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AN ACCOUNT OF THE LEGAL STRATEGIES THAT ENDED AN ERA OF TOBACCO INDUSTRY IMMUNITY[†]

Michael V. Ciresi^{††}

Let me also express my appreciation for being here today with this group of people dedicated to the eradication of the number-one killer of Minnesotans, and indeed of people across the country. I am disappointed that members of the industry, other than Liggett,¹ are not here because I think that they can help enlighten and inform the public debate.

I want to start out by distinguishing Minnesota from the colorful figures that Peter Pringle mentioned during his remarks.² I do that for a very specific reason. We are different, tremendously different, from those other lawyers who sued the industry—and I do not criticize their motives—but they had an approach of “let’s go out and get all the people we can, sue these folks, and see if we can’t get it settled.” They lost sight of what I call the marriage between law and public policy. We hear much criticism of lawyers; it goes with the profession. I have always believed, and our cases at Robins, Kaplan have always shown, that lawyers have an overarching duty to the rule of law, a duty to society, over and above a duty

† This essay is based on a speech Michael V. Ciresi gave at William Mitchell College of Law’s Center for Health Law & Policy symposium titled, “Tobacco Regulation: The Convergence of Law, Medicine & Public Health.”

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1. See Paul Caminiti, *An Industry Perspective and the Unique Role of the Liggett Group*, 25 WM. MITCHELL L. REV. 447 (1999).

2. See Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table*, 25 WM. MITCHELL L. REV. 387 (1999).

to their individual clients. Most lawyers forget this, and so we see some of the things that we have witnessed in litigation in this country.

In our suit against the tobacco industry, we did not have sixty law firms contributing a hundred thousand dollars a year, which comes to six million dollars a year, or twenty-four million dollars over four years. We had one law firm. The industry had sixty law firms, six hundred lawyers, all against our one law firm. We were the only state in the Union that was represented by one law firm, whose allegiance was to one state, and not to a number of states that may have had different motives and objectives in the litigation. And the truth, and I think the merit of our position, is best described by the settlement.³

When we started this case I said to Attorney General Humphrey, "the only thing I ask, besides your support, is that in this case our objectives will be dictated by, and our actions will be taken on, their legal merits, and not on political considerations." The attorney general replied, "you have my word on that." His word is as good as gold, and that approach set us apart from the rest of the states. It was exceedingly difficult for the attorney general, in April 1997, when the national settlement was proposed, to tell people that he had worked with for over sixteen years, "you're wrong and we're taking a different course."⁴ For three-and-a-half years I could stand up across the country in any forum and say, "we are going to hold the industry accountable. We in Minnesota don't fight; you don't hear the governor saying one thing and the attorney general saying another."

For three-and-a-half years that was true. It changed all of a sudden, however, when we got close to trial, when we had people saying, "Take the national settlement. Take the \$4.1 billion. Forget about all the other reasons for which you started this suit. Forget about the fact that we wanted to expose the industry's internal documents. Forget about the fact that we wanted the non-monetary relief. Forget about the fact that we did not want to emasculate the FDA. Forget about the fact that we did not want to

3. See Settlement Agreement and Stipulation for Entry of Judgment, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, 1998 WL 394331 (Minn. Dist. Ct. May 8, 1998) [hereinafter Settlement Agreement].

4. 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).

create special privileges by immunizing an industry that kills over four hundred thousand Americans a year.⁵ Forget all of that and join us, and let's just get a settlement."

We took a different course, and instead of \$4.1 billion, the state of Minnesota got \$6.1 billion.⁶ More importantly, it got all of the non-monetary relief that you see in that consent judgement.⁷ All the other lawyers suing the industry were smart in one thing: they got a "most favored nation" clause⁸ in their settlements because they knew Minnesota—led by Skip Humphrey,⁹ Andy Czajkowski,¹⁰ and our law firm—would not fold. They knew we would try the case and hold the industry accountable. So they wanted a "most favored nation" clause because if Minnesota got something more favorable, they wanted to benefit, and indeed they did.¹¹

5. See Sabin Russell, *Tobacco Deal's Youth Campaign: Just Say Scam*, S.F. CHRON., Dec. 7, 1998, at A8 (asserting that cigarettes kill 400,000 Americans each year; see also Sen. Billy J. Mckibben Hobbs, *Put People's Health Before Johnson's Political Health*, ALBUQUERQUE J., Apr. 16, 1998, at A15 (citing the American Cancer Society for the proposition that "smoking related diseases kill more than 400,000 Americans each year").

