

## SPECIAL COMMUNICATION

# Implications of the federal court order banning the terms "light" and "mild": what difference could it make?

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Federal District Judge Gladys Kessler found that the major American tobacco companies violated the Racketeer Influenced and Corrupt Organizations Act, defrauding the public by deceptively marketing "light" cigarettes. Judge Kessler's ruling prohibits the defendant tobacco companies from implying health benefits through using misleading terms such as "light", "mild" or "low-tar", or through other indirect means. This ruling could be interpreted narrowly as simply prohibiting certain words, or could be interpreted broadly as prohibiting implying health benefits by any other means, including colour, numbers or images. It is important to include indirect communications, as tobacco companies easily circumvent narrow advertising bans. A narrow interpretation would be inconsistent with the court's comprehensive factual findings of fraudulent intent by the industry. A broad interpretation of the Order, including existing brands, line extensions and new tobacco products such as potential reduced exposure products that are marketed as "cigarettes", Judge Kessler's order could make a substantial contribution to protecting health.

On 16 August 2006, Federal District Judge Gladys Kessler found that the major tobacco companies violated the Racketeer Influenced and Corrupt Organizations Act by defrauding the public regarding the dangers of smoking and deceptively marketing "light" and "low-tar" cigarettes.<sup>1</sup> Media attention has largely focused on Kessler's conclusion that she lacked the authority to compel disgorgement of hundreds of billions of dollars of tobacco industry profits obtained as a result of its illegal activities, and only mentioned that her remedial Order prohibits the defendant tobacco companies from stating or implying any health benefits of a brand of cigarettes through the use of misleading terms such as "light", "mild" or "low-tar", or through other indirect means. This Order, if interpreted broadly, could make a substantial contribution to protecting public health.

The tobacco industry has used terms such as "low delivery", "light" and "mild" as a marketing strategy to discourage cessation and sustain corporate revenues as awareness of the health dangers of smoking grew.<sup>2,3</sup> Low-tar cigarettes were introduced in the late 1960s and now make up 85% of the total US cigarette market.<sup>4</sup> Smokers compensate for the nominal lower nicotine delivery in these cigarettes by subconsciously changing the way they smoke to obtain a "target" nicotine level,<sup>3,5</sup> so that there is no health benefit associated with these products.<sup>1,3,5-7</sup> Although scientific evidence demonstrates no health benefit in switching to low-tar cigarettes,<sup>3,8-10</sup> many smokers continue to believe that these products are better for them,<sup>11-14</sup> and adoption of "lights" as a health measure is associated with a lower probability of quitting.<sup>15</sup> Indeed, low-tar smokers are more likely than their regular cigarette-smoking counterparts to want to quit, but less likely to actually do so.<sup>16</sup> Although tobacco companies knew that low-tar cigarettes were

no better for health than regular cigarettes,<sup>17</sup> they continued to make direct or implied health claims in advertising for low-tar cigarettes.<sup>1,3,10,18</sup> It is this deceptive marketing that Judge Kessler prohibited in her Order.

The order states in paragraph 4

All Defendants, Covered Persons and Entities are permanently enjoined from conveying any express or implied health message or health descriptor for any cigarette brand either in the brand name or on any packaging, advertising or other promotional, informational or other material. Forbidden health descriptors include the words "low tar," "light," "ultra light," "mild," "natural," and any other words which reasonably could be expected to result in a consumer believing that smoking the cigarette brand using that descriptor may result in a lower risk of disease or be less hazardous to health than smoking other brands of cigarettes. Defendants are also prohibited from representing directly, indirectly, or by implication, in advertising, promotional, informational or other material, public statements or by any other means, that low-tar, light, ultra light, mild, natural, or low-nicotine cigarettes may result in a lower risk of disease or are less hazardous to health than other brands of cigarettes.<sup>1</sup>

The effects of this Order are stayed, pending resolution on appeal, a process which has no specified end date. Defendants sought and were granted a stay from the District of Columbia Circuit Court of Appeals.

Enforcement of the Order would bring the US into de facto compliance with Articles 11 and 13.4(a) of the World Health Organization Framework Convention on Tobacco Control, the global tobacco control treaty ratified by 143 nations (not including the US) as of 22 January 2007. Article 11 requires that: "tobacco product packaging and labeling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar," "light," "ultra-light," or "mild."<sup>19</sup>

Article 13.4(a) further requires that

As a minimum, and in accordance with its constitution or constitutional principles, each Party shall: (a) prohibit all

**Abbreviations:** FDA, Food and Drug Administration; FTC, Federal Trade Commission; PREP, potential reduced exposure product

forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions.<sup>19</sup>

The importance of these provisions of the Framework Convention on Tobacco Control and Judge Kessler's order was highlighted when the defendant tobacco companies asked the Court's permission to continue using these descriptors overseas.<sup>20</sup> On 3 October 2006, Judge Kessler denied this request.

