

1 CASE NUMBER: BC 226593
2 CASE NAME: BOEKEN v. PHILIP MORRIS
3 LOS ANGELES, CALIFORNIA Thursday, MAY 17, 2001
4 DEPARTMENT 308 HON. CHARLES W MC COY, JUDGE
5 APPEARANCES: (AS NOTED ON TITLE PAGE.)
6 REPORTER: LINDA STALEY, CSR NO. 3359, RMR, CRR
7 TIME: 1:45 p. m

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10

11

12 THE COURT: Our jury panel is with us; counsel are
13 present as well.

14

Good afternoon, counsel

15

16

(Chorus of good afternoon's.)

17

18

THE COURT: Good to see you.

19

Mr. Piuze.

20

21

ARGUMENT (resumed)

22

by MR. PIUZE:

23

24

Well, Your Honor, I figure when two of the
jurors don't come back, maybe I spent too much time on teen
smoking.

25

26

27

28

And there's so much stuff here, I've got to
make a command decision, and the decision is, risk boring
some of you by banging away at this stuff again. I think

1 it's super important. So I mean, there's so many votes for
2 that. And let it slide in order not to bore you. But maybe
3 one of these documents or one of the things that I think is
4 important here slipped during the trial.

5 So I'm going to vote for boring you. But with
6 an asterisk. I think this stuff here is super important. I
7 think that out of all of the tens of thousands or however
8 many juries there have been in the United States that have
9 ever looked at anything in a civil case, ever, any kind of a
10 civil case, ever, that you are one of the extreme few jurors
11 ever to lay eyes on stuff like this in hundreds of years.

12 MR. LEITER: I'm going to object to that, Your Honor.

13 THE COURT: Sustained.

14 MR. PIUZE: Can you turn that on for me, please.

15 Okay. The purpose of showing you this teen
16 smoking thing, which I'm going to do quickly, is not for the
17 truth of the matter stated in here. It is to show what
18 professor Cobbs Hoffman, number one, and Ellen Merlo, number
19 two, have to think or what they've avoided thinking or how
20 they responded to certain of these charges.

21 Ms. Merlo, don't forget, ascribes and
22 subscribes to a clipping service, and because she's what she
23 does in the corporation, anything that the press writes about
24 comes to her attention. So she sees it. She sees it
25 automatically. She looks at it. And she was up here to
26 respond to some of these things. So I'll just take a couple
27 minutes, go through it. Go on to the next topic.

28 This is the 1999 -- on October 31st of 1999,

1 the San Diego union. And this is a guy named Pierce, who's
2 at the ucsc. And professor Cobbs Hoffman was familiar with
3 him. He surveyed teen smokers to find out what made them
4 smoke.

5 (Paraphrased reading:)

6
7 Most popular response:

8 Cigarette ads, 2 to 1. Anti-smoking ads, he
9 says, are merely a high profile smoke screen,
10 probably intended to shield big tobacco from
11 lawsuits. Smoking ads cost the industry over
12 \$5 billion year.

13
14 L.A. times, 1998, in May.

15 (Paraphrased reading:)

16
17 Smoking about image. 3,000
18 teenagers will light up for the first time
19 today. I want to look cool.

20
21 San Diego, March, 2000.

22 (Paraphrased reading:)

23
24 City council down there in
25 national city was requiring an ordinance
26 requiring merchants to keep cigarettes and
27 other tobacco products behind the counter and
28 when within 1,000 feet of schools. The law

1 could require that stores near schools keep
2 tobacco ads away from products, like candy.

3 We know that the tobacco
4 industry strategically places their products
5 next to products that appeal to -- excuse
6 me -- next to products that appeal to
7 children, particularly in stores near
8 schools, says Deborah Kelley, American lung
9 association V.P. for governmental relations.
10 That's why we feel there has to be a visual
11 separation to sever the connection between
12 the 3 musketeers and the Marlboro man.

13

14 San Diego, may 18, 2000.

15 (Paraphrased reading:)

16

17 Cigarette makers have
18 increased advertising in magazines with large
19 teen audiences since 1998.

20

21 San Diego, November 30, 2000.

22 (Paraphrased reading:)

23

24 State school superintendent
25 delane eastin and local American lung
26 association are urging schools to reject free
27 textbook covers from cigarette maker
28 Philip Morris.

1 November 29, 2000, L.A. times.

2 (Paraphrased reading:)

3
4 Shasta county high school
5 district gets handout 1,000 philip morris
6 book covers with Philip Morris written on
7 cover. District disposed of them

8
9 L.A. times, November 17th, 2001.

10
11 Philip Morris stops sending
12 free book covers to California public schools
13 but has not agreed to recall them

14 The covers were an attempt by
15 Philip Morris to promote its corporate
16 identity and, consequently, in cigarettes to
17 children through illustrated book covers,
18 said attorney general bill Lockyear.

19
20 Ms. Merlo told us, you, us, all of us here,
21 that the new Philip Morris -- first of all, denying that the
22 old Philip Morris ever targeted kids, ever -- looking at
23 those blow-ups that I showed you this morning and say, who
24 can explain them, who knows why, but that sure wasn't us. It
25 was someone that snuck into our building at night.

26 But if we did, we would never do it anymore.
27 Our stockholders wouldn't allow it. We would never do it
28 anymore. And I asked her -- and I showed her some of these

1 very things here -- would the American lung association trust
2 Philip Morris any further than they could throw it?

3 No.

4 Would the committee for tobacco-free kids trust
5 Philip Morris any further than it could throw it?

6 No.

7 How about the State Department superintendent
8 of schools here in California -- no -- bill lockyear?

9 No. They wouldn't trust us.

10 But, ladies and gentlemen, you, you should
11 trust us.

12 So that's what I have to show about kids and
13 smoking. No kids; no smoking. No smoking; no profits.

14 Ellen Merlo saying, we will stop selling to
15 kids and targeting kids is like that guy in 1954 saying, if
16 this product is harmful, we'll stop, we'll got out of the
17 business.

18 It's like Bible saying in 1998 in Minnesota
19 under oath, if he thought one person died from this -- what a
20 stupid thing to say, if I thought one person -- where's he
21 been hiding -- died from this, we'd be out of business.
22 We'll stop business.

23 That's ridiculous. It's an insult to the
24 intelligence of anyone.

25 Let me take a little historical run here on
26 some of these things that were being said by --

27 Mr. Boeken was a young man, and when there was
28 some sort of a knowledge out there that he absolutely should

1 have had, should have figured out, should have felt, let's go
2 through a little historical stuff here. Please.

3 Here is March of '65. This is the tobacco
4 institute.

5 The cigarette manufacturers told Congress
6 through the chairman of the board of R. J. Reynolds, who was
7 appearing for the whole industry, spokesman for nine
8 cigarette manufacturing companies, expressed industry
9 opposition to regulation.

10 (Paraphrased reading:)

11

12 The cigarette industry's
13 position is based on three bases.

14 First, the industry is
15 profoundly conscious of the questions
16 concerning smoking and health.

17 Second, many scientists are of
18 the opinion that it has not been established
19 that smoking causes lung cancer or any
20 disease.

21 Third, a great deal more
22 research needs to be done.

23

24 This is a transition document. I'll state that
25 lawyers were in charge of medical and/or scientific decisions
26 at the tobacco companies. Decisions on whether or not to do
27 legitimate scientific testing, legitimate biological testing
28 were not made with the scientists or doctors who should have

1 been in charge of them, or at least not totally made. These
2 decisions were influenced by attorneys almost all the way.

