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RESEARCH PAPER

Tobacco industry litigation strategies to oppose tobacco control media campaigns

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Objective: To document the tobacco industry's litigation strategy to impede tobacco control media campaigns.
Methods: Data were collected from news and reports, tobacco industry documents, and interviews with health advocates and media campaign staff.
Results: RJ Reynolds and Lorillard attempted to halt California's Media Campaign alleging that the campaign polluted jury pools and violated First Amendment rights because they were compelled to pay for anti-industry ads. The American Legacy Foundation was accused of violating the Master Settlement Agreement's vilification clause because its ads attacked the tobacco industry. The tobacco companies lost these legal challenges.
Conclusion: The tobacco industry has expanded its efforts to oppose tobacco control media campaigns through litigation strategies. While litigation is a part of tobacco industry business, it imposes a financial burden and impediment to media campaigns' productivity. Tobacco control professionals need to anticipate these challenges and be prepared to defend against them.

Tobacco control media campaigns can rapidly reduce smoking and prevent initiation, particularly when they contain messages that educate the public about the tobacco industry's manipulation tactics and promote smoke-free policies by educating the public about the dangers of secondhand smoke.[1–9] Campaigns that include messages that denormalise the tobacco industry pose a greater threat to the tobacco industry[10–12] than campaigns that simply stress the negative health impacts of smoking.[1]

California's tobacco control media campaign, financed by a dedicated tobacco tax,[13] was the first to feature aggressive ads that revealed the deceptive practices of the tobacco industry. This campaign was associated with between 33 000 and 173 000 smokers quitting within the its first year.[14 15] Within two years, the campaign was associated with a decrease in California's cigarette consumption by 232 million packs.[16] In addition, denormalisation ads challenge the legitimacy and credibility of the industry marketing the product, thereby leaving the tobacco companies in a negative light in the public's eye. In doing so, this message represents a clear transfer from the individual company to the larger policy environment and focuses on the corporate entity or public policy as a major player in that environment.[17] While tobacco companies have worked through political allies in the past, the growing negative image of the tobacco companies makes it less desirable for elected officials to commit to favours for the tobacco companies and attempt to maintain favour with their constituency.

The tobacco industry has employed a variety of tactics over time to weaken and eliminate tobacco control media campaigns, including monitoring their development,[18 19] attempting to remove funding,[13 19–23] creating "youth smoking prevention programs" to displace these campaigns,[5 18 19 24] challenging their effectiveness,[13 19 23] and limiting the messages (such as to youth and pregnant women) to restrict the audience.[13 20 21]

The tobacco industry considered legal action to stop messages critical of the industry[25] shortly after California ran its first anti-tobacco advertisement, "Industry Spokesman", in April 1990. "Industry Spokesmen" portrays a smoke-filled board room filled with tobacco industry executives and the leader laughing about the fact that the tobacco industry needed to recruit approximately 3000 new smokers every day because 2000 people stop smoking and another 1100 die.[13 21] On 10 April 1990, Kurt Malmgren, senior vice president of state activities for the US Tobacco Institute, wrote to Samuel Chilcote, Jr, president of the Tobacco Institute:

> As previously reported, [the Tobacco Institute's national legal counsel] Covington and Burling and California legal counsel have been reviewing possible grounds for a legal attack on the ad program. Among the possible bases for suit that have been reviewed are that the ad campaign is an improper expenditure of funds under Prop 99 [the voter-passed initiative that created the tobacco control program] and AB 75 [the implementing legislation], that it is defamatory, that it is deceptive advertising, and presents First Amendment concerns. Aside from tactical questions as to the desirability of pursuing any legal action, the considered judgment of counsel here and on the ground in California is *that there is no basis for suit which would have a realistic chance of success.*
> It is also our considered opinion that the industry should not attempt a 'dollar-for-dollar' response in the media. Our goal is to keep the advertisements—not the tobacco industry—at the center of the controversy. If the industry attempts to meet the Department of Health Services head on in the media, the controversy is likely to shift from the ads to the industry.[25] [emphasis added]

The industry did not pursue legal action at that time.

A decade later, however, two tobacco companies did challenge California's campaign in court in 2002[26] and 2003.[27] The legal and public relations outcomes were exactly as predicted in 1990: the tobacco industry lost in court and the attacks shifted attention away from the media campaigns and on to the tobacco companies. While the tobacco companies have not stopped any tobacco control media

campaigns by challenging them in court, industry litigation has increased the cost of running such campaigns and slowed their productivity.

METHODS

Data were collected through review of newspapers, press releases, research reports, and legal documents. Interviews were conducted with health advocates, staff of the media campaigns and advertising agencies in compliance with a protocol approved by the Committee on Human Subjects Research. Internal tobacco industry documents (available at http://legacy.library.ucsf.edu) were searched using the following terms: ''media campaigns'', ''anti-smoking media'', ''tobacco control media'' and ''Legacy''. Based on the results returned from these initial searches, names mentioned and adjacent Bates numbers were also searched.

