Tobacco Lawyers' Roundtable: A Report from the Front Lines

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MR. REID: It's unusual to get to go first when you're the defendant. I'm not sure I can handle it . . . I was listening yesterday intently to the view of what's happening with class actions, and I wanted to tell you how my experiences are either consistent with what you heard yesterday or perhaps are inconsistent.

The first thing I'll say about class actions is that . . . I am amazed at the number of cases that now have the title class action from all kinds of terms and on all kinds of subjects. It used to be there were certain lawyers that were thought to be class action lawyers, but it's almost become the bread and butter of the case.

Now, some people would say that's because there is a thought that if you put a class action on the top of the complaint, there's some effect and you get a better settlement and so forth. That's, obviously, a different problem in state and federal courts in foreign countries.

But to give you an example, the small firm in Miami where I practice, you know, there's two, three, four lawyers who take pride in handling commercial cases. Within a period of about two months, this firm filed a class action case involving Al Gore's (inaudible); a class action involving under-powering a particular line of vehicles; a class action involving wireless telephone billing; a class action involving tobacco, sort of an offshoot of the AG case in Florida; and a class action involving Firestone Tires. . . . There's no consistency in those cases except they're all class actions. I am seeing this more and more.

So I think, in fact, for whatever reason that the trend is that there are more and more—I have more class actions now in my office than I've ever had in my whole career; and it may be because of some of the things that we talked about yesterday.

The second point I'd like to make is that I firmly believe, and notwithstanding that I spent two years doing this and Dan spent . . . ten months doing it, I firmly believe you cannot try any mass court case in using a class action. And I think you should be aware if somebody says, no, I've tried, or . . . you can try a mass court case using a class action, you need to be aware.

1. Benjamin Reid is a partner in the Florida law firm Carlton Fields. He was one of the defendant's counsel in Engle v. R.J. Reynolds Tobacco Company.
Because . . . they probably tried a bunch of improperly joined or improperly consolidated individual cases; they probably had some sort of bifurcation; and they probably—once they finished whatever they did that they called a trial—they probably were left with a set of tasks that most anybody would agree are completely undoable. And I want to give you one example, and then I'll move on and I'll let you decide.

I'm going to tell you what the trial plan was in the *Engle* case in Florida. That was *Engle*, the class action case that was tried for two years. I'm just going to recite the trial plan; and then we can talk about it or you can decide if you believe, if you followed that, whether it's doable or whether it's a class case.

First, . . . we tried something called common issues; and these were things such as is there a defect, but without any regard to whether the defect caused it. As to fraud, we tried the question of whether there is a false statement, whether it was known to be false, and whether it was made with the intent that somebody relied on it, and that's all. We didn't try if someone actually relied on it and if somebody was damaged. That was Phase One.

Phase Two is divided into two subparts. Phase 2(a) was the rest of the liability issues in regard to the individual plans; that is, three named plaintiffs came in and we basically tried the rest of liability. They . . . tried to prove that they curved these statements, they relied on them, they were damaged and so forth. We tried comparing faults as to those three. We tried specific causation as to those three. Those three trials took four months, and at the end of that, those three people received verdicts; and the verdicts were different percentages for each of the defendants, different percentages for each of the plaintiffs, and one plaintiff was . . . found to have been barred by the statute of limitations. That was the first part.

Phase 2(b) was a punitive award for all classes.

Now, we still have Phase Three, and this is in the trial plan. Now, every *Engle* class member—we estimated at trial between three and 700,000—every *Engle* class member now has to come in and prove their individual case. We have to repeat what we did for those three for 700,000 people.

And then—and this is all in writing, I promise you. And then after all of that is finished, the court gets to decide what percentage of the punitive award each individual—assuming all of this goes forward—what percentage of that punitive award would be assigned to each individual. Now, that's what we have left to do. And, so, I will end my brief comments by asking you to consider whether you believe you can do that.
MR. SCRUGGS: Thank you. I want to thank [Steve Landsman] in particular for inviting us here today. Like all students, all members and academics and other lawyers here... I think this sort of exchange is very helpful in getting everybody understanding the current set of the laws evolving in mass court—in mass court hearings.

One of the problems that Ben just pointed out—that he did well on—is the fact that there is right now a substantial void in the subject of law in the United States; and, that is, that a company that manufactures a product... causes widespread injury, i.e., mass tort has the choice between trench warfare fighting every case individually, one by one, paying the company and certain, what we'll call, magic jurisdictions by state.

