

IN THE CHANCERY COURT OF  
JACKSON COUNTY, MISSISSIPPI

**IN RE MIKE MOORE, ATTORNEY GENERAL ex rel,  
STATE OF MISSISSIPPI  
TOBACCO LITIGATION**

Cause No. 94-1429

January 11, 1996

**MOTION TO COMPEL DEFENDANTS TO  
RESPOND TO PLAINTIFF'S FIRST SET OF  
INTERROGATORIES TO THE DEFENDANTS ON  
GENERAL ISSUES**

Pursuant to Rule 37(a) of the Mississippi Rules of Civil Procedure, the State of Mississippi (the "State") respectfully requests the Court to enter its Order compelling the Defendants to respond properly and meaningfully to the State's First Set of Interrogatories to the Defendants on General Issues (the "First Interrogatories") and for other relief appropriate in the premises, and in support thereof would respectfully show unto the Court as follows:

1. On September 20, 1995, the State served its First Interrogatories upon the Defendants by hand delivery to Local Liaison Counsel for Defendants, a copy of which is attached as Exhibit "A" for the Court's convenience.

2. By its Interrogatories 9-12, 14, and 18-19, the State seeks to discover the defendants' direct and indirect contacts with executive, legislative and other public officials and employees of the State regarding, among other things: the issues raised by the claims or defenses in this case; the authority of the Attorney General to bring this lawsuit; legislative or executive action regarding the Attorney General; legislative or executive action regarding the Executive Director of the Mississippi Division of Medicaid; legislative or executive action regarding laws on the sale or distribution of cigarettes; and other legislative or executive action regarding the issues raised by the claims or defenses in this lawsuit.

3. The Defendants' responses, attached as Composite Exhibit "B," uniformly objected to the above-enumerated Interrogatories and variously stated, in essence, that the matters sought to be discovered by the State were irrelevant, not reasonably calculated to lead to the discovery of admissible evidence, and/or are immune from discovery because

lobbying activities involve constitutionally protected rights to petition government and to free speech. The Defendants' responses were in other particulars vague and evasive, and improperly limited pursuant to alleged claims that plaintiff's requests were beyond the scope of this litigation and various claims of privilege.

4. The Parties' efforts to reconcile their differing positions in the premises have been unavailing, and the Plaintiff now seeks appropriate relief from the Court.

5. The Defendants' positions with respect to discovery in this case are contrary both to the letter and the spirit of the Mississippi Rules of Civil Procedure. By failing reasonably to respond to plaintiff's requests, the Defendants attempt to frustrate plaintiff's efforts to prepare for trial and have caused the State's counsel to expend valuable time preparing its Motion to Compel and seeking alternate modes of proof with respect to the matters embraced by plaintiff's discovery.

6. In its Complaint, the State has alleged, inter alia, that the Defendants breached promises made to public health officials (par. 44); engaged in a coordinated, industry-wide strategy designed actively to mislead and confuse the public about the true dangers associated with cigarettes (par. 45); employed a strategy over the years that was designed to confuse the medical evidence, stonewall, delay, refuse reasonably to settle claims, and to run up plaintiffs' attorneys fees in a war of attrition (par. 54); attempted wrongfully to create a privilege for various documents by sending such documents through their legal departments and law firms in order that they might claim the documents to be protected by the attorney-client or attorney work-product privileges (par 55); engaged in misleading promotional, public relations, and lobbying activities to the end that increased numbers of people, including minors, would become addicted to nicotine, in contravention of their duty not to make false statements of material fact and their duty not to conceal true facts from the public (par. 59); specifically targeted underage smokers (par. 60); engaged in a concerted effort to circumvent and violate the laws of the State of Mississippi by targeting minors (par. 62); conspired with, cooperated with and/or assisted each other in the wrongful suppression, active concealment and/or misrepresentation of the true relationship between smoking cigarettes and various diseases to the detriment of the public health, safety and welfare and thereby causing harm to the State (par 65); conspired to fraudulently mislead the public, including Mississippi citizens and the State, with regard to the health risks of smoking for the purpose of furthering their profits from the sale of their cigarettes

(pars. 72 and 73); and publicized statements, representations and promotional schemes that were deceptive, false, incomplete, misleading and untrue in violation of § 97-23-1, Miss. Code Ann. (1972) (par. 76).

