TOBACCO PRODUCTS LIABILITY PROJECT

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TESTIMONY BY

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and
House Labor Relations Committee

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HB 916

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I am pleased to have been asked to appear here today to discuss House Bill 916. I have been for the past 20 years a law professor at Northeastern University School of Law in Boston, working specially in the area of Consumer Protection. Because tobacco products kill many more Americans (390,000 annually) than all other consumer products combined, and because the political power of the tobacco industry has produced an almost complete exemption of tobacco products from consumer protection regulations, my consumer protection interests have for the past several years focused specifically on tobacco products liability suits. I am Chairman and co-founder (in 1984) of the Tobacco Products Liability Project, which encourages tobacco litigation as a public health strategy, and Editor-in-Chief of the Tobacco Products Litigation Reporter, which publishes all of the cases, statutes, and other legal developments relevant to this type of litigation.

I am here to talk about House Bill 916 because it is, in large measure, a very artfully drafted act for the relief and protection of the tobacco industry. There are no fewer than eight (8) separate provisions of the Bill which relieve the cigarette companies from liability for action which they have taken, and continue to take, that puts at grave risks the lives and health of Pennsylvania citizens. They are:

(1) The 15 year statute of repose (§5539). Cancers generally take 20 years or more to develop. This provision mightenable tobacco defendants to escape all possible responsibility by claiming (plausibly) that the plaintiffs' cancers were under way more than 15 years before they manifested themselves and plaintiffs sued. At the very least, it would free them from all liability for their total failure to warn before the federally mandated warnings appeared in 1966, and even for their earlier express warranties ("Will not injure nose, throat, or accessory organs", "More doctors smoke Camels...", etc.). It is also terrible policy, since it provides blanket immunity for manufacturers of products which contain (or act as) slow-acting poisons. The argument for statutes of repose is that manufacturers of capital goods should not be held liable when their products are kept in service long past that expected useful lives. Many of the existing and proposed statutes of repose are expressly limited to capital goods. Since House Bill 916 contains no such limitation, it is an extreme measure, exceeding its stated purpose for the principal benefit of the tobacco industry.

(2) "Downhill skiing"(!) [§7102(c) and (d)]. This innocuously entitled and prefaced section applies a harsh assumption of risk rule to injuries and damages associated with downhill skiing "or any other activity or conduct involving known or inherent risks". Although the tobacco

companies to this very day deny that smoking causes cancer or other diseases, they have insisted in every case that the risks of smoking were known by the plaintiffs, and in any event were inherent. Obviously, they are unwilling to pay even a fraction of the medical and personal costs caused by their conduct and products. Equally obvious is their effort to hide their status as beneficiaries of this provision from the legislators and citizens of Pennsylvania.

(3) Definition and limitation of "product liability actions" (§8372 and 8373). This definition excludes any claim for fraud and conspiracy. Judge Sarokin, in his April 21, 1989 opinion denying defendants' motions for directed verdicts on the fraud and conspiracy claims in Cipollone v. Liggett Group, Inc., found that plaintiffs had produced sufficient evidence of a conspiracy among tobacco manufacturers "to refute, undermine, and neutralize information coming from the scientific and medical community and, at the same time, to confuse and mislead the consuming public in an effort to encourage existing smokers to continue and new persons to commence smoking." While the jury did not find for the plaintiffs on these grounds, no reason has been given why Pennsylvania should not let some other plaintiff present more convincing evidence of these intentional torts.

More generally, the omission of fraud and conspiracy underlines the weakness of approaching tort reform by substituting for the flexible remedies of the common law a short laundry list of statutory torts: it is easy to miss -- and thereby legitimize -- important types of wrongful behavior.

(4) The definition of express warranty [§8373(a)(4)]. This provision changes the Uniform Commercial Code's express warranty provision, which only requires that the representation in question be "part of the basis of the bargain", returning it to the earlier Uniform Sales Act's standard of "specific and justifiable reliance". The problem, of course, it that it would be very difficult for plaintiffs to establish that they relied even on very specific false representations in advertisements 20 or 30 years past: the "basis of the bargain" language was designed to soften this requirement sufficiently to make such express warranty claims practicable. This matter is of great import to the tobacco industry, since the only claims on which the jury in Cipollone found for the plaintiffs were those involving pre-1966 express warranties!