There's one called Jefferson County, [some] in Alabama, [and] there's some in Texas, and probably a dozen or so magic jurisdictions around the country that any company that goes to trial there runs the risk of enormous multi-billion dollar punitive damages.

So companies that... find themselves on the bull's-eye of mass court litigation have very little choice now from between bankruptcy or Chapter 11 bankruptcy code, or trench warfare paying the company in some of these magic jurisdictions.

There's no middle ground they can use to educate themselves; and for lack of any other legal vehicle to do that, the class action method has been tried—and is still being tried—as a vehicle, one, to increase the pressure by plaintiffs, naturally to raise the stakes. Increase the pressure on the industry or the company that they deem to be the defending company. Raise the stakes so high that they can't afford to lose or can't afford to go to trial. And, secondly, it's also a vehicle that can be taken advantage of by a company in such a circumstance to extricate itself from the thousands or tens or hundreds of thousands as in the asbestos case in lawsuits around the country.

That's... one of the ways we got where we did in tobacco. In the early days, 1980s or early 1990s, when Don Barrett and I first started talking about tobacco. Don was one of the pioneers in the tobacco litigation and was breaking a lot of ground in individual cases in Mississippi finding out an awful lot about how the tobacco industry defended themselves in those cases, especially in magic jurisdictions where they come in and simply try to create enough influence to end up with a hung jury in the case. . . .

2. Richard Scruggs owns the Mississippi law firm Scruggs Millette. He was active in both the Mississippi tobacco litigation and the November 1998 national tobacco settlement.
[W]hile we were involved in defending or prosecuting, rather, an Engle asbestos case, we were thinking of ways to raise the stakes. They thought about bringing suits under the Federal Law Claims Act for misrepresentations to the federal government that resulted in enormous medical bills for veterans, for example. The case Don and I tried together for veterans involved the VA Hospital and an enormous expense to the government. So we thought about going that way.

While we were in the process of thinking about that, my board, the Attorney General of Mississippi, and another lawyer who is one of our lawsuit classmates came up with the idea of going after federal Medicaid money or state Medicaid money, which is federal.

And we decided that that was the best way to raise the stakes on the tobacco industry so they couldn’t raise—they couldn’t try one case at a time and bleed us to death. They had nothing to lose by trying one case at a time.

The stakes were not high enough to force a change in their behavior, and that’s why we finally decided to go, after a lot of thought and a lot of brainstorming, with the attorney general’s actions where we were more or less (inaudible) cases. Direct lawsuits by state governments for injuries to their citizens for smoking—not for smokers, but for the 75 percent of the taxpayers who do not smoke.

So the idea there is to raise the stakes on the tobacco industry and perpetuate force of change that had marginal success. It could have been more [of a] success had the (inaudible). But that vehicle of state action with private lawyers is not available routinely for (inaudible).

And, so, what you’re left with is very few choices between a class action to raise the stakes or some sort of aggregation device (inaudible), which are pricey and there are lots of time fields, and whether a class is certified largely depends on what the trial judge had prefaced and you don’t really have a good road map to predict how the court is going to rule on that or how an appellate court is going to rule on that.

You have very little choice now if you’re going to affect corporate behavior or extricate a corporation from mass tort between class action bankruptcy, and that’s why I am concerned now that with mass tort having progressed to the new level.

A company, looking at it from the defense side for a minute, has no way to get itself out. Just the defense cost alone can bankrupt a company, and there needs to be some sort of intermediate vehicle between bankruptcy and between trench warfare where you’re paying the company for both plaintiffs and defendants.
Mr. Webb: I join in thanking Steve for inviting us here. I think it's a great idea to have [this exchange]. I think as lawyers we've all been kind of down in the trenches in the last few years litigating these cases, and I actually tried to—I came in from New York this morning as Steve pointed out. I actually tried not to reflect on things very often. I'd rather just sit back and be involved in the trial of the case and see what happened.

So I actually . . . did. I got involved in tobacco litigations to some extent four or five years ago where people were on the third wave of the tobacco litigation. There's articles written where they called this the third wave of the tobacco litigation. There's articles written back in 1994 [and] 1995 about whether the tobacco litigation would change tort law. Will it actually change tort law?