3 The attorneys got involved because, one, they
4 wanted to preserve some sort of a litigation strategy for
5 right now, today; whether today was going to be 1975 or '85
6 or '95 or 2005 didn't matter. But rather than develop these
7 products in order to guard health, what was being considered
8 was litigation strategy, and what was being considered was
9 influencing Congress. So this is one of the documents that
10 starts talking about that, and there'll be others.

11 This is an important document, right here.
12 October 14, 1969. And this is Mr. Wakeham. He was one of
13 the top two guys across the top line.

14 (Paraphrased reading:)

15
16 The scientific expertise of
17 the industry, because of the liability suit
18 situation, has not been permitted to make a
19 contribution to the problem, a contribution
20 which I believe was and is vital because the
21 industry scientists are willing to consider
22 the scientific problem from the point of view
23 of the industry rather than from the position
24 of the Public Health agency.

25

26 And then (paraphrased reading):

27

28 At the beginning of our

1 support of smoking and health research, this
2 failure may have been connected with our
3 consistent denial of the statistics and our
4 continued assertion that this is nothing to
5 the cigarette causation hypothesis.

6

7 1967. This to Clements. Clements is with the
8 tobacco institute.

9

(Paraphrased reading:)

10

11 The tobacco industry has a
12 very serious problem in the current tobacco
13 health controversy. It is rapidly becoming
14 worse. Prior to 1954, the problem was mainly
15 a public relations problem, and our opponents
16 had no effective base to work from. In
17 December of '53 with the publishing of the
18 Wynder, Graham and Croninger paper, the
19 problem not only intensified, but became a
20 scientific one.

21

22 In the last 14 years, this
23 problem has become much more complex, more
24 involved and much more serious. Although
25 this problem has public relations, business,
26 legal and political components, it is
27 basically a scientific one. So far, however,
28 the major efforts of the industry to cope
with this probe have been other than

1 scientific.

2

3 Here's 1970. This is Mr. Wakeham This is
4 Philip Morris. December.

5 (Paraphrased reading:)

6

7 It has been stated that CTR is
8 a program to find out "the truth about
9 smoking and health." What is truth to one is
10 false to another. CTR and the industry have
11 publicly and frequently denied what others
12 find as "truth." Let's face it. We're
13 interested in evidence which we believe
14 denies the allegation that cigarette smoking
15 causes disease. If the CTR program is aimed
16 in this direction, it is, in effect, trying
17 to prove the negative, that cigarette smoking
18 does not cause disease. Both lawyers and
19 scientists will agree that this task is
20 extremely difficult, if not impossible.

21

22 Which gets me to what I believe -- excuse me --
23 what gets me to the most important exhibit in this case. And
24 this is the proper proposal of 1972. And this is the height
25 of hypocrisy right here.

26

27 Dr. Benowitz talked about the fact that when
28 you've got someone who is addicted, a person who's addicted
is going to tell themselves stories, and whether you call it,

1 rationalize or whatever you call it, someone who's hooked is
2 looking for a reason to believe that they can continue in
3 their conduct. And I think that's something that's probably
4 disputed here. Someone that's hooked is more apt to believe
5 a story than someone who isn't.

6 This is the hook. This is where they talk
7 about the hook. Right here.

8 (Paraphrased reading:)

9

10 For nearly 20 years, this
11 industry has employed a single strategy to
12 defend itself on three major fronts --
13 litigation, politics and public opinion.

14 While the strategy was
15 brilliantly conceived and executed over the
16 years helping us win important battles, it is
17 only fair to say that it is not -- nor was it
18 intended to be -- a vehicle for victory. On
19 the contrary, it has always been a holding
20 strategy, consisting of . . .

21

22 Now, obviously, during the course of this
23 trial -- I'll put that where the jury can see it. And during
24 the course of this trial -- this is the long time line.

25 This will not go to the jury, and so I'm going
26 to bring it out in a little while and discuss as it related
27 to Mr. Boeken.

28 But what they say in writing for the world to

1 see is that they are going to try to create a doubt in
2 People's minds about what these scientists say without
3 actually denying the charge.

4 Now, please think about this here. Whether
5 it's Richard Boeken or the 5 million or 10 million or
6 30 million other smokers that have a heck of a lot of trouble
7 quitting, one of the reasons they have a little trouble
8 quitting or a heck of a lot of trouble quitting is because
9 there was doubt forever and ever purposely implanted in their
10 brains about whether it was really true what everyone said;
11 is it really true that smoking causes lung cancer?

12 As recently as last week, Dr. Hoshizaki said,
13 well, you know, only 20 percent get it, 80 percent don't. We
14 can't get it in animals, we can't put a human tumor in
15 animals, we still can't. I mean, these were important
16 questions. We could never figure these things out. I, as a
17 biologist professor at the university, couldn't figure these
18 things out. And we still don't have answers to these
19 questions.

20 Well, these questions were out there and people
21 that want to, need a reason to, make believe or have
22 something to grab onto were hand fed this starting way before
23 1972.

24 This is what you're going to be reading. The
25 judge will read jury instructions. Later on, the jury
26 instructions will be given to you. There are about four or
27 five or six different kinds of fraud that are claimed in this
28 case. Let's start with this.

1 (Paraphrased reading:)

2

3 The essential elements of a
4 claim of fraud by an intentional
5 misrepresentations are:

6 Philip Morris must have made a
7 representation as to a past or existing
8 material fact.

9

10 It won't hurt you. We're united in your
11 health. Our products are safe. We'll work closely with the
12 authorities to take care of it.

13 Mr. Weisman; we'll close the doors if we think
14 it will hurt you.

15 Mr. Bible; we'll go out of business, et cetera,
16 et cetera, et cetera.

17 (Paraphrased reading:)

18

19 The representations must have
20 been false.

21 Philip Morris must have known
22 that the representation was false when it
23 made it.

24 Or must have made the
25 representation recklessly without knowing
26 whether it was true or false.

27

28 Let's think about that. If Philip Morris

1 truly, with all of the resources at its beck and call, did
2 not know for sure whether or not tobacco caused cancer, why
3 in the world should it deny such a thing?

4 Why shouldn't it say, gee, we've got 1,000
5 scientists over here that say yes, and we've got a couple
6 people over here that say no. So, hey, what the heck. But
7 they affirmatively said no. But even if she said, you know,
8 what -- it's an open question -- they shouldn't have, because
9 it wasn't an open question.

10 (Paraphrased reading:)

11

12 The defendant must have made
13 the representation with an opportunity to
14 defraud the plaintiff.

15 That is, the defendant must
16 have made the representation for the purpose
17 of inducing the plaintiff to rely on it and
18 to act and refrain from relying on it.

19

20 It's another one of these instructions that
21 says the plaintiff -- anyone in the population who listened
22 to this is in the class, anyone, not just Mr. Boeken. Anyone
23 out there.

24 (Paraphrased reading:)

25

26 The plaintiff must have been
27 unaware of the falsity of the representation,
28 must have acted in reliance upon the truth of

1 the representation, and must have been
2 justified in relying upon the representation.

3
4 And here is a place where professor
5 Cobbs Hoffman would say, wait a second. Anyone -- she said
6 this -- anyone who would listen to tobacco industry
7 executives are fools. Anyone who would listen to what their
8 clients, executives say, should have their heads examined.
9 Anyone who would believe what a tobacco company would say
10 would have to have a developmental defect.

11 This comes from a professor of U.S. history.
12 And this comes from a professor of recent U.S. history. And
13 I sure hope that future professors of U.S. history don't have
14 to write that we have sunk to such a situation to such a low
15 level that we should have our heads examined, and we are
16 mentally defective or developmentally disabled if we listen
17 to what the heads of gigantic corporations say.

