Before the Republic of the Philippines Commission on Human Rights

Statement of Sharon Y. Eubanks

U.S. Federal Tobacco Litigation: *United States v. Philip Morris, et al.*

Preliminary Matters

My name is Sharon Y. Eubanks. I have been practicing law in the United States since 1980. I was an attorney with the U.S. Department of Justice for over 22 years and was lead counsel for the United States in the federal tobacco litigation, *United States v. Philip Morris, et al.*, which was tried in 2004 and 2005 before the United States District Court for the District of Columbia, with the Honorable Gladys Kessler presiding. The case was finally concluded earlier this year.

A copy of my current resume and a biographical statement are attached. My professional expertise is in the area of U.S. federal tobacco litigation and how the government was able to establish the tobacco companies' liability for the health effects of smoking.

The United States' government's case was based on proven allegations against the tobacco industry demonstrating fraud and deception. As discussed herein, there are similarities in the corporate behavior of the tobacco industry and the fossil fuel industry. I will address some of the parallels between *United States v. Philip Morris, et al.* and some of the current climate litigation filed in courts in the United States.

History

Tobacco litigation took the long road to success, alleging different theories, over the years, to find liability. Specifically, during the 1950s, scientific reports linking cigarettes to cancer emerged. The companies uniformly denied that there was any "proven" link to disease and smoking, even though their own internal documents at the time established a causal link between diseases, like lung cancer, and smoking. As a result of the scientific issues raised, individual plaintiffs began suing cigarette manufacturers, most frequently alleging that they developed cancer because of smoking. These cases often relied upon product liability theories:

1. Negligent manufacture: The tobacco companies failed to act with a duty of reasonable care in producing and marketing cigarettes;

2. Product liability: The tobacco companies made and marketed a product that was unfit for use and inherently dangerous when used as intended;

3. Negligent advertising: The tobacco companies failed to warn consumers of the risks of smoking cigarettes;

4. State consumer protection statutes: The tobacco companies violated individual state consumer protection statutes, most of which prohibited unfair and deceptive business practices.

These lawsuits led to vigorous defenses, in each instance, by the tobacco industry. The tobacco companies fought each lawsuit, with scorched earth tactics, refusing to resolve or settle out of court any case filed against them. In so doing, the tobacco companies relied upon several theories:

1. They knowingly falsely alleged that tobacco smoking was not harmful to smokers, stating that there was no proof of harm;

2. They alleged that smokers' cancer or disease was caused by other factors and not by tobacco smoking;

3. They argued that smokers themselves assumed the risk of cancer and disease when they decided to smoke, in that they had been warned, yet chose to smoke regardless.[1]

In all of these early suits, the tobacco industry prevailed. It was only in the 1980s that the tide began to turn.

In the 1980s, a new wave of tobacco litigation emerged. In the case of *Cipollone v. Ligget*, the plaintiff, Rose Cipollone, and her family alleged that cigarette manufacturers knew—but failed to warn consumers—that smoking cigarettes caused lung cancer and that cigarettes were addictive. Other plaintiffs adopted this theory, claiming that cigarette companies knew that cigarettes were addictive and caused cancer, and that the companies actively concealed this information from smokers. In defending these lawsuits, the tobacco companies argued that smokers had knowingly assumed the risks of cancer and that other health problems existed when they began smoking.

The companies also relied upon a theory of preemption, arguing, largely successfully, that various state consumer protection laws were preempted by federal laws specifically governing advertising and thus superseding state laws regarding the same thing. In most cases, this preemption completely precluded a plaintiff from suing under the state law.

During the 1990s, plaintiffs began to have limited success in tobacco lawsuits, in part because some internal cigarette company documents became available through the litigation discovery process. In particular, documents demonstrating that the companies were aware of the addictive nature of cigarettes, yet they concealed this information from consumers, were among the documents released in discovery.

