

## Scholarly Commons @ UNLV Boyd Law

---

Scholarly Works

Faculty Scholarship

---

1998

### Symposium, The Florida Tobacco Litigation -- Fact, Law, Policy, and Significance

Jeffrey W. Stempel

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the [Dispute Resolution and Arbitration Commons](#), [Health Law and Policy Commons](#), [Insurance Law Commons](#), [Litigation Commons](#), and the [Other Law Commons](#)

---

#### Recommended Citation

Stempel, Jeffrey W., "Symposium, The Florida Tobacco Litigation -- Fact, Law, Policy, and Significance" (1998). *Scholarly Works*. 180.

<https://scholars.law.unlv.edu/facpub/180>

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact [youngwoo.ban@unlv.edu](mailto:youngwoo.ban@unlv.edu).

TRANSCRIPT OF THE FLORIDA TOBACCO  
LITIGATION SYMPOSIUM—FACT, LAW, POLICY,  
AND SIGNIFICANCE

FLORIDA STATE UNIVERSITY COLLEGE OF LAW

I. INTRODUCTION BY GOVERNOR LAWTON CHILES .....	737
II. PANEL DISCUSSION I: MYTH AND REALITY IN REMEDY AND RESOLUTION: THE GOALS AND RATIONALE OF THE TOBACCO LAWSUIT AND THE RELATION OF THE FLORIDA AND NATIONAL SETTLEMENTS .....	743
III. PANEL DISCUSSION II: THE DYNAMICS OF VICTORY: THE ROLE OF THE REMEDIAL STATE LEGISLATION, RICO CLAIMS, AND SMOKING GUNS.....	762
IV. PANEL DISCUSSION III: LITIGATION IN THE LARGER CONTEXT: THE LEGAL AND POLICY LESSONS OF THE LAWSUIT AND ITS RESOLUTION.....	791

I. INTRODUCTION BY GOVERNOR LAWTON CHILES

GOVERNOR CHILES: Thank you, Paul. I appreciate your kind remarks. I'm delighted to be here this morning to participate in what I think should be a very interesting symposium, having this number of the members of the "dream team" and Professor Blakey here to talk to you. And I assume that Attorney General Butterworth will be here at some time.

Just the overview, of course, is that we won an \$11.3 billion settlement. We think that is a watershed moment in protecting children's health in Florida. What I am very pleased about in that settlement is that the court specifically set aside \$200 million to go for a campaign for anti-smoking effort, earmarked especially for that. We are busy planning how we are going to put that campaign together.

You can imagine this is kind of mind-boggling. There is to be a two-year campaign in which to spend this money. One of the things we know is that we have to hear from kids, so we have been bringing them in very early—and not just acting as adults, telling them what they ought to do—but asking them what would work with their peer group. It is very interesting, the ideas they had. We are going to have a kid symposium right after the first of the year that will bring in hundreds of kids from all over the state. We are busy talking with all of the anti-tobacco groups that are out there and trying to get ready to initiate this program.

The genesis, I guess, of how this all came about was shortly after I became Governor in 1991. Florida was in a slump at that time. One of the first actions I had to take before I was actually inaugurated was a plan that cut back all agencies a certain percent. I think we had to actually do it twice because our revenue was not coming in. That's a very drastic thing when you tell somebody whatever you thought you were going to spend, now you reduce that by a certain amount. But, of course, when that was coming about we were asking, "What are the reasons for all of this?"

amount. But, of course, when that was coming about we were asking, "What are the reasons for all of this?"

We found out that some of it was due to a recession. The sales tax revenue was not coming in. But part of it was that health care costs were just going sky-high in Florida, over twenty percent a year, way above the rate of inflation, way above the rate of everything else. So we asked, "What in the world is the occasion for this huge health care cost?" Part of it was that we were on a fee-for-service, which meant that whatever a doctor or a lab or anyone else ordered, it was paid for in regard to Medicaid patients, which we were paying a share of state workers' and others' costs. So that dictated that we had to start moving to managed care.

But one of the other startling figures that came to light was that we were spending over \$400 million a year for smoking-related, tobacco-related injuries to our Medicaid recipients. Now, that's a huge sum of money, and especially so when you are cutting all kind of programs. We asked how in the world can we fix that, and what in the world can we do to try to recover some of that money. And as we looked at it, we were saying to ourselves, "Maybe the smoker has a choice, because the smoker does elect to do something. Although if they are addicted, you know, what kind of a free choice is that?" But the state has no choice, because the state simply has to pay if the injury occurs.

So that is what we faced, that the state was truly the victim. And this behavior was promoted with advertising, promoted by the tobacco companies. So how can we deal with this? So we started thinking then about trying to bring a suit against the tobacco companies. As we got into that a little bit, we started seeing that the same defense that tobacco was using against individuals, they would attempt to try to use against the state. And we thought, that is not fair, we ought to have a level playing field in which they should not be able to say to us—what they said to the smoker—the warning was on the pack in that the state did not have those kind of choices. So that is where the idea for the Medicaid liability law came from.

That law we put together, we passed it quickly, which has gotten a lot of attention. But the interesting thing was that after the law passed, of course, there was a tremendous attack, and tobacco fully came to the front. They did have some notice of the law and just couldn't make up their mind what to do. I will throw that in. But then the big thing was to repeal the law. And in the next session they were able to repeal the law overwhelmingly in both houses of the Legislature. I, in turn, vetoed that at the end of the session.

That set the stage really, I think, for the biggest part of the fight that I was in, and that was trying to sustain the veto of the law. I think fifty-five lobbyists were hired. Anyone that was a cousin of

anyone or anything else was procured as a lobbyist. Tremendous amounts of money were placed into other organized groups. The Associated Industries took the tack that the law we had, while it just said tobacco, it was really going to get milk producers and orange juice producers and anyone else who made a product because it was going to hold them responsible.

We immediately said that we only were after people who sold a product that kills you when used as directed. And that was the only thing. But we also offered to amend the law. I issued an executive order right away that I would only use the law against tobacco, but they said that's not enough, Chiles will be gone some day. So we offered to amend the law. The interesting thing is the people that were fussing about it kept us from passing the amendment to the law because they thought that might give me some ground to sustain the veto. So they kept the amendment to the law from passing.

We then went into this protracted fight as to whether to override the veto or not. To start with, I don't believe that we hardly had enough votes to count. But we decided that the one way, if we were going to sustain this veto, it had to be something akin to the hallmark of my administration or anybody's relationship with me as Governor from the rest of my term, so to speak. And that is the basis on which we persuaded people and pursued that.

We basically felt that the Senate was where we had to operate. That body was smaller. There were too many House members. We thought we would have a better chance in the Senate. So we slowly went about trying to pick up members who would sustain the veto. Eventually, after much consternation and fights, we were able to sustain the veto. Actually, it never went on the board as such because it became clear that we had the votes to sustain the veto. It was pretty dramatic at the time. But that allowed us then to go forward with our suit.

Our suit was filed in 1995 to recover Medicaid dollars that were paying for health problems attributed to tobacco-related illness, and to protect children from falling victim to tobacco by ending the industry's fraud and callous practice of selling dangerous types of products through Joe Camel-type marketing and advertising. So as the suit progressed, it was originally simply a Medicaid liability suit. As information started coming out from the tobacco companies, we began to see a lot of things they had known, and how long they had known, and what some of their practices are, so we then amended our suit to allege racketeering under a RICO statute and to demand punitive damages. I think that turned out to be one of the most important things of the suit, because the judge had ruled that we were limited to our Medicaid damages for three years, approximately three years, and so we could only put on the table a demand for recovery of a cer-

tain amount of damages for that. But when we were permitted to sue for RICO, and for treble damages, that changed the thing tremendously.

So, in effect, we were fighting on two fronts: the Legislature during most of the time and in the courts. The lawyers, of course, were trying to do most of the fighting in the courts. Most of the administration and our supporters were working to try to preserve the legislation, which we finally did. One interesting thing is, I think maybe you have noted, a number of the lawmakers who fought us the hardest when we were trying to pass the act, bring the suit, and prevent the repeal of the act, were the first to say that when we won the suit, "We want to spend the money for this or we want to spend the money for that." So the legislature is always flexible in its ability to be able to deal with the people's money.

Another interesting thing was, also, there was a shift in public opinion. And I think that is why eventually we were able to sustain the veto. People were becoming more and more informed. They were becoming more and more upset about what tobacco was doing. And they were paying more attention in effect to the fight that was going on in the Legislature. It is easier if someone is giving campaign contributions or other things or if your friend is asking you to do something as a public official if you don't think that everyone is watching or that there might be some accountability. Consequently, having the people's support was tremendously helpful. I don't think we could have sustained the veto without that. But it became clearer, and we were trying to mass that support. We had a number of good anti-smoking groups, a coalition against the repeal of the law that worked very, very hard and very effectively. We certainly give them a lot of the credit.

We were fortunate in that we had a very able judge: very disciplined, very studious, who paid attention to all the pleadings very carefully.

In the meantime, of course, they did carry the Medicaid liability law to the Florida Supreme Court. And the law was upheld in a four-to-three opinion. So everything was close all the way through. And that allowed us to then go back into court.

Tobacco, again in a traditional response, filed all kinds of discovery motions. And as you heard about in the *Cipollone* court case and others, that just wears out most people. We were fortunate in that we had such a fine team of lawyers who I think gave as much as they got in regard to those discovery motions. They were filing their motions and discovery requests on tobacco, and tobacco had a huge team, but our team was able to stay up with the motions. I also give great credit to the Attorney General and to all of our state agencies, because people assigned to those agencies were working hours and

hours to come up with all of the documents that the lawyers needed so that we could stay up to date.

The judge said this case is going to be tried in a certain time. These motions are going to be heard in a certain time. He did not vary from any of those marks that he set down. As it became clear that he was adhering to that, we knew we had to adhere to that, and tobacco found out that they had to, as well. They asked for countless delays and countless continuances. The judge just would say, "This is the way it is going, we are going to do it." And we were prepared at all of those points, which did very well for us.

I would say we settled this case, as you know, just at the time we were picking the jury. We were totally, completely ready for trial. And that again is a tribute to our lawyers, a tribute to the preparation that they did, but that had a lot to do with forcing the settlement, because it was not going to be delayed.

Outside events, because of what was going on in Washington, helped an awfully lot in regard to the settlement that we got. It is my judgment, and it is simply my judgment, that tobacco felt that they had a chance of passing the tobacco liability law in this last session of the Congress, and they felt that they had to have the Florida suit out of the way to do that. I think they were terribly afraid that if we got a verdict on RICO or punitive damages, this could blow everything out of the water, because already the health advocates were saying that what the attorneys general could come up with was not enough. They were trying to get more on the table. But thus far, nobody was really talking about the recovery of punitive damages or a RICO statute. So I think that was a gamble that they did not want to take. And I think that we had a good chance, our lawyers will tell you more about it, of getting a verdict in those areas.

There was a part of me that wanted to see the jury come in with a verdict. We had started this from scratch. It had been a long and hard fight. Many, many, sleeplessness nights, many close, close calls all the way through. In part, I wanted to see what that jury would say about our case. And I was confident that we were going to get a verdict. But, of course, what we had to look at was not just getting a verdict, but also going through all of the appellate processes that we would have to go through, before we would ever be able to see something out of the suit. And then, I began to get calls that said the tobacco companies were very serious, they really want to settle this case, what is our bottom line, then we had to really come to look at that.

I think that we took a bottom line that we thought was almost all that we could imagine. We put in the provisions for protecting the health of children. We put in provisions doing away with tobacco advertising on billboards. We put in a number of things that we

couldn't have won in the lawsuit, because we were in state court and we couldn't deal with many of these issues that were national. But because again they wanted to sue, they would first say, "No, we can't do that." And we said, "Okay, well, we will just go to trial." And so finally, they called and said they were ready to settle. Part of that settlement is that we told them we wanted them to be required to pay our attorneys' fees, and they agreed to that. So then we were looking at this \$11.3 billion, which was truly going to be able to be used by the state, including the \$200 million for the program to protect kids, part of it for other programs. And our lawyers would be paid by the tobacco companies, not out of the recovery by the State. And we certainly thought they should be paid.

We had entered into a contingent agreement with them to start with. I don't think I mentioned earlier, no one would allow the State to put up any money for this lawsuit. So the lawyers themselves agreed that they would fund all of the initial costs to bring this lawsuit. And so they, in effect, docked themselves and put up a large sum of money in order to front the lawsuit. So everything that has been said about the dream team I think is true. I think that we did have the most skilled lawyers.

I think we were fortunate. Professor Bob Blakey from the Notre Dame Law School is here today. You will hear about how he and Professor Laurence Tribe of the Harvard Law School came down, also, to argue both the punitive damages and the RICO motions. They were tremendously helpful to us in the state supreme court, in all of the arguments that we had. And our individual lawyers, the way they divided the case up, just did an outstanding job to do that. I certainly thank all of our trial lawyers who were so helpful to us.

This case was never about money, as such. The case was about trying to prevent tobacco from targeting our kids, from designing their advertising to appeal to kids, because we know they were after replacement customers. Tobacco kills so many people everyday, they have to replace those lost customers. Those replacements are our kids everyday who are being hooked on tobacco. And we knew that we had to do something to change that.

I think that we were very fortunate in our timing that we settled our case when we did. I'm not sure that today we could settle it. I think that we were in a position to get a verdict, and maybe recover under RICO or punitive damages or both. I think that could have been a very substantial recovery. But I think under the circumstances the settlement was timely and a very fortunate one for us to get.

II. PANEL DISCUSSION I: MYTH AND REALITY IN REMEDY AND  
RESOLUTION: THE GOALS AND RATIONALE OF THE TOBACCO LAWSUIT  
AND THE RELATION OF THE FLORIDA AND NATIONAL SETTLEMENTS

PROF. JEFFREY W. STEMPEL: Again, we are switching now to the first of the panel discussions on various aspects of the tobacco litigation. Let me quickly introduce our panelists. We are pleased to be joined not only by the Governor, who is able to be with us for a few minutes, but by the Attorney General of the State of Florida, Robert A. Butterworth, who has been Attorney General since 1986.

General Butterworth is a graduate of the University of Miami where he received his J.D. He has been involved in all aspects of the law enforcement system, as a judge and as the Sheriff of Broward County and as Attorney General.

Our next panelist is C. David Fonvielle, of Fonvielle Hinkle and Lewis, and a co-chair of the symposium. David received his Bachelor's Degree from the University of Florida and his J.D. from Florida State University. David is one of our most esteemed alumni, and a great benefactor of the law school as well. He is an accomplished pilot, as well as a certified trial specialist.

The next panelist is another one of our graduates, Wayne Hogan, who is a double Florida State graduate, receiving both his Bachelor's degree and his J.D. from FSU. Wayne practices law in Jacksonville with the firm of Brown, Terrell, Hogan, Ellis, McClamma and Yegelow. He is an active trial lawyer, and also a major supporter of the Florida State University College of Law, and has given us substantial support for our trial practice programs and mock trial advocacy programs at the College of Law.

The remaining lawyer on the panel is W.C. Gentry of Jacksonville with the firm of Gentry, Phillips and Hodak. W.C. is an accomplished personal injury lawyer as well, and is a graduate of the University of Florida, where he received his J.D.

We also have as a panelist this morning Professor Charles Ehrhardt. He's the Mason Ladd Professor of Evidence at the Florida State University College of Law, and he is literally the man who wrote the book on Florida evidence.<sup>1</sup> He's been teaching at the College of Law for nearly thirty years.

Moderating today's panel is Professor Lois Shepherd of the Florida State University College of Law. Professor Shepherd is a 1987 graduate of Yale Law School, and has been a member of the Florida State faculty since 1993. With those introductions I will turn the program over to Lois.

MR. GENTRY: Did you mention that Governor Chiles is a graduate of Florida, also?

---

1. See CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* (1997).



PROFESSOR STEMPEL: Somehow that escaped me, but thank you for pointing that out. And Governor Chiles has graciously agreed to be with us a few more moments. And with that I will turn it over to Professor Shepherd.

PROFESSOR LOIS SHEPHERD: I want to first turn again to Governor Chiles, since he only has a few minutes more to stay with us, and ask him to tell us a little bit more about the state settlement, and maybe in particular about some of the public health provisions in addition to the financial positions that are in there.

GOVERNOR CHILES: Well, I would be happy to, and I will let the Attorney General chime in on this, because I think he knows all of the details even better than I do.

But basically, you know, in the settlement we got about \$750 million that has come in that we already have in—in escrow, in effect, drawing \$110,000 interest a day, which is very nice that it's drawing interest while it is sitting there. \$200 million of that is ear-marked for the children's program, and \$550 million is for health-related costs. I think General Butterworth can describe much better some of the language of how that was described in the settlement.

What we hope to do with that is, we have talked about children all the way through. We want to broaden our children's programs, our Healthy Start, and our Healthy Families Program that we are starting. We want to use part of these funds to be able to provide matching money for some \$200 million of federal money that is coming down for increasing children's coverage for health care. There are a lot of similar items in the settlement. And I think with that, I will let Bob just go a little further into those details.

Of course as I said at the outset, only because we have an attorney general with the talent and the staff that General Butterworth has were we able to be successful in this suit. He has lived on airplanes. He has gone to Washington. He has been a part of the national attorneys general team that has put together the national settlement. So in addition to all of the duties that he was doing in regard to the trial, our trial, itself, he has been one of the key figures nationally. I don't know how he stands on land, because he flies most of the time in all of those efforts he has made. He has been a tremendous help to us.

PROFESSOR SHEPHERD: General Butterworth, would you like to tell us more of the specifics of the settlement?

ATTORNEY GENERAL BUTTERWORTH: Yes, thank you very much. I tell you, it is hard to believe. I personally believe that Florida played a very, very strong role getting to where we are right now nationally.

As we look back, Mississippi filed the first lawsuit at about the same time that Florida passed the legislation which allowed Florida

in essence to be able to do what the Governor stated, to give us a level playing field. So really Florida and Mississippi were beyond a doubt the first two states to take the action against cigarette companies. Originally when this occurred, public opinion was really not as strong as it is now, and especially public opinion in the legislature.

I believe, as the Governor stated, that after the veto of the legislation repealing the Medicaid Liability Act it was very difficult to sustain that veto. And for a while there we thought, we might lose it in the override. But due to the Governor's talent at negotiation—"I'm the Governor, you are not, I win"—I think really helped to bring this home. If, in fact, we had not prevailed on the sustaining of the veto, I do not believe that tobacco would be where it is right now, where perhaps we will be having a global settlement by as early as the middle of next year.

And remember, what we have is a situation of a threat to public health. This is probably the number one preventable public health problem that we have in the country. There are 400,000 people each year in the United States who die prematurely due to smoking-related illnesses. It is over 3,000,000 worldwide. And it has been predicted if nothing occurs within the next thirty years, it will be 12,000,000 worldwide. So this really is an issue that has affected each and every person, at least in this country, if not most people worldwide.

There were a number of things that worked, and the timing happened to be perfect. There were five states that filed lawsuits in the 1995 area of time. Liggett, which is owned by Bennet S. LeBow, a Floridian, decided he wanted to settle his case because he only had two percent of the market. By settling its case with the five states, LeBow figured he could avoid bankruptcy. Literally one case could bankrupt him. Also, LeBow was trying to position himself in a way to take over RJR Reynolds. But where he came from was the fact that he admitted that cigarette smoking caused health-related problems. That occurred one day before the Florida Senate's vote on the veto override. That obviously made a difference.

Also, from the time of Florida's lawsuit until the override, we had more whistle-blowers from the industry say that they had been working in the industry and they have evidence, evidence that was suppressed mostly through attorney-client privilege, that showed that cigarette smoking did cause illness and that nicotine was addictive. As more and more witnesses and whistle-blowers came forward, more documents were released, including the Liggett documents. Part of our negotiation with Ben LeBow was that he would not only make the admissions, but that he also was to give us documents, as well as to pay each state at that time \$200,000. It was not much

money, but at least it was a token amount. We started to see a shift in public opinion after that.

I believe that tobacco made a lot of mistakes. They were the ones who paid more money, I believe, to politicians in campaign contributions than probably any other industry. As the Governor stated, many lobbyists, just about every lobbyist in Tallahassee, were hired. If you were a lobbyist not at least approached by tobacco, you must not be a good lobbyist, because they literally hired two and three lobbyists for each legislator.

The mistake they made was probably the mistake of just believing that since they had bought everybody for so many decades, why can't we keep buying them now? Back in the 1950s when people first started saying that cigarettes might cause illnesses, they came out with the "frank statement," which it was called, and they said, "We are going to put the best scientists in the world on this. We are going to determine once and for all whether or not smoking causes illness or not. And of course, forty-five years later, we are still trying to determine whether or not that happens. Science is still out. The scientist is still out. We are not sure yet, but as soon as we find out, we are going to tell you."

So they attempted to intimidate the politicians. And probably the biggest mistake they made, which actually won it all, the biggest mistake was when they attempted to intimidate the media. We had ABC and CBS do specials on tobacco. I believe it was ABC that did a report on the issue of whether or not they regulate the amount of nicotine in the product so that if, in fact, you are attempting to quit we give you a little more nicotine and we keep you addicted. They sued on that, and they ended up having ABC have to do, in essence, an apology. They sued for \$15 billion, I believe. But they never collected the money, though, just an apology. The media does not like to apologize, especially when it has been found out later that they were right.

Mike Wallace of *60 Minutes* was going to air a show on Dr. Jeffrey Wigand, who was the Brown and Williamson scientist and who had a lot of the information, and he was intimidated a lot by his former employers, ended up teaching high school at about one-tenth of his original salary. They told *60 Minutes*, "We are going to sue you if you air that particular program." Mike Wallace, who is probably the most respected commentator on TV, had to get up there and say we are not going to be able to show what we were going to show today because our lawyers tell us that we cannot do it. If you watched that, you could tell it was a very troubling moment for him.

A few months later, the *Wall Street Journal*, taking a number of documents off the Internet, had some front page material on what the industry knew, when it knew it, what they were hiding. At that

time, *60 Minutes* decided they would air the piece. And they asked three attorneys general, myself included, and Governor Chiles, to go up there and be interviewed for a forty-minute segment. Usually it is twenty minutes. Here it was either forty or fifty minutes. And they dealt with the lawsuits. They dealt with Dr. Wigand at length. At that moment, you could sense the entire public, at least the media, was now totally against the tobacco industry and their lies. Every time we would do anything, when we would announce anything, there was never a negative question from the media from that day forward. It was almost like everything was a softball question. It was that they had attacked our own, and they intimidated our industry, and they are going to be punished.

The second big mistake that tobacco made was after we did the national settlement. The history of that is very simple. The President of the United States stated to the tobacco industry that before any legislation gets introduced, and since there are lawsuits out there, we wish to have a number of the attorneys general sit across the table from the industry to see whether or not, see how far they can take the ball down the field.

And so four or five of us had the chance, starting last April, to sit across the table from the CEOs and the general counsels and other attorneys for the industry. The person put together to mediate it was a former supreme court justice from North Carolina, J. Philip Carlton. It almost sounds like a name of a cigarette, Philip and Carlton, but he didn't smoke though he did come from a tobacco-growing state.

At the first meeting, the person who started off the discussion was former Senator George Mitchell from Maine, who stated that he and his law firm were also to participate in helping to get this through. The first two people we had who spoke to us, and it was a round table or square table, and there was about maybe forty of us around the table, was a CEO of Philip Morris, Geoffrey Bible, and the CEO of RJR Nabisco, who was Steven Goldstone. Those two men controlled seventy-five percent of the domestic cigarette production. Both of them stated they wanted to make sure that when the thing was over that their industry would be doing business differently than it did beforehand. And they also told us, despite Joe Camel and the Marlboro man, that the industry was not there advocating to bring children into the fold of cigarette smokers. They never targeted children. Joe Camel was for you and me and our parents.

The situation was that they told us just what they wanted to do. Of course, when we attempted to sit around the table further for the next few months, it was not quite as easy as it was that first day. It was easy to say what they were willing to do. But when it got down to the details it got to be very, very difficult. But at the end, we as at-

torneys general believe it brought the ball as far down the field as it possibly could, and we took our proposed suggestions to both Congress and to the President expecting them to make it better. And so far it is being made better.

Our goals were the same as the goals Governor Chiles stated for Florida. The number one goal was public health, and that means the children. The children. Almost everyone who dies a premature death due to smoking-related illnesses started smoking before they were the legal age to smoke of eighteen. Most of them started between thirteen and fifteen-and-a-half. Virtually all of them. Only a few percentage of the people start smoking at a later age.

So we wanted to make sure we would cut down on the amount of teenage smoking. Therefore, we had various incentives and disincentives for the industry. They had to reduce within ten years teen smoking by approximately seventy percent, which was a very, very high number. They were not quite sure they could make it. If they did not make it, they were subject to billions of dollars of fines for each year that they did not make it. They would also pay billions of dollars to each state. And in fact, each state would get the equivalent of what that state was spending on smoking-related illnesses. For Florida, in round numbers, let's say \$300 million a year, I think we figured. Florida would get at least that amount of money for Medicaid reimbursements. The federal government also pays part of the Medicaid costs, along with the state of Florida fifty-five percent of our Medicaid dollar is spent by the federal government. Our share is about \$300 million. Theirs is more than that. In some states, that federal share goes up to eighty percent, as in Mississippi. In some states it's lower, but the average is about fifty-seven percent.

We also worked it out where we would be requesting the federal government to allow us to keep the federal share, which in essence would double our money. We would also say to the federal government you can put strings on that. The attorneys general suggested the strings would be that we will fund the youth health programs in all of the states. So this money would be enough to pay for universal health care coverage for every child in each and every state through the use of this money. Also, money would be set aside, approximately \$4 billion a year, for people in individual lawsuits to be able to sue the industry for actual damages. Punitive damages they would not be able to sue for.

The industry wanted certainty. The certainty they wanted was how much money it would cost them each year. That in essence was all they wanted. And that certainty would probably end up costing them a couple dollars a pack extra in cigarettes over about a ten-year period. According to the experts, a one-dollar-a-pack increase will probably drop youth smoking by approximately thirty percent any-

way right away, and a two-dollar-a-pack increase would probably drop it at least fifty percent.

There would also be money for anti-smoking programs, such as the one that Governor Chiles was just talking about with \$200 million in Florida. It would be hundreds of millions of dollars, probably \$500 million, that would be available for the federal government to give out in grants and their own programs to stop kids from smoking. So the whole idea was twenty-five or thirty years from now, if everything went well, the way it was supposed to, in essence there would be no more smoking in the United States. It would no longer be a problem.

We delivered our package to the President and the Congress, as I stated. The President has given his views on it, and he has expanded on it in order to give the Food and Drug Administration more jurisdiction, and also to make sure that the kids' programs were highlighted, and perhaps that there would be no tax deduction for any type of penalties that they would incur. Under present law penalties are tax deductible for every other industry. This one would be different. They also wanted more for public health communities, which was fine.

The big mistake, and this was the second big mistake, not the biggest mistake that tobacco made, a number of months back they slipped through a \$50 billion tax exemption for themselves when the Congress had passed, I believe, a fifteen cent-per-pack increase in taxes. What they ended up doing was to take that away, by saying in an amendment—no one knows where it came from, but it just happened—that they would get a credit against a global settlement for that \$50 billion. Right there tobacco lost all credibility with everybody, including Congress, throughout the country.

What Florida also wanted was the truth about the product. So did we at the national level. Adults can smoke legally, but they should be able to have all the information available before they make that particular decision to smoke.

As we were coming close to closure in Florida, I agree with Governor Chiles, we were very, very fortunate. We had a very, very, very good judge. This judge every single day we were in court, he would say to Wayne Hogan, David Fonvielle, and W.C. Gentry, "We are going to trial on August the 4th." This might have been a year and a half out. "We are going to trial on August the 4th, 1997." And the tobacco companies said, "Sure, Judge, forget it, that's not going to happen." We might have two or three lawyers on our side of the table. They probably had sixty lawyers on their side of the table each and every day.

"Well," he said, "don't tell me you don't have enough lawyers, because you've got them." They had enough. We had enough. That was it. "You are going to trial." He kept doing it and doing it and doing it.

And the main persons in charge of our preliminary motions were Wayne Hogan and W.C. Gentry and Andy Berly.<sup>2</sup> We were ready, as the Governor stated, and we were there and we were winning our motions. David Fonvielle was doing most of the discovery, and probably at one point in time he had 100 lawyers working with him up here in Tallahassee handling all of the depositions and discovery. Tobacco has told us they thought they were going to break our back on the discovery and the depositions. It didn't happen. It just didn't happen.

So Florida was the battleground. Before any settlement, the Governor made sure that the kids' issue was taken care of, and it was. He also stated that he wanted admissions. In fact, before he went to the table to talk with them, he said, "I want some token of good faith." They killed Joe Camel the first day of our negotiations, probably about six weeks before we actually resolved the case. Coming to the table RJR announced that Joe Camel would no longer be used. They killed off Joe Camel.

We also wanted them to make sure all documents came out in our case, every single document that has been sprung free for trial will become public. Some of them are still in the Fourth District Court of Appeal. They should be out fairly shortly. So when these come out, these thousands of documents come out, they can be used by any other state or any other individual suing in the country.

We also wanted admissions. The tobacco companies said, "Okay, we are probably going to settle this case. You have two of our CEOs, Goldstone and Bible, set for deposition in Palm Beach. We want those depositions postponed."

The comment they got from me was "Forget it, you deposed the Governor," which they had. "We are deposing your CEOs. Talk about settlement afterwards."

"What should we tell our CEOs to say?"

I said, "Well, why don't you tell them to tell the truth?"

They said, "But we always tell our CEOs to tell the truth."

I said, "Well, you should probably say it again."

The first CEO deposed was Geoffrey Bible, of Phillip Morris. In that deposition he was asked a number of questions. I will paraphrase here:

Question: Do you believe it is possible that cigarette smoking might have caused the death of one person?

---

2. J. Anderson Berly, Esq. of the law firm of Ness, Motley, Loadholt, Richardson & Poole, Charleston, S.C., who formally was introduced as part of the second panel. See *infra* Part II.

Answer: Yes, that's possible.

Question: A hundred people?

Answer: Yes.

Question: Thousands?

Answer: Yes.

Deposition over.

Goldstone, RJR CEO, was deposed the next day. That went national, all over the world, CNN, all over.

Goldstone: Well, I'm fairly new to the business, only about three years. And I believe, yes, that smoking can and probably does cause illness.

Another question: Do you believe that a person who chooses to smoke should have access to all information?

Answer: Yes. If there is anything that we have that shows that smoking is harmful to your health or nicotine addictive, that should be in the public domain. Everybody should have all the information before they make the decision whether to use a product. It is our responsibility if the product is not safe to let people know that.

Those were pretty strong admissions from tobacco CEOs all coming here into Florida. The Florida trial team brought this issue home, really not only for Florida—a tremendous victory, the largest ever in the world—but also I personally believe for the country. And that national settlement will be, we believe, sometime towards March or June of 1998.

These lawyers that we are talking about now were in the pits, literally fighting and battling against odds that were, back in 1994 and 1995, the odds—anyone who would have signed up to work on this case for the State should probably be in a psychiatric hospital. That's what people really thought. Because at that point in time the chances of winning, no one ever had. Did you have a legislature behind you? No. How did the law get passed? Some people said we did it the way tobacco does. Maybe we did. But the thing is it got done. This is what happened. These are the results. And the Legislature also passed a legislation appropriations bill saying that no dollar, no State of Florida dollar, can be used to fight the tobacco industry.

The supreme court eventually thought that was not appropriate, but at least that was the law when these gentlemen—the trial lawyers—signed on with the State of Florida. They have done I believe very Herculean work in bringing this to where it is. I believe it is a tremendous accomplishment for the State of Florida, but also for everybody that worked on it.

And I cannot find one legislator of the 160 who did not know what they were voting on back in 1994. They all wanted the law to pass. I cannot find one legislator who knew they were voting to not allow the State to use any public money on this. I cannot find one legislator



who does not believe that the State did the right thing now. It is amazing how selective memory works. And what is very interesting, the same tobacco lobbyists that were working against us, now, in accordance with the settlement agreement, are to work with the State of Florida in lobbying for laws and regulations that will accomplish the reduction of youth smoking. So those 100 and some-odd lobbyists who were working for tobacco may still be working for tobacco, but they will be doing it in conjunction with the State of Florida to reduce teen smoking. So we think it is a total victory.

But the people that really did the work, a lot of people that really did the work will have an opportunity to talk about it.

PROFESSOR SHEPHERD: Let me ask you to explain, if you would, what happens if the national settlement does pass? How will that affect what Florida has agreed to?

ATTORNEY GENERAL BUTTERWORTH: Our settlement agreement is that, if the national settlement passes, if it is substantially the same as Florida's, the national agreement will prevail. The numbers that Florida will get in dollars, besides the \$750 million we have, if the national passes, we will get an additional \$250 million upon the national passing, which is \$1 billion in the first year. If it passes, Florida will also get an additional approximately \$220 million, which is Florida's share of about five and a half percent of the national money that will be there for states. And that will be graduated, starting off right around the \$4 to \$4.5 billion range, up to about five years to an \$8 billion range. Florida gets five and a half percent of that. So theoretically, if Florida gets its first payment in September, Florida will get anywhere between \$1 billion and \$1.2 billion in the first year. And then in the fourth year it would be over \$400 million a year, whether or not the global settlement passes. If the global settlement does not pass, Florida gets these monies. So we think Florida is in a win-win position.