RESULTS

Vilification clauses

On 25 August 1997, the tobacco industry settled its lawsuit with the state of Florida, agreeing to pay Florida to reimburse the state on an indefinite basis for smoking induced medical costs incurred by the state government ($11.3 billion over the first 25 years), and to provide $200 million for a two year long Tobacco Pilot Program ''for general enforcement, media, educational and other programs directed to the underage users or potential underage users of Tobacco Products''.[28] To prevent the funds from being used for a California style campaign that attacked the industry, the industry negotiated to include a ''vilification clause'' in the settlement that stated that funds ''shall not be directed against the tobacco companies or any particular tobacco company or companies or any particular brand of Tobacco Products''.[28]

Despite the restriction, the Florida truth campaign began being broadcast in April 1998 with the tagline, ''Their brand is lies. Our brand is Truth'',[22 23] intentionally leaving ''their'' vague, so as not to directly name the tobacco industry. While honouring the terms of the vilification clause and not attacking tobacco companies, the campaign featured messages that attacked the tobacco industry's support network, including advertising agencies and scientists who work for the tobacco industry.[23]

Within the first year of the Florida truth campaign's kick-off, the vilification clause in the Florida settlement was lifted. Perhaps because it recognised that including the vilification clause in the Florida settlement was a mistake, in September 1998, the state of Texas settled its lawsuit against the tobacco industry without including the vilification clause.[29] The Florida settlement contained a ''most favored nation'' clause, which stated, ''the terms of this Settlement Agreement will be revised so that the State of Florida will obtain treatment at least as relatively favorable as any such nonfederal governmental entity''.[28] Since the Texas settlement did not include the vilification clause, the vilification clause was removed from the Florida settlement. The truth campaign was freed to confront the tobacco industry directly.

The Florida truth campaign successfully reduced youth smoking. In September 1998, Florida State University reported that six months after the truth campaign began, 47% of youth surveyed believed that tobacco companies were using deceptive practices in their advertising, an increase of 6% since April 1998.[30] Additional research showed that within the first year of the campaign, current smoking among middle school students dropped from 18.5% to 15% and among high school students it dropped from 27.4% to 25.2%.[31 32] By 2000, the prevalence among middle school students dropped to 11.1% and among high school students it dropped to 22.6%.[3] Despite the high levels of effectiveness, public health groups did not mount a vigorous defence of the campaign and the tobacco industry's political allies essentially terminated its funding in 1999.[22 23] Therefore, while the tobacco industry was defeated in its attempts to stifle the Florida media campaign through use of the legal settlement between the two parties, it was successful in using political allies to decrease, and ultimately eliminate, funding for the media campaign.

In November 1998, the American Legacy Foundation was created as part of the Master Settlement Agreement (MSA) that settled most of the state litigation against the tobacco industry.[33] Funded by payments of $250 million (over 10 years) for the creation of a public health foundation and $1.45 billion (to be paid between 1998 and 2003) to the foundation's ''National Public Education Fund'', Legacy was created to support research and programmes to reduce youth tobacco use and educational programmes to prevent tobacco related disease.[33] Unlike Texas, however, the attorneys general who negotiated the MSA agreed to include a broadly worded ''vilification clause'' in the MSA stating the National Public Education Fund ''shall be used only for public education and advertising regarding the addictiveness, health effects, and social costs related to the use of tobacco products and shall not be used for any personal attack on, or vilification of, any person (whether by name or business affiliation), company, or governmental agency, whether individually or collectively''.[33] (The vilification clause only applies to the National Public Education Fund, not other Legacy funds or MSA funds paid to the states, some of which is used for tobacco control.)

Despite the presence of the vilification clause, Legacy modelled its national media campaign after the successful Florida truth campaign, focusing on the practices of the tobacco industry and the addictiveness and health effects of using tobacco products, while exercising care not to ''vilify'' specific tobacco companies. As would be expected from the Florida experience, the truth campaign proved effective in reducing smoking among teens[7] and in increasing anti-tobacco attitudes and beliefs.[5] The Legacy national truth campaign was launched in 2000. Between 1999 and 2002, the rate of youth smoking among US students in grades 8, 10, and 12 participating in the *Monitoring the Future* study decreased from 25.3% to 18.0%, with the truth campaign accounting for 22% of the decrease.[34] While the Legacy truth campaign used a similar approach to educating the public about the tobacco industry and tobacco use as was seen in Florida, the Legacy campaign operated in a very different legal and administrative structure. The inclusion of the vilification clause in the MSA would later serve as a legal platform for the tobacco industry to sue Legacy over the truth campaign.