7. With near unanimity in their Answers to the Complaint, the Defendants raised the affirmative defense that the State failed to mitigate its damages: R.J. Reynolds Tobacco Company (17th Aff. Defense, pg. 21); Brown & Williamson Tobacco Corporation (21st Aff. Defense, pg. 16); Corr-Williams Tobacco Company, Laurel Cigar & Tobacco Company, Long Wholesale, Inc., and Wigley & Culp, Inc. (19th Aff. Defense, pg. 31) (joint answer); Hill & Knowlton, Inc. (14th Aff. Defense, pg. 20); Generic Products Corporation (23rd Aff. Defense, pg. 17); Lorillard Tobacco Company (16th Aff. Defense, pg. 17); The Tobacco Institute, Inc. (15th Defense, pg. 4); The Council for Tobacco Research -- U.S.A., Inc. (23rd Defense, pg. 15); Philip Morris, Incorporated (14th Aff. Defense, pg. 17); The Lewis Bear Company (17th Defense, pg. 19).

8. Likewise, with near unanimity in their Answers to the Complaint, the following Defendants raised in some form the affirmative defense that the State has unclean hands: R.J. Reynolds Tobacco Company (12th Aff. Defense, pg. 20); Brown & Williamson Tobacco Corporation (17th Aff. Defense, pg. 16); Corr-Williams Tobacco Company, Laurel Cigar & Tobacco Company, Long Wholesale, Inc., and Wigley & Culp, Inc. (2nd Aff. Defense, pg. 26 and 17th Defense, pg. 30) (joint answer); Hill & Knowlton, Inc. (13th Aff. Defense, pg. 20); Generic Products Corporation (19th Aff. Defense, pg. 15); The Tobacco Institute, Inc. (12th Defense, pg. 3); The Council for Tobacco Research -- U.S.A., Inc. (19th Defense, pg. 14); Philip Morris, Incorporated (11th Aff. Defense, pg. 16); The Lewis Bear Company (2nd Aff. Defense, pg. 16 and 15th Defense, pg. 19) The American Tobacco Company (15th Aff. Defense, pg. 14).

9. Furthermore, the Defendants have propounded discovery seeking evidence to support their above-referenced affirmative defenses. For example, Defendants' First Set of Interrogatories, Interrogatory No. 15, seeks a description of the actions taken by the State to mitigate the increased health care costs; Defendants' Second Request for Production of Documents, Request No. 26, seeks all documents which refer to programs created or operated by the State concerning tobacco or discouraging, limiting, regulating, or preventing tobacco use; Request No. 28 seeks all documents relating to smoking cessation programs; Request No. 32 seeks all documents which refer to the State's efforts to promote the growing of tobacco in Mississippi; Request No. 33 seeks all

documents which refer to revenues collected by the State from the sale of tobacco on State property, including property leased by or to the State; Request No. 34 seeks all documents which refer to cigarette advertising on State-owned properties, such as stadiums, buses, office buildings, billboards; Request No. 35 seeks all documents which refer to licensing of cigarette vending machines or wholesalers; Request No. 36 seeks all documents which refer to investments by the State in tobacco company stocks or mutual funds investing in tobacco company stocks; and Request No. 37 seeks all documents which refer to efforts by the State to create or enforce prohibitions on the sale of tobacco products to minors.

10. Thus, the Defendants argue that they are entitled to contact and lobby State officials to obstruct the State's action to recoup its alleged damages, and entitled to hamper the State in its efforts to mitigate its damages, but at the same time remain insulated from discovery of those "government contacts." They argue that they can assert their affirmative defenses of the State's unclean hands and the State's failure to mitigate its damages while concealing evidence of their conduct in these regards. The Defendants' arguments defy law and logic.

11. Rule 26(b)(1) of the Miss. R. Civ. P. provides in pertinent part:

Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the issues raised by the claims or defenses of any party. ... *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.* (emphasis added).