Judge Kessler's Order could be interpreted narrowly as only prohibiting use of the words "low tar", "light", "mild" or "natural". However, such an interpretation would require ignoring the third sentence of paragraph 4 of her Order that prohibits communicating implied health benefits of a brand "by any other means".<sup>1</sup> The tobacco industry is adept at circumventing partial restrictions on advertising,<sup>21-24</sup> so the extent to which Judge Kessler's Order actually affects public health will depend on how broadly it is interpreted. Throughout the history of "light" or "low-tar" cigarettes, the tobacco companies have communicated these concepts through non-verbal channels.

Colour is a common non-verbal way to communicate brand characteristics.<sup>23</sup> Marketing research on the effects of colour in advertising shows that lighter colours, those with a "whitish" quality, promote relaxation<sup>25</sup>; similarly, blue, green and white are associated with "calming", "gentle" and "peaceful".<sup>26</sup> These affective states are commonly sought by low-tar users.<sup>27-28</sup> Consumers also understand lighter colours such as white, silver or light blue on cigarette packs to signify lighter and, therefore, safer cigarettes.<sup>24</sup> The colour palette also communicates ideas, such as white for purity or blue for freshness. For example, in advertising concept tests in 1982 for Bright, an RJ Reynolds low-tar brand, respondents noted "the ad was vibrant blue, and very blue. I saw a sunburst of blues and aqua colors... it was a different kind of cigarette... They are not as harsh as they used to be... I was thinking they look like a clean, fresh smoke."<sup>29</sup> Cigarette manufacturers also differentiate tar levels on the products themselves; white filter tipping is often reserved for light and ultralight styles.<sup>30</sup> Although Judge Kessler's ruling does not specifically address the use of colour, colour-coding is a specific means of indirectly communicating that a particular brand or style presents less risk than others. Thus, the Order's prohibition "... from representing directly, indirectly, or by implication, in advertising, promotional, informational or other material, public statements or by any other means, that low-tar, light, ultra light, mild, natural, or low-nicotine cigarettes may result in a lower risk of disease or are less hazardous to health than other brands of cigarettes"<sup>11</sup> would logically include colour coding as an indirect means of implying health benefits.

Visual images containing symbols of health, pleasure and social desirability can also convey these ideas without resorting to key words or phrases.<sup>31</sup> In 1964, the major US tobacco companies drafted a set of voluntary restrictions on advertising (amended in 1990), including: "cigarette advertising may picture attractive, healthy looking persons provided there is no suggestion that their attractiveness or good health is due to cigarette smoking".<sup>32</sup> This code was put in place by the industry under the treaty of formal regulator action by the Federal Trade Commission (FTC). The code has been neither followed by the industry nor accompanied by any enforcement mechanism. The voluntary code preserved the use of people in tobacco advertising, limiting only the explicit claim that the health of those people is due to smoking. Smokers seeking "healthier" cigarettes have been targeted with advertising images of intelligent, successful people enjoying peaceful outdoor spaces<sup>31</sup>

or of scientific-looking graphics.<sup>33</sup> If the tobacco companies establish a brand name, its trademark, and its status as a low-tar, light, or "healthier" brand (perhaps while Judge Kessler's order is being appealed), subsequent advertising can use images of desirable, vibrant brand users instead of words to communicate the prohibited implied health messages.<sup>21</sup>

Experience in the European Union (EU) is directly relevant. In 2003, a directive from the European Parliament came into effect narrowly banning descriptors that suggest health benefits on all cigarette packs sold in the EU:

**Article 7 [Product descriptions].** With effect from 30 September 2003, and without prejudice to Article 5(1), [Labeling], texts, names, trade marks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used on the packaging of tobacco products.<sup>34</sup>

Using colour coding, tobacco companies simply communicated "low-tar" and "safety" through non-verbal means. With the ban on terms such as "light", Lucky Strike Lights simply became Lucky Strike Silver.<sup>35</sup> Benson & Hedges Lights, already sold in silver boxes with the tagline "Imagine life without silver",<sup>36</sup> well established the association between tar yields and colour. Elsewhere across the globe, similar strategies have been enacted, effectively communicating "light" or "mild" without relying on the actual terms, possibly in anticipation of future advertising bans (table 1). At present, we are aware of no systematic investigation of the public health effects of a weak partial ban, such as what exists in the EU. Such research would help the tobacco control community understand consumer response to efforts to circumvent the advertising ban through non-verbal communications, and would shed further light on the current discussion of interpreting Judge Kessler's ruling.