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[1] The Federal Cigarette Labeling and Advertising Act of 1965 (Pub. L. 89-92) required that the warning, Caution: Cigarette Smoking May be Hazardous to Your Health," be located in a conspicuous place on every cigarette package. In 1969, Congress enacted the Public Health Cigarette Smoking Act, which provided that each cigarette package include the label, "Warning: The Surgeon General has Determined that Cigarette Smoking is Dangerous to Your Health." By 1984, Congress enacted the Comprehensive Smoking Education Act of 1984, which required four specific health warnings on all cigarette packages and advertisements, including that "Smoking Causes Lung Cancer" and that "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health."

These "waves" of tobacco litigation seemed to move slowly; however, it was the lawsuits by the individual states that ultimately turned the tables on the industry's success. In the 1990s, more than 40 states sued the tobacco companies under their own state consumer protection and antitrust laws. The states argued that cigarettes contributed to health problems that triggered significant costs for public health systems in providing healthcare to sick smokers. In these state lawsuits, the tobacco companies could not use the defense that they had perfected and that had proven so successful in lawsuits brought by individuals, that is, that the individual smoker was aware of the risks and decided to smoke anyway. The claims asserted by the states in their litigation based their theory for financial recovery upon the costs involved in treating sick smokers—actual harm to the public fisc—rather than harm to a particular smoker. This was completely new to tobacco litigation, and provided a real challenge to the industry.

In the discovery process, the states uncovered evidence that the tobacco companies had known for many years about the damage caused by their products and had fraudulently conspired to suppress the information and mislead the smoker, the general public, and public officials.

The tobacco industry realized that the costs of defending lawsuits against states would be prohibitively expensive. After the industry made an effort to work with federal lawmakers, including the U.S. Senate, to obtain immunity from suit, an effort which failed, it became clear that a resolution was necessary. In November 1998, the attorneys general of 46 states and four of the largest tobacco companies doing business in the United States (Philip Morris USA, R.J. Reynolds, Brown & Williamson, and Lorillard) agreed to settle the state suits and the potential suits, without any admission of liability. As stated in the agreement, the parties settled "to avoid further expense, delay, inconvenience, burden and uncertainty of continued litigation (including appeals from any verdicts). The $206 billion settlement, referred to as the Master Settlement Agreement ("MSA"), provided the following terms:

1. Tobacco companies agreed to cease engaging in certain advertising practices targeting youth;

2. Tobacco companies agreed to pay annual sums of money to the states to compensate them for healthcare related costs related to smoking (a minimum of $206 million over the first 25 years);

3. The settlement created and funded a foundation dedicated to reducing youth smoking and preventing diseases associated with smoking.

4. Tobacco companies were required to dissolve the functions of three of the largest tobacco industry organizations.[2]

[2] These organizations were dismantled as part of the MSA because of their significant role in advancing the tobacco companies' fraudulent activities: The Center for Indoor Air Research, The Tobacco Institute, and the Council for Tobacco Research.

The MSA only resolved state and local government lawsuits; the tobacco industry did not gain protection from class action lawsuits and claims brought by individuals, labor unions, private healthcare insurers, and the United States government.

The Federal Government's Lawsuit

During the same time that the states were engaged in negotiating the terms of the MSA, the federal government was engaged in an effort to legislate, rather than litigate. The effort was led by Senator John McCain, and the proposed legislation had bipartisan support. The proposed legislation would have raised the price of a pack of cigarettes by $1.10 and allowed the government to regulate tobacco advertising, and it imposed penalties on the industry if smoking by underage teenagers did not decline sharply. The tobacco industry lobbied hard for inclusion of a provision in the legislation that would grant them immunity from certain personal injury lawsuits; however, that did not become part of the bill. As a result, the legislation was not supported by the industry, and the bill failed to pass.

On January 19, 1999, President Bill Clinton announced in his State of the Union address that the Justice Department was preparing a litigation plan to take tobacco companies to court and to use the funds recovered from litigation to strengthen Medicare. The Justice Department formed a small team of lawyers to work exclusively on the matter and try to develop the case, and eight months later, on September 22, 1999, the U.S. Justice Department filed a civil lawsuit[3] in the United States District Court for the District of Columbia against the major tobacco companies—nine cigarette manufacturers—and two tobacco-related trade organizations. The lawsuit alleged that the companies' actions violated three statutes, including the Medicare Reimbursement Act ("MCRA"), the Medicare Secondary Payor provisions of the Social Security Act ("MSP"), and the Racketeer Influenced and Corrupt Organizations ("RICO") Act.

