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THE CHRONICLES OF TOBACCO: AN ACCOUNT OF THE FORCES THAT BROUGHT THE TOBACCO INDUSTRY TO THE NEGOTIATING TABLE†

Peter Pringle††

At the end of 1998, as the tobacco companies edged toward a truce with the states in the tobacco wars, it was sometimes easy to forget how the conflict began; the gigantic sums involved—hundreds of billions of dollars—had all but eclipsed the war's humble beginnings. No one spoke any more of the spectacular theft of thousands of incriminating documents from the British-owned tobacco giant, Brown & Williamson in Louisville, Kentucky, by a \$9-an-hour law clerk, Merrell Williams.¹ These documents showed that the companies had known for many years about the addictive properties of nicotine, about cancer-causing agents in tobacco smoke, and had covered it up.² These documents were key in per-

† This article is adapted from a speech Mr. Pringle gave at William Mitchell College of Law's Center for Health Law & Policy symposium titled, "Tobacco Regulation: The Convergence of Law, Medicine & Public Health," and from the author's book, *CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE* (1998). Where helpful, citations to the author's book are included at the end of paragraphs adapted from that text.

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1. A series of newspaper interviews with Merrell Williams started in May 1996. Philip J. Hiltz, a *New York Times* reporter, published the first Williams' interview in *A Life of Hiding for a Tobacco Critic Bound to Silence*, N.Y. TIMES, Aug. 8, 1994, at A1. He expanded on the interview in his book, *SMOKESCREEN: THE TRUTH BEHIND THE TOBACCO INDUSTRY COVER-UP* (1996). This led to a number of subsequent profiles in various newspapers. See, e.g., Richard Leiby, *Smoking Gun: Merrell Williams, Ex-Actor, is the Most Important Leaker of Documents Since Daniel Ellsberg*, WASH. POST, June 23, 1996, at F1; Myron Levin, *Smoking Gun: The Unlikely Figure Who Rocked the U.S. Tobacco Industry*, L.A. TIMES, June 23, 1996, at D1; Michael Orey, *A Mole's Tale*, AM. LAW., July-Aug. 1995, at 86.

2. See Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minne-*

suading members of the plaintiff's bar to go ahead with their lawsuits. Even considering the millions of industry files that were unearthed in the Minnesota Medicaid suit,³ the Williams documents remain the single most important collection.

And in all the talk of the colorful and wealthy plaintiffs' lawyers making millions of dollars out of the industry's deals, the important activities of one lawyer in the anti-tobacco forces were overshadowed. He was Professor Dick Daynard, an oracle of tobacco litigation and a key player in the tobacco wars long before any of the other plaintiffs' lawyers had plucked up enough courage to take on the industry. He was a key adviser to the plaintiff's bar at their campaign headquarters in New Orleans in the early days of the battle, but now is back at his tiny tobacco litigation project at Northeastern University. Even the Pascagoula lawyer, Dick Scruggs, and his comrade-in-arms, the attorney general of Mississippi, Mike Moore, who were so prominent at the start and at the height of the campaign, dropped out of sight. David Kessler, the youthful commissioner of the Food and Drug Administration ("FDA"), who led that agency's vigorous attack on the industry, also retreated from the fray to write his memoirs. Instead, the recent media coverage has concentrated on the money involved: hundreds of billions of dollars to the states and tens of millions to the plaintiffs' lawyers, leaving the extraordinary birth of the tobacco campaign to history.

It was in the last week of February, 1994, that an extraordinary confluence of historical events involving these players occurred and created the unprecedented legal onslaught against the tobacco companies. In Washington, D.C., the stolen Brown & Williamson documents found their way to Congress and into the media. The FDA launched an inquiry into the industry with the goal of regulating nicotine as a drug.⁴ The White House was in the hands of America's first anti-smoking president. In New York, ABC News aired a program, based on information from industry insiders, that charged the tobacco companies with "spiking" cigarettes with nicotine to keep smokers hooked.⁵ The TV network was served with a libel writ—for ten billion dollars, the largest in history.⁶

sota Tobacco Litigation, 25 WM. MITCHELL L. REV. 477 (1999).