Further, the EU law banning certain descriptors misguidedly requires the reporting of tar and nicotine numbers in Article 5.<sup>34</sup> Consumers do not have an accurate understanding of tar and nicotine yield numbers, and reporting of these numbers does not constitute sound consumer information.<sup>37</sup> Tar and nicotine numbers may also mislead consumers into believing that a "low-tar" brand is less harmful than a regular brand. Judge Kessler's ruling should be interpreted to include all of these non-verbal forms of implying the health benefits of a brand of cigarettes, particularly as the FTC's own determination is that tar and nicotine ratings by the FTC method cannot predict the actual tar and nicotine a consumer intakes.

The tobacco industry is already beginning to move beyond "light" and "mild" with a new generation of tobacco products called potential reduced exposure products (PREPs). These products, which have been in development for decades,<sup>38-39</sup> are the next step after filters and low-delivery "light" and "mild" cigarettes. The essential idea behind PREPs is that they will deliver the levels of nicotine required for a smoker's addiction with less (but not none) of the toxins associated with smoking. Like earlier "low-tar" products,<sup>40</sup> the introduction of PREPs and their concomitant advertising mimics light and mild products advertised in the 1960s and 1970s, with implicit health messages in a climate of growing public health concern.<sup>21</sup> Such advertising messages are similar to those used for "low tar" to deter smoking cessation.<sup>21</sup> An important question is whether the restrictions in Judge Kessler's Order would apply to these new products, particularly since she did not address this question directly in the Order. The answer to this question relates to whether the PREPs are "cigarettes", which are clearly covered by the order. As of October 2006, revision to the Code of Federal Regulations definition of "cigarette" is under consideration; the outcome of this revision may shed light on

whether or not cigarette-like PREPs will be covered.<sup>41</sup> To date, almost all of the PREPs marketed by the defendant tobacco companies have been marketed as "cigarettes".

For example, Philip Morris' advertisements introducing new "Marlboro UltraSmooth" promote both a new filter technology and the great taste of the cigarette. In a 2005 *Richmond Times-Dispatch* article, Philip Morris said it will not make health claims about the cigarettes "because we do not have evidence that the application of these new carbon filters warrants a reduced exposure claim". A brochure distributed by the company to retailers and wholesalers emphasises the change, saying that the cigarette's "new carbon filter lets the flavor through for a filtered smooth taste".<sup>42</sup>

This approach mimics Philip Morris' advertisement for Merit brand from the mid 1970s, which announced a low-tar cigarette "with 'Enriched Flavor' tobacco [that] delivers taste equal to—or better than—leading high tar brands",<sup>18</sup> and RJ Reynolds' advertisement for Vantage brand from the early 1970s, as the "breakthrough cigarette because it delivers full flavor [and] very low 'TAR' and nicotine numbers [emphasis in original]".<sup>21</sup>

RJ Reynolds' PREP, Eclipse, "heats, rather than burns, tobacco" and claims to produce substantially less sidestream and simplified mainstream smoke than conventional cigarettes.<sup>43</sup> As of January 2007, RJR's promotional website for Eclipse stated that Eclipse is "a cigarette that may present less risk" that "responds to concerns about certain smoking-related illnesses".<sup>43</sup> This website featured discussion and graphics of the scientific testing process RJR used to determine that Eclipse offers "less risk of cancer associated with smoking, ... 17–57% less lung inflammation, ... [and] 70% lower smoking-related mutagenicity (DNA changes)" and that it "reduces secondhand smoke by 80%".<sup>43</sup> The website also featured a "Smokers' Bulletin Board", in which interested parties may register to discuss the product, its use, its benefits and other issues of interest to smokers. Despite providing this forum, RJR states, "All messages posted on the board are the personal opinion of the submitter and are neither endorsed nor approved by RJRT."<sup>43</sup> Visitors to the site thus obtain a smattering of information and join a forum for making health-related claims about Eclipse, for which RJR denies responsibility. This website is an example of both creative attempts by the tobacco industry to communicate health benefits through indirect means and the need for a broad interpretation of Judge Kessler's Order.

Although Judge Kessler's discussion of PREPs did not include advertising specifically for PREPs (as distinct from advertising for conventional cigarettes), her ruling read literally does cover this new class of ostensibly "harm-reduced" cigarettes such as Eclipse and Advance. The ruling explicitly forbids "conveying any express or implied health message or health descriptor for any cigarette brand... on any packaging, advertising or other promotional, informational or other material." As long as the tobacco companies market PREPs as "cigarettes", they would have to abide by the Order.