Now, Senator Bob Graham just last week introduced legislation to allow the State of Florida to keep the other half of the money, so if the global settlement passes we probably will get \$440 million a year versus the \$220 million.

PROFESSOR SHEPHERD: If the national settlement passes, will there be other provisions that will alter how the Florida settlement will be run? I was wondering about the documents. You said, for example, all the documents that have been disclosed in this trial are going to be public. Will that also be the case if the national—

ATTORNEY GENERAL BUTTERWORTH: A number of us have been asking the Congress to hold tight to get documents out. I don't think we need the 12,000,000 documents that are theoretically floating around, because I'm sure hundreds and hundreds of them

are duplicates and the same as the rest. But in our case here, W.C., how many documents did you break out in this case?

MR. GENTRY: We only have about, what, 200, Andy, left?

MR. BERLY: That are still left.

MR. GENTRY: We have about 200 Tobacco Institute documents that are in the Fourth District right now. That brief is due from us in the next week or two.

ATTORNEY GENERAL BUTTERWORTH: How many have you broken out?

MR. BERLY: Oh, thousands upon thousands.

ATTORNEY GENERAL BUTTERWORTH: We have broken out probably thousands after the Florida settlement. So even when you add it up, a lot of what we have out is what Congress has been asking for. So we believe that Congress will have most of the things they want pretty much from the Florida case. But they should still ask for more and more documents, because the more you have, the more history you have about the industry. They are not really complaining about these documents coming out. They are pretty much in agreement.

PROFESSOR SHEPHERD: For years the Council for Tobacco Research was conducting these experiments, for example, or trying to get out information about smoking, suggesting that it wasn't harmful, or that the evidence was not conclusive. What is going to happen? Will that continue?

MR. GENTRY: The Center for Tobacco Research and the Tobacco Institute are to be effectively disbanded under the agreement.

ATTORNEY GENERAL BUTTERWORTH: Right. That nexus was really the whole crime, fraud, that allowed us to free up the documents that were hidden. And in fact, the documents that Andy was so successful in getting, and which are part of our settlement agreement we are still free to get, are approximately 200 Tobacco Institute (TI) documents that appeared to be child targeted documents. We've never seen them. They were subject to privilege law. We were able to get them through the crime/fraud exception to the privilege and they have taken a petition for cert. to the Fourth District. And so we are really kind of excited to see those 200 TI documents which appear to be child-target documents.

PROFESSOR SHEPHERD: Can you explain, Andy, what the work of the CTR [Council for Tobacco Research] and the TI was that has produced these documents?

MR. BERLY: Well, supposedly CTR was established in the early '50s. I think General Butterworth mentioned the "frank statement." The tobacco industry ran an ad called "frank statement" in all papers throughout the country where there was a circulation greater than about 50,000. And they said we are going to set up the Tobacco In-

formation Research Center. They changed the name later to the CTR. We are going to honestly and independently research whether or not tobacco causes disease. And whatever we find out, we are going to tell you, the public, because we believe, quote, health is paramount. We're going to cooperate with the public health authorities, we'll cooperate with the government. These are the things we are going to do in CTR.

Well, the truth of the matter is that CTR was nothing but a public-relations front. It was a sham. Several courts have found that. It's been found in connection with the crime/fraud hearings. What the industry really used CTR for was as sort of an insurance policy. One of the documents I have today sort of speaks to it. The idea was that the industry could have this trade organization, but they told the public it was really independent. It really was controlled by tobacco industry lawyers. If they could point to the CTR and say we are going to independently research it and we are spending \$5, \$10, \$15, \$20 million a year, that was their cheapest insurance that money could buy because they could then look at the public and say why would we spend \$10, \$20 million a year researching this if we weren't sincere about it. Of course, they are spending \$6 billion a year advertising, so their priorities are a bit skewed. But that's really what the CTR was doing.

TI was their non-scientific organization. That was their public relations arm. And they were purely and simply an open and avowed public relations entity. Their theme was that on smoking, there was a controversy. That there was doubt as to whether or not smoking caused disease, notwithstanding every major medical association in the free world saying it did. Their view was there was a controversy and there was a doubt. So that's the way those two work together.

PROFESSOR SHEPHERD: One other thing about the national settlement, if you could speak to it. There has been some criticism of the proposed national settlement, which I guess is the way we should be talking about it. For example, with respect to the elimination of punitive damages' availability to individual plaintiffs, and the elimination of class action suits, could you speak to that?

ATTORNEY GENERAL BUTTERWORTH: Sure. Our goal was to bring the ball as far down the field as we possibly could. And as you are sitting as a lawyer across the table from the other side, you pretty much do the best job you can.

We believe the biggest mistake we made, we took the ball too far down the field, and we gave very little room for the President and for Congress to really move within and put their name on the settlement. The whole idea was that once we did our thing, we were supposed to walk away, and then let the real politicians do their thing. And maybe that's the mistake we made. We took it down to the fif-

teen-yard line, we should have taken it down maybe to the forty-yard line.

PROFESSOR SHEPHERD: So you think some of the criticism is because there is not much credit left for shaping it?

ATTORNEY GENERAL BUTTERWORTH: That's one of the problems we really have. The class action issue, I was always of the feeling that the judicial branch is not going to allow the executive or the legislative branch to tell them how to run their courtroom, especially if they want to consolidate a few cases.

On the punitive damages issue, we believe that the amount of money that the industry was paying up front and everything were, in essence, their punitive damages. Punitive damages are not to be given theoretically to the individual, but are to be given to society at large to prevent defendants from doing this behavior in the future. You're not really out there to give a windfall to a victim, you are out there to prevent them from doing something in the future. And we believe that by having FDA be able to really stop them from selling cigarettes at a point in time, to force them to have to do a safe cigarette or an alternative nicotine delivery device, all that money was probably punitive enough. I believe that at the end of the day, on the punitive damages issue, Congress will probably agree with that.

So on the actual cases, and how many you can consolidate, I believe there is a little bit of room there for Congress to allow some cases to be tried together.

PROFESSOR SHEPHERD: Perhaps some of the private attorneys who were involved can tell us how closely you believe the ultimate settlement matches what you were seeking in the beginning.

MR. HOGAN: Maybe another way to approach that would be to add one additional factor that was insisted on by the Governor and the Attorney General related to the Florida settlement. That is that in the event that there is not a passage of a national proposal that includes a substantial number of equitable remedies, injunctive remedies that are sought there, that our injunctive count still stays in force here in Florida.

More to that point, Judge Cohen, who the Governor and the General have both pointed out has consistently from the day he walked in and introduced himself to us, he said, "Hello, I'm Judge Hal Cohen, and your trial date is August 1, 1997." And he stuck to that and reminded us every step of the way as the General indicated.

In this Florida settlement, the court has retained jurisdiction over the equity count. He has gone ahead and set a trial in September of next year. In the event of a failure of the national proposal, we will be back in trial with the industry to seek additional relief beyond the elimination of the billboards, and beyond the requirement that vending machines be placed only in adult locations, and beyond the

other obligations that the industry now has to assist in passing further regulations related to minors. Included in that is the demand that the Tobacco Institute and the Council for Tobacco Research be ordered dissolved. That aspect is still a part of what Florida has the ability to seek; in addition to that, orders that the industry disclose, disseminate, and publish all of its research.

In other words, we would be asking the judge to require that in the event the federal statute does not require that, that they produce all of these documents that relate to smoking and health. That it enjoin—that Judge Cohen enjoin—they from engaging in any form of consumer fraud in violation of Florida laws. And it covers a wide range of their agents. These are the demands in the complaint. That they fund a corrective public education campaign relating to the issue of smoking and health. And so that would mean regardless of what they agreed to already, Judge Cohen would be permitted to consider these additional steps, to order that they take all necessary steps to prevent the distribution and sale of cigarettes to minors, and that they fund clinical smoking cessation programs. And finally, a demand, although it may be subject to their debate with us, that they disgorge their profits. They may have a contention about whether that has been resolved thus far.

Those are the kinds of things that we are seeking in terms of the public health in the equity case. Much of that will be in the national proposal if it passes as negotiated by General Butterworth and the other attorneys general. But failing that, they will be available to us through our group in the trial.

MR. GENTRY: Professor, I think, because I'm not sure one fully appreciates what an extraordinary settlement it was, it really is attributed to the Attorney General and to Governor Chiles, who stood in there and insisted that the equity piece be in, taking the billboards away and the rest, and insisted we be free to go back to court, which as you know is unheard of. They pay us, but yet we still get to sue them if we don't like what happens in the national settlement. To put it in context, the court had ruled, probably properly so, contrary to my argument, that we could not recover future damages under the act, thereby limiting us to, as far as the Medicaid recovery goes, by our estimate approximately \$1.2 billion.

PROFESSOR SHEPHERD: That would be from 1994 to the date of trial?

MR. GENTRY: July 1, 1994, up to the date of the jury verdict, and by estimate approximately \$1.2 billion. We would have had to have come back every couple of years and do this all over again. We really were enjoying it, but we were pleased that we were not going to have to come back.

So we were limited on the past damages. The remainder of the damages we recovered would be primarily treble damages if we were successful in RICO, and we sure we were with Professor Blakey on board, and/or disgorgement on the equity counts, and punitives. But we were limited in our punitives to fraud under Chapter 817. The judge had stricken all of our other theories of punitives, believing that we were limited to the Medicaid act.

So the settlement, which has a present value, I'm not quite sure what, but probably in the range of at least \$6 billion, settles those future claims that we were going to have to come back time and time again to get as well as the other potential claims. So it is an exceptional settlement. In some ways, one could argue it gave us more than we could realistically expect to accomplish in this lawsuit. So it was really exceptional, and was a tribute to Governor Chiles and the Attorney General that they hung in there and really made them pay an extraordinary premium to the State of Florida.

PROFESSOR SHEPHERD: We had some references to the Medicaid Third-Party Liability Act. Can someone explain what that was about and how central that was to the lawsuit?

MR. HOGAN: Let me start by drawing an analogy that relates, I think, to this whole topic. Medicaid is a program that pays based on the person who receives the benefits, whether they be direct or whether they are payments for medical expenses, if that person falls under a particular category related to their poverty, and in that sense, operates as a welfare program. Where the state, all states who participate in that program, and they all now do, are obligated to pay regardless of what the person may have done to put themselves in that situation, or however it is that they find themselves in need. The state is then in the circumstance where it has expended these monies, and properly entitled in an individual case or in broader context the way the statute is set up, to be reimbursed for the amount of money that has been expended.

It is not unique to the subject of tort law and tortious injury. For example, in the situation in which there is a non-supporting parent, sometimes referred to, generally, if it is a male, as a deadbeat dad. You have a situation in which the State of Florida through Medicaid is obligated to pay expenses for the rearing of and other expenses that otherwise would be paid by the non-supporting parent. The law has been for a long period of time that regardless of whatever equities that father might have, he is denied visitation or a variety of other things, it does not change the fact that the State of Florida and the taxpayers had been obligated to fund the costs involved. And so regardless of what defenses he might be able to raise, if it were the mother who was pursuing the benefits, they don't apply to the taxpayers' claim.

The very same concept applies under the Medicaid Third-Party Liability Act dealing with tortfeasors. In that setting, regardless of what role the smoker may have had, and whether or not the smoker chose, didn't choose, knew, didn't know, regardless of that, the state was in the position where it was obligated to pay. We have all the proof that we need that the industry wanted as many people as they could conceivably get to smoke to be smoking cigarettes, and they didn't care one bit what kind of expenses were incurred by the taxpayers.

So this set of Medicaid statutes provides, and a key aspect of it is, that regardless of what the equities might be, so far as contentions that the cigarette industry might make in an individual suit by a cigarette smoker, when the taxpayers are demanding their money back, they are not subject to any of the defenses or the contentions or the arguments that might have been made if the smoker were the one bringing the lawsuit. So the concept is not a revolution of the law. It is really a continuation of what the rules have been all along, and the industry knew it. The cigarette industry knew it. In fact, there are documents demonstrating that they were aware of the availability of these programs to pay for the health care costs. In many ways, then, the proper argument can be made that they decided to take a ride on the taxpayers' backs.

And so this 1994 statute, which has received all the notoriety, I would tell you that it really is the determination of the Governor, without regard specifically to the 1994 statute, that made this thing happen. The reason I say that, W.C. and I were working on the briefs in defense of the constitutionality of the statute. W.C. made a major point of seeing to it that we included this argument on the constitutionality. The Medicaid Third-Party Liability Act received its name not in 1994, but in 1990, when a major revision, twelve columns of statutory law, was passed and specifically said that it was intended to eliminate any equities that there might be in a third party, and to ensure that the State of Florida was the payor of last resort. A whole series of changes were placed into the law in 1990. We argued in the briefs that that statute in and of itself could have been used by the State of Florida to be able to pursue claims against the cigarette industry.

It is the case, though, that Governor Chiles when he came in saw the problem. And he saw the problem and felt that it needed some very specific kinds of remedies. The supreme court decision<sup>3</sup> that Justice Overton authored made note of the fact that the 1994 statute expanded and clarified the fact that there would be no affirmative de-

---

3. See *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239 (Fla. 1996).

fenses. Not that it said for the very first time that there would be no defenses, but that it clarified it and expanded it specifically to say that there was no comparative negligence, no assumption of the risk.

And a variety of other changes that were included in the statute or were at issue were these, in addition to the issue of the affirmative defenses, that there was a provision that the State would not be required in the lawsuit to identify the individual recipients. During the course of today, we will get into the discussion as to whether it was necessary to have included that provision and the effects that it had during the course of the litigation.

There was a reference that the statute of repose, which is a concept in products liability that cuts off a claim regardless of whether it was known to exist or not, there was a provision that that would be abrogated. I know something about that general topic through history, and there is a question as to whether that particular aspect needed to be placed into the statute, but nevertheless it was. A provision that all of the State's claims could be presented in one proceeding; that is, the idea that the State is receiving each Medicaid claim, each bill paid in essence would be a claim. The statute specifically said that all of those can be brought in one proceeding. We can discuss again whether that was necessary as an element of the statute or whether that is already provided for by the Rules of Civil Procedure.

One of the specific items that it added was the idea that we could use market share against this industry because of the idea that people would use different brands over the years and that carries back over ten, twenty, thirty, forty years, because this is a latent disease-causing product. We were allowed to use market share in conjunction with joint and several liability, which was a problem. A part of the statute that the court had a problem with said you could use market share, but at the same time a defendant would be responsible for the whole. That was one of the issues.

Finally, a provision said that we could prove up causation and our damages, the expenses that the State incurred, and the fact that they were caused by cigarette smoking, by use of statistical analysis.

So those are the six major statements that were made in the 1994 statute that were subject to attack when the declaratory judgment action was filed here in Tallahassee. Judge Steinmeyer ruled on those. Some of his findings found for the industry; some for the State. Then those issues went up to the supreme court resulting in the decision that Governor Chiles mentioned earlier on a four-to-three basis, hinging on a single vote in the supreme court on that issue.

One important thing to know about that is that on this issue, is this something that is going to be used against someone or some industry besides the cigarette industry?



PROFESSOR SHEPHERD: That's one of our questions.

MR. HOGAN: Well, one aspect of that is to know that although it was a four-to-three decision, it was a three-to-one-to-three decision. There was a concurring opinion by Justice Wells, who made it very plain that from his standpoint he did not see a set of circumstances out there that would make this particular statute applicable, where no defenses are usable, et cetera, against any other industry, but for the kind of record that he had the impression that we were able to build against the cigarette industry. It is a unique product. It kills, as the Governor said, when used as intended. And it has not any other benefit, no benefit whatsoever, except to feed a created addiction.

So that opinion upholding the statute also provides protection for other industries which are not in that kind of a situation. And all of us would hope that there are no other industries who want to be or are in the position of producing useless products that are promoted so heavily simply to get the profit by killing people.

MR. GENTRY: Let me just, on that point, make another point. And that is the genesis of the Act was the federal legislation which mandates that every state shall, if it is economically feasible, undertake to recoup these expenditures from a liable third party. So there is a mandate in federal government that the state do these things.

The 1990 statute was, in fact, probably the broadest statute of any state and still is, without the 1994 amendment. So it was pursuant to the federal mandate that the State of Florida enacted this legislation to allow it to proceed to recover from the third parties.

It would not be economically feasible in my view, at least, for the state to even think about proceeding against another industry. People do not appreciate the fact, and Andy probably has the statistics down a lot better than I do, but the morbidity, health problems, death caused by alcohol, illicit drugs and just about any other category of product that you can think of is only a small percentage of that caused by tobacco.

Given the enormous hurdles that we had to prove damages through epidemiology and statistics in this case, where candidly we were only going to be able to recover \$300 to \$400 million a year at best, when we knew it was probably more like a billion, but in terms of what we could prove, we were going to be probably limited to \$300 or \$400 million, it would be totally infeasible for you to bring this sort of action against, say, the alcohol industry or some other industry. It just would not be practical.

So one, the statute wasn't designed to do it. And secondly, it just would not be practical. As Wayne said, the supreme court has made it very clear that it is probably not going to uphold it anyway.

PROFESSOR SHEPHERD: We have one more question that has been asked from the audience that we will go ahead and take the time to answer before we break.

This is a question for the Attorney General. It reads, "This lawsuit was supposed to have been brought to offset the cost of Medicaid for the State of Florida. Are we going to see a tax break or cuts since a large portion of this burden is now going to be shouldered by the settlement?"

ATTORNEY GENERAL BUTTERWORTH: The legislature is the one who will appropriate the money. I would assume, as the Governor stated, and I believe it is the intent of Congress, that this money be used to deal with health. And probably, since the industry has focused its attention on getting children addicted, it is the best thing to use it for children's health issues.

So we believe what this will be doing will be to save the state money in the long run, from not having to pay other money out for certain type of medical issues. But it is up to the legislature how they want to do it. We know that \$200 million will be spent on prevention programs, probably scholarship programs.

The rest of the money can literally be spent by the legislature any way they want. That is up to the legislature. But I just hope they would go along with the settlement, and also I think Congress, and use this for health.

MR. FONVIELLE: Let me point out, too, that this is a long-range program; that the money you are seeing come in, as opposed to perhaps looking at it as offsetting taxes or some other expense today, this is going to offset our entire future. If we can eliminate the smoking or if we can decrease it by ninety percent, then we are going to have so much less cost that we probably wouldn't have to increase taxes in the future or we definitely wouldn't as much as we would have.

And at the same time, remember tobacco has spent decades creating this monster out there that is self-perpetuating and running the cost up to the state. As the Governor pointed out to us early on in the case before we even signed on, and as he told you today, he didn't say it in this many words, but what should be obvious is if the tobacco disease issue went unchecked, it was going to break us sooner or later.

So don't look for—I don't know, because I'm not involved in the legislature. The lawyers haven't been involved in the politics, which would be whether or not you reduce taxes. But I wouldn't expect it to reduce it right now, because I would want every dime spent to save our future; that is, to eliminate the smoking problem in the long run.

PROFESSOR SHEPHERD: Thank you.

### III. PANEL DISCUSSION II: THE DYNAMICS OF VICTORY: THE ROLE OF THE REMEDIAL STATE LEGISLATION, RICO CLAIMS, AND SMOKING GUNS

PROFESSOR STEMPEL: Now we can begin our second panel discussion of the morning. Let me formally introduce two new members of the panel who informally joined the prior panel.

To my far right is J. Anderson Berly. Andy Berly is a partner in the law firm of Ness, Motley, Loadholt, Richardson & Poole, of Charleston, South Carolina. His Bachelor's degree is from Clemson, and his J.D. from Wake Forest. He is an experienced trial attorney who began his career with the U. S. Department of Justice Torts branch before entering private practice. We are thrilled that he could be with us today.

On my far left is Professor G. Robert Blakey of Notre Dame. Professor Blakey has a long association with Notre Dame having obtained his Bachelor's from Notre Dame, as well as his J.D. He also worked in the Department of Justice, not surprisingly I think you will find, in the racketeering section at the beginning of his career. From 1969 to 1972, he was chief counsel of the Senate Judiciary Subcommittee on Criminal Law and Procedure where he was involved very much in the gestation of the Racketeering Influenced and Corrupt Organizations Act, better known as RICO. Professor Blakey is widely reputed to be the primary drafter of the federal RICO statute, as well as the primary drafter of Florida's version of RICO, as well as approximately twenty-six other state versions of RICO. After his time in Washington making dramatic new law, although behind the scenes, he was a professor of law at Cornell University and then returned to Notre Dame in 1981, where he holds the William and Dorothy O'Neill chair.

With that I'm going to turn the program over to Professor Jean Sternlight. She is a graduate of Harvard Law School. Her bachelor's degree is from Swarthmore College. She's been a member of our FSU College of Law faculty since 1992. Professor Sternlight is an authority on civil procedure and alternative dispute resolution, and writes frequently in these areas. With that I will turn the program over to Jean.

PROFESSOR STERNLIGHT: Thank you. This specific panel is entitled "The Dynamics of Victory: The Role of the Remedial State Legislation, RICO Claims, and Smoking Guns." What we are going to do in this panel is really talk about the strategic aspects of this litigation, basically from the lawyer's perspective, how did the case work, what did work, what didn't work. We will also spend some time on the particular issues of the statute, the RICO claims, and as well the smoking gun documents of the case.

I thought what we would do first is just have the various panelists up here identify themselves quickly, not just their names, but also their own particular role in the litigation. Maybe if we can start with you, Mr. Berly.

MR. BERLY: I'm Andy Berly. I am with the Ness, Motley firm in Charleston, South Carolina. We have a number of clients like Florida that have sued the tobacco industry. As such, we sort of serve as national counsel on medical, scientific, and liability issues. We are the ones who have a pretty good cache of internal industry documents obtained in large part here in Florida, but also in other litigation that we are involved in.

And one of my principal roles was to make sure that we pursue the proper documents that we were aware of that needed to be had, and to run them through a procedure that Mr. Gentry in large part set up in Florida called the "deemed produced" procedure so we could get access to these documents to be used in the Florida case.

MR. FONVIELLE: I'm David Fonvielle of Fonvielle, Hinkle & Lewis here in Tallahassee. My primary responsibility in the case was defending the discovery efforts of tobacco in Tallahassee. Basically that was the extent of my involvement in the case.

MR. HOGAN: I'm Wayne Hogan with Brown, Terrell, Hogan, Ellis, McClamma & Yegelwel in Jacksonville. Most of my work is plaintiffs' personal injury work. Over the years a substantial part of that has been asbestos disease. Some of that work has been in association with Andy Berly's firm, Ness, Motley.

It happened that one day I attended a meeting of the trial team, at which I said, "Well, what's going on with this declaratory judgment action where they are attempting to attack the constitutionality of the statute?" And somebody said to me, "Well, I don't know, why don't you find out?"

So early on I managed to get myself "Tom Sawyered" into the business of helping to defend the constitutionality of the statute. I had the privilege of arguing to support the constitutionality in the trial court here in Tallahassee, along with Assistant Attorney General Jim Peters, a person whose name hasn't been mentioned until now, today, but whose name should be mentioned often and glowingly for the tremendous work he did during the course of this case in a wide sphere of involvement, along with Professor Laurence Tribe from Harvard, who also defended the constitutionality of the statute.

I had the additional duties over time in the case of tending to the elimination or contesting of the affirmative defenses, a variety of sets of affirmative defenses that were presented by the cigarette industry defendants in this case.

And then I was smart enough to Tom Sawyer W.C. Gentry into additional work on the defense of the constitutionality of the statute.

Once he got knee deep into it, he decided to jump in up to his neck and over. And, W.C., maybe you can supplement your role in the case?

MR. GENTRY: I'm W.C. Gentry, Gentry, Phillips & Hodak in Jacksonville. I'm just a North Florida lawyer. I nominated Wayne Hogan to find out what was happening in the Tallahassee court on the declaratory judgment decree. Then he nominated me to help write the briefs for the Florida Supreme Court. Wayne and I and Susan Nial from Andy Berly's firm, who is a brilliant woman and a huge asset to us, wrote the briefs to the Florida Supreme Court, which ultimately turned out to be successful.

Then, as a result of our having rather intimate knowledge of the statute at that stage, we took on responsibility, Wayne and I principally throughout the case, to handle all of the legal issues, and had a great opportunity to work with Andy, whom I had never met before, and really one of the most extraordinary lawyers I've ever known. Andy would fly down to West Palm Beach throughout all the discovery disputes. I guess you must have made about seven trips down to Judge Rutter. I would hold his bag and listen to his arguments, and every now and then say, "Florida law does provide for that, Your Honor," and helped Andy with discovery.

So we were kind of coordinating all the activities in West Palm, while David Fonvielle, who kind of diminished his role, but worked here in Tallahassee where there were millions of documents produced. There were literally troops of defense lawyers stomping around Tallahassee for over a year. There were hundreds of depositions taken; and there was the constant problem of trying to work the bureaucracy here in Tallahassee and keep it in line. David completely oversaw all of that, as well as also assisting, with working out our Medicaid damages. So our role was more in West Palm Beach on the affirmative front, while David's was more on the defensive front.

PROFESSOR EHRHARDT: I'm Chuck Ehrhardt, a teacher at the FSU Law School. I had a minor role, and that was to consult on some evidence issues. Perhaps my major role in all this was I was privileged to teach David and Wayne torts when they started here, and was also privileged to serve as a faculty member with Bob Blakey when he was here at the law school as a member of our faculty a few years ago.

PROFESSOR BLAKEY: I'm Bob Blakey. I got involved in this case when they called me one day and said, "Can you do this with RICO?" And my answer was, "No, you probably can't."

He says, "No, no, you don't understand. We are doing it. The question is can we do it."

I said, "Well, if you put it that way, yeah, you can do it. You could do it this way and do it that way."

And then they said, "Well, now that you've gotten us into this, can you come down and defend your handiwork?" So, I came down and worked with Wayne and W.C.

It actually sounded like we knew what we were doing. I was constantly amazed. Every day we would go in court and there would be all this material there, and I would stand up and hear them arguing and they would convince me. Fortunately, we convinced Judge Cohen that this case really was more a Medicaid Third-Party Liability case, which is what it started out to be. As the evidence developed it turned out to be that they weren't just selling a defective product. They were selling a defective product knowing it was defective and lying when they were doing it.

So a case that started out to be just "reimburse us for the injury," turned out to be basically a racketeering case. By that I mean a fraud case, a fundamental fraud case, and the judge saw it. It was fascinating to watch the evidence change, and the direction of the case change as the evidence changed. And the law, it looked a different way as it went down. I'm inclined to think that the outcome of the case was as much a RICO result, which incidentally I don't think it started out that way, but it changed that way.

The final posture of it—you would have to talk to the people who actually did the settlement—but my impression was that a major reason for the settlement was the fact that this was a racketeering case now based on the evidence, rather than simply a medical cost reimbursement case based on the injury. I credit that, not so much to myself for drafting it, but for people like Andy getting the documents out, just to demonstrate it. I had no idea how bad it was, and no idea how intimately involved in the fraud the lawyers were.

As I began seeing it, I was just awestruck myself that an industry would turn and be one thing one day and become another thing another, and that a major role would be played in that by lawyers. I must say that having worked with organized crime all my life, I've never seen anything comparable to that. A lot of people talk about organized crime and the racketeering angle: that was designed for the Mafia. And I said, "Yeah, that's true. But when you look at how these people acted, they acted like they were members of the Mafia." If you figure 450,000 people killed every year, intentionally killed every year, the mob doesn't do that. These people acted like the mob. I'm glad that a statute drafted for the mob held them up to that legal standard.

PROFESSOR STERNLIGHT: Thank you. In the previous panel we spent some time talking about the Medicaid Third-Party Liability Act.<sup>4</sup> I think it was you, Mr. Hogan, who went through a list of the

---

4. See FLA. STAT. § 407.910 (1997).

six features of the statute. I have them written down. You can correct me if I missed any, but you talked about how the statute: (1) abolished affirmative defenses that the tobacco companies might conceivably otherwise have had; (2) allowed for proof of damages through statistics; (3) eliminated certain statute of repose defenses; (4) allowed for proof of market share and joint and several liability; (5) allowed all the companies to be sued together in one lawsuit; (6) allowed that a lawsuit could be brought without identifying the individual recipients of the individual medical treatments.

What I wanted to do now, and perhaps you can start us off, Wayne, is to have you explain from a litigation standpoint which of those provisions were really significant and why, and perhaps were there some as you alluded to earlier that were not actually all that significant.

MR. HOGAN: To talk about the ones that were not essential, and get them out of the way to begin with, the statute of repose had been repealed in 1986. And so it was unclear to us how it occurred that the 1994 statute would have a provision that said that a statute that had been repealed in 1986 was going to be abrogated in 1994. It created some problems for us in the case, because when you go about the business of abrogating something that already is off the books, then somebody gets the idea on the defense side that, well, now we've got an argument here. All we have to do is attack the new abrogation. So, part of the sets of motions that we dealt with near the end of the case had to do with whether the claims were barred by the long-repealed statute of repose. Judge Cohen ruled that the claims for product liability were not barred because of the latent disease exception that exists with regard to statute of repose, but he did apply it to the issue of fraud.

Just let me make a little segue here if I can. During the course of the case, W.C., when we were in the midst of drafting an amendment to the complaint, determined that we should also assert Florida statutory causes of action: unfair and deceptive trade practices, targeting of minors, sales to minors, and false and misleading fraudulent advertising. W.C. can cover this in more detail. The short version of it is, though, that the one that survived as a free-standing count of the complaint was our count four; it provided for recovery for false advertising, and it's a broad definition of the Florida statute.

But the judge applied the statute of repose to cut that off as of 1982, so far as the basis for liability, although we were committed to putting in earlier acts of the companies to show the state of mind of the companies, their intentionality. So the statute of repose was placed at issue when perhaps it would not have been an issue at all.

Another one was the aspect of the statute that provided for all the claims to be brought in one proceeding. That was much contested

over time and over the course of the litigation in the Florida Supreme Court. But in reality, in the end, the supreme court said, "Well, that's what you do under Rule 1.110-G of the Florida Rules of Civil Procedure anyway. A single plaintiff with multiple claims is permitted to join them together." So that was also not something that was needed in the legislation, but was placed there.

There was another provision that the rules of evidence and other, substantive rules were to be liberally construed. The supreme court said, "Well, thank you very much, legislature, for telling us that. We are going to follow the ordinary rules that we have here in Florida for that. We understand that that's predicated language that says what you would like for us to do. We will follow the rules in the way they should be followed."

The court said the very same thing on the issue of the use of statistics to prove up causation and damages. In the end, the court said that we see that in the statute, but it doesn't mean anything other than you are going to follow the appropriate rules of evidence with regard to the use of statistics, both the causation and damages.

So those several areas of the statute were the source of a lot of discussion and debate and lawyering, but in the end were not the keys. The first key provision was the continuation of the concept of eliminating the affirmative defenses, which were abrogated. That was an important factor, whether it was 1990 or whether it was 1994, because that said what was between the smoker and the cigarette industry does not come to haunt or visit the state in its Medicaid reimbursement lawsuit. That's between them, that's an arrangement that they got into some way, somehow, but is not something that should reduce the State's recovery.

The supreme court in the opinion upholding the constitutionality of the statute said that this is a new cause of action for the state, and under those circumstances, new causes of action may or may not depending upon the will of the legislature, carry with them what are traditionally thought to be defenses that might be available to any given defendant. In this instance, the supreme court, dealing with a significant tremendously burdensome public health problem, was entitled to abrogate those affirmative defenses or not allow them to apply. Then the other key provision is the concept of market share. Florida law provides for market share in an appropriate setting through the *Conley v. Boyle Drug Co.*<sup>5</sup> decision that Justice Ehrlich wrote some years ago. But in this instance the Legislature specifically said you can use that concept and you can use it with joint and several liability. Eventually the supreme court said, "Yes, you can use market share, but you cannot use it to provide for several liabil-

---

5. 570 So. 2d 275 (Fla. 1990).



ity as well where there would be joint and several liability for the defendant."

PROFESSOR STERNLIGHT: Market share: that's just the concept that a company can be held liable simply based on how many cigarettes they sold, that they would be held liable for that much damage?

MR. HOGAN: What their proportion of the market would be. And those are the six basic concepts. It might be well for W.C., if you would, to address the way that the market share issue was resolved and applied in the case.

MR. GENTRY: Well, that's kind of interrelated with a couple of things. One thing that Wayne didn't mention, that was a real thorn in our side, was the one provision that provided that discovery or identification of individual Medicaid recipients would not be permitted—a totally gratuitous provision which became a tremendous weapon. The court found that by not allowing any identification of Medicaid recipients, the statute was unconstitutional because it arguably denied due process to the tobacco companies. We only devoted maybe a half page in our brief to it. We thought it was a discovery issue. It was superfluous.

PROFESSOR STERNLIGHT: What is that issue, just whether or not you would have to disclose the names of the individuals who had placed Medicaid claims against the state?

MR. GENTRY: Exactly. The problem is that there are already lots of statutes on the books that prohibit public disclosure of Medicaid recipient information, so a lot of information was going to have to be kept privileged. But the idea that the defendants would not be able to get any information about Medicaid recipients when we are suing them for arguably billions of dollars of Medicaid dollars on its face was unconstitutional—or arguably was unconstitutional. And it was just not necessary. They took the court's finding that this determination that it couldn't be discovered as being unconstitutional as an affirmative statement by the court that they had the right to discover it.