And I know that people talked about that here today, and I'll just share Mr. Webb's reflections on now, five or six years later. I haven't bothered to reflect upon it and I actually don't care about the changes of tort law in the sense that I view myself as an advocate. It doesn't matter to me what the tort law is. Just tell me what it is and then put it in instructions, and we'll try the case.

But . . . having said that—and I'm probably biased because of my role in this litigation. So if I pretend to be unbiased, I think that would be unfair. I've been on the defense side representing Philip Morris in four or five major trials in the last four or five years. But here's Webb's reflections . . . on whether or not the third wave of tobacco litigation and whether [it is] going to leave a profound mark on tort law in America, and here's my view:

At least at this point—and it's not over, there's a lot of cases out there pending, but you've had, in my judgment, some of the best plaintiffs' trial lawyers in the country here on this panel that have done just a marvelous job in developing cases and putting pressure on the tobacco industry, which certainly has led to at least one huge settlement; the Master Settlement Agreement (MSA), the states, up to $246 billion. So no one is going to suggest that there hasn't been an immediate financial impact for the industry and/or on the states in this country.

But as far as tort law is concerned, I'll just reflect upon it. My view is that it has not right now; and I doubt that it does, but I think reasonable people could disagree with me. But as far as whether these cases

3. Dan Webb is one of the leading trial lawyers in Chicago. He is partner at Winston & Strawn. He has participated in a series of tobacco cases, as well as representing the Special Prosecutor in the Iran/Contra proceedings.
are having today a great impact on tort law in America, the biggest challenge if you want to just be in traditional tort law is the concept of proximate cause, I guess, is a very important concept in tort law. So proximate cause was the challenge in all of what they called the third party (inaudible) cases. All of the lawsuits by the states, by the insurance companies, by the labor unions, all of those cases operated on a theory that we have to change the law of proximate cause in America. Because whether you like it or not, they have this doctrine out there bearing on all of these tort cases for a hundred years called the remoteness doctrine and the derivative injury doctrine, which basically said that when a fellow who's a tort feasor injures "A," the fact that down the line it causes financial injury to "B" is what they call a derivative injury—too remote . . . [to] prosecute. . . . It doesn’t matter whether it was good or bad or right or wrong. That was the law of torts.

There’s all this policy and social arguments about why it has to be that way or maybe it shouldn’t be that way; but there’s no question across America that was the law. We are now six years later; and the truth is, there’s now—I lost track because I’ve been away from tobacco for several months now—I think there’s sixteen appellate court opinions . . . and I think it’s sixteen to zero right now. Okay.

The courts—when you finally get these cases up to the appellate courts, the appellate courts are basically saying, we are not going to change the law of proximate causation for your tobacco litigation. That’s the truth. Now, is that going—I doubt that. So, quite frankly, I don’t know whether that’s good or bad. To me, it doesn’t matter. But the fact is, that was a challenge to a fairly significant concept of tort law which has not changed.

Now, by the way, the AG lawsuits taking (inaudible) credits, serves in trial courts including the district court judge in Texas and I think in Florida maybe, basically—who basically said under this doctrine of quasi-sovereign[ty] that the state can bring, basically, a third-party payroll lawsuit. And those suits did not get dismissed at the trial level and eventually there was a settlement. But the other cases, all these other labor cases and these—they’ve all gone up and there’s . . . a lot of authority now and that minute principle of law did not change.

The second major potential change procedurally, (inaudible), are we not to do something different as far as how we deal with mass torts procedurally and whether or not the class action can be used as a vehicle, for whatever reason, to aggregate claims, to consolidate claims; and, quite frankly, the law that’s coming out right now of the appellate courts is basically pretty basic and fundamental.
If you go up to the appellate courts, these appellate courts, with the exception of Engle [and] Florida, are basically saying individual suits predominate, and we are not going to let mass torts—these mass tort cases get litigated in the confines under class action.

So those—that's what's happened. . . . Tobacco offered those two major areas as opportunities where we—our courts will sit back and reflect and say we really ought to make some fundamental changes in both substance and procedures as far as tort law, and I actually don't see that having happened today.

Now, Ben talked about a case Ben and I tried in Florida, the Engle case. There is an opinion from the Third ECA in Florida, which basically says you can proceed with a class action, a statewide class action . . .