(5) Nonliability of nonmanufacturing suppliers [§8373(b)]. The effect of eliminating liability against distributors is to send all Pennsylvania tobacco cases into federal court. Traditionally, defendants have sought removal of all such cases of diversity of jurisdiction

grounds, while plaintiffs have (if they wished) been able to keep their cases in state court by including distributors (which destroys diversity of jurisdiction). This provision would insure that the Pennsylvania Supreme Court never gets to consider a tobacco products liability case -- a consummation devoutly wished by the tobacco industry.

(6) Alternative design requirement [§8374(1)]. This provision protects any oligopoly (such as the tobacco industry) which prefers not to develop safer technology. There was evidence presented in Cipollone that one tobacco company, Liggett Group, Inc., felt under pressure from another, Philip Morris, not to perfect a potentially noncarcinogenic cigarette which it had developed. So long as such internal industry pressure keep a safer cigarette from actually being marketed, no plaintiff could ever meet the burden imposed by this provision of the bill.

(7) "Inherent or unavoidably unsafe aspect" [§8374(2)]. Although tobacco companies deny cigarettes are unsafe, they also insist (in defending liability cases) that their products are inherently and unavoidably unsafe. In California, courts have interpreted a similar tobacco industry-inspired "tort reform" provision to bar all liability suits against tobacco companies. This provision goes so far as to bar claims that the companies could have reduced the dangers or made the cigarettes safer: plaintiffs must show that the aspect could have been "eliminated or made safe" before they are allowed to proceed.

(8) "Comment i" (§8378). The "common consumer products of the kind described in comment i" just happen to include tobacco. They also include castor oil, butter, red meat, and alcohol, but when the leading castor oil manufacturer was asked whether they breathed a big sigh of relief once the (similar) California statute passed, their official representative replied, "What statute?" The same response would doubtless have come from the Meat Board and the Dairy Council. Even the alcohol manufacturers were not much worried, since only a few suits have been filed against them, and they are weakened by the fact that the alcohol industry has never denied the danger of drinking. That leaves only the tobacco industry, which had in fact been the ones who insisted on the provision.

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ACADEMIC PREPARATION

Bronx High School of Science (1957-1960): Mathematics Award, Honor Society.

Columbia College (1960-1964): A.B. summa cum laude, Phi Beta Kappa, Siff (University-wide) Prize in Philosophy of Science, Kinne Prize in Humanities, Regents Scholarship.

Harvard Law School (1964-1967): J.D. cum laude, Harvard Legal Aid Bureau.

Columbia University Sociology Department (1968-1970): M.A., Faculty Fellow.

Massachusetts Institute of Technology (1970-1980): Ph.D. in Urban Studies and Planning (specializing in Law and Social Policy).

PROFESSIONAL EMPLOYMENT

Hughes, Hubbard & Reed, 1 Wall Street, New York City (Summer 1966): Summer Associate.

Hon. Henry J. Friendly, United States Court of Appeals for the Second Circuit, New York City (July 1967-August 1968): Law Clerk.

Columbia University School of Law (September 1968 - June 1969): Associate in Law (=teaching fellow).

Northeastern University School of Law: Assistant Professor of Law (1969-1972); Associate Professor of Law (1972-1973); Professor of Law (1973-present).

Tufts New England Medical Center: Instructor in Psychiatry (1976-1989).

Consultant, Consumers Union, New York Office (1979).

President, TPLR, Inc. (1985-present)

Consultant and Lecturer (1986-Present)

Expert Witness before various state insurance commissions (1988)

BAR ADMISSIONS AND RECOGNITION

New York 1967; U.S. Court of Appeals, 6th Cir. 1986; U.S. Supreme Court 1986; U.S. Court of Appeals, 11th Cir. 1987; Who's Who in American Law (6th ed., 1989)

SMOKING AND HEALTH RESPONSIBILITIES

President, Group Against Smoking Pollution of Massachusetts (1983-)

President, Clean Indoor Air Educational Foundation (1984-)

Chairman, Tobacco Products Liability Project (1984-)

Editor-in-Chief, Tobacco Products Litigation Reporter (1985-)

Advisory Board, Massachusetts Department of Public Health, Office of Nonsmoking and Health (1987-)

Testified (or submitted testimony) before congressional and state legislative committees, Federal interagency Committee on Smoking & Health, administrative agencies, and local governmental bodies in several states.