So much of our effort was spent fighting with the tobacco companies, who were trying to use that to argue that they were entitled to go house by house and depose every Medicaid recipient, which means we would get to trial sometime in the year 3000. Ultimately, the judge had to fashion some way to deal with this language in his decision. He allowed them representative discovery. We got into a lot of tactics there. We were presenting our case by statistical analysis. We kept taking the position that their remedy was to get a statistically valid sampling. They didn't want to get a valid sampling because they knew if they got it, it would prove our case. And they were really using this as a way to get us off track. So one thing David Fon-

vielle did repeatedly in discovery here in Tallahassee was to keep throwing back at them, "We've given you all this stuff, we've given you all this stuff, when are you ever going to get around to discovering what you should be discovering?" So that by the time, they came around saying, "Okay, now that we wasted nine months chasing all these rabbits, now we want to get a valid statistical analysis." The judge said, "Tough luck, guys. You blew your opportunity."

But that was a big problem for us, and candidly again, although the 1994 amendments were primarily helpful, I mean if you really had to focus on it, the one most helpful thing was the abrogation of affirmative defenses.

And whereas the 1990 act arguably, I think pretty strongly we could have argued, abrogated defenses they would have had against the Medicaid recipient, the '94 amendment was so broad that it clearly abrogated all defenses. So we were able to argue that it abrogated the defenses against the state. They were attempting to put in issues regarding whether there should have been more regulation of the industry, whether or not the state was, itself, at fault for not doing more about the smoking by children, and those sort of issues.

PROFESSOR STERNLIGHT: These arguments were in the form of counterclaims?

MR. GENTRY: More in the nature of comparative fault through assumption of risk. We were able to successfully convince Judge Cohen that the 1994 Act had, in fact, abrogated those. They were not going to be defenses to Professor Blakey's RICO count. We were able to press all those defenses over into equity, and they were preserved in equity on the argument that they could be used to show the State had unclean hands. We may hear more about that if we go back to trial.

On market share, I was really pleased with the way we handled market share. In fact, in the supreme court, we basically acknowledged that we couldn't have market share and joint and several liability. That's about really the only thing we lost, and we acknowledged that. What we did on market share, at the close of the case as we went forward with a number of affirmative motions, we filed a motion to preclude any evidence that the State had manufactured cigarettes, which it did. We learned much to our shock that the State had manufactured cigarettes back about fifteen, twenty years ago.

Part of our logic in discovery, poor David, we elected not to copy the documents tobacco was copying because they were copying millions of them, and just the copying of them in an effort to keep track of them would have totally bogged us down. Plus, they were getting stuff through public records and through the libraries, and we had no idea what they were getting. So we made the tactical decision not to

copy documents they were copying from our files. In part we said, "After all, how bad can it be?"

Well, we learned how bad it can be, because every time we would have a hearing they would have a press conference pulling out documents from our files, and some of the documents showed that we made cigarettes. So we filed a motion towards the end to preclude any evidence of our making of cigarettes as not being relevant to the issues, and arguably would only be relevant to the equity count. They, of course, came in and argued strenuously that of course it was important to market share. It should not have been important to market share because they should have only been liable for their share of market, and so it shouldn't matter that there's some other share that goes unaccounted for.

So we then, once they made their argument, said, "Fine, we will stipulate on behalf of the State of Florida, that we will be liable for our share of the market for the greatest number of cigarettes we ever manufactured, without the necessity of proving that what we manufactured back in 1980 has anything to do with 1997. We will stipulate to that, that the geographic market of the State of Florida, the population is the general population. You get the benefit of all the cigarettes we ever manufactured. Your Honor, that should be something to be taken care of post-trial, and you will set off the verdict and give each one of them a pro rata benefit of our market share.

PROFESSOR STERNLIGHT: And that was all to try to keep those documents away from the jury?

MR. GENTRY: Yes, and it worked. The judge said, "Well, that makes—that seems eminently fair and reasonable to me. The State stipulated to this—the maximum market share even though you don't have to prove causation, and it's certainly something we can do post-trial. We will deduct pro rata the State's market share." Of course, the State's market share was probably 0.2 percent, but it took all of that evidence out.

So that was one of the kind of fun things that we did tactically as we went through the case. We learned that if we asked for something, they would always oppose it. So we candidly on more than one occasion would ask for something we really didn't want so they would oppose it and then we could get what we wanted to get. But market share was one of those that worked out that way.

PROFESSOR STERNLIGHT: I wonder if one of you could talk a little bit about the drafting of the complaint. When I read the complaint that I had, which is one of the amended complaints, I thought, "Well, that's a very impressive document and it's got all these great RICO claims and everything else." I gather from talking to some of you there is a little bit of history to the complaint itself.

MR. GENTRY: Well, Mr. Berly's firm, I think, actually drafted the original claim. Just basically the original complaint was drafted with multiple counts, and was similar I think to the Mississippi complaints. But, Andy, you guys were the ones who put that together.

MR. BERLY: Right, it basically started out in our office and went through several drafts and amendments and revisions. I'm not sure how the last one came to be. It did start out originally in our office based on literally piles of documents that we had that had been sorted through so you could see what the industry knew, when they knew it, what they did or what they didn't do about it. It was based largely on Mississippi, which we thought at the time was probably a good idea. It later turned out to be not the best of ideas because of different statutes and different things here. But Wayne Hogan fixed most of what we messed up in our office. It went through several drafts.

PROFESSOR STERNLIGHT: What were some of the real strategic things you had to figure out in filing a complaint, such as which county you decided to file in, and who you decided to name as the defendants? Were those some of the issues, or were there other issues that were more important?

MR. HOGAN: Well, the members of the industry, the key members of the industry, were named. And so there is no mystery to that, including any that were manufacturing cigarettes in Florida. And it turned out that was also the case. And so, no magic to that. That is the industry.

The complaint, itself, began as an eighteen-count complaint. It had a variety of common law counts in addition to the two statutory causes of action. Fraud, unjust enrichment, restitution, an injunctive count, which was the count eighteen, the last count in the complaint.

In the end, when the judge first considered the question of the motions to dismiss, he focused on the fact that the supreme court had upheld this new statutory cause of action, as the court termed it, which allowed it, and the supreme court said, negligence and strict liability, causation and damages.

And it was in that instance when Judge Cohen, in a decision that was going to be really the guide for how the rest of the case was going to go, read this very strictly, read it very literally, and said, "This is what the supreme court says you can do, and that is, what you are going to do, and that is you are going to have a negligence count, you will have a strict liability count, under this statute."

And he then dismissed the other common law counts, except for the independent free-standing count for injunctive relief, which would go to his equity jurisdiction.

And so we went from an eighteen-count complaint to a three-count complaint. Of course, there was the usual industry crowing and press

conference, all because they said this gutted the case, to which the Governor said, the court's ruling protects the heart of our case and we are going forward. We knew that at some point under Florida procedure you can't seek punitive damages in the complaint initially except under a statutory count, for example, as we did eventually in count four. But we knew that eventually we were going to move the court for permission to add punitive damages to the case, and so that was holding to the side. We knew that, but Judge Cohen didn't know that.

So at some point for case management purposes, Judge Cohen asked whether there were going to be any further amendments to this complaint now that you are down to three, and we went through all the processes of evaluating where we were. If we could look back at our fraud count, and look back at everything else that we had said previously, can we take that together and knowing what we know, what name would you apply to that? Well, you would apply fraud statutorily, and you would apply racketeering to it. So out of that case management aspect of the case the complaint then re-expanded to an eight-count complaint that included four counts for racketeering and one count for fraud, false advertising, child targeting, and the unfair and deceptive trade practices.

MR. GENTRY: Professor, Wayne gives much too sterile an explanation on this.

PROFESSOR STERNLIGHT: Juice it up for us.

MR. GENTRY: We were absolutely apoplectic when the judge struck all our counts. We had fraud in there, and we knew we had a great case for punitives. Candidly, I think he was wrong. I mean the statute says that we may bring any cause of action but he took a very literalist view of the statute, which later served us in some cases, but it was literal. It was an untested statute, and he basically said I will read it literally. I am going to apply it that way to everybody. It was fair, it was uniform, but it was literal. In fact, we talked about whether we could take an appeal. My God, what are we going to do? All we've got is negligence and strict liability. We don't have fraud anymore. We don't have any of this stuff.

Then he basically said, "Would you like to amend?" and we said "Yes, we would like to amend; how can we amend?" Someone came up with the idea of RICO, I think it really was the attorney general's office, which has more experience with RICO than obviously we do as civil lawyers.

They called Professor Blakey. He says, "No, I don't think so." We said, "Yes, there must be." And out of, you know, out of necessity came really a resentment. As Bob has said, I think that RICO then became a very, very important engine to the case. It allowed us again to get into the corruption and into potential exemplary damages.

The judge did permit us to do this. His view was you had to have statutory causes of action, so he permitted the Medicaid cause of action which allowed negligence and defect. He permitted Florida statute 817.41, which is the misleading advertising statute, which is very broad, the Deceptive Practices Act. Then he permitted RICO. So we were back in the game again, and we had the same evidence and we had pretty much the same remedies. It's just that they just had a new name. But I can tell you there was a lot of consternation that went on before we got there.

Then Professor Blakey can tell you all the difficulties we had with RICO, which he largely surmounted. Before he does that, I just want to say it is really wonderful to have him sitting there when the defendants bring some hotshot down from Washington to talk about how RICO does not permit this sort of cause of action, and have Professor Blakey explain that, "Well, maybe the federal RICO doesn't, but the reason why I wrote the Florida statute the way I did was to take care of this problem."

PROFESSOR STERNLIGHT: By the way, Professor Blakey also wrote the federal statute and about ten million books and articles about RICO.

MR. GENTRY: He admitted that he made a couple of mistakes in the federal statute. It was the only time I heard him admit he made a mistake. He actually didn't make a mistake, they misconstrued it. Am I stating it more accurately?

PROFESSOR BLAKEY: No. Now that I'm working in Texas to cover RICO I would like to indicate there were no mistakes in the federal statute.

PROFESSOR STERNLIGHT: Tell us a little bit, Professor Blakey, about just what it was that RICO added.

PROFESSOR BLAKEY: Let me kind of talk about the statute as a whole and where it came from and how it is applicable in the situation. The RICO statute was enacted by Congress in 1970. I was working for Senator John McClellan at the time, and the Mafia really was the core that the statute was aimed at. But it was the occasion for its enactment; it didn't define the scope.

The operative language in the statute is "any person." When people say, "Well, does that mean Mafia only?" I always ask, "What part of 'any' don't you understand?"

What happened after that is that a number of states picked it up. In 1977 I worked with Senator Edgar Dunn down here and the state passed the statute. It was a little more sophisticated in Florida because there were some things identified between 1970 and 1977 that needed to be cleaned up, and did clean them up here in Florida. But you probably need to think about this if you want to understand the application of the statute. Take on the one hand the Mafia here, and

the Mafia is distributing heroin in the ghetto. The way that heroin is used is with a syringe. So you say, how can that statute be designed to apply to that, how can it apply to the tobacco industry?

It is not that difficult. All you have to do is say instead of a trade association for people called the Mafia, which is all the Mafia is, a trade association for gangsters, here suddenly we have a trade association for cigarette manufacturers, and instead of having a syringe that gives you heroin in your veins, suddenly we have a cigarette. You shouldn't think of it as a piece of paper wrapping up tobacco. What you should think of is the delivery system for nicotine, which is all it is.

It doesn't really go for taste to your tongue. What it does is it puts nicotine to your brain, puts it right in your blood and takes it right to your brain. Actually puts it into your lung and takes it to your brain. So if you suddenly think of it that way, here is a trade association for gangsters or in this case a trade association for tobacco people, a syringe and a cigarette. Then you look at the end product here, it's 450,000 people dying every year. This product is lethal and addictive.

What started out as an action for really a defective product, as soon as you find out that the defective product is defective or addictive and lethal, and that it's being distributed and marketed in the community by targeting it at children . . . let me stop and drop a footnote. While we call drug pushers "drug pushers," in fact, drug pushers don't push drugs on anybody. People go find them.

The notion that some guy is working near the school selling drugs to kids is simply not true, but it happens to be true when you deal with the tobacco industry. They, in fact, are targeting and pushing drugs on kids. One of the reasons they do that is that adults don't smoke, in other words, take up smoking. You have about a million people a year who are newly addicted and the vast majority of them are children and they then stay addicted.

One of the medical facts is that it is easier to break the addiction for heroin than it is for nicotine. Once you begin thinking of it in those terms, all of a sudden the application of a racketeering statute to the tobacco industry becomes . . . yes, because one of the things we learned in 1970 was that organized crime had found a way to develop fronts in the legitimate industry and continue their activity hidden behind fronts. And suddenly, my God, the tobacco industry is really a front for drug dealers. It is just not the same drug you've always thought about, cocaine or heroin. Now it is nicotine. If you think of it in those terms and you apply the statute to it, what does RICO do for you? Well, it does a lot of really neat things.

The first thing it does on liability is that RICO is a criminal statute, and you can apply it either on the criminal or the civil side, like antitrust or like securities or like food and drug. But because it is a

criminal statute, it doesn't have civil defenses. One of the ways in which the tobacco industry had beaten cases all the way down the line is what I like to call "the mini-skirt defense." This is what is put in in a rape case, "Because she is wearing a mini skirt she deserves it." What they wanted to do was try not their own conduct, they wanted to try the conduct of the victim, the smoker.

Well, none of those kinds of defenses—assumption of the risk, comparative negligence, consent—are defenses in a criminal case. So if RICO is the standard of liability, albeit in a civil context, none of the standard defenses are there. That gives you a neat standard for liability.

The underlying predicate offense or the underlying crime that you have to show in RICO in this case is called federally "a scheme to defraud." Now, a scheme to defraud is not what everybody learned it was at common law. Remember the definition from Prosser, a misrepresentation and justifiable reliance? That is what you think of when you think of fraud.

That's not what it is in RICO. What it is in RICO and federal mail fraud jurisprudence, which the Legislature here adopted for Florida, for these purposes is called the "Gregory" standard. It is conduct inconsistent with morality, fairness, in the general business life of the community. It is not limited to misrepresentation. It includes cheating and overreaching. When you turn and look at what the tobacco industry had done, selling cigarettes to children which is illegal and has been illegal in fifty states since time immemorial, and lying about it, that is exactly what the behavior is. So that gives you a good standard of liability. It then gives you different sets of remedies. Under the state statute you can sue either for equitable remedies or legal remedies.

Let me talk about legal for a minute. One of the problems you have in traditional common law remedies is you have to show a wrong, proximate cause, and then injury, and then typically from the injury you get actual damages. Well, RICO gives you treble damages plus counsel fees. So that is great on that end. When you have to worry about a proximate cause relationship between liability and injury, the way in which this is conceptualized in common law, you had to have a justifiable reliance, in a fraud.

Well, if you don't have to have misrepresentation, you don't have to have justifiable reliance. All you need is a proximate cause relationship between the activity and the injury, not necessarily reliance.

So what they were prepared to argue is that there was no proximate cause, which was that the smokers were not justified in believing what we told them. That takes hubris to make that argument, but that's exactly what they were saying. Our argument was, wait a second. There are two ways in which you can have causation. One



through the misrepresentation, but second simply through the production of the product. So by having mail fraud rather than common law fraud we got out of justifiable reliance.

They came along and said, well, you have to have common law proximate causation. That also means direct and indirect injury. The direct person can recover, but the indirect couldn't. For example, if you take over a business, the business can complain, but the employees can't. If you injure a county, the county can complain, but the taxpayers can't. So in this situation they said, "Well, the directly injured parties are the smokers; the state can't complain."

Well, one of the neat things that RICO does for you is it says, it asks on the question of proximate cause, what's the target of the scheme? If the target of the scheme is only aimed at the smokers, it was a good argument. But Andy Berly kept coming up with documents after documents that showed that the original target of the industry was not just the smokers, it was the people who paid for it, meaning us. If you stop and think about how they were doing it, it makes good sense. They want to sell it to kids. They have to sell it at a low cost to sell it to kids. What they were doing is building in as part of the product the overall cost of the product. If I made widgets and my widgets hurt a certain number of people, I would have to build into the cost of the product the cost of the sale of the widgets, and then I would spread it through the whole community.

What they were able to do is lower the cost of the cigarettes in the first instance to catch people and kids to buy them. If I'm getting my economics right, their demand for cigarettes is elastic. As price goes up, they will buy less. Once they are addicted, their demand for cigarettes is inelastic. So they have to keep the cost of the cigarettes down in the first instance. That means they have to shift the cost of the product out of the product.

And they did exactly that. They said, "We will have the state, the taxpayers, pay the cost of the medical cost or damages associated with this product." That is in their documents. Because that's in their documents, their scheme targeted not just the smokers, but us, too. RICO has a flexible understanding of targeting in mail fraud that I think is probably broader than a common law standard. So this gives us higher damages, treble damages, higher counsel fees. It gives us a flexible proximate cause with no direct or indirect injury in it. And it gives us the business of not worrying about justifiable reliance.

But RICO does more than that. And one of the neatest things that it does is when the state brings a suit, it doesn't merely have to think about money out of its own pocket. One of the remedies available under federal RICO, and therefore under state RICO, is disgorgement.

Disgorgement is not measured by money out of my pocket, it is measured by money into your pocket.

And once we came down and started arguing it, W.C. said, "Well, if that is in there, why don't you say something about that in the course of the argument?" So I started mentioning disgorgement every time I got up in court. Judge Cohen was very, very perceptive. As soon as I said it, you could see his eyes light up. He understood exactly what I said. The tobacco folks didn't for a while.

And then one day they showed up, they understood it, and they made a motion to strike our request for disgorgement, because they suddenly realized that the measure of our damages were not limited, *not limited*, by proximate cause or direct or indirect, that was not our injury, it was *their profits*. They suddenly realized that we could turn them through this suit into a non-profit industry. And then the question would be, how big would that pie be. One night I made a mistake. And they are all going to start laughing.

PROFESSOR STERNLIGHT: Second mistake, oh, no.

PROFESSOR BLAKEY: No, I made a mistake. We were all sitting around one night, and the issue came up, how big could our recovery be? How big? And I said, well, the damages are over here, and there is a range of what you can get in disgorgement. At a minimum it would have been their net profits from sales to children in Florida. That's the minimum. The maximum would be their gross profits from sales worldwide.

Well, one guy just jumped up, he jumped down. I don't think he ever stopped bouncing. All he would remember is the one thing that I said. Worldwide gross profits. He would never focus on net profits for children in Florida. They suddenly realized how powerful this was, it had no problems with proximate cause. Incidentally, you could get both. You could get the damages out of our pockets and all the profits in their pockets. One would be tried by clear and convincing evidence to the jury, that is the damages.

But the equity relief is going to be preponderance of the evidence to the judge. I think the judge had the good judgment to overrule the issue on disgorgement and it remained in the statute, and it was shortly thereafter that we settled. So I think what RICO did for us is it had the effect of dramatically changing the scope of the damage remedy. It had the effect of dramatically changing the nature of the nexus between the wrong and that injury. It had the effect of dramatically increasing the possibility of disgorgement, and having a sound statutory basis for it.

We had a common law disgorgement count in, but common law disgorgement sometimes is tied to a showing of loss on your part. Statutory disgorgement under RICO is not limited at all by any loss

on your part. It changed the scope of the definition of liability, and incidentally let in just enormous amounts of evidence.

I haven't told you the best thing it did for you. It changed the statute of limitations. RICO went through here in the State of Florida in 1977. This little thing they were playing around over here was 1990 or 1994. Suddenly the damage remedy went from 1994 back to 1977. They jumped up and said, "Oh, no, no, you can't do that," and they cited the federal statute, which has a four-year statute of limitations, in which the Supreme Court had just decided that it was a moving statute of limitations. The only problem with that is in 1970 there was no statute of limitations put in the federal act. That was a mistake. In 1977, we put, Senator Dunn put a statute of limitations in the state statute. We made it a continuing one, expressly a continuing one, which meant that if any period of activity was within the statute, *all* activity was within the statute.

And it is the same statute for the criminal side as it is for the civil side. The state courts had clarified if any part of criminal activity is in, all criminal activity is in. So here we had a clean statute of limitations, authoritatively interpreted by the courts. We had a possibility of disgorgement. All of their profits from where we were back to 1970. We had our damages back.

The largest problem we had on damages is, I went to Wayne and W.C. and other people that were working on it, that we can't prove damages back that far. We don't have the evidence back to 1977. So we were in a position of having a greater period of ability to recover the damages than we had evidence for. In other words, we had too much damages. We couldn't prove it all.

Now, the disgorgement we could have proved. All we had to do was go get their annual reports. They had already told the SEC what their profits were. Our theory was, "You made money?" "Yes." "You made it illegally?" "Yes." "You made X?" "Yes." "Give it to us." It wasn't going to be that complicated. So everybody thinks that whatever he works on is the one that is the biggest story. I'm sure that's not the case. But I do think that what RICO did slowly has dramatically changed the character of the entire litigation. It wasn't just third-party Medicaid reimbursement anymore. It was a racketeering case against the industry.

Had we won in Florida after a verdict here, the Third-Party Medicaid Liability Act would have had no impact on any other state. But there are twenty-seven other state RICO statutes. Most of them incorporate the federal mail fraud law. What would have been issue preclusion from Florida would have been carried over to issue preclusion into the other twenty-seven states.

Let's go ahead and say the last thing here. If we could make a federal mail fraud case in Florida, and incidentally the evidence was

there, we were going to make it. I mean, I've been trying federal criminal cases for thirty years. This was an easy mail fraud case. It would have been a lot of trouble to do it, but theoretically it was an easy mail fraud case.

That's not only issue preclusion in the other twenty-seven or twenty-six states, that's federal issue preclusion as well. The Attorney General of the United States could bring a federal case and have the same remedies that we got, which is liability for the conduct established in Florida, national conspiracy.

Since we were going to ask for the profits in the end, we would have gotten probably gross profits in Florida. She can get, Attorney General Janet Reno could get, gross profits throughout the United States and the world, because if they violated RICO in Florida and the predicate offenses are the same, then they violated federal RICO, and it's now not back to 1977, it is back to 1970. Whatever the industry can do, they can afford to pay off individual taxpayer suits or individual smoker suits. They can afford to pay off individual attorney general suits, state by state. They *can't* afford to ever lose a RICO case, because it is national.

Incidentally, if you can make this case civilly, and this evidence is this good, you can make this case criminally.

The other thing that I think that dramatically changed the character of the case, and it is only partly related to RICO, and I say this in the early part, is they changed in the 1950s from a legitimate industry to a corrupt industry. They actually had meetings in which they discussed what to do about the health problem and decided to run a scam instead of cleaning it up.

Who were the people who participated in this decision? I'm chagrined as a teacher and a member of the legal profession at what some lawyers did. The tobacco lawyers designed this fraud, executed this fraud, and kept it going the full length that it did. There may be a four-year federal statute of limitations on civil damages. There is a five-year continuing offense criminal limitation, and there is no exculpation in federal criminal RICO for lawyers.

PROFESSOR STERNLIGHT: Professor Ehrhardt, I think you had a few comments on the RICO evidentiary implications.

PROFESSOR EHRHARDT: There were some documents that the trial team thought were essential. For example, the Surgeon General's report indicating that cigarettes caused certain diseases. The question was whether or not they were admissible in Florida under the Florida evidence code.

It was my opinion that the answer probably was no. There is a hearsay exception to the federal rules of evidence that we did not adopt in Florida. And so we were sitting across the table one day, and I said that I didn't think that those documents can come in as exhib-

its, because they are inadmissible hearsay. Bob was right across the table from me, and replied, "Well, what about RICO?"

PROFESSOR BLAKEY: The key element in the scheme to defraud is intent to defraud. Anything that bears on the intent of the perpetrator comes in, and there are a whole bunch of rules that say evidence of other crimes are only admissible if it is a common scheme and plan. Well, once it becomes a scheme to defraud, and the scheme to defraud begins in the early 1950s and comes to today, anything that bore on their state of mind is admissible to show a scheme to defraud.

They were lying to the Surgeon General, and that the Surgeon General's report then came out without the benefit of truth, it is going to come right in on the scheme to defraud. It may not have come in as an independent report, but Chuck was wanting to tell me from time to time if you can get it under one rule, it is in under all rules. And I kept saying scheme to defraud, scheme to defraud. It turned out that it widened the scope of everything that would come in. What would be in a traditional case a common law murder, rape, or a robbery, where you focus on a single crime, single day, and place, you get very little in. But as soon as you make it a pattern of behavior, a scheme of behavior, it all comes in. There is a paradox in this, by undertaking to prove it, we acquired the duty to prove it. So it wasn't something that the judge had discretion on. He balanced prejudicial value against probative value. We had said we are going to prove all of this. Then we had to prove it all. The paradox of that is we could prove it all, and they had very little ability to deal with much of that.

MR. GENTRY: Professor, I know you want Andy to give you some documents.

PROFESSOR STERNLIGHT: I do.

MR. GENTRY: Let me just mention one thing that was again fascinating, because these things drove one another. Their major defense to giving us a lot of the most incriminating documents was attorney-client privilege, which was a major part of the fraud, in that they had misused the attorney-client privilege to create this scheme to defraud.

When the Liggett settlement occurred, Liggett had to turn over documents as part of the settlement. The Liggett documents were very helpful and we were able to require them to do a privilege log under the Rules of Civil Procedure. As you know, this has just recently been amended in Florida to make it clear that if they claim a privilege, they have to do a privilege log.

Through the privilege log we were able to identify documents as appearing to be involved in a crime of fraud. That's what Andy was doing. But in order for them to claim, the other defendants to claim the privilege to the Liggett documents, they had to come in and show

that they had been associated together since the 1950s and 1960s with a common enterprise which involved smoking and health issues, appearing before regulatory boards, and protecting their mutual interests.

We had fairly lengthy hearings in which we challenged their right to claim a joint privilege, wherein they put on the record all the essential ingredients to a RICO count, establishing that they were an association, an enterprise, and establishing all the predicate necessary, which we could literally and were simply going to read into the record. The findings that the court made in order to allow them to claim joint privilege walked them right into the RICO case, and then we simply had to prove the predicate acts. Then after they had claimed the joint privilege, the enterprise, through Andy's work primarily, we then went about getting the documents under the crime-fraud exception.

PROFESSOR STERNLIGHT: Stuck between a rock and a hard place.

MR. GENTRY: Well, they were between a rock and a hard place. In order to protect on one issue, they walked themselves into another issue. And I think, hopefully, we helped open the door for them.

PROFESSOR STERNLIGHT: I do want to let Mr. Berly talk us through some of the documents, but before I do that, I just wanted to get a sense from Mr. Fonvielle. You were the keeper of your side's documents, as I understand it, with an army of some hundred people or more in these rooms. Can you give us a brief sense of what that all involved?

MR. GENTRY: Where did that army come from, David? I haven't heard about that army.

MR. FONVIELLE: I don't know which army the Attorney General is talking about.

PROFESSOR STERNLIGHT: Okay.

MR. FONVIELLE: If he is talking about the army that tobacco—

PROFESSOR STERNLIGHT: You wish you had an army, right?

MR. FONVIELLE: I guess along those lines one time towards the end of the case we all were sitting down and we figured out that we were basically outnumbered twenty to one. That was the number of lawyers that we felt tobacco had against each one of us.

Your question is what now?

PROFESSOR STERNLIGHT: Well, really just to describe what that was all like, your job of keeping track of the documents and producing documents, and how that all worked.

MR. FONVIELLE: Well, tobacco as you heard from General Butterworth this morning, it is obvious that a tactic they had was to, as the General put it, break our back with discovery. Tobacco came into town and announced that they were going to discover every docu-

ment within the State of Florida's archives, from every office in town. In fact, they began to do that. Tobacco came in and moved high speed copiers into different locations around the city. They gave them permission and gave them rooms in different buildings. They actually came in with two and three high speed copiers, and began copying millions of documents.

The strategy that we took, which became obvious, was basically to sit back and let them copy, and let them go their way. Now, behind the scenes what we were really doing was that every time they would go into a different bureau or department or whatever within the state, we would be over there. We would be talking to the general counsel. We would be talking to the staff lawyers, and we would be looking for the gist of what it is that department did. In fact, we had sufficient documents to know what they were going to find, although we didn't have the surprise documents. We didn't have each one of them, and tobacco would find them. The other thing that we knew is that after tobacco did all this, they were creating a problem for themselves, which they did. They ended up with millions and millions and millions of documents.

They would come in when they started taking the depositions of the state officials and so forth, very many times they couldn't find the document they needed, although they would bring two and three paralegals with them. The paralegals would give them ten documents when the lawyer would ask for one of them, and the lawyer couldn't figure out which one it was half the time.

The other problem they had is that we knew that when we got down to trial time that the tobacco industry was going to have to identify their exhibits. That really did turn out to be a problem for tobacco because once they started identifying them, identifying the exhibits, it was quite easy for us to focus in on what they were doing. But as far as the hundreds of lawyers, I think maybe the General could have been talking about the fact that, in fact I was, we were, given access to every state lawyer here. I had meetings actually. I would have group meetings with all the general counsels of all the state agencies, give them the directions on what we were doing, and they would go back out and periodically we would have to meet again. It was a massive effort, but it worked. We kept up with tobacco and they didn't break our back.

PROFESSOR STERNLIGHT: What you accomplished is almost inconceivable to me, having had to do document production for a number of much, much, much, much smaller cases, which alone can almost break your back. So to have handled this as you did is a real achievement.

MR. FONVIELLE: Well, as it ended up when we were down ready for trial I had every document, and still have every document in our

office that we felt tobacco was going to use against us. I think those documents took up about 130 boxes, file boxes in the office, as opposed to the three, four, five million documents that they have.

PROFESSOR STERNLIGHT: Mr. Berly, we are ready for you. I understand you have some of the key documents and you are going to show us and walk us through some of the most important aspects of that.

MR. BERLY: Yeah, I've got various types, various issues. I think it might help to put into perspective just how extraordinarily profitable this industry is. It sometimes answers the question, people sometimes wonder how in the world the tobacco industry did what it did or why it did what it did. It would appear that it's really all about money.

The question really ought to be what wouldn't a company do to protect a fifty plus billion dollar-a-year income stream. This is a piece of a speech that was prepared for the chairman of B&W to be given here in Florida back in 1983, and he says it quite nicely. Again keep in mind the time frames and you can imagine how much more profitable it is today.

He says in great understatement:

Tobacco is big business. Consumers buy tobacco products at the rate of a thousand packs a second. That's 32 billion packs a year. 62 million Americans smoke. A one point share in the market represents 170 million in sales. And for the year 1981, Brown and Williamson had profits, actual operating income of about \$5 million a week.

So again, putting back in time perspective sort of helps explain why the industry reacted as rabidly as they did in many instances.

Another speech by a Brown and Williamson executive in 1980 in Texas, this fellow happens to have a way with words when you start talking about RICO and concerted action. This guy and many others, they like to talk about we are in combat, we're in the trenches, we're on the front. He says, "I want to take a few minutes this afternoon to talk to you about how we must come together as a company, as an industry, not only to sell our products, but to shape our future."

PROFESSOR STERNLIGHT: Were these all documents that you obtained through the discovery process?

MR. BERLY: Through discovery, he goes on and says, "We must analyze and combat the hostile environment that surrounds and squeezes our marketplace."

Again, the amount of money at stake here is mind boggling. "If the public smoking regulations forced each smoker in this country to reduce consumption by only one cigarette per day, the loss to our industry would be half a billion dollars per year." Again this shows why



they fight as hard as they do in every state, local municipality, wherever. In his nice language he continues:

In fact, a strong case can be made that unless the industry begins to assert itself more aggressively, it will become stylish not to smoke, and then we can expect industry sales to take their first significant reduction in a decade. That is a pessimistic but realistic scenario.

It is one that commands the industry to unite the entire tobacco family. Every man and woman who are part to preserve one of America's largest, and most significant industries.

One thing we found over and over is they like to refer to the tobacco family, which always made Professor Blakey sort of warm inside. It sort of went with the Cosa Nostra. He sort of ends up in his normal lingo, "This means that all businesses and especially the tobacco industry will have to mobilize all of its family if we are to be a significant voice in the 1980s rather than its victims." This document and this tenor and this wording is really very typical of what the industry did. They really had declared war on the public health of America, and this is a good example of their sort of combat-siege mentality.

The next document is one of my favorites. It comes from a researcher, Dr. Greig, with British American Tobacco in London.<sup>6</sup> They are having a little conference. They are trying to figure out how to market their products and what are they going to do. Keep in mind now the industry says cigarettes are not a drug and nicotine is not a drug. They sent their CEOs to Congress to swear to that effect. You can see what they say internally when nobody is looking over their shoulder and they're writing their own documents.

Dr. Greig says the cigarette as a drug administration system for public use has very, very significant advantages. He talks about how in ten seconds it goes to the brain, that the user gets a hit. Keep in mind that the FDA—that's the Food and Drug Administration—is supposed to have jurisdiction over things that affect the brain, affect the form and structure of the body.

Here is a fellow at BATCo pretty much making a four-square admission as to that is what their product is. He continues. He says that we have an emerging picture of a fast, highly pharmacologically effective and cheap drug, tobacco. All in all it is a relatively cheap and efficient delivery system, legal and easily usable. In great understatement he says, however, it has its drawbacks. He describes it as a "health shadow."