But anyway—but whether Engle is an aberration or whether it ever gets affirmed—now you get into the heart of it, you've got to back up the stairs on actually a trial. I don't know, but those are my reflections, and I say . . . the third wave of the tobacco litigation hasn't yet changed tort law in America in my judgment.

MR. BARRETT: I do appreciate the opportunity to be here. I realize I'm a long ways from Lexington, Mississippi. I'd like to speak generally for a couple of minutes before I speak specifically about the tobacco litigation. Before I do that, I'd like to respond a little bit with what Ben and Dan said.

Ben suggested that there are too many class actions . . . and that there certainly shouldn't be any mass tort class actions. Well, what about consumer fraud? What about the case like we had in southern Illinois recently where State Farm was found to have cheated about four million people out of 300 bucks apiece? You know, those folks—it cost us over a million dollars to try that case. I'm going to try it for one person for $300. Of course, it means that if you don't have class actions, the corporations get a free ticket. And, so, class actions are a wonderful device in that area at least. And then as to what Dan said, Dan said he tries not to reflect on things. Well, I think that's a good plan for a nice guy representing the tobacco industry.

People tell me that I'm a member of a pretty small group. I'm a politically conservative trial lawyer, and I'd like to take about two minutes and explain to you why it's not an oxymoron. The basic premise underlying what most conservatives believe about government is that government doesn't work very well. The less we have of it, as

4. Don Barrett owns the Mississippi Barrett Law Office. He was active in both the Mississippi tobacco litigation and the November 1998 national tobacco settlement.
Jefferson said, the better off we are. . . . But conservatives also share with most Americans the view that in this country we have—what sets us apart in this country is a unique social contract that we have. Every citizen, regardless of his station in life, has access to justice, to equal treatment at the hands of the law to ensure that the basic rights are not eroded away. I found I put in place this system of checks and balances at the very center of power.

After the Civil War, there arose a new center of power, a new center of power in the country under these humongous enormous corporations. And think, you know, you have the huge corporation and the lowly consumer who [has] been cheated out of fifty bucks or two-hundred bucks. The corporation has all the advantage, all the leverage, all the power; but remember the America[n] social contract is not going to allow the powerful to run over, to oppress weak and helpless people.

We require in this country by our social contract to address this imbalance in some way, and there are two ways to do it. They’re just—and not but two ways theoretically. The first way—Dan likes this way, Dick probably does too—we make government bigger, more regulations, more red tape, more bureaucrats, more oversight from Washington. Now, this idea is repugnant to conservatives. Remember our basic belief. I mean it’s not philosophical, it’s practical. Big government doesn’t work very well. . . . Ask any businessman who’s had the misfortune of dealing with OSHA. He’ll tell you about the joys of big government in this country.

What’s the alternative? Is there an alternative? Yes. There’s one alternative that’s grown up that doesn’t require a clumsy ham fisted hand of big government. It’s the judicial system. It’s been around for two-hundred years with a body of common law that protects the major corporations and the little guys just a like. So what do we do? Do we choose a big and ever growing central government, or do we choose the county courthouse . . . here in Cook County, Chicago with the judge or the jury controlled and limited by the appellate court system and by two-hundred years of common law?

For us conservatives, that’s a pretty easy choice. Corporate America has done a wonderful job of defending itself. They’ve successfully demonized lawyers who represent the little guy. For the last fifteen or twenty years it’s been astonishing to me to watch a skillful PR effort relentless that succeeded in framing the public debate in an unfair way. The question, you know, generally is you (inaudible) and make all of this money and do all of this social engineering in the country. The premise of that question is wrong. We’re not social en-
gineering when we bring corporate wrongdoers to account into court. You’re just enforcing the basic premise of our social contract. We’re not engineering anything. We’re not doing anything radical or revolutionary. That’s nonsense.

There’s nothing radical or revolutionary about “Thou shall not steal.” The majesty, the genius of common law of the civil justice system is in its ability to adapt to changing circumstances. That’s what we talk about in class action suits. For example, along the general lawsuit, look at what happened when we started having mass production of consumer goods. The whole societal thinking [and] small town idea that the maker of a product ought to stand behind the product was taking a beating until the doctrine of strict liability was developed out in California by Judge Crane.

