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Paul Caminiti

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## AN INDUSTRY PERSPECTIVE AND THE UNIQUE ROLE OF THE LIGGETT GROUP†

Paul Caminiti††

Let me first say I am here as a spokesman for Liggett. We are very pleased that Barbara Colombo put this symposium together and encouraged us to attend. I am personally very honored to be on a very distinguished panel of which I am probably the least distinguished member. I am going to provide a quick overview of why Liggett chose to settle these lawsuits and how we reached that decision.

First, Liggett Group is owned by the Brooke Group, Ltd., which is a publicly traded company listed on the New York Stock Exchange. Brooke Group also has other interests including real estate and an investment banking and brokerage house in New York. Liggett is the fifth largest cigarette manufacturer in the United States, but we are the fifth largest by a long shot; we have less than a two-percent market share, behind Philip Morris, RJR, Brown & Williamson, and Lorillard. Seventy percent of our sales come from discount cigarettes, and our premium brands—L&M, Lark, Chesterfield, and Eve—are small regional players. Liggett is the operating successor of Liggett & Myers Tobacco Co., which was formed in 1873. Brooke Group, which is chaired by Bennett LeBow, who has had a relatively high profile in all this, bought Liggett in 1986. Liggett has five hundred employees.

With that backdrop, let me talk about Liggett's settlements.<sup>1</sup>

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† This essay is based on a speech Paul Caminiti gave at William Mitchell College of Law's Center for Health Law & Policy symposium titled, "Tobacco Regulation: The Convergence of Law, Medicine & Public Health."

†† Paul Caminiti is a vice president of Sard Verbinnen & Co., Inc., a corporate financial public relations firm based in New York City. Mr. Caminiti has provided communications counsel to Brooke Group since 1995 and helped coordinate the announcement of Brooke's landmark tobacco settlements in 1996, 1997 and 1998. Mr. Caminiti holds a J.D. degree from Fordham University School of Law (1992), and a B.A. in history from Princeton University (1989).

1. Since Mr. Caminiti made this presentation in September, 1998, Brooke Group and Liggett's settlement status has changed. On November 20, 1998, the

Liggett, right now, has binding settlement contracts with forty-one states, which account for approximately eighty-five percent of the nation's Medicaid claims. In exchange for the protection that the settlements afford Liggett, Liggett has agreed to pay up to thirty percent of its pre-tax income for the next twenty-five years, as well as certain lump sum payments, to each state on an annual basis.

We have also settled tobacco cases with class action plaintiffs and certain individual plaintiffs. In the contexts of those settlements, we have acknowledged that smoking is addictive and causes cancer.<sup>2</sup> We have put a warning label on our cigarettes.<sup>3</sup> Our brands are the only cigarettes in this country that say smoking is addictive.<sup>4</sup> We have disclosed the ingredients in our cigarettes.<sup>5</sup> We have agreed to Food and Drug Administration ("FDA") jurisdiction and have agreed to severe advertising and marketing restrictions.<sup>6</sup> Perhaps most importantly, we have waived our attorney-client and work-product privileges and disclosed our internal documents in the states where lawsuits are proceeding.<sup>7</sup> No other company has done these things. Our CEO, Bennett LeBow, as well as other Liggett executives, have testified against the industry around the country.

To understand why Liggett decided to settle, you have to try to approach the issue from Liggett's point of view. Since 1954, Lig-

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Company announced that Brooke and Liggett agreed to join the Master Settlement Agreement ("MSA") reached between the attorneys general and the tobacco industry. Under terms of the MSA, Brooke and Liggett have no payment obligation to the signing states as long as Liggett does not exceed a national market share of 1.67% (approximately eight billion units/400 million packs). In the event that Liggett exceeds 1.67% market share, Liggett will pay for the portion above 1.67% according to the formula set out in the MSA.

Prior to joining the MSA, Brooke and Liggett had reached their own settlement agreements with attorneys general representing 41 states, accounting for 85% of the nation's Medicaid claims. The terms of Liggett's prior settlement agreements no longer apply, except with respect to Florida, Minnesota, Mississippi and Texas, the four states that have separate settlement agreements with Liggett and the rest of the tobacco industry and are not signatories of the MSA.