Appeared on national television and radio programs (including "Nightline," "Today," "This Week with David Brinkley," "McNeil-Lehrer," "Frontline," CBS, NBC and ABC Evening News, and "All Things Considered"), on British, German, and Spanish television, on British, Canadian, Australian, and Korean radio, and on local programs in many cities.

Delivered Ford Hall Forum lecture, October 10, 1985, with Surgeon General Koop.; Mellon lecture at University Of Pittsburgh Law School, 1987; Keynote address at Asian-Pacific Conference on Control of Cigarette Smoking, Teipei, June 1989.

Extensively quoted in national magazines and newspapers (including Time, Business Week, Barrons, New York Times, Washington Post, and Wall Street Journal), in the international press, in wire service stories, in syndicated columns, in regional newspapers throughout the U.S., and in legal and medical publications.

Chaired or Co-chaired five nationwide meetings of plaintiffs' attorneys and public health advocates, and three ATLA section meetings.

Lectured on tobacco products liability to doctors at several local hospitals and at the Royal Society of Medicine, London, to attorneys in bar committee and continuing legal education meetings, to public health students at Harvard and Boston University, to meetings of lung and civic associations, and to the American and Massachusetts Public Health Associations.

Presented paper at 6th World Conference on Smoking & Health, Tokyo, 1987.

Lectured on smoking and health issues in Seoul, Korea, June 1989

Designated keynote speaker, 7th World Conference on Tobacco and Health, Perth, March 1990

Lectured to business executives at conferences sponsored by the New Hampshire (February, 1986) and Connecticut (April, 1986) Lung Associations.

Chaired several press conferences.

Submitted amicus curiae briefs in four appellate cases.

Wrote model for Massachusetts ordinances banning smoking in public places (1975).

Member, Harvard Institute for the Study of Smoking Behavior and Policy, Study Group, 1986-present.

OTHER CONFERENCE PARTICIPATION

Conference on Innovative Judicial Decision-Making, (Darmstadt, West Germany, February, 1975), paper given.

Council for Philosophical Studies, Institute on Law and Ethics, (Williamstown, Massachusetts, July-August, 1977).

Presenter and Commentator at various Northeastern University Interdisciplinary Faculty Seminars and Colloquia.

Harvard Law School Dispute Colloquium (February 1981), paper given.

NEH Seminar, "Philosophical Underpinnings of Constitutional Interpretation" (Columbia University, July 1981).

TEACHING RESPONSIBILITIES

Taught (or now teaching): Products Liability; Constitutional Law; Consumer Protection; Law, Policy & Society; Law & Psychiatry; Legal Process; Law Language & Ethics; Administrative Law.

OTHER RESPONSIBILITIES

Law School Liaison, Northeastern University Law, Policy & Society Program.

Member or Chairman of various standing and ad hoc law school, interdisciplinary, and university-wide committees.

Senator, Northeastern Faculty Senate, 1989- ; member, Senate Financial Affairs Committee

Consultant, Special Committee on Consumer Affairs, Association of Bar of City of New York (1979).

ACADEMIC PUBLICATIONS AND TEACHING MATERIALS

"The Use of Social Policy in Judicial Decision-Making", 56 Cornell Law Review 919 (July, 1971).

"Test Case Litigation as a Source of Significant Social Change", 18 Catholic Lawyer 37 (Winter, 1972), reprinted in Bell, Race, Racism, and American Law, (Little Brown, 1973).

Book Review: Stanley Milgram, Obedience to Authority: An Experimental View, 25 American University Law Review 537 (1977).

Consumer Protection Planning (Northeastern University Press, 1977).

Administrative Law Problems (1978).

Book Review: Philip Kurland, Watergate and the Constitution, 23 American Journal Legal History 368 (1979).