The manufacturer ought to stand behind its product. That was the simple thought that I had back in the mid-1980s when I started trying and getting my brains beat out in death cases against the tobacco industry. Didn’t sound radical to me. It had to stand behind that Pinto. . . . They were products, they were legal products that were sold. If a company makes a product that when used exactly as intended kills 430,000 Americans a year, they should be held accountable—some account. It just didn’t make sense to me.

But I hadn’t understood how well the tobacco industry had used the assumption of risk if nobody made them smoke. They did a masterful job at it. I take my hat off to them. They’re good lawyers. Nothing wrong with that. . . . I guess that I became obsessed that what I think is a killer industry [was allowed] to operate and do what it was doing with impunity.

[But] how do we get around this, you know, this nobody made them smoke argument? And it hit us that . . . we didn’t have to do that. Just go back to the basic law of the country. That’s what we did. Say Mississippi wanted to represent these people. I mean, represent the State to recover the money that it lost; not individually, but it had lost taking care of Medicaid patients with tobacco-related illnesses. Eureka.

The State of Mississippi never smoked a cigarette. The argument doesn’t apply, nothing revolutionary, nothing new. We didn’t leap forward. We used the old equitable remedy of unjust enrichment. It’s been around for two-hundred years. The solid laws that we have in this country—we went back to basics to explain what the case was about. The analogy that—my favorite analogy, there’s a lot of them—but the one that I’m most comfortable with and I think is the best is this—and you may have heard it—but a man sets out on the road
from Jerusalem going to Jericho. Going down to Jericho—Guess what? He’s set upon and beaten by robbers and was left in the road. . . . You know about the story. A couple of guys came by and left him there and went on, but that’s not the point of this story. The point is that somebody eventually came along, a good Samaritan guy. And he picked him up and bound up his wounds and put him on his donkey and carried him into Jericho. He took him to the inn, and he paid the innkeeper money to take care of him medically, to give him food and lodging until he was well; and then this good Samaritan went on his way.

Now, the question posed is: As between that good Samaritan and those robbers—assuming you could find robbers—and between those two, who ought to pay—who ought to pay that innkeeper at Jericho. So what if the guy was an idiot for leaving Jerusalem late in the afternoon? Everybody knows there are robbers on that road. Everybody knows something bad is going to happen to you. That has nothing to do with the Samaritan, just between the two. We posed that question. We never got an answer, and the tobacco industry couldn’t answer it, and that’s the reason we were able to achieve—because of law in this country, because of our civil justice system—a $368 billion settlement and a fundamental change in the way that the tobacco industry markets its product. So I say, Hurrah for the law. Hurrah for the civil justice system.

THE INSTRUCTOR: I’ve got about four or five questions, and I want the academic and other members of the audience to think if they’ve got some too. . . . But one thing strikes me, and I’m curious to hear what you think. The people who come in to sit on a jury have a changed attitude about mass litigation. Do you think what happened in the attorney general’s litigation and the traditional statements from Florida (inaudible) signals a change in how people think about the tobacco industry and, therefore, changed the [way jurors view the litigation]?

MR. WEBB: . . . I wasn’t involved in mass litigation during all of the years up until this most recent time. Plaintiffs’ lawyers are winning tobacco cases. They never won cases before. . . . There’s a case in Oregon. There’s two in California. There’s Engle. . . .

I don’t know. There’s no question that at least there was a time, it appears to me, at least in history, that if you basically went up in front of a jury and said, Look, this fellow decided to smoke cigarettes for

5. Professor Stephan Landsman is the Robert A. Clifford Professor of Tort Law and Social Policy at DePaul University College of Law.
forty years and voluntarily agreed to do it. Nobody sucks smoke into his lungs for forty years and then tries to get money for it. That basic sense of, I’ll call it freedom of responsibility, acceptance of responsibility, freedom of choice, there’s certainly, probably, basic things that we govern ourselves by in this country that appear to—ring with jurors. And the tobacco industry, I think—I don’t want to misstate history—but I think they won all of their cases up to a certain point.

I mean, one of the interesting things about tobacco litigation today—and the verdict is not in on this yet—but I assume—I mean, we’re trying to be a little bit reflective here. [But] I assume the purpose of the tort system is to eventually put money in the pockets of people who are injured by tortfeasors. I have to assume that’s it, the goal of the tort system. At least I think that’s one of the goals of the tort system. I think that’s what the goal is.