2. See David Phelps, *A Tobacco Company Settles; Cigarette-Maker Concedes: Smoking is a Cause of Cancer*, STAR TRIB. (Minneapolis-St. Paul), Mar. 21, 1997, at 1A.

3. See *id.*

4. See *id.*

5. See *Under Massachusetts Law, Liggett Discloses Cigarette Ingredients; It was the First Company to Comply, Even Though an Injunction Delayed Enforcement*, STAR TRIB. (Minneapolis-St. Paul), Dec. 16, 1997, at 15A.

6. See Milo Geyelin, *Lonely Lawyers for Liggett Feel Minnesota Chill*, WALL ST. J., Feb. 6, 1998, at B1.

7. See Phelps, *supra* note 2, at 1A.

gett and the other major tobacco companies were united in defending these lawsuits. For years, Liggett, as the smallest company, played along with the other companies and participated in what was really considered a scorched-earth litigation strategy, which was: win every lawsuit; defend every case as vehemently as you can; do not give an inch or they will take a mile.<sup>8</sup>

Until 1995, the cigarette companies had lost only one case, which was reversed on appeal, and not a penny was paid in damages.<sup>9</sup> You can understand why the tobacco companies, from a purely business point of view, were going with this approach. Other tobacco companies told us, from the time we took over the company in 1986, that there was really nothing to worry about—that we had great defenses because of the warning labels and, basically, that these lawsuits were the “Third Wave of tobacco litigation,”<sup>10</sup> and that these too shall pass.

Liggett began to consider settling in the changing landscape of the early 1990s. There were several things happening in the 1990s that influenced our decision. Plaintiff’s lawyers were bringing major class action lawsuits across the country. Probably the best known of those was the *Castano* class action.<sup>11</sup> The *Castano* plaintiffs sought a tremendous amount of damages, not to mention punitive damages.<sup>12</sup>

In addition, people were revising the legal theories under which they were suing the tobacco companies. They were no longer simply saying, “You did not tell us about the health effects of smoking,” to which the industry would say, “We have a warning label that warns you it is not good for you.” Instead, plaintiffs started to argue, “But you never told us that we would get hooked on it. You never told us it was addictive. You never told us that if we smoked two packs we will be smoking for the next twenty years.”

8. See Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 480-87 (1999) (detailing the tobacco industry’s litigation strategy for the past four decades).

9. See *Horton v. American Tobacco Co.*, 667 So.2d 1289, 1292-93 (Miss. 1995) (affirming award of zero damages in case where cigarette manufacturer was found liable for causing the plaintiff’s injury).

10. See Ciresi et al., *supra* note 8, at nn.7-50 and accompanying text (recapitulating the First and Second Waves of tobacco litigation and detailing the Third Wave).

11. See *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 560 (E.D. La. 1995), *rev’d*, 84 F.3d 734 (5th Cir. 1996) (involving attempt at class action certification of action against tobacco companies).

12. See *Castano*, 160 F.R.D. at 548.

However, the most influential factor was probably the state cases. The suits by Mississippi and Minnesota, among others, sent shivers down the spines of a lot of the companies. These suits exposed the industry to huge liabilities—it was no longer just an individual suing for four hundred thousand dollars.

Also, the industry was starting to get some of the worst publicity of its day, not that it ever had good publicity. The FDA was trying to assert jurisdiction. The industry was being vilified, culminating at the 1996 Democratic National Convention, where tobacco use was a major theme. Al Gore, the son of a tobacco farmer, gave an anti-tobacco speech.<sup>13</sup> I think there was a feeling in the tobacco industry, at least at Liggett, that things were caving in.

There are three major reasons why Liggett settled. The first was really an economic consideration. As the smallest company, Liggett could not afford to lose, for example, the case in Minnesota. To appeal a one billion or two billion-dollar verdict for whatever would have been our pro rata share, Liggett would have had to post a bond. Liggett could not have done that. We were faced with the harsh reality that we would have been out of business overnight if we lost one of these cases. Despite the fact that our peers were telling us these cases were not a problem, Mr. LeBow, a savvy businessman, felt differently.