---

6. See C.C. Greig, Structured Creativity Group, Thoughts by C.C. Greig, Marketing Scenario (*infra* Appendix 1).

PROFESSOR STERNLIGHT: Now, these kind of documents that are obviously real good for you and real bad for them, did you get the sense that they made any effort to try to destroy documents or hide documents or they were forthright with the production once they lost on their various attorney-client privileges and so on defenses?

MR. BERLY: I've got a few in here that I will pull out to show you some of their efforts at document destruction and shipping them overseas so they would not be found. But no, getting documents out of them was truly like pulling teeth.

This is the way Dr. Greig ends up, just a wonderful quote from Oscar Wilde. "A cigarette is a perfect type of perfect pleasure. It is exquisite and leaves one unsatisfied. What more can one want." Then he goes on and he says: "Let us provide the exquisiteness and hope that they, our consumers, continue to remain unsatisfied. All we would want then is a larger bag to carry the money to the bank." That pretty much puts into perspective their attitude. The industry of course denies to this very day, or many of them do, that smoking causes disease.

Here is a 1978 memo about a phone call that Dr. Colby from Reynolds has had with a doctor from Imperial in London and also a Dr. Felton, who is the chief scientist for British American.<sup>7</sup> He says, "We have known for many years that Dr. Felton basically agrees with the views of the anti-tobacco scientists who allege that it has been proven beyond reasonable doubt that smoking causes lung cancer." He goes on and he says that Dr. Felton so disagrees with the industry position, that he calls the tobacco industry scientists members of the "Flat Earth Society." Here you are in 1978, the chief scientist for British American believes that beyond a reasonable doubt smoking causes disease. But they've never told the public that.

You mention destroying documents. These are, as I recall, the notes of Dr. Osdene from Philip Morris.<sup>8</sup> Very hard to read so I will read it for you. There was this organization by the way called INBIFO. The industry did a lot of its very secret biological research in Germany, where they didn't want it to be found out. The organization INBIFO in Cologne, Germany.

Dr. Osdene says, "Ship all documents to Cologne by hand. Keep in Cologne. Okay to phone and Telex. These will be destroyed. If important letters have to be sent, please send to home. I will act on them and destroy." Dr. Osdene was not alone in his desire to keep things from being found. There was a procedure set up wherein certain documents were declared as "dead wood."<sup>9</sup> You can imagine what

---

7. See Memorandum from Dr. F.G. Colby to the file (June 1, 1978) (*infra* Appendix 2).

8. See Notes from Dr. Osdene, Phillip Morris (undated) (*infra* Appendix 3).

9. See Memorandum from J.K. Wells to the file (Jan. 17, 1985) (*infra* Appendix 4).

that involves. They had the Assistant General Counsel at Brown and Williamson go through their files and attempt to purge things.

Of course, he submitted affidavits, mind you, that say this really didn't happen, and I really didn't mean this, and these words don't say what they say, but you can read the document. He's gone through and he's marked with an "X" those things that he considers dead wood. And what's he going to do with them? He is going to undertake to remove them from the files. They are going to consider shipping them back overseas to BAT when it is done.

Last paragraph, Carol Lincoln is B&W's librarian. It says:

I mentioned to Carol Lincoln that the offshore research and engineering studies sent to B&W in care of Earl and Bob during roughly the last year had not even been sent to her for logging in. Those documents are in the offices Earl and Bob and would not be reflected on the list that you've reviewed.<sup>10</sup>

So in other words, some of the really sensitive documents would get sent from B&W's sister company, BATCo, to B&W, they're not even put in the files. The ones that do get there are now being declared dead wood and they're getting shipped back to England so that they will not get discovered in litigation.

PROFESSOR STERNLIGHT: That's basically because you couldn't reach them with a subpoena over in England?

MR. BERLY: Exactly, exactly.

PROFESSOR STERNLIGHT: Why would they rather send them over there instead of burn them or shred them or whatever?

MR. BERLY: Why did Nixon keep his tapes? I don't know. Remember the frank statement? They pledged to cooperate with all public health authorities. Here is a Telex from the general counsel of Brown and Williamson to the chairman of BAT in London, Mr. McCormick, copies going to the chairman of B&W, where they agree to withhold from the Surgeon General a new report that Battelle Labs had done.<sup>11</sup>

This is way back in 1963. This report has been described as being very cutting edge, nicotine, and here they are deciding not to turn it over to the Surgeon General, notwithstanding they say they are disturbed at its implication for cardiovascular disorders, but they didn't cooperate. The industry was sort of into destroying documents, things that weren't real helpful to them, if you believe what their documents say. Then references to crime-fraud and the involvement of lawyers. Here is a memo concerning a Committee of Counsel

---

10. *Id.* at 2.

11. See Cable from the General Counsel of Brown & Williamson to Mr. McCormick, Chairman, British American Tobacco Co. (July 3, 1963) (*infra* Appendix 5).

meeting.<sup>12</sup> Committee of Counsel basically ran the industry. They were their lawyers. Rather than cooperating with the government, what you see them doing here is saying they are going to stall any disclosure by the industry. They basically want HHS to think they are cooperating with them, but they really are not.

Then it goes on, and they describe the position by Mr. Northrip of the law firm of Shook, Hardy & Bacon, which now has found itself as a defendant in a number of these lawsuits nationwide.

This is what Mr. Northrip has suggested, apparently, to the industry that they would do. It says, "The product liability litigation risk position stated by Bob Northrip is based on the opinion that it would be more difficult to defend against adverse assessments of additives by an industry panel than by an adverse assessment by HHS scientists."<sup>13</sup>

They desperately wanted the industry to have control. You see what the Northrip position is. He said that by keeping it in house with the industry it would enable the company to control and terminate the research, remove the additives and destroy the data. Hopefully it could be done prior to the adoption of the additives, but if a test were made of an additive in current use, the additive could be discontinued and eliminated from Covington and Burling, another law firm that finds itself as a defendant in some cases, before HHS has an opportunity to make comments.<sup>14</sup> So again, the additives, the ingredients that go into cigarettes, there is a plan here that if they turn out bad, they will be destroyed. And then hopefully the consuming public would never know.

Let me skip over and find a couple of documents relating to targeting youth. The industry, of course, says over and over and over we are not after the youth market. We don't try to entice people to start smoking, we simply want to get those people who are already smoking to switch brands.

MR. GENTRY: That's 1986, right?

MR. BERLY: 1976. This is a ten-year forecast. This is from a Dr. Teague at Reynolds.<sup>15</sup> They have obtained the most incredible deposition testimony from Dr. Teague where he now says that all these documents, and he wrote quite a number of them, that he wrote were just the musings of a private man sitting on company time, just sort of thinking about all the "what-ifs." That's his testimony.

---

12. See Memorandum from J.K. Wells, III, Committee of Counsel, to E. Pepples (Sept. 25, 1981) (*infra* Appendix 6).

13. *Id.* at 3.

14. See *id.*

15. See RESEARCH DEPARTMENT, R.J. REYNOLDS TOBACCO COMPANY, PLANNING ASSUMPTIONS AND FORECAST FOR THE PERIOD OF 19XX (illegible)-1986 (Mar. 15, 1976) (*infra* Appendix 7).

Anyway, look what Dr. Teague writes when nobody is looking over his shoulder. "Evidence is now available to indicate that the 14 to 18-year-old group is an increasing segment of the smoking population. RJR *must soon* establish a successful *new* brand in this market if our position in the industry is to be maintained over the long term."<sup>16</sup> Now, I don't know where you are going to find it legal to sell to fourteen and fifteen year-olds. Dr. Teague was busy trying to find them.

This is a document that came out in Florida and has been reported on by the press. Pretty funny, pretty sad, but funny. It's called Project Kestrel.<sup>17</sup> This is a British-American Tobacco document.

Objective: To develop a brand which breaks the rules. To appeal to a new generation and shock their parents: to make conventional brands look bland and weary.

There seems here to be an opportunity to explore many unconventional routes towards this target, without the need to understand why they may be popular.

It was felt that the literate youth of today, being very image oriented, would require a brand of cigarettes which was not an attempt to match any other brand, like Marlboro for instance, but which was completely unconventional which set new standards encouraging their rebellion, not necessarily just against parents but certainly against the market norm. It would respond to the person's individuality with the possibility of being an alternative to drugs. It was felt that the cigarette should incorporate some sort of "kick" of a similar nature to the Coca Cola "kick," giving the cigarette a physiological effect. A possible route for this would be to incorporate the AMTECH technology, using ammonia to generate nicotine enhancement, ensuring pH distortion to liberate the nicotine.<sup>18</sup>

It goes on. Again, remember, they don't market to kids.

Two flavors which were discussed as options were Root Beer & Brazilian Fruit Juice, both of which tend to appeal to the younger generation while being rejected by their parents.

The cigarettes should have a totally new brand name so that no pre-conceived ideas could be formed, and should reflect the durable youth values discussed (rebellion, glamour of danger, etc.).

In short then, anything goes. The cigarette should not be judged, in any way, by the normal smoker, but purely by the literate youth.<sup>19</sup>

MR. GENTRY: Andy, I don't want to interrupt you. We got this document, and we thought it was so good that it had to be fake. I mean we absolutely couldn't believe it, and in response, rather than

16. *Id.* at 14.

17. *See infra* Appendix 8.

18. *Id.* at 1.

19. *Id.* at 2.

disavowing it, they admitted it was their document but said they didn't know when it was actually prepared. So we were totally shocked that it was a real document.

MR. BERLY: We had nothing else in Florida regarding this project, Project Kestrel, but in other cases that my firm is involved in, we fortunately now have quite a number of other Project Kestrels. So while we might have had a problem using this document in Florida, we shouldn't have that problem elsewhere.

Another Brown and Williamson document. This is pretty clear. Youth cigarette, new concepts.<sup>20</sup> A youth oriented cigarette. "It's a well known fact that teenagers like sweet products. Honey might be considered."<sup>21</sup> They don't market to kids, though.

Just so I'm not picking on B&W, Lorillard: "[T]he base of our business is the high school student."<sup>22</sup>

MR. GENTRY: Andy, do you have that UK document from 1988 to let people know this is still going on, the ETS document?

MR. BERLY: Yes.

MR. GENTRY: Why don't you throw that one in?

MR. BERLY: Let me do this one just because I'm right at it. 1962. Brown and Williamson. Their executives, as late as 1994, swear that nicotine isn't addictive. Take a look at what their chief scientific advisor to the board of directors, Sir Charles Ellis, says. "Lastly, smoking is a habit of addiction that is pleasurable. Many people therefore find themselves subconsciously prepared to believe that it must be wrong."<sup>23</sup> This is the number one scientist for, at that time, the largest, most international tobacco company in the world. This is what Sir Charles says.

Another guy that has a real way with words is Dr. Dunn from Philip Morris, one of their chief researchers. He was in charge of their nicotine research. Again, keep in mind that their view is nicotine is not addictive, and that anybody can quit, and it is easy to quit, and so forth. This is a speech that Dr. Dunn gives. He says:

As with eating and copulating, so it is with smoking. The physiological effect serves as the primary incentive; all other incentives are secondary.

....

The cigarette should be conceived not as a product, but as a package. The product is nicotine. The cigarette is but one of many

---

20. See MARKETING INNOVATIONS, INC., BROWN & WILLIAMSON TOBACCO CORPORATION PROJECT REPORT (Sept. 1972) (*infra* Appendix 9).

21. *Id.* at 1.

22. Memorandum from T.L. Achey to Curtis Judge 1 (Aug. 30, 1978) (*infra* Appendix 10).

23. BROWN & WILLIAMSON TOBACCO CORPORATION, SMOKING AND HEALTH—POLICY ON RESEARCH 3 (1962) (*infra* Appendix 11).

package layers. There is the carton, which contains the pack, which contains the cigarette, which contains the smoke. The smoke is the final package. The smoker must strip off all these package layers to get to that which he seeks.<sup>24</sup>

Then he goes on and says that smoke "is beyond question the most optimized vehicle of nicotine, and the cigarette is the most optimized dispenser of smoke."<sup>25</sup>

I will read one more and then I will stop. W.C. asked about a 1988 document that was uncovered in Florida. As you know, the cigarette industry's main public relations theme is that there is doubt or controversy over whether smoking causes disease, they have done that with respect to smoking as well as environmental tobacco smoke.

This document happens to address environmental tobacco smoke. The background for this is that Philip Morris decides to go to British American Tobacco in London in 1988 and try to get BAT on board with what it is doing on a global basis.<sup>26</sup> Their purpose as they say here is Philip Morris is doing, making this effort to keep the controversy alive. It says they are spending vast sums of money to do so.<sup>27</sup> Philip Morris is meeting in London with The Tobacco Institute's lawyers, Covington and Burling, who now find themselves as defendants in at least one of these lawsuits.

It talks about the financial burden that Philip Morris has and how they are trying to get people to go in and help them. What they're basically doing is buying up scientists so that they can manufacture science. They can go out and get published somewhere something that says that ETS isn't harmful.

It says, "The Philip Morris philosophy of ETS was presented. This appeared to revolve around the selection, in all possible countries, of a group of scientists either to critically review the scientific literature on ETS to maintain controversy, or to carry out research on ETS."<sup>28</sup>

PROFESSOR STERNLIGHT: And they claim controversy means to have a position out there that says it is not addictive?

MR. BERLY: Exactly. It gets clearer in the paragraph right here as to exactly what they are up to. They talk about how the lawyers are going to filter it, how the scientists will be found by the lawyers. They make sure that they did not have any view that was adverse to the company.<sup>29</sup>

---

24. WILLIAM L. DUNN, JR., PHILLIP MORRIS RESEARCH CENTER, MOTIVES AND INCENTIVES IN CIGARETTE SMOKING 4, 5 (undated) (*infra* Appendix 12).

25. *Id.* at 6.

26. See Dr. Sharon Boyse, British American Tobacco Co., Note on a Special Meeting of the UK Industry on Environmental Tobacco Smoke (Feb. 17, 1988) (*infra* Appendix 13).

27. See generally *id.*

28. *Id.* at 2.

29. See *id.* at 3.

Then it says, and it doesn't get much clearer than this, "groups of scientists should be able to produce research or stimulate controversy in such a way that public affairs people in the relevant countries will be able to make use of, or market, that information."<sup>30</sup>

I mean it just doesn't get any clearer than that. There is a document written by the former chairman of Brown and Williamson that says "doubt is our product." It is the most effective way for us to create controversy. And that was dated like in 1962. And here they are in 1988.

Now, you talk about a scheme or a pattern of misconduct, a scheme or pattern to defraud, when you have something that starts in 1954 in connection with the formation of the TIRC, and this one just happens to be dated in 1988, but it continues to this day . . . .

I've got dozens more, but in the interest of time that's probably enough.

PROFESSOR STERNLIGHT: That was terrific. Thank you.

#### IV. PANEL DISCUSSION III: LITIGATION IN THE LARGER CONTEXT: THE LEGAL AND POLICY LESSONS OF THE LAWSUIT AND ITS RESOLUTION

PROFESSOR STEMPEL: Welcome back to the concluding panel of our symposium today, which has the working title of "Litigation in the Larger Context: The Legal and Policy Lessons of the Lawsuit and Its Resolution."

I guess to some extent using the term "resolution" may be a little bit premature. We certainly have a settlement agreement in Florida, but as you've heard this morning, there are remaining aspects to be addressed.

Before we get into that, let me introduce our two newest panelists. One is familiar to you, Dean Paul LeBel, of the FSU College of Law, whose introductory remarks were part of the program with Governor Chiles this morning.

Dean LeBel has taught at the University of Alabama and for the last fifteen years at William and Mary, where he was the Cutler Professor of Law. He joined us at FSU this summer to begin his service as Dean of the Florida State University College of Law.

He is a national expert in tort law, particularly products liability law, and what I kiddingly refer to as "sin product" liability. He is the author of a recent book regarding alcohol-related liability entitled *John Barleycorn Must Pay*.<sup>31</sup>

---

30. *Id.* at 4.

31. See PAUL A. LEBEL, JOHN BARLEYCORN MUST PAY: COMPENSATING THE VICTIMS OF DRINKING DRIVERS (1992).



The other person joining us for the first time this afternoon is Larry Garvin of the FSU faculty. Larry is a graduate of the Yale Law School, which he attended after obtaining degrees from Michigan State University and the University of Michigan. His field is primarily commercial law, but like a moth to a flame he has been drawn to the interesting but tortured aspects of mass tort litigation. As a lawyer in Washington, he had practiced in some of the cutting edge areas of mass tort litigation, and had been involved with some of the major litigation issues in years past.

In terms of the continuing saga of the tobacco litigation, I wanted to ask Andy Berly: What is the status of the related litigation of the Ness, Motley firm of Charleston? I certainly don't mean this disparagingly, but I've heard Ness, Motley referred to as the Wal-Mart of plaintiffs' personal injury and product liability litigation, or the McDonalds of product liability litigation, which I consider a compliment actually. There is more than a kernel of truth in those descriptions. Your firm is involved in litigation across the country in these matters. I wonder if you could bring us up to date on that other litigation, particularly with regard to its relation to the Florida litigation.

MR. BERLY: There are presently something like I think forty-one or forty-two of these attorney general-type lawsuits that are pending. My firm is involved in a number of them. The next one set to go to trial is in Texas. It actually should be in trial now, but it has been postponed. The judge unfortunately was diagnosed with cancer, and there has been a postponement of the trial. We really don't know when that will gear up. If it does not begin within the next six weeks or so, then that probably means the next case up will be the Minnesota case, which starts, I think, in mid-January.

So these cases are still proceeding at full pace, notwithstanding the fact that there is the national settlement agreement. That, of course, has not been finalized. It has not been enacted and I guess really until Congress does act one way or another, certainly our firm and all these firms that are going on behalf of plaintiffs will be working full speed ahead in getting these cases to trial just as rapidly as we can.

PROFESSOR STEMPEL: This morning Attorney General Butterworth sounded as though it was only a matter of checking off days on the calendar until the national agreement was finalized in some form. That certainly wasn't the impression I had reading the newspapers in the aftermath of the national settlement. Has there developed any particular consensus or odds-making on the part as to the likelihood of the national settlement?

MR. BERLY: I personally have never really been involved in those matters, but my understanding is that the attorneys general are very

optimistic there will indeed be a global settlement, and it is just a matter of getting into the new calendar year, the next legislative year. Everything that I hear is fairly positive, although there again you do read some stuff that is negative. I heard General Butterworth this morning sound pretty positive that it will be done in the first half of next year, and I don't know anything to the contrary, but then again that's not really what I do, and that's not what I know the most about.

PROFESSOR STEMPEL: Picking up on this morning's panels, as well, the question was asked, "What is the stopping point?" Will there be other suits against other products, and so on?

I would like to throw open for the panel generally but address it to Wayne Hogan perhaps first. Has tobacco been unfairly singled out? Is the statute coiled and ready for operation against other businesses? In particular, the reason I'm addressing it to Wayne, you've been very active in the asbestos litigation over the years. That's another product that's had substantial punitive awards entered against some of the defendants, substantial monetary awards, and has done a good deal of damage over the years. But was that ever considered? Were asbestos claims ever pursued as a Medicaid reimbursement action in some quarters?

MR. HOGAN: No, not that I know of in terms of the State certainly. I have no idea if they considered that product or other products besides cigarettes to be the likely subject of this form of action taking advantage of the 1994 amendments combined with the 1990 amendments.

It is, of course, the case that the ordinary rules that apply to Medicaid reimbursement in Florida and in other states where a tort action is pursued on an individual basis by, say, an asbestos victim who also was a Medicaid patient, under those circumstances there is a format that is available to enable the state to be repaid for the Medicaid expenditures. That has been in place for some period of time.

So you have a situation where, say, in the field of asbestos, that industry has the argument that their product provided benefits from an industrial-base standpoint, but also some hazards that were obvious in the end.

But those cases, unlike cigarette cases, have been able to be successfully handled by plaintiffs' lawyers over a substantial period of time, thirty years now, going on when you take it from the very first case, the *Borel v. Fibreboard Paper Products Corp.*<sup>32</sup> case in Texas in 1973.

---

32. 493 F.2d 1076 (5th Cir. 1973) (holding that the danger from inhaling asbestos dust was not, as a matter of law, sufficiently obvious to asbestos insulation workers to relieve manufacturers of duty to warn).

So in comparing the two products, for cigarettes, except for the *Carter* case that was discussed by Dean LeBel this morning, and we know the history of *Cipollone* before that, there have been no other successes. If *Carter* had been a Medicaid recipient, he was not, but had he been, then there would be a means by which the state would be reimbursed for medical expenses paid for by Medicaid. So I don't see that industry or the drug industry, or for that matter the alcohol industry being in the same posture as the cigarette industry, considering the addictiveness of cigarettes.

I haven't read Dean LeBel's book on John Barleycorn, but my understanding from what we learned during the course of this case is that the addictiveness of cigarettes is nine or ten times greater than the addictiveness of alcohol, so you've got a much larger population which is put in the circumstance of being just cigarette after cigarette after cigarette that they are smoking because of the addiction. So I don't see the likelihood of that being true for other products.

PROFESSOR BLAKEY: Jeff, it might be worthwhile to comment on whether RICO would have an application to other industries.

PROFESSOR STEMPEL: And I can think of exactly the sort of person who might be able to comment on that.

PROFESSOR BLAKEY: There are two RICOs. There's federal RICO and state RICO. And there are two possible plaintiffs, the individual consumer, we would call it, and a state.

Consumers have had no success in using the federal statute as a basis for products liability. The principal reason they haven't is that the federal statute does not authorize recovery for personal injury. It is only for injury to business or property. So the federal statute is knocked out as a possible products liability claim.

In the states, some do authorize personal injury recovery and some don't. The difficulty that you would have is that it is not simply showing a defective product. You have to show the systemic fraud for an individual to use the Statute. My guess is, for example, if you took alcohol, I think you would have a hard time making the case that the alcohol industry has done anything even remotely related to what was done by the tobacco industry.

PROFESSOR STEMPEL: Let me play devil's advocate for a moment. There seems to be, at least just from reading the paper casually, a tendency toward targeting the young in alcohol sales: sweeter drinks, creamy drinks, milk shaky sort of drinks, things like that. Is it your view that it is so different in quality that you can't compare it to tobacco?

PROFESSOR BLAKEY: Well, I'm the one who thought in the first blush you could not apply this to the tobacco industry. I'm either wishy-washy or I can't make up my mind.

When I learned the evidence in the tobacco industry, I thought it could be applied. I would simply have to say to the degree that I know the alcohol industry, my judgment would be not, and I would say the same thing for cars or drugs or substances generally. On the other hand, if you can show that an industry is engaging in a systemic pattern of fraud that is inflicting personal injury, you might be able to do a state-level RICO.

The one industry where it does I think promise—or threaten, it depends on your perspective—is in the medical industry generally. Medical fraud is systemic in hospitals and among doctors and in Medicare.

Forgetting for a moment the product, and looking at the people who process medical services, my estimation is that both false claims acts and RICO will be increasingly used in medical fraud.

I don't think the rest of us should have any fear of that. If we squeezed out of the medical system the enormous fraud where the public pays and therefore nobody cares by vigorous application of false claims statutes, which most states now have, or RICO statutes, which a number of states have, I think that would probably be a good thing.

PROFESSOR STEMPEL: We've been dancing around the liquor liability question with an authority right at our fingertips here. I should ask the author of *John Barleycorn Must Pay*. I understand that Dean LeBel and his products liability students have come up with a working title should he ever address the tobacco situation—*Joe Camel Must Pay*.

Let me ask you that, Paul. Do you concur with the assessment that the other panelists have given regarding what's different about alcohol versus tobacco?

DEAN LeBEL: I do. As was said by the Governor and the Attorney General and many people in the morning sessions, tobacco is absolutely unique in that it causes harm to the user as a necessary by-product of its normal use. There is no other product about which we can say that. Without rehashing what went into a couple hundred page book, John Barleycorn doesn't have to pay for much.

What I developed in that book was a proposal for a tax on alcohol that would be used to finance a special fund for the undercompensated victims of drunk drivers. In a passing paragraph at the end of the book I said that this idea might have some applicability to the tobacco industry if the scientific evidence on secondhand smoke, environmental tobacco smoke, rises to the level of convincing proof.

I think that is the way to go. I see this Florida litigation as a very encouraging sign. U.S. Supreme Court Justice Louis Brandeis said the states were laboratories, and what this litigation that we've heard so much about today stands for is a successful conclusion of an

experiment in the Florida laboratory. It's an experiment that reflects what I think is the most significant development in contemporary tort law.

That is a growing recognition of the public interest that is deeply involved in the resolution of what had historically been viewed as matters of individual responsibility for harm caused by wrongful act.

This lawsuit and its settlement indicates that however egregious—and it is impossible to overstate how egregious the tobacco company behavior has been over the years—however egregious that behavior is, the public at large suffers and is entitled to some relief in various forms. What I would do, I am more skeptical about the prospects for the global settlement in Congress. But that I think is not based on any special understanding of what Congress is likely to do here. I think it's a reflection of a deeper skepticism about Congress in general.

What I would like to see is a continuing responsibility on the industry to provide for the medical care for tobacco-related harms. And the way to do that it seems to me is not so much through individual state-by-state settlements of claims of this sort, but through a much higher tax on tobacco products that is used to set up a fund from which medical health care providers could be compensated directly. I don't think the public interest is well served by transferring vast amounts of wealth from the tobacco industry to smokers who at least initially chose to smoke, and to those whose claims are derived from the smokers.

I *do* think the public interest is very well served by transferring those vast amounts of wealth from the tobacco industry to the health care industry. There was a question earlier this morning about the tax effects of this litigation, a question that was directed to the Attorney General. Will there be a tax cut as a result of this settlement? No, of course not. I don't mean to be quite that flippant. It is unlikely that there would be a tax cut. But a tax that was paid by the users of the dangerous product would shift some of the costs away from the population in general that pays those costs through health care expenses generally and health insurance premiums in particular.

PROFESSOR STEMPEL: Mr. Gentry.

MR. GENTRY: I think it is important to put an exclamation point on this question, and this answer to this question, because as you know, Associated Industries and the tobacco industry spent several millions of dollars trying to convince small business people that every laundromat and every seller of milk and bacon and sugar is going to be sued under this act.

As I mentioned earlier this morning, as a practical matter it can't happen. One, it would be totally cost ineffective to bring this sort of action against any other industry that I can identify, and I can as-

sure you I've thought about it a lot. There is no other industry like tobacco. Not even alcohol which, in fact, in our hearings, when they were trying to put on evidence of what the State did with alcohol, arguing they were entitled to put that on to show the State had not taken appropriate steps with tobacco, our response was, "Well, wait a minute, are you saying you are willing to be regulated like alcohol, because, if you are, we may be able to resolve this lawsuit." They would immediately run and hide.

And you know, people forget that alcohol is strictly regulated. There are strict rules on how you sell it, where you sell it, when you sell it. You can't go get a bottle of whiskey out of a vending machine in the store next to the school. So to try to compare other products to tobacco is totally false, but they did a good job in the state of using that as a basis to try to repeal this act.

Secondly, there simply is no other product that has created the carnage that this has. As Wayne says, there is no other product that has no utility. This product has no utility. There is no other drug at least that I'm aware of that we yet know of that is out there in the marketplace to be consumed by anyone that is not regulated by the FDA. So it is just fallacious to suggest that this statute could be used for another industry.

And finally, to me, what has happened in Florida and is happening around the country, but certainly what we did in Florida, has got to be a tremendous vindication for the civil justice system. What you've got is an industry that has been pervasive in our society. It has co-opted the executive branch. It has co-opted the legislative branch. Andy, through our discovery, found The Tobacco Institute crowing over its great victories in the legislative halls, fighting back any local ordinances to do with anti-smoking measures.

No one has been able to regulate these people or do anything about it. It has only been through the court system that we have finally been able to hold them accountable. I think that's what the three branches of government are about, and I think that's what is so exciting about being a lawyer, that we know that ultimately, if we can get into the judicial system, you can finally have a fair resolution, a fair answer.

It is just that we needed the tools to get us there, and a big enough game, if you will, to justify bringing what amounted to tens of millions of dollars of time and expense to bear on this industry. It was only by virtue of the Act that we could finally really join issue with it. And so I am very proud of what we did but also of the state, that the State of Florida stepped up to the plate to do this. Apparently it really wasn't the state, it was the Governor and a couple of people who were able to get this bill passed and then gave us the tools to do it.

But I can't conceive that any industry anywhere should be fearful of this sort of action being taken against them.

MR. HOGAN: I was going to take Dean LeBel's idea about tax. I now know there are some bills pending in Congress related to this increased tax. Just think how hypothetical that would have sounded just a couple of years ago.

Because we know about the power of this industry. General Butterworth made the point they still had the power to slip through a \$50 billion tax credit even after this national settlement proposal was done. Well, they've had that kind of control for forty, going on fifty years. And so following up on what W.C. said, it is only by reason of the fact that the civil justice system was able to step in and make the inroads that we could then even get to the point of discussing with any semblance of reality the suggestion that you might put a \$1 or a \$2 tax on cigarettes and have that kind of an increase.

One of the statistics that I learned during the course of this case is shocking. The chart comes out of a book called *The Tax Burden on Tobacco*, put out by The Tobacco Institute. When you look at the charts, you realize that the tax percentage of the cost of a pack of cigarettes in 1997 is less than the percentage of the tax that was on a pack of cigarettes in the mid 1950s. Those increases that have occurred over time in the price of cigarettes have typically been for purposes of the profit of the companies, and not the tax. They've had that kind of tremendous power, and the only way to break through was to go some other route. That happened to be the civil justice system.

PROFESSOR STEMPEL: Let me just follow up a little bit on one of Wayne's comments. It earlier struck me that with asbestos and other types of mass torts, the private sector market, if you will, seemed to be handling that fairly well, firms like yours and others were willing and able to go toe to toe with manufacturers to extract some settlements to get some verdicts. Tobacco, up until the recent case in Jacksonville and the pyrrhic victory in *Cipollone*, has been relatively unscathed. We've touched upon some of this before, but can I throw this open to any of the panelists having had experience litigating against tobacco and against other defendants?

What was different? Was it that they just had more money? Was it that they were meaner, more cohesive? What would you say?

MR. HOGAN: Andy, you probably know, Andy probably knows the documents better than I do to be able to quote it.

MR. BERLY: There is a document that is authored by one of Reynolds' trial counsel that says something like, to paraphrase General Patton, the way we have won all these cases is by not spending all of Reynolds' money, but by making the other side spend all his. And that pretty much puts it in perspective. They have run the lawyers

into the ground by burying them with discovery, burying them with motions, burying them with depositions. We were outnumbered at least twenty to one.

MR. GENTRY: I think that's important. Something is going on right now around the country that tobacco I think is clearly behind. They are attacking the ability of attorneys general to hire private counsel as we speak.

We know in the State of Florida they were able to get legislation passed to keep the AG from funding this litigation. And so we see now an effort around the country legislatively and otherwise to prevent public officials from having the authority to hire private counsel.

The only reason we were successful is that we had a group of eleven law firms, and we did have the Attorney General's office who did put tremendous resources into this fight.

But we've all litigated with Ford and Chrysler and the asbestos industry and all that. But none of us, to my knowledge, has had a case where I show up and there are literally twenty lawyers on the other side. I've never had a case where we had to have seventy discovery hearings. I mean, it is absolutely overwhelming. It is magnitudes of tenfold or a hundredfold compared to other litigation.

For example, with David, I have no question that they really thought that they would just absolutely overwhelm us. Somehow we were able to respond here in Tallahassee. So it's just a matter of degree. Yes, they hide documents and they do all the same things. But when they do it, they just overwhelm.

PROFESSOR BLAKEY: Jeff, there are two sorts of jurisprudential things that ought to be mentioned. The one is that the tort system that developed in the nineteenth century in this country was developed in a different time and a different place.

At least one analysis of it is that it was designed to externalize the cost of entrepreneurial capitalists. We lacked capital. What we needed to do was concentrate it in railroads and developing businesses. To do that we developed a whole series of doctrines such as the fellow servant rule, the assumption of risk defense, contributory negligence, that have the effect of letting capital concentrate in order to allow the economy to develop. We got railroads and we got canals out of it. We got our industrialization. It was in major part paid for by the people who invested in it and lost the money or were even the employees injured by the operations.

Many of those doctrines are still present in our law, and when we have this modern phenomena of product liability, an interesting thing that happened is that the judiciary principally stepped in and modified many of those rules in order to shift the balance of the loss



from the individual who suffered the cost or the damage and put it back on the industry.

A lot of people objected to that, that this was legal change occurring through the judiciary, when it should have taken place through the legislature.

I think one of the unique aspects of the Florida situation is this wasn't just a bunch of private lawyers dreaming something up and going out and convincing the judiciary to make these changes. If you want to look for one person who brought this about, it was the Governor who looked at the public policy issue and decided the change had to occur, and exercised executive leadership. He then went ahead, and you can get mad at him for how he got the legislation through or kept it in, and, but for that legislative action, this suit would never have occurred.

So this is not an example of private lawyers manipulating the judiciary to produce a result that the community doesn't want. This was an example of legislative and/or executive leadership and then legislative leadership that made it possible.

If you turn and even look at the RICO statute, it was not passed to deal with the tobacco industry. On the other hand, the application of general legislation to new problems has been a characteristic feature of our society for a long time. The antitrust statutes went through thinking about the tobacco industry or the oil industry. It subsequently was legitimately applied to intercollegiate athletics. The civil rights statutes originally went through to deal with the Ku Klux Klan in the south. It is now legitimately applied in prisons in the north.