18 Once upon a time in America, people like this
19 used to be our leaders and respected, and not only once upon
20 a time, but now, they get chosen for the cabinet of the
21 government.

22 But professor cobbs Hoffman would say, you
23 can't trust them, you shouldn't trust them, if you trust
24 them, you're a fool.

25 What a defense. We're such snakes that if you
26 trust us, you're a fool. What a defense.

27 That's called intentional misrepresentation.
28 Here's a brother or a sister.

1 (Paraphrased reading:)

2

3

Expression of opinion.

4

5

Ordinarily, expressions of
opinion are not treated as representations of
fact upon which to base actionable fraud.

6

7

8

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23

24

This is called (paraphrased reading):

25

26

Fraud and deceit, concealment.

27

28

Philip Morris must have
concealed or suppressed a material fact prior

1 to July 1, '69.

2

3 Which is a magic cutoff date for us here for a
4 couple of issues. One of the issues in this case has to do
5 with a failure to warn. And another one of the issues in
6 this case has to do with a failure to show people how to
7 properly use a product. And I'm talking about light
8 cigarettes. And I'm talking about compensation. And I'm
9 talking about a situation where people who think they're
10 smoking down to a lower tar cigarette, they really think
11 they're going to get lower tar, and they don't.

12 Up until 1969, Philip Morris had a duty to warn
13 the public, anyone, everyone, all users, about the dangerous
14 propensities of its product.

15 The cutoff date, magically, is July 1, '69.
16 After that time, there was no such duty.

17 Similarly, up until July 1, 1969, Philip Morris
18 had a duty to warn people who bought light cigarettes that,
19 guess what, you're buying these low-tar cigarettes, you think
20 you're going to get less tar, you think you're going to get
21 less of the bad stuff, you think you've got less of a chance
22 to get sick. Wrong, wrong, wrong, wrong, wrong.

23 After 1969, no such duty claimed in this case.

24 So back to this.

25 (Paraphrased reading:)

26

27

28

The defendant must have
concealed or suppressed a material fact prior

1 to July 1, '69.

2

3 We've had a ream, mound, huge pile of documents
4 in which they conspired to do just that. We're going to
5 dummy up and not tell anyone about what we know about what's
6 in these cigarettes and what it does to you.

7 The defendant must have been under a duty to
8 disclose that fact to plaintiff and everyone else that's
9 smoking. Obviously, a manufacturer of a product has got to
10 tell -- a reasonable manufacturer of a product has got to
11 tell about the bad side effects, about what's really going
12 on, not give false information, misinformation,
13 disinformation.

14 (Paraphrased reading:)

15

16 Philip Morris must have
17 intentionally concealed or suppressed the
18 fact with the intent to defraud plaintiff.

19 The plaintiff must have been
20 unaware of the fact and would have acted --
21 would not have acted as he or she did if
22 known of the concealed or suppressed fact.

23

24 And I want to tell you. I asked
25 Richard Boeken -- and it's there in the volume of a
26 deposition. And it's a what-if question. But what if they
27 said -- they said, don't forget, Mr. Boeken was aware of the
28 surgeon general's report. Mr. Boeken was aware that warnings

1 were made. Mr. Boeken was aware of what he called a --
2 what's the word -- brouhaha?

3 MR. CARLTON: Something like that.

4 MR. PIUZE: A brouhaha or thing-a-ma-jig, a fight
5 between the tobacco companies and the surgeon general. He
6 was aware of that. And he listened to it. And he said, you
7 know what, I thought the surgeon general was on a political
8 vendetta. I believed what she said. I listened to them. He
9 and 50 million other people.

10 Now, was he justified in listening to them?

11 We're back to professor Hoffman now. According
12 to professor Hoffman, no. When someone looks you in the eye
13 and makes you promise and tells you, this ain't going to hurt
14 you, don't worry about it. We promise you. You are not
15 entitled to rely on that.

16 Mr. Boeken did. Mr. Boeken is a businessman.
17 Mr. Boeken has expressed admiration for big business. His
18 wife backs that up. His wife said that's the centerpiece of
19 his life. He really, really, really loves it. He told you
20 on his videotape deposition he couldn't conceive of these
21 people standing up, all of these extremely responsible
22 people, standing up and lying under oath.

23 He was wrong.

24 How about the cousin?

25 (Paraphrased reading:)

26

27 Fraud and deceit.

28 Active concealment of known

1 facts.

2 Intentional concealment exists
3 where a party, while under a duty to speak,
4 does, nevertheless, does so --

5

6 THE COURT: No. Under no duty to speak.

7 MR. PIUZE: Excuse me. That's a sign.

8 (Paraphrased reading:)

9

10 Intentional concealment exists
11 where a party, while under no duty to speak,
12 nevertheless, does so, but does not speak
13 honestly and makes misleading statements or
14 suppresses facts which materially qualify
15 those stated.

16

17 And the English of that is, if you don't have
18 to say anything, but you do, and it's misleading, and you
19 know it is, and you suck someone in, that's wrong.

20 Here's another one (paraphrased reading):

21

22 Fraud and deceit, false
23 promise.

24

25 But I'm tired of reading, and you're tired of
26 listening. There are about seven of these things. And every
27 one of these things has to do with fraud. The subject matter
28 is fraud. And the issue is, Philip Morris knew everything it

1 had to know and either lied about it or covered it up or
2 dummi ed it up or didn't let it out or gave misinformation or
3 gave disinformation:

4 Listen to this, please. This is Dr. Farone.

5 MR. LEITER: Page number, please.

6 MR. PIUZE: 1549.

7 MR. LEITER: Thank you.

8 MR. PIUZE: (Paraphrased reading):

9

10 About a year and a half after
11 I had been there, I had been told by
12 Dr. Osdene on several occasions that one of
13 his main missions, as he put it, was to
14 maintain the controversy, meaning, keep
15 shedding doubt on whether or not Nicotine was
16 addictive and whether or not smoking caused
17 disease.

18 It was his job to maintain the
19 controversy?

20 About whether Nicotine was
21 addictive?

22 Even though you knew Nicotine
23 to be addictive?

24 It was his job to maintain the
25 controversy about whether tobacco caused
26 disease.

27 Even though you knew tobacco
28 caused disease.

1 It's an amazing -- this is the guy who
2 said that if the Nicotine studies turn out wrong, destroy
3 them

4 This is the guy who said, if the tests come
5 back from Germany, send them to my house. They're going to
6 be destroyed.

7 This is the guy who showed Dr. Farone a test of
8 a real, honest to God, real Marlboro cigarettes back around
9 '79 or '80 that had been done for biological activity, and
10 this has been a document that has never been found. This is
11 a document that Philip Morris denies the existence. Never
12 happened. Couldn't have happened.

13 This is page 1560 (paraphrased reading):

14

15 Dr. Osdene was a colleague of
16 mine. It was his responsibility to do safety
17 testing on cigarettes. The way this was done
18 was to have the tests done in Europe and
19 Philip Morris -- at the time, I didn't know
20 Philip Morris actually owned a facility, but
21 Philip Morris used a facility in Germany
22 called the, in German, the institute for
23 biological technology. The ACRONYM is
24 inbifo, and that was a laboratory in Germany
25 where products were sent to be tested for all
26 of the kind of testing that we just talked
27 about, the in vivo testing as well as the in
28 vitro testing.

1 In vitro is a tease. In vivo is
2 real-life subjects, whether animal or not.

3 This is page 1513 (paraphrased reading):

4
5 Did high-ranking people at
6 Philip Morris discuss the gentleman's
7 agreement with you?