3. See *id.* at 479. Thirty-five million pages were produced. See *id.*

4. See Jill Schlick, Note, *Administrative Law—The Fourth Circuit Strikes Down the FDA's Tobacco Regulations—Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155 (4th Cir. 1998), 25 WM. MITCHELL L. REV. 741 (1999).

5. See *Day One* (ABC television broadcast, Feb. 28 & Mar. 7, 1994).

6. See PETER PRINGLE, CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE 5

These events marked the beginning of a new anti-smoking era that was to become known as the Third Wave of tobacco litigation. The First Wave, from 1954 to 1973, followed the big lung cancer scare of the early '50s, when laboratory research linking smoking to cancer in mice was first published. Sick smokers went to court, claiming millions of dollars in damages. Proving their cancer was caused by cigarettes was much more difficult than the lawyers had imagined; the companies easily created a doubt in the minds of juries as to who was to blame, the companies or the smokers.⁷

In the Second Wave, from 1983 to 1992, the scientific evidence that smoking was harmful was more firmly established, but the industry still successfully beat back claims for damages by persuading juries that a smoker chose to smoke knowing the risks. By this time, the industry had built up the most sophisticated legal defenses of any U.S. commercial enterprise. Their frontline defense included such firms as: Chadbourne & Parke of New York; Jones, Day of Cleveland; King & Spalding of Atlanta; and the legendary tobacco law offices of Shook, Hardy & Bacon of Kansas City. Together they wore down their opponents by outspending and outlasting them.⁸

Suddenly, a new opposition emerged, well-funded and well-armed. The leading members of the plaintiff's bar had won a series of spectacular awards in cases involving the asbestos industry, silicone breast implants, and the makers of women's contraceptives. They had accumulated a war chest and were prepared to spend it⁹—to roll the personal-injury dice for the biggest prize of all, the vast profits of the fifty billion-dollar tobacco industry. Among those now willing to take their chances were the nation's top trial lawyers: Wendell Gauthier of New Orleans, Dick Scruggs of Mississippi, Ron Motley of South Carolina, and Mike Ciresi of Minneapolis.

The American legal system had never witnessed such an extravagant contest as would unfold over the next three years. By the middle of 1997, at least 530 law firms and thousands of attorneys were engaged in the battle for the hearts and lungs of millions of Americans. Half of the country's largest law firms, charging fees of

(1998); see also Elizabeth Jensen & Eben Shapiro, *Phillip Morris Suit Against ABC News Seeks \$10 Billion, Alleges Defamation*, WALL ST. J., Mar. 25, 1994, at B12.

7. See PRINGLE, *supra* note 6, at 5; see also Ciresi et al., *supra* note 2, at 482-85.

8. See PRINGLE, *supra* note 6, at 5, 7; see also Ciresi et al., *supra* note 2, at 485-87.

9. See PRINGLE, *supra* note 6, at 5, 6.

up to five hundred dollars an hour, were working for the tobacco companies. Another 182 firms had joined the anti-tobacco forces. The annual legal bill for the Big Six tobacco companies—Philip Morris, R.J. Reynolds, Brown & Williamson, Lorillard, American Tobacco Co., and Liggett & Myers—amounted to six hundred million dollars. The long arm of United States civil law had even drawn in Britain's biggest tobacco enterprise, BAT Industries.¹⁰

Gauthier's modest firm in New Orleans was the first to file suit. Gauthier had been thinking about suing the tobacco companies ever since the death of his close friend, Peter Castano, another New Orleans lawyer, from lung cancer.¹¹ But it was the ABC News documentary that prompted him to act.¹² If the industry was purposely addicting people, then this was a personal injury case. Gauthier found still more suggestions of hidden evidence in the 1980s case of Rose Cipollone, a lifelong smoker, who died from lung cancer.¹³ Her case had been taken on by a young lawyer named Marc Edell. He had defended asbestos companies in their fights in the 1970s and 1980s and knew a lot about lung diseases. He delved into tobacco company files for almost a decade and among the papers produced were 1,500 documents for which the companies claimed attorney-client privilege. The judge in the case, H. Lee Sarokin, ordered a private review of the papers by the court to see if the companies' claim was justified. In his ruling, Sarokin issued one of the sternest judgments ever made from the bench against the industry. It included the following two paragraphs:

10. See *id.* at 9.

11. Judge Okla Jones, a federal judge in New Orleans, certified *Castano v. American Tobacco Co.* as a class action lawsuit in February, 1995. See *Castano v. American Tobacco Co.*, 160 F.R.D. 544, 552 (E.D. La. 1995). The judge ordered a two-step process where the plaintiffs would first determine if the tobacco companies had committed negligence and fraud in not revealing their knowledge of nicotine addiction, and then proceed to separate mini-trials seeking damages for addicted smokers. See *id.* at 550-52. The Fifth Circuit reversed Judge Jones' decision on May 23, 1996, which decertified the class action. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996). In a 36-page opinion, the three judges agreed that variations in state law were too great to cover the millions of possible plaintiffs, defeating the class action requirements of predominance and superiority. See *id.* at 743-44.

12. See PRINGLE, *supra* note 6, at 34 (referring to the ABC News *Day One* story charging tobacco companies with "spiking" cigarettes with added nicotine).

13. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); see generally PRINGLE, *supra* note 6, at 40-41 (discussing the *Cipollone* complaint and lawsuit).

All too often in the choice between the physical health of consumers and the financial well-being of business, concealment is chosen over disclosure, sales over safety, and money over morality. Who are these persons who knowingly and secretly decide to put the buying public at risk solely for the purpose of making profits and who believe that illness and death of consumers is an appropriate cost of their own prosperity?

As [the facts of the case] disclose, despite some rising pretenders, the tobacco industry may be the king of concealment and disinformation.¹⁴

To Gauthier, Judge Sarokin's allusion to hidden documents was like a croupier spinning the wheel for the start of play. The discovery process is the plaintiffs' lawyers' most powerful weapon. If the companies were manipulating nicotine levels in cigarettes to keep smokers addicted, then that was the cause of action. Gauthier would eventually persuade sixty other law firms to pledge \$100,000 a year to launch the largest-ever class action lawsuit. Among the stars in his cast were Elizabeth Cabraser of the San Francisco firm of Lieff, Cabraser & Heimann, whose managing partner, Robert Lieff, had acquired a taste for big-case hunting when he worked with Melvin Belli in the 1960s. There was Stanley Chesley of Cincinnati; Peter Angelos, owner of the Baltimore Orioles; John O'Quinn of Houston; and John Coale of Washington, D.C. The *Castano* complaint charged that the companies had engaged in fraud and deceit by misrepresenting that nicotine is non-addictive; were negligent in not accurately describing their products; violated consumer protection statutes; breached an express warranty that their products were fit for consumption; and caused intentional, emotional distress on those who smoked their cigarettes.¹⁵ The suit sought compensatory and punitive damages and a fund to treat smoking-related diseases.¹⁶ The total amount of damages was im-

14. See PRINGLE, *supra* note 6, at 41 (alterations in author's book, CORNERED) (quoting *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681, 683 (D.N.J. 1992), *mandamus granted & order vacated*, 975 F.2d 81 (3d Cir. 1992)). The *Haines* case, which arose on the heels of the *Cipollone* case, involved a lawsuit by the executor of a smoker's estate against the Liggett Group for damages. See *Haines*, 975 F.2d at 84-85. The *Haines* and *Cipollone* cases were combined for at least one decision during the many years they were in the court system. See *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664 (D.N.J. 1986).

15. See *Castano*, 84 F.3d at 737.

16. See *id.* at nn.4-5.

possible to calculate; if each addictive smoker received only five thousand dollars for medical monitoring, it could run to a hundred billion dollars, or more than twice the industry's annual revenues.