"Richterliche Innovationsbereitchaft and Einstellung gegenuber 'Autoritaten'" ("Judicial Attitudes Toward 'Authorities' and the Propensity to Innovate"), J. Harenburg/A.Podlech/ B. Schlink (Hrsg.), Rechtlicher Wandel urch richterliche Entscheidung. Beitrage zu einer Entscheidungs-theorie der richterlichen Innovation. Darmstadt 1980, S. 363-379.

Report of Special Committee on Consumer Affairs, "The Impact on Consumer Protection of the Sentencing and Remedial Provisions in the Proposed New Federal Criminal Code", 35 Record of the Association of the Bar of the City of New York 23 (1980).

"Consumer Redress by a Licensing Authority: Settling Home Improvement Disputes in New York City", 1985 Missouri Journal of Dispute Resolution 89 (1985).

"Tobacco Liability Litigation as a Cancer Control Strategy", 80 J. Nat. Cancer Institute 9 (1988).

Journal of the National Cancer Institute

COMMENTARY

Tobacco Liability Litigation as a Cancer Control Strategy[1]

Richard A. Daynard[2]

Since the 1930s there has been a steadily rising trend in cigarette-induced cancer deaths in the United States, reaching about 120,000 such deaths in 1984 (*1*). This trend reflects a similar trend in cigarette consumption that began about 20 years earlier. While total U.S. cigarette consumption has been falling 1%–2% annually since 1982, even at that rate of decline several million more Americans will die from cigarette-induced cancers before the epidemic concludes. Obviously, any viable strategy for further reducing cigarette consumption deserves high priority among cancer control strategies.

Reasons for Viewing Tobacco Liability Litigation as a Cancer Control Strategy

Successful products liability suits against cigarette manufacturers on behalf of diseased smokers and their families would be likely to reduce future cigarette consumption dramatically. Briefly stated, they could shift billions of dollars of health and productivity costs from families and third-party payers to cigarette companies, forcing increases in cigarette prices and consequent large drops in consumption, especially among children and teenagers. They may drive home the point about the dangers of smoking, while forcing the industry to stop its deceptive advertising, promotion, and public relations. Finally, materials documenting the industry's disinformation campaign, discovered by plaintiffs' attorneys in the litigation process, may hinder industry lobbying efforts against other anti-smoking strategies.

Products liability suits have achieved similar effects with respect to asbestos and other dangerous products.

Economic effects. Products liability suits transfer costs, albeit inefficiently, from injured parties to the manufacturers of defective or unreasonably dangerous products. Plaintiffs include the injured person, his immediate family, and—by "subrogation"—whoever has paid his medical bills. Plaintiffs' attorneys bear the cost of pressing the suits and, where successful, share in the judgment or settlement. It is, however, the defendants' costs that are most relevant from a public health standpoint.

Defendants pay their own attorneys' fees, plus whatever judgments or settlements are reached. Attorneys' fees and other costs in successfully defending a single smokeless tobacco products liability case in 1986 were estimated at $15 million (*2*). This may have contributed to a consequent price increase and sharp decline in smokeless tobacco use. Cigarette manufacturers obviously spend much more to defend the 120+ cases currently pending against them. However, since sales and profits from cigarettes are many times those from smokeless tobacco, the recent cigarette price increases may not have been motivated by a need to pass along defense costs.

But five or ten successful tobacco liability suits should impact quickly and heavily. Thousands of suits, distributed widely throughout the United States, can be expected. The six major cigarette companies will have to retain counsel in every large city. Fresh liability insurance will cease to be available, while the manufacturers' financial statements will have to reflect enormous contingent liabilities. Industry executives and directors will have to decide whether to try to absorb current liability costs, to raise prices to cover them, or to raise prices even further to cover the average additional liability exposure incurred with each additional pack sold.

The amount of exposure is very substantial. The annual cigarette-caused medical costs and productivity losses, divided by annual cigarette sales, have been conservatively estimated at $2.17/pack (*3*). Of course, every affected smoker will not sue, and every meritorious suit will not succeed. On the other hand, the manufacturers have to cover their defense costs as well, and punitive damages may raise some judgments well above the amounts needed for compensation.