Actually, even with the third wave of tobacco litigation, the truth is I think there’s only one smoker in America that is putting money in his pocket because he’s been injured by the tobacco industry, even today. . . . So my point is that . . . the basic concept that someone who assumes the risk of these thoughts raised, I’m not arguing about that, apparently still has some resonance and still—because even today, money isn’t going to the injured party.

The money that Dick and Doug and others use their skill in putting pressure on the industry—I’m not saying the states are not using some of that money for good purposes, but many states use that money for smoking succession programs, anti-youth smoking programs. I think those are very, very good things.

So I’m not suggesting that the money is not being used in a way that’s good for mankind as far as antismoking issues are concerned. The fact is, even now, after all of these years, there isn’t really much money going to the injured party; and, so, whether there’s been any profound change, I don’t know.

**Mr. Reid:** If I could just add to that . . . I think Dan’s point that the jury is still out, so to speak, is accurate because there have been some different verdicts, a couple. There have been a number of cases, if you count them all up—before *Engle*, during *Engle* and since *Engle*—that have tended to go the way of the other cases.

And I think it’s more than just personal responsibility. A lot of these cases are tried on medical causation issues, and those seem still important issues that juries consider. And I think—I guess I go back to the concept that the juries—what’s going on in these early phases of the tobacco litigation, those were jury verdicts. You know—I mean,
that's the system that we were talking about. And the juries were
deciding those cases.

And my concern, my biggest concern, is that we're changing the
rules. And by changing the rules, I'm talking about things such as the
Florida statute that permitted the AG case to move ahead, and I'm
talking about what I consider to be an expansion—I'm not saying let's
get rid of... class action. I'm saying it's just being misused.

So I would say as long as we're moving ahead, the jury is still out on
the issue of whether there has been a fundamental change. I guess
public opinion people can tell us that more than anybody else. You
know, I think those are just legitimate concepts, responsibility, medi-
cal causation. Those are issues that are found in all lawsuits, not just
tobacco; and I guess what I'm saying, we shouldn't change the rules
because we have at this point in time a politically unpopular class of
defendants. Richard.

MR. SCRUGGS: I think as to juror attitudes, I think the principal
result of tobacco litigation over the last four or five years has been
more to raise the negative image of the tobacco industry than to con-
vince the general public that smokers (inaudible).

The premise, although we didn't articulate it like that, for the state
actions, was really not to extract money or transfer money from the
tobacco industry to the state treasuries. We polled that. We focused
that. That didn't resonate very well for the general public.

The purpose for suing for big money, which is the only remedy we
really have, was to raise the stakes so high that the tobacco industry
would have to change its business practices, change its behavior. We
put them—we tried to and we did, in fact, put them in peril of losing
their business if they didn't change. That's why we raised the stakes,
money incentive is the vehicle to coerce a change in behavior.

It's very similar to what we are doing in the (inaudible). We're try-
ing to enforce a change in the behavior of the insurance industry for
the insured.

THE INSTRUCTOR: Critics would say that there hasn't been much
change, that there's still a lot of marketing, still a lot of businesses as
usual.

MR. SCRUGGS: There's some validity to the criticism of change in
the tobacco industry... We did not anticipate in trying to change the
tobacco's industry behavior. We thought that once we had them by
the foot where they could not afford to go to trial in Mississippi, Flor-
ida, or Texas or any of those states, they couldn't buy the judge, the
verdicts would have been in the billions of dollars, and they didn't
have much choice but to agree to our terms.
During the negotiations, which lasted over three months, and I'm proud of that because there was a lot of talk among us as to what we really wanted these guys to do, we forced the tobacco industry to ... basically accept every term that any public health advocate could think of. We've had enormous financial pressure on the industry. Youth smoking did go down, and that's the premise of everything we're trying to do.

We knew we couldn't stop adults from smoking who had already started smoking. The idea was ... to postpone it past the 18th and 19th birthday. It's our ability to start to smoke. ... About 90 percent of the smokers started before they were eighteen; and the idea was to cut off the appeal to youth and gradually force smoking out to a marginal behavior, sort of like using cocaine or something today. You're not going to eliminate it, but you're going to marginalize it, making it where people, once they get past that youthful rebellious stage, quit taking it up.

That was the idea, and we created enormous financial incentives. Some say they could have been greater; but, now, they're not as a result of the settlement not passing Congress. But enormous financial pressure on the tobacco industry to stop smoking made them strictly liable for cutting off smoking, $80 million for every point they missed the target, 50 percent reduction in five years. Those are no longer present.