In September 2000, the court dismissed the MCRA and MSP causes of action and permitted the government to proceed with its RICO case as pled. (The RICO statute had been used extensively by the United States to prosecute cases involving organized crime). In its complaint, the government alleged that defendants violated and continued to violate RICO by engaging in a lengthy unlawful conspiracy to deceive the American public about the health effects of smoking and second-hand smoke, the addictiveness of nicotine, the health benefits from low tar and "light" cigarettes, and their manipulation of the design and composition of cigarettes in order to sustain nicotine addiction. As Supreme Court Justice Sandra Day O'Connor noted in *Food and Drug Administration, et al. v. Brown and Williamson Tobacco Corp., et al.*, 529 U.S. 120, 125 (2000), "[t]his case involves one of the most troubling public health problems facing our Nation today: the thousands of premature deaths that occur each year because of tobacco use."

[3] On the same day that the civil litigation was filed, the Justice Department closed, without issuing any indictments, its criminal investigation of the tobacco industry. The evidence collected in connection with that Justice Department investigation was *not* available to the lawyers pursuing the civil case, under the Federal Rules of Criminal Procedure.

Defendants argued that the scope and breadth of the case, involving allegations that spanned approximately 50 years, made the case nonjusticiable. The court did not find those arguments persuasive. In particular, the government, which was the party with the burden of proof,[4] argued that for approximately 50 years, the defendants falsely and fraudulently denied: (1) that smoking causes lung cancer and chronic obstructive pulmonary disease ("COPD"), as well as many other types of cancer; (2) that second hand smoke causes disease and endangers the respiratory systems of children; (3) that nicotine is a highly addictive drug which they manipulated in order to sustain addiction; (4) that they marketed and promoted low tar/light cigarettes as less harmful when in fact they were not; (5) that they intentionally marketed to young people under the age of twenty-one and denied doing so; and (6) that they concealed evidence, destroyed documents, and abused the attorney-client privilege to prevent the public from knowing the dangers of smoking and to protect the industry from adverse litigation results. The court ultimately found that the government met its burden and proved these allegations.

In preparing its case, the government was allowed to conduct discovery, including the production of documents and deposition testimony from witnesses within and outside the United States. The tobacco industry inundated the government with discovery requests, and discovery took place over a four year period. The trial in the case, following extensive pretrial motions, took place from September 2004 through May 2005—nine months. The case was tried before the bench rather than a jury, and the Honorable Gladys Kessler presided.

On August 17, 2006, Judge Kessler issued an opinion consisting of 1,683 pages, holding that the tobacco companies were liable for violating RICO by fraudulently covering up the health risks associated with smoking. She found defendants liable for a RICO conspiracy, noting that they engaged in and executed, and continued to engage in and execute, a massive 50-year scheme to defraud the public, including consumers of cigarettes, in violation of RICO.

The foundation of defendants' case was denial; they had no affirmative defenses. The government's case was largely a case made through documentary evidence. The tobacco industry's own internal documents obtained through state cases and in discovery provided the best evidence supporting the government's allegations of the fraudulent manner in which the industry conducted itself. Judge Kessler summed up the case in her August 26, 2006 ruling as follows:

"The seven-year history of this extraordinarily complex case involved the exchange of millions of documents, the entry of more than 1,000 orders, and a trial which lasted approximately nine months with 84 witnesses testifying in open court. Those statistics, and the mountains of paper and millions of dollars of billable lawyer hours they reflect, should not, however, obscure what this case is really about. It is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and

[4] As a civil action, the government had to prove its case by a preponderance of the evidence. Had a criminal case been filed under the RICO statute, the government would have had a higher burden of proof and would have been required to prove its case beyond reasonable doubt.

economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community. . . . in short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted."