8 Sure. Seligman, Osdene,
9 Wakeham, Resnick, carpenter, Kuhn, pages,
10 Hauserman, gaisch.

11 As they told it to you, why
12 not put up a Marlboro against a Winston or a
13 Winston against a kool or a kool against
14 whatever's out there?

15 His answer was: The
16 information could be used in court
17 proceedings like this to prove that the
18 products are carcinogenic.

19 If you do an animal test, when
20 you do the animal test, what you're doing is,
21 you're saying the animal is a model for
22 humans. You can never use an animal to
23 exactly mimic a human without using humans,
24 but you are not going to use humans in tests.

25 Well, as it turns out,
26 epidemiology is a human test, but you don't
27 intend to test your products on humans to
28 start off with.

1 parameters of how we could state that a
2 cigarette could be safe where you couldn't,
3 epidemiologically, tell the difference
4 between the use of that cigarette and
5 nonsmokers; but I mean, in terms of a normal
6 cigarette, there's no such thing as a
7 cigarette., a normal cigarette on the market
8 right now that's absolutely safe.

9 Is it your testimony there
10 could be a safe cigarette on the market
11 today?

12 Yes, there could be a safe
13 cigarette on the market today.

14
15 But what happens, for instance, if Cambridge
16 was on the market today, and Cambridge was 0.1 milligrams of
17 tar. What if?

18 99 plus percent less of the bad stuff.
19 Virtually no bad stuff.

20 If there was a difference, he says, between two
21 brands that were being sold, the concern was that people
22 would always migrate to the safer one.

23 And if there was a difference between two
24 brands that were being sold and people always migrate to the
25 safer one, the foundation of the empire was in jeopardy.

26 Cambridge cigarettes, hard to light. And in
27 the 1980's, that cigarette had the lowest tar figures ever,
28 ever seen, ever anyplace on a cigarette, and it was hard to

1 light.

2 I already mentioned this morning that flavor
3 and Nicotine could both be put in the filter. I asked
4 Philip Morris' witness, tell us you tried that or tell us
5 that you can't do it, whatever the question was. He
6 wouldn't. Dr. Farone said both of those things could be
7 done., but it was hard to light.

8 And look what happened with that 20 years
9 later, and we come in here with an electronic gizmo that
10 gives you seven puffs with a cigarette -- do it with some
11 sort of a battery. Hard to light. Hard to catch cancer.
12 Impossible to catch cancer.

13 Dr. Farone says there is such a thing as a safe
14 cigarette, but they didn't want to pursue it. And while I'm
15 on it, let me take two minutes there.

16 There was more than a day reading of these
17 depositions. Uydess, Mele. One of them was a rat
18 researcher. He was a Nicotine researcher. The research was
19 being done in Richmond, Virginia. It was done under secret
20 conditions. The rats were brought in, covered up with --
21 they had tarps on them, and no one was supposed to know they
22 were there. And they were secret animal labs, and no one was
23 supposed to know about this. And it was all top secret.

24 What they figured out was that these rats were
25 just as hooked on Nicotine as they would have been on
26 cocaine. And there are several documents either that you
27 will see or that I'll get to and read that flat out say, a
28 lot of people in science say that Nicotine is just as

1 gentleman's agreement the week that he joined the company.

2 This roper proposal that I had up on the board
3 talked about politics, so I just want to talk a little bit
4 about politics.

5 This is page 1500. This is Dr. Farone
6 testifying.

7 (Paraphrased reading:)

8
9 Dr. Seligman, who became my
10 boss, was very clear on the two main
11 functions that they were interested in my
12 helping them with. Based on my background,
13 one was diversification into areas other than
14 cigarette products. And the second was
15 making the product, the cigarette product,
16 safer.

17 Seligman and Wakeham and
18 Resnick indicated they were concerned that
19 the cigarette industry would face increasing
20 regulation, the products would be either
21 banned or changed approximately in five to
22 ten years. They were thinking they'd have a
23 great deal of difficulty selling products,
24 therefore, they wanted to take the
25 opportunity to move into other businesses,
26 while, at the same time, trying to improve
27 the safety of the product.

28

1 In 1976, they thought they had five to ten more
2 years of unfettered business.

3 This is something that professor Cobbs Hoffman
4 brought in.

5 MR. LEITER: May I see it, please?

6 MR. PIUZE: Sure. It's the cartoon from 1988.

7 MR. LEITER: May I see it for one more second?

8 I'm sorry.

9 MR. PIUZE: I'll read it for you.

10 MR. LEITER: Your Honor, I'm going to object to this.

11 THE COURT: Was this from Ms. Hoffman --

12 MR. PIUZE: Yes. It's been displayed when she was
13 cross-examined.

14 MR. LEITER: Objection. Noerr pennington as to the
15 argument.

16 THE COURT: If this was part of her testimony,
17 something she reviewed, overruled.

18 MR. PIUZE: So anyway, that speaks for itself.

19 Politics, public opinion and litigation. And
20 I'm here, obviously, on the last, but they're active not just
21 on the last. And so now I have a question. And the question
22 is, how do you spell justice?

23 There's two possibilities. I guess it depends
24 who you are how you spell justice.

25 But, Um . . .

26 Here's where I want to go. To litigation. Not
27 to politics and to public opinion. This will be the last
28 time I read this. I think this is super important for

1 Mr. Boeken. Super important for 5 or 10 or 20 other million
2 people.

3 (Paraphrased reading:)

4

5 In the cigarette controversy,
6 the people, especially those who are present
7 and potential supporters (tobacco state
8 Congressmen and heavy smokers) --

9

10 And I don't care about tobacco state
11 Congressmen. I care about heavy smokers.

12 (Paraphrased reading:)

13

14 -- must perceive, understand
15 and believe in evidence to sustain their
16 opinions that smoking may not be a causal
17 factor.

18

19 So let me put a name on that. Heavy smoker,
20 Richard Boeken, who's been giving us his money since 1957
21 when he was 13 years old, and who's been hooked on this
22 product for the last 50 years, since he was 13 years old,
23 must perceive and must understand and must believe in
24 evidence that will sustain his opinion that smoking may not
25 be the causal factor to cancer.

26 So they're going to feed him and 5 or 10 or
27 15 or 20 or 40 million other people a little bit of
28 disinformation.

1 (Reading:)

2

3 "As things stand, we supply
4 them with too little in the way of ready-made
5 credible alternatives."

6 "The alternatives."

7 Two of them

8 "1. The constitutional
9 hypothesis. People who smoke tend to differ
10 importantly from people who do not in their
11 heredity, in constitutional make-up, in
12 patterns of life and in the pressure under
13 which they live.

14 "2. The multifactorial
15 hypothesis. As science advances, more and
16 more factors come under suspicion as
17 contributing to the illness for which smoking
18 is blamed -- air pollution" . . .

19

20 Air pollution. Los Angeles. Early '70's.
21 Might not be able to see your hand in front of you again.
22 That's what's causing your cancer. It isn't cigarettes.
23 It's that.

24 (Paraphrased reading:)

25

26 Viruses, food additives,
27 occupational hazards, stresses."

28 In 1970, our public opinion

1 survey showed that 52 percent believed that
2 cigarettes are only one of many causes of
3 smokers having more illnesses. It also
4 showed that half of the people who believed
5 that smokers have more illnesses than
6 nonsmokers accepted the constitutional
7 hypothesis as the explanation.

8 Thus, there are millions of
9 people --

10

11 and I want to stop here again.

