

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
	.	
Plaintiff,	.	Docket No. CA CA99-02496
	.	
v.	.	
	.	
PHILIP MORRIS USA, et al.,	.	Washington, D.C.
	.	February 2, 2005
	.	
Defendants.	.	
.	

VOLUME 58
MORNING SESSION
TRANSCRIPT OF BENCH TRIAL PROCEEDINGS
BEFORE THE HONORABLE GLADYS KESSLER,
UNITED STATES DISTRICT JUDGE

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 THE COURT: Good morning, everybody. This is United
4 States versus Philip Morris, CA 99-2496. Dr. Eriksen, you're
5 still under oath today, and Mr. Bernick, please.

6 MR. BERNICK: Thank you, Your Honor.

7 CONTINUED CROSS-EXAMINATION OF MICHAEL ERIKSEN, Ph.D.

8 BY MR. BERNICK:

9 Q. Good morning, Dr. Eriksen, and welcome back after all
10 your travels. It's always a little bit awkward, I suppose, to
11 start out with an examination that's been interrupted, it's kind
12 of like, well, and I try to think of a way to maybe do it a
13 little differently and I couldn't, so I'm just going to pick up
14 exactly where we left off if I could.

15 I think we were talking about the Siegel Study in
16 particular, which you identified as the one longitudinal study
17 that takes you from cigarette marketing to actual smoking
18 behavior, although you then acknowledge that it was through a
19 proxy, that is, receptivity being a proxy for exposure to
20 cigarette marketing, correct?

21 A. We were discussing the Biener and Siegel paper, but
22 that's not the only longitudinal study that looks at marketing
23 in relation to actual smoking. We haven't gotten to the other
24 ones that are in my written testimony.

25 Q. Well, it's the one you identified when I asked you the

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- 1 question, correct? I said, "Isn't it a fact that you don't
2 have" -- this is at 11547 of the transcript -- "you don't have a
3 single longitudinal study, not one longitudinal study that
4 actually takes you from exposure to cigarette marketing on the
5 one hand, to initiation of smoking among adolescents on the
6 other, not one?" You say, "I would disagree, I would say that
7 the Biener and Siegel article brings you from exposure to
8 marketing, as measured by their receptivity variable to the
9 initiation of smoking." That was your testimony, correct?
- 10 A. Yes, sir, but I didn't say it was the only study.
- 11 Q. Well, we can certainly come back. Let's work with this
12 Biener and Siegel Study for just a moment. I had three
13 follow-up questions. One, you did say receptivity was a proxy
14 for exposure to marketing, correct?
- 15 A. Yes, sir.
- 16 Q. And as a result, it would still be true, would it not,
17 that there is not even one longitudinal study that takes you
18 from cigarette marketing -- exposure to cigarette marketing as
19 an end point directly measured, on the one hand, to initiation
20 of smoking directly measured on the other, correct?
- 21 A. The Pucci Study is a, as we discussed, a longitudinal
22 study that actually looks at actual exposure to cigarette
23 marketing and its relationship to subsequent brand preference in
24 adolescents or actual smoking behavior.
- 25 Q. Well, no, I said "initiation". Let's be totally clear.

1 I'm not talking about brand preference, I'm talking about the
2 initiation of smoking.

3 There is not one longitudinal study that directly measures
4 the impact of exposure to cigarette marketing on the one hand,
5 with initiation of smoking on the other, correct?

6 A. Yes, sir, that's correct.

7 Q. Okay. Now, in talking about proxy, you said that not
8 only was the -- did Biener and Siegel work with receptivity as
9 being a proxy, but you further acknowledged that you -- you
10 further said, I think your words were at 11546 that "as a proxy
11 it was a valid measure of exposure to cigarette marketing." Do
12 you recall saying that?

13 A. Yes, sir.

14 Q. Now, validation is something that science actually tries
15 to do through a method or a procedure, correct?

16 A. If possible, yes.

17 Q. Okay. And what kinds of procedures are used to provide a
18 validation of something as being a measure or a proxy?

19 A. There are a number of ways of trying to validate a
20 measure from issues like content validity and face validity and
21 concurrent validity. Validity is more difficult to ascertain
22 than is reliability, which are the two major criteria to look at
23 of the consistency and scientific quality of a study.

24 Q. Now, are you aware of any study that actually formally
25 validates receptivity as a proxy for exposure to cigarette

1 marketing?

2 A. In the articles that use receptivity, they justify the
3 use of that concept as being an indicator or proxy for exposure
4 because it actually shows possession or desire to possess a
5 marketed item, or having a favorite ad, so scientifically that
6 would be considered face validity.

7 Q. Face validity. I'm really not sure I understand what you
8 mean by "face validity", but let me ask it this way:
9 Receptivity could also be a function of other factors, for
10 example, we're going to talk about peer smoking here more
11 extensively in a minute. Receptivity could be a function of
12 peer smoking, correct?

13 A. Conceivably it could be, as well as marketing.

14 Q. Okay. Are you aware of any study that validates
15 receptivity as actually being caused by cigarette marketing as
16 opposed to and independently of peer smoking?

17 A. I don't know of any study that can tease out the
18 independent effects of peer smoking from overall influence of
19 marketing.

20 Q. Okay. Now, that was my first question, is validation.
21 My second question has to do with the inclusion in the Biener
22 Study in the cohort of people who have -- who may have smoked
23 one cigarette in the prior 30 days. Do you remember ending our
24 discussion talking about that fact?

25 A. Yes.

- 1 Q. I want to talk a little bit about what the potential
2 consequences of that might be. Is it correct that in the Siegel
3 Study, Siegel takes a look -- Biener -- Biener takes a look at
4 whether higher receptivity to advertising at the beginning of
5 the longitudinal study is associated with an increased risk or
6 incidence of being -- of becoming an established smoker, right?
- 7 A. Yes, becoming an established smoker.
- 8 Q. Can you see it?
- 9 A. Yes.
- 10 Q. Now, we know that people who are -- who have smoked a
11 cigarette within the prior 30 days in the Biener Study could
12 well be experimenters, correct?
- 13 A. It's conceivable. I think it's -- just to clarify the
14 study we talked about, the Pierce Study, their study population
15 was non susceptible never-smokers.
- 16 Q. I understand that.
- 17 A. This one was never-smokers included someone who may have
18 smoked a puff or up to one cigarette. And the third study that
19 I refer to in my testimony that we may discuss is the Choi
20 Study, and the Choi Study actually looked at experimenters at
21 baseline to see what their subsequent behavior was.
- 22 Q. Okay.
- 23 A. So different studies use different baseline populations
24 to see -- to look at the progression of smoking. No one of
25 those is right or wrong necessarily.

- 1 Q. But that's why you've got to take them one at a time?
- 2 A. Right.
- 3 Q. And in the Pierce Study, Pierce does not measure as an
4 end point actual initiation, Pierce, as we talked about last
5 time, is receptivity and susceptibility, correct?
- 6 A. I would call it progression towards smoking.
- 7 Q. Progression towards smoking. But the two end points that
8 are being measured are receptivity and susceptibility changes,
9 correct?
- 10 A. Receptivity and progression towards smoking.
- 11 Q. Well, the two variables that are measured -- it's changes
12 in susceptibility that are measured in relationship to levels of
13 receptivity, correct? Those are the two end points in the
14 Pierce Study, correct?
- 15 A. My understanding of the Pierce Study, he looked at
16 receptivity as the independent variable --
- 17 Q. Right.
- 18 A. -- and progression towards smoking as the dependent
19 variable, which included changes in susceptibility, but I
20 wouldn't label it as just being susceptibility.
- 21 Q. Well, you did last Thursday. Let me just ask you this
22 very clearly. Don't you really have the relationship reversed,
23 Dr. Eriksen, that is, changes in susceptibility includes
24 initiation and becoming a smoker; that is, susceptibility is
25 broader than and inclusive of that behavior as well as other

- 1 behaviors, correct?
- 2 A. I'm sorry, I -- could you repeat the question?
- 3 Q. What Pierce -- when Pierce looks at susceptibility,
4 susceptibility to smoking includes all elements of a
5 relationship to smoking, including actual smoking initiation?
- 6 A. Yes.
- 7 Q. Right?
- 8 A. Yes.
- 9 Q. And what he measures, he doesn't tease out initiation of
10 smoking and relate it to receptivity; the initiation of smoking
11 is included within the broader ambit of changes in
12 susceptibility, correct?
- 13 A. That's where I'm disagreeing with you in terms of the
14 terminology, that my understanding of the Pierce Study is that
15 he looked at progression towards smoking, including
16 susceptibility, including intentions to smoke, and he documented
17 changes in the stage on the smoking continuum index he
18 developed.
- 19 Q. I suppose we can come back to it and maybe we'll come
20 back to it on another day and on another occasion, it's not
21 really material to my point. My point is that Pierce looks at
22 receptivity, call it progression to smoking, okay, agreed?
- 23 A. Yes.
- 24 Q. Siegel looks at receptivity and actually becoming an
25 established smoker, correct?

- 1 A. Yes, Biener and Siegel.
- 2 Q. Biener and Siegel; Pierce doesn't do that, right?
- 3 A. No, he looks at progression towards smoking.
- 4 Q. Right. And Choi doesn't do what Biener did either,
5 correct?
- 6 A. No, Choi does do exactly what Biener did.
- 7 Q. It does do exactly what Biener does, so we now have
8 receptivity and established smoking?
- 9 A. Yes, sir.
- 10 Q. Okay. And now clarify for me, because maybe I'm mistaken
11 on this, what was the cohort in Choi? Experimenters, I think
12 you said?
- 13 A. Yes.
- 14 Q. Now, with respect to Siegel in talking about receptivity
15 and the progression to becoming an established smoker, I think
16 where we started out with this whole discussion was that he
17 includes in his population people who may be experimenters,
18 correct?
- 19 A. He includes adolescents who may have smoked up to one
20 cigarette.
- 21 Q. Okay. And those may be experimenters, correct?
- 22 A. In terms of the terminology I used in my written -- I
23 mean my oral presentation, I wouldn't define them as an
24 experimenter, that was like a trier, someone who tries a puff of
25 a cigarette up to one cigarette. Experimenters were more

1 frequent triers, they may try a cigarette on multiple occasions.

2 Those would not be included in the Biener and Siegel Study.

3 Q. Well, you don't know that, do you? Is someone who has
4 had a cigarette in the last 30 days could actually be an
5 experimenter?

6 A. That's not my understanding of how they
7 operationalized -- it was one cigarette in a lifetime not in the
8 last 30 days.

9 Q. Well, in fact, isn't it true, and I think there is a
10 reason why Biener actually disagrees with you on this, Biener
11 herself says, "Respondents who reported that they had a puff or
12 a whole cigarette were classified in the highest risk group
13 early experimenters." So in other words, somebody who has tried
14 that cigarette in the last 30 days could be at the beginning of
15 being an experimenter; that is, it may be after the 30-day
16 period had passed, they tried it again, so they could be early
17 experimenters and would still be included in the Biener Study,
18 correct?

19 A. There's nothing in the Biener Study about past 30 days.
20 This is lifetime.

21 Q. Then that's fine. Same thing applies. I was thinking
22 about 30 days because of current smokers, but the same thing
23 applies; that is, somebody who has tried a cigarette at any time
24 prior to the time that they are administered the questionnaire,
25 could well be somebody, maybe not, but may be somebody who is in

1 the early stages of experimentation, correct?

2 A. Yes.

3 Q. Okay. And isn't it --

4 THE COURT: Does the article distinguish, as I think you
5 are distinguishing, Dr. Eriksen, between what the article calls
6 early experimenters, quote unquote, and some other kind of
7 experimenters, which I guess we could just call later or more
8 sophisticated experimenters, does the article make that
9 distinction?

10 THE WITNESS: I don't believe they make it in terms of the
11 terminology or jargon. I think what they're trying to do is to
12 basically -- someone who has never smoked, not even a puff, they
13 typically are called nonsusceptible never-smokers; someone who
14 has never smoked but has tried a puff or smoked a cigarette,
15 that's what they're referring to as early experimenters. And
16 then there's another category of true experimenters, but I'm not
17 exactly sure what terminology they may use in the study to
18 describe them, but the purpose of the study was to look at this
19 fairly -- this group that may have tried a puff but never smoked
20 more than one cigarette, and the point I think is important is
21 that the different studies have picked out different groups of
22 young people, some who have never even had a puff, some have had
23 up to a cigarette, then the Choi Study who are children who were
24 actually true experimenters.

25 THE COURT: And would it be correct to say, although this

1 may be a layperson's over simplification, that in a certain sense
2 these studies that we talked about last time and that Mr. Bernick
3 has started with this morning, are comparing apples and oranges
4 because each of the studies compare a slightly different
5 population?

6 THE WITNESS: Across the studies are different
7 populations, but within the study they're comparing all apples to
8 apples and then seeing what happens over time with the only
9 variable that's changing is exposure to marketing as measured by
10 this receptivity variable.

11 THE COURT: I understand that, but the different studies
12 are measuring different populations; is that accurate?

13 THE WITNESS: Yes, Your Honor.

14 BY MR. BERNICK:

15 Q. Just to pick up on that, and I've got my version which
16 we'll get to in a minute of apples and oranges, maybe fruit
17 salad is a little bit more like it, but the particular apple
18 that we're dealing with in Biener and Siegel is the apple of
19 receptivity in established smoking, correct?

20 A. Yes, sir.

21 Q. And then even the -- it's the brands or style of apple,
22 the Macintosh apple in the Biener Study works with a population
23 that by the article's own statement includes what they believe
24 to be early experimenters, correct?

25 A. Yes, sir.

1 Q. And would it be true that earlier experimenters are
2 probably more likely to be receptive to cigarette advertising?

3 A. I don't know, I'm sure that's determinable by looking at
4 the level of receptivity and these three different studies of
5 when you work with non susceptible never-smokers and early
6 experimenters and that you could actually look at their level of
7 receptivity at baseline to see if it's different, I haven't done
8 that.

9 Q. But you do know from the literature that people who are
10 starting to smoke have a greater focus and attention to
11 cigarette promotion and advertising, do you not?

12 A. It seems like a logical conclusion. I'm not sure I know
13 that. I couldn't cite a study to show that, but it doesn't seem
14 illogical.

15 Q. It's kind of what you would expect from the literature
16 that's out there, that there's greater attending to ads for
17 cigarettes by people who are starting to use them, right?

18 A. That would make sense.

19 Q. Okay. And it would also be true, I think you've already
20 said, you talked about one-third one-third one-third, that
21 one-third of people experiment with cigarettes, one-third of
22 those -- one half -- one half of those go on to actually become
23 established smokers. Would you agree with me that people who
24 are starting to experiment with cigarettes are more likely to
25 become established smokers than people who have never even taken

1 a puff?

2 A. Yes, just to correct though your original
3 characterization, I didn't say half of one-third go on to become
4 smokers, I was trying to get the fact that if you divided
5 children into thirds, a third would never experiment, a third
6 would experiment and not go on, and a third would experiment and
7 go on, so it's basically two-thirds, two-thirds of adolescents
8 try smoking at some level and half of those go on.

9 Q. Bare with me, I think we're going to agree here in just a
10 moment. You've got one-third who are nevers; two-thirds fall
11 into a different category, and all of the people in that
12 category started out as experimenters and one half of those
13 experimenters become established smokers, correct?

14 A. Yes.

15 Q. Which would then mean that among experimenters they have
16 a one and two chance of becoming smokers, whereas the population
17 as a whole when you started out was only one-third?

18 A. Yes.

19 Q. So, you know that people who have started to experiment
20 have a much greater chance of becoming established smokers than
21 the beginning population, correct?

22 A. Yes, I'd agree with that.

23 Q. Which then means that when Biener chose to work with a
24 population that included early experimenters, she was working
25 with a population that included people who were more likely to

1 be attentive to ads and because they were experimenters or early
2 experimenters, more likely, then, to progress to established
3 smoking, correct?

4 A. All -- but all of the subjects were the same in these
5 studies. You have all are early experimenters up to one
6 cigarette, so you're keeping that constant, and then you're
7 looking at the change over time in relation to their exposure to
8 cigarette marketing.

9 Q. I don't think that that's right. Isn't it true that the
10 Biener Study included people who had never smoked as well as
11 people who had smoked as much as one cigarette?

12 A. Yes, but they're all the same in terms of that definition
13 of either having never smoked or smoked one cigarette, you're
14 keeping that group constant and you're following them over time
15 controlling for peer pressure, rebelliousness, other factors,
16 holding constant the only difference being this variable of
17 receptivity.

18 Q. I understand. But I'm saying that because those people
19 are included, that is, the people who are the early
20 experimenters, because they were included, there is there's now
21 an increased chance within this population that this population
22 will, in fact, progress to become established smokers than if
23 those people hadn't been included at all?

24 A. Yes, I agree with your statement that children who've
25 smoked a cigarette are more likely to progress to become an

1 established smoker than who haven't smoked any.

2 Q. Okay. And it is further true that those particular
3 people who do go on and progress are at higher risk of going on
4 to progress to become established smokers, are also the people
5 within that population who are likely to be more receptive to
6 advertising, that is, the early experimenters, correct?

7 A. They may be, as I said before, I'm not sure of any
8 evidence that has established that, but that may be the case.

9 Q. And if both of those things are true, if both of those
10 things are true, would you agree with me that by including the
11 early experimenters in the population, it had the affect, or may
12 have had the effect of increasing the chance that an association
13 would be found between higher receptivity and increased risk of
14 becoming an established smoker? Would you agree with me that
15 that may have been so?

16 A. It may have been so, and my recollection is that they
17 looked at that in their study of -- they look at their entire
18 population and they looked at the subset non susceptible
19 never-smokers and found the same increased risk based on
20 baseline exposure to marketing.

21 Q. Well then, if that's so then you know the answer to my
22 next question which is, if you have -- you're saying they
23 actually ran a comparison that excluded the early experimenters
24 from the analysis?

25 A. My recollection of the study is that they did. I don't

1 have the study with me, but --

2 MS. CROCKER: Could Dr. Eriksen be provided with that
3 study? We've had a lot of specific questions about it and I
4 don't think he has it in front of him.

5 THE COURT: Yes, it certainly should be. We've had enough
6 conversation about that study.

7 MR. BERNICK: We'll check that in a minute.

8 THE COURT: Well, are you going to remain on this study?

9 MR. BERNICK: What?

10 THE COURT: Are you going to remain questioning on this
11 study?

12 MR. BERNICK: No, I'm going to move on to something else
13 and come back to that. I have one more question with respect to
14 the study, but it doesn't really relate to that detail.

15 THE COURT: And I think Dr. Eriksen was just given a copy
16 of it. He was.

17 BY MR. BERNICK:

18 Q. We'll go back -- so it's your view that in the study they
19 teased out that the same relationship would apply that they
20 found in the study, even if the earlier experimenters were
21 excluded?

22 A. My recollection was that they looked at both the entire
23 sample and they also looked at what happened to the -- what I
24 would refer to as the non susceptible never smoker was my
25 recollection of it.

1 Q. Okay. We'll take -- are you saying that the effect of
2 that would be that they determined, even with respect to the non
3 susceptible never smoker, that the relationship still held?

4 A. Yes, it was attenuated. My recollection was that
5 46 percent of the individuals with high -- of the entire group
6 with high exposure became established smokers and about half of
7 that for the never-smokers, the non susceptible never-smokers
8 became heavy smokers. In both instances it was double the rate
9 among the children with low exposure to marketing, is my
10 recollection of it.

11 Q. We'll take a look at that and then pursue that, maybe, a
12 little bit later on.

13 Let's talk about replication. You talked earlier in your
14 testimony about the importance of having, I think you put it, a
15 whole bunch of studies all of which come out basically the same
16 way. Do you recall that? It's at page 11490. "When it comes
17 to observational studies you have to have consistency coherency,
18 you have to have a whole bunch of studies all which come out
19 basically the same way, right?" Answer, "Exactly the whole
20 budge of studies." Do you recall that?

21 A. I was going to say, that wasn't the most scientific term.

22 Q. You got it from me.

23 A. But I just was repeating yours, that's right.

24 Q. Now, in fact, an interesting and important thing to do
25 would be to take -- the Biener population is a Massachusetts

- 1 population, correct?
- 2 A. Yes, sir.
- 3 Q. And if it was really true that there was this tie that
4 they found between receptivity to marketing and actual
5 establishment of smoking, you would expect to see that same kind
6 of relationship established in other geographical locations,
7 correct?
- 8 A. Yes, you'd expect to see it in other studies and other
9 geographical locations.
- 10 Q. Are you aware of any effort that's ever been made to take
11 the same Biener approach and see if it works for the California
12 data, which is publicly available?
- 13 A. That is exactly what was done with the Choi Study.
- 14 Q. But the Choi Study worked with a different population?
- 15 A. It was a California adolescents that were done in the
16 Pierce Study and they looked at experimentation at baseline and
17 established smoking at follow up.
- 18 Q. Well, we've now seen that. Actually, the Biener Study
19 worked with a somewhat different population, correct?
- 20 A. Yes, as I've said, they're all working with slightly
21 different groups.
- 22 Q. That's what I said. Are you aware of any effort to take
23 exactly the same approach, same method, all the same things that
24 were done by Biener and apply it to any data set from any other
25 population?

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1 A. I'm not sure what the Sargent Study, what their baseline
2 population was, but I would consider these groups to be very
3 similar.

4 Q. I didn't ask you, I just asked you whether they were the
5 same. We know that they're not the same, so the question is,
6 are you aware of any effort to take the Biener approach, whether
7 published or not, the Biener approach and apply it to a data set
8 from a different geographical location?

9 A. The Biener approach is the Pierce approach and Sargent
10 approach and Choi approach, where they operationalized the
11 variables in precisely the same way in terms of exposure with
12 slightly different groups of adolescents, so the reason I'm
13 saying this is that if you were to say replication, this is very
14 much exactly what's happening, you're having this proxy measure
15 of receptivity in terms of favorite ad done in California,
16 Vermont, New Hampshire and Massachusetts.

17 THE COURT: Slightly different populations?

18 THE WITNESS: Yes, Your Honor, slightly different.

19 BY MR. BERNICK:

20 Q. Let's go down that road. I think that the Court has --
21 is obviously where we are. My able partner, Ms. Honigberg,
22 points out to me the following, and we can walk through it
23 together and you and I can both learn at the same time as the
24 Court.

25 This is quoting from the Biener article. "To examine the

1 effect of tobacco marketing on youths who had not engaged in any
2 experimentation with tobacco, we repeated the analyses with only
3 the 402 respondents who at baseline had never taken a puff of a
4 cigarette. Among these never-smokers, the rate of progression to
5 establish smoking was 29 percent for those who had high
6 receptivity to marketing at baseline. The rates of smoking
7 initiation among those who had moderate and low were 12 percent
8 and 11 percent respectively. We used the same multiple logistic
9 regression model described above, but substituted a two-level
10 indicator of susceptibility to smoking for the three-level
11 baseline smoking status; the magnitude of the effect of
12 receptivity to marketing was essentially unchanged. The odds
13 ratio for youths with high receptivity in relation to those with
14 low receptivity was 2.32. However, the 95 percent confidence
15 interval for the odds ratio included, 1, most likely a result of
16 lower statistical power because of the reduced sample size."

17 What that means was it was not found to be statistically
18 significant, perhaps as a result of low sample size, correct?

19 A. I would say it was definitely the result of low sample
20 size when you have an odds ratio over two and it doesn't
21 overlap -- when it overlaps one, it's almost exclusively a
22 sample size issue.

23 Q. But the fact remains that with the design of the Biener
24 Study, they were not able to find statistical significance
25 within well established scientific parameters for that

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1 comparison, correct?

2 A. For which comparison, sir?

3 Q. The comparison we just went through where we excluded the
4 experimenters?

5 A. When you excluded the experimenters it was not
6 statistically significant at the 95 percent level, but the odds
7 ratio was in excess of 2 and the rate of smoking was double for
8 those with high exposure.

9 Q. Well, but again, you can't make that statement on the
10 basis of statistical significance, it fails that test, correct?

11 A. It is not statistically significant at the 95 percent
12 level, that's not the only level of significance of a study.

13 Q. And again --

14 THE COURT: Isn't that an extraordinarily well established
15 level of statistical significance?

16 THE WITNESS: In this instance, Your Honor, where they are
17 looking at this very issue where they basically cut their
18 original sample in half to just look at the non susceptible
19 never-smokers and still found a doubled risk but among a lower --
20 fewer number of young people, that would be viewed as being a
21 very -- an important finding of clinical significance, realizing
22 that it's not statistically significant primarily because they
23 cut their original sample in half to look at this specific
24 question.

25 BY MR. BERNICK:

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1 Q. Well, let's just go over that for one moment because --
2 well, first of all, we agree that recognized statistical
3 methodology would not recognize that result as being a positive
4 result, correct? You may make a different judgment based upon
5 your clinical experience, but from a statistical point of view,
6 that result is not a positive result, correct?