California

In 2000, Laurence and Laurie Lucier, two smokers who became ill as a result of their tobacco use, filed suit against Philip Morris and RJ Reynolds.[35] In autumn 2002, RJ Reynolds filed a motion which alleged pollution of the jury pool as a result of the California Tobacco Education Media Campaign.[26] RJ Reynold's attorneys argued that the ''right to a fair trial in a fair tribunal is a basic requirement of due process''[26] and went on to say:

> No longer was the State targeting cigarettes, but rather cigarette companies and their executives and witnesses. The express objective of the refocused media campaign is to hold cigarette companies 'accountable' by changing the 'legal climate' within the State—in other words to affect the outcome of jury trials through extrajudicial communications…

> In internal memoranda, the State itself refers to these ads as 'propaganda' designed to 'ambush' by directly attacking the integrity, motives, and honesty of cigarette companies. Some messages go so far as to call the companies liars…
> In at least one instance, the State reached even further, purchasing billboard space near a courthouse to display to jurors messages that vilified cigarette companies.[26]

RJ Reynolds asked the judge to dismiss the Lucier case, move the trial to a county where potential jurors were exposed to fewer of the media campaign's ads, or issue an injunction to suspend the operations of the California media campaign for the duration of the trial.[26]

Colleen Stevens, chief of California's Department of Health Services Tobacco Control Section Media Unit, responded, ''That allegation is ludicrous. There is absolutely no coordination between the media campaign and the lawsuits'' because the state buys advertising slots about a year in advance of airing the ads.[36] Even so, RJ Reynolds went on in its memo to the Court to say:

> Polling data complied by independent experts reinforces these findings. For instance, recent polls conducted by Wirthlin Worldwide in Sacramento County [paid for by R.J. Reynolds] showed that 94% of jury-eligible adults recalled seeing state-sponsored ads. Of those, 79% reported that the ads made them feel less favorable to tobacco companies.[26]

Judge Michael T Garcia disagreed with RJ Reynolds and denied the motion for a change of venue on the basis of the inability to find an unbiased juror; he ruled:

> Nowhere, to be certain, do Plaintiffs [Reynolds] offer evidence showing that the State's propaganda campaign is anything less than it purports to be—'a multi-million dollar paid television, radio, billboard, and print advertising campaign' designed 'to expose the industry's manipulative tactics.'…
> Plaintiffs [Reynolds] admit that 72%–82% of prospective jurors in Sacramento County have been influenced by the State's anti-tobacco media program. In their next breath, however, Plaintiffs suggest that this is not enough for remedial action by the Court because there exists the possibility from among the 18%–28% of prospective jurors not impacted by the State's propaganda campaign, that an impartial jury could be seated.[37]

While the court denied RJ Reynolds' motion to move the trial or halt activities by the media campaign, the litigation did affect the media campaign. Staff were forced to devote time to discovery and to work with the attorney general in opposing Reynolds' motion, rather than working on the development and production of new ads,[38] reducing the media campaign's productivity.

In February 2003, the jury issued a verdict [in the Lucier case] stating that Philip Morris and RJ Reynolds were not liable for the plaintiff's lung cancer.[39]

In April 2003, RJ Reynolds, this time with Lorillard Tobacco Company, attacked the media campaign again, this time in a lawsuit filed in the United States Federal District Court, Eastern District of California directly against the California Department of Health Services.[27] The suit alleged that ''the creation and distribution of the anti-industry ads constitutes a violation of Plaintiffs' [RJ Reynolds and Lorillard] rights under the First, Sixth, and Fourteenth Amendments''.[27] Foremost, in the tobacco companies' claims against the taxpayer financed media campaign, is that it is entitled to its right to free speech and ''a central component of the right of free speech is the right not to be compelled to pay for speech that one would not voluntarily fund''.[27] An internal report from Philip Morris (not party to the suit) states, ''tobacco is a legal product and it is wrong for taxpayer money to be spent on attacking a law-abiding company or industry''.[40] In 2001, the US Supreme Court ruled that the First Amendment protected individuals and corporations from ''compelled speech'' when they were forced to pay directly for advertisements with which they disagreed.[41]

Health advocates rallied to support the Department of Health Services. In June 2003, the American Cancer Society, American Heart Association, and the American Lung Association filed a brief of Amicus Curiae (friend of the court) in support of the Department of Health Services' opposition to Reynolds and Lorillard's motion for a preliminary injunction to halt the airing of anti-industry ads. The amicus brief pointed out:

> Restrictions on the program are likely to have immediate adverse consequences. Enjoining the Department's ability to publicly communicate its stated policy of eliminating smoking in the most effective manner would severely harm the State in its efforts and would cause significant public injury.
> In addition, the position advocated by [Reynolds and Lorillard] would dramatically interfere with the government's ability not only to promulgate an anti-smoking message, but any message, particularly if funded by the use of targeted revenues. Indeed, any expressive activity of the government, even educational programs, are at risk under [Reynolds and Lorillard] view of the First Amendment.[42]

Reynolds responded to the amicus brief:

> …the constitutional violation results not from any implicit association between the funding party and the speech by a quasi-government agency but in the compulsory funding of speech with which the funding party disagrees.[43]