6. See Settlement Agreement, *Philip Morris*, 1998 WL 394331, at *6.

7. See Consent Judgment, *State ex rel. Humphrey v. Philip Morris Inc.*, No. C1-94-8565, 1998 WL 394336, at *2 (Minn. Dist. Ct. May 8, 1998). For example, the tobacco companies are permanently enjoined from marketing cigarettes to children in Minnesota and from advertising on billboards, buses or transit areas. See *id.*

8. A "most favored nation" clause provided that a state could upgrade its settlement with the tobacco companies to take advantage of "any additional benefits negotiated by later-settling states." Bill Van Voris, *Minn. Smoke Trial Starts: Big Tobacco Faces AG Hubert Humphrey III and Perhaps Its Toughest Fight*, NAT'L L.J., Jan. 12, 1998, at A6. The Mississippi, Florida and Texas tobacco settlements contained such a clause. See *id.* See also Mark Curriden & Richard A. Oppel Jr., *Tobacco Deal Could Hit \$20 Billion: Minnesota Case May Allow Texas to Get Extra Money*, DALLAS MORNING NEWS, May 15, 1998, at 1A ("The "most favored nation" clause is truly one of the ingenious provisions ever dreamed up by trial lawyers,' said Martin Feldman, a Wall Street analyst with the investment firm Salomon Smith Barney.").

9. Hubert "Skip" Humphrey, III, was Minnesota's attorney general during the tobacco litigation. See generally Humphrey, *supra* note 4.

10. Andrew Czajkowski is chief executive officer of Blue Cross and Blue Shield of Minnesota, which was co-plaintiff with the State of Minnesota in the tobacco litigation. See Andrew P. Czajkowski, *The Making of a Lawsuit: A Health Plan Perspective*, 25 WM. MITCHELL L. REV. 379 (1999).

11. See Bruce Hight, *Tobacco Victory Declared; Cash to Start Flowing: All Sides Agree to a Settlement, But Attorney's Fees are Still in Doubt*, AUSTIN AM.-STATESMAN, July 25, 1998, at B1. Hight noted:

After Texas reached agreement with the tobacco industry, Minnesota settled its lawsuit on even more favorable terms, triggering the "most favored nation" clause in the Texas settlement. That clause said that the

Mississippi, led by Michael Moore, who I have called a carnival barker, although I don't mean that in a bad sense, got a lot of states to get involved. That played a factor in moving the national legislation. Of course it failed,¹² but they played a factor in that. Michael Moore's state got an additional five hundred and fifty million dollars because of our settlement.¹³ Texas got \$2.3 billion because of our settlement.¹⁴ Florida got \$1.7 billion,¹⁵ and they all got the non-monetary relief.¹⁶

Who carried the burden? We did.

Of course no good deed goes unpunished, and now we hear some criticisms, and I will accept those criticisms. We were in the public eye and I understand that, and we have forthrightly said from 1994 what we were doing. Our retainer agreement was filed. Nobody said, "Hey Mike, let me contribute, this is a hell of an idea." Indeed, I saw former Minnesota Governor Wendell Anderson yesterday, and he reminded me that in October of 1997 I was giving a speech with the attorney general out at the airport. At that meeting were attorneys from across the world. We debated the national settlement. We, of course, stated our position and during the course of that I said, "alright, now you've heard it all." Now this is October or November of 1997, and I said, "how many of you

industry would pay Texas more if other states later got better terms. The Minnesota settlement generated an additional \$2.3 billion for Texas.

Id.; see also *Judge OKs Tobacco Settlement Bonus for State*, ORLANDO SENTINEL, Dec. 10, 1998, at D12. ("Florida will receive a bonus of \$1.7 billion over the next five years from its agreement with the tobacco industry to boost the overall settlement to \$12.7 billion Florida obtained the extra \$1.7 billion under a 'most favored nation' clause in its 1997 settlement.")

12. See Anthony Flint, *Tobacco Agreement Gives States a Tool to Push Enforcement*, BOSTON GLOBE, June 23, 1997, at A1. The original proposal was the result of negotiations between the states' attorneys general and tobacco companies, and it required congressional approval to take effect. See *id.* It called for cigarette manufacturers to pay \$368 billion to the states and the federal government over a fifteen-year period in return for immunity from lawsuits by state or local governments. See *id.* After undergoing considerable alterations and additions, the proposed settlement finally died in June 1998 after reaching \$516 billion. See James Rosen, *Tobacco Bill Dies. The Senate Voted to Send Its Bill Back to Committee, Effectively Killing it and Triggering an Election-Year Battle Over the Issue of Youth Smoking*, STAR TRIB. (Minneapolis-St. Paul), June 18, 1998, at 1A.