7 A. All it is is it's not statistically significant at the
8 point 05 level.

9 THE COURT REPORTER: Point 05 level?

10 THE WITNESS: Yes.

11 Q. And that is the established level that is used for
12 virtually, probably, all the studies that you've talked about in
13 your testimony that are statistical studies, correct?

14 A. Yes, typically, yes.

15 Q. Okay. And just so we're clear on what we're dealing
16 with, you're talking about an odds ratio in relationship to one,
17 correct?

18 A. Yes.

19 Q. Okay. And what statistical significance does it say
20 within the range -- I'm sorry, you can develop a point estimate,
21 but in looking for statistical significance, you say to a
22 95 percent degree of certainty, what is the range where we can
23 say -- what is the range of outcomes that we can say is the
24 correct range to a 95-degree percent of certainty, correct?

25 A. Yes, sir.

1 Q. Okay. And all that you can say, if you have a point
2 estimate that falls within that range, all that you can say is
3 that to a 95 percent degree of certainty, the actual result, the
4 true result falls within this range, correct?

5 A. Yes, sir.

6 Q. And what that means is that as long as you're applying
7 that standard, you can't say that the real result is more likely
8 at the top end of the range or at the bottom end of the range,
9 correct?

10 A. Not in terms of statistical significance, no.

11 Q. Right. So it is equally likely that the true result, if
12 you have a positive odds ratio, but the confidence interval
13 includes or goes below one, it is equally possible that the true
14 result is either positive, that is as above one, or its
15 negative, it's below one or it is one, you can't make any
16 statistical differentiation between the likelihood of those
17 different results, correct?

18 A. That's right.

19 Q. And that's why statisticians, then, say it's not
20 statistically significant, correct?

21 A. Yes. And that's why -- but you also look at the
22 magnitude of the odds ratio. Previous discussion, when I was in
23 the secondhand smoke the odds ratio is 1.2 and there's argument
24 as to whether that's statistically significant and here we have
25 an odds ratio of 2.3, which is more than twice the risk, and

1 they say in the paper that it doesn't reach statistical
2 significance because of the halving of the sample size to 400
3 students.

4 Q. But in ETS where you may have 1.16 or 1.2, that's a very
5 low increased risk, correct?

6 A. Compared to 2.3, yes.

7 Q. Those are though, when people make that statement,
8 they're doing it on the basis of a meta-analysis, which puts
9 confidence intervals around that point estimate that do not
10 include one, correct?

11 A. Not just in a meta-analysis, the results from many of the
12 ETS studies show a similar type of increase in relative risk.

13 Q. Right. But those studies have a confidence interval that
14 does not include one, the positive studies do, correct?

15 A. Yes, typically.

16 Q. Now, let's then push on to talk about what all this means
17 in terms of the longitudinal studies that we've gone through --
18 and I think I can move more quickly towards the end of this,
19 although I suppose we're going to get to your further testimony
20 about the Biener and Siegel Study at some point in any event,
21 right. Let's talk about these longitudinal studies, and I want
22 to review by talking about actual smoking behaviors in terms of
23 initiation.

24 We've dealt with marketing, right, studies that look for
25 a relationship between marketing and initiation, right?

- 1 A. Yes, sir.
- 2 Q. And with respect to advertising only, are there any
3 longitudinal studies that work with advertising only, tying them
4 to initiation?
- 5 A. The only study that looks at advertising only is the
6 Pucci and Siegel Study, but it looks at an actual behavior, but
7 not in terms of initiation.
- 8 Q. Right. So if we wanted this first thing, this first deal
9 would include through a proxy the Biener and Siegel, right?
- 10 A. Yes, sir.
- 11 Q. But on advertising only, is there any study that goes
12 from advertising only to initiation?
- 13 A. I would put brand preference there, so you would know
14 what the outcome was. If you have under actual behavior,
15 initiation is one part of behavior, brand preference is --
- 16 Q. I'm talking about initiation.
- 17 A. Well, I'm just saying that advertising -- the literature
18 points advertising only, as in magazines, towards subsequent
19 brand preference.
- 20 Q. But I'm talking about initiation of smoking, that is,
21 actual initiation of smoking as opposed to the preference of
22 those who ultimately do become smokers.
- 23 A. I'm not aware of any longitudinal study that does that on
24 advertising only.
- 25 Q. What about promotion only? We'll get to specific brands

1 in a minute. What about promotions only, is there any that does
2 promotion only to initiation?

3 A. The studies don't break out when they look at marketing,
4 they don't typically break out advertising and promotion, so,
5 no.

6 Q. What about specific brands?

7 A. There may be, I'm not aware of any that are specific
8 brands.

9 Q. What about a specific ad campaign within the brand? I
10 take the answer to that would be no by virtue of the same fact?

11 A. Yes.

12 Q. Now, I'm going to ask a slightly different question that
13 I didn't think to put on the chart but I think is probably
14 important to ask: What, if you wanted to isolate a certain kind
15 of image, the image of being young and having fun, or the image
16 of the independent woman or the independent man, whether it's a
17 Camel image or a Marlboro image, or a Kool image, is there any
18 longitudinal study that picks out a kind of image and advertise
19 it longitudinally to initiation?

20 A. I don't see how you could tease out in a single campaign
21 or image. That would have to be done experimentally, and as we
22 discussed before, experimental studies with an outcome of
23 initiation wouldn't be able to be done.

24 Q. Well, no, no, I'm talking about not just a particular
25 brand, but there are a variety of brands that detect, for

1 example, an independent woman or an independent man, correct?

2 A. Yes.

3 Q. Okay. I'm just asking whether there are any studies that
4 take that kind of image, regardless of the brand, and try to
5 trace it to initiation?

6 A. And I was just saying I don't know how you could tease
7 out only that image from a longitudinal study because children
8 are exposed to multiple images from different types of
9 campaigns. It would be difficult.

10 Q. Okay. Let me pursue it --

11 THE COURT: And so, therefore, I think the answer is no;
12 is that fair to say?

13 THE WITNESS: Yes, yes, Your Honor.

14 BY MR. BERNICK:

15 Q. Now, when you get to post -- advertising has changed
16 since the MSA was put into place, correct?

17 A. It's changed and it's increased in expenditures and it's
18 changed in some ways as well.

19 Q. Well, just so we're clear, today you don't have cigarette
20 advertising on TV, you don't have it on the radio, you don't
21 have it on billboards, correct?

22 A. Post MSA you don't have it on billboards, but we didn't
23 have it on TV or radio in terms of any of these studies.

24 Q. I understand. But you don't center it on billboards, you
25 don't have it in a variety of other contexts that used to be

1 covered in -- with cigarette advertising campaigns, correct?

2 A. The only venues that I'm aware of that's not covered that
3 was pre-MSA was billboards and transit.

4 Q. Okay. And there has been also -- let's just get it this
5 way. This is page 79 of Dr. Chaloupka's testimony in this case,
6 and figure 44 basically takes the share of price-related and
7 image-oriented marketing advertising expenditures, and we can
8 see that by 2002 the price related share is over 90 percent and
9 the image-related share is somewhere probably less than
10 10 percent, is image related, correct?

11 A. Yes, sir, that appears that's what this is showing.

12 Q. Okay. And that does represent a change as you go back to
13 the mid-1990s, does it not?

14 A. Yes, it appears to. The only point I was trying to make
15 was that the pie has increased as well, that 10 percent of 12
16 billion is much more than 10 percent of six billion.

17 Q. But even on a normalized dollar basis, do you know there
18 is anymore -- whether the image related to advertising was more
19 or less than it was in the mid-1990s?

20 A. I think that's the question. I don't know the answer.
21 But we could calculate it.

22 Q. Well, let's get beyond dollars to then talking about, I
23 guess, measured still by dollars, but get into particular types
24 of advertising. Isn't it true that when you break out the image
25 advertising in 2002, that also the vehicles for that advertising

1 have significantly changed in terms of share of expenditures?
2 For example, outdoors, I think you've indicated that's the pink
3 one here, that's almost gone; print advertising has also shrunk
4 in terms of share, and public entertainment, public
5 entertainment was more similar to what it was previously,
6 correct, rather than having you squint at the chart, print
7 advertising of cigarettes has also declined, correct, that is in
8 magazines?

9 A. I don't know if the dollar amount has declined or not. I
10 know that it appears that the percent of the pie has declined,
11 but I don't know personally whether the dollar amount on print
12 advertising has changed pre or post MSA.

13 Q. Okay. What about sampling?

14 MS. CROCKER: Your Honor, if Dr. Eriksen could be provided
15 a copy of the testimony of Dr. Chaloupka, as I have been, he
16 could see these charts and he could see the context and perhaps
17 be able to see them better than on that small monitor.

18 MR. BERNICK: All this is really getting to, and I'll
19 withdraw the last question.

20 BY MR. BERNICK:

21 Q. Are you aware of any longitudinal study going to smoking
22 initiation that has focused, in a sense, where we are today in
23 terms of the advertising that's being done?

24 A. Yes.

25 Q. Which one?

1 A. Keeller and Hu.

2 Q. Yeah, but that's not a longitudinal study working with
3 initiation, is it?

4 A. It's an econometric study looking at consumption.

5 Q. Consumption, I didn't ask you about that. I'm talking
6 about a longitudinal study that looks at smoking initiation as
7 among adolescents.

8 A. The only two longitudinal studies that I'm aware of that
9 look at smoking initiation are the Biener and Siegel and the
10 Choi Study.

11 Q. And do any of those work with where we are, let's say as
12 of 2002?

13 A. No, my recollection of both studies, the data were
14 collected during the '90s.

15 Q. Let's go back to the concept of cause for just a moment,
16 and I think what I'll try to do is just put this up here. I
17 don't know if that will stay up there it may fall down. If it
18 does it does.

19 We talked very outset about the fact that observational
20 studies, longitudinal observational studies could, in fact, be
21 used to establish a causal relationship, correct? Do you
22 remember that?

23 A. My recollection of the discussion was that there was a
24 variety of types of evidence, including longitudinal studies,
25 but also case control studies, histological pathology studies,

1 that were used in the 1964 report to establish the causal
2 relationship. Particularly they acknowledge that you couldn't
3 just do it experimentally, you had to rely on the variety of
4 types of evidence, including longitudinal.

5 Q. But my question wasn't really confined to the '64 report.
6 You acknowledge, and we went through Susser and we went through
7 the Cochrane review, you acknowledged that longitudinal studies,
8 observational longitudinal studies could, in fact, be the basis
9 for determining a causal relationship, correct?

10 A. Yes, if that's all you have available to you, yes.

11 Q. Okay. Now, we know that if we wanted to take a step back
12 over time, there's been a lot of discussion about this 1994
13 Surgeon General's Report and then subsequent reports, and this
14 language has been picked out of the '94 Report where the preface
15 by the then Surgeon General, that was Dr. Elders, correct?

16 A. Yes, Surgeon General Elders was in office at the time of
17 that report.

18 Q. It says in the preface, "A misguided debate has arisen
19 about whether tobacco promotion "causes" young people to
20 smoke -- misguided because single source causation is probably
21 too simple an explanation for any social phenomenon. The more
22 important issue is what effect tobacco promotion might have."
23 And she goes on at the end of the paragraph to say, "Whether
24 causal or not, these effects foster" -- it doesn't say
25 "cause" -- "foster the uptake of smoking, initiating for many a

1 dismal and relentless change of events."

2 The first question to you is, isn't it a fact that the
3 preface that Dr. Elders wrote is not part of the formal peer
4 review process that is followed for the issuance of Surgeon
5 Generals reports?

6 A. If this is in the preface, yes, that's true. The remarks
7 of the Surgeon General are not peer reviewed.

8 Q. If we go to the body of the report itself, under "major
9 conclusions" in 1994, the body of the report itself actually
10 says as to cigarette advertising, number 5, "Cigarette
11 advertising appears to increase young people's risk of smoking
12 by affecting their perceptions of the pervasiveness, image and
13 function of smoking." Do you see that?

14 A. Yes, I do.

15 Q. And that, obviously, is not a clear or unequivocal
16 statement of causality, correct?

17 A. I believe it's a clear statement. There are other
18 statements in the report as well that speak to the influence of
19 marketing on initiation.

20 Q. I know, but this is actually the major conclusion being
21 recited in the report, correct?

22 A. Yes, sir.

23 Q. Okay. And this major conclusion doesn't say that
24 cigarette advertising causes initiation, does it?

25 A. It doesn't because it's a misguided debate, as the

1 Surgeon General said in the preface.

2 Q. For whatever reason, we've already been through a lot of
3 reasons, but it doesn't say that, correct?

4 MS. CROCKER: Objection, Your Honor, asked and answered.

5 THE COURT: Sustained.

6 BY MR. BERNICK:

7 Q. In fact, if we go to the further body of the report, it
8 says: "A substantial and growing body of scientific literature
9 has reported on young people's awareness of and attitudes about
10 cigarette advertising and promotional activities." Skipping
11 down. "To date, however, no longitudinal study of direct
12 relationship" --

13 THE COURT: Wait a minute, where are you?

14 MR. BERNICK: I'm sorry, it's my bracketed section. I
15 said "skipping down do date however."

16 THE COURT: Thank you.

17 BY MR. BERNICK:

18 Q. "No longitudinal study of the direct relationship of
19 cigarette advertising to smoking initiation has been reported in
20 the literature. This lack of definitive literature does not
21 imply that a causal relationship does not exist, rather, better
22 quantification of exposure, effect and etiology is needed.
23 Important data from research conducted for the tobacco industry
24 are not available; such information would add considerably to
25 our knowledge."

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1 But then critically it says, "A definitive study such as a
2 randomized control trial with young people exposed and not
3 exposed to cigarette advertising, is both practically and
4 ethically impossible." That would be our randomized control
5 trial, right, on our board here?

6 THE COURT: What's the objection?

7 MS. CROCKER: Could we just know what page Mr. Bernick is
8 reading from?

9 MR. BERNICK: I'm sorry, page 188.

10 MS. CROCKER: So Dr. Eriksen can direct himself in the
11 actual report in he needs to.

12 THE COURT: I believe he has it.

13 MR. BERNICK: Yes.

14 BY MR. BERNICK:

15 Q. That was the randomized control trial we talked about as
16 being one of the methods, right?

17 A. Yes, sir.

18 Q. "What is possible, and needed, is research that is
19 longitudinal and multi variant that takes very much statistical
20 modeling methods and uses large samples of children and young
21 adolescents who have not tried smoking and who have had
22 relatively little exposure to cigarette advertising." Do you
23 see that?

24 A. Yes, sir.

25 Q. So what the report is suggesting is that although the

1 randomized control trial methodology is not available, the
2 longitudinal observational studies properly control multi
3 variant are available and are possible, correct?

4 A. This was a call for this that were not available at the
5 time. This was a call for these studies to be conducted.

6 Q. That was my whole point, and if those studies were
7 conducted it would then enable, presumably, the Surgeon General
8 to more definitively speak to what, if any, the causal
9 relationship was, correct?

10 A. Yes.

11 Q. Okay. Now, since 1994, the longitudinal studies have
12 been done, correct?

13 A. A number of them have, yes.

14 Q. And by the Surgeon General's Report of the year 2000, the
15 Pierce Study had been done, correct, that's 1998?

16 A. Yes, but I'm not --

17 Q. And published?

18 A. Yes, it was published in '98. I'm not sure it was
19 reported in the Surgeon General's Report or not.

20 Q. And the Surgeon General's Report of 2000 did not reach
21 the conclusion that cigarette advertising caused initiation, did
22 it?

23 A. I was just looking at the conclusion from that report
24 that's quoted in my written testimony where they say, "Intensive
25 review of the available data, however, suggests a positive

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1 correlation between level of advertising and overall tobacco
2 consumption, that is as advertising funds increase, the amount
3 of tobacco products purchased by consumers also increases."

4 Q. Could I borrow that from you for half a second? Just so
5 we're clear, that wasn't really particularly responsive to my
6 question. My question dealt with causal relationship to
7 initiation of smoking among adolescents. What you just read us
8 from the Surgeon General's Report is that there's a suggestion
9 of a positive correlation between level of advertising and
10 overall consumption. It's not the same thing as a causal
11 relationship between marketing and youth initiation, is it?

12 A. I don't agree. It depends on what you mean by "causal
13 relationship". The 1964 Surgeon General's Report defines --
14 calls a relationship as a significant effectual relationship.

15 Q. Wait. The Surgeon General once again in 2000, even with
16 the benefit of the longitudinal studies, doesn't say cigarette
17 advertising causes initiation of smoking among adolescents, does
18 it?

19 A. It doesn't use the word "cause" it uses the word
20 "increases", "influences", "fosters" and other terminology such
21 as that.

22 Q. You're sure about that, that is that the Surgeon
23 General's Report in 2000 says that cigarette advertising
24 "increases", not suggests, increases youth initiation? You
25 think that's the language of the 2000 report?

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- 1 A. No, the language is on the screen now that "Advertising
2 funds increase the amount of tobacco products purchased by
3 consumers also increases."
- 4 Q. Right, and that's consumers generally, correct?
- 5 A. Yes, it's not limited to adolescents.
- 6 Q. And, in fact, that's a statement about the consumption
7 studies, and you recognized yourself that the results of the
8 consumption studies are mixed, correct?
- 9 A. If you're referring to the econometric studies, yes, I
10 noted that.
- 11 Q. Now, after 2000 more studies come out including the
12 Sargent Study came out in 2000 -- I'm sorry. And the Biener
13 Study came out in 2000 or 2001, correct?
- 14 A. I'm not exactly sure of the year, but it was either 2000
15 or 2001.
- 16 Q. And those studies were available to the people who did
17 the Cochran review, correct?
- 18 A. Yes.
- 19 Q. In fact, the Cochran review, just so we're clear --
20 actually on the 2000 report before we leave it completely, this
21 is at page 161 of the 2000 report, it was out of order in my
22 folder, otherwise I would have shown it to you earlier. I'm
23 sorry, Dr. Eriksen, for that. It says "The potential
24 influence" -- at page 161 -- "of cigarette advertising and
25 promotion on smoking prevalence has been the subject of concern

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1 and debate for many years." And it talks about some of the
2 issues. "A contentious debate has persisted about whether
3 marketing induces demand and what the appropriate role of
4 government is in protecting the consumer. Although some of
5 these issues are not fully settled, they provide background for
6 considering the reduction of smoking through regulating
7 cigarette advertising, promotion, product availability, and
8 product presentation."

9 There's no statement there that, in fact, cigarette
10 advertising increases youth initiation, is there?

11 A. Not in the paragraph that you just read because that's
12 the introduction to the section that explores this issue.

13 Q. Well, "whether children and adolescents are exposed,
14 those are said to be the subject of a contentious debate,"
15 correct?

16 A. In this section, yes, it says that, but that's not the --
17 I wouldn't want the Surgeon General's report of 2000 to be
18 characterized only by that introductory paragraph.

19 Q. Well, you haven't -- the paragraph you point to doesn't
20 even mention youth initiation, does it?

21 A. It talks about the effect of tobacco marketing on
22 consumption overall.

23 Q. Let's go to the Cochrane Report which now post dates the
24 studies that you talked about. I have on the screen page 80 of
25 your testimony and you say that "The Cochrane Report was just

1 published in 2004 and is the first systematic review conducted
2 on the impact of cigarette marketing on adolescent smoking
3 behavior", correct?

4 A. Yes, I did.

5 Q. So, basically, this is the first systematic review.
6 That's a powerful statement. It says this is the real
7 enchilada, right?

8 A. Did I use that term?

9 Q. No, but you can still agree.

10 A. It's a significant study because systematic reviews are
11 important to look collectively at what the scientific literature
12 has shown and pull it together.

13 Q. And this is the study, in fact, that I showed earlier
14 which says that, "Since experimental studies addressing this
15 issue this question cannot be conducted, we have to rely upon
16 observational data. Susser identifies criteria for evaluating
17 causality of a suspected agent from epidemiological studies,
18 lists the criteria citing Susser, properly conducted
19 longitudinal studies, et cetera, et cetera, can provide evidence
20 supporting the causal links between tobacco marketing and
21 smoking behavior." Those are the criteria that are now going to
22 be applied, correct?

23 A. Sounds familiar.

24 Q. Okay. Now, if we take a look at the Cochrane Review, the
25 Cochrane Review goes through a bunch of longitudinal studies,

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1 and one of the things that is observed by the Cochrane Review is
2 that there are, and this is at page 9, there are several
3 limitations that should be considered in interpreting the
4 results of this review. First, it includes nine studies,
5 included nine studies that are comparatively heterogeneous."
6 Does that have something to do with the apples and oranges
7 issue?

8 A. Yes, sir.

9 Q. Okay. Now, I prepared a little chart that I'll give you
10 --

11 MR. BERNICK: And Your Honor, it's being used for purposes
12 of capturing the concept. Counsel will have it if they want to
13 take issue with its accuracy, I'm sure that they will, but I
14 think that it can be used.

15 THE COURT: A little chart?

16 MR. BERNICK: A little chart. It's a big one on this
17 screen. Do we have that little board of that one, Kathleen?
18 I've got on the left-hand column of JDEM 010219.

19 THE COURT: Now, let's have copies for counsel and for me
20 if you have copies. I'm not sure if you do.

21 BY MR. BERNICK:

22 Q. We see on the left-hand column a total of nine
23 longitudinal studies that are included in the Cochrane Review.

24 A. Yes, sir.

25 Q. And then I've broken out the location of the study, for

1 example Alexander and Armstrong, Charlton, Diaz and While are
2 all non-U.S. populations, correct?

3 A. That's my recollection, yes.

4 Q. And in fact, they're diverse non-U.S. populations,
5 they're people from Scotland, people from Spain, people from
6 Australia, correct?

7 A. It depends on how you define "diverse". They're all
8 developed countries that we consider to be peer countries, so --

9 Q. The smoking status at baseline of these different cohorts
10 were different. Alexander and Armstrong were nonsmokers; Biener
11 included never-smokers as well as experimenters; Charlton is
12 never-smokers; Diaz is nonsmokers; Pierce is never and
13 non-susceptible smokers; Pucci is never-smokers and the like.
14 We have different types of initial cohorts, correct?

15 A. I agree with the concept; I can't attest to the accuracy
16 of anything in this table, but there are apples and oranges in
17 terms of the existing longitudinal studies.

18 Q. Okay. Same thing true of advertising measures, they
19 are also various among the different studies, correct? Would
20 you agree with that statement, that is, that there are different
21 measures of advertising exposure, different proxies in the
22 different studies?

23 A. Yes, some are proxies and some are more direct
24 measurements, but they're different.

25 Q. Likewise in the follow up, the outcome measurement that's

- 1 being examined, those also are various, for example, in Pierce
2 it is smoking susceptibility continuum, or as you said, movement
3 towards smoking, whereas in Biener it's established smoking,
4 correct?
- 5 A. Yes, sir.
- 6 Q. Control, not all of these studies are control studies,
7 are they?
- 8 A. It depends on what you mean by "controlled".
- 9 Q. That is that they control for confounders, Pucci and
10 While are not control studies are they, they say so?
- 11 A. Yes, and they -- most of the studies control for
12 confounders, not all of them do.
- 13 Q. Right, the interview method is also different, school
14 questionnaires, that is questionnaires used in the classroom are
15 the interviewing method in some of the studies, telephone
16 surveys are the methodology in other studies, correct?
- 17 A. Yes, sir.
- 18 Q. For example, Biener is not a questionnaire administered
19 in a classroom setting, it's picking up the telephone and
20 talking to somebody, correct?
- 21 A. That's right, it's telephone administered.
- 22 Q. And not all of the results are statistically significant,
23 correct?
- 24 A. All of the studies have statistically significant results
25 for at least part of their population.

1 Q. So if we wanted to line up, for example, and get blue all
2 the way across by working with a U.S. population where we begin
3 with never-smokers, we measured actual exposure to cigarette
4 advertising, establish smoking as an outcome, controlled, and --
5 even use telephone survey, and then look for statistical
6 significance, we wouldn't find it, correct?

7 A. I have to say, I cannot comprehend the color scheme here,
8 what you mean by lining up all colors the same.

9 Q. Would you agree with me that there's substantial
10 heterogeneity in the group of studies that was reviewed in the
11 Cochrane Review?

12 A. Yes.

13 Q. Would you agree with me that there's substantial
14 heterogeneity in the longitudinal studies with regard to
15 cigarette smoking or advertising and smoking generally? That
16 is, longitudinal studies looking for the impact of cigarette
17 advertising on smoking behavior, that group of longitudinal
18 studies has substantial heterogeneity, correct?

19 A. It depend, not to be cute, it depends on what you mean by
20 "substantial". They all are slightly different in terms of
21 their independent variable and their outcome variable, whether
22 that would be substantial or modest, it depends on what you mean
23 by "substantial".

24 Q. But you were able to answer the question that I just
25 asked you a moment ago by saying yes that it was substantial

1 heterogeneity in the population of studies that were examined by
2 Cochrane, correct?