So it seems to me that this is not unique, but fully within our history and our tradition that the American system, legislative, executive, judicial, private lawyers, public lawyers, responded to a public problem. There is a lot of, what shall I say, cynicism about the fact that the government doesn't work. In my own profession there are a lot of law professors running around saying that law is politics and politics is money.

Well, let me tell you, the law in this situation was not politics, and it was not money. It was a public interest and it was seen by public officials who had nothing to gain from it individually, who went into the system, and the system—executive, legislative, judicial—was responsive to it and has begun to turn the problem around.

PROFESSOR STEMPEL: Let me ask you about this, playing the cynic for a moment. This is a rather fragile victory. Another few thousand votes and it would have been Governor Jeb Bush, not Governor Lawton Chiles. One more vote in the supreme court and the statute is unconstitutional. Instead of Judge Cohen, you could have gotten a judge who used to represent tobacco companies. At that

point, break any one of those links in the chain and it seems to come apart.

Let me raise this with Larry Garvin and get him into the discussion here. Am I being overly cynical? If it hadn't been Florida, would it have been some other state or does this suggest that maybe there are some problems, whether we call them public choice related problems or otherwise, in trying to move against the juggernaut, so to speak, if you would consider major industries to be juggernauts?

PROFESSOR GARVIN: Well, sure. These are necessarily somewhat fragile, particularly when you do have opponents so resolute, to put it gently.

It may well have been necessary for something like this to come about, to have as determined a governor as Governor Chiles and to have the less than fully publicized initial enactment of the statute. But here it is, and it is possible that this was a little fragile. It remains fragile, that any number of things could have gone wrong.

But on the other hand, I don't think that would have doomed something like this. There may have been one of the best possible circumstances for it to come about in a resolute governor, but there are others. So that, itself, doesn't trouble me. I am perhaps a trifle less cynical than some, give me a few years.

PROFESSOR STEMPEL: Wayne.

MR. HOGAN: I would like to believe that even if we had failed on the one vote in the legislature, or failed on the one vote in the supreme court, that once the challenge had been put out there, we would have continued to stay at the drawing board to try to achieve what we knew would be an important measure for public health.

Remember that we have our equity count in the complaint that is still out there. It would have allowed us to ask the judge to enable us to obtain discovery and the more facts that we saw, the more determined I think we were even if we had failed on some of these legal issues.

There is a big distinction between what this lawsuit was about and the individual tobacco or cigarette smokers' cases. It is not necessarily something that should be laid at the feet of those smokers, because they are caught as teenagers. They become addicted. But they face another major obstacle that we haven't talked about yet today.

I will lead into a question for W.C. and that has to do with the fact that the political power of the cigarette industry was such back in the 1950s and into the 1960s, that when the revelations came out through the Surgeon General's report in 1964, about the learning that they were developing on the disease causing capability of cigarettes, the executives of the companies when they went and testified, no, it doesn't cause lung cancer, doesn't do this, doesn't do that; nev-

ertheless, they understood that they were going to have to take, I think they called it in the documents, "one step back in order to take two steps forward."

And so they actually, unknown to the general public, crafted the language of the warning, so-called milquetoast as it was, that was placed on the cigarette packages. They crafted it. And they put forward an agenda. I think there were five items that actually were incorporated into the legislation to pass the Congress at that time.

Ever since then and especially when there was a slight change in the warning in 1969, they have sought to use that warning in order to defend against the lawsuits on the subject of preemption. Basically saying, because part of their agenda was, look, we don't want each of these individual states to be passing their own legislation about how cigarettes and the law should interact. We want to make it federal.

PROFESSOR BLAKEY: Clarify for the people who are listening what you meant by preemption and the strategy that they employed to defeat the local suits by going national and what that meant to us, because that's crucial.

MR. HOGAN: That point is that they were able to get the Congress to pass a national rule so that they would then only be subject to that rule from the standpoint of the federal government, and a state could not have a higher requirement that would demand more strict warnings, more explicit warnings than the Congress would allow.

And so in every one of these individual suits that is filed around the country, one of the principal defenses is preemption. In fact, in one of the Jacksonville trials the lawyer for the defendant, whether it was Brown and Williamson or RJR, would simply stand up and he would say preemption, and the rules would change right there in front of the jury. W.C. was involved, as was Professor Blakey and Professor Tribe, on the issue of whether the preemption that was at issue in *Cipollone* would apply to this case.

MR. GENTRY: That is such a great example about the difference between tobacco and other situations. People apparently don't realize this, and we were very fortunate to get Professor Tribe to come down. He argued *Cipollone* on rehearing. *Cipollone* was a plurality decision. But of the justices, three of them would have found no preemption whatsoever. Four found very limited preemption, clearly stating it doesn't apply to fraudulent claims and basically limiting it to the products that bear the warning, if you will.

Tobacco comes out of *Cipollone* having had an absolute disaster, spins it publicly as being a victory, and you look around and damned if the federal courts aren't saying that these claims are preempted.

PROFESSOR BLAKEY: Texas Supreme Court, too.

MR. GENTRY: And the Texas Supreme Court in *American Tobacco Co. v. Grinnell*.<sup>33</sup> So many things went right that could have gone wrong. Well, I'm not that cynical. Bob used to say "we are doing God's work." And I really think we were, because one vote in the supreme court, one vote in the Senate, a different governor, I mean, time and time again.

In our preemption memorandum, for example, it is really amazing. We were writing about *Grinnell* in the district court of Texas as one of our major decisions that we were arguing as coming up with a narrow preemptive effect to this tobacco issue on all fours, great decision, and the young associate I had working with me, I asked him to Shephardize all the cases on Saturday before we took the brief down to the judge on Monday.

He found through WESTLAW that *Grinnell* had been overturned in part, but we didn't know what the decision was. We couldn't believe that it could be that bad, but we pulled *Grinnell* totally out of our memoranda because we didn't know for sure what *Grinnell* held.

On Monday, when we got to the hearing and we were going to have argument on Wednesday on preemption, they hand me a copy of *Grinnell*, and it looks like something the tobacco industry would have written.

PROFESSOR BLAKEY: It was more outrageous than tobacco.

MR. GENTRY: Yes.

MR. GENTRY: But the point is that again this industry is so powerful with its PR arm, and excellent lawyers. Anything I've said, I certainly don't mean to in anyway demean the lawyers. They have excellent attorneys, lawyers today that represent tobacco.

It has also been ironic and intriguing to me and shows the system does work. It is the lawyers today in 1996, 1997, that produced the privilege logs. They fought us tooth and nail on these documents. But they played by the rules. It was through their production that we then discovered the crime-fraud of the predecessor attorneys.

But for the professionalism and the honesty of the lawyers that we are litigating with today, as hard as they can litigate, we would have never have discovered the crime and the fraud that had been perpetrated by other lawyers in the 1950s and '60s and '70s. So they have the very best lawyers, great lawyering. Everything is spun PR-wise. The courts all over the country pick up on these things. And we won in the supreme court, and we heard we lost. They lost *Cipollone*, but you read that they won. And it is just, it is almost impossible. Every time it is like one of those little machines you hit one and another one pops up.

---

33. 951 S.W. 2d 420 (Tex. 1997).

PROFESSOR BLAKEY: You know, Jeff, it is worth going back to your question, that if this was a monolithic country, all we would have to do would be to corrupt one place and it would be all over every place.

But there are so many centers of power in this country. People talk about being cynical and they can't change anything. This is the case that proves that they are wrong. So many centers of power, so many places where good people can do things that make a difference. And I think that if it hadn't happened in Florida, because it is a real problem with real people we are dealing with, it would have happened in Texas, or it would have happened in Minnesota, or it would have happened in New Jersey.

This is a wrong. The American people have identified it. The government, whatever you think about it, the government, in fact, and I mean that not just as Washington, is responsible. And it is not corrupt. The law does work. And that's one of the messages that ought to come out of this.

PROFESSOR STEMPEL: Let me follow up on that, Bob, I may be a creature of my own generation. When I went to law school, a lot of what we were taught commonly was the emerging federal writing of law was a response to discrimination that was embedded in certain states. And so at least in my callow youth, I always sort of thought state government was retrogressive, federal government progressive. To some extent there's a flip here when you see the tobacco industry going to get a national warning to try to cut off some of the state claims.

I was going to ask before your last comment, does this mean that we've seen that the "federal government rides to the rescue" theory was intrinsically wrong or have we seen any sort of a movement politically or legally? I think what you might be saying is that civil rights was a case where the power center of the road to the rescue just happened to be federal because of the other embedded problems in the states. Or have we seen a movement now where the action in terms of progressive legal activity is in the states and away from the federal government?

PROFESSOR BLAKEY: The history has always been of a shift in movement. Sometimes it has been in the states, and sometimes it has been at the federal level. If you grew up in the 1950s and 1960s and heard the federal government was perfect and it was a solution to all your problems, you were misled. And what we're seeing today is the degree to which you were misled.

Let me tell you a horror story. Right now the United States Congress is considering legislation to preempt all state fraud claims, *all state fraud claims*, because they are interfering with the creation of capital on Wall Street.

So, the federal government can be a source of injury and danger to people who want rights. It is not just the best place to go. We are a federal system. The founders were right. You split power, and you divide it out, and people can't be harmed by too much power. They can move in other places.

MR. HOGAN: Jeff, I didn't know about the pending federal fraud statute, but we do know that there is a pending federal products liability statute.

In other words, the proposal is to make a federal case out of it, to make the law of products liability a federal law. And you then have to wonder, those who favor that, what happens in ten years or five years or whenever the political winds blow differently. The senator who is favored by the manufacturers is not the chairman of the Senate Judiciary Committee, which decides what the federal product liability law will be, but instead it is a senator, whatever party it might be, but let's say it were a Democratic majority in the Senate and a senator who favors access to courts and rights to jury trial and the ability to pursue claims against manufacturers and you have a liberalized federal standard of strict liability in the field of products liability.

So when the decision is made to federalize something, it is then federalized for everybody. Wrong decisions can be made, and the advocates who wanted it to be federal in the end may not like that at all and wish that it was being done by the states. So there are particular dangers with this business of federalizing everything to protect one's own interests.

PROFESSOR BLAKEY: I don't mind when they federalize it, I hate when they federalize it and then preempt everybody else. It's a question of truth. There isn't just one version of it in Washington. Hopefully there are fifty states that can work out alternative solutions that other people don't interfere with.

MR. GENTRY: This argument by Bob is the reason why a lot of people are opposed to the national settlement. There are very legitimate concerns that by passing this national law we are setting a precedent here. We are limiting the rights of individuals, whether or not we are basically federalizing individual rights to their detriment.

There are good arguments on that side. I don't know that you've heard those arguments today because most of the people here at least on this panel, I think, have been so involved with this issue and believe that the national health care benefits involved with this terrible epidemic so far outweigh the relatively slight limitations on individual claims, which are largely illusory because nobody can win them, but this is such a unique situation that it does, in fact, justify a national solution.

But I've got to tell you, you know, I can argue that out of the other side of my mouth very well. And it makes me very, very nervous, because I think most of us at this table historically have opposed the idea of limiting individual rights, certainly on a federal level, and replacing individual rights or state rights with a federal system or compensation system. So it is very problematical and probably would have been helpful if we had somebody here who can really advocate the other side of that. Maybe Bob can.

PROFESSOR STEMPEL: Let me raise this issue, too. In corporate law they talk about a race to the bottom or some people think it is a race to the top. Others think it is a race to the bottom in terms of what you will do to attract business.

Are you going to have some states that settle too cheaply if we have tobacco litigation on a state-by-state basis and don't overcome it with a national agreement, or do you think all states would be ultimately as inspired as Florida was to do a pretty thorough job of fighting?

MR. FONVIELLE: I think it is a tough question, because I think we know there are an awful lot of states that have just, so to speak, jumped on the bandwagon. I think Andy would know better than I do. I know that the states coming up for trial right now are all very well prepared to go to trial. But I also know from talking to some other states that they've just filed the lawsuits thinking that they are going to get an easy settlement. The last thing you would want from an individual state standpoint is to start trying these cases and losing them.

On the other hand, if we started trying and winning them, I'm sure it would end up with some sort of resolution on a global basis, on a national basis in any event. Andy can probably speak to that. This is something that Andy is dealing with right now with the other states. You can answer that better than I can.

MR. BERLY: As far as settlement and so forth is concerned, Mississippi has settled and Florida has settled. There was rationality in the apportionment of damages separate and apart from just the models that were going to be presented at trial.

You know, the industry has their figures and there are the national Medicaid numbers so that you can sort of graph out what the gross Medicaid dollars are, and then look and say what Florida's proportion of that is, what Mississippi's proportion of that is, what say, for example, Oklahoma's would be. So if the national settlement, for example, does get bogged down somehow, and there are some of these cases that come up for trial, there should be a logical way, should the industry be inclined to settle these cases, of using a mathematical formula for determining what their pro rata amount of the Medicaid dollars would be.

Certainly the best overall resolution would be a global national deal that wraps everything in there together and gets all the public health benefits, because some states and some governors and AGs may not be as public-policy oriented as Governor Chiles and General Butterworth were who held out for some major concessions by the industry concerning advertising and so forth. It may be that some other states would really just try to get the Medicaid dollars back, but that remains to be seen.

DEAN LeBEL: I moved here in July from the state of Virginia, which amended its Medicaid recovery act in the 1996 legislative session to require that the state be subjected to all of the affirmative defenses that would have helped in an action by the smoker. That state's Attorney General is going to be the next governor, and it is a very different political climate for tobacco. The politics of this are interesting. I would like to echo what Bob was saying about the importance of multiple centers of power. It is important not to leave the public out of this as a power center.

Three states, with very different political characters, California, Arizona, and Massachusetts, by referendum raised the tax on tobacco products, with those funds earmarked for a number of public health programs; not just repaying the state for some of the health care costs, but also financing smoker cessation programs, smoking prevention programs in the schools.

To think that the political live wire, the live third rail of a tax increase would be brought about in those states through voter actions or referendum rather than through what might have been seen foolhardy legislative action by people who were going to lose their seats almost immediately, I think is encouraging.

PROFESSOR STEMPEL: With regard to that, let me raise this issue. President Clinton, David Kessler, C. Everett Koop, and others have criticized the national settlement. And we've talked about it as a received thing. What about the criticisms that it is too easy on the tobacco industry? Once Professor Blakey made one of his rare mistakes and talked about all profits worldwide for time immemorial, it makes the price tag look pretty huge.

Did people look at a lot of money and grab the brass ring too quickly, or is the national settlement fair? There seems to have been a lot of criticism of it since July, that it has been tilted too much toward the tobacco industry.

DEAN LeBEL: There is one point that I think is important to make about the settlement. We've used the term "global settlement" a number of times. I used it this morning in my introductory remarks.

This is not a global settlement. It is a global settlement only in the sense that the World Series is the "World" Series. There is a very un-



fortunate response on the part of the American industry, multinational industry now, to the advances that are being made and the protection of consumers in this country through products liability litigation and legislation. That is to export the harmful products and to increase dramatically the harm that has been caused in other parts of the globe.

We just need to be careful as we pat ourselves on the back for what we've accomplished for our citizens. We need to be careful we don't lose sight of the significant harm that is being inflicted on the rest of the world.

MR. FONVIELLE: Jeff, along the lines of the national settlement, what we saw from Washington and Congress right after the national settlement was a sudden change of sentiment or feeling by the public that, "Gee whiz, anybody can beat tobacco."

Really. I got calls from Congressmen. They are saying, "Hey, you know, what's going on? You know, why are y'all still suing in Florida? Tobacco, anybody can beat tobacco. They will roll over."

Whether or not the national settlement dollars are right, you need to take that in light of the fact that there has got to be some give and take on both sides. There is no way in the courtroom that we could ever get the relief that has been offered and held out there like a carrot on the end of the string, the end of the stick. We could never get in the courtroom a lot of what's been offered in the national settlement and an opportunity to get rid of the real problem, such as advertising.

We may go in the courtroom and win some against tobacco, but they are just going to gear up their advertising campaign and go back out there and try harder to sell more cigarettes. The national settlement, as much as I am for individual rights, in light of the reality of the approach to litigating with tobacco, I think is a fair settlement.

MR. HOGAN: One of the other criticisms that is out there related to the national settlement is not something that I understand perfectly well, but it has to do with what is perceived as a type of restriction on the FDA's regulatory power. It is not what you would expect would happen there, but is a reversal of some of the procedural requirements.

My guess is that particular thing, which is of concern—I think the President said that was one of his major concerns—is something that would be improved as Attorney General Butterworth was saying as legislation goes to the Congress.

The last thing you would want to do I think is come out of this change and all of this litigation producing an overall good public health result, by having something that would weaken the ability of the regulatory agency to address this drug. So my guess is that's a

criticism that would be seen as a valid criticism, and changes would be likely to be made.

PROFESSOR STEMPEL: But relatively independent of the dollars and extracting other concessions.

MR. GENTRY: I think with Surgeon General Koop, the major criticism has been the concern that the FDA's authority that is desired would be weakened. That's my understanding of the major criticism.

As Wayne said, hopefully that would be resolved in Congress. I don't know that the public in general understands or maybe many lawyers, that one of the reasons why the global, so-called global, settlement was done is that there are tremendous, as you might guess, First Amendment issues involved here.

And as David said, we simply could not make them take down the billboards. We simply could not control their advertising through the legal system. There is only so much that can be done. And I think there is only so much that Congress can do unless especially what amounts to a consent decree. Basically what the industry is doing is they are willing to give up certain rights that they would have even in the face of federal legislation. There are certain other things that can occur.

The belief is that by putting this multifaceted approach in, within the next ten or fifteen years it will largely eradicate smoking as the health epidemic that it is. And so that makes it worthwhile.

The overseas problem, are they going overseas? Yes. Do many overseas countries actually participate in selling cigarettes? Yes. Is it considered to be a boon in some countries? Absolutely. In the *Wall Street Journal* they reported that it was a great thing. Many countries actually participate in the sale of it, so they make profit at a retail level. They tax it. And it kills people about the age of sixty before they become unproductive. It is a three-way benefit to some countries, and honestly people have made that sort of financial analysis in Third World countries and in Eastern Europe.

So cigarettes are going to be around. The question is what can we do here in the United States to try to save the health of our people. I think that's the way most of us looked at it.

PROFESSOR STEMPEL: In your assessment is overseas tobacco marketing not necessarily to dump your tobacco stock because of the overseas market? Will there really be a substantial reduction in this country as a result of these activities?

MR. HOGAN: The hope would be—we lead the world in a whole range of other things—and the hope would be that we would lead the world in causing others to see that there is an importance to adopting approaches to public health and approaches to the legal system the way the United States has done.

It is a strange thing when our civil justice system is criticized, and yet you see the important benefits that it can bring. If you brought in other countries you would have no right to do anything about this kind of tremendous carnage that is intentionally created.

So you really would like to think that others would model on what we've done right. This approach would spread and hope to save some lives across the seas.

MR. GENTRY: There can be a safer cigarette, which we never addressed in the symposium, and it is a big part of what Andy discovered. There could be and there could have been for the last three decades a much safer cigarette. They intentionally withheld it from the market rather than acknowledging the fact they had been killing people previously. And if nothing else comes out of this, maybe they will come out of the closet with a safer cigarette, because there can be a safer cigarette.

PROFESSOR STEMPEL: We're now in the wake of the settlement. The talk has been in some quarters, "Let's repeal that portion of the Medicaid Reimbursement Act now that tobacco has been eventually slain or dealt a mortal wound."

What do the panelists think about that? Have we just heard a consensus seeming to emerge that this was the type of product for which this sort of action would work and that there aren't others out there? Do you favor retaining the statute in its present form or repealing it so that Associated Industries and others can sleep peacefully at night knowing it is no longer on the books?

MR. HOGAN: The Governor told us this morning that he offered to limit the statute in its application to cigarettes, and that was rejected by Associated Industries, which wanted to keep the sword, the imaginary sword hanging over its members. It didn't want to protect them. So apparently that was a false issue out there.

My guess would be that Governor Chiles had the political acumen and judgment to know whether he needed this statute on the books or not, and for my part, I would follow his judgment on the question of when and if this statute should be changed.

MR. GENTRY: For goodness sakes don't take it away from us until after we know whether or not we have to go back to court, which is what they really want to do. We may still need it.

MR. HOGAN: We have a September 1998 trial date. The judge has retained jurisdiction over this industry. We know that this industry is capable of a lot of things. It is maneuvering in the Congress even as we speak. So things are better left alone for now.

PROFESSOR GARVIN: Even if the settlement ultimately goes through to everyone's satisfaction or at least to everyone's even discontent, which is just as good, I think, there is something that might be rather nice about keeping it around, which is a couple of aspects of

it having to do with, for example, the liberal construction of the rules of evidence due to statistical proof, the market share approaches that represent the more progressive trend of tort law.

One thing that I found particularly interesting about this statute is that it states nothing revolutionary, but just what is perhaps the better opinions in tort law, especially against what seems to be a retrograde move. If you look at something like the *Restatement (Third) of Products Liability*, which to editorialize briefly, is an unmitigated disaster.

When you look at some more changes impending I think in the law of warranties, having a legislative recognition is, something that I think is more properly called "tort reform" than the things that are typically called tort reform by legislators nowadays. Tort "reform" would be perhaps closer to the truth. I think it is something that is worth pursuing perhaps more generally at some point as the pressures on the economy tend to push it further toward the defense side, as well as they have legislative recognition.

PROFESSOR STEMPEL: Let me follow up on that just for a second. What do you consider to be the pressures that are pushing the common law of tort toward more of a defense perspective? This case seems to run counter to that, but this case is also a unique public-private partnership, if you will.

PROFESSOR GARVIN: Well, there are the things that actually deal with problems, and the things that are advertised as doing so, I think, which may be distinctions.

I suppose the thing that is normally advertised is a problem of the so-called punitive damages problem as you see in tort reform statutes in the states. I think that's one of the major focal points, an attempt to limit the availability of punitive damages. But a good deal of the changes you see is an attempt, in large part I think, to turn back some of the moves as in the 1960s that advanced strict liability for product defect. It is not surprising that defendants perhaps see opportunities as the common law is remade and restated, and this is a particularly ripe time for doing it, with the Restatements and the Uniform Commercial Code being revised. This is the time when the common law and relevant standards can be shifted greatly.

It is not surprising you mentioned public choice or interest group activity before. This is a time for lobbying. This is a time for fierce advocacy.

MR. HOGAN: The one thing that is worrisome about that move that you detected out there is that a move away from consumer protection in the law is happening at the same time that we come off a good number of years of regulatory change, where the consumer protection capability of agencies has been reduced, either by reduced staffing or reduced regulations.

One would think that you should have one or the other, or at least a good solid mix of both. But if you take away regulatory controls, and at the same time you take away free enterprise controls from the standpoint of civil justice, or a remedy for wrong, you leave little impetus except the criminal law, I suppose.

I don't think we want to be in a position where we turn every industry into the object of criminal sanction and have to go to that level. There ought to be the ability to have appropriate civil liability for wrongdoing and something that is known as monetary damages and punitive damages for egregious wrongdoing. So it is alarming that you would have both aspects, both regulatory and the civil justice system in retrograde to the detriment of consumers.

PROFESSOR STEMPEL: Paul LeBel. Products liability, you have devoted a good part of your career to that. Do you agree with that assessment?

DEAN LeBEL: Absolutely, I'm on the consultative group for the *Restatement (Third) of Products Liability*, and it's more dreadful than has been described. It is more retrograde than the current versions of the federal products liability legislation.

The good news I suppose is that it is less likely to enjoy the substantial support that the Second Restatement had because it is so out of whack.

PROFESSOR STEMPEL: Is it your sense, too, that the courts perceive that this was a Restatement like, unfortunately, many of the ALI products of the last decade, that have been subject to pretty heavy lobbying from interest groups, that it's less of a pure intellectual analysis of the situation?

DEAN LeBEL: I was elected to the American Law Institute after the work on corporate governance had concluded, but what I was told by members was that that was the first instance of the politicalization of ALI projects. It was certainly true of the products liability Restatement. In fact, the selection of the reporters for that project was itself a political statement on the part of the ALI and foreshadowed what the end product was going to be.

PROFESSOR STEMPEL: Andy Berly, what does a firm with a national tort practice do in this environment? Are the days as dark as suggested? Are there other lurking tobacco litigations out there that you see in the offing, or when everything works through Texas and works through the system in the national settlement, is this the last we are going to see of this sort of litigation?

MR. BERLY: I don't really know. I have been so buried in the tobacco litigation for the last three years. Truly all I have seen is the tobacco litigation from a view of the trenches. I don't get involved much in the politics, the legislative end of things. I truly just don't know.

Judge H. Lee Sarokin in the *Haines* case, started out talking about in the days and age of breast implants and Dalkon shields, when it is going to end, when are big businesses going to pay attention to the consumer, when are they going to put people ahead of profits. If history is any indication, there are going to be companies, there are going to be industries that continue to conduct business like this. And hopefully there will be laws around to provide some redress.

One of my favorite Tobacco Institute documents is one of their presidents or chairmen, I forget which, giving a speech. He is lamenting the reformulation of Congress. I forget what year it is. And he says, "We are going to have a tough row to hoe in this coming year because Congress has become much more consumer oriented, which is very bad news for us." This struck me as horribly ironic because they sell a consumer product. There they are lamenting the fact that they are going to have a legislature to contend with that is pro consumer.

I mean if that doesn't say it, I don't know what does.

PROFESSOR STEMPEL: Bob Blakey, let me ask you. The RICO statute, it must be like watching your child grow to adolescence and be adjudicated a delinquent in the popular press. I can remember reading articles and articles in the 1980s and '90s about how "garden variety" business wrongs were being turned into RICO claims, and wasn't this an outrage, that no streets were safe for the average American CEO, and that life is crumbling in western civilization—all because of RICO.

After what appears to be the critical role by consensus, we've agreed that the RICO claim has had in bringing about this most impressive result, is there potentially new life in RICO claims?

PROFESSOR BLAKEY: There are two RICOs. There is a criminal RICO that I think is virtually untouchable. It is a general consensus in the federal judiciary and the federal prosecutors and in the Congress that it has been effective against the Mafia, drug groups, political corruption, and it is just beyond being touched. The civil side of RICO is, and has been, in serious trouble. The so-called securities reform—Professor Garvin said tort reform or deform—I like to think of securities chloroform legislation that went through in 1995. The hubris and all of the scandals on Wall Street, Michael Milkin and everything, that should normally have led to reform legislation, actually led to cutting back rights of people to sue. And it took securities fraud out as a civil predicate for RICO.

And I will tell you that the federal courts using enormous care not to touch the criminal side have virtually made it impossible in certain geographic circuits to bring civil RICO cases now. If you look at the statistics on it, they are declining slowly. My estimate is that the

tobacco industry has suffered such a blow because of civil RICO in this, that you will see in some of the states efforts to repeal civil RICO.

For example, in Delaware. Now why would they choose Delaware? In Delaware, as a result of new litigation, no civil RICO case can be brought until there has been a criminal conviction on the underlying predicate act. So none are brought.

PROFESSOR STEMPEL: So, in Delaware, the *Sedima*<sup>34</sup> case got codified. The Second Circuit *Sedima* case got codified.

PROFESSOR BLAKEY: For much the same reason that the common law defenses were put on third-party medical actions in Virginia.

While I said previously that people ought not to be cynical, that law is not politics, I probably should have said it is not always politics. There is hope for us, and there is ample room for us to think that the price of liberty is eternal vigilance, and if we don't watch these things and fight for them, the war is never won. There are only battles in the RICO reform to do the right thing.

PROFESSOR STEMPEL: Those seem almost like closing remarks, Bob. And without truncating anybody else's rights of free speech here at the panel, I think I might use that opportunity to bring the program to a close, although I want to thank all of our guest speakers and participants.

I want to thank Mark Evans back in the booth and Kevin Davis and Diana Patterson and Frank Bowden and the people who have worked so hard on the technical aspects of this program. In particular I want to thank our guests, Bob Blakey from Notre Dame, W.C. Gentry and Wayne Hogan from Jacksonville, Dean Paul LeBel, Professor Larry Garvin, and Andy Berly all the way from Charleston.

I want to reserve for a moment a special word of thanks for David Fonvielle. The old adage is that there is no limit to what can be done if no one cares who gets the credit. David has absolutely personified that in putting together this program. It is through his great efforts and great rapport with a number of the speakers whom we've heard from today that we were able to bring together this group of people today, including the Governor and the Attorney General.

And as is his way, David has been very happy to let other people bask in the limelight. He deserves a very special thanks on our part here at FSU for the program. With that we will conclude our symposium.

---

34. *Sedima S.P.R.L. v. Imrex Co., Inc.*, 741 F.2d 482 (2d Cir. 1984), *rev'd*, 473 U.S. 479 (1985). The Second Circuit in *Sedima* had required that there be a conviction on an underlying predicate act before a civil RICO claim could be made, the standard now applied in the Delaware RICO Act according to Professor Blakey. In the Supreme Court's *Sedima* decision, the court rejected this "prior conviction" requirement. *See id.* at 488.

## Appendix 1

"Structured creativity group"

Thoughts by C.C. Greig - R&D, Southampton

Marketing scenario

Before starting on any future scenario, let us look at what we are currently selling and where and how it has developed.

A cigarette as a "drug" administration system for public use has very very significant advantages:

i) Speed

Within 10 seconds of starting to smoke, nicotine is available in the brain. Before this, impact is available giving an instantaneous catch or hit, signifying to the user that the cigarette is "active". Flavour, also, is immediately perceivable to add to the sensation.

Other "drugs" such as marijuana, amphetamines, and alcohol are slower and may be mood dependant.

ii) Low dosage

The delivery of nicotine from the puff of a UK middle-tar (US full flavour) is about 0.1mg or 100ug of the active agent. By contrast, other common drugs such as aspirin require about 300mg (3000 fold excess on one puff, 300 fold excess on a per cigarette comparison), and a saccharin tablet contains about 15mg of active agent.

Other extremes of drug dosages are alcohol (1 "shot" of about 1oz, = 28gms, at approx. 40% alcohol is about 10gms or 10,000ug, an excess of 100,000 fold per puff or 10,000 fold per cigarette), and LSD, where a dose of 100-500ug lasts 12-24 hours but is viewed

100515899

BATCOLE

CCOLITIGATION

*Exhibit 1*

18064



askance by most legal authorities. The contraceptive pill, another all day active (hopefully) drug, has 1 to 1/5mg of active ingredients. Thus nicotine is about the lowest dose "common" drug available!

#### Cost

The unit cost of a 10 minute "high" from tobacco is, in UK terms, about 6 pence (approx. 9.5 US cents), although much lower elsewhere. This sum is about 40 seconds pre tax earnings at the UK average wage or about 1 minute after tax!

#### The future?

Thus we have an emerging picture of a fast, highly pharmacologically effective and cheap "drug", tobacco, which also confers flavour and manual and oral satisfaction to the user. There are other things about tobacco though. It is legal (as is alcohol but not marijuana and LSD), and the articles themselves are eminently portable. It can be used freely in public places in most countries.

So, all in all, it is a relatively cheap and efficient delivery system, legal, and easily usable.

However, it has drawbacks. The major one is that it has a "health shadow" over it which is not easy to dispel. Secondly, it is a messy habit, polluting the non-smokers breathable atmosphere, and leaving ash and debris, not to mention smells, around for hours or days. Thirdly, carelessly used, it sets fire to things.

As a result of all these, it now has a social acceptability much below that of former times.

As to the design and production of the device, like all consumer goods it has had to react to the marketplace. As time has evolved most consumer products into more convenient, higher performance variants, so

0000000000

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

have tobacco producers reacted to consumer and governmental pressures.

However, this reaction can be seen as due to three pressures, of which only one is the consumer to which we sell our products! The other two are both arms of government, on the one hand the Treasury, who collect a vast amount of their income from our product. Indeed in the UK tobacco (mainly cigarettes) is the third largest contributor to the Government revenue - at £4.5 billion it represents, after income tax and VAT (a consumer sales tax), 5% or slightly more of Government revenue.

I propose to dwell only briefly on the consumer aspects of product change, since I believe that only a minor part of the total change is due to the consumer. Repeated attempts by outside forces to drive the consumer to lower tar have in general, resulted in at worst (in Governmental and Social pressure group eyes) a backlash and at best only a steady, inexorable grind downwards in deliveries. It is a moot point whether actual deliveries to humans have ever really dropped across the vast majority of the smoking population. True, there is now a group of "health concerned smokers" who buy low or ultra-low delivery products and puff away valiantly, but I suspect that there are few even of these who are real "smokers" - they are not "smokers" in the real sense of the word, mere users of cigarettes to divert internal stress. It must be a dilemma for them whether to smoke at all - their peer group probably is the most vocal anti-smoking class of all, so they must really need the relief of those internal pressures very badly indeed!

If one looks, cursorily, at the human behaviour records in GR&DC over the last fifteen years, the immediate conclusion is that puff volumes have risen as inexorably as machine deliveries have declined.

Given the design parameters of the cigarettes, it is possible to speculate that human compensation has, for a significant part of the

100515901

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

smoking population, negated attempts to reduce tar deliveries.