12 Millions of people, including Richard Boeken --
13 not Richard Boeken alone, not Richard Boeken and other
14 members of alcoholics anonymous, not richard Boeken who was a
15 hippie, And not Richard Boeken who is going to become a
16 conservative businessman -- but Richard Boeken, as one of
17 millions of people who would be receptive to a new message.
18 And the new message is (reading):

19

20 "Cigarette smoking may not be
21 the main health hazard that the anti-smoking
22 people say it is because other alternatives
23 are at least as probable."

24

25 So in 1972, the tobacco institute decided that
26 what should be done is to spoon-feed misinformation,
27 disinformation, counter-information and lies to people to
28 keep them smoking, to keep money rolling in. And

1 unfortunately, to keep the undertaker busy.

2 This one document -- this is exhibit 330. This
3 one document, if there is one document in the case that shows
4 the hypocrisy and the dishonesty and unforgivable conduct of
5 the tobacco industry over a course of decades in this
6 country, this is it right here. 330.

7 I'm done with this kind of document. Promise.
8 1974. June. Lorillard.
9 (Paraphrased reading:)

10

11 Historically, the joint
12 industry-funded smoking and health research
13 programs have not been selected against
14 specific scientific goals, but rather, for
15 various purposes, such as public relations,
16 political relations, position for litigation,
17 et cetera. It seems obvious that reviews of
18 such programs for scientific relevance and
19 merits in the smoking and health field are
20 not likely to produce high ratings. In
21 general, these programs have provided some
22 buffer to public and political attacks of the
23 industry, as well as background for litigious
24 strategy.

25

26 I'm showing you to show conspiracy --
27 (reading):

28

1 "CTR is the best and cheapest
2 insurance the tobacco industry can buy, and
3 without it, the industry would have to invent
4 CTR or would be dead. "

5
6 And the amazing thing is, whoever wrote that,
7 forget that the tobacco industry did invent CTR, or it would
8 have been dead.

9 And this that we spent too much time on in
10 1978, Dr. Summers, states that (paraphrased reading):

11
12 The CTR should be renamed for
13 council for legally permitted tobacco
14 research.

15
16 Imagine that. Before we can do our research,
17 we will have to run it past our lawyers. Our lawyers will be
18 in charge of the safety and research for our company. Not
19 our scientists, not our doctors, but our lawyers will be in
20 charge of the research for the company.

21 And he talks about the fact that they lost
22 Dr. Craighead. And there are two other documents which I'm
23 not going show you, because I just don't want to beat this
24 unmercifully to death, where there was talk about other
25 people leaving the programs, other scientists leaving the
26 programs because they can't put up with the outside pressure.

27 Now, I'd like to talk about Mr. Boeken.

28 Maybe it's best just to put it here. If you

1 want to bring one of those easels, you can.

2 Do you like being there?

3 Nice tie.

4 MR. GOLDSTEIN: Thank you.

5 MR. PIUZE: This is last time you're going to get to
6 see this, probably. And I APPRECIATE your attention in
7 looking at it.

8 This is a history in which we have tried to
9 overlap what went on in Mr. Boeken's life with what went on
10 in science with what went on in the misinformation,
11 disinformation, lying of the tobacco industry and
12 Philip Morris.

13 And this story covers, it looks like, 50 years,
14 almost. And unfortunately -- have you got that now?

15 Here, let me slide this up here.

16 Unfortunately, Philip Morris fessed up too late
17 for Mr. Boeken. Just remember, as you look at this document
18 here, every, single year on this document is 400,000 lives
19 that end prematurely from smoking in this one country. Just
20 remember that of those 400,000, Philip Morris has half the
21 market share. 200,000 every succeeding year.

22 And also, please remember that for each and
23 every single year you see here, roughly up to 75,000, in
24 round numbers, people die in the United States of lung cancer
25 caused by smoking and tobacco and Philip Morris has
26 50 percent of that share.

27 So every year, it's 175,000 lung cancer deaths
28 that are preventable from smoking. And every, single year is

1 400,000 deaths overall that's preventable from smoking.

2 Mr. Boeken, according to the only evidence
3 we've had in this trial, uncontested from Dr. Hammer, right
4 here -- or right here -- had lung cancer. 1989. He didn't
5 know it. His doctors didn't know it. Those little cells
6 were multiplying and multiplying and multiplying. It got ten
7 years worth of multiplying to get to the size where it showed
8 up.

9 But way back in 1989, it was already too late
10 for him. So by the time that Philip Morris decided to change
11 its position, as Ms. Merlo said -- or excuse me -- by the
12 time, alternatively, that Philip Morris and the other
13 tobacco companies got cornered, put in a corner from which
14 they couldn't escape, and put up their hands and
15 surrendered -- sort of, depending on how you look at it -- it
16 was already ten years late for Mr. Boeken because he was
17 going to get cancer, and lung cancer is not a curable
18 disease.

19 Slide that back now, if you would, please.

20 1912, Titanic went down. More people died in
21 the Titanic than died in the entire country from lung cancer.
22 It was an almost unknown disease. Dr. Ludmerer, Dr. Doll,
23 Dr. Feingold, Dr. Strauss, they all discussed the fact if you
24 saw a lung cancer patient back then, the professor called the
25 medical students and said, come take a look at this, you may
26 never ever again see this in your lives. Someone with lung
27 cancer. Amazing.

28 Cigarettes became popular going towards the

1 20's. We had the machines that made the cigarettes.
2 Cigarettes were all over the place. According to professor
3 Cobbs Hoffman, there were seven or more states.

4

5 (Juror sneezes.)

6

7 Mr. Piuze: Bless you. Twice. It's always twice.
8 Bless you.

9 According to professor Cobbs Hoffman, there
10 were at least seven states that banned tobacco. According to
11 Dr. Doll, he thinks it was more than that. But it was banned
12 in these states.

13 With the increasing use of tobacco in this
14 country and in Europe, lung cancer rates went up like a
15 rocket.

16 1950, and when the first studies that we
17 discussed too many times already were published. By 1952,
18 there were more studies. And in 1954, there were enough
19 studies and there was a big enough deal so that the Frank
20 statement was put out by the tobacco industry.

21 And there's the Frank statement. We've
22 discussed it and have read it and I've read it. There it is
23 in 1954. We ain't going to hurt you.

24 1954's the year that Mr. Boeken picked up that
25 first cigarette out of a bucket -- out of an ashtray, a butt
26 out of an ashtray.

27 And then starts these commercials here and
28 these advertisements here. And after the break, I may pull

1 out a couple and flash them at you, and I may not. I'll flip
2 a coin.

3 But there's an amazing thing here, ultimately.
4 These guys -- and it may just be a coincidence. We've heard
5 about Mr. Boeken and the way he presents himself and what his
6 step kid thought about him, what his wife thought about him
7 Big, tough, well built, construction guy, outdoor guy,
8 tanned, Harley, strong, in shape, guy's kind of a guy.
9 Mrs. Boeken says, he was my Marlboro man. Okay.

10 Look at these guys. Tough, rugged, tough,
11 anchors. They've all got an anchors tattooed on the back of
12 their hand here. All of them And then we get to this guy.
13 Maybe the first known cowboy. And this guy is sitting there
14 with an anchor on the back of his hand and a cowboy hat on.
15 And Mr. Boeken winds up going in the navy and then buying his
16 harley so he can get as close as he can to be the Marlboro
17 man without actually having the horse.