3 A. I don't recall using the word "substantial".

4 Q. I did and you agreed with me.

5 A. Then I misspoke, I meant to agree with you that
6 heterogeneous as reported in the Cochrane Review.

7 Q. Let me then ask you with respect to this group of studies
8 that are in the Cochrane analysis. Isn't it correct that in
9 Cochrane there was no meta-analysis performed of these
10 longitudinal studies?

11 A. That is correct.

12 Q. And by "meta-analysis" we mean, obviously, that the data
13 was not aggregated for purposes of a statistical analysis,
14 correct?

15 A. That is correct.

16 Q. And as a result, in the Cochrane Review there was no
17 finding of a statistically significant association between
18 cigarette advertising and youth initiation, correct?

19 A. They didn't attempt to put statistical significance on
20 it, they did a qualitative analysis where they came to a
21 conclusion that there was a relationship and a consistent
22 relationship between marketing and youth initiation.

23 Q. Okay. Maybe you've answered the question. You agree
24 with me that they did not make a finding of statistical
25 significance in the association, correct?

1 A. Yes, they did not attempt to.

2 Q. They did not attempt to, nor did they even attempt to
3 quantify --

4 THE COURT: Well, let me just be clear. That wasn't the
5 goal of the Cochrane Study was it?

6 THE WITNESS: Exactly, Your Honor. They very purposefully
7 laid out that they were going to do a qualitative review of all
8 of the longitudinal research that met certain criteria, and then
9 come to an informed decision without a quantitative analysis of
10 statistical significance.

11 BY MR. BERNICK:

12 Q. Let me pursue that. Should we be clear with the Court
13 under the protocols followed by the Cochrane group that in doing
14 their reviews they look for the possibility of doing a
15 meta-analysis?

16 A. I'm not familiar with their parameters for the Cochrane
17 Review except to know that some are analytic and some are
18 qualitative and this one is very directly qualitative and never
19 intended to be analytic.

20 Q. So you don't know one way or the other whether the
21 Cochrane protocol calls out for doing a meta-analysis where the
22 studies permit a meta-analysis?

23 A. No, I do not know that.

24 Q. In fact, these studies that we've got listed here would
25 not be amenable to a meta-analysis, would they?

1 A. I don't know if they attempted to do a meta-analysis or
2 not.

3 Q. I didn't ask you. Isn't it true that these studies are
4 too heterogeneous to do a meta-analysis?

5 A. I'm sorry, I'm not a meta-analysis expert.

6 Q. Fair enough. Are you aware of anybody who has done a
7 meta-analysis of the data relating to cigarette advertising to
8 youth initiation?

9 A. No, I would have reported it if I was aware of it.
10 That's why we rely on the systematic review.

11 Q. Let's take a look at the conclusion that the Cochrane
12 folks reached. In summary it says, and this is at page 10,
13 Dr. Eriksen, "There is substantial evidence that exposure to
14 tobacco advertising is associated with adult smoking [sic] --"

15 THE COURT: No.

16 MR. BERNICK: I'm sorry.

17 BY MR. BERNICK:

18 Q. "-- with adolescent smoking", that's what it says,
19 correct?

20 A. Yes.

21 Q. And then further on, "Longitudinal studies suggest that
22 exposure to tobacco advertising and promotion is associated with
23 the likelihood that adolescents will start to smoke."

24 And it goes on, "Based upon the strength of the
25 association, the consistency of findings across numerous

1 observational studies, temporality and the like, we conclude that
2 tobacco advertising and promotion increases the likelihood that
3 adolescents will start to smoke." That's what it says, correct?

4 A. Yes, Your Honor -- excuse me.

5 THE COURT: That's Mr. Bernick.

6 MR. BERNICK: I haven't gotten that far and I don't think
7 I ever will.

8 THE COURT: Well, I think I won't say anything having
9 learned that it's better if judges don't say much. Go ahead,
10 Mr. Bernick.

11 BY MR. BERNICK:

12 Q. So you have three different things being said. First of
13 all, in summarizing they reach no conclusion with regard to
14 statistical significance at all, that is that the association is
15 statistically significant, we've already agreed on that,
16 correct?

17 A. They didn't attempt to, Your Honor.

18 Q. Well, they -- they didn't do it. They could have, they
19 could have, Dr. Eriksen, they could have said, gee, Dr. Biener's
20 conclusion is that there's a statistically significant
21 association and we buy that.

22 MS. CROCKER: Your Honor, this has been asked and answered
23 many times.

24 THE COURT: It has been. It has been.

25 BY MR. BERNICK:

1 Q. They don't say "causation," do they?

2 A. No, they say "increases the likelihood".

3 Q. In fact, isn't it true that we can't find any statement
4 in the literature today that says cigarette advertising has been
5 shown to cause youth initiation, true or not?

6 A. I'm not sure whether that language is in the literature
7 or not. I know the language that I included in my report is in
8 the literature around "increases", "influences", "fosters", "is
9 associated with", et cetera.

10 THE COURT: Let me ask you a question about the Cochrane
11 Study. Is it appropriate or not in a qualitative analysis, such
12 as this one, rather than a quantitative one, for a study to reach
13 a firm decision on causation? Is that the kind of conclusion, if
14 merited, that is appropriate or not?

15 THE WITNESS: The 2004 Surgeon General's Report, which
16 just came out less than a year ago, outlines ways of coming to
17 conclusions that is based on the weight of the evidence. That
18 may or may not be statistically significant. That report was in
19 relation to smoking and disease, and many of the studies are
20 pathologies, case reports in hospitals, examination of autopsy
21 that don't deal with statistical significance, but rather
22 findings, clinical findings, and all of that evidence is included
23 in coming to a conclusion along the lines of the elements that
24 are up here around whether it's a strong relationship, whether
25 it's consistent, whether there's a temporal dimension.

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1 So statistical significance is one part of evaluating the
2 evidence; not the only part. So qualitative assessments of the
3 existing literature as Cochrane did is very informative. They
4 look at all of the studies, they compare the results, they
5 exclude ones that weren't done well, and then the reviewers come
6 to a conclusion. So it's accepted not always to have to have
7 statistical significance to make a determination, because in some
8 instances like this it's not easily doable.

9 BY MR. BERNICK:

10 Q. Well, let's go to the 2004 Report. The 2004 Report is
11 very specific, is it not, in saying that when you're talking
12 about a causal relationship, you should be very careful about
13 how you use your words, correct?

14 A. I don't know if they say that or imply that.

15 Q. Well, in fact, the whole first part the whole first
16 chapter of the 2004 Report spells out the criteria for saying
17 "cause", correct?

18 A. I believe it speaks to the issue of "causal inference".

19 Q. Using the word "cause," correct?

20 A. I'm not sure.

21 Q. Isn't it a fact that the 2004 Report specifically says
22 that people should avoid using words that are words like
23 "influence" or "risk factor" or "really affect" and should be
24 precise in talking about cause?

25 MS. CROCKER: Your Honor, could Dr. Eriksen be provided a

1 copy of that as I have just been? Thank you.

2 THE WITNESS: Well, it -- no one is going to see me up
3 here anymore.

4 BY MR. BERNICK:

5 Q. Dr. Eriksen you just cited the 2004 Report yourself,
6 correct?

7 A. Yes, sir, I did.

8 Q. Did you read the 2004 Report? I'm assuming you did.

9 A. Yes, I commissioned it.

10 Q. Did you specifically focus on what the 2004 Report says
11 about causality?

12 A. Yes.

13 Q. And isn't it true that nobody has said, nobody has said
14 that the requirements for causality, according to the 2004
15 reports' definitions of causality, have been met when it comes
16 to the relationship of cigarette advertising and youth
17 initiation?

18 A. It wasn't the subject of the 2004 Report. It didn't
19 comment on the topic.

20 Q. I didn't ask that, I said given the tests and
21 methodologies announced in the 2004 Report, nobody's established
22 that any of those tests or methodologies for saying "cause" have
23 been met when it comes to the relationship of advertising and
24 youth initiation, correct?

25 A. I'm sorry, I'm not following this, because I thought we

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1 were talking about the 2004 Report, which is about
2 disease/causation.

3 Q. You're the one who raised it in the context of talking
4 about cigarette advertising and initiation and all I'm saying is
5 if you took that parallel, or said that the 2004 Report has some
6 relationship to your testimony, the fact is that the 2004 Report
7 gives specific requirements for saying "cause", right?

8 A. The 2004 Report lays out a process for determining causal
9 inference and with categories of recommended language from
10 "sufficient evidence" to "suggested evidence" to "inadequate
11 evidence" to "needing more research".

12 Q. Right. And when it comes to the criteria or the
13 methodology for saying there is sufficient evidence to say
14 "cause" the criteria that are established or set out in that
15 report have not been met in the area of the relationship between
16 cigarette advertising, on the one hand, and smoking initiation
17 among adolescents on the other, correct?

18 A. I disagree. The Cochrane Report has the exact criteria
19 on the screen now and they conclude that they were met. They
20 conclude that the association is considered strong, temporally
21 correct, does gradient relationship --

22 Q. And they never say that there is a causal relationship
23 between the two.

24 MS. CROCKER: Your Honor, he was in the middle of his
25 answer.

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1 THE COURT: You may certainly finish your statement.

2 THE WITNESS: They very much come to the conclusion that
3 advertising and promotion increases the likelihood that
4 adolescents will start to smoke. They do not use the word
5 "cause", but they don't need to to come to a conclusion of the
6 relationship, a significant effectual relationship.

7 BY MR. BERNICK:

8 Q. And as you just said, you're not aware of anybody who
9 uses the word "cause", correct?

10 A. I said I'm not aware if anyone is now.

11 Q. And, in fact, you don't use the word "cause", and we just
12 went over early on -- and I want to come back to this -- you
13 said "substantial contributing factor," correct?

14 A. Yes, sir.

15 THE COURT: Let me interrupt with one question in terms of
16 the 2004 Surgeon General's Report. I understand clearly your
17 point that that report addresses causation and disease and,
18 therefore, in your view, Mr. Bernick's question was irrelevant.
19 In terms of laying out the criteria for determining cause, in
20 your view with the criteria laid out in the 2004 Report, apply to
21 the relationship between advertising and youth initiation as well
22 as the relationship between tobacco and disease?

23 THE WITNESS: I would say so in general, and just to give
24 you an example, in this 2004 Report and the original Surgeon
25 General's Report they talk about biologic plausibility, and when

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1 you're talking about a social phenomenon like marketing and
2 behavior it's not biology plausibility it's more -- they use the
3 word theoretic plausibility. Is it plausible that this could be
4 a cause and effect relationship.

5 So it can generally be applied, but there may need to be
6 certain changes based on the fact that we're not dealing with
7 disease causation but rather social factors influencing behavior.
8 But the strength of the association, it's consistency, that one
9 precedes the other, those concepts would apply.

10 BY MR. BERNICK:

11 Q. Now, if we go to the 2004 Report now, just to pick up on
12 what you just said, page 24, the Surgeon General specifically
13 cautions against using certain words that imply causal
14 conclusions by suggesting an active effect on disease. For
15 example, the statement that "smoking is associated with disease
16 could mean that disease frequency is higher in smokers, that it
17 is statistically significantly higher, or that an inferential
18 conclusion about the association has been reached. Depending on
19 the context, words like "effect" or "contributor" can fall into
20 that category, as do statements like smoking, "increases" risk.
21 Such language often appears to be a causal conclusion, albeit
22 without consideration of all of the causally relevant evidence."

23 The Surgeon General is saying if you want to say "cause",
24 be careful when you say it and avoid other words that suggest
25 cause but aren't really based upon an appropriate consideration

1 of the evidence, correct?

2 A. Well, I think the Surgeon General says what's said on the
3 screen and what you just read. I think that it's -- you need to
4 weigh all the evidence in making an attribution of cause and I
5 would agree with that, yes.

6 Q. You specifically decided not to use the word "cause" in
7 your own work in this case, correct?

8 A. Yes, I did.

9 Q. You use "substantial contributing factor". I want to
10 write this up. "Substantial", and then "contributing factor".

11 Now, "contributing factor", "contributing" suggests a
12 relationship, correct?

13 A. Yes.

14 Q. And yet the whole purpose of doing statistical
15 comparisons is to determine whether the relationship is real or
16 whether it may be due to chance, correct?

17 A. I'm sorry, could you repeat the first part?

18 Q. The whole purpose of doing statistical analyses is to
19 reach a conclusion about whether a relationship between two
20 things is real or whether it may be due to chance, correct?

21 A. Yes, I agree with that.

22 Q. Okay. So when you say "contributing factor", you can't
23 say "statistically significant" because that hasn't been
24 demonstrated, correct?

25 A. It's been demonstrated in the individual studies, yes.

1 Q. But it's not been demonstrated as between these two
2 specific points, cigarette marketing exposure and initiation,
3 correct?

4 A. It has in the Biener and Siegel Study and the Choi Study.

5 Q. We already went through that ad nauseam, are you saying
6 that you can say "contributing factor" because there is a
7 statistically significant relationship, is that your testimony?

8 A. I'm sorry, you asked me whether there's been any studies
9 that have shown a statistically significant relationship.

10 Q. Fair enough. When you say "contributing factor", are you
11 representing to the Court that you believe that there has been
12 proven a statistically significant association between cigarette
13 advertising and youth initiation? Do you think that
14 contributing -- do you think that that test has been met or not?

15 A. I did not use the term "contributing" to imply
16 statistical significance. I used it to imply importance.

17 Q. Importance.

18 THE COURT: Mr. Bernick, we're going to have to take a
19 break soon. If this is a good time, fine, if you want to go a
20 few more minutes that's all right.

21 MR. BERNICK: Just a few more minutes, and I'm sorry for
22 how long it's taken, it's taken longer than I thought and it's my
23 responsibility.

24 BY MR. BERNICK:

25 Q. The word "substantial", you have no quantitative estimate

1 of the impact of cigarette advertising on youth initiation, do
2 you?

3 A. I'm sorry, could you repeat it one more time?

4 Q. You have no quantitative estimate of the effect of
5 cigarette advertising on youth initiation, do you?

6 A. I would -- based on the literature, based on the
7 published studies, I would say the published studies, Choi and
8 Biener, Biener, Siegel and Choi suggest that the exposure
9 approximately doubles the risk.

10 Q. Suggest. Isn't it a fact that you testified yourself
11 that you don't have any estimate of the extent of cigarette
12 advertising or promotion upon youth initiation or prevalence?
13 Hasn't that been your testimony in this case?

14 A. I was just saying what the literature is showing, in
15 terms of the increased risk that's been published and is
16 statistically significant, I'm not purporting to represent that
17 as a definitive answer for all the literature or in this case.
18 That's why I use the word "substantial", but I heard your
19 question to be is there evidence showing, quantifying a
20 statistically significant relationship between marketing and
21 youth initiation, and there is and it's about double the risk.

22 Q. Well, we can get into that in more detail perhaps on
23 another occasion, let's just get down to this. Do you remain of
24 the view, as you swore to in your deposition, that not only do
25 you not have an estimate of the extent of youth cigarette

1 advertising or promotion upon youth initiation or prevalence
2 because you haven't seen one. Do you stand by the testimony
3 that you gave under oath in the year 2002?

4 MS. CROCKER: Your Honor, does Dr. Eriksen have a copy of
5 that deposition and can we know what page we're referring to,
6 because I can see --

7 MR. BERNICK: Page 323.

8 MS. CROCKER: -- the context is going to be important.

9 MR. BERNICK: Well --

10 THE WITNESS: I'm sorry, what was the page?

11 THE COURT: 323, I think you said.

12 MR. BERNICK: 323.

13 BY MR. BERNICK:

14 Q. You don't have, as an expert today, you have not provided
15 in your expert report, you don't provide in your testimony on
16 direct examination, you don't provide an expert estimate of the
17 extent of cigarette advertising and its impact on initiation or
18 prevalence, do you?

19 MS. CROCKER: Your Honor, is Mr. Bernick withdrawing his
20 previous question, because that is a new question?

21 MR. BERNICK: Yes, I will, and I want to save time is the
22 reason I'm doing it.

23 BY MR. BERNICK:

24 Q. You're not offering an expert opinion as to a particular
25 estimate, correct?

- 1 A. That's right.
- 2 Q. What you're able to say is "substantial", correct?
- 3 A. Yes, sir.
- 4 Q. Okay. Now, those judgments, that is "substantial", that
5 is that cigarette advertising is a substantial and important --
6 I'm trying to get both of those words together -- it's a
7 substantial important factor in youth initiation, that's the
8 essence of what you're saying, correct?
- 9 A. Actually, "important" is synonym for "substantial" in my
10 mind.
- 11 Q. Oh, okay, "substantial" means "important", and
12 "contributing" doesn't necessarily mean "statistically
13 significant" but it means "important"?
- 14 A. That it is a factor.
- 15 Q. That it is a factor. Now, are you aware of any objective
16 methodology or test, a reproducible objective methodology or
17 test that tells us when a relationship is "important"?
- 18 A. No, not in the sense that you're meaning it.
- 19 Q. Are you aware of any objective reproducible test that
20 tells us when a relationship is "substantial"?
- 21 A. Not in those words. It's an issue of the weight of the
22 evidence and coming to a conclusion about the influence of the
23 factors.
- 24 Q. Would it be fair to say that you're saying that there is
25 a "substantial" or "important" relationship between cigarette

1 advertising and youth initiation, is a qualitative judgment of
2 yours? Maybe based on evidence, but it's a qualitative judgment
3 of yours?

4 A. It's qualitative in that it's not quantitative, but it's
5 my conclusion based on my review of the evidence.

6 Q. Okay. And, in fact, would you be fair and candid with us
7 in saying that there is an important feature of that judgment,
8 which is subjective?

9 A. No.

10 THE COURT: Are you able to quantify in any way what you
11 mean by "substantial" when you say "substantial contributing
12 factor"? For example, are you able to say that in your
13 definition of those terms, you're talking about a 51 percent or
14 more percentage that you apply to the term or equate to the term
15 "substantial"?

16 THE WITNESS: I purposely use "substantial" to avoid
17 "significance" because that was the trap I was getting into of
18 saying what do you mean by "statistically significant". But in
19 terms of my own judgment, I've seen the evidence from the well
20 done studies showing a doubling of the risk based on exposure,
21 and I wouldn't extend that to all of the literature, but the
22 literature that looks at the relationship between marketing and
23 subsequent smoking, established smoking, is showing about a
24 doubled risk between those high exposures and those low
25 exposures, and to me I equates that to "substantial".

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1 BY MR. BERNICK:

2 Q. And yet you can't say that that has been demonstrated
3 statistically, correct?

4 A. Within the individual studies it has.

5 Q. No, I'm saying that your judgment that says it's a
6 doubling of risk, there's no statistical analysis that drives
7 that statement, correct? You have not done a statistical
8 analysis in order to make that statement, correct?

9 A. No, I'm simply -- when I use that statement I'm relying
10 on the individual studies, the longitudinal studies. For
11 instance, the Pucci and Siegel Study, they showed an increased
12 risk on brands preference, you can't come up with a way of
13 comparing all of those into one statistically significant
14 metric.

15 Q. I had a couple more questions on that, but I know that
16 the time has gone on.

17 THE COURT: I think we should take a break for the court
18 reporter. Let's just take 10 minutes and be back, certainly, by
19 quarter of or a little earlier.

20 (Thereupon, a break was had from 11:33 a.m. until
21 11:48 a.m.)

22 THE COURT: All right. I need some time estimates. I
23 think probably we've gone longer than everybody anticipated, but
24 that may be in part because I had a number of questions.

25 Mr. Bernick, when do you think you're going to finish your

1 cross?

2 MR. BERNICK: I should be done in 45 minutes, max.

3 THE COURT: All right. Then we'll probably take a lunch
4 break when you're done.

5 And what does the government anticipate on redirect?

6 MS. CROCKER: Still no more than an hour, Your Honor. Of
7 course, always depending on objections.

8 THE COURT: Right.

9 MR. BERNICK: I'll try to behave myself.

10 THE COURT: Go ahead, please.

11 BY MR. BERNICK:

12 Q. I want to pick up where we left off once again,
13 Dr. Eriksen.

14 If you squirm, then I'll start to squirm.

15 With the decision made to use -- to opine that
16 advertising is a substantial contributing factor -- and I think
17 you acknowledged before we broke that that was a very deliberate
18 decision that you made in this case, correct?

19 A. Yes.

20 Q. You felt that it best articulated your expert views?

21 A. Yes, sir.

22 Q. Okay. Now, you were asked previously, and let me just
23 confirm in your deposition -- you were asked previously why it
24 was that you used the term "substantial contributing factor"
25 rather than "causation." Do you recall that?

1 A. Generally, if you could point me to a page or a
2 deposition.

3 Q. Sure. This is at pages 87 and 88, August 22, 2002.

4 "So what is the difference" is at the top of 88 and you
5 say: "Typically, I would rely on more empirical evidence to
6 establish a causal relationship than was done with control --
7 that was done with controlling for more confounders and use it
8 in terms of -- more of an epidemiologic manner. That's my own
9 personal style and use of the term."

10 And you then go on to explain: "I said, to use the term
11 'causal' or 'causation,' I would reserve that terminology for an
12 investigation that was more empirical, analytic, epidemiologic,
13 that controlled for confounding variables."

14 Does that remain true today?

15 A. Partially. At the time I was deposed, I was trying to
16 differentiate between "substantial" and "significant" and my
17 answer appears to be more differentiated on empirical as opposed
18 to statistical significance. So the answer -- I mean, the issue
19 is: Why did I use "substantial" -- is because I wanted to
20 differentiate it from "significant," which is slightly different
21 than what was in the deposition that you just read.

22 Q. Okay. Then let me be clear. We are clear, and it's true
23 today, that you've used the term "substantial contributing
24 factor" to specifically avoid making a statement regarding
25 statistical significance, true?

1 A. Yes.

2 Q. And you've also used those terms to specifically avoid
3 making a quantitative estimate, true?

4 A. Yes.

5 Q. Okay. Now, there was reference before the break to a
6 doubling of risk or relative risk of 2.0. When you made that
7 reference in response to the Court's question that there was a
8 doubling risk or 2.0, that was harking back to the Biener and
9 Siegel Study, correct?

10 A. Yes. And also the Choi study.

11 THE COURT: I think your microphone isn't working.

12 THE WITNESS: I must have hit it by accident.

13 Yes, Biener and Siegel and also the Choi study.

14 BY MR. BERNICK:

15 Q. There's no statement in your direct testimony or in your
16 prior report that advertising is a substantial contributing
17 factor because there is in fact a doubling of risk, correct?
18 You don't make that statement in your report or in your
19 testimony, correct?

20 A. That's correct. When I responded doubling the risk, I
21 was responding to the question that I thought that you were
22 saying there was no empirical evidence that attempted to
23 quantify it. And I'm just saying there is empirical evidence
24 from these two studies, but I'm not representing that to be the
25 meta-analysis or the weight of the overall literature indicating

- 1 a doubling of the risk.
- 2 Q. And you're not representing that there's a substantial
3 contributing factor relationship because you've reached the
4 assessment that in fact advertising doubles the risk of youth
5 initiation, correct?
- 6 A. That's right.
- 7 Q. You've not expressed that expert opinion, correct?
- 8 A. That's right.
- 9 Q. Okay. Now, it's actually interesting to me, because you
10 talked about a doubling of risk in response to the Court's
11 question about whether there was anything to say more likely
12 than not. Do you remember that?
- 13 A. No, I do not.
- 14 Q. I believe the Court asked a question about whether there
15 was any evidence that the relationship was more likely than not
16 to be true and I think that you then pointed to the Biener -- or
17 you used the word or you pointed to the doubling of risk,
18 correct?
- 19 A. Yes, I recall that.
- 20 Q. And there is, in a sense, a logic to the notion that if
21 you're to say that a relationship is more likely than not, you
22 should have an increased risk of at least two, correct?
- 23 A. Not necessarily, no.
- 24 Q. Well, that's what you were referring to, correct?
- 25 A. No. I was just saying that the empirical evidence

1 suggests that the risk is doubled, but I think you could have a
2 risk that was increased by 50 percent and that would still be a
3 substantial risk. So there's nothing magical about having the
4 risk doubled to be more likely than not.

5 Q. Okay. Well, then, let's unpack that a little bit.
6 You're not here to say that the relationship is a doubling of
7 risk, correct? We've established that?

8 A. I'm just saying that -- no, not the overall relationship.
9 I was just saying that the evidence out there suggests, from two
10 empirical, longitudinal studies, that the risk was doubled.
11 That's all -- the point I was trying to make by bringing that
12 up.

13 Q. Okay. Now, if we actually go to the Biener and Siegel
14 Study, isn't it true that the relationship -- the doubling of
15 risk relationship we previously discussed in talking about
16 whether it held with respect to people who were never smokers;
17 do you remember that?

18 A. Yes, I remember the discussion.

19 Q. And that discussion yielded as an outcome that when it
20 comes to never-smokers, that there was no statistically
21 significant relationship found, in your view, because of sample
22 size; do you remember that?