In July 2003, US District Judge Lawrence Karlton dismissed the lawsuit, stating that the media campaign was ''simply the cost of living in a democracy''.[44 45] The media campaign is financed through tobacco taxes (Proposition 99). Moreover, the anti-tobacco messages did not represent speech compelled by the tobacco taxpayers, but rather by an agency of the state government and the tobacco companies do not have the authority to control speech made by the government.[46]

In May 2004, RJ Reynolds and Lorillard filed an appeal to the case in the US Court of Appeals for the Ninth Circuit.[47] Reynolds and Lorillard maintained that the financing of the media campaign was a violation of their First Amendment rights because it was a case of compelled subsidisation of speech similar to a Supreme Court case (*United States v. United Foods, Inc., 533 U.S. 405 (2001)*), which favoured the tobacco companies' position; the State of California maintained that the advertisements are government speech immune from the First Amendment argument.[47] The tobacco companies acknowledged that the tax was not unconstitutional and the campaign itself did not create a First Amendment violation; rather the funding mechanism created the problem.

In September 2004, Judges Raymond C Fisher and Stephen Trott rejected the tobacco companies' arguments:

> We reject this argument as unsupported by the Constitution and Supreme Court precedent, and as so unlimited in principle as to threaten a wide range of legitimate government activity. We also reject the tobacco companies' claim that the advertisements violated their rights under the Seventh Amendment or the Due Process Clause. We thus affirm the district court.[47]

If the court had found in favour of Reynolds and Lorillard, it could have set precedent for tobacco companies to block the use of tobacco excise taxes for any form of tobacco education as long as they objected to them.[48] Furthermore, while the tobacco companies argued that they should not be ''compelled to pay for speech that one would not voluntarily fund'',[27] they didn't dispute the veracity of the content of the ads in question.[49]

American Legacy Foundation

Various tobacco companies have attacked the Legacy Foundation's truth campaign. The first attack came from Philip Morris in 2000 claiming that the Legacy Foundation's first television advertisement, ''Body Bags'', which showed 1200 body bags in front of a tobacco company to symbolise the 1200 Americans per day killed by tobacco, was a violation of the MSA and threatened to stop making payments to Legacy.[50] Despite approval of all ads from the Legacy board of directors, the attack led by Philip Morris resulted in the Legacy board's decision to suspend airing the ads to provide ''sufficient time to re-review the ads and discuss the appropriate course to take''.[50] Within a few weeks, the board reaffirmed its initial approval and the ads were returned to the airwaves and internet. Philip Morris did not act on the threat of withholding MSA payments to Legacy.[50]

Beginning in July 2001, Lorillard began to attack the truth campaign, first addressing correspondence to Arnold Worldwide, the advertising agency responsible for the truth campaign,[51] and then directly addressing Legacy's chief executive officer Cheryl Healton.[52] The letters complained about the radio ad called ''Dog Urine'' (table 1) which consisted of a recorded conversation between a Lorillard employee and a professional dog walker who was offering to sell dog urine to Lorillard, alleging that Lorillard adds urea (contained in urine) to their products.[53] Urea is used in cigarettes to affect pH in a way that increases nicotine bioavailability.

The complaints from Lorillard were that the company does not add urea (or dog urine) to their cigarettes and that it was illegal to record a telephone conversation without the Lorillard employee's consent.[51] Legal counsel for Arnold Worldwide responded by explaining that the call originated in New York and was received in North Carolina, both one party consent states (New York Penal Law § 250.00(1) and N.C. Gen. Stat. Ann.§ 15A-287(a)) and, since the caller consented to recording the conversation, there was no violation of the law.[54] Lorillard then began to pursue the allegation of adding urea to its products.

In a letter dated 13 November 2001 from Jim W Philips, Jr of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, the law firm representing Lorillard, to John W Payton of Wilmer, Cutler & Pickering, the law firm representing the Legacy Foundation, Lorillard's attorneys clearly stated that Lorillard does not add urea to its cigarettes and that the only urea found in the products is that which is naturally occurring in the tobacco leaf (table 2).[55] In the same document, Lorillard's legal counsel advised that Lorillard would move forward to file a complaint against Legacy for breach of the ''vilification'' clause in the Master Settlement Agreement[33] unless Legacy agreed to acknowledge in writing that the ''Dog Urine'' ad contained false statements about Lorillard adding urea or dog urine or any derivative to its cigarettes, and that it regretted making these statements and that Legacy retract the ad and never air it at any time in the future.[55]

On 18 January 2002, after Legacy had not agreed to the aforementioned conditions, Lorillard gave 30 day notice (required by the MSA) to Legacy stating that it was going to file suit against the Foundation in Wake County, North Carolina alleging that Legacy's truth campaign violated the terms of the MSA through personal attacks on and vilification of the company.[56] In a January 2002 press conference, Legacy president and CEO Healton said, ''Lorillard's threats are unwarranted and outrageous … they're a smokescreen to hide the company's real goal, which

Table 1 Script from the American Legacy Foundation's truth campaign's ''Dog Urine Ad''