The second major reason is that in 1995 the law firm that had been representing Liggett for a number years, predating LeBow's ownership of the company, was disbanded. Those lawyers wanted to go to another law firm in New York. They asked for our permission, as we were a huge client of theirs providing probably eighty to ninety percent of their business. We said to them, "We would prefer if you went with this other law firm in New York, Kasowitz, Benson, Torres and Friedman," who did a lot of other work for Liggett's parent company, Brooke Group. In addition, the Kasowitz firm specializes in product liability. It made sense to us to consolidate our legal representation. Liggett felt it would have a little more control over the litigation, which quite frankly it did not feel it had at the old law firm.

Their response was, "Let us think about it." Then they came to us and said, "We have a proposal for you. If you let us go to the law

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13. See Eric Black, *Covering the Coverage; If the Networks Were to Halt Live Coverage, Well, Life Would Go On*, STAR TRIB. (Minneapolis-St. Paul), Aug. 30, 1996, at 25A (describing the media's reaction to Vice President Al Gore's speech regarding his sister's death from smoking-related lung cancer).

firm we want, Philip Morris will pay your legal fees." Liggett's legal fees were running between eight to twelve million dollars a year, which for Liggett was a major expense. Obviously, this seemed very odd to us. Our competitor was going to not only take control of our litigation, but pay our fees.<sup>14</sup> Being businessmen, and not wanting to look a gift-horse in the mouth, we said we would accept it in the near term. But at that point, we started to reconsider our litigation strategy.

The third major reason was that at this time Brooke Group was engaged in a proxy fight with investors on Wall Street to separate RJR Nabisco's food business from its tobacco business.<sup>15</sup> This was something that a lot of people on Wall Street were calling for in mid-1995.<sup>16</sup> There was a lot of support for it in the investment community and the financial press.<sup>17</sup> RJR's stock had been languishing ever since the takeover in the late 1980s,<sup>18</sup> and everyone saw this as an easy way to unlock the real value. Plus, it was a way to isolate RJR's tobacco business from its food business and get Nabisco out from under the cloud of tobacco litigation.

Then RJR told the investment community that it could not separate RJR and Nabisco because of the outstanding legal liability.<sup>19</sup> They were afraid that it would look like a fraudulent conveyance if the parent company took the assets of the food company and put it beyond the reach of creditors. This, I think, sent a shock wave through Wall Street because people felt, "My God, RJR Tobacco could not handle to pay if they were ever found liable. They

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14. See *Little Money, Lot of Symbolism in Liggett Tobacco Settlement; Proposal Itself States that it is Favorable to Company*, STAR TRIB. (Minneapolis-St. Paul), Mar. 24, 1997, at 11A (stating that of the \$9.6 million of attorney's fees spent by Liggett in 1996 defending against tobacco suits, an undisclosed portion of that money actually came from other tobacco producers).

15. See Elizabeth Lesly, *Will Joe Camel Have to Hoof it Alone?*, BUS. WK., Aug. 30, 1993, at 58

16. See Linda Sandler, *RJR Nabisco's Bond-Swap Plan Sparks Anger Among Holders Who Feel Unequally Treated*, WALL ST. J., Mar. 20, 1995, at C2 (stating that proposed split of RJR Nabisco was "seen as heralding an eventual splitting-up of the company into totally separate food and tobacco concerns.").

17. See *id.*

18. See Gene G. Marcial, *RJR Starts Sending Up Smoke Signals*, BUS. WK., Apr. 12, 1993, at 84 (stating that RJR Nabisco stock fell from \$13.00 a share in early 1991 to \$7 ¼ a share in early 1993).

19. See Elizabeth Lesly & Gail DeGeorge, *Why is a Lawyer Running RJR Nabisco?*, BUS. WK., Dec. 18, 1995, at 38 (quoting RJR Nabisco officials as supporting a complete spin-off of the company's food business but stating that it cannot do so until certain commitments to debt holders and "other issues" are resolved).

would need to dip into the assets of Nabisco.” That really made Liggett start to reconsider its approach.

The confluence of all these factors caused Liggett to think that there were some serious legal and ethical issues that we should address. We spoke to the Kasowitz firm—Mark Kasowitz and his partner, Dan Benson—and asked them to initiate discussions with the other side. We did not tell our then general counsel. We did not tell our litigation lawyers. Mr. LeBow is a very sensible person, and he said, “Let’s see if we can strike a deal.”