There are two other categories of PREPs. Non-cigarette PREPs such as nicotine gums and tobacco lozenges that already fall under the Food and Drug Administration (FDA) regulation as nicotine delivery devices, whether produced by the pharmaceutical industry or by the defendant tobacco companies, would not be covered by the Order. Indeed, if the tobacco companies were to argue that PREPs like Eclipse are not "cigarettes", they would fall under the FDA regulation as nicotine delivery devices, something the company has assiduously avoided. A grey area exists with respect to the non-cigarette tobacco products of the defendant tobacco companies that are marketed as line extensions of cigarette brands, such as Camel Snus. Marketing cigarette-branded non-cigarette tobacco products

raises the question of whether the defendant tobacco companies are trying to circumvent Judge Kessler's Order and deserves examination.

Interpreting the Order broadly is preferable to the type of permissive FDA regulation advocated by Philip Morris that distinguishes between "reduced risk" and "reduced exposure", where the reduced risk requires demonstrable reduction in risk to health but the reduced exposure requires only demonstrable reduction in one or more toxic constituents, regardless of the net effect of such reduction for individual or public health. If the FDA regulation distinguishes between reduced exposure and reduced risk, the door is open to myriad "reduced exposure" products accompanied by advertising (including possibly advertising for "FDA-approved" tobacco products) that consumers will certainly interpret as "safer".<sup>44</sup>

Even if it becomes possible to obtain legislation authorising effective FDA regulation of the tobacco industry, it is likely that many of the same goals of such legislation (in terms of ending the marketing of cigarettes using an implied health message) would be realised more quickly by pressing for compliance with the remedies enumerated in Judge Kessler's Order. The judge did not name an Independent Investigations Officer (an officer of the court who reports directly to the judge) to monitor the defendant tobacco companies' compliance with the Order; this task lies with the Department of Justice and the public health groups that were granted intervenor status. Enforcement of the Order will require them to bring violations to the Court's attention. Despite this limitation and even with appeals, it is likely that Kessler's Order could be implemented more quickly than passing legislation authorising the FDA to regulate tobacco products, completing the FDA rulemaking process and defending the subsequent regulations in court.

To be effective, Judge Kessler's Order must be interpreted as restricting broader communications of health associations for existing brands, line extensions and new tobacco products. Elimination of verbal descriptors alone is easy for tobacco companies to circumvent because the same "benefits" can be communicated through the use of colour, packaging and advertising imagery. The emphasis of specific actions should be on consumer interpretation of advertising messages, regardless of what specific colours or what elements in advertising images are used. Public statements "by any other means" need to include viral marketing techniques, such as the Eclipse Smokers' Bulletin Board. Without care to these details and anticipating future industry strategies, Judge Kessler's landmark ruling and Order will just represent one more case of the tobacco industry demonstrating its resilience to changed circumstances without really changing its fundamental behaviour, repeating and updating the behaviour that Judge Kessler found to be a violation of the Racketeer Influenced and Corrupt Organizations Act in the first place.

Some specific actions could be recommended from a broad interpretation of Judge Kessler's ruling. The metric for determining whether an advertisement or a marketing effort is misleading or deceptive should be consumer perception. If consumers interpret an advertisement or marketing campaign for a tobacco product to communicate reduced risk over another tobacco product, the advertisement or marketing campaign should be considered a violation of Judge Kessler's ruling and should be prohibited. Both protocols for investigating individual- and population-level risk reduction and methods for assessing consumer perception should be developed independent of the direct or indirect involvement of the tobacco industry.

The Department of Justice and the intervenors should carefully monitor promotion of any ostensibly "reduced-risk" cigarettes to ensure that implied or explicit health claims are

### What this paper adds

- US Federal District Judge Gladys Kessler found that the major tobacco companies doing business in the US violated the anti-racketeering law.
- Part of the reason for this ruling was her conclusion that the tobacco companies had misled the public by using the terms "light" and "mild" to describe cigarettes, when, in fact, the industry knew that these cigarettes were no healthier than "regular" cigarettes.
- As a result, as part of the remedy, she ordered the companies to stop using these product descriptors.
- The tobacco companies use many ways, such as colour-coding products, to convey the ideas of "light" and "mild". We argue that Judge Kessler's ruling must be interpreted broadly in order to realise its desired positive effect on public health.

not made until it can be demonstrated by truly independent investigation that these products offer meaningful harm reduction for both individuals and society. The experience with "light" and "mild" has shown that taking the tobacco industry's word that a new product may be safer or may reduce exposure has proven deadly in the past.

Today, the vast majority of smokers are concerned about their health. A broad interpretation of the Order and vigorous monitoring by the plaintiff and intervenors could force fundamental changes in tobacco industry marketing that would make it exceptionally difficult for it to continue to mislead these smokers.

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