[Telephone rings]
Lorillard Operator: Good afternoon, Lorillard.
''John'': Hello ma'am. My name is John. I was hoping I could talk to someone about a business idea I think your company might benefit from.
Lorillard Operator: What is…What is the…What is the nature of the business, though?
''John'': Oh, I'm glad you asked. I am a professional dog walker by trade and…and my dogs, well, they pee a lot, usually on, like, fire hydrants and people's flowerbeds. I thought that's a total waste of quality dog urine and why not collect it and…and sell to it to you tobacco people.
Lorillard Operator: Hmm.
''John'': Well, you see, dog pee is full of urea. And that's one of the chemicals you guys put into cigarettes, and I was just hoping to make a little extra spending cash, you know, under the table. You know what I'm saying?
Lorillard Operator: Let me connect you with the consumer department.
''John'': I…I can send you some samples. Let's see, I got Chihuahua, Golden Retriever. I got some high-test Rottweiler pee. And it's all good stuff.
Lorillard Operator: Hold on.
Lorillard Employee: Mike Loy.
''John'': Hello sir. My name is John. I have a business idea…a pee proposal.
[Telephone hung up]
[Telephone signal]
Announcer: You have reached truth.

Source: Lorillard Tobacco Company v. American Legacy Foundation and Arnold Worldwide, Inc. Draft Complaint, 2001.

Table 2 Excerpt from letter between Lorillard and the American Legacy Foundation's legal counsel regarding the allegations that Lorillard adds urea to its cigarettes

1. Is the presence of urea on the list of composite ingredients related solely to products of manufacturers other than Lorillard?
Answer: Yes
2. Is it in fact true that the only urea that exists in Lorillard's cigarettes is that which ''naturally occurs in the tobacco leaf'' from which those cigarettes were produced?
Answer: Yes
3. Has Lorillard ever added urea to any of its cigarettes?
Answer: No
4. Does Lorillard reintroduce urea into its cigarettes that may be lost in the manufacturing process?
Answer: No
5. Does urea occur in different levels in different types of tobacco? If so, does Lorillard alter the tobacco blend in its cigarettes to affect urea levels?
Answer: Lorillard does not measure the levels of urea in tobacco and does not alter its tobacco blend for any reason having to do with urea.
6. Does Lorillard add other compounds that contain urea?
Answer: No

Source: Letter from Jim W Philips Jr of Brooks, Pierce, McLendon, Humphrey & Leonard, LLP to John A. Payton, Esq of Wilmer, Cutler & Pickering, 13 November 2001.

is to crush the truth campaign because it's working to stop kids from smoking.''[57 58]

In anticipation of Lorillard's filing, Legacy filed a pre-emptive suit against Lorillard in New Castle County, Delaware (where Legacy is incorporated) on 13 February 2002.[57] Legacy argued that it was not a signatory to the MSA and therefore the terms of the MSA did not apply.[59] With knowledge of the nature of Lorillard's complaints, Legacy asked for a declaratory judgment stating that:

> Lorillard has no basis to assert, in any court, any claim or suit against the Foundation seeking to enforce any term of the MSA or seeking to establish any violation of the MSA…
> seeking to enforce any of the Foundation's bylaws or seeking to establish any violation of the bylaws'' and an injunction preventing Lorillard from asserting either of these claims in any court.[60] Legacy also asked the Court to declare that ''none of the components of the Foundation's truth campaign…constituted a 'personal attack' or vilification' within the meaning of the MSA and the Foundation's bylaws.''[60]

Lorillard's response to the Delaware court was that Legacy ''took advantage of the thirty-day notice letter to file a 'declaratory judgment'''.[61] On 19 February 2002, Lorillard filed suit in Wake County North Carolina claiming that Legacy has used funds from the MSA to ''publish or broadcast a number of advertisements that do not address the 'addictiveness, health effects, or social costs' of tobacco use'',[61] as was the directive set forth in the MSA.[33] The advertisements in question ''included personal attacks on companies and individuals, and the vilification of Plaintiff, its employees and tobacco companies collectively'' which constitute a breach of the MSA.[61] Lorillard also alleged that Legacy had sent ''harassing and vulgar emails'' which is a violation of North Carolina's Cyberstalking Act.[61] The tobacco company stated: ''American Legacy Foundation attempts to couch the litigation as a tobacco industry attack upon its success in reducing the rates of teen smoking, but it fails to grasp that the litigation is not focused on the ends, but upon the means used to achieve the ends.''[59] Lorillard requested that the court find that Legacy had breached the terms of the MSA, award damages in the amount of $1 (minimum amount required for damages to be claimed), order Legacy to comply with the terms of the MSA (with regards to vilification and the intended messages of the truth campaign), and issue injunctive relief requiring Legacy to stop sending harassing emails.[61]

Legacy's response was that Lorillard was acting to protect its economic interests because anti-smoking campaigns reduce cigarette consumption and that the litigation would divert the Foundation's funds away from anti-smoking ads to pay for litigation costs.[62]