Now, there are many confounding factors involved - and I invite you to take your pick as to which you think most important, but I surmise that over a smoker's lifetime involvement with cigarettes in general, he tends to invariably "titrate" or adjust his current delivery towards that with which he was first acquainted - if the cigarette will let him. Indeed, a doleful letter recently appeared in the "Times" bemoaning the fact that "Capstan", a plain UK 70mm brand, used to last nine minutes but now is consumed in four. Allowing for cigarette design and increased smoulder rate for delivery reductions, one would expect, on machine smoking, to see at least seven minutes duration. The conclusion must be that while puffing, this smoker is increasing his puff volume - and thus his tar intake, possibly from the current machine delivery, approx. 19mg tar, up to the 35 or so mg of his youth. Many people will tell you authoritatively that, on sound statistical analysis of well designed experiments, low tar smokers do not compensate. Rubbish. The findings are valid, but the choice of smokers probably was not.

Observation of my mother-in-law tends to confirm the point. I have, unbeknown to her, given her middle tar (BAT) products while she is a, and possibly the, confirmed low tar Du Maurier smoker. She, I would guess, since I have no data other than that seen from observations of puff duration and coal temperature, certainly does not take a 35ml puff on Du Maurier - probably nearer 50 -, and probably about 35 on State Express. From what we know of deliveries at non-standard puff volumes, I would suggest that she gets about the same from either cigarette! So, you say, since she's 65, why doesn't she, on my prior reasoning, increase volumes and durations till she can get 35-40mg, which are the deliveries of her youth some 45-50 years ago? The answer is simple - the cigarettes won't let her!

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

100515902

So, I am proposing two things for your consideration. One is that people try to compensate for past cigarette designs to the best of their ability and the other is, that over time, these efforts may become less necessary as the distant memory of long-ago events fades.

At this point you may have read those what I hope were interesting "divertissements" and are now wondering what I am aiming at. I have shown you nicotine in relation to other drugs, and indicated that humans perhaps "titrate" for nicotine.

Where do we go from here? One obvious route is to give people more nicotine as tar is reduced, i.e. increase the nicotine:tar ratio, or as we normally use terms, decrease the tar:nicotine ratio. But could we?

Technically, the answer is yes, but all our experiences founder on the rock of acceptability. The very reason is that since tobacco is a relatively efficient nicotine delivery system, over what is now some hundreds of years, a balance in subjective flavour: strength ratios has been struck. If I allude back to my comments about my mother-in-law, her initial cigarettes of 35mg tar (or so) probably delivered 3mg of nicotine. If we attempt today by blend modification, to give her her 3mg of nicotine at a tar:nicotine ratio of say 5:1 rather than 11:1, as previously, she will have a natural revulsion to this "flavourless but over potent" new cigarette! It follows from this that I have equated the flavour:strength ratio with tar:nicotine, which I do not think unreasonable.

If we follow this type of thinking a little further, we can begin, perhaps, to understand why we seem to be plagued with such a conservative population of consumers. It is because early trials of cigarettes, as in so many of our meetings with novel concepts, shape our later behaviour. We all hear comments like "roast beef (or hamburgers

100515903

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

etc etc) doesn't taste like it used to". Surely, roast beef and hamburgers won't, because the style of cattle, their feeding, the way joints of meat are cut, the use of growth accelerating hormones and the presence of preservatives have had an effect. All are consumer (or Government?) demands. The significant thing, I suggest, is that we think we can remember what they were like years ago. Surely, this must extend to cigarettes?

It is very important to remember that any attempt on our part to revive past glories in consumer minds must be a credible one. To borrow from the motor car business, in the UK there is a small, private firm, Morgan, who manufacture a car whose design goes back to 1908 in certain parts and whose style is 1930's. It would not be credible (though it has been tried) to have both modern car performance and convenience from such a machine. Who wants a Model T that goes like a Corvette, or an Austin 7 like a Ferrari? The concept of Barclay can be allied to this type of nostalgia. Advertising lines like "the pleasure is back" suggest, through the promotion, a Scott Fitzgerald 1930's USA image. Is it credible that a long cigarette can perform like the US cigarettes of that era? I do not criticise Barclay, which is a magnificently engineered device. Neither do I criticise the promotional ideas which led to the campaign. I merely ask "can the concept be substantiated in real consumer attitudes?"

I will go further. Recently, I did a long and complicated piece of research work to try to discover what elements of cigarette design influence "smoking mechanics". I regret to say, from a purely scientific view, I succeeded only to a very limited, but hopefully useful degree. What emerged, in my philosophical thoughts about the work, was a comparison that I would like to share with you.

100515904

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

You are an international businessman, well conversant with the jet set life - flying from A to B, usually being met and chauffeured to your hotel. However, from time to time, this is not possible, and in these events you hire a car. You step forth from the formalities, key in your hand, to the parking lot, and your vehicle, let us say a Ford Sierra or Chevrolet Chevette, awaits you. It is dark and raining, and you have no time or inclination to look for those status marks such as V8, GLS etc etc. You get in, start the (we suppose silent) motor, engage a gear, having remembered which side of the road to drive on, place your foot on the accelerator, and set off. What happens?

Well, in Germany you probably got the V8 turbo charged version - result, you're at the other end of the parking lot before you know it. In the UK, with the standard model, all goes roughly according to your past experiences. In the US, with all the anti-pollution gear, the thing may only barely move.

Why such a smile? Because our cigarettes can behave similarly! One white rod is apparently like another, until it is lit. It is only then - when you put your foot on the accelerator, figuratively speaking - that things change. Is there an opportunity for us here?

Let us go back to the white stick. Sure, it's like any other white stick. It's filled with tobacco (you presume), it's firm, there's an end to it of reasonable appearance and some tobacco there to show its made of tobacco, and its usually got a white filter end on the other, covered in cork or white tipping.

My question is, why don't we use the construction or colour of the cigarette to tell our consumer what to expect. My analogy with the hire-car was dependant, if you remember, on two things. One, the motor

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

100515905

was silent in operation, and two, you couldn't see the badges that told you what performance to expect. Our cigarette is exactly similar. It comes out of a package unlit (silent) and, once out, nothing really differentiates it from another cigarette (no badges, though we do try).

We've forgotten to tell the user what to expect. Sure, we wrote in big letters (or as big as the government told us), some data on deliveries of various things. Once out of that pack, our cigarette is not differentiated from any other, and no smoker offered it unseen knows what to expect. I could produce for you two cigarettes of visually identical construction (unless you use a microscope) which could be of 1mg and 20mg delivery!

So, the final question I ask is, can we give a consumer some guarantee that we, the manufacturer, are offering him something that he wants, that satisfies his requirements, is credible and is unique to us? Splitting this down into sections, we can deal with them as follows:  
What does he want

He wants, in my estimation, a product that smokes like those he was familiar with some years ago (naturally, as the years go by, there will be less and less smokers who "remember" plain cigarettes of 35+mg). We can do this by assuring him through a good quality smoke, perhaps better than he was used to, with a reduced tar:nicotine ratio, though not overtly so. We couple this with a "normal" cigarette design that does not offend through being "too" unconventional, and we position this product to take maximum advantage of league tables, which are still basically "tar" driven.

100515906

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

What satisfies his requirement

What seems to satisfy smokers requirements is a device that broadly in line with what it claims to be. Thus, ultra-low tar, though indubitably a cigarette, seems only to be a saleable proposition to a minority of customers, who perhaps anyway are a health risk conscious group. Most recent market analyses by tar groups or delivery levels suggest that any "surge" towards lower tar has faded, and that there is a "backlash" toward 15mg type products. I suggest that this area is where smokers really want to be today, though time may be against us maintaining this level. And we may return to my original remarks on drugs and their doses. For a sweet cup of tea, we put in two saccharin, not one. For a bad headache or hangover, we take two aspirin, not one. I suggest that there is a parallel with cigarettes - we may smoke a low delivery cigarette - but in times of tension or altered mood we want a stronger one. What happens? Either we smoke one more intensively (remember, there is no single dose for a cigarette) - or we smoke two in rapid succession. A dilemma appears - do we design a compensatable cigarette - and sell one - or the non (or minimally) compensatable cigarette - to sell two? Given the unit cost, it is very probable that the second option is not viable - so we have, perhaps, to do the first.

Given these considerations, one can predict that in an era of value-for-money, people will want the "highest" delivery for a unit price (in most places if not all, low tar costs the same as high). Whether this "highest" delivery is to be the highest available in a market is unlikely - it is more liable to be a "medium" delivery compensatable product.

100515907

BATCO LTD - FLORIDA AG TOBACCO LITIGATION



SUMMARY

So - give them what they seem to want taste and value. And always remember that, while King James I issued his famous "Counterblaste to Tobacco", in 1604, it is nicer from our point of view to remember Oscar Wilde's words in "The Picture of Dorian Gray" in 1891:

"A cigarette is the perfect type of a perfect pleasure.

It is exquisite, and it leaves one unsatisfied. What more can one want".

Let us provide the exquisiteness, and hope that they, our consumers, continue to remain unsatisfied. All we would want then is a larger bag to carry the money to the bank.

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

100515908

SPECIFIC PROPOSAL

From what I have said in the preamble, you will understand that I do not consider that there is a lot of sense in continuing to drive for ever lower tar. Nearly every BAT company has products in the low tar segment of its markets, but they do not generally command a major position in sales and, apart from costing the consumer the same as higher delivery products, they cost us, the manufacturer, more to produce. This is because, typically, they use more expensive tobaccos, they have high cost filtration/ventilation systems and do not have production economies of scale. In the extreme low delivery range, unless they are specifically designed, they offer very poor "reward for effort".

What would seem very much more sensible, is to produce a cigarette which can be machine smoked at a certain tar band, but which, in human hands, can exceed this tar banding. Such is the case with Barclay. However, Barclay is an extreme example of this "elasticity" of delivery, and this may well be why other manufacturers have spent so much money lining lawyer's pockets in attempts to get it banned.

There are however, ways to obtain moderate "elasticity" through non-obvious cigarette design features. One particular way is to use a recent R&D development, Project Rugby, though this is in some ways, notably the use of 80% expanded tobacco, rather obvious to the expert but not, necessarily, the customer. Project Rugby had origins as low tar, low cost, high quality. Time has moved these to middle tar, lower than normal cost, normal quality. The design of the product with 80% of expanded tobacco means that the product advantages are:

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

100515909

1. High Z/T content allows high tobacco rod pressure drop to be combined with relatively low filter pressure drop plus ventilation to give a nicely "elastic" product which has good smoking mechanics.
2. Blend selection in standard design allows USB/mod USB/mod Va taste types.
3. As configured, cigarette is of low CO/tar index (LOCO) as a benefit for league tables.
4. Due to reduced weight of tobacco and almost standard burn time, sidestream emission and ambient burden are reduced without recourse to special papers/constructions.

Thus, an existing project seems to be able to fulfil a number of the criteria I outlined earlier. We are trying to progress Rugby in market tests - a considerable leap, in our opinion, for an R&D project that was firmly research based a year ago. We acknowledge that there may be some problems in consumer reaction to a novel product such as this. We are trying hard to correct what we see as minor deficiencies, but our goal is to match a target brand on all normal criteria. We can then test out the consumer reaction to a product which will then be exactly what I outlined earlier, that is:-

"A medium delivery compensatable product, with taste and value."  
Time will tell what they think of it, and also my opinions.

And, ending as I did earlier with a quotation, and expanding slightly on Rudyard Kipling, remember always

"A woman is only a woman but a good cigar(ette) is a smoke".  
(Departmental Ditties, 1886).

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

100515910

## Appendix 2

MEMORANDUM FOR THE RECORD/FILE

June 1, 1978

FGC/ks



RE: Telephone conversation between Dr. Bentley and Dr. Colby  
June 1, 1978.

Following Dr. Bentley's and my discussion on the role of the MBRG on the Stockholm World Conference, we had an off-the-record discussion about the future of the MBRG. Apparently, Mr. Pat Sheehy, Chief executive of BAT/England, against the advice of his chief scientific advisor, Dr. G. Felton, will propose during the next executive or other meeting of ICOSI, that the MBRG be dissolved. According to Dr. Bentley this is based on the totally erroneous opinion of Mr. Sheehy that measuring the contribution of sidestream cigarette smoke to the environment, has competent aspects. He seems to think that different cigarette make drastically different contributions and/or that such cigarettes might be developed.

Dr. Bentley also informed me that Imperial will vigorously oppose Mr. Sheehy's suggestion to dissolve the MBRG.

In my own personal judgment, the alleged reasons for Mr. Sheehy's position are only part of the story. In my judgment, Mr. Sheehy's position is based on the fact that he gets poor advice regarding smoking and health from Dr. Felton.

We have known for many years the Dr. Felton basically agrees with the views of the anti-tobacco scientists, who allege that if has been proven beyond reasonable doubt that smoking "causes" lung cancer and other smoking associated diseases. Dr. Felton totally disagrees with my own convictions and the position of the American Industry in general. That, regarding smoking and health, there is a try controversy regarding all the diseases alleged to be associated with smoking. As an example for Dr. Felton's attitude, I would only like to cite that he has labeled me repeatedly as a member of the "flat earth society".

In my judgment, a contributory reason for Mr. Sheehy's attitude is the rather poor performance of Dr. Bentley during the Hamburg meeting (April '78).

In my judgment it would be very unfortunate to dissolve the MBRG because it is important to maintain contacts on a scientist to scientist level, to know what is going on in the various ICOSI member countries. I also see in the MBRG a vehicle to attempt to change the views of the tobacco industry scientists and trying to convince them that there is indeed a smoking and health controversy. I am fully aware that these attempts will be successful and that progress at best, will be firmly convinced that my efforts have at least a successful in changing the scientific feed-back which S. ICOSI executives I have taken advantage who try to convince the MBRG members that they were the beliefs and I have cited to them scientific data position, and challenged them to show me that me be . In no case were any of the MBRG members able to response.

Exhibit 2

7577

50029 7720

In summary, maintaining the NDRG is essential if we want to try to change the erroneous and politically harmful views of the representatives of the non-American tobacco companies.

RECEIVED  
JAN 11 1998  
LIBRARY  
FLORIDA STATE UNIVERSITY  
TALLAHASSEE, FL 32306-1000

50029 7721

## Appendix 3

NT

- (1) Ship all documents to Cologne by T-1
- (2) Keep in Cologne
- (3) OK to phone & letter (these will be destroyed)
- (4) Please make available file cabinet Jim will put into shape end of August or beginning Sept.
- (5) We will discuss in person every 2y & more
- (6) If important letters have to be sent please send to home - I will act on them & destroy
- (7) Advise Rylander - 2/11/98
- (8) Can UK, RR & TSO meet in Cologne to discuss

0000130803

Exhibit 3

## Appendix 4

FILE NOTE

FROM: J. K. Wells  
 DATE: January 17, 1985  
 RE: Document Retention

On Tuesday, January 15, 1985, I talked with Earl Kohnhorst about engineering and scientific reports held by the <sup>Dept</sup> ~~Adm.~~ Department.

I gave Earl copies of papers which contained, variously, document numbers and titles, and document numbers and .... abstracts. I explained I had marked certain of the document references with an X. The X designated documents which I suggested were "deadwood" in the behavioral and biological studies area. I said that the "B" series, <sup>✓</sup> are "Janus" series studies and should also be considered as deadwood.

I said in the course of my review of scientific documents stored by <sup>Dept</sup> ~~Adm.~~, a great deal of deadwood had appeared, such as studies of the chemical composition of Canadian tobacco leaf in 1965. I suggested that in the context of moving the <sup>Dept</sup> ~~Adm.~~

*Raw -  
document  
search*

*... is delete  
in WMR.*

660530855

*Exhibit 13*

471

-2-

facility to the new building and in the context of building a reference set for smoking and health materials, which contained mainstream scientific materials, <sup>KDE</sup> ~~Bob~~ should undertake to remove the deadwood from its files. I said the articles I had suggested were a first pass at removing the deadwood and that <sup>KDE</sup> ~~Bob~~ should do additional work to identify and remove deadwood on other subjects.

I suggested that Earl have the documents indicated on my list pulled, put into boxes and stored in the large basement storage area. I said that we would consider shipping the documents to BAT when we had completed segregating them. I suggested that Earl tell his people that this was part of an effort to remove deadwood from the files and that neither he nor anyone else in the department should make any notes, memos or lists.

I mentioned that Carol Lincoln had said that offshore research and engineering studies sent to B&W in care of Earl and Bob Sanford during roughly last one year period had not been sent to her for logging in and that most of those documents may be in the offices of Earl and Bob and would not be reflected on the list which I had reviewed. Earl said he would send all of the studies in his possession to Carol, who would make a list

0905300554



-3-

of the documents and send it to me for review. Earl suggested  
that I should ask Bob Sanford to do the same.

J. K. W.

pcd/3332k

650530890

## Appendix 5

CENAL (12/12/63)

BROWN & WILLIAMSON TOBACCO CORPORATION  
OUTGOING CABLEDATE July 3, 1963TO: MR. MCCORMICKCITY: LONDON COUNTRY: (ENGLAND)

PRIOR TO RECEIPT YOUR TELEX JULY 3 HOYT OF TIRC AGREED TO WITHHOLD DISCLOSURE  
BATTELLE REPORT TO TIRC MEMBERS OR SAB UNTIL FURTHER NOTICE FROM ME. FINCH  
AGREES SUBMISSION BATTELLE OR GRIFFITH DEVELOPMENTS TO SURGEON GENERAL  
UNDESIRABLE AND WE AGREE CONTINUANCE OF BATTELLE WORK USEFUL BUT DISTURBED  
AT ITS IMPLICATIONS RE CARDIOVASCULAR DISORDERS.

WE BELIEVE COMBINATION BATTELLE WORK AND GRIFFITH'S DEVELOPMENTS HAVE  
IMPLICATIONS WHICH INCREASE DESIRABILITY REEVALUATION TIRC AND REASSESSMENT  
FUNDAMENTAL POLICY RE HEALTH. HOPE TO GET OFF COMPREHENSIVE NOTE NEXT WEEK.

YEAMAN

Sent by: MScc: Messrs. Finch, Wad.  
(2 copies to Cable Dept.)*Exhibit 4*

P

## Appendix 6

PRIVILEGED

MEMORANDUM

TO: E. PEPPLES  
cc: R. H. Sachs  
FROM: J. K. Wells, III  
Corporate Counsel  
DATE: September 25, 1981  
RE: Additives

Pursuant to our discussion, here is a thinkpiece on the additives issue.

Committee of Counsel Meeting, September 23

The positions announced at the Committee of Counsel Meeting on September 23 are as follows:

RJR: Continue meetings with HHS at the industry's initiation and two or three meetings from now submit to HHS a list of commonly used casings and flavorings which would include about thirty items.

PH: Submit a list of about fifty items soon.

American: Submit a list of the most heavily used casings and flavorings at any time.

Lorillard: Stall any disclosure by industry as long as possible; industry should immediately appoint an independent panel of reputable toxicologists to review a list of as yet undetermined items.

L&M: Stall disclosure and industry should immediately appoint one independent toxicologist to review a list.

Horace Kornegay's assessment of the legislative situation is that the current criticism of the industry on the hill in the additives area is based on the industry's failure to disclose. He cannot predict whether the industry could sell an independent review panel; it's possible.

*Exhibit 5*

521038287

Stan Tempko believes the concept of review of additives by an industry panel "won't fly."

Disclosure and Industry Toxicologists - Pro and Con

The following reasons support disclosure:

- (1) There are no toxicological problems with the industry's additives - the judgment about most additives is "uncertain".
- (2) If the industry discloses now the problem will go away.
- (3) Disclosure now will appease critics in the Congress who are attacking the industry on the basis of its refusal to disclose.

The following reasons oppose disclosure:

- (1) There is long term pressure to use the additives issue to attack the industry in public and support adverse legislation, such as the "little FDA" proposed by the Surgeon General in 1979. Disclosure would give anti-industry activists a focal point for the next phase of the attack, which might begin with a renewal of the HHS request for disclosure of the material which the companies have on hand pertaining to health consequences of each additive or review of the list by scientists who are unfriendly to the industry.
- (2) Although the balanced, rational judgment of the industry is that there are no problems with its additives, anti-industry activists would soon create a body of scientific opinion that many of the additives posed grave problems.
- (3) Subsequent to disclosure, anti-tobacco activists would probably be successful in presenting a persuasive picture of adequate industry research pertaining to health consequences of additives and a body of adverse scientific opinion. The picture would provide strong support for adverse legislation and public criticism of the industry's products. No agreement which the companies could arrange with HHS will protect the list of additives from disclosure to a congressional committee and public disclosure at the whim of the committee, even assuming good faith on the part of HHS.

The following reasons support the appointment of an independent panel of scientists:

521038288

(1) Avoid adverse legislation by allowing MMS to announce it is meeting its requirements through industry self-policing.

(2) Avoid mandatory disclosure of all additives.

(3) Improve the public image of cigarettes through MMS endorsement of industry self-policing. Gain control of how additives issue will be handled even if self-policing is not sanctioned.

The following reasons oppose an industry panel of toxicologists:

(1) Products liability litigation risk is increased because of the possibility that the industry appointed panel might conclude that certain additives have problems.

(2) Unnecessary because the problem will go away if the industry simply discloses some number of its additives.

The product liability litigation risk position stated by Bob Northrip is based on the opinion that it would be more difficult to defend against adverse assessments of additives by an industry panel than adverse assessments by MMS scientists. The assessment is the same even if the MMS scientists concluded that a larger number of substances were dangerous. The Northrip position is that a better alternative would be company review and testing of additives. If company testing began to show adverse results pertaining to a particular additive, the company control would enable the company to terminate the research, remove the additive, and destroy the data. Hopefully, the company testing would be done prior to adoption of an additive, but if tests were made of an additive in current use the additive would be discontinued and eliminated from the C&B list before MMS had opportunity to make adverse comment.

A few comments are in order about the Northrip position. There is no way to know that each company would have performed review and testing of its additives before submitting them to C&B. When Northrip gave his assessment of the seriousness of the risk he described, he assumed that the industry panel would be asked to give a judgment in the form of "safe" or "unsafe." Northrip also assumed that a toxicologist who reviewed the industry list of additives would probably find four or five substances which were problems. This is not his own conclusion; he made this assumption because it had been stated as a probability at the table.

521038289

Presenting the B&W Position

Key factors in assessing the industry position on additives will probably be:

- (1) The importance and possibility of improving the image of the industry's products through MMS sanction of industry self-policing.
- (2) The assessment of the legislative and public affairs environment over the next five years.
- (3) The assessment of the products liability risk.

We cannot argue that there is no increased products liability risk inherent in the B&W position. However, the increased risk must be judged against alternatives forecast for the future. If, following disclosure, adverse scientific comment about currently used additives and the claimed failure of the industry to perform adequate testing prior to usage become major public affairs issues, the result would also be an increase in products liability risk. Is it feasible to expect each of the companies to do review and testing of its additives and remove problematical additives from usage and from the list? If so, then the risk of adverse finding by industry toxicologists is substantially reduced. If not, then the Northrup scheme to prevent adversity subsequent to disclosure is not available.

There appears to be some confusion that the recommendation of an independent industry panel of toxicologists is primarily for the purpose of developing information about our additives. Of course, this is not the case. The industry panel is a formal mechanism for self-policing as part of an industry strategy to gain MMS sanction. The panel is not intended as a substitute for each company's own review and testing of its additives.

The best pitch for B&W's position on additives might be as follows:

The industry can improve public acceptance of its products through MMS approval of industry self-policing of additives. Self-policing will involve research at some point in the future when the research can be satisfactorily set up; immediately the formal mechanism for self-policing would involve only literature review and opinion. It is assumed that the companies will have done their own private review and research of additives and eliminated any which cannot be defended.

521038290

A paper describing the B&W position is attached. The most significant change from the earlier draft is the form of the toxicologists' opinion in the literature review phase.

J. K. W.

/slh82

521038291

## Appendix 7

(1258)  
SECRET

PLANNING ASSUMPTIONS AND FORECAST FOR THE PERIOD 1977-1986<sup>+</sup>

FOR

R. J. REYNOLDS TOBACCO COMPANY

- I. THE GENERAL BUSINESS CLIMATE . . . . . 1
- II. THE TOBACCO INDUSTRY AND R. J. REYNOLDS TOBACCO COMPANY . . . . . 2
- III. THE RESEARCH DEPARTMENT . . . . . 3
- A. GENERAL . . . . . 4
- B. SMOKING AND HEALTH . . . . . 5
- C. REGULATION, TAXATION, ETC. . . . . 6
- D. RAW MATERIALS AND PROCESSES . . . . . 7
- E. PRODUCTS . . . . . 8
- F. MISCELLANEOUS . . . . . 9

Research Department  
March 15, 1976

Exhibit 6

8407

THIS DOCUMENT AND ITS CONTENTS ARE SUBJECT TO A COURT ORDER AND SHALL NOT  
BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER.



1. THE GENERAL BUSINESS CLIMATE

1. No sudden change will occur in the "system" or business environment in which we operate, i.e., there will be no catastrophic pestilence, disease, world war, revolution, major depression, natural disaster, or the like. There is a possibility of renewed warfare in the Mid-East probably again accompanied by a petroleum crisis.
2. As the present "under 35" age group becomes the dominant power group in our society, the new personal and political values of that group will exert a more predictable influence for change upon most aspects of government, society, business, morality and foreign policy. The changes which occur are not expected to be favorable to business. However, this large consumer group will have needs to be satisfied in terms of tobacco products. This offers us a large market if we are sufficiently astute to identify those needs and design and sell products to meet them.
3. World leaders of morality, such as the Pope, will exert great influence to modify the personal mores, and consequently the civil and political values, of the present "under thirty" age group. There will be a strong swing toward wholesomeness, integrity and decency which will affect the consumer outlook and product expectations of this group. Price, quality and durability will become more important than fad, flamboyant fashion or sex appeal.
4. The "consumerism" movement will remain strong, and the ability of consumers to objectively judge the quality and utility of products may increase. Product labeling will become more definitive in terms of composition, date, hazards, and the like.
5. Present socio-legal-governmental trends will continue. Concern for "social justice", environment, energy, population control, and product safety will remain high. Governmental regulation of almost all aspects of our society will increase.
6. The energy shortage and to a lesser extent other material shortages over the next decade will cause a change in world economy and politics, a change in national priorities and life style, and increased cost and difficulty in doing business. Concern for environment will remain high among certain groups; and although energy needs will finally outweigh environment considerations, the environmental groups will continue to fight and delay. These influences will continue beyond the projection period and will intensify as energy needs and environment consideration exert a greater effect on the average person.
7. The U. S. standard of living will not increase at the rate of the last decade. The amount of discretionary income will decrease. The main squeeze will be on the middle economic class.

CONFIDENTIAL  
 THIS DOCUMENT AND ITS CONTENTS ARE SUBJECT TO A COURT ORDER AND SHALL NOT  
 BE DISCLOSED OR REPRODUCED WITHOUT THE WRITTEN CONSENT OF THE COURT

8407

## 1. THE GENERAL BUSINESS CLIMATE (cont'd)

8. The health consciousness and technical understanding of the population as applied to products, will increase. — ?
9. Price-wage-profit controls will remain a possibility for at least several more years.
10. Coping with the business cycle will remain difficult. The profit squeeze will remain a major problem unless periodic "pass-through" price increases are competitively feasible and allowable.
11. Due in large part to political tampering with an economy already under real stress, it was long thought that the economy would cycle between high unemployment and high inflation at about 2 to 3-year intervals. However, it is apparent from recent experience that this idea should be abandoned. For several years unemployment and inflation have been cycling together. As a 10-year average, inflation will probably run at about 8% and unemployment at about 8%; i.e., politicians will continue, in election years, to place more emphasis upon full employment than upon price stability. Also for complex reasons, the government is committed to a continued policy of inflation.
12. A key factor in the control of the economy's vigor is the decreasing birth rate. Even at current levels, every facet of the juvenile market may expect to be depressed. And only a few years beyond the production period looms a markedly reduced generation of young adults who will need consumer goods. This may provide a built-in cooling of the economy, leading toward less inflation and specialized areas of unemployment.
13. More and more evidence of financial mishandling by cities, states, and national governments will leak through to the public in the immediate future. The root causes, such as overextending in welfare programs, abuse of expenditures in such programs, corruption, waste, unwise and expensive experimentation with educational programs, and unnecessary services will become more evident to the public and will elicit strong response and possibly backlash. Considerable instability in municipal, state and federal spending policies and programs will result, with attendant uncertainties in taxation outlook.

THIS DOCUMENT AND ITS CONTENTS ARE SUBJECT TO A COURT ORDER AND SHALL NOT BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER

# II. THE TOBACCO INDUSTRY AND R. J. REYNOLDS TOBACCO COMPANY

## III. THE RESEARCH DEPARTMENT

The format for the discussion of the two sections (a) The Tobacco Industry and R. J. Reynolds Tobacco Company and (b) The Research Department has been presented as two separate sections in past issues of Planning Assumptions and Forecasts. This format has been changed for the present memorandum.

The planning assumptions and forecast for The Tobacco Industry - RJR for 1977-1986 paralleled, where applicable, on the same page with comments on the possible response of the Research Department to the assumptions affecting the Industry and RJR. While this parallel format leads to some repetition in the text, hopefully it will provide a better understanding particularly to personnel in other departments of the Research Department's involvement in the situations forecast for the 1977-1986+ period.

### A. General

1. The profit squeeze, the increasing cost of domestic and Oriental leaf tobacco, increased taxation, and the smoking health controversy will remain the major problems of the Industry.

1. As the technical complexity of the tobacco business and the demand for its products increase, there will be increased needs and opportunities for research, particularly in the area of basic research. Results and techniques developed in basic research over the years will be utilized at an increasing level.

Projects aimed at effecting changes in economics will continue to be a major short- and long-term emphasis.

The need for research services and new analytical methods developed in analyses, literature, ecology, health related, and the like, will increase as the size, production, and scientific complexity of the tobacco business increase.

Closer working relationships between Manufacturing, Marketing, Tobacco Development, Legal, and other Company Departments will provide improved pertinent to research programs.

11. THE TOBACCO INDUSTRY AND R. J. REYNOLDS TOBACCO COMPANY

111. THE RESEARCH DEPARTMENT

A. General

2. RJR-T has a great opportunity to capitalize on the growing foreign market, particularly the market in "emerging nations". Increasing trade barriers and international monetary difficulties, increased regulation and taxation of tobacco products in foreign countries, and increased requirements that much of the tobacco used be "home grown" will add to the difficulty in penetrating these markets.
3. Over the long run the influence and political power of the Industry will decrease.
4. Total cigarette consumption in the U.S.A. as well as per capita cigarette consumption will be affected principally by the following demand factors (listed in order of estimated decreasing importance):
  - a. Total U.S. population (18 and over)
  - b. Age distribution within this population.
  - c. Taxation and other cigarette price factors
  - d. The impact of the health controversy
  - e. The per capita disposable income

For the projection period, per capita consumption will stay level, at best, and may tend to decrease as the percentage of new smokers decreases. It can be assumed that the other factors will have their "logical" impacts. Thus, the long-range unit sales will increase no more than two 2% per year. For RJR-T, the unit sales increase will exceed that of the Industry at least in the first few years of the projection period.
5. The public concern over energy, inflation, political integrity, unemployment, etc. will create a period of national psychological stress, during which smoking-health concerns may be overshadowed.
6. The declining birthrate, if continued, indicates decreased cigarette sales in 15 to 20 years, due to the reduced consumption by the then large over-50 age group.

2. Research Department will be involved. RJR-I on request (probably through RJR-T)

*Opportunity to approach tobacco with a home test*

CONFIDENTIAL  
THIS DOCUMENT AND ITS CONTENTS ARE SUBJECT TO A COURT ORDER AND SHALL NOT BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER.

# II. THE TOBACCO INDUSTRY AND R. J. REYNOLDS TOBACCO COMPANY

## III. THE RESEARCH DEPARTMENT

### B. Smoking and Health

1. The scientific controversy over the alleged effects of smoking on the health of the smoker will stabilize or abate, provided Industry, Government and other groups begin to reach a truly constructive, collaborate consensus and joint effort; otherwise it may intensify. A hard-core anti-tobacco group will always remain and will be joined by anti-big-business groups in attacks on the tobacco industry.
2. The negative effect of the smoking-health controversy on consumer behavior is approaching a maximum, i.e., no new adverse data would be expected to materially change the attitude of the public toward smoking and health.
3. The anti-tobacco lobby, in addition to harping on the alleged association of cigarette smoke with cancer and other diseases, will aim a major long-range thrust at smoking as an attempt to stigmatize it as a socially objectionable and lower class habit. One of the major tools in this endeavor will be the campaign against the effects of environmental smoke which is labeled "passive smoking". "Passive smoking" is defined as the exposure to tobacco smoke by nonsmokers. Three related but distinct areas need be considered:
  - a. Legislative activities of anti-tobacco forces aimed at prohibiting or restricting smoking in public places such as restaurants, semi-public places such as the working place in general, including offices, factories, etc. A concerted effort to counteract these activities is being made by the Tobacco Institute; no RJR initiative is needed.
  - b. The long-range, more important, second area is the unequivocal declaration to label smoking an objectionable habit. Very little is being done to contest this industry-wide, and an RJR-led effort could be highly important.

1. Smoking-health research done on a collaborative basis by Company, Government and private or academic groups will require the Research Department to provide inputs such as consultation, analyses, and possibly various laboratory studies.