The tobacco companies appealed Judge Kessler's judgment to the U.S. Court of Appeals for the District of Columbia. A three-judge panel unanimously upheld Judge Kessler's decision finding liability, as well as most of the remedies that she ordered. The appellate court also found that the First Amendment does not protect fraudulent statements, noting that defendants knew of the falsity at the time the statements were made and that those statements were made with an intent to deceive.

The findings from Judge Kessler's opinion have been used to support tobacco control efforts world-wide. They are findings of fact, supported by evidence, from a neutral judicial body, and as such, they carry significant weight. In fact, findings from Judge Kessler's decision were adopted by the U.S. Congress in its findings in section 2 of the Family Smoking Prevention and Tobacco Control Act. This law was enacted in 2009, and it gave the Food and Drug Administration the power to regulate the tobacco industry. A signature element of the law imposes new warnings and labels on tobacco packaging and their advertisements, with the goal of discouraging minors and young adults from smoking. The Act places limits on the advertising of tobacco products to minors and requires companies to seek FDA approval for new tobacco products. Litigation and legislation are both effective means of addressing the way this industry conducts business.

Climate Deception Litigation

Evidence of global warming has been mounting for generations, and major fossil fuel companies have been aware of the underlying climate science for decades. Yet instead of taking action, these companies embarked on a series of campaigns to deliberately deceive the public about the reality of climate change and to block any actions that might curb global warming emissions—because it would affect their profits, their "bottom line." In order to confuse the public and delay action, they elicited support from industry organizations in order to sow seeds of doubt and to suggest that there was no scientific consensus about global warming and what causes it, even though they knew this was false. Indeed, they had themselves conducted the research.

The similarities in the behavior of the fossil fuel industry to that of the tobacco industry, are clear. Just as with the tobacco industry, recently uncovered documents support the determination that the fossil fuel industry deceived the public and investors about climate change.

States and municipal governments have filed lawsuits against the fossil fuel industry, alleging that major corporate members of the fossil fuel industry have known for nearly 50 years that unrestricted production and use of their fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate. Moreover, they have known for decades that those impacts could be catastrophic and that only a narrow window existed to take action before the consequences would become irreversible. They have nevertheless engaged in a coordinated, multi-front effort to conceal and deny their own knowledge of those threats, discredit the growing body of publicly available scientific evidence, and persistently create doubt in the minds of customers, consumers, regulators, the media, journalists, teachers, and the public about the reality and consequences of the impacts of their fossil fuel pollution. At the same time, the fossil fuel industry has promoted and profited from a massive increase in the extraction and consumption of oil, coal, and natural gas, which has in turn caused an enormous, foreseeable, and avoidable increase in global greenhouse gas pollution.

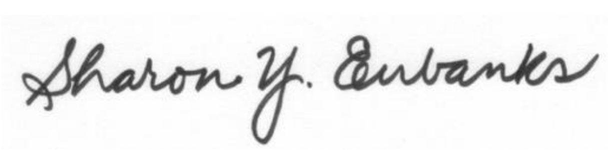
The lawsuits assert tort claims, including strict liability failure to warn and public nuisance, as well as violations of state environmental protection statutes. *See, e.g., State of Rhode Island v. Chevron Corp., et al.*

Closing

The United Nations has recognized that climate change is one of the major challenges of our time and adds considerable stress to societies and the environment. The impacts of global warming are clearly global in scope and unprecedented in scale.

Climate change has an impact on an array of internationally guaranteed human rights. It has long been recognized that a clean, healthy, and functional environment is central to the enjoyment of human right to life, health, food, and an adequate standard of living. Climate change poses a definite threat to the natural environment of human societies' well-being. Ecosystems, natural resources, and physical infrastructure are all affected, which in turn impacts human lives and safety. Harmful impacts include sudden onset events (storms, fires, arctic temperatures, for example) threatening human lives and safety as well as more gradual forms of environmental degradations that ultimately will undermine access to clean water, food, and other essentials to human life. Put simply, climate change will have a profound effect on the enjoyment of human rights for individuals and communities across the planet and for years to come if we ignore it. The law, whether litigation or legislation, can be a powerful tool to address all of these issues.

Signed:



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