23 A. Yes. And also the authors' view. It wasn't just mine.

24 Q. Fair enough. I want to focus on a different feature of
25 that article in that way.

1 Setting aside the question of whether -- what the effect
2 was of including the experimenters, I want to focus on what
3 role, if any, advertising paid in the equation and what role, if
4 any, promotion paid in the equation.

5 THE COURT: You don't mean "paid," do you?

6 MR. BERNICK: "Played." What --

7 THE COURT: I think you said "paid," Mr. Bernick.

8 MR. BERNICK: "Played."

9 BY MR. BERNICK:

10 Q. In Biener and Siegel, isn't it true that, depending upon
11 whether an individual who was the subject of that study picked
12 out an advertisement or a promotion drove the question of what
13 their level of receptivity was? That is, to get to the -- to be
14 more specific, to get to the highest level of receptivity, you
15 had to have had picked out both a favorite ad and a favorite
16 promotion, true?

17 A. I would need to look at the study to see if that was
18 precisely the --

19 Q. I'm going to show you the study at page 408:
20 "Predictors: Receptivity to Tobacco Marketing." And it goes on
21 to talk about --

22 THE COURT: Now this is the Biener Study?

23 MR. BERNICK: This is the Biener Study, yes.

24 BY MR. BERNICK:

25 Q. "The highest level of receptivity was assigned to those

1 who reported owning a promotional item and who named a cigarette
2 brand in response to the second question. Those who either
3 owned an item or named a brand were scored as being moderately
4 receptive to marketing. Those who neither owned an item nor
5 named a brand were scored at the lowest level of receptivity."

6 Do you see that?

7 A. Yes, sir.

8 Q. So people -- to get into that highest category, you had
9 to have both, right?

10 A. Yes.

11 Q. Now, today, we don't have promotional items being sold,
12 correct? That is, the image items or the image promotional
13 items are no longer, under the MSA, being used, correct?

14 A. I don't know if that's definitely the case.

15 Q. Well, isn't that your understanding of what's going on
16 under the MSA?

17 A. I believe that there is still the ability to have
18 couponing for -- excuse me -- for collecting miles and
19 exchanging that for products.

20 Q. But promotional items here were things like -- they had
21 to have a logo; they had to have like a bag or a T-shirt. Those
22 kinds of items aren't in use anymore, correct? At least they're
23 not being used by the companies anymore, correct?

24 A. Yes. My understanding is that the MSA required a
25 separating of the use of the logo of the cigarette and the

1 promotional item. But there they're still in existence, but
2 they're no longer being offered.

3 Q. So if we go to the Biener and Siegel Study and talk about
4 the exposure proxy today, we could only look to people's having
5 a favorite ad; we no longer could look to having a promotional
6 item, correct? That wouldn't be a good measure ?

7 A. I think you're probably right. I think -- yeah.

8 Q. Okay. Now, if we take a look at what difference that
9 made in the outcome of the Biener Study, isn't it true that in
10 the Biener Study, people who had only a moderate receptivity --
11 that is, had only a favorite ad or only a promotional item --
12 the result was a point estimate below 1 and the statistical
13 range included 1.

14 In other words, there was no association found; no
15 association found as compared to those with low receptivity?
16 People who only had a favorite ad were no more likely to
17 progress to established smoking than people who had no favorite
18 ad and no promotional item, correct?

19 A. No. Just to correct, this is saying that the moderate
20 was either not having a favorite ad or not having a promotional
21 item.

22 Q. Correct.

23 A. And if there was that either/or situation, they were no
24 different than the group who had neither.

25 Q. So somebody who only got a favorite ad is no more likely

1 under the Biener analysis to progress to becoming an established
2 smoker -- is no more at risk to become an established smoker
3 than somebody who doesn't have a favorite ad or promotional item
4 at all, correct?

5 A. No. Again, you can't conclude that from this. This
6 moderate category is not having -- having either a favorite ad
7 or a promotional item, so some of these -- half of these may
8 only have not had -- they may have had a promotional item, but
9 not a favorite ad. You're only asking me the question in terms
10 of the favorite ad.

11 Q. But let's just put it this way: There's no evidence in
12 the Biener Study that having only a favorite ad puts you at risk
13 to become an established smoker, true?

14 A. Yes, I would agree with that.

15 Q. Wasn't the same result achieved in the Choi study?

16 Do we have Choi for Dr. Eriksen? It's U.S.

17 Exhibit 74019.

18 A. I believe the Choi study had another variable in it which
19 had to do with ability to quit smoking that was used to help
20 define progression to establish smoking.

21 Q. But in any event, whether there was progression --
22 whether it was identical in that respect or not, isn't it true
23 that for those who had only a favorite ad, they were not at risk
24 under the Choi study to become -- to progress to becoming
25 established smokers? That is to say, they were no more likely

1 to be at risk -- withdraw all of that.

2 I'll make it simple. Just having a favorite ad did not
3 put adolescents at risk of progressing towards established
4 smoking in the Choi study, true?

5 A. Let me just take a second.

6 Q. Sure.

7 A. Yes, the moderate category was having a favorite ad.

8 Q. Would you agree with me that on the basis of the very
9 same two studies that you highlighted to the Court before the
10 break -- that is, Choi and Biener -- that the best science that
11 you can point to would say, based upon longitudinal data,
12 statistical analysis, quantitative assessment, that people who
13 only have a favorite ad are not at increased risk of progressing
14 to becoming established smokers as against those who do not have
15 a favorite ad?

16 A. Yes, I would say that's the conclusion of these two
17 papers.

18 Q. Are you aware of any longitudinal study that reaches a
19 different or contrary conclusion?

20 A. The study -- the conclusions that the studies reach are
21 based on the increased risk of exposure to cigarette marketing,
22 including advertising and promotional activities. That's where
23 the relationship has been established.

24 Q. I'm sorry?

25 A. The relationship has been established for those

1 adolescents who are exposed to marketing activities, including
2 advertising, having a favorite brand and promotional activities
3 of having or wanting or using a promotional item.

4 Q. I'm asking you -- if you just focus on people -- on the
5 factual circumstances where there's no promotional item, where
6 people only have a favorite ad, would you agree with me that
7 there's no longitudinal study that says that having that ad
8 alone puts you at significantly increased risk for becoming an
9 established smoker? Would you agree with me?

10 A. Yes, I would agree with you.

11 Q. Good. One last subject and then we'll close it off and
12 let you go on to do other things.

13 I briefly want to touch on a couple other factors. We
14 focused very heavily on cigarette marketing, receptivity and
15 initiation. Peer smoking has also been very heavily studied,
16 has it not?

17 A. Yes, sir.

18 Q. Would you agree with me that peer smoking is a
19 substantial contributing factor to smoking initiation?

20 A. I would agree.

21 Q. What about social and cultural environment? Would you
22 agree with me that that is a substantial contributing factor to
23 smoking initiation?

24 A. Could you help me understand what you mean by "social and
25 cultural environment"?

1 Q. I mean, for example, what the Surgeon General discussed
2 in 1989 in the Introduction to the '89 Report as being the
3 cultural changes that had been responsible for the dramatic
4 decline in cigarette consumption. Are you familiar with the '89
5 Report?

6 A. I am familiar with the '89 Report, but I'm not familiar
7 exactly with how they refer to social and cultural environment.

8 Q. Well, if that's not good enough, how about "social forces
9 on tobacco in society"? Are we on the same page now?

10 A. No, not in terms of helping define what you mean by
11 "social and cultural." I mean, I'm just trying to get an
12 understanding.

13 This article was written with relation to the
14 sociopolitical environment around the tobacco control efforts,
15 which I don't think is what you're referring to about social --

16 Q. Yeah. I'm talking about the social and political
17 environment, the same social and political environment that you
18 referred to in your own article. The social and political
19 environment is in fact a substantial contributing factor to
20 whether people start to smoke or not?

21 A. I would say I don't think there's that good empirical
22 evidence to show that's in effect with adolescents; that
23 adolescents seem to be somewhat inured to that influence.

24 Q. Well, that was going to be -- fair point.

25 What you have written, actually, is that the social and

1 political environment is a substantial contributing factor in
2 whether adults continue to smoke, correct?

3 A. I may have. If you can show it to me.

4 Q. Would you agree with me, then, whether -- I can point it
5 out to you, but would you agree with me that the social and
6 political environment that you've written about is a substantial
7 contributing factor when it comes to adult smoking?

8 A. I'm not sure what I've written exactly, but the fact of
9 the social norms changing, putting pressures on smokers to quit
10 has been an important factor. And if that's what you're
11 referring to, social-cultural environment for adults, I would
12 agree with that.

13 Q. Now, when it comes to adolescents -- I had my circle and
14 then I put it down.

15 When it comes to adolescents, isn't it true that there is
16 a factor -- and I think it has been formerly referred to here as
17 "psychological needs"; it is a very important factor when it
18 comes to smoking initiation?

19 A. I believe I agree with that if it's referring to
20 adolescent psychosocial development and those types of issues.

21 Q. And in particular, you have tended in your public
22 comments to refer to the angst -- that being a technical term --
23 the angst of adolescents and how important it is in thinking
24 about smoking initiation, correct?

25 A. I can't recall using that word, although I don't deny

1 having used it. But again, the process of being an adolescent,
2 I've said, corresponds -- well, you'll show me.

3 Q. This is a quote that was attributed to you by the Atlanta
4 Constitution during a more felicitous time of the year,
5 August 23, 1995. And you say -- at least the quote is:
6 "There's an increased level of cynicism now about the future and
7 we don't know why, whether the environmental conditions in the
8 future will be bad, whether there will be jobs. And in general,
9 there's some angst amongst teens about the future."

10 And then, this is not a quote, but it's attributed to
11 you: "This angst, he adds, comes from a common feeling that
12 there's little to look forward to and this is fed by bleak
13 warnings that bombard youngsters about unsafe sex and the like."

14 Do you remember saying words to that effect?

15 A. Yes. I take that direct quote, that in general, there's
16 some angst among teens about the future. I said that.

17 Q. Now, you said this in 1995, correct?

18 A. That appears to be the date of this.

19 Q. And in 1995, adolescent -- initiation of smoking or
20 prevalence of smoking among adolescents was coming to a peak.
21 I'm showing you page 40 of your direct testimony.

22 Right?

23 A. Yes, sir.

24 Q. And a lot of people are wondering why is it that
25 adolescent smoking has come up so much; is that correct?

- 1 A. Yes, sir.
- 2 Q. Whereas adult smoking -- this is page 46 of your
3 testimony -- was on a different track. Adolescent smoking was
4 increasing; adult smoking was still continuing on the way down,
5 right?
- 6 A. A very minor decrease in adult smoking during that year,
7 I think a half a percent.
- 8 Q. But still, obviously, not doing what the adolescents were
9 doing?
- 10 A. Definitely a different direction.
- 11 Q. And people were trying to figure out, well, why is that
12 true? Is that the social-political environment? Is it
13 something about the psychology of kids at the time? Is it
14 something about peer smoking? People were wondering what that
15 might be, correct?
- 16 A. Yes, there was a lot of interest in trying to understand
17 that, including the possible effect of cigarette marketing on
18 it.
- 19 Q. Correct. Isn't it true that the State of California
20 Department of Health Services' Tobacco Control Section
21 specifically analyzed the question of what it was that was
22 contributing to this spike in prevalence in 1995, right?
- 23 A. I'm not aware of the study.
- 24 Q. You're not aware of the study and the conclusion -- I'll
25 read you the conclusion and see whether you've heard this coming

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1 out of California. Quote: "There is no evidence that tobacco
2 industry promotional campaigns aimed at young adults are making
3 young adult smokers more at risk to smoke or encouraging those
4 that had experimented during adolescence to begin again and
5 convert to established smoking."

6 You're not familiar that the California folks reached the
7 conclusion that this spike was not caused by advertising and
8 promotion?

9 MS. CROCKER: Your Honor, could Dr. Eriksen be provided
10 with that so he can see those words?

11 MR. BERNICK: I'm just asking whether he's familiar with
12 it. If not, it's not worth it.

13 BY MR. BERNICK:

14 Q. Are you familiar with the fact that --

15 THE COURT: Do you think you recognize it or do you need
16 to look at the study to see whether you recognize it?

17 THE WITNESS: I definitely don't recognize it. It sounds
18 like it's a report that's not been published, so I don't know
19 what he's referring to, really.

20 BY MR. BERNICK:

21 Q. Well, I'll just show you JD 001223.

22 A. Thank you.

23 Q. Actually, that's mine and Kathleen here has got the full
24 one for you.

25 Are you familiar with that report?

1 A. No, I'm not.

2 Q. Did people also during this period of time study the
3 potential influence of ethnic and gender differences on youth
4 smoking?

5 A. Yes, sir.

6 Q. And it turned out that there might be some impact of
7 ethnic background and gender differences on smoking trends,
8 correct?

9 A. Yes, sir. We were one of the first to identify the
10 differences, particularly in ethnic -- racial and ethnic
11 disparities and youth smoking.

12 Q. Was there also analysis of trends in risk behaviors
13 during this period of time?

14 A. Yes, there's ongoing monitoring of other risk behaviors
15 in addition to smoking.

16 Q. Showing you JDEM 010211. This was taken from "Monitoring
17 the Future" study, 2004. Are you familiar with the "Monitoring
18 the Future" study in 2004?

19 A. Yes.

20 Q. And it shows -- we just isolated alcohol use, any use
21 being -- illicit drug use, marijuana, hashish and cigarettes and
22 they all appear to show, do they not, an increased trend in
23 those types of risk behaviors during the mid-1990s and a
24 tapering off somewhat of that trend in the latter part of the
25 1990s and early 2000 period of time?

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- 1 A. I wouldn't necessarily agree with that. I think it's a
2 complex pattern. You see some lines that are flat; you see
3 spiking at different times. You see --
- 4 Q. Can you --
- 5 A. -- increases in marijuana and hashish that seem to be
6 fairly stable over time, so I'm not sure --
- 7 Q. Take a look at alcohol use. It starts to rise in the
8 early '90s, peaks in 1997 when cigarette smoking peaks and then
9 comes down. It's not as pronounced, but it's still the same
10 trend, isn't it?
- 11 A. I'm sorry. I can't agree with that.
- 12 Q. Okay. Are you aware of any analysis that attempts to
13 determine whether the bump in cigarette smoking among
14 adolescents in the mid-1990s might have been affected -- might
15 have been affected in the sense of a substantial contributing
16 factor by increases in risk taking among adolescents generally?
- 17 A. I am. The 1994 Surgeon General's Report made a big
18 analysis of the relationship between cigarette smoking and other
19 risk behaviors and concluded that cigarette smoking was often
20 the first risk behavior in a cascade of other risk behaviors.
- 21 Q. Fair enough. Might be possible. What about with the
22 benefit of all the data through the year 2000?
- 23 A. No, sir.
- 24 Q. Is it true, on the basis of your own analysis, that there
25 has been a cyclicality in adolescent smoking prevalence at other

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1 points in time; for example, in the 1970s, there likewise was an
2 increase in smoking prevalence among adolescents and then a
3 decline?

4 A. Yes, sir.

5 Q. A couple clean-up questions. First, with respect to the
6 Joe Camel campaign that you mentioned, isn't it true that after
7 extensive analysis, you have concluded that the target audience
8 for the Joe Camel campaign was younger adult smokers, 18 to 24
9 or 18 to 20?

10 MS. CROCKER: Your Honor, I object on scope grounds. This
11 is beyond the scope of Dr. Eriksen's direct testimony in this
12 case.

13 MR. BERNICK: Well, but he raised this himself in talking
14 about the fact that when he looked at some numbers, he says,
15 "Well, I believe that that's the influence of the Joe Camel
16 campaign."

17 THE COURT: In his direct?

18 MR. BERNICK: No, in my cross-examination he raised this,
19 so I just want to close it off.

20 MS. CROCKER: Your Honor, what he raised -- and I guess
21 it's a comparison of memories here unless we have a citation to
22 the record -- was not target groups, but was rather whether or
23 not that campaign, in combination with other campaigns, had an
24 effect, looking at the scientific literature, which is in his
25 direct testimony.

1 MR. BERNICK: I don't think --

2 THE COURT: I'll allow a couple questions on it.

3 BY MR. BERNICK:

4 Q. Was that the conclusion that you reached; that is, that
5 the documentation from Reynolds' files established, in your
6 view, that the target audience for Joe Camel was people 18 and
7 above?

8 A. I believe that's what I previously testified and
9 reflected in my deposition.

10 Q. Let's talk a little bit about a statement in your report.
11 And you shouldn't believe that I construed this to be a personal
12 comment, but you single me out, so I have to rise to my own
13 defense in the event that it was directed --

14 THE COURT: What page?

15 MR. BERNICK: This is page 48.

16 BY MR. BERNICK:

17 Q. I told my colleagues here that it wasn't necessary to
18 respond to this, but I now believe, with the benefit of
19 hindsight or benefit of more thought, that I'm going to ask you
20 a question.

21 It says: "Is it accurate, as counsel for Brown &
22 Williamson suggested in a question on January 10th, 2005 at page
23 9612, that, quote: 'Approximately 25 percent of people who
24 become established smokers become established smokers between
25 the ages of 18 and 21?'"

1 And then you say: "Understanding 'established' to mean
2 daily smoking, I'm not aware of any data that quantifies this
3 fact as stated. The 1994 report of the Surgeon General" -- and
4 there's a cite -- "indicates that among people persons who have
5 smoked daily, 53 percent become daily smokers before the age of
6 18 and another 24 percent become daily smokers before the age of
7 20. Thus what I can state is that 77 percent of persons who
8 have ever smoked daily started daily smoking by age 19. I can't
9 figure out whether that is confirmatory of what I said or not."
10 It says, "Another 24 percent become daily smokers before the age
11 of 20. I have suggested that approximately 25 percent of people
12 who become established smokers become established smokers
13 between the ages of 18 and 21."

14 Is there a difference of view that you and I have on that
15 or --

16 A. The -- the only difference is the age. I was trying to
17 be precise to indicate that the only data we had was to 18 to
18 20. We didn't have any data going to age 21.

19 Q. Fair enough.

20 A. But this would be an example of validation.

21 Q. Of validation?

22 A. Right.

23 Q. Okay. Then I'll take it precisely that way.

24 Finally, are you aware of any scientific study that has
25 addressed the question of whether representations made by the

1 tobacco industry on whether they market to people who are under
2 21 has had -- or have had any actual impact on smoking
3 initiation among adolescents? Are you aware of any scientific
4 studies that have analyzed that issue?

5 A. I'll ask you if you could just repeat it again.

6 Q. Yeah. It was kind of tricky. There's a claim that's
7 been made in this case, I'll tell you, Dr. Eriksen, that the
8 tobacco companies represented publicly that they only marketed
9 to people 21 and over. I'll give that to you as a statement,
10 regardless of what the evidence is.

11 And my question is: Are you aware of any scientific
12 studies that have analyzed whether any such representations
13 actually have had an impact on smoking initiation among
14 adolescents?

15 A. If the question is: Has the representation of
16 advertising only to those under 21 -- has been scientifically
17 studied to have some type of adverse effect?

18 Q. Yes. On anybody, really.

19 A. I'm not aware that that particular study has been -- that
20 question has been studied or published in those terms.

21 MR. BERNICK: I have nothing further.

22 THE COURT: Let me point out that the question asked about
23 marketing, not just advertising. Is your answer in terms of
24 marketing or in terms of advertising?

25 MR. BERNICK: Oh, fair enough. I'll make it clear.

1 BY MR. BERNICK:

2 Q. I'll recharacterize and describe the claim that's being
3 made. The claim that's being made in this case is that the
4 tobacco companies, or some of them, represented that they didn't
5 market to people who were under the age of 21.

6 Would your answer to my question be the same now that
7 I've clarified it to be a representation that's broader; that
8 is, that there's not marketing to people who are under 21?

9 A. And again, the preface -- the prefatory phrase to this
10 question is: "Are there any studies that have shown this hasn't
11 had an adverse effect?"

12 Q. Or that it has had an adverse effect.

13 A. I'm sorry. I guess -- I want to answer truthfully and
14 I'm just not sure I'm fully understanding --

15 Q. Assume for purposes of my question that one or more
16 companies represented that at a certain point in time, they were
17 not marketing to people who were under the age of 21.

18 Has any scientific study addressed whether there was any
19 impact of any such representation?

20 A. Again, my confusion is about the impact of the
21 representation versus the impact of the marketing.

22 Q. No, it's the impact of the representation. I'm glad you
23 asked that question.

24 A. I'm not aware of studies that have looked at the impact
25 of the representation. I am aware of studies that have looked

1 at the impact of the marketing, but not of the representation.

2 MR. BERNICK: And we've been talking about the marketing
3 already.

4 Thank you. That's all I have, Dr. Eriksen.

5 THE COURT: Ms. Crocker, the choice is yours. Do you want
6 to start your redirect now or would you benefit from the lunch
7 break at this point? What do you wish to do?

8 MS. CROCKER: I think it would be fine for us to go ahead
9 and take our lunch break, Your Honor, and I can start right after
10 lunch if that's okay with the Court.

11 THE COURT: Okay. Then let's come back at 1:30, please.
12 We'll obviously finish redirect. And your next witness is
13 Mr. Wells; is that right?

14 MS. CROCKER: That's right, Your Honor.

15 THE COURT: And how long do you anticipate for your direct
16 of him?

17 MS. EUBANKS: The direct of Mr. Wells, we estimate
18 anywhere from two to three hours.

19 THE COURT: So that would be the afternoon.

20 Who's going to do the cross, Mr. Bernick? Do you have any
21 idea.

22 MR. BERNICK: My estimate would be pretty much about the
23 same, maybe somewhat less, but I certainly would hope not more
24 than two to three hours.

25 THE COURT: And then some redirect. He's certainly going

1 to go through tomorrow morning.

2 MS. EUBANKS: It seems like.

3 THE COURT: Sounds like?

4 MS. EUBANKS: My guess.

5 MR. BERNICK: That would be my estimate.

6 THE COURT: And you will start tomorrow afternoon with

7 Mr. LeBow?

8 MS. EUBANKS: Correct, Your Honor.

9 THE COURT: And will you be able to get through your
10 direct of Mr. LeBow tomorrow afternoon?

11 MS. EUBANKS: I think so, but I'm not certain.

12 THE COURT: All right. Okay. Thank you. We'll take
13 until 1:30, everybody.

14 (Thereupon, a luncheon recess was had.)

15

16 C E R T I F I C A T E

17 I, Scott L. Wallace, RDR-CRR, certify that the
18 foregoing is a correct transcript from the record of proceedings
in the above-entitled matter.

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I N D E X

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E X H I B I T S

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	:	CA No. 99-2496(GK)
	:	February 2, 2005
Plaintiff,	:	
	:	1:34 p.m.
	:	
v.	:	Washington, D.C.
	:	
PHILIP MORRIS USA, et al.,	:	
	:	
Defendants.	:	
.	:	

VOLUME 58
AFTERNOON SESSION
TRANSCRIPT OF TRIAL RECORD
BEFORE THE HONORABLE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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10 P R O C E E D I N G S

11 THE COURT: Ms. Crocker, please, on redirect.

12 MS. CROCKER: Elizabeth Crocker, for the record.

13 MICHAEL ERIKSEN, Ph.D., Government's witness, SWORN

14 REDIRECT EXAMINATION

15 BY MS. CROCKER:

16 Q. Dr. Eriksen, I'm going to ask you a couple of questions
17 first about an area that we just covered before our lunch break.
18 You were asked some questions related to the Biener study that
19 isolated advertising from promotion. Do you recall that line of
20 questions?

21 A. Yes.

22 Q. You were asked specifically whether there was evidence in
23 the Biener study that having only a favorite ad puts you at risk
24 to become an established smoker. Do you recall being asked
25 that?

1 A. Yes.

2 Q. And you agree with that statement. Do you recall that?

3 A. I'm not sure what the statement was.

4 Q. Let me read it to you, Dr., Eriksen, so we are clear. The
5 statement was: "There is no evidence in the Biener study that
6 having only a favorite ad puts you at a risk to become an
7 established smoker. True?"

8 A. Yes, I recall that. And I said, "yes".

9 Q. And your answer was, "yes"?

10 A. Yes.

11 Q. Is it your testimony that there is no evidence that connects
12 advertising and youth smoking initiation?

13 A. No, not at all. I was simply responding to the question of
14 having a favorite ad in and of itself did that have a
15 significant relationship with subsequent smoking.

16 Q. What evidence is there, if there is evidence as you've
17 indicated, that connects advertising and youth smoking
18 initiation?

19 A. Well, I think it's very difficult to separate advertising
20 from.

21 MR. BERNICK: I'm sorry, Your Honor. I understand that
22 this is -- I object. This is simply a reiteration, that
23 question probably would be asked of the entire direct
24 examination that he offered, that was the whole purpose of his
25 testimony.

1 MS. CROCKER: This is limited follow up to follow up
2 exactly on the question that asked Dr. Eriksen to isolate
3 advertising from promotion, address each in turn, and it's not
4 addressed in his direct testimony under that guise, Your Honor.