What we found out is that in more than forty years, this was the first time that a tobacco company had ever spoken to the other side, which just astounded us. We also found out that the two sides were not that far apart, at least with respect to Liggett, so we were able to very quickly put together a settlement with five of the six or seven states that were suing at the time. In March 1996, we announced that settlement—Liggett I.<sup>20</sup> It signified the first break in tobacco’s wall.<sup>21</sup>

Once we settled, our outside attorneys asked our previous attorneys for all the Liggett documents. For the next several months, our lawyers went through those documents, most of them dating back twenty, thirty, forty years, into the late 1950s and early 1960s. Our new lawyers were astounded. They were shocked. They expressed concern that there was evidence of fraud, conspiracy, and possibly criminal activity. These were, in short, extremely damaging documents.

At this point, the company decided that it wanted to make a clean break from the rest of the industry. We believed it was ethically and financially the right thing to do. We entered into talks with the additional states that were suing the industry. This led to our March, 1997 settlement, which Minnesota Attorney General Humphrey referred to,<sup>22</sup> where we totally broke ranks with the rest

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20. See Milo Geyelin, *Liggett, Five States Set Pact Covering Treatment of Smoking-Related Illnesses*, WALL ST. J., Mar. 18, 1996, at A3 (announcing a settlement deal of \$41 million payable over 25 years made between Liggett and Florida, Massachusetts, Mississippi, West Virginia, and Louisiana).

21. See Sandra Torry, *Plaintiffs Think They See a Crack in Tobacco’s Armor*, WASH. POST, Mar. 18, 1996, at F7 (“The Liggett settlements may pressure other companies to soften their fight-at-all-costs stance . . .”).

22. See Hubert H. “Skip” Humphrey, III, *The Decision to Reject the June, 1997 National Settlement Proposal and Proceed to Trial*, 25 WM. MITCHELL L. REV. 397 (1999).

of the industry.<sup>23</sup> We agreed to release our internal documents to various courts.<sup>24</sup> We waived our privileges.<sup>25</sup> We admitted that nicotine is addictive and causes cancer.<sup>26</sup> I cannot stress that enough because no other company had admitted, or has admitted, that nicotine is addictive. That is the crux of a lot of the new lawsuits, and it was a huge development. We also agreed to FDA regulation.<sup>27</sup> Lastly, but perhaps most importantly, we agreed to make all efforts to ensure there was no marketing to children under eighteen.<sup>28</sup>

About two weeks after the March, 1997 settlement, Big Tobacco was at the table in Washington trying to negotiate a global deal. I think they had explored it with Mississippi Attorney General Michael Moore after our original settlements, but it was not until they saw that Liggett was "turning state's evidence" and turning over documents that they took decisive action. The documents referred to "The Committee of Counsel" and all sorts of joint meetings where litigation strategy and health concerns were discussed with the other companies.<sup>29</sup>

Since the March, 1997 settlement we have continued to broaden our settlements. We have entered into an agreement with the Justice Department by which we are cooperating with their investigation of the tobacco industry.<sup>30</sup> We have been lobbying Congress to ensure that if there is going to be any sort of global settlement, our settlements with the forty-one states will be honored.

In conclusion, let me just say that Liggett's CEO, Bennett LeBow, has said that if cigarette companies are *really* not going to market to children, we will all be out of business in twenty-five years.<sup>31</sup> Liggett is prepared to accept that fate.

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23. See Phelps, *supra* note 2, at 1A (describing Liggett's settlement and agreement to disclose internal and industry documents).

24. See *id.*

25. See *id.*

26. See *id.*

27. See Geyelin, *supra* note 6, at B1.

28. See *id.*

29. See David Phelps, *Tobacco Industry Might Have to Turn Over Internal Documents*, STAR TRIB. (Minneapolis-St. Paul), Sept. 11, 1997, at 10A ("The Committee of Counsel' [is] a group composed of attorneys from all the major tobacco companies who conferred regularly on strategy and tactics.").

30. See Ann Davis, *Big Tobacco Turns to Criminal Bar for Help on Attorney-Client Brief*, WALL ST. J., Aug. 20, 1998, at B7.

31. See *Master Recommends Tobacco Papers Be Admissible in Minnesota Case*, Dow Jones Online News, Feb. 10, 1998, available in WL, MNNEWS File (stating LeBow expects Liggett "to be out of business in 20 or 30 years").

