

KANSAS CITY BUSINESS JOURNAL

EXCLUSIVE REPORTS

From the September 2, 2005 print edition

U.S. attorneys take some shots at Shook Hardy

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Lawyers from [Shook Hardy & Bacon LLP](#) acted with "fraudulent intent" in past efforts to protect cigarette manufacturers from lawsuits, [U.S. Justice Department](#) attorneys allege.

Post-trial documents filed Aug. 15 and Aug. 24 in a civil racketeering case against tobacco companies mention at least 15 Shook Hardy lawyers by name and refer to the firm more than 250 times.

But Shook Hardy is not a defendant, and legal observers disagreed whether the government should have sued the firm as well as its clients in the case, which was awaiting a judge's verdict.

The tobacco companies' court filings describe the lawyers' activities as proper and more passive than the government alleges. Shook Hardy Managing Partner John Murphy declined to discuss the case because it's in litigation.

Pleading its case that leading cigarette-makers engaged in a 52-year conspiracy to produce biased research on nicotine addiction, cancer, emphysema and secondhand smoke, the government alleges that Shook Hardy lawyers:

- Aided the conspiracy to confuse or deceive the public about dangers of tobacco that have been widely reported since the early 1950s.
- Caused tobacco scientist Gary Huber "to fear for the safety and financial security of his family" in 1997 before the former [Harvard University](#) scientist testified that the industry had cut his research money as he developed new evidence of tobacco health hazards.
- Participated from 1967 through 1993 in 24 "racketeering acts" in Kansas City, primarily mail fraud, by mailing or receiving letters that recommended suppression of research or that identified researchers who could create doubt about the dangers of cigarettes.
- Attempted "covert contamination of the scientific record" regarding the dangers of secondhand smoke.

A Justice Department spokesman refused to discuss why Shook Hardy wasn't sued along with Altria (formerly [Philip Morris Co.](#)), [Brown & Williamson Tobacco Corp.](#), British American Tobacco PLC, [R.J. Reynolds Tobacco Co.](#), The [American Tobacco Co.](#), The Council for [Tobacco Research-USA Inc.](#), The [Tobacco Institute Inc.](#) and The [Liggett Group](#).

But the government's many mentions of the lawyers in the case are "an indication they could have sued them," said G. Robert Blakey, a professor at [Notre Dame Law School](#).

"Lawyers should not be above the law, but in practice they are," he said.

Blakey represented Texas and Florida in suits against tobacco companies (but not their lawyers) in the 1990s and served as an expert witness in the federal government's suit.

He said tobacco lawyers were defendants in just two of the 50 states' cases against tobacco companies.

It's routine practice to excuse lawyers from conspiracy suits, in part because of the extra cost of litigating against a law firm's defenses, he said.

"It's an indefensible practice," Blakey said. "It's indefensible if lawyers could have been sued but they were not."

A private lawyer who opposes the tobacco companies in the federal case said lawyers aren't good targets for lawsuits, particularly in cases seeking monetary damages where the clients have deeper pockets than the law firms.

"What's the payoff?" said Scott Nelson of the Public Citizen Litigation Group in Washington. "You're not going to win against the attorneys if you don't win against the underlying conspirators."

Nelson declined to comment specifically on the federal tobacco case, but he said that suing lawyers of alleged conspirators usually is costly and risky.

"When you're trying to evaluate a conspiracy case against facially legitimate businesses, you've got to consider that in the course of doing business, clients have a right to receive legal advice, and attorneys have a right to give legal advice," he said. "The fact that you give advice to people who may, themselves, be conspiring does not make you a conspirator."

Shook Hardy has had a big tobacco defense practice since 1962, when David R. Hardy won a federal suit brought by a Johnson County smoker against Philip Morris. In the late 1960s, Hardy played a key role in finding researchers willing to testify that an "open question" remained about cigarettes causing cancer, the government alleges.

But by 1991, Shook Hardy foresaw allegations of fraud against tobacco companies and wrote memos addressing the subject.

"A responsible industry, faced with scientific studies questioning the safety of its product, would have, among other things, supported research by independent scientists addressing the basic causes of the purported problem and more focused studies relating specifically to that product," the law firm wrote. "This is precisely what the tobacco industry did."

Defense filings in the federal case against the tobacco companies said the lawyers' handling of research money largely was an accounting function.

"Defendants' counsel also set up special accounts to deal primarily with allocating costs among defendants for projects tied to litigation," the defense said in a June 2004 filing.

Disputing the allegation that lawyers torpedoed potentially embarrassing research, the defense said lawyers advised only against financing research that would have violated antitrust strictures.

Defense filings argued that tobacco was under increasingly intense regulation during much of the period covered by the government's suit and that tobacco companies consistently lost their public relations battle with government-sponsored researchers who continuously expanded the list of health harms attributable to smoking.

The government has asked U.S. District Judge Gladys Kessler to assess billions of dollars in payments from the tobacco companies to pay for anti-smoking ads and programs, alleging that previous settlements between the companies and various states did not deter the companies from improperly marketing their products.

Kessler's verdict faces an almost certain appeal to a higher court that already has ruled tobacco companies can't be punished for past conduct under civil racketeering charges, which target preventing future misconduct.

Although the industry still portrays secondhand smoke as an unproved health hazard, Shook Hardy attorneys now overtly acknowledge scientific evidence of smoking's effects on health. An Aug. 25 filing by [Lorillard Tobacco Co.](#) and signed by attorneys Gene Voigts and Richard Gray of the firm said: "Lorillard admits that cigarette smoking can be addictive. Lorillard believes, however, that cigarette smokers can reach and successfully carry out a decision to quit smoking."

"Lorillard admits that cigarette smoking can cause lung cancer and other serious diseases ... Lorillard further admits that the evidence is sufficient to infer a causal relationship between cigarette smoking and lung cancer and other serious diseases."

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