5 THE COURT: The objection is overruled.

6 BY MS. CROCKER:

7 Q. Do you recall, the question, Dr. Eriksen?

8 A. Could you repeat it, please?

9 Q. You had just indicated that there was evidence that
10 connected advertising and youth smoking initiation and I was
11 just following up to ask you to explain briefly what that
12 evidence is?

13 A. Yes. First of all, it's artificial to separate advertising
14 from promotions in this way. The line of questions was about
15 having a favorite ad versus having a promotional item. And, in
16 reality, promotional items and their availability in advertising
17 is intertwined.

18 My answer yes to the question was only in relation to
19 the very specific question of, is there any evidence about
20 having a favorite ad being associated with initiation of
21 smoking?

22 And, based on those two studies, I said no, that there
23 wasn't any evidence, but the reality is there is evidence that
24 advertising influences smoking initiation when viewed as having
25 a favorite ad, owning a promotional item, desiring to use a

1 promotional item, et cetera.

2 Q. And what evidence are you referring to?

3 A. I was referring to the longitudinal studies that have been
4 discussed, the Biener and Siegel study, the Choi study, the
5 relationship to established smoking, as well as the other
6 advertising studies that we discussed, such as Pucci and Siegel,
7 that looked at exposure to actual advertising images in
8 magazines and subsequent preference for the brands that were
9 advertised in those magazines.

10 Q. And just to follow up briefly. What you just said that
11 there would be -- it would be artificial to separate out
12 advertising from promotion. Do you recall just testifying that?

13 A. Yes.

14 Q. Can you explain why you would state that?

15 A. Well, the -- the desire for promotional brand is very much
16 related, or desire for promotional item is very much related to
17 the advertising for that brand. You know about the availability
18 of the promotional item through advertising and the two are
19 intertwined, that you can't separate them in reality.
20 Advertising and promotions come together to reinforce and
21 support one another.

22 And you know, my response to the question was, in terms
23 of the narrowly-defined specific question of do you have a
24 favorite brand is how I respond. But that's in no way an
25 indication of the real scope of advertising or its interplay

1 with promotional activities.

2 Q. Thank you, Dr. Eriksen. Moving to a different question that
3 was asked of you today.

4 You were asked to respond to, or to affirm that your
5 testimony was as you gave it at your deposition. This is your
6 deposition of August 23, 2002. I'll remind you of what was put
7 up on the board. And this is from page 323 of that deposition.

8 Do you recall being shown this testimony? I'll give
9 you a moment to turn to it.

10 A. Yes, I recall.

11 Q. And the question that was read into the record was the
12 question there on line 5, "You don't have any estimate of the
13 extent of cigarette advertising or promotion upon youth
14 initiation or prevalence, do you?"

15 And your answer, "I don't have an estimate of that or
16 have I seen one."

17 Dr. Eriksen, would the benefit of the whole page in
18 front of you, did you go on to further explain your answer to
19 that question?

20 A. Yes. I noted this earlier. There have been estimates of
21 the quanti -- efforts to try to quantify the precise
22 contribution of cigarette advertising and promotion on youth
23 smoking. And the one in particular I'm familiar with was
24 published in the 1998 Pierce article where he attributed
25 34 percent of youth smoking as due to marketing. So, I raised

1 that to say there are -- there is an estimate of attempt to
2 quantify it that's in the literature.

3 Q. And when you say you raised it, you pointed to the screen.
4 Were you pointing to a portion of your deposition where you had
5 stated that?

6 A. Yes. It's on the bottom of page 323, starting at line 14.

7 MR. BERNICK: Your Honor, I have an objection. If that
8 testimony is proffered for the purpose of establishing that
9 Pierce made that estimate, I have no quarrel.

10 To the extent that this testimony is now being
11 proffered as this witness's opinion that, in fact, there is a
12 34 percent increase, then I most definitely object as beyond the
13 scope of the direct examination. It's beyond the scope of the
14 cross-examination, beyond cross-examination.

15 He confirmed that he was not offering an estimate here.
16 So that would be my objection. I know it's a little bit
17 belated, but I took it he was simply reciting the results of the
18 Pierce study.

19 THE COURT: He's bound by the testimony he gave, and
20 the government can correct me. I don't think you're offering it
21 for his personal opinion but rather for the opinion for which it
22 was cited.

23 MS. CROCKER: That's right, Your Honor.

24 THE COURT: All right.

25 BY MS. CROCKER:

1 Q. Okay, Dr. Eriksen, I'm going to take you to another one of
2 your depositions that you were showed today, and this is your
3 deposition of August 22, 2002. If you would take a moment to
4 locate that one.

5 And if you would turn with me at page 88 of your
6 deposition.

7 A. Okay.

8 Q. Do you recall being asked a series of questions about the
9 testimony you provided on pages 87 and 88 of your deposition?

10 A. Yes, I do.

11 Q. And do you recall that your answer, specifically at lines 12
12 to 16 of page 88, were read into the record?

13 A. Yes, I do.

14 Q. And that's your testimony there that the term causal or
15 causation you say, "I would reserve that terminology for
16 investigation. It was more empirical analytic, epidemiologic,
17 controlled for confounding variable." Is that correct?

18 A. Yes.

19 Q. Dr. Eriksen, you stated in response to questions that your
20 answer there was to provide an answer to the question of whether
21 there was a difference between substantial contributing factor
22 and statistical significance.

23 Do you recall testifying to that this morning?

24 A. Yes, I do.

25 Q. Did you go on in the next few pages of the deposition to

1 provide a more direct answer to the question that was asked you
2 this morning regarding the difference between saying that
3 advertising is a substantial contributing factor and saying that
4 advertising is a cause of the decision to smoke?

5 A. Yes. We had a substantial discussion, or we had a long
6 discussion of it in the deposition.

7 Q. And was that exact question posed to you on page 92 of that
8 deposition? And I just point you to lines 14 through 18.

9 A. Yes, it was.

10 Q. And the question there is, "Is there any difference in your
11 mind between saying that advertising is a substantial
12 contributing factor to the decision to smoke and saying that
13 advertising is the cause of the decision to smoke?"

14 Do you see that question?

15 A. Yes.

16 MR. BERNICK: Your Honor, I object. I don't know what
17 the purpose is for the proffer of other prior testimony. I
18 offered it for purposes of impeachment.

19 I don't believe there's anything in the rules that says
20 you can proffer another early statement that is in fact
21 inconsistent, but by way of bolstering now the witness's opinion
22 or rehabilitating it.

23 MS. CROCKER: Your Honor, a limited portion of this
24 deposition was read, and the specific question before
25 Dr. Eriksen was this question asked by Mr. Bernick. "What is

1 the difference between saying that marketing is a substantial
2 contributing factor and between saying that marketing is a cause
3 of the decision to smoke?"

4 And he was -- Dr. Eriksen was pointed to the pages
5 that I read to before, but not to the page directly afterward
6 where that question was read, and so --

7 THE COURT: The objection is overruled.

8 Certainly when an attempt is made to impeach a witness
9 with prior testimony, it is perfectly appropriate for -- on
10 redirect -- for that witness to be given an opportunity to show
11 that he gave further testimony at that deposition which
12 clarified his position or more fully explicated it.

13 And I'm assuming that that's the purpose that you're
14 providing this for.

15 MS. CROCKER: That's exactly right, Your Honor.

16 THE COURT: Go ahead, please.

17 BY MS. CROCKER:

18 Q. Dr. Eriksen, your testimony at lines 20 of page 92 through
19 line 5 of 93, was "That the language that I've used in my
20 depositions and testimony and statement that there will be
21 consistency between using the term contributing factor and a
22 cause implying -- as long as it's understood it's not being said
23 to be the only cause, but it's one factor among many or one
24 cause among many. I would generally be comfortable with that
25 being used interchangeably."

1 Do you see that testimony?

2 A. Yes, I did.

3 Q. And is that consistent with the testimony that you were
4 providing today?

5 A. It certainly was my intent to be consistent with that.

6 And I think the issue becomes when a cause is implied
7 or I infer that's being used to be the only cause as opposed to
8 one cause of many, which is what I answered in my deposition,
9 that I'm comfortable with using cause if it's one cause of many.

10 It's in my written testimony to that effect, and that's
11 how I believed I was answering the question in the context of
12 cause. If it's meant the only cause, I don't agree that's the
13 only cause. But if it's one cause of many I'm comfortable with
14 using the term cause.

15 Q. So by choosing the term "substantial contributing factor,"
16 you meant to indicate that marketing was one cause among many?

17 MR. BERNICK: Objection, leading.

18 THE COURT: I'll overrule.

19 A. Yes, I meant it to mean a cause, but not the cause.

20 Q. Thank you, Dr. Eriksen.

21 We're going to turn back to some testimony that you
22 gave, and I know it's been a few days since you were here with
23 us, so I'll remind you by putting the testimony up on the screen
24 where I can.

25 First, I'm going to ask you just to follow up briefly

1 on demonstrative, United States Demonstrative Exhibit 17684.
2 Dr. Eriksen, do you recall being shown this demonstrative by
3 Mr. Bernick?

4 A. Yes, I do.

5 Q. And do you recall being asked a series of questions about
6 whether or not the events after 1989 on this demonstrative were
7 present in the 1989 Surgeon General report?

8 A. Yes, I do.

9 Q. And I'm going to put this testimony on the screen. And I've
10 got page 11475 on the screen and I would just point you to line
11 11.

12 The question asked of you was, "The same thing is true
13 of the first Great American Smokeout. That was not on the
14 Surgeon General's chart in 1989, was it?"

15 "Answer: I do not know, sir. May I clarify what I
16 believe I said during the live presentation?

17 "Question: You said whatever it is you said. We can
18 go back over it."

19 Dr. Eriksen, this is our chance for you to clarify what
20 it was that you believed that you said during the one hour live
21 presentation about that chart. So what would you like to
22 clarify for the court?

23 A. Well, first of all, in response to the question about
24 whether the Great American Smokeout was in the 1989 report, I
25 was saying I do not know whether it is or is not. It may be,

1 but I don't recall it without looking at it firsthand.

2 And then going back to my live testimony. What I
3 believe I said was that the -- this chart was -- appeared in the
4 1989 Surgeon General's Report and then was maintained on the CDC
5 website from which I took it and then added in these additional
6 data points, not the narrative.

7 Q. Just so that we are absolutely clear, Dr. Eriksen. Did you
8 type or did you have typed for you any words that appear on this
9 chart?

10 A. No. The only -- well, the source at the bottom I had put in
11 and then changed the date at the top from 1900 to 1999 to 1900
12 to 2003.

13 Q. But the series of words with arrows that point to events
14 that happened after 1989, for example, Nonsmokers Rights
15 Movement begins, First American -- Great American Smokeout, et
16 cetera, did you include those data points on this chart?

17 A. I did not include the narrative on the chart at all. No
18 events were inserted by me. It was just the data.

19 Q. Where did you derive those events from?

20 A. The events are on the CDC website that has the per capita,
21 the slide is maintained on the CDC website and they update it
22 with events, which were -- I'm not certain which were in the
23 1989 report. But that was where this graph appeared in a
24 published form with some different -- obviously, some changes on
25 it. But the events came from the CDC website.

1 Q. Thank you, Dr. Eriksen.

2 I'm going to take you to a different series of
3 questions now that were asked of you on that first day of your
4 testimony.

5 There were a series of questions that asked you about
6 causation and the meaning of the word "cause" in 1964, talking
7 about the Surgeon General's Report of 1964. Do you recall that
8 series of questions?

9 A. Yes.

10 Q. I'm just going to point you to your testimony that you
11 provided, and this is at page 11481. The testimony at line 20,
12 or the question was, "The 1964 report said, significantly and
13 signally that smoking caused disease, caused lung cancer;
14 correct?"

15 And your answer was, "I believe that the language was
16 that smoking causes -- was causally related to lung cancer in
17 men."

18 Do you recall that testimony?

19 A. Yes, I do.

20 Q. Dr. Eriksen, is there a difference between using the term
21 "cause" and "causally related"?

22 A. That's a difficult question to answer. It depends on who
23 you're asking.

24 But the whole -- the Surgeon General's Report was very
25 careful to describe why they used the word cause and they chose

1 cause and what it meant when they chose it, and they were very
2 careful with using the language causally related.

3 So, I think cause and causally related at times is used
4 interchangeably and at times may have separate meanings.

5 In this case, this specific case, it's clear that the
6 authors of the Surgeon General's report in 1964 meant it to mean
7 and they used this term a significant effectual relationship.
8 And they had to choose between determinants, cause, and factor
9 and they chose "cause" as the word to describe a significant
10 effectual relationship.

11 Q. Has the Surgeon General expressed in any reports a
12 conclusion regarding the connection between marketing and
13 smoking behavior in the terminology that you've just explained,
14 a significant effectual relationship?

15 A. Yes. Absolutely and consistently from the Surgeon General's
16 Reports from 1989 to 2001, all of the reports come to the same
17 conclusion, that there's a relationship between marketing and
18 youth initiation using different terms throughout those reports.
19 But they've all come to the same consistent conclusions, which
20 are reflected in my written testimony.

21 Q. What are some of the different terms that were used in those
22 reports, if you can recall?

23 A. They used terms such as -- I think the most common term was
24 influence, but they also used terms such as effects, fosters, is
25 associated with -- there's a variety of other -- increases. I

1 actually went through and listed out the terms that were used in
2 the various reports.

3 And while the terms differed, they all indicated the
4 same nature of the relationship between marketing and cigarette
5 smoking, as is the case not only with our Surgeon General's
6 Reports, but reports from across the world.

7 Q. You were also asked a series of questions related to the
8 criteria the Surgeon General had specified for determining
9 cause. Do you recall some of those questions?

10 A. Yes.

11 Q. You were asked questions about the criteria in the 1964
12 report. Do you recall those?

13 A. Yes, I do.

14 Q. And the criteria include consistency, strength, specificity,
15 temporal relationship, and coherence. And that's at page 11483.
16 Is that correct, Dr. Eriksen?

17 A. That's correct, what I was asked. I think there were
18 additional criteria, but they were certainly consistent and
19 among the criteria in that Surgeon General's Report.

20 Q. You were also asked a series of questions, and we've covered
21 it extensively today as well, about the Cochrane Collaborative
22 Review. Do you recall those questions both on your first day
23 and this morning?

24 A. Yes, I do.

25 Q. And do you recall being asked about the factors for

1 determining a causal relationship that are specified in that
2 review?

3 A. Yes, I do.

4 Q. I'm just going to put that testimony up to remind you.

5 This is at page 11484. And I'll read from 11485. The
6 criteria are specified there at lines 3 through 13. Do you see
7 that on the board there, Dr. Eriksen?

8 A. Yes, I do.

9 Q. And then those were compared to the criteria in the 1964.
10 Do you see that question being asked of you at line 16?

11 A. Yes, I do.

12 Q. Do you have a copy of the Cochrane interview in front of
13 you?

14 A. Multiple copies.

15 Q. If you could turn to the third page of that review where
16 those criteria appear. Do you see those criteria listed at the
17 top left-hand corner of that page?

18 A. Yes, I do.

19 Q. Dr. Eriksen, how, if at all, are these criteria relevant to
20 the conclusions that you have stated that marketing is a
21 substantial contributing factor to youth smoking behavior?

22 A. These criteria are what was recommended in 1964 by the
23 Surgeon General and again in 2004 by the Surgeon General to
24 establish causal inference to be able to make a link between
25 cause and effect.

1 And the significance of the Cochrane Review is that
2 they looked at those criteria in relation to the existing
3 evidence, and they came to the conclusion based on that, that
4 there is evidence that marketing, cigarette marketing, increases
5 cigarette initiation among young people based on those criteria.

6 So in some ways it comes full circle. These are the
7 criteria for causation. They were applied to the existing
8 literature that exists pro and con, and they were all consistent
9 in direction, the association, all these criteria. That's why
10 it led them to that conclusion as opposed to relying on a
11 statistically significant meta-analysis. They applied the
12 criteria and the tools that were available to them.

13 Q. Dr. Eriksen, if you would turn to the prior page, page 2 of
14 that review.

15 You were read a portion of this paragraph, and I'm just
16 going to ask you to look at the rest of the paragraph. We have
17 it up on the screen for you.

18 Do you see the conclusion there in the first sentence
19 of that paragraph, "Randomized control trials of the effects of
20 advertising would be unethical and impractical. In addition,
21 advertising strategies and their effects are very complex. Even
22 if true experiments were ethically possible with randomization
23 of exposure to advertising and promotion, they could not capture
24 the vast array of marketing strategies that are employed by
25 tobacco companies such as event sponsorship, portrayal of

1 smoking in movies, television programs and popular music."

2 Do you see that, Dr. Eriksen?

3 A. Yes, I do.

4 Q. Is this conclusion that I've just read into the record
5 inconsistent or consistent with the Cochrane Reviews,
6 Consideration and Discussion of the Criteria For Evaluating
7 Causality, that are then discussed on the immediately following
8 page?

9 A. I think it's very consistent in that you need to rely on the
10 criteria of causal inference when you can't do experimentation
11 and randomization, and that's the relevance of these causal
12 criteria and the conundrum of not being able to do an
13 experiment.

14 Q. And finally, Dr. Eriksen, I'm going to ask you to flip to
15 page 10 of this review and to look at the paragraph of summary
16 that is directly above reviewer's conclusions on that page.

17 Do you recall being asked questions about this
18 paragraph today?

19 A. Yes, I do.

20 Q. The paragraph states, "In summary, there is substantial
21 evidence that exposure to tobacco advertising is associated with
22 adolescent smoking.

23 "Number one. All nine longitudinal cohort studies
24 showed a positive, consistent, and specific relationship.

25 "Number two. The association is considered strong and

1 a temporally-correct dose gradient has been demonstrated between
2 naming advertising brands and being willing to use a promotional
3 item, and smoking uptake.

4 "Number three. It is theoretically plausible that
5 exposure to advertising increases smoking uptake."

6 Now, my question to you, Dr. Eriksen, following up from
7 questions you were asked today, is the word cause, causation or
8 any form of that word used in this conclusion?

9 A. Not explicitly, no.

10 Q. If this review, as you had just testified, applied to
11 criteria for evaluating causality that we've just discussed, why
12 did the review not use the word cause or causation in its
13 conclusion?

14 MR. BERNICK: Objection. In a way it calls for
15 speculation. He can give his interpretation of that, but unless
16 he knows for a fact why they didn't use it, I think the question
17 is improper.

18 THE COURT: Unless the Doctor can answer of his own
19 personal knowledge, the objection is sustained because it does
20 call for interpretation.

21 So, Doctor, let me just state it a little more clearly.
22 You may answer the question only if you know the answer based on
23 your own personal direct knowledge.

24 MS. CROCKER: Your Honor, I'll withdraw and just ask a
25 better question.

1 THE COURT: All right.

2 BY MS. CROCKER:

3 Q. How can this review apply to criteria for causality and
4 reach a conclusion without using the term cause or causality or
5 causation in the review?

6 A. I believe the answer to that is the -- this long history of
7 causal inference has been based on trying to establish the
8 criteria by which you make a determination, and these ones of
9 specificity and strength and directionality have been used to
10 demonstrate that there's a -- I go back to a significant,
11 effectual relationship. That there's clearly -- the independent
12 variable is a cause, is a factor contributes to the change.

13 And that's the -- the literature, the scholarship on
14 this doesn't focus on the word cause. It focuses on, is there
15 evidence that A affects B and how strong is that evidence?

16 And that's the context in which this language is
17 provided for them to come to their conclusion, which doesn't
18 include the word cause either.

19 But it says, can clearly that -- and I'd have to look
20 precisely to see what the word was -- but that marketing
21 increases youth smoking.

22 Q. Thank you, Dr. Eriksen.

23 You were asked numerous questions today about your
24 conclusion that there is a substantial contributing -- that
25 marketing is a substantial contributing factor to youth smoking

1 behavior. Do you recall those questions?

2 A. Yes, I do.

3 Q. Is there any real scientific debate among scientists that
4 cigarette marketing affects youth smoking initiation or smoking
5 behavior, in general?

6 A. Not that I'm aware of among independent scientists.

7 Q. Is there any real scientific debate that there exists some
8 causal relationship between cigarette marketing and youth
9 smoking behavior?

10 A. I'm sorry. Could you repeat the first part?

11 Q. Is there any real scientific debate that there exists a
12 causal relationship between cigarette marketing and youth
13 smoking behavior?

14 A. No.

15 Q. And for how long has this been true in the scientific
16 community?

17 MR. BERNICK: Could we get a specification of how long
18 has what been true?

19 BY MS. CROCKER:

20 Q. How long has it been true that there has been no real
21 scientific debate that there is a causal relationship between
22 cigarette marketing and youth smoking behavior?

23 A. I can't put a specific date on it, but I would say the --
24 the scientific evidence has accumulated in the last half of the
25 1990s and going into the present.

1 Q. Do any scientists or recent published studies that you can
2 recall conclude there is no relationship whatsoever between
3 cigarette marketing and youth smoking behavior?

4 A. I'm sorry. I'm going to have to ask you to repeat the first
5 part again.

6 Q. Do any scientists or scientific studies that you can recall
7 conclude that there is no relationship whatsoever between
8 cigarette marketing and youth smoking behavior?

9 A. Yes. As I indicated in my written testimony, there are
10 primarily econometric studies that question whether there's a
11 relationship between marketing expenditures and consumption, and
12 there's other studies that question it between youth smoking. I
13 mean, one study I can think of.

14 So there is some published scientific studies. They
15 tend to the large part to be funded by or -- tobacco industry or
16 be conducted by consultants who work for the tobacco companies.

17 Q. Just so that we are clear. The studies that you're
18 referring to are all econometric studies; is that correct?

19 A. Yes.

20 Q. And is that why you've stated in your response to
21 cross-examination that the results from the field of
22 econometrics on this issue are mixed?

23 A. Yes.

24 Q. Do the tobacco companies admit or deny publicly that there
25 is a causal relationship between cigarette marketing and youth

1 smoking behavior?

2 MR. BERNICK: Your Honor, I object. It goes beyond the
3 scope of the direct examination and also my cross.

4 THE COURT: Sustained.

5 There was no discussion on the cross this morning about
6 that -- about what the position is of the tobacco companies.

7 BY MS. CROCKER:

8 Q. I'm going to turn to a different area, Dr. Eriksen.

9 Do you recall being asked a number of questions related
10 to the demonstrative that you prepared for your live testimony
11 which showed the gold standard for establishing causality?

12 A. Yes, I do.

13 Q. And at page 11489, the question was asked, "In fact, there
14 is no study that you cited to the court in your direct
15 examination or here in court live, there's no study that says
16 you cannot determine cause unless you have a randomized
17 controlled trial.

18 "Answer: I'm not aware of any studies that directly
19 address that point. What I was trying to do was just to show
20 the gold standard for establishing causality is the randomized
21 controlled trial."

22 Do you recall that testimony?

23 A. Yes, I do.

24 Q. Is it your testimony that science requires that this gold
25 standard study must be done in order to determine whether

1 marketing has an effect on smoking behavior?

2 A. No, not at all. In fact, that's the whole point, is that
3 you don't need to have the gold standard to establish the
4 relationship. And that's why the Cochrane Review is so
5 important, because it analyzes the existing literature and makes
6 a conclusion based on the weight of the evidence.

7 This issue came up as well during the FTC proceedings
8 with the Joe Camel Campaign, and they concluded as well that you
9 did not need one definitive study of statistical significance to
10 determine whether cigarette marketing causes children to start
11 to smoke.

12 Q. Dr. Eriksen, if this gold standard study that you described
13 in your demonstrative is not required by science, has anyone
14 asserted that a single definitive study must be performed to
15 determine whether marketing has an effect on smoking behavior?

16 A. That certainly has been the inference that I've drawn from
17 all of my experience in legal proceedings on this issue, both in
18 testifying and in deposition; that the absence of that single
19 definitive study was -- therefore, there was a failure to show
20 there was a relationship or a causal relationship between
21 marketing and cigarette -- smoking initiation among young
22 people.

23 And that single definitive study can't be done and it
24 need not be done because the evidence is already exists to come
25 to that conclusion.

1 Q. Dr. Eriksen, you were asked a question about your own study
2 in relationship to advertising, and you were asked a question
3 about promotion. I'll just put it up. It's from page 11531.

4 Do you recall providing the testimony, "I'm not aware
5 of any study that looks at promotions in relation to brand
6 preference because promotional data are typically not available
7 to researchers. The advertising data that we use, we purchased
8 from a third party."

9 Do you recall that testimony?

10 A. Yes, I do.

11 Q. Why are promotional data not available to researchers?

12 A. The -- the promotional data are considered to be proprietary
13 by the cigarette companies, and while they are available and are
14 provided to the Federal Trade Commission, they are not available
15 to the scientific community for the purposes of scholarly
16 analysis.

17 And as I previously discussed, that type of data would
18 be very valuable in better understanding the nature of the
19 relationship between advertising and promotions and brand
20 specific smoking behavior. But it's considered to be trade --
21 it's considered to be proprietary and confidential and not
22 available.

