

<TITLE>SECRET DOCS. SHOW NICOTINE FACTORY.</TITLE>

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Secret Documents Seem to Show Philip Morris Ran Nicotine "Factory"

ABC-TV's Lawyers Had This Proof of "Spiking" But Apologized

Previously-secret tobacco industry documents seem to show that Philip Morris [PM] ran a "tobacco extract factory" which added nicotine to cigarettes. Moreover, the leak of a key legal brief filed under seal with the court hearing a libel suit against ABC-TV shows that the network's lawyers had these documents, but nevertheless caved into PM's demands for an expensive settlement and the issuance of a public apology for claiming that PM "spiked" cigarettes with nicotine.

<P><P> ABC's lawyers told the court that "Philip Morris adds tobacco extract that is derived from tobacco material not used to make cigarettes." Its reconstituted tobacco plant "is a tobacco extract factory, no different from the outside flavor houses that were referred to on [the program] Day One to illustrate this point."

<P><P> "Philip Morris adds a nicotine-containing solution -- manufactured from some other tobacco -- to that original tobacco material or tobacco sheet." "This," ABC's lawyers said, "bears repeating: The nicotine applied is derived from another source."

<P><P> More specifically, the brief charges that PM soaks tobacco fibers used in cigarettes in a nicotine-containing solution called "rich brown water." It also allegedly sprays on more nicotine-containing extract if the measured ratio is too low.

<P><P> PM admits that it uses "rich brown water," and that it does measure soluble levels both on the tobacco sheet and in the extracted solutions, but it insists that none of its actions are nefarious. However, the specific description of the process by ABC seems to contradict statements previously made by the tobacco company.

<P><P> Thus, says law professor John Banzhaf, Executive Director of Action on Smoking and Health (ASH), these latest revelations may provide even more evidence in a continuing grand jury investigation

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by the Department of Justice into whether PM executives committed perjury or deliberately mislead federal officials. They also further bolster the case now being made by the FDA that the industry was aware of the drug effects of nicotine, and sought to make use of them to addict smokers.

<P><P> ASH is the national antismoking organization which the tobacco industry has charged in court was primarily responsible for the FDA's proposal to regulate cigarette advertising and promotions directed towards children.

<P><P> More information about the ABC memo may be found in today's [1/15/96] issue of the Legal Times in an article entitled "Philip Morris v. ABC: The Case ABC Never Made."

<P><P> A copy can also be obtained online from the Legal Times Web Site.

><http://www.courttv.com/download/legalt.html>

<h3>Philip Morris v. ABC: The Case ABC Never Made</h3>

A confidential ABC memo may fuel the FDA's campaign to regulate nicotine as an addictive drug.<p>

By Benjamin Wittes

<i>Legal Times</i><p>

Call it the defense ABC never made.<p>

The Philip Morris Companies Inc.'s libel suit against American Broadcasting Companies Inc. was settled last summer after the network apologized for parts of its 1994 broadcast that alleged that nicotine is added to tobacco products. The much-anticipated showdown between the media giant and the tobacco powerhouse would not be.<p>

What was the network prepared to argue in defense of its assertion? Because all the key documents were filed under court seal, it appeared no one outside the immediate parties to the case would ever know. But now, a copy of a key brief prepared by ABC's lawyers--made available to Legal Times--reveals serious new charges to buttress the network's claim that Philip Morris added addictive nicotine to its cigarettes.<p>

The ABC memorandum, a highly detailed and accusatory brief based on secret Philip Morris documents, is significant not simply as an historical footnote to a case that continues to generate controversy in legal and journalism circles. If the allegations contained in the ABC motion are true, say tobacco industry critics, the details could provide a significant boon to the Food and Drug Administration's ongoing efforts to regulate nicotine in cigarettes as an addictive drug. They also could lend weight to an ongoing Justice Department probe into whether Philip Morris executives misled federal officials when they denied manipulating nicotine levels. Further, the arguments laid out in the brief could also help members of a giant class action suit in New Orleans, who allege that the cigarette industry knowingly addicts consumers of its products.<p>

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"If what is in that document [the ABC brief] is true in its entirety, it represents one of the most significant new disclosures about manipulation and control of nicotine ever," says Matthew Myers, a partner at D.C.'s Asbill, Junkin & Myers, who represents the Coalition on Smoking OR Health. "These disclosures by themselves would provide a more than adequate basis for the FDA to assert jurisdiction [over cigarettes] independent of any other facts that have been uncovered in the last five years."<p>