On 11 March 2002, Lorillard filed a motion in the Delaware Court to stay or dismiss the action brought by Legacy claiming that Legacy unfairly filed its suit upon notice from Lorillard and because both suits involve the same parties and the same issues.[63] It argued that to promote the efficient administration of justice and because the North Carolina Court has better access to proof, the case in Delaware should be dismissed.[63]

In a victory for Legacy, on 29 April 2002, vice chancellor Stephen P Lamb of Delaware's New Castle County Court denied the motion to dismiss or stay the Delaware filing by the American Legacy Foundation.[64] Vice chancellor Lamb ruled that Legacy's filing was ''strategic, not inequitable'' in light of the coming suit from Lorillard and Legacy had a right to ''seek equitable relief preventing Lorillard from suing it in multiple or numerous jurisdictions on the same claims''.[64] In addition, vice chancellor Lamb said that Lorillard did not prove ''overwhelming hardship and inconvenience if forced to litigate in Delaware'' or ''identified specific pieces of evidence necessary to its defense that it will not be able to produce in Delaware''.[64] Vice chancellor Lamb then ordered both parties to inform the Superior Court of Wake County to remove their motions from the schedule for 3 May 2002.[65]

In a victory for Lorillard, on 31 January 2003, the Delaware Chancery Court denied Legacy's motion for summary judgement which means that the issue would go to trial.[66 67] The court stated that Lorillard had the right to pursue legal action against Legacy as a means of enforcing the provisions of the MSA.[67]

With annual payments due at the end of March, Lorillard announced on 21 March 2003 that it was placing its share of MSA payments into an escrow account to prevent the funds from going to Legacy.[68] Vermont Attorney General William Sorrell, chair of the Tobacco Committee of the National Association of Attorney's General (NAAG), said, ''they [Lorillard] clearly violate the terms of the [MSA]. Lorillard should quickly reconsider this position or NAAG will be forced to consider litigation to ensure the MSA terms are met''.[68]

In addition to threatening to withhold payment, Lorillard altered its claim for damages in the pending case against Legacy from $1 to the return of MSA payments made by the company since 1999 to the escrow account set up in the MSA.[68] While Lorillard quickly reversed its decision regarding the annual payments under pressure from NAAG and made the 31 March 2003 MSA payment (to both the states and Legacy), the company maintained its request for damages equal to all MSA payments made by the company.[69] If successful and used as a precedent by other tobacco companies who were signatories to the MSA, this action would lead to the end of the American Legacy Foundation.

In June 2004, after almost two years after the legal accusations began, Lorillard modified its position to drop the claim that it was unjustly accused of adding urea to their cigarettes. While presenting arguments on motions to compel production of documents before Judge Stephen Lamb during discovery, counsel for Lorillard stated, ''We are not complaining that they are saying urea is in cigarettes. We're not complaining that they are saying urea is added to cigarettes. What we are complaining about is the implication that Lorillard puts the equivalent of dog urine in cigarettes or that Lorillard would consider doing something like that''[70] (table 3). Counsel for Lorillard went on to say that the company had no intention of challenging the credibility of the comments about adding urea and that its purpose for being in court was to challenge the vilification clause.[71]

On 22 August 2005, Judge Lamb ruled against Lorillard and ruled that the Legacy truth advertisements did not violate the MSA.

DISCUSSION

In 2002, the tobacco industry reversed its earlier decision not to pursue litigation as a strategy to oppose tobacco control media campaigns.[25 72] As early as 1969, Philip Morris began discussing legal strategies to counter tobacco control media campaigns. In an internal draft memo from RR Millhiser, president of Philip Morris, to JF Cullman, CEO of Philip Morris, Millhiser states: ''We have considered legal action to stop the most scurrilous of these [anti-smoking] messages but for various reasons, have never pursued this course.''[73] Major tobacco companies have the resources, both in terms of dollars and legal expertise, to file lawsuits and maintain day-to-day business even if these lawsuits fail. The tobacco

Table 3 Excerpt from argument on motion to compel before the Court of Chancery of the State of Delaware

