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Article 2

Introduction: The Changing Landscape of the Practice, Financing and Ethics of Civil Litigation in the Wake of the Tobacco Wars - Seventh Annual Clifford Symposium on Tort Law and Social Policy

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INTRODUCTION

*Stephan Landsman**

One of the seminal events in recent American Civil litigation history came in November 1998, when the five giants of cigarette manufacturing in the United States agreed to settle pending cases mounted by the attorneys general of forty-six states, the District of Columbia, and five United States Territories. This so-called Master Settlement Agreement obligated the cigarette manufacturers to, among other things, pay the states more than \$200 billion over twenty-five years and reform the way cigarettes are marketed in America.¹

The states were assisted in mounting and winning this litigation by a group of private practitioners who had, for the most part, taken the case on a contingency fee basis and stood to gain handsomely from the settlement reached. In consequence of these events, state coffers have begun to swell with payments from the tobacco companies and successful private counsel have begun to harvest perhaps the richest rewards ever secured by American lawyers.²

The impact and implications of these events remain to be sorted out. The goal of the Seventh Annual Clifford Symposium is to facilitate that sorting process by exploring the tobacco war's impact on the practice of law, the financing of future litigation, the relationship between state attorneys general and the plaintiffs' bar, the application of established ethical principals, and the worldwide legal scene.

The Symposium begins with a pair of articles considering the financing of civil litigation. Professor Stephen Yeazell argues in *Re-Financing Civil Litigation*³ that the economic changes implicit in the tobacco litigation pay-outs are the culmination of a decades-long historical process that has led to a better-financed and effective plaintiffs' bar. Professor Herbert Kritzer concurs in his piece entitled, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratifi-*

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1. See Milo Geyelin, *States Agree to \$206 Billion Tobacco Deal*, WALL ST. J., Nov. 23, 1998, at B13.

2. For the nature of the involvement of the private bar see, e.g., Michael Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 William Mitchell L. Rev. 477 (1999); on the question of fees recovered see *Attorney's Fees & the Tobacco Settlement: Hearing on H.R. 2740 Before the House Comm. on the Judiciary*, 105th Cong. 36 (1999).

3. Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001).

*cation of the Plaintiffs' Bar in the Twenty-First Century.*⁴ Professor Kritzer remarks the growth of the stratification of the plaintiffs' bar, as a group of remarkably talented and successful lawyers have, in recent times, distinguished themselves from other practitioners representing injured individuals. In both pieces, the tobacco wars are viewed not as the cause of change, but a logical outgrowth of changes that have already taken place.

Professor John Coffee, in his article "*When Smoke Gets in Your Eyes*": *Myth and Reality About the Synthesis of Private and Public Counsel*,⁵ reinforces the notion that the tobacco cases may be less revolutionary than some have claimed. He compares the recent wave of tobacco proceedings to securities litigation and concludes that the "new" approach displayed in contingency fee financing of attorney-general-directed litigation is a sensible ordering that replicates approaches relied upon to secure fairness in a variety of large and difficult cases.

Professor Richard Abel then provides a useful comparison to the American scene by surveying contingency fee developments in England. His piece, entitled *An American Hamburger Stand in St. Paul's Cathedral: Replacing Legal Aid with Conditional Fees in English Personal Injury Litigation*,⁶ reminds us that the American way of doing things with contingency fees is expanding abroad, as well as at home. Professor Abel also reminds us that what is lost in such a shift, particularly commitment to legal aid for the poor, is significant.

David Dana returns us to consideration of the special relationship at the heart of the tobacco wars—that between the state attorneys general and the plaintiffs' bar in *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*.⁷ Professor Dana concludes that this special relationship is likely to grow but that it will increase the likelihood of serious conflicts of interest between private parties and public claimants.

Professor Robert Rabin has labored long and thoughtfully in the vineyards of tobacco litigation.⁸ In his article entitled *The Tobacco*

4. Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-first Century*, 51 DEPAUL L. REV. 219 (2001).

5. John C. Coffee Jr., *When Smoke Gets in Your Eyes: Myth and Reality About the Synthesis of Private and Public Counsel*, 51 DEPAUL L. REV. 241 (2001).

6. Richard L. Abel, *An American Hamburger Stand in St. Paul's Cathedral: Replacing Legal Aid With Conditional Fees in English Personal Injury Litigation*, 51 DEPAUL L. REV. 253 (2001).

7. David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315 (2001).

8. See e.g., ROBERT RABIN & STEVE SUGARMAN, *REGULATING TOBACCO* (Robert Rabin & Steve Sugarman eds., 2001); ROBERT RABIN & STEVE SUGARMAN, *SMOKING POLICY: LAW, POLITICS AND CULTURE* (Robert Rabin & Steve Sugarman eds., 1993).