The core argument made by ABC's lawyers is that in manufacturing its American cigarettes, Philip Morris adds unnecessary, extraneous nicotine to a tobacco filler product that makes up a sizable portion of the finished product. That assertion is diametrically opposed to the position taken only weeks later by ABC's legal team in apologizing to Philip Morris for making that very claim in its 1994 "Day One" newsmagazine broadcast.<p>

"Philip Morris adds a nicotine-containing solution--manufactured from some other tobacco--to that original tobacco material or tobacco sheet," wrote ABC's legal team in its memorandum in support of its motion for summary judgment, submitted July 10 to Circuit Court for the City of Richmond. "This bears repeating: The nicotine applied is derived from another source."<p>

Philip Morris categorically denies the charges, noting that ABC itself repudiated them in its now-famous apology to the tobacco giant.<p>

". . .[T]he account of Philip Morris' manufacturing process presented in the summary judgment papers filed by ABC's counsel was patently false, misleading and distorted--so much so that ABC itself only weeks after those summary judgment papers were filed squarely repudiated the representations of its own attorneys..." wrote John Mulderig, senior assistant general counsel at Philip Morris, in a Jan. 11 letter to Legal Times.<p>

The company also is harshly critical of the fact that the sealed motion was leaked.<p>

"[T]he documents were filed under seal because they contain proprietary information about Philip Morris' manufacturing processes," Mulderig wrote. "...Plainly, these sealed court records have been made available to the Legal Times in violation of the terms and conditions imposed by the Protective Order."<p>

Roger Witten, a partner at D.C.'s Wilmer, Cutler & Pickering, who headed ABC's litigation team, denies any wrongdoing on the part of the network's lawyers.<p>

"I could not and would not comment on the substance of any document filed under seal," says Witten. "Our summary judgment motion was meritorious and accurate. Nothing in the motion was fabricated or falsified, and the apology ABC made in connection with the settlement was not inconsistent with the summary judgment motion in any respect whatsoever."<p>

Along with Witten's name on the memorandum were Wilmer, Cutler partners Stephen Sachs and John Payton, as well as associates Charles Mendels, Steven Dunne, and Craig Goldblatt (Goldblatt is no longer with the firm). Also on the brief were William Broadbuss and Thomas Spahn, both partners at Richmond, Va.'s McGuire, Woods, Battle & Boothe, which served as ABC's local counsel in the case. All either declined to comment or did not return calls.<p>

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A spate of recent leaks from tobacco company research departments have suggested that Philip Morris and other companies did a great deal of research on the pharmacological effects of nicotine. But anti-tobacco activists say the ABC memorandum represents one of the first serious discussions of industry documents dealing with actual manufacturing practices and the handling of nicotine within those practices.<p>

The filing, which was submitted under the highly restrictive protective order that governed discovery in the case, was followed by a Philip Morris opposition memorandum and then an ABC reply. Richmond Circuit Court Judge Theodore Markow never ruled on ABC's dismissal request. The matter was mooted the following month, when Philip Morris dropped the action in exchange for legal fees and an ABC apology for alleging in its Feb. 28, 1994 Day One newsmagazine broadcast that tobacco companies add extraneous nicotine to reconstituted tobacco.<p>

The apology--which said that the network "now agree[s] that we should not have reported that Philip Morris adds significant amounts of nicotine from outside sources" in its manufacturing processes--appears to be a 180-degree reversal of the arguments laid out in the brief.<p>

Cigarettes are manufactured using a blend of tobacco and "reconstituted" tobacco--a filler made of tobacco waste products like stems and small particles. Reconstituted tobacco is made using a process similar to percolating coffee. The tobacco materials are flushed (or "pulped") with water, which dissolves certain chemicals from the fiber, and these chemicals are thereby extracted. The fiber is then pressed, and the extracted solution, after being concentrated somewhat, is sprayed back on. The result is a paper-like sheet that can be ground up and used in cigarettes along with natural tobacco leaf. By using reconstituted tobacco, the industry dramatically increases its volume of usable tobacco.<p>

Philip Morris has long contended that its process for making reconstituted tobacco is an "entirely closed" one, meaning that nicotine is not added, merely extracted from tobacco fiber and then reapplied.<p>