23 Q. Thank you, Dr. Eriksen.

24 MS. CROCKER: We have no more questions.

25 MR. BERNICK: Your Honor, I had one matter to raise

1 before Dr. Eriksen gets off the stand, but if you will give me
2 just a moment to consult with my co-counsel here.

3 (Pause)

4 There was a part of the redirect examination that
5 related to the FTC proceeding concerning Joe Camel.

6 THE COURT: One sentence.

7 MR. BERNICK: And I think that the record should be
8 clear on what conclusion the commission actually reached with
9 respect to that.

10 And we can cover that with other witnesses, but I don't
11 know if the witness intended to represent to the court that
12 there was a conclusion that Joe Camel caused youth initiation.

13 THE COURT: Let me go back to the answer because that
14 was not very long ago at all.

15 MS. CROCKER: Your Honor, I could follow up with
16 Dr. Eriksen to clarify that if you find that helpful for the
17 record.

18 (Pause)

19 THE COURT: One minute, everybody. Let's see if I can
20 find it.

21 This is the testimony, everybody.

22 "Question: Is it your testimony that science requires
23 that this gold standard study must be done in order to determine
24 whether marketing has an effect on smoking behavior?

25 "Answer: No, not at all. In fact, that's the whole

1 point, is that you don't need to have the gold standard to
2 establish the relationship. And that's why the Cochrane Review
3 is so important, because it analyzes the existing literature and
4 makes a conclusion based on the weight of the evidence.

5 "This issue came up as well during the FTC proceedings
6 with the Joe Camel Campaign, and they concluded as well that you
7 did not need one definitive study of statistical significance to
8 determine whether cigarette marketing causes children to start
9 to smoke."

10 MR. BERNICK: Yes.

11 THE COURT: I am virtually positive that that was the
12 only reference in the redirect.

13 MR. BERNICK: That's correct. And the inference from
14 that statement is that the commission did, in fact, conclude
15 after hearing the evidence that there was, in fact, that
16 relationship.

17 THE COURT: All right. This is the point, Mr. Bernick.
18 I know there's going to be testimony. We've already had a lot
19 of testimony. Do you feel it has to be established with this
20 witness?

21 MR. BERNICK: I thought it might be easy to establish
22 that that's not what the commission did, but we are more than
23 happy to put it in through another witness.

24 THE COURT: Do you want to ask a final follow-up
25 question? If you think --

1 MS. CROCKER: Yes, Your Honor, because I think now --

2 THE COURT: -- because you think the witness knows the
3 answer.

4 MS. CROCKER: -- there's confusion on the record as to
5 what Dr. Eriksen was testifying to, and I can clear that up
6 right now.

7 THE COURT: Go ahead.

8 BY MS. CROCKER:

9 Q. Dr. Eriksen, were you testifying that after hearing evidence
10 the FTC proceeding ended with a finding that Joe Camel -- the
11 Joe Camel Campaign had an effect on youth smoking initiation?

12 A. No. The complaint was dropped as being moot because the
13 remedies were already achieved it was felt through the Master
14 Settlement Agreement.

15 My comment was specific to the administrative law
16 judge's conclusion that was contained in the dismissal order
17 that the FTC commissioners agreed with that pertained to the
18 issue of not having a need for one definitive statistically
19 significant study.

20 Q. And just so that we are clear. Are you talking about the
21 first Joe Camel proceeding in the early 1990s or the second
22 proceeding that was later in the 1990s?

23 A. The second proceeding that concluded in November of 1998.

24 MS. CROCKER: Your Honor, I think that's very clear
25 now.

1 THE COURT: All right. Thank you.

2 All right. Dr. Eriksen, thank you, you may step down.

3 MS. CROCKER: Your Honor, we have very few document
4 issues with respect to Dr. Eriksen, all of which we can just
5 submit in an order to Your Honor.

6 THE COURT: All of which what?

7 MS. CROCKER: I think we can submit in an order to Your
8 Honor because there were no actual objections filed.

9 MR. BERNICK: We have not -- I don't know -- reached a
10 conclusion as to the exhibits that we would intend to offer.

11 THE COURT: Wait a minute. Wait, wait. Just a minute.
12 Let me see something. Defendants stated that they have no
13 objections.

14 MR. BERNICK: No objections to the government's
15 exhibits, but I don't know that we've reached a conclusion as to
16 the exhibits that we would seek to proffer as part of the
17 testimony.

18 THE COURT: Counsel will work on that and then bring it
19 back to me.

20 MS. CROCKER: Yes, thank you, Your Honor.

21 THE COURT: All right. Let's start our next witness,
22 please.

23 MS. BROOKER: Your Honor, may I just read one sentence
24 stipulation that Mr. Redgrave and I have reached into the record
25 about changing one word in an earlier trial transcript?

1 THE COURT: Yes.

2 MS. BROOKER: Okay. On -- the date is January 10,
3 2005, the afternoon session, and the page is 9524 of the trial
4 transcript, and on line 1, the word impetus, i-m-p-e-t-u-s, is
5 changed to impudence, i-m-p-u-d-e-n-c-e, and it was just to
6 clarify during the examination of Dr. Biglan. And that's a
7 stipulation that Mr. Redgrave and I reached.

8 THE COURT: All right. That, of course, was in the
9 record. I guess there's no way for just to make life a little
10 bit easier for any appellate court to get the actual transcript
11 changed. I'm not sure court reporters are even allowed to do
12 that, even with the stipulation.

13 Do you remember whether it was Mr. Wallace? It was, I
14 think.

15 MR. BERNICK: I'm not familiar with this particular
16 issue, but I think that there have been times when, by
17 agreement, the transcript has been corrected.

18 We have another one that we've asked the government
19 about, and I think if it goes to the nature of the
20 transcription, I'm not sure why if the parties believe that the
21 record was otherwise --

22 THE COURT: Well, I do not know the actual answer. I
23 do know that all the court reporters operate under a very strict
24 code of procedure and ethics, and therefore whatever they deem
25 appropriate is what we will live by.

1 The record shows there was a change. I'm just trying
2 to think about it from a very practical standpoint when someone
3 is reading that transcript later on.

4 MS. EUBANKS: Your Honor, I have a suggestion because
5 I'm fairly familiar from another proceeding with the situation
6 with the court reporters with respect to their certification of
7 the record and so forth already in.

8 What we could do with respect to this particular issue,
9 so that it's clear for any appellate court record, is do a
10 written stipulation which would show up in the file. The
11 parties obviously would know what it is, and we could -- it
12 would be on file. And obviously, if we've made that change, we
13 can do pen and ink to our own changes and know what is there.

14 There would then be a record that the parties agreed,
15 and that the court endorsed that agreement, and we would have a
16 filing, and therefore there would never be any lack of clarity
17 with respect to that particular change.

18 And I understand that there is a discussion with
19 respect to another change. Based on my experience, that's
20 certainly the safer way to proceed.

21 MR. BERNICK: The other -- as I understand now, with
22 this one and also with the one -- it seems to me that if we,
23 first of all, ask the court reporter to go back and determine
24 whether there might have been an error. If the court reporter
25 then agrees that there was, then I don't know that there even

1 really would be the necessity of having --

2 THE COURT: Everybody, we are all speculating unless
3 somebody knows for sure.

4 MR. REDGRAVE: Your Honor, Ms. Brooker and I did speak
5 with Mr. Wallace. I gathered that Ms. Brooker had asked
6 Mr. Wallace to go back to listen to the tape from that, and he
7 agreed, based on that review, that the word should have been
8 "impudence" and therefore he agreed that that change should be
9 made, and then it's really just a matter, if this record here
10 that we've made is enough, to just take care of the issue and I
11 think it probably is.

12 THE COURT: Well, if he agrees to make it, and you've
13 got the stipulation in the record, we don't need anything more
14 than that.

15 I just will remind everybody there's one other possible
16 area of change -- there may be many, but it's the only one I'm
17 aware of -- and that's what I called to your attention, I think
18 yesterday, regarding use of the words Coumadin and coumarin.

19 MS. EUBANKS: Coumarin and Coumadin.

20 THE COURT: Coumarin and Coumadin, that's correct.

21 MS. EUBANKS: Yes. We are looking at that closely to
22 make a determination and we want to make sure that the witness
23 takes a look at it since it was his testimony.

24 THE COURT: Because the witness will know what he meant
25 to say.

1 Okay. All right. Are we ready at this point for
2 Mr. Wells?

3 MR. GETTE: Yes, Your Honor, James Gette on behalf of
4 the United States.

5 THE DEPUTY CLERK: Please remain standing and raise
6 your right hand.

7 J. KENDRICK WELLS, III, Government's witness, SWORN

8 THE DEPUTY CLERK: You may be seated.

9 DIRECT EXAMINATION

10 BY MR. GETTE:

11 Q. Good afternoon, Mr. Wells.

12 A. Good afternoon, counsel. Could someone instruct me on the
13 use of this amplification equipment?

14 Q. Sure. I think you're on. And if you just keep it in
15 reasonable proximity, I think you will be okay.

16 A. But I should speak into that mike?

17 Q. That would be best.

18 THE COURT: Yes. And we can hear you. You're fine.

19 If we have any trouble hearing you, we will let you know.

20 THE WITNESS: Thank you.

21 BY MR. GETTE:

22 Q. Mr. Wells, my name is James Gette and I represent the United
23 States here today. I would just like to ask a few questions to
24 begin to put your testimony into context today.

25 You are a former assistant general counsel for product

1 liability -- or for product litigation of Brown & Williamson
2 Tobacco Corporation; correct?

3 A. That's correct.

4 Q. And you were at Brown & Williamson in the Law Department for
5 almost 30 years; correct?

6 A. That's correct.

7 Q. But you are recently retired from Brown & Williamson?

8 A. October the 1st, 2001.

9 Q. Mr. Wells, are you represented by counsel today?

10 A. I am represented by Kirkland & Ellis, counsel for the
11 company. I am not represented by any private counsel.

12 Q. And I assume that Brown & Williamson is paying for that
13 representation?

14 A. That's my understanding.

15 Q. You are not paying for that representation?

16 A. Not yet anyway.

17 Q. Okay.

18 A. I believe that I will not be asked to pay for it.

19 Q. Now, on January 24th of 2005, this year, the United States
20 filed with the court a document entitled: United States Written
21 Direct Examination of John Kendrick Wells, III, Submitted
22 Pursuant to Order 471.

23 Some time in the last 10 days did you receive a copy of
24 that document?

25 A. Yes, I did.

1 Q. And the document you received was in question and answer
2 format; correct?

3 A. That's correct.

4 Q. You made some changes to that document; correct?

5 A. I did.

6 Q. And with those changes, let me hand you this document, which
7 is entitled: United States Written Direct Examination of John
8 Kendrick Wells, III, Submitted Pursuant to Order 471 as
9 Corrected by John Kendrick Wells, III. Is that the document
10 that contains the corrections that you made?

11 A. I have a copy that I can answer affirmatively to that in my
12 hand. It could take a few minutes to go through here and
13 compare them if you like.

14 Q. The version that you have with me, how did you come into
15 possession of that?

16 A. Counsel for Kirkland & Ellis, counsel provided me with this
17 shortly after noon last Friday saying this was the transcript
18 that was submitted as my direct examination.

19 Q. Have you made any notations or markings in that document?

20 A. I have not.

21 MR. GETTE: Counsel stipulates that that's his.

22 MR. BERNICK: I don't have any problem.

23 BY MR. GETTE:

24 Q. Mr. Wells, the document that we have just been referring to
25 that you brought with you, with the changes that you made, is

1 that the testimony that you would adopt as your written direct
2 testimony in this case?

3 A. Yes, it is.

4 MR. GETTE: Your Honor, I would ask to move that
5 testimony into evidence.

6 THE COURT: That's granted.

7 BY MR. GETTE:

8 Q. Mr. Wells, when did you first receive the testimony as
9 offered by the United States?

10 A. I arrived in town last Tuesday in the evening and I saw it
11 for the first time then.

12 Q. Would that be Tuesday, January 25th?

13 A. It sounds right.

14 Q. And have you been in town since then?

15 A. Yes, I have.

16 Q. Did you also receive documents along with the testimony when
17 you arrived on Tuesday?

18 A. Yes, I did.

19 Q. Were those the documents that were cited as exhibits in the
20 testimony?

21 A. My understanding was that it included those, yes, and that
22 it also included some government -- some documents that the
23 government had filed. I'm not familiar with the process, that
24 were not specifically mentioned as exhibits.

25 Q. Beyond the documents that were cited in the testimony along

1 with those filed by the United States along with the testimony,
2 were there any other documents that you received or reviewed?

3 A. Yes. Counsel provided me with a lot of documents to go
4 through. All documents I believe that have been produced in
5 litigation.

6 I mean, they were all copies of -- in that sense, they
7 were all documents that have been produced in litigation, with
8 the possible exception of I asked to see four years of Surgeon
9 General's Reports. I don't know whether they are in evidence or
10 not. But all the other documents are documents produced in
11 litigation.

12 Q. Beyond the Surgeon General Reports, did you ask counsel to
13 see any other documents in preparation for your testimony?

14 A. Yes, I did.

15 Q. What documents were those?

16 A. I asked specifically to see the -- sort of the introductory
17 portion of the Federal Trade Commission Staff Report on
18 Cigarette Advertising that was issued, I think in 1981, not by
19 the commission but by the staff. I may have asked for a couple
20 of other government documents. And I lose track of that.

21 Q. Were there specific Surgeon General Reports that you asked
22 to see?

23 A. Yes.

24 Q. What reports were those?

25 A. The reports in 1981, 1982, 1983, and the report of 1989 that

1 was the 25 years' review.

2 Q. What led you to select those four Surgeon General Reports to
3 review in preparation for your testimony?

4 A. I thought they would help orient me to time frame of
5 around -- in the early 1980s as familiar documents when I was at
6 Brown & Williamson.

7 I had a collection of the Surgeon Generals Reports
8 right behind my desk, and I referred to them frequently, and I
9 thought it would be helpful to see something familiar.

10 Q. Was there a reason you thought it particularly useful to
11 familiarize yourself with the period in the early 1980s in
12 preparation for your testimony?

13 A. Yes.

14 Q. And what was that?

15 A. That's the time frame when the Surgeon General's Report
16 changed their assessment of whether low-tar cigarettes reduced
17 risk.

18 Q. Have you reviewed the proposed findings of fact that have
19 been submitted by either, any of the parties in this case?

20 A. In fact, I think the answer is no, because I'm not even sure
21 what you're asking for. The only document from this case that I
22 know of that I've even seen is my own testimony.

23 Q. Now, since you have arrived in Washington last Tuesday, have
24 you been working with counsel in preparation for your testimony
25 today?

1 A. Yes, I have.

2 Q. And has that been each of the days that you've been here,
3 each and every one of the days that you've been here since last
4 Tuesday?

5 A. Tuesday evening, a good full day Thursday -- I'm sorry -- a
6 good full day Wednesday, a full day Thursday, and then, of
7 course, cut off at noon on Friday and not since then.

8 Q. When you determined that you desired to make changes to your
9 testimony, how did you go about having those changes made?

10 A. I told counsel the changes I would like to have made.
11 Counsel included one of the lawyers acting as a scribe worked
12 with a computer and made the changes.

13 Q. Did you discuss the changes with counsel?

14 A. Yes, I did.

15 Q. Beyond your time meeting with counsel, did you do anything
16 else to prepare for your testimony here today?

17 A. I spent the time that I -- that I prepared for the case just
18 reading the documents we've mentioned.

19 Q. And what counsel did you meet with to prepare for your
20 testimony today?

21 A. I met with Ken Bass, David Mendelson, Steve McCormack, and
22 also Paul McDonald was in for one day, and I think his name is
23 Andrew Bautista was there briefly on one day. All of those are
24 Kirkland & Ellis lawyers, of course.

25 And I met with David Bernick for, I think about -- I

1 met with David Bernick for dinner one night, Thursday night I
2 think, and talked with him for about 20 minutes about my
3 testimony.

4 Q. Did counsel ask you to modify any of the answers you
5 provided in your testimony?

6 A. No.

7 MR. BERNICK: At what point in time?

8 BY MR. GETTE:

9 Q. During, since Tuesday when you arrived.

10 MR. BERNICK: Well, obviously, there will be a big
11 difference if it were before or after the testimony had been
12 submitted.

13 THE COURT: Correct.

14 MR. BERNICK: And I think that that's the only really
15 germane questions. The substance of conversations with counsel
16 before the testimony is submitted is not really an appropriate
17 subject for examination.

18 THE COURT: Sustained.

19 BY MR. GETTE:

20 Q. Since the testimony was submitted, have you had
21 conversations regarding modifying any of your answers with
22 counsel?

23 A. Since the testimony was submitted?

24 Q. Correct.

25 A. I've had no conversations with any counsel about my

1 testimony, period.

2 Q. Have you reviewed the testimony of any other witnesses in
3 this case?

4 A. No.

5 Q. Mr. Wells, I would now like to go through some of the
6 changes that you made to the testimony as it was provided to you
7 from the United States and modifying it to the final form that
8 was submitted to the court.

9 If you could please turn to page 16 of your testimony.
10 You see on line 4 you were asked the question, "Before
11 statements on smoking and health were released to the public
12 were they reviewed by the Legal Department?"

13 And the testimony provided by the United States was,
14 "Answer: Yes."

15 You changed that by adding to that, "Yes, generally."
16 Is that correct?

17 A. That's correct.

18 Q. Now, "yes, generally" in response to that statement is
19 really a significant understatement, isn't it?

20 A. I don't understand.

21 Q. Well, lawyer review of documents before they were released
22 to the public from Brown & Williamson was more than just
23 generally occurring.

24 This was a consistent and routine practice year in and
25 year out during your tenure at Brown & Williamson, wasn't it?

1 A. Yes, generally.

2 Q. Well, is it yes or no?

3 Did you year in and year out review, edit documents on
4 smoking and health as a lawyer on behalf of Brown & Williamson
5 that were to be released to the public?

6 A. That shifts the question. My understanding of the word
7 edit, and my answer has to be no.

8 Q. Well, let's take a look historically at what's gone on at
9 Brown & Williamson since we seem to be parsing over generally
10 versus not generally, and let someone else come to that
11 conclusion for us.

12 Starting in as early as 1977, Mr. Wells, you proposed a
13 comprehensive policy which would require legal clearance for all
14 statements made to the public related to smoking and health at
15 Brown & Williamson; correct?

16 A. I'm sorry. Could you -- could that be repeated?

17 Q. Sure. Starting in as early as 1977 you proposed a
18 comprehensive policy which would require legal clearance for all
19 statements made by -- made to the public related to smoking and
20 health at Brown & Williamson; correct?

21 A. I don't recall that occasion.

22 Q. Okay.

23 A. I'd be happy to answer, but I --

24 Q. That's fine. Let's pull up --

25 A. I can't focus on it.

1 Q. Let's pull up U.S. Exhibit 90151. Here is a copy for you,
2 Mr. Wells.

3 A. Thank you.

4 Q. Now you see from the first page of that exhibit that this is
5 a memorandum that you wrote on October 20, 1977?

6 A. Yes, it appears to be.

7 Q. And you wrote that memorandum to Messrs. Pittman, Wyatt,
8 Roach, Sachs and Pepples; is that correct?

9 A. Yes.

10 Q. And who was Mr. Pittman in 1977?

11 A. Mr. Pittman was a vice president, I think at the time he was
12 a senior vice president who had responsibilities for both the
13 Public Affairs Department and the Marketing Department.

14 Q. And Mr. Wyatt?

15 A. Mr. Wyatt was the head of the Public Relations Department.

16 Q. And Mr. Pepples and Sachs, they were lawyers. Yes?

17 A. Yes.

18 Q. What about Mr. Roach?

19 A. Mr. Roach worked for Mr. Wyatt in the Public Relations
20 Department.

21 Q. And do you see that this document related to procedure for
22 submissions to Law Department of public statements?

23 A. As I see it, it has a second line.

24 Q. In addition, it does say, "and activities in corporate
25 affairs and other areas." Correct?

1 A. That's correct.

2 Q. So at least in part, though, this was a procedure for
3 submissions to the Law Department of public statements; correct?

4 A. Counsel, as I read it, you can't lop off the second line.
5 It's "public statements and activities in corporate affairs and
6 other areas."

7 Q. In corporate affairs and other areas?

8 A. Yes.

9 Q. Yes. Now, if you will turn to the second page of the
10 document, you will see that the first paragraph states,
11 "Statements to the public by B&W or its employees or agents can
12 create obligations and liabilities for Brown & Williamson."
13 Correct?

14 A. With an addition, I would agree with that.

15 Q. Now, liabilities for Brown & Williamson would include
16 liabilities in smoking and health litigation; correct?

17 A. That's correct.

18 Q. And if we look further on through the document, the next
19 sentence --

20 Actually, Charles, go up to the end of the first
21 paragraph, first.

22 The next sentence says, "B&W's objective of long-term
23 profitability dictates that we fully assess and manage the
24 dangers connected with such public statements." Correct?

25 A. It says that.

1 Q. So the proposal that you are making here is sensitive to the
2 fact that public statements could have adverse impacts not only
3 on the corporation in smoking and health litigation, but also on
4 the long-term profitability of the corporation; correct?

5 A. Yes. And if I may add, in fact, it equates public
6 statements with published advertising.

7 Q. In what way does this document equate public statements with
8 published advertising?

9 A. It says that the -- pardon me. It says that the potential
10 for liabilities in violation of laws and regulations applies to
11 public statements essentially by corporate affairs in the same
12 way as it does in our brand advertising.

13 Q. So the concern exists whether it's in advertising or whether
14 it's in public statements; correct?

15 A. That's right.

16 Q. So, at least in part the concern is with the public
17 statements that are being made; correct?

18 A. Yes.

19 Q. And if we go on to the next paragraph we see that some of
20 the public statements that we're concerned about, if we look in
21 the very middle of the list that's provided, are public
22 statements related to smoking and health; correct?

23 A. Yes, that's one of the lists.

24 Q. Now, I'd like to show you an additional document which is
25 U.S. Exhibit 89371.

1 A. Thank you.

2 Q. You're welcome.

3 If you take a look at that document, you will see that
4 this is a note from Mr. Pepples -- from Mr. Pittman, excuse me,
5 to all directors and department managers. It appears to be a
6 policy that's consistent with the proposal that you had made in
7 U.S. Exhibit 90151; correct?

8 MR. BERNICK: Your Honor, I don't believe that any of
9 this has really been tied to some change that was made to the
10 direct testimony.

11 MR. GETTE: Your Honor, not only in the point that
12 we've already provided, which is that he's suggesting,
13 understating the role that lawyers played in the review of
14 public statements and scientific documents throughout the
15 company, but I can point you to four other places at a minimum
16 in his written direct where he tried -- where he has underplayed
17 the role of lawyers in the editing of documents and the vetting
18 of scientific documents.

19 MR. BERNICK: I guess I'm not sure I understand that
20 statement.

21 I think the witness said, yes, generally, to the
22 question of whether there was review. And I think it's
23 counsel's characterization that somehow that's an
24 understatement.

25 THE COURT: Well, let's try and move along more

1 quickly. He certainly answered many of the questions in the
2 direct.

3 You're quite right that on page 16 he said, "Yes,
4 generally." But then many other answers were answered very
5 specifically.

6 So, why don't you try and cover this particular topic
7 as quickly as you can, certainly by 3:00 o'clock when we will
8 take a brief break.

9 MR. GETTE: Okay. Your Honor, what I'd like to do is
10 simply -- is I want to just march through a series of documents
11 and I'll move more quickly --

12 THE COURT: All right.

13 MR. GETTE: -- for the court.

14 THE WITNESS: I'm sorry. Is the question pending?

15 BY MR. GETTE:

16 Q. I'll withdraw that question. All right.

17 From the first document that we've looked at, however,
18 we've seen that there was some review proposed by lawyers of
19 public statements related to smoking and health; correct?

20 A. Yes, that's correct.

21 Q. And that procedure was proposed in 1977; correct?

22 A. It was proposed in 1977, formalization of one that I
23 understood had existed, but yes, it was -- it was formalized in
24 this memorandum in 1977.

25 Q. Okay. So that policy was formalized in 1977. So let's put

1 1977 up. And let's identify that with your initials, that you
2 at least played some role in establishing and defining the
3 procedure.

4 Let's turn now, then, to --

5 A. If you said some role.

6 Q. Yes.

7 A. I believe.

8 Q. That's correct.

9 A. Yes, I agree.

10 Q. Okay. Let's turn now, then, to a couple of documents that
11 are discussed in your direct testimony, and all I want to do is
12 confirm that they were there and that they did involve your
13 review and work with some scientific documents.

14 So if we could look at Joint Defendants 053700. Are
15 you familiar with this document, Mr. Wells?

16 A. Generally, counsel. It's one of the ones that I read over
17 fairly quickly in preparing for my testimony.

18 Q. And this is one of the documents that you've indicated
19 provided comments to a scientist in the UK related to something
20 he had written called the Change of Stance on Smoking and
21 Health; correct?