THE COURT: Is it Lorillard's position in this litigation that for the purpose of whatever happens in this case, you do not contest that your cigarette and other tobacco products contain urea?
LORILLARD: Urea is a naturally occurring substance in tobacco. We do not contest that fact.
THE COURT: Number two, do you add it to cigarettes, or have you ever added it to cigarettes or tobacco products?
LORILLARD: And we had said that we have not, Your Honor.
THE COURT: What I read was you said you didn't add it to cigarettes. How about other tobacco products? Was that just an oversight or something?
LORILLARD: I do need to clarify that. The only tobacco Lorillard makes is cigarettes. They no longer make either chewing tobacco—they sold that awhile back. And they do not make cigars. If I'm correct, I believe that they only make cigarettes, and they do not add urea. As I mentioned, we are not going to come in on this ad or any other ad and say, ''It is vilifying because it is false,'' because we believe that that is irrelevant to the analysis. If the issue is to run down the truth of every statement made in every ad—I would like to show, if I could, Your Honor, two ads.
THE COURT: All right. You are not going to say it's false, even though you believe it is false.
LORILLARD: We are not going to argue that falsity is relevant to the analysis. We are not going to come in to Your Honor and say, ''Your Honor, that Dog Walker ad…''
THE COURT: You go to the next step and say that for the purpose of my analysis, I can assume that it's true?
LORILLARD: Our view is, Your Honor, for the purpose of your analysis, we believe it's irrelevant whether it's true or false. We can not stipulate that statements that aren't true are true.
THE COURT: You are not going to contest the truth or falsity of the statement made in the ad?
LORILLARD: We are saying it's not relevant to the analysis. We are not going to come to the Court and argue that any of the facts in any of the ads are false.
THE COURT: As long as you understand that—given all that, in my opinion, I would say that you believe it isn't true, but you are not contesting it, and that—you also believe that truthfulness is not relevant to the topic. But if I determine that truthfulness is relevant, I will then have to make an assumption for the purpose of my analysis of this one ad that the statement was true.
LORILLARD: I understand that, Your Honor.

Source: American Legacy Foundation v. Lorillard Tobacco Company: argument on motions to compel, 2004.

industry has a history of filing or encouraging lawsuits against state and local tobacco control ordinances, despite the fact that it usually loses.[74] Regardless of the merits of a lawsuit or the verdict if the case is heard in court, there is still a significant cost to government agencies, which has some deterrent effect on pursuing effective tobacco control legislation. Likewise, litigation affects tobacco control media campaigns both financially and in terms of reduced productivity, and by encouraging risk averse managers not to attempt use of effective messages that highlight industry behaviour.

The tobacco industry has burdened media staff with massive requests for information under state and federal freedom of information acts as a means to delay or diffuse progress on reducing tobacco consumption.[75 76] In one instance, the tobacco industry claimed that contractors in the National Cancer Institute's ASSIST tobacco control project were conducting illegal lobbying[77]; a $40 violation, which resulted in paying a small fine, required state officials to spend more than 300 hours responding to the accusation.[78] In Minnesota, the attorney general challenged grantees from the Minnesota Partnership for Action Against Tobacco (MPAAT), a foundation created by the Minnesota tobacco settlement to run a tobacco control programme, to produce information which resulted in one grantee spending $20 000; none of the material that was provided to the attorney general was ever used or seen in subsequent litigation.[79 80]

Progress in California's media campaign was virtually halted for months while staff members worked to produce evidence requested by the tobacco companies.[38] While the final legal judgement was in favour of the media campaign, the time lost cannot be recaptured. Furthermore, in the first case brought by RJ Reynolds in 2002, the court granting their request for an injunction to suspend operations of the media campaign for the duration of the trial would have set dangerous precedent for future tobacco trials to request and be granted similar injunctions, thereby putting the media campaign in perpetual suspension.[49]

Similarly, in response to the judge's decision in Delaware to allow Lorillard's suit to move forward, Legacy president and CEO Healton stated at a press conference: ''As a result of this situation, we will be forced to divert valuable resources from our critical work to reduce the deadly toll tobacco takes on our nation.''[81] As a result of these legal proceedings, Legacy's legal fees have drastically increased. Before Lorillard began its attack, Legacy's total expenditures on legal fees were $32 918 in 1998, $654 805 in 1999, and $797 678 in 2000.[82–84] After the litigation began in 2001, Legacy's total expenditures on legal fees were $1 749 430 in 2001 and $2 110 354 in 2002 (data for 2003 through 2005 not yet available).[85 86] At the same time, Legacy has decreased their expenditures on the truth campaign from $112.7 million in FY2001 to $77.5 million in FY2002 to $62.1 million in FY2003 to $58.9 million in FY2004.[50] While overall funding for Legacy was declining as laid out in the terms of the Master Settlement Agreement, Legacy was also being forced to divert resources from the media campaign to cover legal expenses to defend itself.

To avoid the industry denormalisation messages that had been used successfully in the California campaign, the tobacco industry included a ''vilification clause'' in the settlement that created the Florida Tobacco Control Program.[28] Learning from the removal of the ''vilification clause'' in Florida due to the most favoured nation clause in the Texas Settlement,[29] the tobacco industry worked hard to ensure that a vilification clause in the Master Settlement Agreement was included, thereby providing a legal basis for future attacks on successful campaigns funded by the MSA. Given this experience, it is surprising that the attorneys general who negotiated the MSA included the vilification clause, particularly given the demonstrated effectiveness of previous media campaigns which focused on the practices of the tobacco industry, such as in California[87 88] and Florida.[3 30 31]

Another problem with vilification clauses is uncertainty regarding what it actually means. There is even confusion within the industry on this point.[40 89–93] Indeed, in a meeting of Philip Morris' Vilification Task Force in 2000, two of the decisions that had to be made were: ''1) determination of our legal options with regard to ALF [American legacy Foundation] and whether or not we would take such action…and 3) Settle on a definition of 'vilification' or develop a criteria against which ads can be measured.''[90]