So as a result of the—of the failure of the legislation to pass Congress, we had to enter into what's called (inaudible) settlement. But all leverage is gone then, and we couldn't get nearly the reforms from the tobacco industry that we could have gotten at the time of the legislation.

Another mountain that I want to talk about is one of the reasons that failed was because the process got politicized. Many of the public health police—public interest police that say now they are fighting tobacco and ... what we ask for and what we agreed to settle on in June of 1997 was not enough, don't really want a resolution of the tobacco industry.

... .

They needed to keep that cause. We ran into a lot of that with some of these health groups, and it was very disappointing and very discouraging, the very cynical behavior by some of these people to keep this issue alive.

Politicians did the same thing. They thought it was a good issue. I generally vote democratic. I'm not maternalistic ... but I do. Many Democrats saw this thing as a political issue, and they wanted to keep
that issue alive. They thought that youth smoking was a good issue for them to cut way in for the Republicans, and it did.

The fact is, though, [that the tobacco industry] was not very high—it was not on anybody’s top ten list of the most important issues of the country. A lot of white heat on two ends of the spectrum, but nothing to note. And, so, they miscalculated.

So what we ended up with in the MSA was not nearly the reform measures that we had set out to achieve. The reason that [we] mortgaged out homes on this litigation was because we felt inspired not to make money—we ultimately made money. We don’t look back on it and say that’s why we did it, but we did this because this was our chance as a couple of . . . little boys from small town Mississippi to really change the world. We had that in our grasp. Unfortunately, most of it got away from us as a result of political legislation.

. . .

**The Instructor:** Looking out over the experience of the tobacco litigation, one of the things that strikes me is that the plaintiffs’ side of the ledger behaved differently than it had before. In other words—the coordination, team playing—it was cooperation and development of facts of a very complicated set of issues leading to activities to help with other litigation and so forth and so on. Is it your sense that the plaintiffs’ bar has changed in a permanent sense, or is this just the way for this litigation?

**Mr. Scruggs:** I think it’s changed. We learned that by networking we could accomplish what we could not accomplish by ourselves . . .

. . .

The plaintiffs’ bar is like a—you know, there are a lot of chiefs and few indians. They’re usually small, relatively small, law firms—there are exceptions. There are large, organized law firms. . . . Most trial lawyers are that way. There are small law firms where they have great lieutenants that they have a strong personality at the top. And there are probably a dozen or so like that in the country, real movers and shakers.

The relationships among those twelve or maybe, more or less, leading plaintiffs’ lawyers in the country have been strengthened enormously as a result of the tobacco litigation. . . . It took an awful lot of ego massaging. These lawyers all have huge personalities in the cases. It’s really difficult to get everybody working the same. . . .

One of the greatest advantages we have and we still have, quite frankly . . . is that the big corporations insist on having national counsel come down and call the shots to try the case. They get much better
lawyers, much more relationship with judges and jurors involved in an earlier stage. They don’t let them do very much. They pretend that they do initially; but then as the case progresses, the Washington lawyer or the New York lawyer or the defense guy starts taking over. A big city lawyer comes in and takes over and calls the shots, and they do it . . . it’s almost like—like a movie script that they use.

And it’s a great advantage to us that these guys—they’re national—the national firms that represent these companies try to call all the shots and actually interface with the judge and jury more than they should. If they were smart, they’d hire guys like us—not us, but guys like us—who have local connections to the judge’s trust, especially in areas of law that . . . the trial judge generally deals with. He’s going to trust a lawyer that he has dealt with for months or years over somebody who’s going to try to tell him what the law is. He’s going to have a national resentment.

And so we have a great advantage to that. The defense side has the same—they have the same (inaudible) dominant role in trying the case. The plaintiffs have to do that too. That’s one of the things they’ve done that’s been very successful. . . . Don has (inaudible) his own egos in organizing, and be sort of a—not only a great trial lawyer, but a great head coach. He doesn’t necessarily have to be a quarterback, the star quarterback. He could pick a good quarterback depending on the game sequence.

If I have a talent, that’s mine. Not necessarily going out there and trying the case or arguing the motion, but selecting the right team to do it and keeping everyone working. I think we have an advantage over the defense.