18 This was him This grabbed him This was his
19 identity. And you know what?

20 They've got great advertising. I don't fault
21 them for it. But he bought into it hook, line and sinker.

22 And we know that this guy here is 30 stories
23 high in Hong Kong on a couple of buildings, and we know that
24 this stuff here is responsible for the second greatest
25 product brand loyalty there is after Coca-Cola. And
26 Mr. Boeken went for this and bought into this entire thing.

27 So he became a Marlboro smoker, and he's always
28 been a Marlboro smoker. And as time has gone on, whether

1 it's red or gold or tan or platinum or ultra or whatever,
2 it's Marlboro, Marlboro, Marlboro, Marlboro.

3 In 1957 was when he really started smoking. He
4 was 13 years old when he started smoking, and he wasn't alone
5 when he started smoking.

6 In these years here, '50's and '60's, according
7 to a defense expert, up to 60 percent of the men in this
8 country smoked. And you know, there was testimony in here
9 about Eric Severeid, who was an extremely famous CBS
10 newscaster who gave the news with a cigarette out of his
11 mouth, on the tonight show and the today show and on and on
12 and on.

13 For those of you who were born in another time
14 and another place, This is the way it was. When the jury
15 back then left this room for a break, everyone had a
16 cigarette, or lots of people had cigarettes. That's the way
17 it was.

18 So here we go.

19 By here, by right in here, according to
20 Dr. Doll, and by right in here, according to Dr. Ludmerer,
21 right in there, depending on the words they used, Dr. Doll,
22 no reasonable scientist could say that there wasn't a
23 link -- or maybe it was Dr. Feingold that said that. But the
24 handwriting was on the wall, huge, right in here.

25 Dr. Ludmerer says down here, there was a big
26 consensus of scientific opinion. Whatever words you want to
27 use. These are scientists now. These aren't people. These
28 aren't people out in the open world. These are scientists.

1 So what happens to the manufacturer of these
2 consumer products when it's put right in their face, you got
3 a big problem here?

4 This is ten years after the Frank statement.
5 Now, everyone's against you. What's up?

6 Denials and denials and denials. Then just --
7 let this drop a little bit.

8 Then followed by -- I guess we don't have --
9 creating doubt about the health charge without actually
10 denying it.

11 Mr. Boeken met a woman. Mr. Boeken liked the
12 woman. The woman didn't like cigarettes. Mr. Boeken had a
13 choice. Boy, she was a nice woman. There go the cigarettes.
14 For how long?

15 Three weeks. And then the woman wasn't as
16 important as the cigarettes.

17 Just remember one of those documents I read to,
18 a Philip Morris document that said that the Nicotine is right
19 up there with eating and copulating. Think about it. The
20 Nicotine is right up there with eating and copulating; one of
21 the necessities of live.

22 And so he quit for three weeks there. He quit
23 because he wanted the lady more than he wanted the cigarette.
24 And then after three weeks, he didn't want that lady anymore,
25 and he wanted the cigarette more. He described his
26 withdrawal symptoms, and they were classic.

27 One of the issues that I thought was going to
28 occur in this case was a fight over whether or not Mr. Boeken

1 was addicted or not. But that's a fight that didn't happen.
2 Because the defendants' last accident expert witness said, I
3 changed my mind. He was addicted.

4 In 1966, I think, the first warning labels went
5 on tobacco. And it's important for all of you younger jurors
6 to realize that during this whole time, there were no
7 warnings. There were no warnings of any kind. There was
8 nothing.

9 And right in here, the first warnings went on.
10 And the first warning said, cigarette smoking may be
11 hazardous to your health. May be. Surgeon general.

12 And then when we get up here into 1969, the
13 second warning label goes on, and that warning label says,
14 cigarette smoking is hazardous to your health.

15 Did everyone believe that?

16 No.

17 Was there a reason why everyone didn't believe
18 that?

19 Yes.

20 Was it an accident that everyone didn't believe
21 that?

22 No.

23 Was there a reason for creating doubt about the
24 health charge without actually denying it?

25 Sure.

26 What was the reason?

27 Do you have this?

28 Can you hold onto that?

1 That is the reason.

2 Here's the roper proposal right here.

3 Mr. Boeken had bronchitis starting when he was a teenager.

4 Mr. Boeken would smoke cigarettes through his bronchitis.

5 Some of us know how that is. Mr. Boeken wanted to be able to

6 run. Cigarette smoking interferes with your ability to run.

7 Mr. Boeken didn't like the bronchitis, and he

8 tried to quit here and he tried to quit here.

9 Did he know that smoking was bad for some sorts

10 of his health?

11 Yes.

12 Did he know that it wasn't good for bronchitis?

13 Yes.

14 Did he know that it would screw up his ability

15 to run?

16 Yes.

17 Did he believe it would kill him?

18 No.

19 Did he believe it would cause lung cancer?

20 No.

21 Did he believe it would cause serious illness

22 and disease?

23 No.

24 Why not?

25 How could he be so dumb?

26 Well, he could be so dumb because he listened

27 to them

28 The incredible, unbelievable diabolical defense

1 in this case is, if he listened to us, the hell with him If
2 he listened to what we said, the hell with him

3 1980. Two things happen. 1980. He goes to
4 see Dr. Trabulus. You're going to see Dr. Trabulus' records.
5 Someone said there were all these things in the records about
6 when the doctor told him to stop smoking. That ain't right.
7 Look at the record.

8 But he saw Dr. Trabulus and he laid out his
9 history, and I'm sure Dr. Trabulus talked to him about
10 smoking. Mr. Boeken said in his deposition -- quoted
11 Dr. Trabulus as saying, I'm not going to tell you to stop.
12 And Mr. Boeken understood that to mean, I'm not going to give
13 you a lecture, but I understood exactly what he meant. And
14 Dr. Trabulus told you, this guy was hooked.

15 At any rate, in 19 -- meaning addicted. That
16 because his doctors, his own doctors, saying, he is addicted.

17 In 1980, same here. He went to see
18 Dr. Trabulus. He and his sister went and got hypnotized, and
19 he stopped smoking for 35 to 40 days. And he could not
20 maintain it.

21 And you know, I skipped a bunch of stuff here
22 that we heard earlier. But here's one thing I skipped.

23 In the navy. '65 to '65. Vietnam war going
24 on. Knee surgery -- I'm sorry -- leg injury. Out of the
25 navy.

26 Hippie. Living in a van. Smoked some dope for
27 a couple of years. Didn't like it. Made him tired. Made
28 him eat too much chocolate. Gave it up. Said the heck with

1 it.

2 1970, went north. Formed rock and roll band,
3 which didn't happen. Injected himself with heroin. Very
4 dangerous substance. In three months, he got scared to death
5 of it. Now, heroin is an addictive, addictive substance.
6 But he was scared of it. And because he was scared of it, he
7 kicked it. And he went on a methadone program, and that
8 methadone program lasted for approximately three years.
9 Started in the San Francisco bay area, ended up at the V.A.
10 on Sawtelle over in West L.A. And he kicked it.

11 He saw himself as drinking too much. He said
12 on the videotape deposition he was never a daily drinker. I
13 don't know how much he drank. I got no clue. Doesn't
14 matter. He saw himself as drinking too much. And he went
15 to AA. He went to AA to get clean and sober.

16 And in 19 -- what was the year he was at AA?

17 1976, I think. Clean and sober. This guy
18 hasn't had a drink, hasn't had any drugs other than
19 prescription drugs or Nicotine for 25 years. Went totally
20 straight. No one disputes that. No one disagrees with that.
21 He's extremely proud of that.

22 He met his wife to be at one of these meetings.
23 She made an interesting comment when she was up on the
24 witness stand here.