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Furthermore, even a relatively small price increase—such as $.25/pack—will have very significant consumption effects. Price increases of 10% have been shown to produce overall consumption decreases of 4%, with 14% decreases among males 12–17 years old (*4*). Since 50% of smokers begin by age 14 (*5*) and the great majority by age 18, the reductions in smoking by children and teenagers may be the most relevant for cancer control purposes. In any event, the hypothesized $.25/pack, 20%, price increase would produce long-term reductions of at least 10,000 cigarette-caused cancer deaths annually, and possibly much more.

Information/disinformation. Public education against smoking faces the problems of abstractness and diminishing marginal effectiveness. In an age of "celebrities," neither statistics nor even anonymous diseased lungs make the point that "real" people actually suffer and die from cigarette-induced diseases. Furthermore, new reports of the adverse health effects of cigarettes make little impression on people who already know at some level that cigarettes are dangerous. But the first few nationally publicized cases of particular individuals suing cigarette companies for their disease—and the first few such cases in each local media market—will focus media and public attention on the plaintiffs' cigarette-induced suffering, as well as exciting widespread discussion and debate on the larger issues of personal and corporate responsibility.

This debate has already produced a salutary shift in the industry's public relations. Public statements by industry representatives portray smokers who would sue cigarette companies for their lung cancer, emphysema, or peripheral vascular disease as people who knowingly and voluntarily accepted these risks. Since the industry *still* denies the reality of these and other health risks, their new position is essentially that "anyone foolish enough to believe us deserves the disease he gets." This is surely not the most effective posture for selling cigarettes: It is at least possible that some portion of the dramatic drop in smoking incidence reported between 1985 and 1986 was attributable to this public relations shift.

Successful cases are likely to produce even more dramatic changes in the industry's communicative behavior. Continuing deceptions, ranging from not admitting that smoking causes a range of diseases to actively misrepresenting the state of scientific knowledge (*6*), are likely to outrage jurors and judges, making substantial punitive damage awards more likely. Industry lawyers are likely to advise their clients and their clients' public relations and lobbying representatives to stop the active denials and perhaps actually to admit the dangers. Advertising campaigns using juvenile culture heros, young models, people engaged in active sports, and so forth may have to be curtailed for similar reasons.

Success of tobacco industry lobbying. A wide variety of anti-smoking efforts fail as a result of the tobacco industry's lobbying power. Recent efforts to regulate cigarette design and advertising have been completely thwarted, and efforts to regulate cigarette use in public places have met only partial success.

Information obtained by plaintiffs' attorneys through the "discovery" process in tobacco products liability cases will document industry "stonewalling" and disinformation campaigns, as well as publicize the actual ingredients of commercially available cigarettes. The resulting public embarrassment to the industry will likely make future lobbying efforts significantly more difficult.

Relevant Legal Doctrines

A successful lawsuit requires a viable legal theory. The common law of most states offers products liability attorneys a variety of possible theories, any or all of which may be available in tobacco cases.

The "failure-to-warn" theory has gotten the most attention, though it may be the hardest to prove in the cigarette context. While any significant differential between the manufacturers' and the ordinary customers' knowledge of the dangers of smoking should be sufficient to invoke this theory, the public seems wedded to the absurd notion that there has been no such differential at least since warnings started appearing on cigarette packs in 1966. In any event, three U.S. Circuit Courts of Appeals have decided, perhaps erroneously, that Congress intended to "preempt" failure-to-warn claims once the warning started appearing (*7–9*). Inadequacy of pre-1966 warnings can still be proved and may even be more relevant, since the warnings received or not received before addictions set in may be the ones that really matter.

A related theory is "overpromotion," that a manufacturer may not deliberately subvert the consumers' understanding of the warnings which it is legally required to display. Thus the manufacturer of chloromycetin was held liable for suggesting to doctors that the required warnings of aplastic anemia were overstated (*10*). Of course, cigarette manufacturers and their public relations representatives continue to urge, contrary to the mandated warnings, that smoking has not been proved to cause any disease. The major problem with this theory is that the three Circuit Court preemption decisions used language broad enough to preclude claims based on post-1966 overpromotion: Whether they really intended this indefensible result will be tested in future litigation.