"No nicotine whatsoever not found in the original tobacco materials is introduced in the production of the reconstituted tobacco sheets," Philip Morris stated in its libel complaint against ABC. "Indeed, the reconstituted sheets contain approximately 20-25 percent less nicotine than the natural tobacco materials."<p>

William Campbell, then president and chief executive officer of Philip Morris USA, made similar statements to the House Subcommittee on Health and the Environment on April 14, 1994, and the tobacco industry's comments on the FDA's proposal to regulate cigarettes likewise echo this theme.<p>

"The only nicotine that ends up in the finished sheets comes from the tobacco materials used to make them," the five major tobacco companies, along with the Tobacco Institute, the industry's lobbying arm, wrote in their joint comments. "The process does not involve adding any nicotine to that already contained in the raw tobacco materials that are reconstituted."<p>

ABC's summary judgment motion does not purport to defend every detail or implication of the Day One story. It does not, for example, seek to show that Philip Morris purchases tobacco extract from outside vendors, known as flavor houses, and adds it to reconstituted tobacco -- a practice the Day One story described in general, but never specifically pinned on Philip Morris.<p>

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Rather, the ABC memorandum claims to prove that the company makes its own extracts to manipulate and supplement nicotine levels in reconstituted tobacco-- and that Philip Morris' reconstitution process is anything but the closed one the tobacco maker claims.<p>

"Tobacco extract is a stand-alone, physically separate, manufactured product. It is not just temporarily removed from and then returned to the same natural tobacco from which it came. It is not used in manufacturing to match the tobacco to its incoming chemical or physical state ... but to match the tobacco sheet to Philip Morris's engineering and design specifications," wrote ABC's lawyers. "Accordingly, Philip Morris precisely controls the strength and quantity of this physically separate, nicotine-containing tobacco extract that it adds to tobacco sheet."<p>

The ABC motion, citing Philip Morris documents made available in the litigation, makes a number of specific allegations relating to the crucial issue of nicotine manipulation.<p>

According to the brief, Philip Morris:<p>

Soaks the tobacco fibers during the initial pulping stage not in water, as the company claims, but in nicotine-containing extracts and a nicotine-containing solution called "rich brown water." The extract, the network alleged, was "produced from entirely different tobacco materials at a later stage in the [reconstitution] process."<p>

Measures the ratio of dissolved chemicals (solubles), which include nicotine, in its extracts and boils off water to intensify solutions that are not strong enough.<p>

Measures the ratio of solubles on the final sheet and sprays on more nicotine-containing extract if the measured ratio is not high enough.<p>

Uses tobacco extract manufactured on one production line for reconstituted tobacco on an entirely separate line when the latter runs out of extract and needs more to meet preset design specifications.<p>

Manufactures tobacco extract and then throws out the tobacco fiber used to make it. "Philip Morris adds tobacco extract that is derived from tobacco material not used to make cigarettes," ABC's lawyers wrote. In this sense, Philip Morris' reconstituted tobacco plant "is a tobacco extract factory, no different from the outside flavor houses that were referred to on Day One to illustrate this point."<p>

All of these allegations seem to contradict Philip Morris and industry statements, both in the litigation and elsewhere.<p>

In particular, Campbell, the former Philip Morris chief, specifically described using water--not extract or nicotine-containing solutions--to soak tobacco fibers. He also denied measuring nicotine levels at any intermediate stages of the cigarette manufacturing process.<p>

"As representatives of the FDA learned when, at our invitation, they recently visited our manufacturing center in Richmond, nicotine levels in tobacco are measured at only two points in the manufacturing process -- at the stemmery, where tobacco leaves are prepared for processing, and then 18 months later after

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those leaves have been manufactured into finished cigarettes," Campbell testified at the April 1994 congressional hearing.<p>

According to press accounts, an ongoing Justice Department inquiry is examining whether Campbell and other tobacco industry officials committed perjury at the hearing, during which the top officials of America's largest tobacco companies all testified that they did not believe that nicotine was addictive and they did not manipulate nicotine in their products. Justice Department spokesman Carl Stern could not be reached for comment.<p>

FDA officials decline to comment on the implications of the summary judgment motion. The agency has always maintained, however, that it does not require evidence of addition of extraneous nicotine in order to establish that nicotine levels in cigarettes are manipulated in a conscious effort to affect the structure and function of the human body.<p>

