intervenors:
  - Proposed remedies that went beyond those proposed by the Department of Justice, including prohibitions on industry marketing and advertising practices and industry funding for smoking cessation programs. The recommendations, filed with the U.S. District Court for the District of Columbia (D.C.) on August 31, 2005, are available [online](#).
  - Recommended the substance and language of corrective statements that the district court ordered the industry to publish in newspaper and television ads, on websites and in other media. The proposed corrective statements, filed with the District Court on October 16, 2006, are available [online](#).

- Filed an appeals brief with the U.S. Court of Appeals for the D.C. Circuit on December 10, 2007, available [online](#).
- Petitioned the U.S. Supreme Court to hear the case. The petition, filed February 19, 2010, is available [online](#).

## Funding

The Robert Wood Johnson Foundation (RWJF) provided two grants totaling \$500,285 from November 2005 through March 2010 to the Tobacco-Free Kids Action Fund—mainly to support the legal costs incurred by the public health intervenors. The grantee dedicated extensive staff time to the project, funded by five other tobacco-control groups participating in the lawsuit as well as individual and corporate donors.

## CONTEXT

In September 1999 the U.S. Department of Justice filed a lawsuit in U.S. District Court for the District of Columbia against the major tobacco companies, alleging that they had engaged "in a lengthy, unlawful conspiracy to deceive the American public about the health effects of smoking and environmental smoke." The presiding judge, Gladys Kessler, ruled that the case could proceed under the Racketeer Influenced and Corrupt Organizations Act (RICO).

The government outlined the remedies it would seek, including \$280 billion in past profits allegedly obtained through unlawful marketing practices, and \$130 million for tobacco prevention and cessation programs over 25 years. However, in early June 2005 the government told the court it would instead seek only \$10 billion over five years should it win the case.

"As the trial wore on, the Department of Justice underwent a dramatic transformation, which its own senior trial team clearly disagreed with," said Matthew Myers, president of the [Campaign for Tobacco-Free Kids](#), with which the Tobacco-Free Kids Action Fund is affiliated. "Suddenly it curtailed what it was asking the court to order. We suspected that the decision was political, not substantive, and that it was not based on a change in the law or new facts."

## Tobacco-Control Advocates Become Involved

Tobacco-control advocates had been following the case closely from its inception. "This was a very important case for tobacco control, and we wanted the best outcomes in terms of public health and support for our tobacco-control efforts, as well as government tobacco-control efforts," said Michelle Larkin, R.N., J.D., RWJF senior program officer.

Sensing a change in the government's strategy, RWJF had convened representatives from the tobacco-control community in April 2005 to discuss the case and consider how they might become involved. Six advocacy groups decided to petition the district court to become a party to the lawsuit as "public health intervenors" and to seek a complete set of remedies should the court find the defendants liable. The six advocacy groups were:

- Tobacco-Free Kids Action Fund
- American Cancer Society
- American Heart Association
- American Lung Association
- Americans for Nonsmokers' Rights
- National African American Tobacco Prevention Network

Although the legal standard for becoming an intervenor is far higher than that for becoming a "friend of the court," the U.S. District Court granted the motion in June 2005. Obtaining intervenor status meant that the advocates became a party to the case, and could present arguments in court. "Most people would agree that it was genuinely extraordinary that the court granted our motion to participate," said Project Director Myers.

RWJF's Larkin explained further, "When you intervene, you are saying, 'I have a constituency and a membership that is not being adequately represented by the plaintiff.'" In this instance, the public health intervenors were contending, in essence, that the government was not adequately representing the interests of the American people, and the judge agreed.

The industry moved unsuccessfully to dismiss the public health intervenors as a party during the trial and subsequent appeal.

### **About the Tobacco-Free Kids Action Fund**

The Tobacco-Free Kids Action Fund is affiliated with the [Campaign for Tobacco-Free Kids](#) (CTFK). CTFK promotes policy and environmental changes designed to reduce tobacco use and exposure to secondhand smoke, especially among children. The Tobacco-Free Kids Action Fund has a different tax status from CTFK and fewer restrictions on its political activities. RWJF established CTFK in 1995 and has provided financial support since then. See "[Additional readings](#)" (bottom of page) for Program Results on CTFK.

## RWJF's Interest in the Area

From 1991 through 2010, RWJF invested more than \$700 million in efforts to significantly reduce tobacco use in the United States. As a leader of funding tobacco-control initiatives nationwide, RWJF has funded research on policy changes that could exert the greatest impact, and advocacy to implement those changes. RWJF has placed particular emphasis on:

- Raising taxes on tobacco products
- Implementing clean air laws
- Reducing exposure to secondhand smoke
- Increasing public awareness of the dangers of smoking
- Preventing youth smoking and spit tobacco use
- Making proven cessation resources and treatment available to smokers

## THE PROJECT

In partnership with the other five public health intervenors, the Tobacco-Free Kids Action Fund filed multiple legal briefs and other supporting documents as the case moved through the trial and appeals process. Project staff:

- Hired outside counsel with expertise in civil racketeering law
- Purchased and reviewed the 23,000-page transcript of the district court trial
- Collected and reviewed thousands of documents introduced during the trial
- Developed legal and policy strategies for pursuing the case through the appeals process
- Filed legal briefs and other court documents
- Guided other public health agencies and advocates in filing "friend of the court" briefs

Project staff also issued press releases and summaries of legal developments, spoke with reporters, developed memos for newspaper editorial boards, briefed members of Congress and continually updated a [website](#) on the case. The Tobacco-Free Kids Action Fund funded these communication activities through its core budget.