Even if the cigarette manufacturers did not "know" that their products were lethal, they certainly had enough information no later than 1950 (*11,12*) to be under a moral and legal obligation to test whether their products were toxic. If they performed the relevant tests, they would have found their cigarettes toxic; since they have continued publicly to deny the dangers, they would be guilty of actionable misrepresentation. If, on the other hand, they failed to test, they are guilty of negligence, since the relevant tests, properly conducted, would have demonstrated toxicity.

If cigarettes have been improperly designed or manufactured, in that a feasible alternative design, or simply more careful manufacturing techniques, would have avoided some of their dangers, then their manufacturers are liable to anyone injured as a result of these unnecessary dangers.

Evidence recently discovered by plaintiffs' attorneys and anti-smoking activists strongly suggests that the industry has known for many years how to make cigarettes that are less likely to cause cancer. For example, the Liggett

Myers Tobacco Co. obtained a patent in 1977 for tobacco mixed with palladium and magnesium nitrate hexahydrate: The patent claimed that while tar from ordinary cigarettes produced 38 tumors after 79 weeks when applied to the skin of 50 mice, tar from the treated cigarettes produced only one tumor in a similar test (*13*).

Similarly, the R. J. Reynolds Tobacco Co. recently announced a new "smokeless" cigarette and publicly claimed: "Since the tobacco does not burn, a majority of the compounds produced by burning tobacco are eliminated or greatly reduced, including most compounds that are often associated with the smoking and health controversy" (*14*). Private representations on the same subject made the same day to federal health officials were allegedly even more explicit (*15*). The new device, which is described in a patent as producing "wet total particulate matter having no mutagenic activity, as measured by the Ames test" (*16*), appears to be quite similar to the device described in a 1966 patent (*17*).

Evidence is beginning to appear suggesting that at least some brands of cigarettes may contain non-tobacco carcinogenic substances. Thus a former maintenance employee at a cigarette plant submitted an affidavit in a pending case that chemicals that came in barrels "marked with skull and crossbones" were sprayed on all tobacco and were not washed off. The chemical was later identified as dimethyl 2,2-dichlorovinyl phosphate (*18*). Furthermore, a materials analyst retained by the plaintiff's attorneys in the same case discovered 35 inorganic fibers (man-made or asbestos-like) in a sample of cigarette ash under a transmission electron microscope: The equivalent number for an entire cigarette would be 46 million (*19*). Similarly, both hydrazine residues and polonium-210 have been found in cigarettes. None of these are naturally contained in tobacco: If their presence and carcinogenicity are proved, the cigarettes that contain them could easily be found defective.

Finally, it may be possible to win a case on the basis of the inherent dangers of tobacco. Most states permit juries to find liability if a product is more dangerous than an ordinary consumer would expect, or if its risks exceed its benefits, or even if it is simply unreasonably dangerous. While many courts may be reluctant on their own authority to find wanting a generic product like tobacco, at least one court (in Louisiana) has taken that step with respect to asbestos, and others may follow. It is clear that any of these tests, fairly applied, would make tobacco product manufacturers strictly liable for the deaths and diseases that their products cause.

There are also legal theories under which the industry as a whole, including the Tobacco Institute (its lobbying and public relations arm) and the Council for Tobacco Research, could be held liable. One is "civil conspiracy," based on evidence that the manufacturers may have gotten together beginning in the 1950s to plan and implement a strategy for marketing cigarettes in the face of the developing scientific evidence of their dangers. Another is a "Good Samaritan" theory: that the companies, having publicly pledged in 1954 to investigate the possible dangers of smoking, were obliged to carry out their promise and take reasonable action based on what they found.

Required Inputs

To succeed in its purpose of reducing cigarette consumption, the tobacco products liability strategy requires the cooperation of *a*) doctors willing to testify, *b*) attorneys willing to invest, *c*) organization(s) willing to perform clearinghouse functions, *d*) judges willing to apply settled legal doctrine, *e*) juries willing to relax the impulse to blame smoker victims, and *f*) legislatures and law-making coalitions willing not to interfere.