22 A. I think the answer as you've put the question has to be, no.
23 There's some technical differences.

24 Q. Through this document, did you provide comments to a
25 scientist in the UK?

1 A. Not this document.

2 Q. Through what document did you provide comments to the
3 scientist in the UK?

4 A. My recollection is that there was a subsequent document
5 which would have been similar to this one in the part of this
6 one that -- let me just check this.

7 It begins, Comments on the New Stance, which I think
8 appears to be page 7 of this document. My recollection is that
9 I prepared this document as my own preparation to subsequently
10 give comments.

11 So, my recollection is that this first portion of this
12 document, 1 through half of 7 were not comments that I made on
13 this paper.

14 Q. Subsequently, though, you did provide comments to the
15 scientists in the UK regarding the paper that is called, Change
16 of Stance on Smoking and Health; correct?

17 A. I did.

18 Q. And that's in 1980; correct?

19 A. I think that's about right. And I don't mean to quibble,
20 but -- that's close. The handwriting in the top corner of the
21 first page is mine. I remember when I put that date on it. I
22 had some question in my mind about whether that was right to the
23 day, but it's about right. 1980.

24 Q. So we are in the ballpark?

25 A. Yes.

1 Q. Okay. All right. Let's turn to another example of your
2 involvement with scientific documents.

3 This is United States Exhibit 21723. And you'll
4 notice, Mr. Wells, that this is a letter to you from someone
5 named Lionel Blackmun; correct?

6 A. That's correct.

7 Q. And Lionel Blackmun was one of the scientists at Southampton
8 in the United Kingdom; correct?

9 A. Correct. He was also, he also had an office in the
10 corporate headquarters in London.

11 Q. And Southampton, because we know these terms a lot better
12 than the court does, was BAT's research facility in the United
13 Kingdom; correct?

14 A. That's correct.

15 THE COURT: I think it's fair to say the court is
16 getting to memorize these terms at this point.

17 MR. GETTE: Your Honor, I think you've spent more time
18 listening to the testimony than I have, so I'm never sure what
19 the court has heard or before.

20 THE COURT: That's all right.

21 BY MR. GETTE:

22 Q. Now, if you look at the last sentence of the second
23 paragraph of that letter, the letter is talking about an
24 enclosed position paper; correct?

25 A. Yes, it references an enclosed position paper.

1 Q. And if you jump up to the beginning of the document, the
2 second sentence in the first paragraph, Dr. Blackmun said, "We
3 have acted on the various points you have made." Correct?

4 A. It does say that.

5 Q. And so he's confirming that with respect to the position
6 paper, he's looked at some comments that you've made on it and
7 worked on the position paper; correct?

8 A. I don't recall. I've made comments of the obvious here, as
9 I'm sure is correct. I have no specific recollection of making
10 comments on that particular position statement.

11 Q. Okay. You have no reason to doubt this document, the letter
12 in front of us though, do you?

13 A. Beyond the fact that I don't remember it, I have no -- I
14 know of nothing contrary.

15 Q. And the final thing I'd like you to look at, at this
16 document, Mr. Wells, is there's a sentence in the beginning of
17 the third paragraph that says, "I agree with you that the
18 important next step is to produce a revised version of the blue
19 book."

20 The blue book was a document used within Brown &
21 Williamson to provide information to employees related to
22 smoking and health issues; correct?

23 A. No.

24 Q. It was used within the BAT organization to provide
25 information on smoking and health. Is that accurate?

1 A. No.

2 Q. Okay. Tell us what the blue book was.

3 A. The blue book was an ongoing project of Dr. Blackmun's and
4 his staff also worked on it.

5 He wanted to put together a full scale statement on the
6 state of the smoking and health science. He wanted to pull in
7 all the relevant science on at least some areas.

8 It emphasized the low tar cigarette area, and the
9 intention was to publish it as a public relations statement, but
10 my understanding is it was never published and it never reached,
11 to my knowledge, any sort of final form for circulation other
12 than to his scientists working with him on it.

13 Q. So it is a public relations statement in the works that
14 never made it to final, across the finish line. Is that fair to
15 say?

16 A. That's right.

17 Q. And this letter that we were just looking at was in 1982
18 from Dr. Blackmun to yourself; correct?

19 A. Yes.

20 Q. So I'm going to put that down, and again with your initials.

21 MR. GETTE: Your Honor, I see we are approaching 3:00
22 o'clock. We might, with a break, particularly be able to work
23 through expediting a handful of additional documents.

24 THE COURT: And --

25 MR. GETTE: One moment, Your Honor.

1 (Pause)

2 Your Honor, to speed this one, when we come back
3 together I do have a series of additional documents that were
4 not in the direct that I would like the witness to take a look
5 at, simply confirm or deny that they were indications of his
6 involvement at some level with scientific documents in the
7 company, and then we could add them to the list. If we do that,
8 it would certainly expedite the testimony for the court.

9 THE COURT: If you do what?

10 MR. GETTE: Provide the documents to him on break and
11 then simply ask him a collective question.

12 MR. BERNICK: I certainly would like to expedite this
13 in any way we can. I'd be happy to have the witness, and I'm
14 sure he will be in accord with any instructions given, review
15 the documents.

16 My issues are twofold. One, I still don't see that
17 this is tied back to some particular aspect of the direct
18 examination.

19 And number two is that counsel is creating this list
20 and wants the witness to sign off on the fact that these all are
21 lawyer involvement with scientific documents. Those are his
22 words, and I think he really has to establish whether the
23 witness signs on to that, or what he means. If he means to have
24 scientific documents include anything --

25 THE COURT: The witness's testimony stands for whatever

1 it is. That's number one.

2 Number two, Mr. Bernick, especially as a lawyer who
3 likes to use all your own charts a whole lot, it seems to me
4 that Mr. Gette can put up his little chart, which isn't nearly
5 as elaborate as the ones you use.

6 But, no, I don't expect him to have him the witness
7 sign off on it. I don't know if he's going to request it, but
8 certainly that's unnecessary precisely because Mr. Wells'
9 testimony will stand for what it is.

10 To deal with your first point. Certainly the
11 government on this very important substantive issue is entitled
12 to do its best to make the record clear as to what, if any,
13 involvement there was of Brown & Williamson lawyers with
14 scientific documents and scientific papers. So therefore the
15 government may proceed, but expeditiously.

16 Mr. Wells, during the break -- we will take
17 15 minutes -- the government will give you a number of
18 documents. Do your best to look them over, please. But you're
19 not allowed to discuss those documents with your own counsel
20 during the break. Do you understand that?

21 THE WITNESS: I understand that, Your Honor.

22 THE COURT: Okay. Let's take 15 minutes, everybody.

23 (Recess began at 3:02 p.m.)

24 (Recess ended at 3:20 p.m.)

25 THE COURT: Mr. Gette, any chance of your getting done

1 in the next hour or hour and a quarter?

2 MR. GETTE: It depends on how the next five minutes
3 goes, Your Honor --

4 THE COURT: Okay.

5 MR. GETTE: -- in all honesty.

6 MR. BERNICK: Boy, the pressure is on.

7 THE COURT: Why don't you proceed, please.

8 BY MR. GETTE:

9 Q. Mr. Wells, during the break I gave you a series of documents
10 and let me identify the U.S. exhibit numbers for the record.
11 They were: 92070, 31031, 23024, 21695, 78246, 22076, 89376,
12 22032, 79219, 77508, 90150, and 21013. I feel a little like a
13 bingo caller.

14 What number of those documents have you been able to
15 review during the break, Mr. Wells?

16 A. Counsel, I must be slow. Maybe it's just the one I started
17 with.

18 I started with the one that I have not seen ever, I
19 don't think, and it's several pages long. It took me a while.
20 Then I got to maybe two or three others that -- I got to two
21 others I have seen and then hit another one I have never seen.
22 So, only four or five.

23 MR. GETTE: Your Honor, I guess I might propose that I
24 just walk the witness through them on the screen as quickly as I
25 can.

1 THE COURT: Either that or put aside this area of
2 inquiry, let Mr. Wells look at all the documents overnight, and
3 move on to another area of inquiry right now.

4 MR. GETTE: I think that's fine, Your Honor. It would
5 be my preference, actually. I'm sure once he's familiar with
6 the documents. We can move very quickly through them.

7 THE COURT: In other words, you want to go through them
8 now?

9 MR. GETTE: No. I think your suggestion --

10 THE COURT: That's fine. Let's do that, please.

11 BY MR. GETTE:

12 Q. Mr. Wells, let's get you going in a completely different
13 direction now.

14 If you could look at page 43 of your testimony, and I'd
15 like to look at lines 8 to 18. You were asked the question --

16 A. Counsel, excuse me. Are we putting these documents aside
17 for the moment?

18 Q. Yes, indeed.

19 A. I'm sorry for the interruption.

20 Q. That's all right. Get them out of your way for now. We
21 will keep this set to make sure you take it with you when you
22 leave.

23 Are you with me in your testimony?

24 A. I have page 43.

25 Q. Okay. If you look at line 8, you were asked the question,

1 "With respect to report number 453, you stated that if reports
2 include discussions of pharmacological effects of nicotine, the
3 information will not be interesting and would be helpful to the
4 plaintiff; correct?" And you said, "Yes."

5 Now that relates to a document, U.S. Exhibit 21004, and
6 I'd like you to have an opportunity to look at that since this
7 question and answer relates to that.

8 A. Thank you.

9 Q. Now, you see that this is a memorandum from yourself to
10 Mr. Pepples dated February 17, 1986; correct?

11 A. That's correct.

12 Q. And Mr. Pepples was your boss. He was the general counsel
13 of Brown & Williamson at the time; correct?

14 A. That's right.

15 Q. And if you look at the first paragraph, you report to
16 Mr. Pepples that, "Pursuant to Earl Kohnhorst request, I met
17 with Earl, Gill Esterle and David Gordon to discuss whether B&W
18 should receive reports from certain projects to be done at the
19 laboratories of affiliated companies."

20 Do you see that language?

21 A. I do.

22 Q. And the gentlemen that are mentioned in that first sentence
23 were individuals who worked in Brown & Williamson's Research and
24 Development Department; correct?

25 A. They are all in the Research and Development Department. I

1 guess it's fair to say Mr. Kohnhorst was working at -- he was
2 the vice president.

3 Q. So he was the vice president of Research and Development at
4 the time?

5 A. Yes.

6 Q. So, they are all in the research and development function,
7 and you were meeting with them to determine what reports they
8 should receive from sister companies at Brown & Williamson;
9 correct?

10 A. I can't agree with that way of phrasing it.

11 Q. Well, it is clear that you were talking to them regarding
12 whether B&W should receive reports from certain projects to be
13 done at the laboratories of affiliated companies; correct?

14 A. That's correct.

15 Q. Okay. So this was about whether or not Brown & Williamson
16 was going to receive reports generated by its sister companies;
17 correct?

18 A. It was about whether, as it says, should receive reports
19 from certain projects. This is not a wholesale question, in
20 other words. You're looking at the curtailment -- possible
21 curtailment of reports from certain projects.

22 Q. So you were looking at specific areas and specific projects
23 being done by the sister companies in deciding whether you would
24 receive reports related to those projects at Brown & Williamson;
25 correct?

1 A. Yes. The R&D people had called me in to talk with them.
2 They had -- they had set out some areas that they thought they
3 didn't need reports from.

4 Q. Now, if you go back to your testimony and we look at that
5 question and answer that we looked at on page 43, line 8, and
6 it's referring to a report number 453, this was a report from
7 one of these projects that you were deciding whether it ought to
8 come to Brown & Williamson or not; correct?

9 A. That's correct. I believe it's the one that is summarized
10 on the bottom of the next page of the memorandum.

11 Q. That's right. On page 2 of U.S. Exhibit 21004 it discusses
12 that project, doesn't it?

13 A. That's correct.

14 Q. Okay. Let's look at that project, and it says, "RD&E is
15 interested in information pertaining to the role of nicotine in
16 the smoker's subjective perception of smoke quality."

17 RD&E there is research development and engineering;
18 correct?

19 A. That's correct.

20 Q. And that was research development and engineering at Brown &
21 Williamson; correct?

22 A. Yes.

23 Q. Okay. So they were interested in information pertaining to
24 the role of nicotine in the smoker's subjective perception of
25 smoke quality; correct?

1 A. Yes, they were.

2 Q. But you go on to state in that paragraph, "However, if the
3 reports include discussions of pharmacological effects of
4 nicotine, the information will not be interesting and would be
5 helpful to the plaintiff." Correct?

6 A. That's correct.

7 Q. And related to that statement, if we go back to your
8 testimony, you were asked the question, "As a lawyer you have no
9 scientific basis to conclude that Brown & Williamson scientists
10 would not find information related to the pharmacological
11 effects of nicotine interesting, do you?"

12 And you changed the simple "No," to, "No, I didn't have
13 a scientific basis for that conclusion, but I knew it from
14 talking to the Brown & Williamson scientists."

15 That was the change you made; correct?

16 A. Yes, that's my answer.

17 Q. And at the point in time when this document -- this is
18 February of 1986; correct?

19 A. That's correct.

20 Q. And in 1988 the Surgeon General came out with a fairly
21 substantial statement on nicotine and addiction; correct?

22 A. It did.

23 Q. And a significant --

24 A. He did.

25 Q. He did. Correct.

1 And a significant portion of that analysis was based
2 upon the pharmacological effects of nicotine; correct?

3 A. Yes.

4 Q. And here, two years before that you're testifying that
5 scientists at Brown & Williamson told you they had no interest
6 in the pharmacological effects of nicotine. Is that what you're
7 testifying to?

8 A. Yes, in the very clear context that you've established, no
9 interest in receiving material composed by BATCo on that
10 subject.

11 Q. So they were interested generally in the topic of
12 pharmacological effects of nicotine. Is that fair?

13 A. Yes.

14 Q. They just didn't like the work of their sister company
15 related to it.

16 A. I agree with that, although probably "dislike" is a strong
17 word. They thought that further work from the sister company
18 would not be beneficial.

19 Q. So they thought their sister -- their scientists at their
20 sister company were going down the wrong path. They didn't like
21 the results they were getting. They ought to stop doing the
22 research?

23 MR. BERNICK: That's three different questions. Object
24 to the form.

25 THE COURT: Sustained.

1 BY MR. GETTE:

2 Q. Mr. Wells, they didn't want to receive additional research
3 from BATCo because they knew the issue of pharmacological
4 effects of nicotine were a significant issue for Brown &
5 Williamson with respect to smoking and health litigation;
6 correct?

7 A. No.

8 Q. So in 1986, just two years before the Surgeon General's
9 Report came out -- the Surgeon General came out with his
10 definitive statement on nicotine and addiction, your scientists
11 decided, without seeing the results before the reports were
12 written, that they didn't want to see the results of the
13 scientists at their sister company. Is that your testimony?

14 MR. BERNICK: Objection, asked and answered.

15 A. No.

16 THE COURT: Overruled everybody. And what is the
17 answer, please? What is the answer to the question?

18 THE WITNESS: My answer is -- pardon me. My answer is
19 no.

20 BY MR. GETTE:

21 Q. Well, then they did want the reports?

22 A. I defer to the language of the comment itself which says,
23 "They did want the research." It was the discussions they were
24 objecting to.

25 Q. So they didn't like the descriptions of the research that

1 the scientists at the sister company were providing.

2 A. Counsel, I am concerned about definitions of terms here.
3 We're talking in the abstract, and we can go -- I'm just afraid
4 to go round and round on this as to which parts they didn't
5 like.

6 If you think of -- I just hope to shorten it. If you
7 think of a published scientific report, it has of course a
8 conclusion and it has the research data there. And their
9 statement was that that research would be appreciated and
10 welcomed.

11 We had received other kinds of reports from BATCO that
12 were -- that were really done for a different purpose. They
13 were done for the possible purpose of talking about the effect
14 of nicotine in the smoke in a way that would emphasize the
15 benefits of smoking.

16 That was not research -- those papers, the ones I'm
17 thinking of, were not research, they were just discussions based
18 on other research already done. And that's one example that was
19 on the table right at this time of what they didn't care to see.
20 Q. But what you reported was they didn't care to see
21 discussions of pharmacological effects of nicotine. That's what
22 you've indicated they didn't want to see; correct?

23 A. It says that in the second sentence, but it begins with the
24 conjunction -- really, both of those sentences go together, and
25 the first one clearly says, "If the reports stick to research

1 data, the reports would be interesting."

2 Q. And so we come back to they were okay with the data. They
3 just didn't want the further commentary from the scientists at
4 their sister companies; correct?

5 A. Again, I'm a little concerned about the terms.

6 We're thinking here of not -- not the kind of
7 conclusion that goes with the research data. We're speaking of
8 other kinds of discussions about the benefits of nicotine in the
9 cigarette smoke. That specifically was the objection.

10 Q. Well, but that's not what you write here.

11 You write that they weren't interested in discussions
12 of pharmacological effects of nicotine. You don't say that they
13 weren't interested in discussions about the beneficial effects
14 of nicotine, do you?

15 That's not what you wrote here, is it?

16 A. I agree that's not what it wrote, but it certainly includes
17 that. And if I may just add, the government has submitted with
18 my testimony the Ferris' report, which is a good example of not
19 research, it's discussion which winds up with a conclusion that
20 the nicotine in cigarette smoke has beneficial results.

21 We were not interested in publishing benefits of
22 smoking information. And our scientists thought they could
23 check the science for themselves. They really didn't feel they
24 needed someone at BATCo.

25 And we were paying for this, by the way. Which was

1 another issue. They didn't feel they needed to spend their
2 research money for a scientist at BATCo to look at published
3 research and tell them about his opinions on pharmacological
4 effect. They felt perfectly capable of doing it themselves.
5 And they were proud of their own currency on published nicotine
6 research and the implications regarding pharmacological
7 activity.

8 Q. You've given us an opportunity to take this down to the
9 specific level. You said the Ferris' article was a perfect
10 example of that; correct?

11 A. Particularly the first Ferris' article written in 1983.

12 Q. Right. Let's take a look at what the lawyers at Brown &
13 Williamson were saying about the Ferris' article, and let's pull
14 up, first of all, U.S. Exhibit 85395 just to put it in context.

15 This was something that you said about it in your
16 direct testimony. Or this is a document -- I'm sorry -- that
17 was mentioned in your direct testimony related to the Ferris'
18 report; correct?

19 A. I think that's correct. Do you have a page number
20 reference?

21 Q. For the testimony, I believe it is page 25, line 22, to page
22 26, line 7.

23 A. I see it.

24 Q. And so in this note, this was a wire that you sent to Anne
25 Johnson over in -- at BATCo in the UK; correct?

1 A. That's correct.

2 Q. And she was a lawyer for BATCo.

3 A. Yeah, I think that's correct.

4 Q. And you had been asked to comment on whether or not there
5 was any reaction from Brown & Williamson to the publication of
6 Mr. Ferris's article; correct?

7 Let me correct that. Any concern with the publication
8 of Mr. Ferris's report as an article.

9 A. No.

10 Q. You weren't asked to comment on that?

11 A. No.

12 Q. Okay. But you did, did you not?

13 A. No.

14 Q. Let's look at the language of your note.

15 You say, "It is doubtful whether editing can transform
16 the paper into one which would not be helpful to the plaintiff
17 in a products liability action."

18 Was that comment unsolicited?

19 A. That's exactly what I said. No, it wasn't unsolicited.
20 Robert Ely, who was the Director of Public Relations for BATCo,
21 sent me the 1983 version of the Ferris' paper and I didn't get
22 it until '84.

23 I was asked to comment on it -- I was asked to comment
24 on the proposal that BATCo published that paper as a public
25 relations piece, and specifically to assist BATCo in an idea he

1 had that BATCo could somehow publish materials that showed some
2 benefits for smoking.

3 And so I am responding, instead, to Mr. Ely. I was
4 more comfortable responding to the lawyers who worked with
5 Mr. Ely, and so I am responding to the proposition that BATCo
6 publish the paper as a statement of corporate position.

7 Q. But the bottom line is you were concerned that, without
8 editing this document, it would be helpful to a plaintiff in a
9 products liability action; correct?

10 A. Close.

11 Q. Well, you say, "It is doubtful whether editing can transform
12 the paper into one which would not be helpful to the plaintiff
13 in a products liability action." Correct?

14 A. That's right. That's just a little further than saying only
15 if you edit -- I'm saying you can't fix it.

16 Q. Now, you weren't the only one within -- let me go -- remind
17 us that the Ferris' paper. Mr. Ferris was not in the public
18 relations section of BATCo, was he?

19 A. That's correct.

20 Q. He was a scientist at Southampton; correct?

21 A. I think that's true.

22 Q. So he had prepared a scientific report in his role as a
23 scientist for BATCo; correct?

24 A. In as far as it goes, yes.

25 Q. And you weren't the only one within Brown & Williamson,

1 Brown & Williamson's Legal Department, who commented on the
2 scientist, Mr. Ferris's article or his report, were you?

3 I keep saying article. Let's clear that up.

4 This was never published, this report, was it?

5 A. I'm sorry. I missed your question.

6 Q. This report by Mr. Ferris, the scientist in the UK, was
7 never published, was it?

8 A. I don't know.

9 Q. Were you the only person within Brown & Williamson's Legal
10 Department to comment on this report?

11 A. I'm not certain. To my knowledge, yes, but I see there was
12 a copy to Mr. Pepples. It's possible that he could have
13 commented independently from me.

14 Q. Actually, he did comment in addition to you, and let's take
15 a look at that.

16 Let's pull up U.S. Exhibit 23024. Mr. Wells, you see
17 this is an August 28, 1984, letter from -- to a Mr. Ray
18 Pritchard. If you look at the second page, it's from Ernie
19 Pepples; correct?

20 A. It appears to be so.

21 Q. And Ernie Pepples was your boss, the general counsel at
22 Brown & Williamson?

23 A. Yes.

24 Q. And Mr. Ray Pritchard was the Deputy Chairman of BATCo;
25 correct?

1 A. Yes.

2 Q. He later became the CEO and Chairman of Brown & Williamson;
3 correct?

4 A. That's correct.

5 Q. Now, you also see on the right-hand side of this document
6 toward the top a stamp that says, "J.K. Wells, III. Restricted.
7 May be opened and seen only by the addressee and persons
8 authorized by addressee."

9 Now that, along with the stamp slightly further down,
10 which says, "Received August 29, 1984, JKW," indicates that you
11 received a copy of this document; correct?

12 A. The presence of the Received stamp indicates I had a copy.
13 I don't think -- you probably didn't intend this. I don't think
14 the restricted stamp is any indication that I saw it.

15 Q. Okay. Fair enough.

16 Let's look at just to the left of where it says,
17 J.K. Wells, III, typed at the top. And you see F slash BAT, S
18 slash H.

19 A. Yes.

20 Q. And that indicates, or is that your writing?

21 A. It is.

22 Q. And I've seen this on several documents and I'm guessing
23 it's a notation that you used for your secretary to tell her
24 where to file it.

25 A. You probably have to guess at a lot of it, but that is

1 correct.

2 Q. And in this case, you're saying file it in the BAT file
3 under smoking and health. Yes?

4 A. Something like that. I'm not sure there was more than one
5 file with that label on it, but BAT smoking and health file.

6 Q. This was a little process that you used with some
7 regularity, this kind of notation on your documents; correct?

8 A. I did.

9 Q. Now, let's take a look at what Mr. Pepples had to say, and I
10 want to look at the second paragraph of that letter just so that
11 we can see that we are talking about the Rob Ferris' article.

12 It says, "Let me draw your attention to another
13 specific item scheduled for the plenary session on Monday, the
14 10th of September. It is a talk by Rob Ferris which springs
15 from a report entitled 'The Functional Significance of Smoking
16 in Everyday Life.' Report Number RD 1962 restricted."

17 That's the same report that we were just discussing
18 related to the cable that you sent to Anne Johnson; correct?

19 A. No.

20 Q. Let's pull up both documents. 85395 and 23024.

21 On 85395, let's look at the first paragraph where you
22 say -- the paper titled: The Significance of Smoking in
23 Everyday Life.

24 And let's pull up the other document, it says: The
25 Functional Significance of Smoking in Everyday Life.

1 And it's your understanding that these were different
2 reports?

3 A. Yes, based on the -- the -- as you've noted slight
4 difference in the title, but also the difference in the dates
5 involved.

6 Q. And these are, August of 1984 is the letter from
7 Mr. Pepples; correct? And yours is in November of 1984, about
8 five months later; right?

9 A. Yes.

10 Q. Now, while these were slightly different papers, they were
11 addressing the same subject; correct?

12 A. Yes, that's right.

13 Q. And, in fact, one was the report that was prepared by
14 Mr. Ferris as his scientific report at the research facility in
15 Southampton, and the other was his attempt to modify that into a
16 publishable piece of work; correct?