But anti-tobacco activist Myers says that even if only some of the allegations ABC made in the filing are true, the consequences for Philip Morris could be enormous.<p>

"It demonstrates that a cigarette is as much a pharmaceutical-delivery device as the most technologically sophisticated drug-delivery systems sold by America's pharmaceutical industry," Myers says. "It means that the testimony that Philip Morris' chief executive gave before Congress was an outright deception contrary to the entire manufacturing process of its products. It means that Philip Morris' comments to the FDA, filed only last week, are entirely misleading. . . . It means that the most explosive, controversial assertion in the Day One story was, in substance, entirely accurate -- if not understated."<p>

Philip Morris, of course, contests the very essence of the ABC filing -- as well as most of the details within it. At the same time, the release of the memorandum has sparked an unprecedented willingness at the company to disclose details of its reconstitution process, which the company regards as proprietary trade secret information.<p>

"We cannot stand mute in the face of such misinformation," wrote Michael York, a name partner with D.C.'s Wehner & York and a member of Philip Morris' legal team, in a detailed 10-page letter to Legal Times. In the Jan. 11 letter, York answers each ABC allegation, all of which, he says, "must be viewed with deep suspicion."<p>

York reiterates the company's position that its reconstitution process is a closed one. ABC's charge that the process is open, he wrote, "was a blatant attempt to distort an unremarkable fact of the manufacturing process, namely, that it takes longer to process the solubles than it does to form the [sheet]."<p>

York acknowledges that the solubles may "not be recombined with the precise same fiber from which they were separated," but he insists that "the origin of both the fibers and the solubles is the raw tobacco materials fed into the pulpers at the beginning of the process."<p>

He also denies that the "rich brown water" that ABC claimed is used to pulp tobacco fiber is anything nefarious. Rather, the company claims it is merely recycling water previously used in the process and that the nicotine levels in the solution are very low.<p>

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"For environmental and economic reasons, the water that is used for pulping the tobacco materials is principally recycled water," York writes. "In fact, it contains only infinitesimal trace amounts of nicotine."<p>

The company does not deny that it measures soluble levels both on the tobacco sheet and in the extracted solutions. But it does deny measuring nicotine specifically. Moreover, York denies that boiling off water is an effort to strengthen nicotine concentrations, noting that the heat actually reduces nicotine levels.<p>

"Evaporating water that has previously been added . . . cannot operate to increase the quantum of tobacco materials in the solubles one iota beyond the amounts in which they exist," writes York. "Philip Morris has no specification for nicotine in finished [reconstituted tobacco] and makes no attempt to control the amount of nicotine in [reconstituted] sheet or to 'accommodate' or compensate for natural variations."<p>

Finally, York denies that the company generally moves nicotine-containing extracts between production lines or that it throws out tobacco fiber after extracting solubles.<p>

"On rare occasions, it is necessary to transfer some of the solubles from one line . . . to another line because of a problem in the process -- such as the failure of an evaporator or a press that has become clogged," he writes. The allegations of discarding fiber, he adds, come from a few instances in 1989 and 1990 when small quantities of fiber were thrown out because of technical problems. Generalizing it, he writes, "was a total falsification and distortion of Philip Morris' [reconstitution] process."<p>

Detailed though it is, Philip Morris' response hardly satisfies anti-tobacco activists.<p>

"According to Philip Morris, the bottom line is 'trust us and leave us alone,' " says Clifford Douglas, after hearing a summary of the ABC brief and Philip Morris's response to the charges raised within it. Douglas, who acted as a major source for the Day One report and now heads an Evanston, Ill.-based group called Tobacco Control Law & Policy Consulting, adds that the difference between ABC's allegations and Philip Morris' explanations only heightens the need for an independent review of the documents ABC obtained in discovery.<p>

The discrepancy between ABC's aggressive brief and its humiliating apology is, as Philip Morris points out, dramatic. Without the actual documents that the network's lawyers relied on to construct the brief, moreover, it is not possible to ascertain which characterization of Philip Morris' manufacturing process is accurate.<p>

If ABC's brief is accurate, it would only fuel criticism of the network's decision to settle the case and heighten the sense that ABC caved on a story worth defending. If, however, the document is as contorted a reading of the discovery documents as York insists it is, it might ultimately show that ABC had sound legal basis for coming to terms--even humiliating ones--with the industry it had so vigorously investigated.<p>

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