Doctors. Medical testimony is, of course, needed both from the treating physicians and from experts in relevant fields. While any physician should be competent to testify to the causal link between smoking and lung cancer, cigarette manufacturers still deny this link in their pleadings and find some scientists willing to testify against it in court. The causation defense is more powerful where science is less certain: thus, on the relationship between moist snuff use and tongue cancer, a snuff manufacturer was able to persuade a jury that no causal link exists (*20*).

Testimony is needed not only from oncologists but also from epidemiologists (on the methodology of causal attribution), from historians of medicine (on the state of medical knowledge when the plaintiff began smoking), from toxicologists (on the proved effects of cigarette smoke and its components), from pathologists (on both the diagnosis and diagnostic methodology), from psychiatrists (on nicotine dependence), and perhaps from other medical specialists. Nonmedical experts are also needed on such issues as the purpose and effect of cigarette advertising, the chemical composition of cigarettes and cigarette smoke, nature of addiction, and methods of comparing the risks and "benefits" of smoking.

Medical experts have been very forthcoming, often waiving their fees. Doctors have, however, been more reluctant to take other supportive steps, with only a few publicly supporting the strategy or referring cases to attorneys or to the Tobacco Products Liability Project.

Attorneys. The prosecution of products liability cases is financed by plaintiffs' attorneys, who look to contingent fees obtained in successful cases to finance their enterprise. The financial attractiveness of any given case depends on the likely cost of bringing it to completion, the likelihood of success, and the damages likely to be awarded or obtained in settlement.

Tobacco products liability cases are at present extremely expensive to bring, since the cigarette companies defend them with unprecedented ferocity and the plaintiffs' attorneys have no successful models to emulate, no "cookbooks" to follow. Trials are delayed by complicated pretrial skirmishing, and the paucity of relevant experience, combined with the strength and complexity of public feelings on the issue, makes it impossible to estimate the prospects for eventual success in any given case. While the majority of products liability cases are settled before trial, the cigarette manufacturers have refused to settle any cases against them, thereby maximizing the costs to attorneys contemplating such cases. It is unlikely that attorneys will be able to recoup their costs in litigating their first tobacco case through fees earned in that case.

Attorneys are sometimes attracted to new fields in the hope of obtaining recognition and additional cases, recouping their initial investment further down the line. Attorneys are also sometimes motivated by a desire to prove that they can succeed where others have failed, and even sometimes by a desire to do justice. Some combination of these three factors has motivated a small number of highly competent attorneys to press forward with tobacco products liability cases.

Organization(s). The costs of bringing tobacco products liability cases have been reduced, and their prospects for success brightened, by the Tobacco Products Liability Project. The purpose of the Project is to help lawyers avoid some mistakes made in the first wave of tobacco liability cases in the 1960s by sharing information with each other and with medical authorities, as well as generally to explain and promote the strategy.

The Project, located in Boston, MA, at Northeastern University School of Law, holds annual meetings of physicians, attorneys, and others who support this strategy; convenes plaintiffs' lawyers to discuss tactics on a more frequent basis; submits *amicus curiae* briefs in important cases; does legal and other backup research; and explains and advocates the strategy to a variety of audiences. It created and works closely with a reference service for lawyers—the *Tobacco Products Litigation Reporter*—and publishes its own newsletter for nonlawyers—*Tobacco on Trial.*

The defendants, however, are even better organized. The six cigarette manufacturers have mounted a "joint defense." They work out a common strategy for defending each case and exercise tight central control over local counsel, thereby ensuring that, for example, an attorney representing one of them in Montana does not repeat the recent faux pas of one of their attorneys in admitting that smoking causes lung cancer and other diseases (*15*).

Furthermore, the industry in its defense vastly outspends the plaintiffs' attorneys and the Project. It is, therefore, well positioned to take advantage of any inadequacies in preparation and coordination among plaintiffs' attorneys. As a practical matter, for the strategy to succeed, the Project may need additional financial support, and plaintiffs and their attorneys may need some measure of sympathetic understanding from judges and juries.