## RESULTS

The following description of the efforts of the public health intervenors as the case evolved—and the key legal developments—are drawn from grantee reports, legal documents and interviews with the project director and RWJF program staff:

- **On August 31, 2005, the public health intervenors filed a legal brief with the U.S District Court proposing remedies "to prevent and restrain future wrongdoing by the tobacco company defendants" if they were found liable under the RICO statute.** These remedies included:
  - Prohibition of a host of industry activities, including deceptive claims about smoking and many marketing and advertising practices.
  - Some \$4.8 billion annually in industry funding for smoking cessation, and \$600 million a year for a public education campaign against smoking.
  - Enforcement measures and requirements for industry disclosure.

These remedies supplemented those sought by the government, which included restrictions on marketing and health claims by the industry, and modest funds for smoking cessation. See [Appendix 1](#) for details.

The Tobacco-Free Kids Action Fund legal brief is available online.

- **On August 31, 2006, Judge Gladys Kessler found that the industry had violated civil racketeering laws and defrauded the American people by lying for decades about the health risks of smoking and conducting marketing to children.**

Judge Kessler issued a Judgment and Remedies Order against the industry banning certain cigarette labels, such as "low tar" and "mild," and requiring the industry to publish "corrective statements" in various media about the health risks of tobacco. See [Appendix 2](#) for details.

However, the judge concluded that previous court decisions on financial remedies possible under the RICO statute prevented her from imposing financial penalties sought by the federal government and the public health intervenors.

The industry appealed the judge's conclusion, and the Department of Justice and the public health intervenors appealed the remedies portion of the decision. The court-sanctioned remedies were stayed pending the appeal.

- **On October 16, 2006, the intervenors proposed the substance and language of the corrective statements the court had required the industry to publish.** See [Appendix 3](#) for examples. The full text of the proposed statements, filed with the U.S. District Court, is available [online](#).
- **On December 10, 2007, in appealing the remedies mandated by the district court decision to the U.S. Court of Appeals, the intervenors argued that:**

- RICO gives the court broad authority to undo the harm caused by fraud.
- The remedial measures sought by the intervenors are essential to undo that harm.
- Requiring the industry to fund smoking cessation is essential to preventing it from benefiting from wrongful efforts to addict smokers.

The appeals brief is available [online](#).

- **On May 22, 2009, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously upheld both the district court's finding that the industry had engaged in racketeering and almost all its remedies.** The appeals court denied the additional remedies sought by the government and the public health intervenors. Both sides appealed to the U.S. Supreme Court.
- **On February 19, 2010, the intervenors petitioned the U.S. Supreme Court to hear the case and reconsider the remedies.** The intervenors argued that the lower courts' interpretation of RICO was inconsistent with the intent of Congress and other court decisions, and that the case raised vital public health issues. The petition, known as a *writ of certiorari*, is available [online](#).
- **The intervenors urged the Department of Justice to support an appeal to the Supreme Court.** Staff of the Tobacco-Free Kids Action Fund wrote two letters to the solicitor general and participated in two meetings, one with the solicitor general and one with her deputy. The Justice Department ultimately filed a writ of certiorari arguing that the Court should take the case.

On June 28, 2010, the Supreme Court declined to hear the appeal, upholding the earlier decision and returning the case to the lower courts to implement the remedies they had ordered. "The tobacco companies are racketeers and they have defrauded the public, and they cannot ever deny that now," observed RWJF's Larkin.

## LESSONS LEARNED

1. **Advocates can exert critical influence on government action.** "Don't underestimate the impact of a watchdog able to raise issues, as we were permitted to do, on the decision-making process of the government," said Project Director Myers. "The fact that we were participating in the appeals court process led the DOJ to take positions that were far more aligned with the aggressive pro-public health position than they took at the conclusion of the first trial."
2. **Public health advocates can also have an impact on court decisions.** "We believe that making the public health case did influence the Court of Appeals thinking," said Myers. "We were constantly reminding the court that their decisions have real-world implications of a very substantial nature."
3. **A group of advocates may have more impact on a lawsuit than a single litigant.** Tobacco-Free Kids Action Fund "understood the importance of engaging other

partners. Having a group come together and ask the court to be a party to the suit was really powerful," said Larkin.