As this powerful team plotted their attack, they had no idea that in neighboring Mississippi another plan to take on the tobacco companies was being hatched. In the spring of 1993, Mike Lewis, a lawyer in Clarksdale, called his 'Ole Miss classmate, Attorney General Mike Moore, to tell him how angry he was about the death of his bookkeeper's mother. After a lifetime of smoking and a long struggle with lung cancer, the woman had died, having exhausted her personal assets and, in her last days, had her care paid for with state Medicaid funds. The cost of her illness eventually exceeded one million dollars. Lewis wanted Moore to sue the tobacco companies to get the state's money back. He thought it might be possible to use the federal False Claims Act,¹⁷ which allows a private citizen to bring a suit in the name of the government if he or she believes that the government has been wronged, but has not moved to protect itself.¹⁸ The provision was basically designed to stop fraud on government contracts, when a private citizen might have inside information and be in a better position to sue than the government. Sometimes, if the case gets too big for the private citizen to handle, the Justice Department will either provide legal aid or take over the case entirely.¹⁹

Scruggs had once thought of using the False Claims Act in preparing a suit against the tobacco companies, and he had mentioned this to Moore. So when Lewis came up with a similar idea, Moore put him and Scruggs together.²⁰

In Mississippi, half a million people—out of a total population of two and a half million—rely on Medicaid. Not all of them have tobacco-related illnesses, but Moore estimated that the state spent between seventy to a hundred million dollars of Medicaid funds a year on smokers. In addition, about eight million dollars of the

17. 31 U.S.C. §§ 3729–3731 (1994).

18. *See id.*

19. *See PRINGLE, supra* note 6, at 30.

20. *See id.* The information regarding the Mississippi suit comes from the author's interviews with key participants, including Dick Scruggs and Mike Moore. For profiles of Dick Scruggs, see Michael Orey, *Fanning the Flames*, *AM. LAW.*, Apr. 1996, at 52, and Suein L. Hwang, *Tobacco: Lawyer Applies Lessons of Asbestos*, *WALL ST. J.*, Mar. 15, 1996, at B1. For a profile on Mike Moore, see Kevin Sack, *Tobacco Industry's Dogged Nemesis*, *N.Y. TIMES*, Apr. 6, 1997, at A4.

state's health insurance plan went toward tobacco-related diseases.²¹

There are several versions of who first came up with the idea of suing for reimbursement of Medicaid expenses, but credit is rarely given to a 1977 article by Donald Garner, a law professor at the University of Southern Illinois. Long convinced that the tobacco companies should be made to pay for the health havoc they wreak, Professor Garner was on the lookout to bring the industry into court. In *Cigarettes and Welfare Reform*,²² Garner noted increasing economic waste caused by cigarette smoking, especially when it came to health costs.²³

Professor Garner suggested that the states get the appropriate cigarette manufacturer to pay the direct medical cost of looking after patients with smoking diseases.²⁴ He did not claim to fully understand how this cause of action would work in the courts, and he acknowledged that there might be a problem proving that smoking caused the illnesses.²⁵ But the issue could be overcome, he suggested, by employing a method similar to that used to assess the eligibility of coal miners for black lung disease benefits.²⁶ Proof that the individual coal miner's pneumoconiosis was caused by working in a coal mine was accomplished with the rebuttable presumption that, after ten years in the mines, the miner's black lung, or his death from a respiratory disease, was caused by his employment; the burden of proof then shifts to the operator to rebut the presumption.²⁷

Scruggs and Moore could not use traditional theories of law for recovering damages for an injured person; they did not apply because the state was, in effect, a third party paying the bill for the injured party. The state doesn't smoke; people do. So they chose the theory of equity. The premise was that unlike the smoker who presumably chose to smoke, the state had no choice in providing health care to its citizens. Mississippi claimed that the companies had been unjustly enriched because the state paid bills that were

21. See PRINGLE, *supra* note 6, at 30.

22. Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269 (1977).