13. See *Across the USA: News from Every State*, USA TODAY, July 8, 1998, at 13A.

14. See Hight, *supra* note 11, at B1.

15. See *Judge OKs Tobacco Settlement Bonus*, *supra* note 11, at D12.

16. See Curriden & Oppel, *supra* note 11, at A1; *Judge OKs Tobacco Settlement Bonus*, *supra* note 11, at D12.

managing partners or substantial partners in all these law firms . . . how many of you want to contribute to our case, which we are going to start in January, and we are standing alone, and we are looking at federal legislation that is going to emasculate our lawsuit—how many of you would like to join in? Raise your hand.” Not one did. Not one.

So when I hear the criticism I will accept it, but Minnesotans used to have a tradition that I treasured. Maybe it’s because I was born, bred and raised here. That tradition was: we used to talk about the facts. We debated the facts. We would enlighten the public. We would not deal in lies and distortions. So I will debate the facts with anyone, and I will point out the distortions when I see them.

The themes of our case were simple and led to the documents that Roberta Walburn has spoken about.¹⁷ Our themes were: the defendants had a duty to know, discover and disclose the hazards of their product; they could not sell a legal product illegally; and there are no special privileges or exemptions for the cigarette industry. Why should they be treated differently than 3M or Medtronic or Honeywell or any other great company in this country? They should be held accountable the same way everyone else is. We were never prohibitionists, and the case was never about prohibition.

The case was about corporate responsibility and accountability. The taxpayers—the citizens—should not pay. The shareholders should pay if these companies violated state laws. The industry had intentionally concealed facts, contrary to their voluntary promise and undertaking that they made in 1954, when they said the protection of the public health was their paramount responsibility.¹⁸ They could not mislead by their intentional and misleading public pronouncements. They could not intentionally exploit the youth market; over eighty-two percent of people who start smoking start

17. See Roberta B. Walburn, *The Role of the Once-Confidential Industry Documents*, 25 WM. MITCHELL L. REV. 431 (1999); see also Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477 (1999).

18. See Ciresi et al., *supra* note 17, 520 nn.196-97 and accompanying text. The tobacco industry’s “Frank Statement,” a 1954 advertisement that appeared in newspapers across the United States in which the tobacco industry “accept[ed] an interest in the people’s health as a basic responsibility . . .” and asserted that it “always ha[s] and always will cooperate closely with those whose task it is to safeguard the public health.” See *id.*

before age seventeen;¹⁹ if you eliminate or dramatically reduce that eighty-two percent, this industry will not be as wealthy and powerful as it is today. Next, they intentionally exploited nicotine to create habituation, addiction and dependence. Because of these actions there was unprecedented carnage caused in this state and in this country.

Our trial approach was pretty simple. We led off with our own witnesses to establish our case. We had a choice between Dr. Richard Hurt²⁰ and Channing Robertson. Dr. Hurt runs the Mayo Clinic's Nicotine Dependence Clinic and is world renowned. He was a unique witness because he was born in Kentucky. He was formerly a smoker—in fact, a heavy smoker. He was passionate in his belief about what this industry was doing to people in this country and across the world. Between him and Channing Robertson, who is a great chemist from Stanford University, we chose Dr. Hurt to testify first because he could tell the complete story. Hurt had studied the industry extensively over a long period of time, and he was a remarkable witness, as was Channing.

Hurt and Robertson were our first two witnesses. Then we switched and went after their people because we wanted the jury to hear this case through the industry's words and documents. I always prefer to have people from the other side in a case because I want someone live there, someone who the jury can look in the eye and judge their credibility: is what they are saying plausible and reasonable in light of these documents that you see? So that is what we did. We called Mr. Walker Merryman, the head of the Tobacco Institute; Dr. James Glenn, head of the Council for Tobacco Research; Mr. Geoffrey Bible, chief executive officer of Philip Morris; and Mr. James Schindler, the president of RJR Tobacco to testify. Through those witnesses, I believe the jury saw and witnessed this industry's deceptiveness.

Bible was going to be the smooth, Australian chief executive officer of this Fortune 50 company. A remarkable witness in the sense that they sent him to charm school because they thought that they could get him to a point were he was going to just "wow" the jury. He's a pleasant guy. You would look at him and think, yeah,

19. See John G. Carlton, *Health Officials Help Teach Teens to Quit Smoking*, ST. LOUIS POST-DISPATCH, Feb. 8, 1998, at C1 (asserting that 82% of lifelong smokers begin by age 17).