12. Thus, unless the Defendants are entitled to some claim of privilege, the issues raised by the allegations contained in the complaint, together with the allegations of unclean hands and failure to mitigate damages raised by the Defendants' affirmative defenses, entitle the state to discover evidence of the full range of Defendants' "governmental contacts" which were calculated to achieve unlawful and impermissible ends -- such matters as contacts calculated to facilitate the sale of tobacco products to minors while giving the false appearance of controlling tobacco use among children; "governmental contacts" designed to obstruct and extinguish this lawsuit, such as the Defendants' collaboration with the State's executive branch in its filing of an *amicus curiae* brief seeking dismissal of the complaint; the hiring of State

employees to oppose positions taken by the State in this case; and the Defendants' obtaining an affidavit from a State employee, the Director of the Medicaid Division, in support of the Defendants' motion for partial summary judgment.

13. Defendant R.J. Reynolds argues in its Recurring Objection C. that Plaintiff's request for information concerning Reynolds' lobbying efforts and its support for candidates for particular offices is objectionable because such activities are protected under the First Amendment, citing *Liberty Lobby, Inc. v. Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967) ("every person or group engaged ... in trying to persuade Congressional action is exercising the First Amendment right of petition"); *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886 (9th Cir. 3988), *cert. denied*, 488 U.S. 965 (1988) ("[p]ayments to public officials, in the form of honoraria or other campaign contributions, is a legal and well accepted part of our politician (sic) process"); and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (corporations are guaranteed the same rights as individuals to engage in political advocacy under the First Amendment). These authorities, and the propositions characterized by Defendant R.J. Reynolds as deriving from them, in no way support the argument that the Defendants' activities which are conducted pursuant to the protections of the First Amendment are thereby absolutely privileged from discovery by the Plaintiff. Rather, the cases illustrate that no such absolute privilege exists in favor of the Defendants' activities, especially in this litigation which involves significant public health issues.

14. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S. Ct. 1407, 55 L.Ed.2d 707 (1978) the Supreme Court held a Massachusetts criminal statute that prohibited corporations from making contributions to influence the outcome of any vote other than on matters affecting the property, business or assets of the corporation to be unconstitutional as an impermissible restriction of the First Amendment rights of corporations. The Bellotti Court did not grant absolute immunity from discovery to such speech by corporations, however, and specifically commented at n.32 that the opposite might be more appropriate and desirable in the political arena:

Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. *See Buckley*

[*v. Valeo*], 424 U.S. at 66-67, 96 S. Ct. at 657-658; *United States v. Harriss*, 347 U.S. 612, 625-626, 74 S.Ct. 808, 815-817, 98 L.Ed. 989 (1954). In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed. 424 U.S., at 67, 96 S. Ct., at 657.

*Bellotti*, 435 U.S. at 792, 98 S.Ct. at 1424.

15. *Liberty Lobby, Inc. v. Pearson*, *supra*, presented a clash between the First Amendment freedoms of the press and the right to petition, and involved an action between Liberty Lobby, Inc., on the one hand and newspaper columnists Jack Anderson and Drew Pearson on the other. Anderson and Pearson had come into possession of and had published excerpts from certain documents which Liberty Lobby alleged were removed from their premises by a former employee of Liberty Lobby. Liberty Lobby's request for a preliminary injunction prohibiting Anderson and Pearson from publishing from the documents allegedly removed and/or copied unlawfully from Liberty Lobby's files by the former employee was denied by the District Court and that denial was affirmed by the D. C. Circuit:

The express purpose and the admitted activities of Liberty Lobby -- political lobbying and dissemination of information on highly controversial subjects -- render its affairs a matter of public interest. While the term 'lobbyist' has become encrusted with invidious connotations, every person or group engaged, as this one allegedly has been, in trying to persuade Congressional action is exercising the First Amendment right of petition. Like other Constitutional rights, the right to petition is subject to abuse and misuse and a vigilant press can expose abuses to public view.

Appellants contend ... that their case presents considerations not controlled by the First Amendment holdings. They argue that this case does not involve free expression of ideas but rather use of private papers illegally taken in violation of rights of privacy and property.