Research related to the smoking-health controversy will continue to receive major short- and long-term emphasis.

2. Awareness will be maintained by the Research Department.

3. Techniques to determine the quality of sidestream smoke to which a nonsmoker is exposed will be developed.

*Low tar cigarettes generally have the rates of tar and nicotine released to the nonsmoker. Control of sidestream smoke may be a future goal.*

THIS DOCUMENT AND ITS CONTENTS ARE NOT TO BE COPIED OR REPRODUCED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM, WITHOUT PERMISSION IN WRITING FROM THE RESEARCH DEPARTMENT.

II. THE TOBACCO INDUSTRY AND R. J.  
REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

B. Smoking and Health

- c. The third effort of the anti-tobacco lobby could be labeled indirect prohibition. This refers to the effort of the anti-tobacco lobby to enforce over a period of time a steady lowering of tar and nicotine levels with the purpose that lowering tar and nicotine, especially the latter, will eventually lead current smokers to stop altogether and the "new smoker" not to start. Very little is being done on an industry-wide basis to counteract this, and a RJR initiative seems warranted. It is important that efforts on this point be made, not only within the United States, but also overseas.
4. New data favorable to smoking, if generally accepted by the public, could significantly improve the position of the Industry. If RJR were to become the industry spokesman in matters relating to smoking and health and take the offensive in presenting information favorable to the industry (and RJR-1), the impact of the oft-repeated arguments of the anti-tobacco forces will be offset.
  5. Nicotine, ultimately, may return to its position in the 1964 Surgeon General's report; i.e., not good for a few persons with specific health problems, but in general not a significant health hazard.
  6. Currently cigarettes having no more than 12 mg of "tar" and about 0.8 mg of nicotine, with accompanying reduction in carbon monoxide, etc., would appear to be considered acceptably "safe" to the more moderate anti-tobacco group. With time, these maximum acceptable values would be expected to drop to lower levels; e.g., 5 mg of "tar", 0.5 mg of nicotine.
  7. Current simplistic emphasis on direct reduction of smoke "tar" and nicotine will remain high but may be replaced gradually by emphasis on selective reduction of specific smoke components alleged to be harmful, with shift from "prohibition-total cessation" to development of an allegedly "safer" cigarette. This is based on the growing acknowledgment by anti-tobacco groups that large numbers
4. Awareness will be maintained by Department.
  5. Awareness will be maintained by Department.
  6. The Research Department will be to assess the composition of tar from such cigarettes in terms of flavorant delivery, physiologic and satisfaction, and the like effort will be directed toward "tar" concept.
  7. Anticipation of the nature of the specific selective smoke component alleged to be harmful will permit development of appropriate analytical procedures, methods to control level objective assessment of alleged health effects, etc.

CONFIDENTIAL  
THIS DOCUMENT AND ITS CONTENTS ARE SUBJECT TO A COURT ORDER AND SHALL NOT BE USED OR DISCLOSED EXCEPT AS PROVIDED IN THE COURT ORDER

II. THE TOBACCO INDUSTRY AND R. J.  
REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

B. Smoking and Health

of people will continue to smoke and that the realistic goal should be to minimize the alleged health hazards claimed to be associated with smoking.

8. Increased research effort under the National Cancer plan will not furnish substantial amounts of immediately useful new information bearing on the smoking-health controversy, but, by the end of the decade, government research may point to moves which it feels the Industry can make toward allegedly "safer" cigarettes, with at least indirect government endorsement.
  9. Substantial progress will result toward what is alleged to be a "safer" cigarette from use of a combination of many techniques, e.g., use of homogenized tobacco, porous paper, improved aeration and filtration, alteration of the burning process, pre-treatment of tobacco additives, alteration of tobacco varieties, use of synthetic or extended tobacco, and the like, rather than from a single effect.
  10. Some presently-used flavorants, additives, and colorants may come under attack because they may be claimed to add to the alleged health hazards of smoking. Detailed information on the properties of flavorants and additives with long historical use may be required by Federal agencies.
  11. Despite improvement in methods for prediction of susceptibility to, detection, prevention, treatment or cure of some of the diseases alleged to be associated with tobacco usage, and improvement in the alleged safety of tobacco products, the allegations regarding the "risk" of smoking will not be substantially altered in the next five years.
  12. Mouse skin painting will remain the standard but imperfect test procedure for alleged carcinogenicity of smoke for most of the decade, but progress will be made toward development of new more rapid and meaningful, and less expensive test procedures. Inhalation testing will become increasingly important as the method is improved and becomes more widely accepted.
8. Consultation of Research personnel with National Cancer Institute personnel will be directed toward ensuring that government personnel recognize and acknowledge the Company's (and its subsidiaries') contributions to the studies in progress or planned.
  9. Studies on the effect of various modifications of these techniques on the quality and properties will be conducted or implemented to ensure that progress is indeed in the direction of a "safer" cigarette.
  10. In anticipation of such attacks, the Research Department will, as time and personnel availability permit, determine the nature and chemical and physical properties of the major and minor components of all flavorants and additives.
  11. Because both the "tar" yield and concentrations of allegedly harmful components in the "tar" will probably continue to decrease during the production period, the "risk" from smoke should be reassessed in terms of response.
  12. Awareness of alternate short-term, expensive test procedures for the carcinogenicity of smoke will be maintained.

THIS DOCUMENT CONTAINS INFORMATION THAT IS UNCLASSIFIED DATE 11/19/01 BY 60322 UCBAW

8

11. THE TOBACCO INDUSTRY AND R. J. REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

B. Smoking and Health

13. The component or components of tobacco smoke deemed responsible for alleged health hazards associated with smoking will be more closely defined during the decade. Appropriate biological test procedures for these components will be developed.
14. Carbon monoxide will receive increasingly more attention as a major alleged smoke-health hazard, particularly when FTC begins to publish carbon monoxide values for brands in about two years. Before the end of the projection period, nitric oxide will also receive increased attention.
15. Studies may identify certain types of individuals highly susceptible to diseases allegedly associated with smoking. This may allow others to smoke with less health anxiety.
16. Diseases or disabilities not presently alleged to be associated with smoking will, in the projection period, be alleged to be so associated.
17. Progress will be made in developing techniques to make cessation of smoking easier.
18. Anti-tobacco programs aimed at the public, and particularly at children, will continue, and with experience and time may become more effective.
19. Industry-sponsored research related to smoking and health is likely to be expanded, at least for the next several years.
20. The search for a quality cigarette free of alleged health hazards will continue, but it is unlikely that smoking critics will be totally satisfied with any product produced. Such a product would, of course, be a boon to the industry.
13. The Research Department will anticipate the nature of the component or components. Appropriate methods to reduce the levels of components will be investigated. Claims that such components are responsible for health hazards will be scrutinized as to their validity.
14. Continued emphasis on carbon monoxide by anti-tobacco forces will require continued research on methods of controlling levels of carbon monoxide in smoke.
16. The validity of such allegations will be objectively scrutinized and counterarguments, if available, will be prepared.
17. Awareness will be maintained.
18. Awareness will be maintained.
19. Research services in the form of analytical methods, consultation, preparation, and the like will be provided as requested.
20. All necessary research services will be supplied to Tobacco Development, Manufacturing, etc. in support of search.



II. THE TOBACCO INDUSTRY AND R. J.  
REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

C. Regulation, Taxation, Etc.

1. Composition, manufacture, advertising, sales and use of tobacco products will come under increasing governmental regulation.
2. The Federal government may set maximum permissible levels for "tar", nicotine, carbon monoxide, and other components, probably via a "voluntary" agreement with the industry. Failure to comply may result in increased taxation or the necessity to immediately reduce "tar" levels of major brands while maintaining quality. The probability and the date of such government action may be advanced by the introduction of low "tar" products such as the Carlton and the 100M which demonstrate the feasibility of low "tar" cigarettes.
3. Taxation of tobacco products will increase, becoming more punitive and ultimately more specifically related to the alleged health hazard of each product.
4. Additives or adulterants and colorants of tobacco products may be regulated.
5. The FTC may extend its smoke analyses to include components in addition to "tar" and nicotine. Carbon monoxide and other gas-phase components are the next likely group. Analyses for these other components may ultimately be required in advertising. This extension of analyses may require simultaneous determinations of various entities; e.g., "tar", nicotine, carbon monoxide, and nitric oxide on the same sample.

1. Research services to provide for to combat such regulation will be provided on request.
2. Research will provide technology to enable such reductions to be achieved.
3. Awareness will be maintained.
4. Awareness will be maintained.
5. Anticipation of analyses required by FTC will be a continuous Research Department function.

CONFIDENTIAL  
 THIS DOCUMENT AND ITS CONTENTS ARE SUBJECT TO A COURT ORDER AND SHALL NOT BE USED SHOWN OR DISTRIBUTED EXCEPT AS REQUIRED BY THE COURT ORDER

II. THE TOBACCO INDUSTRY AND R. J.  
REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

C. Regulation, Taxation, Etc.

- |  |  |
|--|--|
| <p>6. Patent protection on "new" tobacco technology, particularly in the areas of flavorants, additives and synthetic tobaccos, will be increasingly difficult to obtain.</p> <p>7. Lawsuits by plaintiffs allegedly harmed by use of tobacco products will dwindle with time.</p> | <p>6. With a concerted effort involving preparation of appropriate arguments, rebut the patent examiner, patents be obtainable where such effort deemed advisable.</p> <p>7. The Research Department will supply services necessary to aid in defense against such lawsuits.</p> |
|--|--|

D. Raw Materials and Processes

- |  |  |
|--|--|
| <p>1. On both a domestic and world-wide basis, unit sales of cigarettes will continue to increase. Leaf prices will increase by an amount in excess of the inflation rate.</p> <p>2. The projected leaf price squeeze will require acceleration of maximization of yield of cigarettes per unit weight of tobacco (e.g., full usage of stems, scrap and dust; maximum use of B13 tobacco; shrinkage of tobacco rod dimensions; relaxation of firmness standards; use of whole plant, stalk and all; and the like).</p> <p>3. Growing and processing of tobacco on the farm will become more technically sophisticated, e.g., trends to improve varieties and cultural practices, mechanized harvesting, bulk curing, and the like will accelerate. This will change the cost, quality, and manufacturing characteristics of our raw material.</p> <p>As growing and processing of tobacco do become technically more sophisticated, both quality and cost will approach realistically acceptable values, the dominant fact being, as with all agricultural products, the law of supply and demand will assert itself and eventually sufficient tobacco of satisfactory quality and reasonable price will be available.</p> | <p>2. The Research Department will provide necessary information on the smoke composition and quality of techniques described.</p> <p>3. Awareness will be maintained.</p> |
|--|--|

THIS DOCUMENT AND ITS CONTENTS ARE SUBJECT TO A COURT ORDER AND SHALL BE HELD CONFIDENTIAL OR PROPRIETARY

II. THE TOBACCO INDUSTRY AND R. J.  
REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

D. Raw Materials and Processes

4. Government support of domestic tobacco production eventually will be dropped and Federal support of agricultural research will be curtailed. The entire system for production and marketing of leaf will change, and the tobacco material produced will change in form and have substantially lower smoking and physical quality. The trend will be toward mechanized production of a chopped, whole-plant, bulk-dried tobacco material derived from high density plantings on relatively few very large farm complexes, domestic and/or foreign, on a contract basis, perhaps in new geographic regions, possibly on a two-crop per year basis.

5. Substantial changes in the physical and smoking qualities of our raw material mix will require substantial changes in our processing and manufacturing techniques. As raw material quality declines severely, our present processes, aimed at preserving and enhancing the qualities of natural leaf, will give way to processing where the over-riding aim will be to produce the most product from the least amount of raw material, with desirable smoking qualities being imparted during processing via flavorants, additives, substantial diluents, and chemical treatments.

6. This change in processing philosophy may ultimately give rise to much simpler, less expensive manufacturing systems for converting raw material to finished cigarette. Design of such systems will also be directed toward reduced energy consumption.

4. Awareness will be maintained.

5. A competitor or other agency with an advance in technology may require rapid technological response from the Research Department at the expense of on-going projects.

Substantial changes in processing technology, raw materials, and product composition and configuration may lead to substantial alteration of product position, will necessitate increased effort on biological evaluation of new or altered products. Under the Company policy, this work will be contracted to independent laboratories with arrangements, experimental monitoring, and interpretation of results the primary responsibility of the Research Department. On the possible in terms of cost and ability to arrange for some of this to be done by the National Cancer Institute.

6. Efforts along these lines will continue at an increased level.

THIS DOCUMENT IS NOT TO BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM, WITHOUT PERMISSION IN WRITING FROM THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION.

II. THE TOBACCO INDUSTRY AND R. J.  
REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

D. Raw Materials and Processes

7. If homogenized tobaccos are produced and used, the processing involved will present a unique opportunity to manipulate and control the composition of the product and its smoke, and to standardize product quality and effect overall processing economies.
  8. Imported, non-Oriental tobaccos will find growing use of domestic products as long as they are substantially less expensive than domestic tobaccos and can be upgraded by addition of flavor and other additives. The economics of many countries which are sources of off-shore tobaccos will grow at a faster rate than that of the U.S.A.; thus, some off-shore tobaccos may rapidly be priced out of our reach.
  9. The use of Turkish tobacco will decrease as the tobacco becomes less available, more expensive, and of lower quality.
  10. One or more "synthetic" tobaccos or tobacco extenders may find appreciable use in tobacco blends. By the end of the projection period, one or more synthetic tobaccos or tobacco extenders may be developed to the point where they will provide reasonably acceptable cigarettes alone, not admixed with tobacco. Synthetic tobaccos are being promoted as offering alleged health advantages to the smoker and probably will not in the near future be less expensive to use than natural tobaccos. Natural extenders which the Government or others suggest will reduce allegedly harmful effects of tobacco may come into use. They may also offset leaf shortages and improve profitability; presently, however, all non-tobacco materials are under a "cloud".
  7. Past studies indicated that homogenization of the strip portion appears to appreciably affect smoke quality adversely. Hence, further sophisticated work on homogenization of leaf appears clearly indicated.
  9. By 1978, RJR-T will produce and market proprietary Turkish flavorant in domestic products. In addition, proprietary flavorants first used a decade ago in the Research Department work in progress will yield new flavorants.
  10. Awareness of competitors' "synthetic" will be maintained. In specific instances, examination of smoke "strangers" may be instituted.
- Our J10 product, when developed, will offer a very attractive alternative to use of synthetic tobaccos or tobacco extenders, in terms of both secondhand smoke and alleged "safety". Appropriate studies on the properties of J10 tobacco smoke will be completed in late 1977.

11. THE TOBACCO INDUSTRY AND R. J.  
REYNOLDS TOBACCO COMPANY

111. THE RESEARCH DEPARTMENT

D. Raw Materials and Processes

11. There will be increasing emphasis on chemical alteration of smoking quality as "smoke numbers" continue to trend downward and as off-shore, processed, homogenized or synthetic tobaccos are increasingly used, along with full return stems.
12. In terms of economy, a cigarette made with 100% expanded tobacco and stems is a highly desirable objective.
13. For environmental reasons, manufacture and use of Freon and related halogen compounds may be severely controlled or eliminated. This will require us to develop alternate to the present G13 process.
14. Other companies, domestic and foreign, will continue to seek satisfactory ways to expand tobacco which are free of our patents, hence, some return from royalty payments may diminish in time.
15. Licorice, natural menthol, cocoa, sugar and other natural additives for tobacco will be in short supply and/or very expensive by the end of the projection period.
16. In the interests of efficiency, the industry will move toward automation -- computerization of inventory control, blending and processing, quality control, etc.
11. Comparison and quantitation of profiles will be improved to assess the effects of lower "smoke numbers" and/or inclusion of off-shore, processed, homogenized or synthetic tobaccos.
12. Further research on smoke and qualities of cigarettes containing 100% expanded tobacco will be needed.
13. Awareness of all factors affecting the Freon 11 situation (climate, theory, cardiovascular problems) will be maintained. Consideration of TPD, Arjay, etc. will continue.
14. Despite the low probability, work to develop new or alternate expansion processes will continue. Attempts will be made to protect Company by patenting all such alternatives.
15. Alternatives will be sought.
16. The Research Department is employing considerable automation and computerization in its operations. Data computerization will be extended. However, there are no obvious areas for major improvement in per man by further automation.

II. THE TOBACCO INDUSTRY AND R. J.  
REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

E. Products

1. WINSTON and SALEM market shares will peak and then decline during the projection period. Marlboro will displace WINSTON as the leading domestic cigarette in 1976. Our objective is to maintain RJR-T as the leading Company in our industry.

Extremely important are our related objectives to have a leading product in each category and to discover and produce leading products in new categories.

2. The present large number of people in the 18 to 35 year age group represents the greatest opportunity for long-term cigarette sales growth. Young people will continue to become smokers at or above the present rates during the projection period. The brands which these beginning smokers accept and use will become the dominant brands in future years. Evidence is now available to indicate that the 14 to 18 year old group is an increasing segment of the smoking population. RJR must soon establish a successful new brand in this market if our position in the industry is to be maintained over the long term.

3. The total market for low "tar" and nicotine brands will continue to grow. The 100-mm (and 100-mm+) regular and menthol categories will also continue to grow. Combinations of these categories (100-mm low "tar" cigarette in the 4- to 6-mg range, regular and menthol) offer new opportunities. The market for very low "tar" cigarettes (2 mg or less) will remain limited for at least 5 years. The low "tar" cigarette opportunities in the 2- to 10-mg range will be exploited in the next few years and may become an important market segment by 1981.

1. Work to improve smoke quality. Innovations directed toward development of new brands will continue to receive major short- and long-term emphasis.

2. Work to improve smoke quality. Innovations directed toward development of new brands will continue to receive major short- and long-term emphasis.

3. Work to improve smoke quality. Innovations directed toward development of new brands will continue to receive major short- and long-term emphasis.

CONFIDENTIAL  
THIS DOCUMENT AND ITS CONTENTS ARE SUBJECT TO DISCOVERY AND DISCLOSURE  
BE USED: SHOWING OR DISTRIBUTION EXCEPT AS PROVIDED IN THE CONFIDENTIALITY ORDER

II. THE TOBACCO INDUSTRY AND R. J.  
REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

E. Products

- 4a. Carbon-filtered cigarettes will continue to decline in share of market because of inherent off-taste. Unfiltered cigarettes and the present 85-mm Normal Flavor Filter (UFF) cigarette will decline in share of market.
5. By the end of the projection period, essentially all cigarettes sold will have either filters or mouthpieces.
6. Most brands, responding to pressures for lower numbers, will eventually use some form of air dilution.
7. Spin-offs from established brands will yield more than modest net brand gain, but wholly new brands, of good quality and image, have higher market potential.
8. With exception of the very low "tar" cigarettes (HOF), any fully successful new brand will have to deliver real satisfaction to the smoker and will have to be demonstrably different in composition and/or physical configuration from present products.
9. Increasing attention will be paid to identification, measurement and reduction of unpleasant "negative" factors in cigarette smoke, such as stemmy taste, "dry-mouth" irritancy, and the like. The most successful brands will increasingly become those which deliver nicotine satisfaction accompanied by the least amount of "negatives". Negative, or unpleasant, flavor and "mouth-feel" are primary factors in customer selection of cigarettes, along with nicotine satisfaction.
10. There may be a limited market for a quality cigarette delivering essentially no nicotine.
4. The Research Department will attempt to anticipate brands.
5. New filter concepts will be explored.
6. Capability will be maintained; new concepts will be explored.
7. New cigarette concepts will be explored.
8. In some instances, the Research Department may be the "court of last resort" in providing the necessary smoke data to indicate that an additive, colorant, etc. does not contribute "strangers" to the cigarette.
9. Panel testing will remain an important measure of tobacco smoke quality; however, panel testing needs to be improved to become more "realistic" and a more objective measurement based on reproducible analytical data profiles, is needed and will be technically feasible.
10. A low-nicotine cigarette may be acceptable in terms of smoke quality by inclusion of certain nitrogen or precursors of these compounds or other flavorants.

THIS DOCUMENT IS UNCLASSIFIED DATE 01-10-2001 BY 60322 UCBAW

II. THE TOBACCO INDUSTRY AND R. J. REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

E. Products

- |   |  |
|---|--|
| <p>11. One or more cigarette products with novel flavor may establish a new market category. This new flavor concept may include an all-burley or flue-cured cigarette.</p> <p>12. A cigarette with "normal" smoke nicotine and significantly lowered "tar", e.g., with unique "tar"/nicotine ratio of 10 or less, may achieve a significant place in the market.</p> <p>13. A cigarette designed and labeled as being "noninhalable", i.e., with alkaline, high nicotine smoke, may appeal to a limited market.</p> <p>14. A cigarette (85 and/or 100 mm) at or just above the Carlton (tar" 4 mg, nicotine 0.8 mg) with good smoking quality should offer excellent long-term growth potential for RJR, i.e., a cigarette at a 5- to 7-mg "tar", 0.5-mg nicotine, and 5-mg or less carbon monoxide level.</p> <p>15. There may be a place in the market for a product with the dimensions and convenience of a cigarette and the mouth-piece and smoking properties and "mouth-feel" of a pipe.</p> <p>16. There should be high acceptance for a "good" cigarette leaving no unpleasant breath or aftertaste.</p> <p>17. Innovations in packaging, if economically feasible, offer promise as a sales tool.</p> | <p>11. The Research Department will attempt to create new concepts.</p> <p>12. The Research Department will attempt to create new concepts. Sources of nicotine for this type of cigarette will be investigated.</p> <p>13. The Research Department will have to examine such a cigarette in detail with regards to smoke composition and properties to demonstrate that no conflict exists with the Winston Little Cigar.</p> <p>14. Research will explore possibilities and provide prototypes for evaluation by TPD and Marketing.</p> <p>15. Research will explore new concepts.</p> <p>16. Research will explore new concepts.</p> <p>17. Research will explore new concepts.</p> |
|---|--|

CONFIDENTIAL AND ITS CONTENTS ARE SUBJECT TO ORDER AND SHALL NOT BE DISCLOSED TO THE PUBLIC



II. THE TOBACCO INDUSTRY AND R. J. REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

E. Products

18. As raw material (tobacco and substitutes) qualities and manufacturing techniques change, changes in product configuration and qualities will occur. This may lead to a variety of new product configurations such as:

- a. Cigarettes made from homogenized sheet tobacco (stem, stalk and all) plus substitutes-extenders and additives.
- b. A cigarette rod made by extrusion of ground, puffed tobacco and extender, treated with appropriate additives, and encased in paper.
- c. Cigarette-shaped aerosol "smoke" generator devices, where the aerosol is modified smoke condensate or a purely synthetic mixture of nicotine, flavor, moisture, etc.
- d. Cigarettes made wholly from "synthetic tobaccos", with appropriate additives.
- e. Other "smoke generator" systems, not yet conceived, may appear.
- f. Other nicotine delivery systems not involving combustion, e.g., in chewable, lozenge or beverage form, may appear. However, this type of product may come under FDA scrutiny.
- g. Cigarettes with diameter equivalent to or less than the HORE may appear. Reduction of cigarette diameter has been claimed to reduce biological activity of smoke in mouse skin painting studies.

- a. Present research work in this area will continue into the projection period.
- b. Present research work in this area will continue into the projection period.
- c. Research will explore new products.
- d. The smoke from such cigarettes whether generated in-house or outside the Company will be examined for "strangers" as advisable. Awareness will be maintained and periodic status reports will issue on "synthetic" products.
- e. Research will explore new products.
- f. Research will explore new products.
- g. Studies on influence of cigar parameters on smoke yield, color and properties will continue projection period.

Produced by

CONFIDENTIAL

THIS DOCUMENT AND ITS CONTENTS ARE SUBMITTED TO A COURT ORDER AND SHALL NOT BE USED, SHOWN OR DISSEMINATED WITHOUT THE WRITTEN CONSENT OF THE RESEARCH DEPARTMENT

11. THE TOBACCO INDUSTRY AND R. J.  
REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

E. Products

19. With the projected deterioration of smoke quality, menthol (and perhaps other additives) will be increasingly used to provide "covering power".
20. As less tobacco and more extender is used in cigarettes or as novel smoke generator systems come into use, FTC "tar" and nicotine numbers will inevitably decrease with accompanying decrease in smoke quality. This implies an increasing need either for means to restore or maintain levels of nicotine, flavor, and the like or for methods to improve the conversion of tobacco components to smoke flavorants during the smoking process.
19. The contribution of additives other than menthol to smoke composition will not be examined.
20. Research efforts will be directed towards exploration of the possibilities here. Current basic research may eventually provide answers to the efficient conversion of tobacco smoke during the combustion process.

F. Miscellaneous

1. The Research Department headcount will grow at a modest rate for the remainder of the projection period as the complexity of our business increases. Also, periodic infusions of new personnel will be needed to provide for orderly succession and to provide fresh ideas and view points. By 1985, over one-third of the 1976 professional staff will either have retired or be within three years of retirement.
2. The present Research Building will be adequate for our space needs during the projection period. However, a drastic remodelling of laboratory space to accommodate increased reliance on sophisticated instrumentation will be required. Instrumental handling of laboratory work is rapidly replacing the cumbersome classical procedures.
3. Major capital investments in new, improved and/or more sophisticated instruments or apparatus will be necessary as the scope and complexity of our research effort increases.

produced by  
in  
BARNES

11. THE TOBACCO INDUSTRY AND R. J. REYNOLDS TOBACCO COMPANY

III. THE RESEARCH DEPARTMENT

F. Miscellaneous

4. The Research Department budget will be similar to that for 1976, adjustments for wage and inflation increases.
5. Improvement in skills of management research personnel for high productivity and creativity will continue to receive high priority.
6. Support from the Research Department for recent or future acquisitions will continue. Any requirement for substantial support on a continuing basis will require an increase in technical staff.

Produced by HJH  
in  
BARNES

CONFIDENTIAL

THIS DOCUMENT AND ITS CONTENTS ARE SUBJECT TO THE ORDER OF THE COURT. IT IS NOT TO BE USED, SHOWN OR DISTRIBUTED EXCEPT AS PROVIDED IN THE COURT'S ORDER.

11970 09105

## Appendix 8

PROJECT KESTRELOBJECTIVE

To develop a brand which 'breaks the rules' to appeal to a new generation and shock their parents; to make conventional brands look bland & weary.

There seems to be an opportunity to explore many unconventional routes towards this target, without the need to understand why they may be popular. It was felt that the lithe youth of today, being very image oriented, would require a brand of cigarettes which was not an attempt to match any other brands like Marlboro for instance, but which was completely unconventional which set new standards encouraging their rebellion, not necessarily just against parents but certainly against the market norms. It would respond to the person's individuality with the possibility of being an alternative to drugs. It was felt that the cigarette should incorporate some sort of 'kick', of a similar nature to the Coca-Cola 'kick', giving the cigarette a physiological effect. A possible route for this would be to incorporate the AMTECH technology, using enzymes to generate nicotine enhancement during pH distortion to liberate nicotine. Another route would be to use the FLITE technology to inject various flavours into the blend. These flavours would be new and unconventional, and probably foul-tasting to the average smoker.

400649145

Exhibit 2

21288

BATCO LT

ACCO LITIGATION

Two flavours which were discussed as options were Root Beer & Brazilian Fruit Juice, both of which tend to appeal to the younger generation whilst being rejected by their parents. The foul-tasting aspect was discussed at great length. It was felt that the rebellion aspect would be encouraged if the cigarette not only tasted horrible, but also had a totally distinctive ~~over~~ characteristic, possibly enhanced by the use of high sidestream paper. The cigarette paper could also be studied with respect to changing its texture and also its colour, and an alternative possibility is to have various different flavoured cigarettes, all individually wrapped in different coloured paper, all in the same packet. The cigarette should have a totally new brand name so that no pre-conceived ideas could be formed, and should reflect the durable youth values discussed (rebellion, glamour or danger etc.). The type of packaging was also discussed and it was felt that the pack should be in some way distinctive, without being over-sensational. It was felt that the youth of today tend to associate with the colour Black, so it would be important to distinguish the black pack from other brands such as J.S. Zipples etc. In short, then, anything goes. The cigarettes should not be judged, in any way, by the normal smoker, but purely by the literate youth. A trial and error basis should be incorporated so this may involve many different flavours, most of which would probably be abhorrent to Mr Average Smoker.

400649146

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

## Appendix 9

PRODUCED BY B & W IN CHILES TOBACCO LITIGATION  
MARKETING INNOVATIONS, INC.

SCARBOROUGH HOUSE, BRIARCLIFF MANOR, N.Y. 10510, USA • PHONE (914) 762-3030

CONFIDENTIAL  
PURSUANT TO COURT ORDER

BROWN & WILLIAMSON TOBACCO CORPORATION

PROJECT REPORT

September, 1972

PROJECT: Youth Cigarette - New concepts

MARKETING INNOVATIONS' SUGGESTIONS:

MI suggests new ideas for the breath-freshener field...

COLA-FLAVOR

While the government would not permit us to add caffeine to a cigarette, it may be possible to use artificial ingredients to obtain a cola taste and aroma. Suitable names might be: COLA-COLA, COLA-COOLER.

APPLE FLAVOR

Apples connote goodness and freshness and we see many possibilities for our youth-oriented cigarette with this flavor. Apple cider is also a possibility.

SWEET FLAVOR CIGARETTE

We believe that there are pipe tobaccos that have a sweet aromatic taste. It's a well known fact that teenagers like sweet products. Honey might be considered.

If any of the above ideas have interest, MI, will prepare concept ads.

1635

*Exhibit 8*

170042014

## Appendix 10

*First with the finest cigarettes...through Lorillard research*

*Bob Davis:*

*Please draft a reply for me by 9/11 -*

TO: Mr. Curtis Judge

FROM: T. L. Achey - Field 3

SUBJECT: Product Information

August 30, 1978

*Thanks -*

*9/6*

Mr. Judge, if you will look at my Sales figures (attached), you will note that NEWPORT KING SIZE is the #1 selling Lorillard brand, and NEWPORT BOX the #6 selling Lorillard brand in Field 3 for the year-to-date.

I know your immediate concern must be the "Lights" market; however, I also know the efforts placed into several "taste" brands over the past few years.

The success of NEWPORT has been fantastic during the past few years. Our profile taken locally shows this brand being purchased by black people (all ages), young adults (usually college age), but the base of our business is the high school student.

NEWPORT in the 1970's is turning into the Marlboro of the 60's and 70's. It is the "In" brand to smoke if you want to be one of the group.

Our problem is the younger consumer that does not desire a menthol cigarette. If that person desires a non-menthol, but wants to be part of the "In group", he goes to Marlboro.

Could we be furnishing a back-lash to Marlboro from our NEWPORT brands?

Is Marlboro as strong with the early beginning consumers as the NEWPORT brands?

Could we end the success story for Marlboro by furnishing the young adult consumers with a total category of "In" brands?

I think the time is right to develop a NEWPORT NATURAL (non-menthol) cigarette to attract the young adult consumer desiring a non-menthol product. We have a solid base with NEWPORT and I foresee much success with the name of NEWPORT on new packaging.

SUITE 2, RTR BLOC, RTE. 72, MT. LAUREL, N.J. 08054 Telephone: 1800 236-8141-42

CONFIDENTIAL MATERIAL, PROTECTED BY ORDER OF THE CHANCERY COURT  
JACKSON COUNTY, FLA. IN RE TOBACCO LITIGATION, CAUSE NO. 84-107

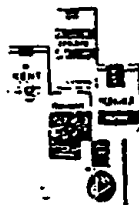
01537131

*Exhibit 9*

14187

*First with the finest cigarettes...through Lorillard research*

-2-



We would need packaging in the Soft pack and Box.

A good test area might be the Camden, New Jersey Division.  
 NEWPORT KING SIZE is the #6 brand (all companies) in this  
 Division.

*Thd*  
 T. L. A.

TLA:es

CONFIDENTIAL MATERIAL PROTECTED BY ORDER OF THE CHANCERY COURT  
 JACKSON COUNTY, MS, IN RE TOBACCO LITIGATION, CAUSE NO. 94-147

03537132

SUITE 2, 4TH FLOOR, RTE 73, MT LAUREL, NJ 08054 Telephone (609) 234-8141-42



## Appendix 11

COPY No. 81

RESEARCH CONFERENCE, SOUTHAMPTON, 1961

SMOKING AND HEALTH - POLICY ON RESEARCH

CHAIRMAN: Sir A.D. McCORMICK

PROPERTY OF  
BROWN & WILLIAMSON  
RESEARCH DEPARTMENT  
- LIBRARY -

Introduction.....Page 1

The Smoking and Health Problem, .....Page 2  
by Sir Charles Haddad

Discussion.....Page 24

650000000

ML 02358

52544?