4. **Tapping legal counsel with expertise in RICO law was essential.** The Tobacco-Free Kids Action Fund hired experienced external counsel to guide the intervenors—often pro bono or at a reduced rate. (Senior Program Officer/Larkin)
5. **Participating in a lawsuit of this magnitude is a massive undertaking.** Pursuing and supporting the multiple court cases required extensive time of staff members who already had full-time jobs. To free up those staff members, the Tobacco-Free Kids Action Fund shifted some of their responsibilities to other staff.

## AFTERWARD

The public health intervenors are reviewing their earlier recommendations for corrective action by the industry, to see if they need revision. "This case isn't over," said Myers. "We have to figure out ways to ensure that the court's remedies are fully implemented."

---

### Report prepared by: Karyn Feiden

Reviewed by: Sandra Hackman and Molly McKaughan

Program Officer: Michelle A. Larkin

RWJF Team: Public Health

---

## APPENDIX 1

### Remedies Sought by the Intervenors

In the legal brief filed in U.S. District Court in August 2005 (available [online](#)), the public health intervenors proposed the following remedies:

- ***Prohibited activities:*** A general prohibition on future acts of racketeering by the industry, and more specific prohibitions on making deceptive statements or failing to disclose information on the health effects of tobacco and secondhand smoke; distorting the conclusions of the Surgeon General's reports; implying that any product reduces the health effects of smoking; targeting marketing and advertising at youth; and collecting information on youth for databases on consumers.
- ***Smoking cessation:*** Some \$4.8 billion annually in industry funding for smoking cessation programs. This funding would continue until less than 10 percent of the nation's smokers say they want or intend to quit.
- ***Public education and countermarketing:*** Payments by the industry of \$600 million a year for at least 10 years to fund public education and countermarketing campaigns run by the American Legacy Foundation. Three separate campaigns would aim to reduce tobacco use among youth; educate consumers about claims such as "light" and "low tar"; and educate the public about the risks associated with secondhand smoke.
- ***Targets and penalties regarding smoking among youth:*** A shortened timeline for achieving targets for reducing smoking among youth (the government proposed a 42 percent reduction from 2003 to 2013; the intervenors proposed reaching that target by 2010). The intervenors also proposed larger penalties if targets are missed.
- ***Document disclosure:*** Provisions expanding on those proposed by the government, including disclosure of documents produced by the tobacco companies in foreign courts and administrative proceedings.
- ***Compliance and enforcement:*** Strengthened authority for a government-proposed independent investigations officer—a court appointee who would supervise implementation of court-ordered remedies.

## APPENDIX 2

### Remedies Ordered by the U.S. District Court

The following remedies ordered by the U.S. District Court, with slight modifications by the U.S. Court of Appeals, will now be implemented. The industry is:

- Prohibited from committing acts of racketeering and making false, misleading or deceptive statements about the health risks of cigarettes.
- Banned from using terms such as "low tar," "light," "mild" and "nature." Tobacco companies are also prohibited from conveying explicit or implicit health messages about any cigarette brand.
- Required to make corrective statements about the health risks of smoking and secondhand smoke and their deceptive practices through newspaper and television ads, their own websites, retail outlets and cigarette packaging.
- Required to make public more internal documents produced during litigation.
- Required to report information on marketing practices annually to the federal government.

### Appendix 3

### Proposed Corrective Statements

The public health intervenors recommended that the industry's corrective statements, published in various venues, begin as follows: "For decades, we deliberately misled the American Public about the health effects of smoking. A Federal District Court is requiring us to make this statement."

Examples of additional recommended text include:

- ***Television ad on the addictiveness of smoking:***

"We told Congress under oath that we believed smoking is not addictive. We told you that it's easy to quit.

"Here's the truth: Smoking is very addictive and therefore very hard to quit."

- **Advertisement attached to a cigarette pack on the industry's manipulation of cigarette design to ensure optimum nicotine delivery:**

"For decades, we falsely denied that we controlled the level of nicotine delivered in cigarettes. Here's the truth:

— Cigarettes are a finely tuned nicotine delivery device designed to addict people.

- We control nicotine delivery to create and sustain smokers' addiction, because that's how we keep customers coming back.
- We also add chemicals such as ammonia, to enhance the impact of nicotine and make cigarettes taste less harsh.
- When you smoke, the nicotine actually changes the brain—that's why quitting is so hard."
- ***Counter display at point of sale for cigarettes on the adverse health effects of smoking:***

"We told you smoking wasn't dangerous. We even paid scientists to raise doubts about the health effects of smoking. Here's the truth:

- "Smoking kills 1,200 Americans every day from cancer, heart attacks and many other illnesses.
- "That's more deaths than from murder, AIDS, suicide, drugs, car crashes and alcohol combined."

## **BIBLIOGRAPHY**

*(Current as of date of the report; as provided by the grantee organization; not verified by RWJF; items not available from RWJF.)*

### **World Wide Websites**

[www.tobaccofreekids.org/reports/doj/index.php](http://www.tobaccofreekids.org/reports/doj/index.php). Includes all the legal briefs filed by the public health intervenors, as well as related press releases and statements. The site also links to the Department of Justice tobacco litigation page, and to court judgments and opinions.