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HEALTHY CHOICES FOR MIND AND BODY

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THE U.S. GOVERNMENT VS BIG TOBACCO

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Who should pay the cost to society for tobacco addiction? This question smolders beneath the current six-year court battle between the US Department of Justice (DOJ) and six major tobacco companies. The issue attracted media coverage when the DOJ reduced the penalty sought from \$130 billion to \$10 billion.

The DOJ seeks to punish the tobacco companies for denying the existence of and conspiring to conceal the health dangers and addictive nature of nicotine, for targeting young people in ads, and then lying about it - for the past 50 years. The case, begun during the Clinton administration, accuses tobacco companies of violating the Racketeer Influenced and Corrupt Organizations Act (RICO). Initially the government sought financial penalties that would 1) repay past profits (euphemistically termed 'disgorgement'), 2) treat smoking-related illness, and 3) pay for programs to un-addict current and future smokers. The DOJ also sought to restrict the industry's scope of in-store promotions and advertising language and to eliminate vending machines and advertising to children and teens.

Early on in the trial a federal judge had cleared the way for the biggest civil racketeering suit in history by ruling that the government could seek \$280 billion as repayment of allegedly ill-gotten profits. The government's case suffered a blow when the judge rejected the claim that tobacco companies should repay Medicare for the costs of treating sick smokers. In November 1998, thirty-six states had won such a medical-expense-repayment suit, the Master Settlement Agreement (MSA).

Another huge hit came in February 2005, when an appeals court ruled that the tobacco companies were not liable for repaying past profits. The court ruled that disgorging profits was "backward-looking" and not designed to prevent future fraud, which is a key component of anti-racketeering laws.

The government slammed its own case this summer, surprising even tobacco company lawyers, when Associate Attorney General Robert McCallum decided to reduce the penalty sought to \$10 billion to treat tobacco addiction. He said that this was consistent with a "forward-looking" approach: The fine should only pay to un-addict smokers who will become habitual smokers in the first year after the final court decision - those who have not yet become addicted. Government expert Michael Fiore had testified that smoking cessation programs for 45 million current smokers would cost \$130 billion over 25 years.

The Justice Department's Office of Professional Responsibility launched an investigation into why the proposed penalty was reduced. Six leading public health organizations have intervened as parties in the case, saying the government has abdicated its responsibility. They hope to restore remedies commensurate with the wrongful conduct. The court has yet to make its final ruling, which could award any penalty, regardless of what the DOJ asks.

See <http://www.usdoj.gov/civil/cases/tobacco2/> for the history of the case, <http://www.usdoj.gov/civil/cases/tobacco2/20050824%20US%20Post-Trial%20Brief.pdf> for the whole legal brief, which is anything but brief.