Litigation: A Tentative Assessment,⁹ he moves toward synthesis of his work in the vast field. He finds that the tobacco cases may have less to teach us than might appear at first blush and may indeed be an anomaly in mass tort litigation. Rabin underscores the irony of the tobacco wars, which have led us to question the propriety of the monetary success of a plaintiffs' bar that had to surmount the resistance of scorched-earth defendants who for forty years used their "enormous resources to beat down every effort by litigants to secure compensation, usually by imposing such heavy litigation costs that the cases were dismissed far short of the courthouse door."¹⁰

Martin Redish, Bruce Green, Roger Crampton, and Richard Daynard shift the focus of our attention from the outcome of the tobacco wars to the behavior of warriors. Professor Redish, in his article entitled *The Adversary System, Democratic Theory, and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*,¹¹ defends the vigorous representation provided by advocates to their tobacco clients in the early years of the dispute. He finds in the defense bar's legal work the sort of representation required by the core values of our adversarial system of justice. Professor Green in *Thoughts about Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun?"*¹² finds much less to be sanguine about in the conduct of the tobacco industry's corporate counsel but, nevertheless, believes it to be in accord with the modern "hired gun" ethics that have come to guide our expectations about counsel's conduct. In trenchant comments, Professors Roger Crampton and Richard Daynard review the Redish and Green articles.

Tapping into one of the core themes of the Symposium, Professor Richard Marcus, in his article *Reassessing the Magnetic Pull of Megacases on Procedure*,¹³ concluded that the tobacco litigation has had far less impact on the civil litigation landscape than might have been expected. In fact, tobacco litigation "has been a dud in terms of procedural innovation," despite the common wisdom that megacases are the driving force behind procedural reform.¹⁴ Professor Marcus explores the reasons for and implications of this situation.

9. Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331 (2001).

10. *Id.* at 357.

11. Martin A. Redish, *The Adversary System, Democratic Theory and the Constitutional Role of Self-Interest: The Tobacco Wars, 1953-1971*, 51 DEPAUL L. REV. 359 (2001).

12. Bruce A. Green, *Thoughts about Corporate Lawyers After Reading The Cigarette Papers: Has the "Wise Counselor" Given Way to the "Hired Gun?"*, 51 DEPAUL L. REV. 407 (2001).

13. Richard L. Marcus, *Reassessing the Magnetic Pull of Megacases on Procedure*, 51 DEPAUL L. REV. 457 (2001).

14. *Id.* at 458.

Professor Deborah Hensler next presents us with an analysis of the implications of what she terms the “new social policy tort” that seems to have arisen out of tobacco cases. In her piece, *The New Social Policy Torts: Litigation as a Legislative Strategy—Some Preliminary Thoughts on a New Research Project*,¹⁵ she begins to consider the implications of this arguably new approach and sketches the framework for a study of such litigation in the context of several contemporary theories about democracy.

Professor Michael Rustad in an article entitled *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*¹⁶ seeks to place the work of Professors Hensler and Marcus into the framework provided by prior discussion of the role of private attorneys general in American litigation. He argues on behalf of the seminal importance of private attorneys general in the decades past.

The Symposium concludes with a roundtable discussion by four outstanding lawyers who have been in the front lines of the tobacco wars. Benjamine Reid of Florida law firm Carlton Fields was one of the lead counsel for the tobacco industry in the recently concluded *Engle v. American Tobacco Co.*,¹⁷ where the claims of Florida plaintiffs led to an enormous punitive damages award against the tobacco industry. Dan Webb, an outstanding trial lawyer from the Chicago First of Winston and Strawn, was on the defense side in *Engle* and has been involved in a number of other significant tobacco cases. Richard Scruggs and Don Barrett, each of whom heads his own Mississippi law firm, are two of the stars of the plaintiffs’ tobacco bar. They had a major hand in the series of cases that led to the \$206 billion settlement reached in 1998. In a broad-ranging discussion, these four consider the merits, problems, and future of the tobacco litigation and the lawyers who were involved in it.

15. Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493 (2001).

16. Michael L. Rustad, *Smoke Signals from Private Attorneys General in Mega Social Policy Cases*, 51 DEPAUL L. REV. 511 (2001).

17. No. 94-08273 CA-3 (Fla. Cir. Ct. Dade Co. Nov. 6, 2000)(Final Judgment & Amended Omnibus Order). For earlier proceedings in the same case, see R.J. Reynolds Tobacco Co. v. Engle, 672 S. 2d 39 (Fla. Dist. Ct. App. 1996).