25 When she found out -- maybe through her own,
26 I'm not sure -- but when she found out that people were
27 saying, Nicotine was a drug, it got her all upset because she
28 had been clean and sober since 1976, and to think that she

1 really hadn't been, that smoking Marlboros was taking drugs
2 really upset her. And she testified here that when she was
3 in AA, they never, ever told them it was a drug.

4 But I'd like to finish up here just before our
5 break by quoting Mr. Boeken, Ms. Boeken, I think
6 Dr. Benowitz, for this purpose: When you go to AA, when you
7 go to alanon meetings, go to meetings where there are people
8 addicted to substances, smoke, cigarette smoke, cigarette
9 smoke, cigarette smoke, more cigarette smoke.

10 Mrs. Boeken talked about sitting outside of the
11 meetings on a patio and smoking where you could hear the
12 meetings through the windows. Through the open door. Her
13 son testified when he was a little kid he used to go with his
14 mom and step dad to AA meetings and everyone would be
15 smoking. People that had kicked all kind of drugs, kicked
16 alcohol, they were all smoking.

17 Dr. Benowitz testified about drug addicts
18 getting off heroin, getting off other drugs smoking.
19 Smoking. Smoking cigarettes. And so it's a strange thing,
20 but these people who spent so much time and so much effort
21 and give so much of themselves to get off of these
22 substances, alcohol and heroin, and doing it successfully,
23 kept smoking.

24 Now, why would that be?

25 Well, there's a couple of reasons, but one
26 strikes me as far as Mr. Boeken is concerned.

27 He knew heroin was bad for him He quit.
28 There wasn't anyone out there that was saying to him, you

1 know, what; heroin might not be so bad after all. We've run
2 some studies. We know. We've got scientists. Heroin may
3 not be so bad after all.

4 He thought he was drinking too much, and he
5 quit that. And there was no one out there whispering to him
6 hey, it's not what it's cracked up to be, don't believe those
7 people. There are other reasons.

8 But when it came to cigarettes, whether he was
9 rationalizing things, whether he was telling himself stories,
10 whether -- as Dr. Benowitz said, an addict is someone that
11 has to have something, and if there's a reason out there to
12 justify it to himself or herself, they'll grab onto that
13 reason -- he bought their line. And he kept smoking. He
14 knew it wasn't good for him, bronchitis-wise. He knew it
15 wasn't good for him, running-wise. And he made continuing
16 attempts to try to get off of it.

17 But as far as, you're going to be dead, he
18 bought into this. And now when I'm done, there were certain
19 burdens that I've got in this case, burdens of proof. We'll
20 talk about that after this break.

21 But when I'm done and I sit down, I want to
22 pass the burden onto Philip Morris, and I want to say, I want
23 to hear, why in the world should he be criticized for
24 believing what you told him to believe?

25 That if you went out of your way to create
26 doubt about the health risk and he bought into your story,
27 how in the world can you be hypocritical enough now to blame
28 him for that?

1 Your Honor, do you want me to finish this chart
2 or do what?

3 THE COURT: No. I think we really do need to take our
4 break.

5 Thank you very much.

6 Ladies and gentlemen, we'll be back at 3:20.

7 Don't discuss the case with anyone.

8 Try to be back here promptly.

9

10 (RECESS.)

11

12 THE COURT: Our jury panel is back with us; counsel
13 are present as well.

14 Mr. Piuze.

15 MR. PIUZE: Thanks.

16

17 (Videotapes being played.)

18

19 MR. PIUZE: Used to be that at night, instead of
20 seeing ads for donating money to homeless shelters and giving
21 free water to flood victims and doing all those great things,
22 it used to be that every, single night when people turned on
23 their television sets in this country, what you just
24 saw -- the white is the area that was not sponsored by
25 tobacco.

26 And so if someone turned on their television
27 set in the '50's or the '60's, tobacco commercials were
28 everywhere all the time. It's a nice thing. It's good for

1 you. Look how healthy it is. If you want to be a cowboy,
2 et cetera. And you know what?

3 Good advertising is good advertising. But for
4 those of us who have been brought up under proposition 99 or
5 if we see alligators or see tobacco company executives
6 smoking in the room, laughing diabolically --

7 MR. LEITER: Objection. Outside the evidence.

8 MR. PIUZE: Ms. Merlo talked about that.

9 THE COURT: Proceed.

10 MR. PIUZE: Mrs. Merlo said should she was one of
11 them. The kind of warnings that out are there now.

12 Boom, boom, boom, don't, don't, don't, don't.

13 With respect to -- And the kind of stuff that
14 said do, do, do, do were everywhere all the time.

15 Look at -- all the time. So that's when
16 Mr. Boeken was brought up. Right there.

17 That's Philip Morris advertising. Just
18 happened to be on a particular season --

19

20 (juror sneezes.)

21

22 MR. PIUZE: Bless you.

23 -- 1963. And I find no fault with them
24 advertising their product. I'm not pointing any blame at
25 them for advertising their product.

26 But I'm simply showing all of you that
27 Mr. Boeken, when he turned on his television, it was there.
28 It was everywhere. It was in magazines. It was on

1 billboards. It was on television. It was on everyWHERE.

2 And it wasn't warnings. It was, look at this
3 great cowboy. Look at -- I'm not going to show you all of
4 them, but just a quick selected sample here that he talked
5 about in his deposition.

6 Look at those guys. They're marines. They're
7 the fighters. Yeah. Marines. That's what I like. He
8 thought one of them might be John Wayne.

9 And we heard commentary on all of these ads
10 from professor Goldberg about what they were designed to
11 attract. And again, I find no fault whatsoever. I mean, if
12 they're going after kids, I find fault. If they're going
13 after adults, I don't find fault. But this is just to show
14 you what he was exposed to.

15 And there are no warnings in any of these ads.
16 That's the only one I recognize for sure.
17 Paul hornig. Notre Dame. Smoked Marlboros. Greenbay
18 packers.

19 And then later, this.

20 And we heard from Mr. Boeken in his deposition
21 that he had the jacket. He went out and bought the fringe
22 suede Jacket. He did everything but buy the horse, because
23 he couldn't have a horse. And he got himself, I think, a
24 Triumph 650 over in England instead when he went to Europe in
25 1966.

26 And by the time he met his stepson, now he had
27 a Harley. So he had his motorcycle, as I said, he said in
28 his deposition, instead of a horse, but that's how he saw

1 himself. That guy. Right there.

2 Strangely enough, his wife used to call him her
3 Marlboro man. I mean, what is that message of that guy
4 leaping over that fence?

5 It's not, you're going to get sick.

6 Now, it's okay for Marlboro guys to smoke light
7 cigarettes. And gee, he did.

8 I'm going to get to light cigarettes in just a
9 bit.

10 So anyway, in the 1950's and the 1960's when
11 Mr. Boeken was a kid and a young man and a young adult, he
12 didn't see what we see today. He didn't see negative,
13 negative, negative, don't do it, don't trust them, don't
14 believe them, alligators, smoke-filled rooms.

15 He saw cowboys, and he saw tough guys, and he
16 saw people who said, you said it's cool and sophisticated.
17 This is the way it is.

18 Someone here -- it was professor, Dr. Ludmerer
19 said, you don't want to be judging medical science by
20 hindsight. And I asked him, is that true of regular human
21 beings, too?

22 Do you want to judge regular human beings by
23 hindsight?

24 And he said, it's not a good idea judging
25 anyone by hindsight.

26 And so when the time comes for Philip Morris to
27 say, tough -- like Richard Boeken -- tough luck to you, I ask
28 you to judge Mr. Boeken not in hindsight, but I ask you to

1 judge Mr. Boeken by the times that he was in.