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Upon a proper showing the wide sweep of the First Amendment might

conceivably yield to an invasion of privacy and deprivation of rights of property in private manuscripts. But that is not this case; here there is no clear showing as to ownership of the alleged private papers or of an unlawful taking and no showing that [Anderson and Pearson] had any part in the removal of these papers or copies from the offices of [Liberty Lobby] or any act other than receiving them from a person with a colorable claim to possession. (footnote omitted).

*Liberty Lobby, Inc.*, 390 F.2d at 491.

16. In his concurring opinion in *Liberty Lobby, Inc.*, Judge J. Skelly Wright commented at length regarding the people's right to know about lobbying activities:

Lobbying often strikes at the roots of the democratic process. Though protected by the First Amendment's right to petition clause, lobbying is not always in the public interest. Indeed the special interest, represented by the lobbyist as he tries to influence elected representatives of the people, and the public interest may be, and often are, in direct conflict. Moreover, the clandestine character which some lobbying tends to assume makes it imperative that the freedom of speech and of the press provisions of the First Amendment are not paralyzed while the right to petition by lobbying is being exercised. ...[It] is really too late in the day to suggest that a lobbyist operates other than in a goldfish bowl as far as the law is concerned. ...

The public has an interest in knowing who is influencing or attempting to influence their public officers, for what purpose, the means adopted to that purpose, and the results achieved. (citations omitted).

*Liberty Lobby, Inc.*, 390 F.2d at 492.

17. Similarly, the Defendants' citation to *Boone v. Redevelopment Agency of San Jose, supra*, for the proposition that certain payments and honoraria are a recognized part of the political process does little to illuminate the question whether such activities are beyond the reach of permissible discovery. *Boone*

does, however, shed light on the question and it does not bolster the Defendants' position. *Boone* was an antitrust case involving questions concerning the oft-cited *Noerr-Pennington* exception to the Sherman Act which immunizes legitimate lobbying activities from liability under the antitrust laws. The doctrine grew from two Supreme Court cases: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1965), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L.Ed.2d 626 (1965). The doctrine permits parties to petition the government for favorable action with respect to their interests, even when they are motivated by anti-competitive intent. *Boone* notes the doctrine and its reach, but also notes that the doctrine is not absolute and has certain exceptions: the "sham" exception, whereby an actor is actually not interested in petitioning government, but only to inconvenience his competitor; the "judicial/quasi-judicial" exception whereby activities normally immunized lose their protections because they occurred in a judicial or quasi-judicial setting; and the "co-conspirator" exception whereby the participants lose their immunity if a government official is a participant in conduct in restraint of trade. *See Boone*, 841 F.2d at 895-97.

18. The existence of exceptions to the *Noerr-Pennington* doctrine teaches that discovery must be available for litigants to flesh out the facts surrounding the applicability of these exceptions, and several courts have found that *Noerr-Pennington* is not a bar to discovery. *See, Associated Container Transportation (Australia) Ltd. v. United States*, 705 F.2d 53, 59 (2d Cir. 1983) (*Noerr-Pennington* doctrine immunity no bar to discovery under Civil Investigative Demand where investigation might demonstrate exception to doctrine and where CID reasonably calculated to produce admissible evidence regardless of possibility that some conduct might be shielded by doctrine); *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 5253 (4th Cir. 1981) (*Noerr-Pennington* doctrine is an exemption from anti-trust liability and not a bar to discovery of evidence); *In re Burlington Northern, Inc.*, 822 F.2d 518, 533 (5th Cir. 1987) (prima facie showing that prior litigation was sham for purposes of *Noerr-Pennington* would evaporate attorney/client and work/product privileges related to such litigation).

19. Certain of the Defendants complain that permitting discovery into their lobbying activities would have a chilling effect upon or impair their First Amendment rights. The Fourth Circuit commented on such concerns in *North Carolina Electric Membership Corporation, supra*, an anti-trust action between rural electric cooperatives and two utility companies In that

action, the plaintiffs requested the defendants to produce documents relating to "existing, contemplated or proposed state legislation" related to marketing of electric power and documents relating to "contemplated or proposed federal legislation regulating the supply of electric power in bulk or power exchange services." The defendants objected and claimed that such information was "constitutionally protected and absolutely privileged." The District Court ruled that the defendants did not have to produce the materials under the *Noerr-Pennington* doctrine and that "unbridled discovery" would "chill" the defendants' exercise of their First Amendment rights.