23. See *id.* at 294-95.

24. See *id.* at 314.

25. See *id.* at 315.

26. See *id.*

27. See *id.*; see also *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 38 (1976) (stating that the approach used passed the constitutional challenges presented by the mine operator).

the consequence of them selling cigarettes in Mississippi.²⁸

At the beginning of 1994, Moore was preparing his charges against a dozen of the major tobacco companies when the attention of the plaintiffs' lawyers was suddenly focused on a surprise announcement from the FDA. On February 25, FDA Commissioner David Kessler²⁹ charged there was "mounting evidence" that the tobacco companies controlled the levels of nicotine in cigarettes in order to satisfy the smoker's addiction. This was an astonishing departure from previous FDA policy toward the tobacco industry. For decades, the anti-tobacco forces had been pushing the FDA in vain to impose stricter controls on tobacco, and since 1988 a petition had been sitting on the commissioner's desk from the Coalition on Smoking or Health³⁰ asking the FDA to regulate cigarettes as a drug. Now, in a letter to the coalition's chairman, Scott Ballin, Kessler said evidence suggested that the manufacturers intended their products to contain enough nicotine to satisfy "an addiction," and therefore should be regulated as a drug.³¹ The Third Wave was gathering force.

The three-pronged offensive had mixed results. Gauthier failed to get his massive *Castano* class action certified (it passed the lower court but was turned down on appeal by the Fifth Circuit),³² and the FDA's regulation efforts became bogged down in court. But Mississippi became the first state to settle with the tobacco companies—then Florida, Texas and Minnesota followed.

After the *Castano* decision, Elizabeth Cabraser, the group's lead attorney, wrote a paper for the American Bar Association in which she critiqued the Fifth Circuit's decision.³³ In calling addiction an "immature tort" requiring experimentation in many trials, the Fifth Circuit, Cabraser argued, had suited the tobacco companies' "interests and preferences admirably."³⁴ Such a ruling played directly into the industry's legal strategy of wearing down the oppo-

28. See PRINGLE, *supra* note 6, at 30-31.

29. David Kessler's arrival at the FDA comes from author interviews and newspaper reports; especially *Kessler Discusses FDA Role*, 14 CHAIN DRUG REV., June 29, 1992, at RY18.

30. The Coalition on Smoking or Health includes the American Cancer Society, the American Heart Association and American Lung Association. See PRINGLE, *supra* note 6, at 33.

31. See *id.*

32. See *supra* note 11 and accompanying text.

33. Elisabeth J. Cabraser, *The Road Not Taken: Thoughts on the Fifth Circuit's Decertification of the Castano Class*, SB24 ALI-ABA 433 (1996).

34. *Id.* at 449

sition.³⁵ A single plaintiff was likely to find the cost of litigating an addiction claim so much greater than the prospective award as to be of “negative value” because litigation would cost much more than could possibly be gained in damages.³⁶ Therefore, the plaintiff would be deterred from taking action.³⁷ This had been the experience of the First and Second Waves of tobacco litigation. Cabraser concluded that concepts such as “immature tort” were, in fact, attractive “catch phrases” that were “largely unsupported by any widely accepted body of evidence or jurisprudential consensus.”³⁸ In short, she said, immature tort was an immature concept.³⁹ Concluding her attack, she said that it appeared, “at least to the ‘losing’ side, as essentially a value judgment, in which one court’s view of the merits of the case has become inextricably entangled with the neutral procedural principles of Rule 23 [of the Federal Rules of Civil Procedure that cover class actions].”⁴⁰

The *Castano* group soldiered on, splitting up their original class into “son of *Castano*” cases in state courts, but it was an uphill struggle opposed at every turn. The focus now turned on the state Medicaid cases, and the end game the attorneys general played in the summer of 1997⁴¹—the abortive bid for a national settlement of the lawsuits passed by Congress. The small band of liability lawyers who had launched the Third Wave would take a back seat—for a while.

35. *See id.* at 449.

36. *See id.*

37. *See id.*

38. *Id.* at 450.

39. *See id.* The Harvard Law Review agreed that the Fifth Circuit’s adoption of the maturity test was “decidedly premature.” *See Recent Case, Class Actions—Class Certification of Mass Torts—Fifth Circuit Decertifies Nationwide Tobacco Class—Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), 110 HARV. L. REV. 977, 979 (1997).

40. Cabraser, *supra* note 33, at 451.

41. *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).