An email dated 16 March 2000 from Carolyn Levy, head of Philip Morris' Youth Smoking Office, raises this same confusion: ''A thought – we may need to think about the difference between ads that depict 'industry manipulation' and those that 'vilify the industry.'''[91] A response from Jodi Sansone, senior manager of Philip Morris' Youth Smoking Prevention Programs, confirms this lack of certainty on the topic: ''It feels like identifying 'vilification' is in the eye of the beholder and a matter of what someone's intention is. Since we don't believe a lot of those industry manipulation ads are truthful about how we operate, I would say that they vilify the industry.''[93]

According to the Merriam-Webster dictionary, vilify means ''to lower in estimation or importance'' or ''to utter slanderous and abusive statements against''.[94] These two

definitions are, from a legal perspective, quite different. Under the first definition, advertisements that educate the public about the industry's behaviours could be ''vilification'' because they (justifiably) lower the esteem with which the public holds the industry. Truth would not be a defence. Under the second definition—libel—truth would be a defence and advertisements would only ''vilify'' the industry if the statements made in them were factually untrue. At the very least, this ambiguity has prolonged expensive litigation.

In addition to its use as a tool in litigation against tobacco control campaigns, the vilification clause provides some positive public relations opportunities for the industry. Rather than appear to be working to weaken the media campaigns, the tobacco companies are attempting to put forth the image that they are merely trying to play by the rules. A 2000 strategy document from Philip Morris states:

> It's easy for activists to ''spin'' our current anti-vilification efforts as an arrogant Big Tobacco effort to silence or intimidate the health community or networks, and paint themselves as heroes…even when we point out that the ALF agreement contains anti-vilification language…
> It should not be as easy if we position ourselves as moving from a posture of ''take the ads off'' to a posture of ''run what you want but please be sure to tell the truth about Philip Morris.''
> We state that we will consider legal action only if the above dialog ultimately fails…that we want to work this out together, etc…always repeating and stressing our messages about PM following the new laws, our YSP [Youth Smoking Prevention] program, etc.[95]

While Philip Morris did not pursue litigation, others did.

It is also interesting to note that in pursuing legal strategies against the media campaigns, RJ Reynolds and Lorillard have been the only companies to go to court. In a 1985 report from RJ Reynolds assessing its position ''regarding its response to media inquiries, public questions, allegations of anti-smoking factions on issues of smoking and health,'' the document states, ''RJR would serve as a 'lightning rod' for all anti-smoking activities if it assumed a high-profile position. Why should RJR assume this burden for the entire tobacco industry?''[96] On the other hand, in a Philip Morris report on focus group testing of the American Legacy Foundation's ads, the report states:

> While these results clearly illustrate the public's view that many of the ALF ads that target the tobacco companies and their executives, it also demonstrates that the tobacco industry also faces an uphill battle in gaining public sympathy regarding this matter…
> While the ALF's violation of the agreement may be an effective argument for the tobacco industry to use with the state attorneys general, Philip Morris would be ill-advised to use this argument in the court of public opinion. Even after being told of the agreement's provision against vilifying the tobacco companies, respondents rate this message as the least persuasive.[6]

Therefore, while attacks on tobacco control campaigns may have been a united effort across tobacco companies in the case of the other strategies, the legal strategy in particular appears to be a company by company decision and Philip Morris may have opted out based on the negative public opinion that would have ensued.

What this paper adds

Previous studies have documented various strategies employed by the tobacco industry to weaken and/or destroy tobacco control media campaigns, including working through third party allies, claiming fiscal crisis at the state level, and burdening tobacco control programmes with requests for information, thereby impeding progress on new ads.

This study documents the tobacco industry's new strategy to defeat media campaigns: litigation. Using the cases of California and the American Legacy Foundation, this study demonstrates that the tobacco industry has the resources to pursue litigation regardless of the ultimate outcome. For the tobacco industry, the legal costs associated with these challenges are merely part of the price of conducting business. However, for the tobacco control programmes, these legal costs are taking dollars away from effective tobacco control strategies such as educating the public about the deceptive practices of the tobacco industry. It is also important for tobacco control advocates to understand the importance of avoiding ambiguous provisions like the ''vilification clause'' in settlements or legislation that creates media campaigns.

Conclusion

Historically, tobacco companies have attempted to influence policy through legislation, at both the state and local levels, directly and through third party allies. The strategy of turning to the legal system to oppose media campaigns is a new strategy being employed by some tobacco companies. While the price of legal challenges is a normal cost of business for the tobacco industry, it is a significant financial burden to media campaigns and a substantial impediment to their productivity. Given the effectiveness of the ''industry manipulation'' theme, it is important that tobacco control media campaigns continue to use and defend these messages. Future settlements with the tobacco industry and implementing legislation for tobacco control programmes should avoid ''vilification clauses''.

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