2 And you know what?

3 I will extend the same; that's what's good for
4 the goose is good for the gander courtesy to Philip Morris.
5 Let's not judge them in hindsight. Let's judge them by what
6 they knew at the time. So before I put this time line back
7 up here, don't forget. This is what Mr. Boeken was doing.
8 This is what the industry was doing. This is what knowledge
9 was doing.

10 Let me just jump back a little bit, if I could,
11 to Philip Morris.

12 Can we see there, too, the scientist and the
13 executive, please.

14 1976.

15

16 (Videotape being played.)

17

18 MR. PIUZE: So that's the scientist.

19 Let's hear from the executive. '76.

20

21 (Videotape being played.)

22

23 MR. PIUZE: Two years earlier, two people over at the
24 Lorillard tobacco company shared this confidential memo,
25 which we've seen. This blowup is not going to be available.
26 This will be in a much, much smaller size.

27 But i'd like to use a couple of your precious
28 minutes and our precious minutes to discuss this.

1 1974 (paraphrased reading:)

2
3 The joint industry funded
4 smoking and research programs have not been
5 selected against specific scientific goals,
6 but rather for various purposes, such as
7 public relations, political relations,
8 positions on litigation,
9 et cetera. It seems obvious that reviews of
10 such programs for scientific relevance and
11 merit in the smoking and health field are not
12 likely to produce high ratings. In general,
13 these programs have provided some buffer to
14 public and political attack of the industry,
15 as well as background for litigious strategy.

16
17 Four years later, Lorillard (paraphrased
18 reading):

19
20 We have again "abdicated" the
21 scientific research directional management of
22 the industry to the "lawyers" with virtually
23 no involvement on the part of scientific or
24 business management side of the business.

25 Lorillard's management is
26 opposed to the total industry future being in
27 the hands of the committee of counsel --
28

1 counsel, as in good co-counsel, as in lawyers.
2 (Paraphrased reading:)

3
4 Lorillard's management is
5 opposed to the total industry future being in
6 the hands of a committee of lawyers. It's
7 reminiscent of the late 1960's when the ramms
8 group ran the tobacco institute, ctr and
9 everything else involved with the industry's
10 public posture.

11
12 We heard -- okay. That's Lorillard. So what?
13 And we spent a little time on the fact that
14 Philip Morris saw it differently. Excuse me. This is '77.
15 Right in between that period. Seligman and Osdene.
16 Osdene says (Reading):

17
18 "It's my strong feeling that
19 with the progress that has been claimed, we
20 are in the process of digging our own grave."

21
22 Now, think about that. He sees honest
23 scientific research as digging Philip Morris' own grave.
24 (Reading:)

25
26 "I believe that the program
27 as set up has the potential of great damage
28 to the industry, and I strongly urge that the

1 whole relationship of our company to CTR be
2 carefully reviewed. I'm very much afraid
3 that the discretion of the working taken by
4 ctr is totally detrimental to our position
5 and undermines the public posture which we
6 have taken to outsiders."

7

8 So this guy -- you know, if Philip Morris wants
9 to distance itself from him, a former top-ranking exec --

10 Philip Morris says, Gee Whiz, nothing like that
11 happens here. But when the first of their scientific
12 witnesses was here, I asked him if it wasn't true that right
13 now out -- this is a former Ph.D. chemist from Philip Morris
14 saying he was told to destroy documents as late as -- and he
15 said, yeah, well, that's the allegation.

16 Anyway, whether they want to distance --
17 whether Philip Morris wants to distance itself from this man,
18 a very high-ranking responsible -- we never heard he was
19 fired. We never heard he was kicked out. We never heard he
20 was denied his pension. We never heard anything about him,
21 except he's still around.

22 This guy says, honest science will dig our
23 grave, and honest science is totally detrimental to our
24 position and underlies the public posture we take to
25 outsiders.

26 And so that leaves us, I think again --
27 everybody, the court, counsel, ladies and gentlemen -- I
28 thank you for your patience here. But that leaves us with my

1 last topic that I'm going to be able to get to today, and I
2 promise I will finish as quickly as I can tomorrow.

3 This first one Dr. Hoshizaki did not agree to.
4 So it's up there, but she didn't agree to that.

5 I made this little chart here showing what
6 Lorillard thought of the CTR versus what Philip Morris
7 thought of the CTR. And she pointed out, well, it wasn't
8 Philip Morris. It was just Dr. Osdene.

9 I'd like to tell you in advance, this is before
10 you ever saw, and certainly, before she ever saw, the memo
11 that I showed you earlier where three Philip Morris
12 high-ranking executives called CTR a front and a shield.
13 That was their words. Philip Morris' words were front and
14 shield.

15 But anyway, at the time and without the benefit
16 of that information, either for her or the jury, this chart
17 was set up, and it shows that Lorillard believed that the CTR
18 was a political front, public relations front, a litigation
19 front, and it was being run by lawyers.

20 On the other hand, Dr. Osdene didn't like the
21 biomedical research that was being done there. And a
22 question was asked, which was sort of -- by Mr. Carlton on
23 redirect examination -- well, it really can't be both of
24 those things at the same time, can it?

25 And you know what?

26 It can.

27 So the rough analogy -- and it is rough -- that
28 I thought of is as follows: CTR is a cat. Lorillard is a

1 mouse. Philip Morris is a Rottweiler. Now, when the mouse
2 describes what a cat is, imagine what the mouse would say.
3 But when the Rottweiler describes what the cat is, that dog
4 sees the cat in a slightly different way.

5 Here, Lorillard -- and I'm not here to praise
6 Lorillard -- but here, Lorillard, through its management,
7 thought that the committee for tobacco research was a front,
8 was a shield, was for political reasons, was for PR reasons,
9 was for litigation reasons and was something cooked up by a
10 bunch of lawyers who were running a company, running an
11 organization, running the industry.

12 Philip Morris is in a totally different
13 position. Philip Morris was a different kind of company, and
14 Philip Morris saw it differently. And I'm sure as heck not
15 here to praise Philip Morris.

16 Philip Morris saw it as something that
17 threatened its position in the marketplace because it was
18 doing honest to God research. And anyone in the mid '70's or
19 earlier that was doing honest to God research was
20 jeopardizing Philip Morris' financial position.

21 And I cannot put it any better than Dr. Osdene
22 put it. Honest research digs Philip Morris' grave. Honest
23 research is totally detrimental to Philip Morris' position.
24 Honest research undermines the public posture that they've
25 taken with outsiders.

26 One those outsiders that it took a position
27 with is my client, Richard Boeken, who's dying of lung
28 cancer -- and he couldn't even stick around for oral argument

1 here today.

2 So in 1977 -- I got through the 70's when I
3 stopped and I interrupted to show that chart.

4 But in the 1970's, if we want to judge
5 Richard Boeken and we want to find out why he did certain
6 things, let's think about who was molding his thought. Let's
7 think about who was putting thoughts in his mind, was
8 channeling what was being done.

9 Philip Morris thought the truth would dig its
10 grave. And you know what?

11 It would have.

12 And you know what?

13 I hope it does.

14 And you know what?

15 Tomorrow morning, I'm going to describe how it
16 should be done.

17 Thank you for listening.

18 THE COURT: All right.

19 Ladies and gentlemen, it's now 4 o'clock.

20 We'll see you tomorrow morning at 8:45.

21 Try to be prompt.

22

23 (AT 4:00 P. M., AN ADJOURNMENT WAS TAKEN

24 UNTIL Friday, may 8, 2001 AT 9:00 A. M.)

25

26

27

28