*Exhibit 10*

## RESEARCH CONFERENCE, SOUTHAMPTON, 1962

## SMOKING &amp; HEALTH: POLICY ON RESEARCH

## DELEGATES

BRITAIN

Mr. A. B. McGonigal (Chairman)  
 Mr. H. B. Anderson  
 Mr. A. A. Southwood  
 Sir Charles Hillis  
 Mr. D. E. F. Gibson

IRELAND

Mr. G. V. Goid

FRANCE

Mr. J. H. Chesterfield  
 Mr. E. C. Fildes

CANADA

Mr. R. G. Gibb  
 Mr. L. C. Laporte  
 Mr. L. A. Howell  
 Mr. R. S. Wade

USA

Mr. W. G. V. Geyron

IRELAND

Mr. D. E. Geyron

SOUTH AFRICA

Mr. J. E. Slaney

SOUTHAMPTON

Mr. C. J. Ayres  
 Mr. D. G. Fenton  
 Mr. W. E. Pordyke  
 Mr. E. J. Gowan  
 Mr. S. A. Grew  
 Mr. I. B. Hughes  
 Mr. P. J. Nicholl  
 Mr. J. W. H. Sower  
 Mr. H. E. Hillis  
 Mr. W. J. Wood

ITALY

Mr. J. G. Kosterie  
 Mr. A. S. Griffiths  
 Mr. A. Welford  
 Mr. T. B. Wade, Jnr.

65030-1-135

ML 02360

935443

and also shares some of the aura of death connected with tuberculosis. I can well remember how pneumoconiosis in the coal mines had much of this emotional background and was correspondingly difficult to deal with in a rational manner. Smoker's cough is a real phenomenon and obvious to everyone, and we should recognize that it is a factor in the emotional build-up.

Lastly, smoking is a habit of addiction that is pleasurable; many people, therefore, find themselves sub-consciously prepared to believe that it must be wrong.

I do not believe that it is either possible or wise to attempt to argue directly against these emotional attitudes. They will diminish or increase as the facts about the situation become clearer - but we should in my opinion have them in our minds when we consider the scientific investigation of this problem.

There are regrettably few facts in this subject. The epidemiological evidence on the association of cigarette smoking and lung cancer is well known to you and is coherent, but until the recent remarkable paper of Black/Week little had been reported about the aetiology of lung cancer just because of the difficulty of causing it to occur in experimental animals. The opinion seems to be generally held among medical men that cancer of the lung is not a good research approach to cancer, and that it will only be practicable to make worthwhile advances in understanding the origin and growth of lung cancer and how to control it when more progress has been made with cancers in other sites. This unfortunately is where we cannot but be influenced by the emotional attitude of the country, whether it is sensibly reasonable or not we, as its doctors, just have to investigate the various possibilities of this cause of lung cancer and as a very important possible factor, the effects of cigarette smoke.

1966-1967

ML 0236

325447

## Appendix 12

CONFIDENTIAL

## MOTIVES AND INCENTIVES IN CIGARETTE SMOKING

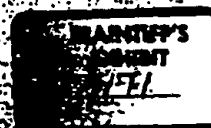
William L. Dunn, Jr.  
Philip Morris Research Center  
Richmond, Virginia

There is a lovely little island lying about 150 miles east of the Virgin Islands. It is at the northern end of the Antilles, that string of islands flung out crescent-like across the blue Caribbean waters. Legend has it that in the 16th century, both the Dutch and the French lay claim to possession of this tiny body of land. Rather than fight it out as was their wont in those days they showed a surprising and exemplary willingness to apply human reason. A Frenchman and a Dutchman were placed back to back on the beach and told to walk along the beach until they met again on the opposite side. They did so, and a line was drawn between the points of start and finish, dividing the island into the French half called St. Martin, and the Dutch half called San Marteen.

It seems that the Frenchman walked faster than the Dutchman, because the French got the bigger half. Some say this was because the Frenchman was drinking French champagne and the Dutchman was drinking Dutch whiskey. However true all this may be, the two colonies continue to live peacefully under these 16th century terms.

Exhibit 11

62



-2-

CONFIDENTIAL

In January, 1972, the Dutch side of St. Martin was invaded by an unlikely party of twenty-five scientists. There were pharmacologists, sociologists, anthropologists and a preponderance of psychologists. They came from England, Canada and the United States. Each brought with him a carefully prepared scientific paper which represented his best efforts at attacking the question "Why do people smoke cigarettes?"

Inspired by the rare 16th century display of human reason shown by the French and Dutch colonists, and while not sunning on the beach, they listened to and reflected upon each other's ideas.

You've heard many explanations for cigarette smoking. These were reviewed at the St. Martin conference. I think it appropriate that we list the more commonly proposed explanations here:

- 1) For social acceptance or ego-enhancement
- 2) For pleasure of the senses (taste, smell)
- 3) For oral gratification in the psychoanalytic sense
- 4) A psychomotor habit for the release of body tension
- 5) For the pharmacological effect of smoke constituents.

I might mention one other explanation, not because anybody believes it but as an example of how distorted one's reasoning can become when under the influence of psychoanalytic theory.

Smoking according to this argument, is the consequence of pulmonary eroticism. Translated, this means the lungs have become sexualized and smoking is but another form of the sexual act.

CONFIDENTIAL

-3-

If one asks the smoker himself why he smokes, he is most likely to say "It's a habit." If he is intelligent enough, he might be more to the point and say either one of two things: "It stimulates me", or "It relaxes me". And now we are already deep into our topic. The polarity of these two observations has plagued investigators for fifty years. The challenge to any theory as to why people smoke lies in the theory's ability to resolve this paradoxical duality of effect.

The St. Martin conference was called by the Council for Tobacco Research, U.S.A., in an effort to goad the scientific community into having another go at the problem. And go at it they did. Much of what follows in this presentation comes from that St. Martin conference.

Most of the conferees would agree with this proposition: The primary incentive to cigarette smoking is the immediate salutary effect of inhaled smoke upon body function. This is not to suggest that this effect is the only incentive. Cigarette smoking is so pervasive of life style that it is inevitable that other secondary incentives should become operative. The conference summarizer, Prof. Seymour Kety of Harvard, used eating as an analogy. Elaborate behavioral rituals, taste preferences, and social institutions have been built around the elemental act of eating, to such an extent that we find pleasure in eating even when not hungry.

It would be difficult for any of us to imagine the fate of eating, were there not ever any nutritive gain involved. It would

1003291924

-4-

be even more provocative to speculate about the fate of sex without orgasm. I'd rather not think about it.

As with eating and copulating, so it is with smoking. The physiological effect serves as the primary incentive; all other incentives are secondary.

The majority of the conferees would go even further and accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking. Some strong evidence can be marshalled to support this argument:

- 1) No one has ever become a cigarette smoker by smoking cigarettes without nicotine.
- 2) Most of the physiological responses to inhaled smoke have been shown to be nicotine-related.
- 3) Despite many low nicotine brand entries into the marketplace, none of them have captured a substantial segment of the market. In fact, critics of the industry would do well to reflect upon the indifference of the consumer to the industry's efforts to sell low-delivery brands. 94% of the cigarettes sold in the U.S. deliver more than 1 mg. of nicotine. 98.5% deliver more than .9 mg. The physiological response to nicotine can readily be elicited by cigarettes delivering in the range of 1 mg. of nicotine.

I hope our English friends who are developing the synthetic nicotineless cigarette are not going to be too disturbed by all this.

-5-

CONFIDENTIAL

Why then is there not a market for nicotine per se, to be eaten, sucked, drunk, injected, inserted or inhaled as a pure aerosol? The answer, and I feel quite strongly about this, is that the cigarette is in fact among the most awe-inspiring examples of the ingenuity of man. Let me explain my conviction.

The cigarette should be conceived not as a product but as a package. The product is nicotine. The cigarette is but one of many package layers. There is the carton, which contains the pack, which contains the cigarette, which contains the smoke. The smoke is the final package. The smoker must strip off all these package layers to get to that which he seeks.

But consider for a moment what 200 years of trial and error designing has brought in the way of nicotine packaging:

Think of the cigarette pack as a storage container for a day's supply of nicotine:

- 1) It is unobtrusively portable.
- 2) Its contents are instantly accessible.

Think of the cigarette as a dispenser for a dose unit of nicotine:

- 1) It is readily prepped for dispensing nicotine
- 2) Its rate of combustion meters the dispensing rate, setting an upper safe limit for a substance that can be toxic in large doses.
- 3) Dispensing is unobtrusive to most ongoing behavior.

1003231926



-6-

Think of a puff of smoke as the vehicle of nicotine:

- 1) A convenient 35 cc mouthful contains approximately the right amount of nicotine.
- 2) The smoker has wide latitude in further calibration: puff volume, puff interval, depth and duration of inhalation. We have recorded wide variability in intake among smokers. Among a group of pack-a-day smokers, some will take in less than the average half-pack smoker, some will take in more than the average two-pack-a-day smoker.
- 3) Highly absorbable: 97% nicotine retention.
- 4) Rapid transfer: nicotine delivered to blood stream in 1 to 3 minutes.
- 5) Non-noxious administration

Smoke is beyond question the most optimized vehicle of nicotine and the cigarette the most optimized dispenser of smoke.

Lest anyone be made unduly apprehensive about this drug-like conceptualization of the cigarette, let me hasten to point out that there are many other vehicles of sought-after agents which dispense in dose units: wine is the vehicle and dispenser of alcohol, tea and coffee are the vehicles and dispensers of caffeine, matches dispense dose units of heat, and money is the storage container, vehicle and dose-dispenser of many things.

So much for extolling the virtues of the rod. Let us go back now and pick up our discussion of the motivational aspects of smoking. If we accept the premise that nicotine is what the smoker seeks, we've still not answered the question "Why do people smoke"? We've merely reformulated it to read "Why does the smoker take

nicotine into his system?"

Systematic research on the question dates back some fifty years to the time when American Tobacco Co. funded the work of a psychologist later to become the most prominent American psychologist of his time. His name was Clark L. Hull. His question then was "Wherein lies the charm of tobacco for those accustomed to its use?"

In order to review the data that has been collected over these intervening fifty years, I have organized it under three headings:

- 1) Differences between smokers and nonsmokers.
- 2) Human physiological responses to inhaled smoke.
- 3) Situational variables related to smoking behavior.

First, then, let us quickly review what is known about the differences between smokers and nonsmokers.

TABLE 1

INDIVIDUAL TRAITS AND GROUP CHARACTERISTICS BY  
WHICH A GROUP OF SMOKERS CAN BE DISTINGUISHED  
FROM A GROUP OF NONSMOKERS

PERSONALITY TRAITS

- More independent (Pflaum, 1965)
- Greater anti-social tendencies (Smith, 1970)
- More active, energetic (Schubert, 1959; Straits, 1965)
- Higher mean extroversion rating (Smith, 1970)
- "Happy-go-lucky" (Smith, 1969)
- Higher mean measure of "orality" (Smith, 1970)

1003291928

CONFIDENTIAL

Poorer mental health (Smith, 1970)

Less rigid, less orderly, more impulsive (Smith, 1970)

Greater reliance on "external" than "internal" controls (Smith,

More chance-oriented (Straits, 1963)

More emotional (Smith, 1967)

Less agreeable (Smith, 1969)

"Type A" personality (More time-conscious, competitive, etc.)

(Rosenman, 1966)

Less "strength of character" (Smith, 1969)

Higher anxiety level (Walker, 1969; Srole, 1968; Thomas, 1968)

#### LIFE STYLE CHARACTERISTICS

More business-oriented in occupation (Seltzer, 1964)

Poorer academic performance (Veldman and Bown, 1969; Pumroy,  
1967; Salber, 1962)

More users of alcohol (Higgins, Kjelsberg, & Metzner, 1967;  
Lilienfeld, 1969)

More users of coffee and tea (Lilienfeld, 1959)

Religious service attendance less frequent (Cattell, 1967;  
Straits and Schrest, 1963)

Proportionately higher frequency of marriages and job changes  
(Lilienfeld, 1959)

Higher incidence of prior hospitalizations (Lilienfeld, 1959)

Higher incidence of smoking among parents (Salber and Abelin,  
1967)

More active participation in sports (Lilienfeld, 1959)

More auto accidents (Ianni and Boek, 1958)

CONFIDENTIAL

-9-

MORPHOLOGICAL TRAITS

Greater body weight (Seltzer, 1963)

Greater height (Seltzer, 1963; Baer, 1966)

Thinner (Higgins and Kjelsberg, 1967)

Higher height/(cube root of weight) ratio (Damon, 1961)

Thinner skin folds (triceps and subscapular) (Higgins and Kjelsberg, 1967)

DEMOGRAPHIC CHARACTERISTICS

More men (Public Health Service Publication No. 1000, 1970)

Proportionately more 25-45 year-olds (Public Health Service Publication No. 1000, 1970)

Lower mean socio-economic class (Salber and MacMahon, 1961)

Proportionately fewer college men (Higgins, Kjelsberg, & Metzner, 1967; Lilianfeld, 1959)

More urban residents (Higgins, Kjelsberg, & Metzner, 1967)

Many of these characteristics have little meaning without considerably greater explanation than is appropriate for this presentation. Suffice it to say that the list does summarize our state of knowledge on the smoker-nonsmoker differences. As for the relevance of this knowledge to the question of motivation in smoking, I would say that it is a rich source of hypotheses and hunches, but unfortunately, that is about as far as it can take us. And I regret to say that the major effort of psychologists has been to search for these differences. Hull warned us fifty years ago that the difference approach was a primrose path, but only recently have psychologists begun to appreciate Hull's warning.

1003291930

-10-

CONFIDENT

The pharmacologists and physiologists have done much better, which leads us to the second body of fact; the human physiological response to smoke. The list in Table 2 again is a summary of our knowledge. To be sure there are other responses, some of which have been noted in the literature, some likely yet to be discovered, but those listed have been reported by at least two non-related laboratories.

TABLE 2  
TRANSIENT PHYSIOLOGICAL  
RESPONSES TO SMOKE INHALATION

1. Elevated heart rate
2. Elevated coronary flow
3. Elevated blood sugar level
4. Lowered cutaneous temperature in the extremities
5. Increased blood flow in skeletal musculature
6. A reactive release of adrenalin
7. Alterations in electrical potential patterns of the brain  
involving alpha wave suppression
8. Inhibition of patellar reflex

Where these responses have been plotted over time, they have been observed to have their onset within several minutes of smoke inhalation, and they are short-lived, having a decay function with a half-life of about thirty minutes. Onset and decay roughly parallel the coincident plotting of nicotine in the bloodstream. (Isaacs & Rand, 1972)

-11-

CONFIDENT

These facts are considerably more relevant to the motivation question than are the facts about smoker-nonsmoker differences. In psychology, when we talk about motivation we refer to a force which impels one to act, and the action is goal-oriented. Hunger, for example, is a motive which impels one to the action of ingesting food. The goal is a state of satiety. Reaching the goal is the reward, and the behavior which is instrumental in reaching the goal is reinforced.

With this in mind, we can now ask several questions "Are any of the listed physiological reactions sought after by the smoker?", "Are these physiological reactions symptomatic of a body state which is the goal of smoking behavior?"

One feature of the list which has impressed many investigators is its close resemblance to the physiological response pattern accompanying emotional arousal, such as fear, anger, even joy. Is this perhaps the goal of the smoker, to achieve a body state which mimics emotional arousal?

In the context of this question, let us now turn to the third body of fact, the situational variables related to smoking behavior. So as not to bore you with references and the recitation of all the evidence, permit me to present this body of fact in the form of a summary statement: The rate and incidence of smoking varies as a function of external conditions which influence the emotional state of the smoker. The evidence at hand permits us to go one step further; the rate and incidence of smoking is highest at the extremes of the arousal continuum.

CONFIDENTIAL

-12-

If one were to plot smoking rate against some measure of the smoker's level of bodily arousal, one would observe a nice U-shaped distribution. This observation brings us full circle, for you will recall that at the outset of this presentation I quoted the smoker as explaining his smoking in paradoxical terms: It calms me, it stimulates me.

You may also recall that I stated that the challenge to any explanatory theory of smoking is to resolve this paradoxical duality of effect. At the St. Martin conference, Professor Stanley Schachter, a psychologist at Columbia University, labeled this as the Nesbitt paradox; Nesbitt being a student of Schachter's who called the paradox to his attention.

Let me state this paradox as clearly and succinctly as I can: The known physiological effects of smoking are those that we consider as indicating body activation or arousal. This fits in nicely with the smoker's statement "It stimulates me". But it is highly discordant with the polar explanation which the smoker provides perhaps even more often - "It calms me". How can an agent which is physiologically arousing be calming? And why should an already aroused, excited person seek further physiological arousal?

Summarizing the known facts pertinent to the question of motivation:

- 1) Smoking is relateable to personality variables.
- 2) Smoke inhalation induces documented physiological responses similar to those induced by emotional arousal.

- 3) Smoking rate varies as a parabolic function of body activation level.

I will end this presentation by summarizing the two major theoretical explanations proposed at the St. Martin conference. We shall see how each attempts to cope with the Nesbitt paradox.

The first is that of Hans Eysenck. To appreciate his explanation of smoking, you must sit still for me to give you a skeletal outline of his theory of personality. Eysenck contends that there are two major dimensions of personality. He uses the poles of the dimensions to label them: extroversion-introversion and neuroticism-stability. He states that the evidence shows no relationship between smoking and the neuroticism-stability dimension. There is, however, abundant evidence of a relationship between smoking and the extroversion-introversion dimension. His explanation for smoking proceeds as follows: Under identical external conditions of low-sensory input, extroverts will have a low level of cortical arousal and introverts a high level of cortical arousal. For every individual there is an optimum level of arousal. Since arousal varies with the level of sensory input, one can visualize as in Figure 1 the relationship of sensory input and hedonic tone, or sense of well-being. It can be seen that, in these terms, too much stimulation is to be avoided, and also too little. Introverts and extroverts require different levels of input for optimum arousal; the extrovert needs more, the introvert less. Extroverts will become stimulus seekers, introverts stimulus avoiders. Drugs are used to alter the level of sensory input. Nicotine is also

1003291934



used to alter the level of sensory input. Now we shall see how he resolves the paradox: He acknowledges that nicotine has an arousal, activating effect, and reasons that extroverts therefore should smoke more than introverts. And happily this is true. But what now does he do with his smoking introverts? Surprisingly, he does not attempt to resolve the Mesbitt paradox. He invokes it, pointing out that nicotine can have both arousing and sedating effects. He cites the well-known biphasic action of nicotine as documented by neuropharmacological research. At low concentrations, nicotine activates neural function, at high concentrations, it depresses neural function.

Two serious flaws in Eysenck's reasoning must be pointed out:

- 1) The neuropharmacological evidence for the biphasic action of nicotine is based upon observations of neural tissue response to the local application of nicotine in animal studies. Stimulation occurred at low concentrations of nicotine, depression at high concentration levels. It is absolutely impossible for the concentration level required to induce neural depression to be attained by means of smoke inhalation.
- 2) To postulate both activating and sedating effects is to defy the documented universality of the activating physiological effect of smoke inhalation.

Eysenck, then, has not dealt effectively with the Mesbitt paradox. And I would remark in passing that the theory of Sylvan Tomkins, widely acclaimed in some circles, suffers from the

same criticism. Tomkins has proposed that there are different types of smokers each type seeking different effects from smoking. Tomkins, too, has chosen to overlook the universality of smoke-induced physiological arousal, agreeing with Eysenck that smoking can be either arousing or sedating, depending upon the person and the situation.

The second theoretical explanation from the St. Martin conference is that proposed by Professor Schachter, whom I have already mentioned for coining the phrase "the Nesbitt paradox". Schachter offers an ingenious resolution of the paradox, and an explanation of smoking which you will most certainly find novel and possibly noncredible. Again you must first be briefed on Schachter's theory covering all kinds of affective or emotional experience.

The bodily arousal accompanying emotion is the same for all emotions: fear, anger, joy, etc. The person interprets the bodily emotional state in terms of the circumstances under which the emotion is experienced. Sometimes there are faulty interpretations. These can be dramatically demonstrated in a laboratory setting.

An example: A male college student is given adrenaline without his knowledge and under pretext that makes him unsuspecting. All this takes place in the presence of a very attractive female lab assistant. At about the time that the adrenaline begins to take effect the young woman crosses her legs provocatively and lets her hand linger a bit too long on his arm. The subject invariably interprets the adrenaline-induced arousal as an erotic arousal and behaves accordingly. The lab assistant threatened to quit if the experiment were to continue.

Now how does Schachter apply this theory to resolving the Nesbitt paradox? There is no paradox, of course, in the smoker seeking arousal when at the low end of the arousal continuum, but why seek arousal through smoking when excited, as is so often the case?

I quote him: "As we all know, disturbing and frightening events are presumed to throw the autonomic nervous system into action, epinephrine is released, heart rate goes up, blood pressure goes up, blood sugar increases, and so on. Now notice that many of these physiological changes are precisely those changes that we're told are produced by smoking a cigarette. What happens, then, to the smoking smoker in a frightening situation? He feels the way he usually does when he's frightened but he also feels the way he usually does when he's smoking a cigarette. Does he label his feelings as fright or as smoking a cigarette? I would suggest, of course, that to the extent that he attributes these physiological changes to smoking, he will not be frightened. And this, I propose, is a possible explanation for the strikingly calming effect that smoking a cigarette had on the chronic smokers in Nesbitt's experiments."

There is a variant on the Schachter hypothesis that should properly be ascribed to Frank Ryan, one of my psychologist colleagues at the Philip Morris Research Center.

Ryan suggests that arousal by smoking is perhaps a means of muting or damping an arousal response to exciting or disturbing circumstances. There are limits within which a person will operate

1003291937

on the arousal continuum. If pushed up toward the upper limit by smoke inhalation, there is little room left for further arousal by external events. Thus the smoker can prep himself against the disturbing effect of anxiety or fear, or anger or whatever.

This is the end of my presentation. If you have been intrigued by any of these ideas, I recommend the recently published volume entitled "Smoking Behavior: Motives and Incentives", a compendium of papers presented at the St. Martin Conference, published by V. H. Winston & Sons of Washington, D.C.

1003291938

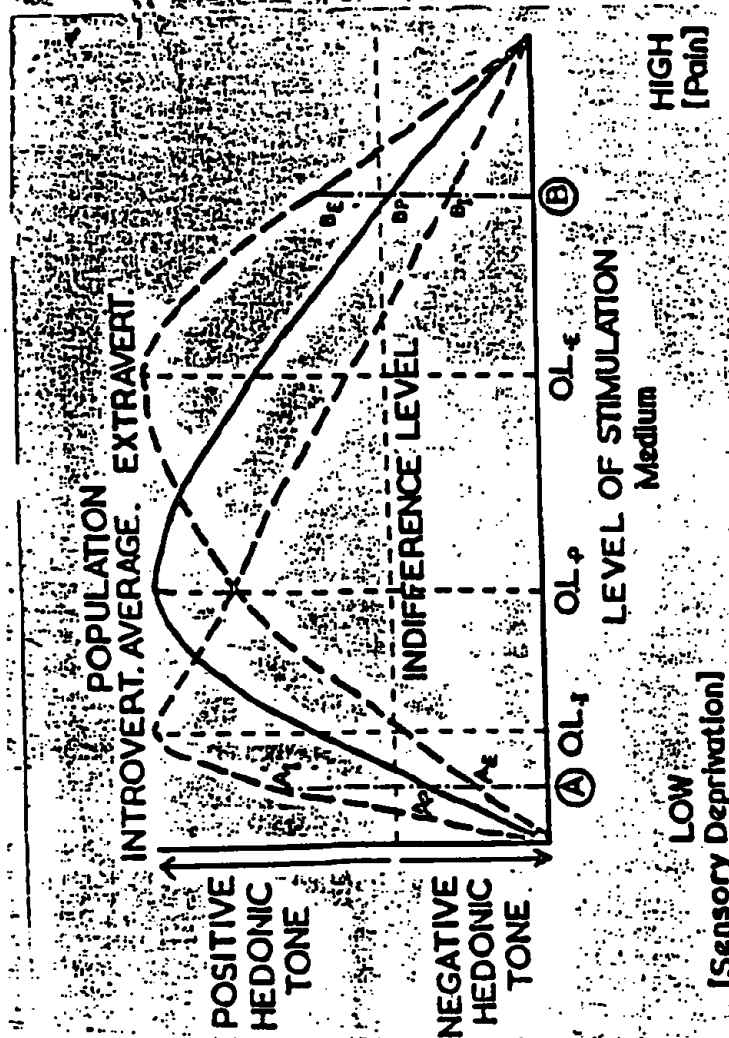


Figure 1. Relation between level of sensory input and hedonic tone as a function of personality. Reprinted from H. J. Eysenck, 1963.

100291939

## Appendix 13

2257 1000

(estimate)

12:

Here is a special meeting of the UK Industry on Environmental Tobacco  
Smoke, London, February 11th, 1988

Present:	Mr R Williams	)	-	meeting only
	Mr P Brown	)	Rothmans	
	Mr B Frost	)		
	Dr H Gaisch	)	Philip Morris	
	Mr D Omberry	)	-	dinner only
	Mr M Whittaker	-	Imperial	) meeting only
	Dr A J Helms	-	Gallaher	)
	Dr S Joyce	-	B&W	
	Mr D E Rames	-	Covington Barling, USA	
	Dr C A Leslie	-	Biossary Ltd	

**Summary**

Philip Morris presented to the UK industry their global strategy on environmental tobacco smoke. In every major international area (USA, Europe, Australia, Far East, South America, Central America & Spain) they are proposing, in key countries, to set up a team of scientists organised by one national coordinating scientist and American lawyers, to review scientific literature or carry out work on ETS to keep the controversy alive. They are spending vast sums of money to do so, and on the European front Covington & Burling, lawyers for the Tobacco Institute in the USA, are proposing to set up a London office from March 1988 to coordinate these activities. The countries in Europe where they have already been working are the UK, France, Germany, Switzerland, Italy, Spain and Scandinavia (via Sweden). A list of potential scientists who could be contacted in the UK was produced.

Because of the heavy financial burden, Philip Morris are inviting other companies to join them in these activities to whatever extent individual companies deem to be appropriate. Presumably they expect interested companies to respond on an individual basis: it is perhaps significant that they did not hold this meeting through the Tobacco Advisory Council. Although action on Environmental Tobacco Smoke is becoming more vital to the industry, Philip Morris ..... questionable in some respects e.g. level; disadvantage; 'pro-industry' etc. fundamental scientific only be perceived as a

401247331

Exhibit 12

21747

- 1 Dr Thornton had been invited to attend this meeting by Rothmans at their headquarters in Mayfair; in fact, the meeting turned out to have been organised by Philip Morris. Due to previous commitments I attended the meeting instead of RIT, which was followed by dinner.
- 2 The aim of the meeting was for Philip Morris to present to the industry their global strategy on environmental tobacco smoke and how they propose to apply it to the UK. They apparently hoped both to inform the UK industry, out of courtesy, about what they were planning, and also if appropriate to partially either financial or moral support for the idea. *W. Marshall*
- 3 Dr Gaisch said that their strategy on ETS had been established in the USA at a meeting between Philip Morris and Covington and Burling, the lawyers acting for the Tobacco Institute of the USA. At a later date R J Reynolds were also brought in to support some of their US activities, one of these being the Centre for Indoor Air Research.
- 4 The Philip Morris philosophy of ETS was presented. This appeared to revolve around the selection, in all possible countries, of a group of scientists either to critically review the scientific literature on ETS to maintain controversy, or to carry out research on ETS. In each country a group of scientists would be carefully selected, and organised by a national coordinating scientist.
- 5 David Benas presented the approach of the US lawyers, and said that he believed their function to be to act as intermediaries between the consultants and industry and also to indicate 'areas of sensitivity' on ETS research. He was not prepared to elaborate on these areas of sensitivity or on the stage at which any filtering process would be carried out. He noted that in the USA, their strategy at first had been to meet short-term 'emergencies' by presenting teams of witnesses as Witsch, Gray Robertson. He did, however, acknowledge that this kind of roadshow would be unlikely to be acceptable in Europe. The Centre for Indoor Air Research that Philip Morris, RJR and Lorillard have set up in the UK was mentioned as a further development of this strategy which would not necessarily be practical elsewhere.

401247332

BATCO LTD - FLORIDA AG. TOBACCO LITIGATION

- 6 Covington & Burling are proposing to set up an office in London to coordinate their European activities. They will know for certain in March whether they are likely to do so; if so, this will occur almost immediately. When asked, David Rames said that of course they would be consulting British product liability lawyers 'where appropriate'.
- 7 Philip Morris have already initiated various programmes of research on ETS in Europe as with Battelle in Geneva, Neurath in Germany, about which they were quite open. Their aim now is to supplement these researchers with their proposed coordinating teams. Their major target countries in Europe are: UK, France, Italy, Switzerland and Scandinavia (Sweden). In all of these countries Philip Morris have already begun to identify and talk to suitable scientists.
- 8 The consultants should, ideally, according to Philip Morris, be European scientists who have had no previous connection with tobacco companies and who have no previous record on the primary issue which might, according to Rames, lead to problems of attribution. The mechanism by which they identify their consultants is as follows:- they ask a couple of scientists in each country (Francis Roe and George Leslie in the UK) to produce a list of potential consultants. The scientists are then contacted by these coordinators or by the lawyers and asked if they are interested in problems of Indoor Air Quality: tobacco is not mentioned at this stage. CVs are obtained and obvious 'anti-smokers' or those with 'unsuitable backgrounds' are filtered out. The remaining scientists are sent a literature pack containing approximately 10 hours reading matter and including 'anti-ETS' articles. They are asked for a genuine opinion as independent consultants, and if they indicate an interest in proceeding further a Philip Morris scientist makes contact.
- 9 Philip Morris then expect the group of scientists to operate within the confines of decisions taken by PM scientists to determine the general direction of research, which apparently would then be 'filtered' by lawyers to eliminate areas of sensitivity.

401247333

BATCO LTD - FLORIDA AG TOBACCO LITIGATION



- 10 Their idea is that the groups of scientists should be able to produce research or stimulate controversy in such a way that public affairs people in the relevant countries would be able to make use of, or market, the information. The scientists would not necessarily be expected to act as spokesmen for the industry, but could be if they were prepared to do so.
- 11 Philip Morris stressed that they did not want to offend other companies by treading on their toes in countries or territories where another company was the market leader. In fact, they would ideally like some of the coordination to be transferred to RIAS. However, as this meeting was not carried out through the Tobacco Advisory Council they clearly did not see TAC as being willing or able to play a role in the UK in this respect.
- 12 In respect of Professor Perry, Dr Gaisch said they he strongly believed TAC should continue to support him because it could be problematic to withdraw support from a scientist who has been sympathetic to the industry. Dr Gaisch, Dr Holmes of Gallaher and David James were to go and see Professor Perry on February 18th to reassure him and if necessary Philip Morris would support Perry alone.
- 13 The list of potential consultants produced by Dr Leslie for the UK was as follows:-
- |                 |  |
|-----------------|--|
| E Butler        | (a pathologist at BIRBA)                                       |
| John Peccini    | (ex-officers and Hasleton, now a consultant in Lyon)           |
| Philip          | (ex-Huntingdon)  |
| Robert Edgewood | (a pharmacologist at the University of Leeds)                  |
| Brian Large     | (a lecturer in Occupational Health at the University of Leeds) |
| Law Levy        | (a consultant in occupational hygiene)                         |
| Frank Lunn      | (lecturer in respiratory pharmacology at Cardiff University)   |
| Paul Nicholls   | (Professor of paediatric medicine at the University of Leeds)  |
| Prof. Smithers  |  |

101247334

BATCO LTD - FLORIDA AG TOBACCO LITIGATION

Frank Sullivan (a consultant to Rothmans)  
 Donald Wheatman (another pharmacologist at Sunderland School of  
 Pharmacy)  
 Gerald Clough (as 'environmental physiologist' at York)  
 Bob Brown (MRC Toxicology Unit, Carshalton)  
 Chris Rhodes (ICI)  
 Jim Bridges (Rothmans Institute)

In addition Rothmans suggested:-

John Daniels (ex-ICI toxicology)  
 Gordon Cumming

Gallagher's suggested:-

Bob Schroter (Imperial College)  
 Professor Clifton (medical physics, DCL)

- 14 Not only are Philip Morris active in the US (via John Rupp of Covington & Burling) and the UK and Europe (via David Remes), but other Covington & Burling lawyers have also been commissioned to coordinate PM's ETS activities in the Far East, Australia, South America, Central America, and Spain.
- 15 Although the industry is in great need of concerted effort and action in the ETS area, the detailed strategy of Philip Morris leaves something to be desired. The excessive involvement of external lawyers at this very basic scientific level is questionable and, in Europe at least, is likely to frighten off a number of scientists who might otherwise be prepared to talk to the industry. Also, the rather oblique initial approach may appear to be somewhat less than honest to many scientists. In the past the industry (at least in the UK) has had no difficulty approaching scientists directly. The idea of setting up a special group of consultants coordinated by one national coordinating scientist is also rather likely to frighten away scientists who would justifiably not wish to be associated with industry in this rather structured way or who would not wish to be part of what will inevitably be seen to be a pro-industry group, but who would be prepared to carry out exactly the same activities on an individual, and therefore less compromising, basis.

401247335

BATCO LTD - FLORIDA AG. TOBACCO LITIGATION

16 It must be appreciated that Philip Morris are putting vast amounts of funding into these projects: not only in directly funding large numbers of research projects all over the world, but in attempting to coordinate and pay so many scientists on an international basis to keep the ETS controversy alive. It is generally felt that this kind of activity is already giving them a marketing and public affairs advantage, especially in countries in which, until recently, they have played a rather low profile.



Dr Sharon Boyse

cc: Mr EAA Brwell  
Mr RJ Pritchard  
Mr AL Beard  
Mr MB Connor  
Mr RLO Ely  
Dr RE Thornton  
All members of the Scientific Research Group

401247336

BATCO LTD. FLORIDA AG. TOBACCO LITIGATION