20. The Fourth Circuit reversed, noting:

Appellants argue that the *Noerr-Pennington* doctrine applies only as a defense to the plaintiff's anti-trust action, and not as a bar to discovery of relevant materials. Moreover, they assert that the First Amendment offers no rationale for prohibiting discovery of materials in an anti-trust case. Appellees counter that the district court acted within its discretion in limiting discovery and that the discovery of inadmissible materials will have a "chilling" effect upon defendants' future exercise of First Amendment rights. We agree with appellants that *Noerr-Pennington* does not apply to discovery.

First, *Noerr-Pennington* is by definition an exemption from anti-trust liability, and not a bar to discovery of evidence ... [T]he [Supreme C]ourt in *Pennington* held that evidence of legislative activity, if relevant, must be accompanied by an instruction which limits the jury's consideration to non-legislative activities. 381 U.S. at 670, 85 S. Ct. at 1593. That holding presumes the admissibility of relevant evidence. If the evidence is arguably admissible, certainly it should be discoverable.

Second, the appellee's contention that the discovery of this material would have a chilling effect is without merit. In *Herbert v. Lando*, 441 U.S. 153, 99 S. Ct. 1635, 60 L.Ed.2d 115 (1979), the Supreme Court ordered production of a memorandum from a producer's "behind the scenes" planning conference for a television news special. The Court held

that such discovery would not have a chilling effect upon the news organization's first amendment rights. If discovery into the internal affairs of a news organization does not have a chilling effect, then neither would discovery in this case.

Finally, we think that the district court has too narrowly limited Fed. R. Civ. P. 26. ... There is no authority for fitting the *Noerr-Pennington* doctrine into the "privilege" exception to the rule. Nor is there any question that discovery of this material may lead to admissible evidence. Indeed, the *Pennington* decision allows at least some of that evidence to be admitted at trial if accompanied by a proper jury instruction. Thus the limitations placed upon plaintiffs, discovery are outside the discretionary control of the district court, and therefore invalid.

*North Carolina Electric Membership Corporation*, 666 F.2d at 52-53.

21. Logic dictates and Miss. R. Civ. P. 26 provides that the State is entitled to discovery pertaining to the full range of unprivileged matters relevant to the issues presented in the complaint and in the defenses asserted by the Defendants. By their Objections, the Defendants are attempting improperly to evade proper discovery and to redefine the State's claims and to unduly restrict discovery in this case, contrary to law.

22. The Mississippi Supreme Court provides guidance to resolve certain of the issues presented here. *Strong v. Freeman Truck Line, Inc.*, 456 So.2d 698, 713 (Miss. 1984), interpreted § 13-1-226(b)(1), the pertinent language of which is identical to Miss. R. Civ. P 26 (b) (1):

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The *Strong* Court went on to describe the very nature of the discovery process:

Discovery is a stage of the proceedings entirely separate and apart from trial. The idea is to encourage full disclosure of all relevant facts and circumstances.

Questions of admissibility are wholly reserved for trial, or at least for the post-discovery pretrial period.

Our rules have been shaped to assure that each party knows all of the relevant facts and circumstances so that the question of admissibility can be fully presented to the trial judge

23. The State's Interrogatories are appropriate and reasonably calculated to lead to the discovery of admissible evidence -- evidence which pertains to conduct of the Defendants which is relevant to the issues raised in the instant litigation. Any claims by the Defendants that such information might not be admissible at trial should fall on deaf ears and they should be compelled to provide answers which are responsive to the State's requests.

24. By their responses in Composite Exhibit "B," the Defendants have failed to comply with the Miss. R. Civ. P. and the Orders of this Court with respect to discovery in this case.

WHEREFORE, premises considered, the State respectfully requests the Court to enter an Order compelling the Defendants to respond properly and meaningfully to the State's First Set of Interrogatories to the Defendants on General Issues, and for such other and further relief to which the State justly may be entitled.

Respectfully submitted,  
MIKE MOORE, ATTORNEY GENERAL ex rel  
STATE OF MISSISSIPPI, PLAINTIFF

By: Richard F. Scruggs  
The Mississippi Bar #6582