17 A. Counsel, I can't speak to what was in his mind, but that's
18 generally correct, looking at the two documents.

19 One, for instance, has, I think, no references in it,
20 and the '84 document has a significant number of footnotes.

21 Q. And the longer document, the research report from the
22 scientists at Southampton, that's the one that Mr. Pepples is
23 commenting on, the longer one with lots of citations; correct?

24 A. That's correct. And I think you also suggested perhaps that
25 came first.

1 Actually, it was the shorter one without references
2 that has the prior date, and then, yes, I believe Mr. Pepples is
3 commenting on the substantially longer document with all of the
4 scientific citations.

5 Q. Now, let's look at what Mr. Pepples said about this very
6 comprehensive research report -- or more comprehensive research
7 report than the article that you had looked at and see what he
8 says.

9 If you look at the final paragraph on the first page
10 you will see, he says, "However, in developing and carrying
11 forward the position that a simple" -- in quotation marks --
12 "addiction model cannot explain smoking behavior, the report
13 seems to concede that many potential criteria for addiction
14 identification are met by smoking behavior."

15 It says, "For example, the report urges the position
16 that the primary motivation for smoking is ultimately tied to a
17 pharmacological psychoactive function of nicotine. Some of the
18 scientists who consult with B&W in connection with health
19 litigation would not agree with this approach. Accordingly, the
20 report is inconsistent with the scientific position on which B&W
21 may make its defense in the New Jersey cases."

22 Do you see that language?

23 A. I do see it.

24 Q. Mr. Wells here is expressing his concern regarding --
25 Mr. Pepples is expressing his concern for the information

1 because it might be inconsistent with what your experts might
2 say in New Jersey; correct?

3 A. I'd have to phrase that differently.

4 Q. Well, he's expressing a concern in this letter about this
5 article; correct? This report.

6 A. Yes.

7 Q. And at least part of that concern is that B&W is facing
8 litigation in New Jersey over this -- over nicotine; correct?

9 A. I would agree that the litigation in New Jersey is more of
10 the context for his concern.

11 Q. So the context for his concern was this litigation in New
12 Jersey?

13 A. One of them.

14 Q. One of them.

15 And so because of this concern -- the context of which
16 is the litigation in New Jersey -- he sends this letter over to
17 Ray Pritchard, the head of BATCo; correct?

18 A. Yes, in the sense that that was -- his concern was broader
19 than that one context.

20 Q. But that was within the context. The context in which
21 you've described it was one led to the concerns. Yes?

22 A. No. The context is -- as one of the applications of the
23 concern. I probably wasn't very clear on that. I'm sorry.

24 Q. That's okay. We will just go through a few questions and
25 clear it up.

1 Mr. Pepples was aware of, and expresses that awareness,
2 of the New Jersey litigation to Mr. Pritchard; correct?

3 A. Yes.

4 Q. And in that context he identifies a concern related to the
5 report from Mr. Ferris; correct?

6 A. Yes.

7 Q. And one of those concerns was -- if we look at the bottom of
8 the first page -- one of the concerns was that the report seems
9 to concede that many potential criteria for addiction
10 identification are met by smoking behavior.

11 That was at least one of the concerns he was
12 expressing; correct?

13 A. Counsel, I'm sorry. There's a piece of your question that I
14 missed. Could that be repeated?

15 Q. Sure. One of the concerns that Mr. Pepples is expressing to
16 Mr. Pritchard is that which is identified at the bottom of that
17 first page, which is that the report seems to concede that many
18 potential criteria for addiction identification are met by
19 smoking behavior.

20 That was at least one of the concerns he was
21 expressing; correct?

22 A. Yes. That's right.

23 Q. And he concludes -- before we get to his conclusion, let's
24 look at the second page. There's one other thing I'd like to
25 look at. And if we look at the fifth paragraph that begins, "As

1 you know."

2 Mr. Pepples writes, "As you know, in the current
3 legislative and litigation environment in the U.S., claims of
4 addiction have been and will be used against Brown & Williamson
5 by our adversaries."

6 Adversaries is a word that came up on Monday. Here,
7 Mr. Pepples is expressing concern about adversaries, including
8 plaintiffs in litigation; correct?

9 A. Correct, that he is expressing the thought that plaintiffs
10 in litigation are adversaries here. I'm not aware of what wider
11 context for the term adversaries you have in mind.

12 Q. I was just asking you about Mr. Pepples. He was expressing
13 concern about adversaries that included plaintiffs in smoking
14 and health litigation; correct?

15 A. It's the word "included" I'm stumbling over. That suggests
16 there's something more, and I don't get that from this letter.
17 It's plaintiffs' lawyers.

18 Q. Do you think the only adversary that Mr. Pepples is talking
19 about is plaintiffs in smoking and health litigation?

20 A. I have to amend that. I'm sorry, counsel. I wish I had
21 more time to spend with the letter.

22 I see in this paragraph we're talking about, he says,
23 "current legislative and litigation environment." So, it is
24 broader than that.

25 He would -- I understand him to be using the term

1 adversary here in the classic legal definition, and that is an
2 adversary in court, an adversary -- just meaning the other side.
3 At a congressional hearing is an adversary. But in that sense,
4 that's what I see expressed here. I hope I'm not giving you too
5 much trouble on that.

6 Q. No. So, at a minimum, Mr. Pepples is explaining concern
7 about adversaries that includes plaintiffs in smoking and health
8 litigation and adversaries in the legislative context; correct?

9 A. That's correct.

10 Q. Now, let's go to the conclusion that Mr. Pepples -- the last
11 paragraph there -- sends on to Mr. Pritchard, and he says, "If
12 such matters as the 'functional significance' document and the
13 conference binders, enclosed herewith, are not already routinely
14 vetted with BATCo lawyers, you may want to consider involving
15 them more closely in both the conceptual and the drafting stages
16 of these projects." Correct?

17 A. It says that.

18 Q. And this was a suggestion that Mr. Pepples, the general
19 counsel of Brown & Williamson, was making to Mr. Pritchard, the
20 Deputy Chairman of BATCo; correct?

21 A. Yes.

22 Q. And this article by Mr. Ferris, and this report by
23 Mr. Ferris, this is one of those ones that you've testified to
24 the court that your scientists at Brown & Williamson didn't want
25 to see; correct?

1 A. That was not my testimony.

2 Q. I think earlier you told us as an example of the types of
3 reports that the scientists at Brown & Williamson would not want
4 to see. You mentioned Mr. Ferris's article, or his report.

5 A. Yes. That was in a different chronology, a different --
6 excuse me. Yes, that answer referred to a different time.

7 Q. Your prior answer referred to a different time?

8 A. Yes. We're talking about two years difference in the
9 statements here as between -- you're referring to my statement
10 that the scientists were not interested that was 1986. Then
11 Mr. Pepples' comments to Mr. Pritchard on this article are dated
12 1984. If I may just apply a fact --

13 Q. Well, so, in fact, so you're pointing out to us that the
14 chronology of how this worked. I mean, Mr. Ferris wrote an
15 article back -- or a report back in -- he started working on it
16 in 1983 at least, we know that; correct?

17 A. He wrote one of the two versions in 1983 and circulated it.

18 Q. And then he wrote another one in 1984; correct?

19 A. That's right.

20 Q. And ultimately in 1986 you wrote a memorandum that said,
21 Brown & Williamson scientists were not interested in research
22 related to pharmacological effects of nicotine; correct?

23 Do we have the sequence down right?

24 A. Counsel, you did say example, and I may have been a little
25 too close on that interpretation.

1 I was just thinking that it's -- it's an example -- the
2 Ferris' article is an example of type -- in fact, that article
3 was in the Brown & Williamson files in 1986, so in that sense
4 it's an example of documents that had already come in.

5 Q. But this was the type of document that you were talking
6 about in 1986 as the research folks at Brown & Williamson not
7 wanting to receive; correct?

8 A. That's correct.

9 Q. Let's move on to a different area. Let's move on to pages
10 43 and 44 of your testimony. If we could blow up lines 19
11 through the end.

12 You were asked the question here, "Do you recall
13 editing documents related to a 1989 research conference in
14 Vancouver, British Columbia, Canada?"

15 And the answer that had been proposed to you was, "I
16 have some recollection of looking at a draft report of such a
17 meeting that came into Jeff Wigand from BATCo and discussing it
18 with Jeff."

19 And you added to that, "I don't recall editing
20 documents on a research conference, in the sense that I don't
21 recall having any role in making directions or interfering in
22 any way related to what was being written."

23 A. Counsel, I'm sorry, I got lost on the sequence there. We're
24 starting on line 19?

25 Q. Correct. You see the question you were asked about editing

1 the research conference documents. Do you see that question?

2 A. Yes.

3 Q. Okay. And you inserted a sentence at the beginning there
4 that says, "I don't recall editing documents on a research --"

5 A. I see what you mean. You read -- you read the original
6 sentence first. Okay.

7 Q. Correct. And you inserted a sentence that says, "I don't
8 recall editing documents on a research conference, in the sense
9 that I don't recall having any role in making directions or
10 interfering in any way related to what was being written."

11 Now, that seems to me different than a "No." That
12 seems like a "Yes" with some reservation built into it; is that
13 correct?

14 A. What's the question?

15 Q. Whether you edited documents from the 1989 Vancouver RPG
16 meeting.

17 A. I'm sorry. If you're asserting that the answer I provided
18 starting on line 21 somehow is an affirmative response to that
19 question, I just can't read it that way.

20 Q. Well, did you -- let's just cut to the chase.

21 Did you or did you not have a hand in editing the
22 minutes from the Vancouver meeting in 1989?

23 A. No. And we may have some difference in a notion of editing.
24 But I have to answer it no, as stated.

25 Q. Well, I have the notion of editing of getting a document,

1 striking some portions out, putting some new words in, changing
2 the document in that respect.

3 If that's our term of editing, were you involved in
4 editing the minutes?

5 A. No.

6 THE COURT: Did you make any changes in the notes of
7 the conference that were sent to you?

8 THE WITNESS: Your Honor, these notes were sent to
9 Dr. Wigand and he sent them to me.

10 THE COURT: Well, that's my question. Did you make any
11 changes in those notes that were sent to you?

12 THE WITNESS: Only by direction from Dr. Wigand. I
13 acted --

14 THE COURT: Is that a yes, that you did make some
15 changes? And then you can explain your answer. If we could
16 just try and get an answer, please.

17 THE WITNESS: Yes, I produced an entirely different
18 document.

19 THE COURT: Aha. Go ahead, Mr. Gette. Maybe the
20 government can follow up and elicit something. Let's try to
21 move along, please.

22 BY MR. GETTE:

23 Q. Let's pull up U.S. 30923.

24 THE COURT: Mr. Gette, I know late in the day I tend to
25 get a little less patient, but it would seem to me that there's

1 a more useful way to follow up. But go ahead. It's your
2 questioning.

3 BY MR. GETTE:

4 Q. Mr. Wells --

5 A. Thank you.

6 Q. You said you didn't edit it in the sense that we were
7 talking about, but you may have in terms of creating a different
8 document.

9 A. Yes. Not on my own authority as an editor, for example.

10 Q. But you did produce a different document that was ultimately
11 sent out as the minutes of the Vancouver 1989 meeting; correct?

12 A. I produced a document that was given to -- that I submitted
13 to Dr. Wigand. I think it's the one he sent out. But I did
14 not, contemporaneously with this, I did not see what he actually
15 sent.

16 Q. Okay. But you produced -- you produced a new document that
17 you gave to Dr. Wigand. What he did to it after that, you don't
18 know. Is that your testimony?

19 A. I produced a document under Dr. Wigand's direction as to
20 what it should have in it and gave it to him. And, yes.

21 Q. His direction or not, you produced the document; correct?

22 A. I was the scribe.

23 Q. Well, he didn't actually read to you and you sat and typed,
24 did you?

25 A. Very close.

1 Q. Is that your testimony to the court, that you sat and typed
2 at a typewriter as Mr. Wigand dictated to you?

3 A. Dr. Wigand told me by type -- by example what he wanted
4 included. The document I prepared simply pulled out from these
5 draft minutes the parts that he had instructed me to put
6 together, and it's what I mean by acting as scribe. I took
7 those parts out, and I'm the one who manually put them into the
8 form of one much shorter document.

9 Q. Dr. Wigand had his own secretary, didn't he?

10 A. Yes.

11 Q. So, I think we are at the point where you have indicated you
12 did, in fact, create a set of minutes that you gave to
13 Dr. Wigand that were presented as the minutes of the 1989 RPG
14 meeting; correct?

15 A. I can't agree with "create," no.

16 Q. You prepared a document that represented to be the 1989
17 Vancouver meeting minutes; correct?

18 MR. BERNICK: I object. I think the witness has
19 described pretty much what happened. We're now trying to figure
20 out a label for it. I think his testimony about what factually
21 occurred is there.

22 THE COURT: The objection is overruled, not because I
23 don't -- because I don't want to get to the heart of this
24 matter, but rather, because it seems difficult to get a clear
25 and straight and fairly timely answer from this witness.

1 The objection is overruled. Go ahead, please.

2 BY MR. GETTE:

3 Q. Mr. Wells, do you remember the question?

4 A. Counsel, you continue to use words that implies some
5 creative function as if I have information on my own that I
6 supplied here or that I had discretion as to what to include
7 in -- in the final set of minutes, and neither of those is
8 correct.

9 Q. So, if I understand it, then. You were providing
10 secretarial services to Dr. Wigand?

11 A. Essentially, that's correct.

12 Q. That's your testimony to this court?

13 A. Yes.

14 Q. You didn't attend the 1989 RPG meeting, did you?

15 A. No.

16 Q. If we pull up Joint Defendants' Exhibit 010471.

17 Sorry, Mr. Wells, I'm having trouble pulling up copies
18 of that for a moment, so let me move on to one other thing.

19 Let's go back just briefly, while we try and find that,
20 to U.S. Exhibit 30923, which you have in front of you.

21 A. Yes.

22 Q. And you see at the top right-hand of that document, F BATCo
23 smoking and health September 1989 in handwritten?

24 A. Yes, I do.

25 Q. That was the type of notation that we talked about before

1 that you would put on the top of your documents; correct?

2 A. Yes.

3 Q. And if you look throughout this document, do you see
4 additional handwriting -- examples of your handwriting
5 throughout the document?

6 MR. BERNICK: I'm sorry. Are we -- a different
7 document is now being displayed on screen.

8 MR. GETTE: We can pull that down.

9 BY MR. GETTE:

10 Q. Mr. Wells, do you remember the question?

11 A. I did not hear the conclusion.

12 Q. The question was, are there additional -- beyond the
13 notations at the top right-hand side of the first page of U.S.
14 Exhibit 30923, are there additional examples of your handwriting
15 and markings throughout the document?

16 A. Yes, that's fair.

17 Q. Now, I'd like to look at Joint Defendants 010471. And I'm
18 going to ask you to take a look at the last three pages of that
19 document and simply let me know if that is the version of the
20 document that was sent by you to Mr. Wells after the changes
21 that you made?

22 THE COURT: Wait. Did you misspeak?

23 BY MR. GETTE:

24 Q. I'm sorry. From you to Dr. Wigand after the changes you
25 made.

1 A. I think so, counsel.

2 It's been a long time, but it says they were the ones
3 approved by Mr. Pritchard, which I believe -- I believe
4 Mr. Pritchard approved this set that I produced for Jeff, and --
5 I don't have a photographic memory that would allow me to
6 identify it, but it does seem to be.

7 Q. And you say the one approved by Mr. Pritchard. He at this
8 point was Chairman and CEO of Brown & Williamson?

9 A. That's correct.

10 Q. And he hadn't attended the meeting in Vancouver either, had
11 he?

12 A. No.

13 Q. Let's look at one more document related to the Vancouver
14 minutes, and that is U.S. Exhibit 90132.

15 I apologize about the size of the print there. It may
16 be easier for you to actually read on the screen. I don't know.

17 A. Thank you. This is squint size.

18 Q. Do you see that this is a memorandum to Jeffrey Wigand to
19 yourself dated November 1, 1990?

20 A. Yes.

21 Q. And you see that the subject of this is Draft RPG Minutes;
22 correct?

23 A. Yes.

24 Q. And RPG minutes, those -- that was the kind of document that
25 was created coming out of the Vancouver meeting; correct?

1 A. It's the same group. I'm not sure that it was always
2 exactly the same individuals attending. I think they may have
3 had smaller meetings from time to time. But it's the same
4 group.

5 Q. Fair enough. This is the same group, and now they are
6 meeting approximately a year later over in Germany; correct?

7 A. Apparently. There's no -- I have no reference for this
8 statement. It's minutes of the Germany 1990 meeting. That's a
9 fair guess.

10 Q. But this is your signature on the document; yes?

11 A. Yes.

12 Q. And you have no reason to believe you were inaccurate when
13 you wrote this document, do you?

14 A. I'm sorry, I don't mean to be evasive. Ask me the question
15 again, and maybe it's a yes.

16 Q. You have no basis to doubt the accuracy of what you wrote in
17 that memorandum, do you?

18 A. No.

19 Q. And in the memorandum, if you look at the second paragraph,
20 you wrote, "I am pleased with the attention which the author has
21 given the language in this draft." Correct?

22 A. It says that.

23 Q. And then you go on to say, However, there are a couple of
24 changes that I think might be in order; correct?

25 A. Yes.

1 Q. So here in 1990, a year later, you were offering suggestions
2 for revisions to the RPG minutes; correct?

3 A. Yes, at Dr. Wigand's request.

4 Q. Dr. Wigand's request, your request, and Mr. Pritchard's
5 request, you were offering changes to the 1990 minutes; correct?

6 A. I'm referring to the document, counsel. It's to Dr. Wigand
7 and says, "Pursuant to your request," which is my statement.
8 Mr. Pritchard is not mentioned on here.

9 Q. And my question to you is, regardless of who may have asked,
10 you provided comments which suggested changes to the 1990 RPG
11 meeting minutes; correct?

12 A. Yes.

13 MR. GETTE: Your Honor, this is the end of the series
14 of questions related to the RPG minutes.

15 THE COURT: All right. Now, this witness is going to
16 look over those documents, the additional documents tonight, and
17 you may want to start with those documents tomorrow morning.
18 And then based on the estimates, you should have about an hour
19 or an hour and a half of direct at most, I think.

20 MR. GETTE: I think that's at most, Your Honor.

21 Yes, I would like to go back over to the area we were
22 on and then one other small area.

23 If the witness could be instructed beyond the documents
24 that he's been provided with that set, that he not review other
25 documents, please.

1 THE COURT: I will.

2 Mr. Bernick.

3 MR. BERNICK: I was going to raise one other matter
4 with the court concerning this witness's testimony, but it might
5 be more --

6 THE COURT: Should he be excused?

7 MR. BERNICK: Yes.

8 THE COURT: Mr. Wells, you may step down now. You
9 should look over the documents this evening that you didn't get
10 a chance to finish looking over during our recess. You, of
11 course, cannot talk with counsel about anything. You can't
12 refresh your recollection about anything else other than those
13 particular documents.

14 Do you understand that?

15 THE WITNESS: Yes. Thank you, Your Honor.

16 THE COURT: All right. Good. And you may be excused
17 now.

18 THE WITNESS: Am I excused, Your Honor?

19 THE COURT: Yes, you may be excused.

20 Counsel, as to Friday, I know I'm due testimony from
21 people. Under our orders, it's not required to be submitted
22 until 12:00 o'clock. The government will be submitting it. If
23 it's possible for you to get it in at 11 or 11:15, I'd
24 appreciate it. If it's not possible, I'll work with that.

25 MR. BRODY: It's actually when, Your Honor, it will be

1 coming from the defendants because it's from the adverse
2 witnesses.

3 THE COURT: I see.

4 MR. NARKO: Your Honor, we will do everything we can to
5 get those in as early as possible. There are three witnesses
6 that we're working on, so it may be difficult, but we will do
7 our best.

8 THE COURT: Or if you could even get one or two in the
9 order, and choose them in the order in which they are going to
10 testify next week.

11 MR. NARKO: We will make every effort to do that, Your
12 Honor.

13 THE COURT: All right. Mr. Bernick.

14 MR. BERNICK: Just an observation about trying to
15 expedite the process tomorrow with Mr. Wells. I've known
16 Mr. Wells for years and years, and he is slow and deliberate, to
17 the point that annoys all who have ever dealt with him.

18 THE COURT: Well, that's comforting to know. I thought
19 it was just my New York background.

20 MR. BERNICK: It is -- all the cylinders are there
21 clicking right along, but there's just something that takes time
22 and it's very consistent. But what I was going to suggest, he's
23 a very careful guy.

24 If he could be given the opportunity to review the
25 documents that he is being asked about completely before the

1 questions get asked, because you can see what he's doing is he's
2 reading the rest of the document and just to make sure that he's
3 got everything before him. That I think would really expedite
4 the process a lot, and that's my own experience.

5 THE COURT: Well, Mr. Gette, to the extent that you
6 feel comfortable giving him other documents -- he may have left,
7 but you can always work through counsel -- you may want to give
8 him other documents overnight to review. That's up to you.

9 MR. GETTE: Your Honor, a couple of things.

10 One, no. There's no others I think I would like to
11 give him now. There really are, beyond the ones he's taken with
12 him, only a very small number of additional documents that I may
13 use tomorrow.

14 Number two, to the extent I can accommodate
15 Mr. Bernick's request, I will, but obviously an examination at
16 times goes in different directions and will need to be
17 accommodated.

18 Number three, someone pointed out to me that Mr. Wells
19 did take his written direct testimony with him this evening and
20 so --

21 MR. BERNICK: I saw that. I think that's right.

22 Would it be appropriate to get that? I think that's
23 going to be the actual testimony submitted to the court, so we
24 will go and get that from Mr. Wells.

25 THE COURT: It would be, and I think some of your

1 people are going out to get him now, although I could be wrong
2 that they are with you. But, yes, we ought to retrieve that.

3 MS. STRAUB: Your Honor, if I may. Nancy Elizabeth
4 Straub for Liggett.

5 Your Honor, one request to get a firm time frame for
6 Mr. LeBow. Back in December, Mr. LeBow had certain health
7 issues that precluded him from testifying before the end of the
8 year, and although he is not going to invoke obviously those
9 same issues and not traveling, he's able to travel.

10 Considering the time estimates for tomorrow, we would
11 ask the court to consider allowing Mr. LeBow to start first
12 thing Monday morning so he doesn't have to travel twice within
13 four days back and forth.

14 THE COURT: Where is he coming from?

15 MS. STRAUB: Miami.

16 I believe there's one defendant, Mr. Webb, that will
17 have questioning for Mr. LeBow. I know Liggett will have about
18 20 to 30 minutes.

19 THE COURT: Is Brown & Williamson going to have any
20 questions of him?

21 MR. BERNICK: No.

22 THE COURT: Let's see. Of course Mr. Webb is not here.
23 Do you have any idea of how long his cross will be? It's kind
24 of hard to estimate. Probably some idea.

25 MR. NARKO: Your Honor, Mr. Webb is still working on

1 it. Roughly two hours is what I think a good estimate would be.

2 THE COURT: And the government's direct?

3 MS. EUBANKS: Well, looking at it right now, it could
4 be as long as three or four hours.

5 But I guess our concern is that with Mr. Wells, if
6 Mr. Gette has say an hour and a half more and if defense counsel
7 has three hours, then we're going to have down time and we
8 certainly have -- you know, we don't object. It's up to the
9 court, obviously.

10 We don't have an interest in having the witness just
11 come and go and wait for nothing, but it would be a shame to
12 have a couple of hours at the end of the day and not have them
13 filled.

14 THE COURT: I think the most we would have, I think,
15 would be two hours down time, and even that is probably not
16 right because I'm taking into account that there's probably at
17 least another hour of redirect, Mr. Gette. I think that's fair,
18 don't you, or no?

19 MR. GETTE: I do, Your Honor, given the deliberateness
20 of the witness.

21 THE COURT: All right. Mr. Bernick has said two to
22 three hours. Let's say he only takes two hours, which would not
23 be totally consistent with prior practice, but, in any event,
24 that would be three hours.

25 MR. BERNICK: I really object --

1 (Laughter)

2 THE COURT: And then the government gets redirect. So,
3 I really think we will use most of the day. I doubt that we
4 would get in an hour or much more of Mr. LeBow's testimony.

5 And let me double-check. I think there are no
6 interruptions next week. We will start at 9:30. I have a 5:00
7 o'clock meeting on Monday, which means I want to end moderately
8 promptly, somewhere between 4:30 and 4:40.

9 We will certainly start on time on Tuesday. We do have
10 an executive session in the afternoon, so Tuesday afternoon we
11 will probably end about 4:20 or so.

12 Those are the only interruptions. So you may tell him
13 Monday morning then.

14 MS. STRAUB: I appreciate that, Your Honor. Thank you
15 very much.

16 THE COURT: And let's do our best for tomorrow, please,
17 everybody.

18 (Proceedings concluded at 4:35 p.m.)

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CERTIFICATE

I, EDWARD N. HAWKINS, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Edward N. Hawkins, RMR