20. See Richard D. Hurt, M.D., *The Influence of the Minnesota Tobacco Trial on the Healthcare Community and Tobacco Regulation*, 25 WM. MITCHELL L. REV. 455 (1999).

I'd like to have a beer with him sometime. That's if you put aside the fact that he's the head of the largest cigarette manufacturer—they are killing thousands of people a year, he knows it, they are doing it willfully and intentionally, and they are exploiting our youth. Put that aside, and he's a hell of a guy.

They put Bible on the witness stand and we cross-examined him and a funny thing started happening to him over a period of time. It was a three-day cross-examination, and as he started seeing these documents, we could see his tenor change. At one point, Bible tried to project the image that he was only looking forward. Keep in mind, now, that during this time the national settlement was going on, and they were going to wipe out the lawsuits.²¹ When Bible took over in 1994, in Philip Morris' annual report,²² he said,

21. During the yearlong period during which Congress considered and modified the national tobacco settlement, the tobacco companies insisted that the legislation must grant them immunity from future lawsuits. See Peter Grier & James N. Thurman, *Back to Court Cases on Tobacco. Congress Balked at a Deal. Now Tobacco Firms Face Suits by States and Individuals Armed with Strong New Evidence*, CHRISTIAN SCI. MONITOR, June 19, 1998, at 1.

22. See PM 2047120454-55. In the annual report, under a subheading labeled "Defending Our Company," Bible assured Philip Morris shareholders:

- *No doubt you're aware of the many pressures facing the U.S. tobacco industry; public smoking restrictions, possible excise tax hikes, the threat of FDA regulation, congressional hearings, negative media coverage, litigation.*
- *Still, you should remember that our U.S. tobacco company has faced similar threats before and has overcome them. I want to make this crystal clear: We believe these issues remain manageable.*
- *On the legislative and regulatory fronts, we have already weathered several storms, as the dark clouds of massive federal excise tax hikes and more federal regulation of cigarettes appear to have passed for now.*
- *In the legal arena, we are committing all the resources necessary to defend the company from new forms of litigation, making sure we have better firepower than our foes, no matter how formidable.*
- *In the new class-action suits and state Medicaid cases, we believe the law continues to be on our side. Although these new cases pose difficult challenges, we should ultimately prevail in them, just as we have been successful in other types of cases over the past 40 years. It is important to note here that the tobacco industry has never lost or paid to settle a case.*
- *Beyond defending ourselves, we are turning the legal tables on some of those who attack us. We are going on the offensive to vindicate our rights and to make it clear that current notions of "political correctness" cannot be used to justify unlawful conduct that abridges those rights.*
- *We're suing the EPA over its misleading report on secondhand smoke, suing state and local governments that have unlawfully restricted public smoking, and suing ABC for falsely accusing us of "spiking" our cigarettes with extra nicotine.*

about people who might sue them, to paraphrase Winston Churchill, “we’re going to meet them on the beaches, we’re going to meet them in the valleys, we’re going to meet them in the air, we’re going to annihilate them,”²³ in accordance with the tactics that they had employed over forty years.²⁴ Then, the most amazing thing happened with him. At one point he finally said, with regard to all these documents, “this didn’t happen on my watch.”²⁵ “This didn’t happen on my watch?”—it’s your watch now!

Then we got into the national settlement with him. They actually put the document into evidence. Then we got an opportunity to say, “so you want immunity, you want to emasculate the FDA, you want all these things, you want to eliminate class actions, you want to eliminate people’s ability to join together, you want to eliminate punitive damages. Of course you want to look forward, you want a free reign. You want to say ‘forgive us for killing millions of people in the past and never paying, but give us immunity going forward.’”

Obviously we could talk forever about this case and the time allowed does not permit that, but it was an honor to represent the state.

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- We’re also running ads to let the public know our position on such issues as accommodating the rights of smokers and non-smokers, and preventing cigarette sales to minors.
 - We believe we are absolutely right in all of the positions we take on these issues. And we are fighting very hard for what we believe in.

Id. (emphasis added).

23. See MARTIN GILBERT, CHURCHILL: A LIFE 646 (1991).

24. See Ciresi et al., *supra* note 17, at 480-87 (detailing the industry’s litigation tactics for the past 40 years).

25. See Transcript of Proceedings, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, 1998 WL 85584, at *17 (Minn. Dist. Ct. Mar. 3, 1998).