Judges. The strategy requires judges to apply in an even-handed manner legal principles developed with respect to products less lethal than cigarettes. Many of the principles supporting tobacco products liability cases—such as that toxic as well as traumatic injuries are compensable and that some awareness of the danger by plaintiffs does not bar recovery where the manufacturer had more precise information—were established by 1973 in the asbestos cases (*21*). Other legal doctrines—such as that compliance with regulatory standards does not prevent a jury from determining that a reasonable manufacturer would have done more—were settled even earlier (*22*). Since judges generally have life tenure, they should not be as susceptible as legislators to tobacco industry pressure to bend principle for the industry's benefit.

Surprisingly, three appellate courts have ignored settled interpretative principles in deciding that the Federal Cigarette Labeling and Advertising Act preempts failure-to-warn claims in cigarette products liability suits (*7–9*). Their decisions have made these cases more difficult—but by no means impossible—to bring.

Many judges, however, have applied existing principles to tobacco cases, developing especially useful precedents with respect to the scope of discovery of tobacco industry documents and the ability of plaintiffs' attorneys to share the results.

Juries. Jurors need to be convinced to relax their impulse to blame the victims of tobacco-induced disease. A dominant notion, even among smokers, is that "anyone stupid enough to smoke deserves what he gets." Ignored, in this reasoning, is that most smokers became addicted as teenagers (*5*), that most have tried unsuccessfully to quit, and that few have had an accurate notion of the range and magnitude of the dangers presented by smoking (*23*). Also ignored is the role played by the tobacco industry in encouraging the addiction and in publicly denying the dangers that, in the litigation context, they insist lay plaintiffs should have been fully aware of.

Increasing public awareness of the addictiveness of tobacco use can be expected to reduce the prejudice against smokers. Nor will smokers be thought to have knowingly accepted the additional risks posed by carcinogenic contaminants. Furthermore, detailed evidence of unsavory tobacco industry behavior may redirect some public animosity toward the industry.

In the first cigarette case to go to a jury this decade, *Galbraith* v. *R. J. Reynolds Tobacco Co.*, the jury found for the defendant on a 9–3 vote (*24*). The three holdouts would have voted for the plaintiff despite a paucity of evidence that he had died of a tobacco-related disease. The impulse to hold the tobacco industry accountable for the damage that it causes is potentially as strong as the impulse to blame the victim.

Legislatures. The tobacco industry thus far has been able to defeat most proposed anti-smoking measures both in Congress and the state legislatures. Thus it is a strength of the tobacco products liability strategy that it does not require affirmative legislative support. It can, however, be defeated by hostile legislation.

The tobacco industry by itself is not strong enough to obtain legislation protecting itself from products liability suits. The limited protection that it has received from the recent judicial interpretation of the Federal Cigarette Labeling and Advertising Act is not supported by the legislative history of that Act. But, ever resourceful, it combined in 1987 with pharmaceutical manufacturers and other groups—in one state including plaintiffs' malpractice attorneys!—to obtain products liability "reforms" designed to protect their special interests. Thus while earlier such reforms impacted evenly on various industries, three states adopted statutes in 1987 that either explicitly (California) or indirectly (New Jersey and Ohio) made bringing tobacco products liability suits especially difficult.

Prospects

As of the end of 1987 there were about 125 cases against the tobacco industry pending in 17 states. Two—*Horton* v. *American Tobacco Co.*, pending in the Mississippi state court (*25*), and *Cipollone* v. *Liggett Group, Inc.*, pending in the New Jersey federal court (*26*)—were scheduled for trial in January 1988.

Perhaps the greatest difficulty confronting the tobacco products liability strategy is the inference that, since no case has yet been won, the cases must simply not be winnable. This is buttressed by the tobacco industry's extraordinary record of emerging unscathed from over three decades of convincing evidence of the lethal consequences of smoking. This difficulty will not go away until a case is won.

Until a case is won, most lawyers, public health advocates, and journalists will likely stay on the sidelines. The typical citizen will probably continue to think that someone who "chose" to smoke should not be permitted to sue a tobacco company. The tobacco companies will probably be able to continue to make legislative deals, even with doctors and lawyers who do not think they are giving up anything of substance by agreeing to ban tobacco products liability suits.

Once a case is won, the general perception of the value of the strategy should change rapidly. The useful economic, educational, and political effects described at the beginning of this commentary would follow.

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