. . .

Mr. Webb: First of all, both sides have one basic issue . . . on the plaintiffs’ side and the defense side you have multiple lawyers that they have to sort out. Who’s going to play what role at trial. . . . Those ego personality stabbing issues get worked out. On the defense—where I think the plaintiffs have, maybe, a bit of an advantage is that, for example, in the defense side when you really do have multiple defendants like tobacco, diet drugs, and lead paint. . . .

The truth in tobacco is that there are four major companies—and I’ll just use Engle as an example. . . . We were down in Florida. There were 900,000. So they knew how many. They can only give them . . . a couple million apiece. You’re over a trillion, okay. You’re over a trillion at that point. So the numbers were there. It didn’t matter at that point. That trial, there were 900,000 plaintiffs and it was going to be a
The jury just told them, all you've got to do is decide how much, $500,000. So that was the corporate existence for those companies.

So I can tell you that those companies had individual issues that transcend the personalities of lawyers. And, so, the only real difference is besides us trying to work out our trial team with the personalities, which we, I think, try to do, clearly there are other issues in those cases and particularly we break down stuff like punitive damages. There is a liability base on the case.

Traditionally, I think as everyone knows and tries these cases, the industry by and large is approaching these cases in a little more unified way. When you get down to damages and smoking history and things like punitive damages and who ought to be held accountable, to be run out of existence, there's such individual issues that come into play with these companies that clearly requires a lot of diplomacy and hard work because obviously when you try it, the jury starts seeing the defense fighting among themselves. That's not exactly what we want to have happen.

**The Instructor:** This raises a question that I haven't really thought much about. The propriety of the value of punitive damages on the plaintiffs' side is having a shot at a huge recovery in every case, isn't it, for the right situation?

**Mr. Barrett:** Let me respond to that. The case that I was involved in, in Illinois, downstate Illinois, the State Farm case, here's the value of punitive damages: We accused State Farm of breaching the contract of four million people by giving inferior imitation parts on the car repairs and paying for that instead (inaudible). The jury found for us and awarded 400 and some odd million dollars.

State Farm issued a statement that day saying that they were going to continue to put these parts on, that it was absolutely absurd, and that there was nothing wrong with it, that they're going to keep on doing it. Judge Sceroni had the punitive damages to see if they count under advisement. And by ten days, he issued his opinion and tacked on $600 million in punitive damages and developed (inaudible) and so forth, and they issued another press release saying that they were stopping it as of that day. Punitive damages work.

**Mr. Webb:** I think [that] used to be, but I think the problem with punitive damages is that it's too often used as a threat; and in dealing with, you know, a publicly known company and you got people whose pensions have your stock and individuals who have your stock and you're not talking about some (inaudible) out there. We're talking about all of these people who are going to be paid. You know, the
people who have businesses and stock and mutual funds, things like that.

My thought was the problem with punitive wasn't the number of awards that was so great . . . its sort of the same idea that I have about putting the word class action on the complaint now, that it creates a warm effect. And, you know, I guess one of the local federal judges here has gone so far as to describe that as judicial blackmail. And, so, my concern is [that it's] being misused. The same concept that I mentioned earlier, the class action.

There's a placement for punitive damages in the system, and nobody is suggesting we shouldn't have that ability to have it; but the concern is that it's being used in such a way that you get . . . the wrong results.

**MR. SCRUGGS:** I agree that it's an imprecise weapon, but it's sort of like the basis of the law enforcement. . . . The judicial blackmail issue is probably a valid argument. Some jurisdictions, generally speaking, these—I was going to say these guys, I'm sorry. (Inaudible). Some of us have a bit more of a chance to level it out, not all cases; but we can't win every battle there is.

Corporate America has the opportunity, at least, and resources to hire the best and brightest lawyers to influence legislation to have the most political—political issues and legal strength over the consumer. There are a handful of us running around trying to—trying to do justice where we—where we think we can. We take on cases that make us feel good. Some cases make us money. Finances are always an incentive; but remember what—this is, again, I'm talking more in a general sense now. This country was chartered back two-hundred plus years ago. The founders of the country had just gotten through disposing of one dictator, the one dictator, the king; and the last thing they wanted to do was create a government that could coordinate the—so they created this system of checks and balances, three [branches] as the government instead of one king.

The whole purpose of that was to prevent total power by the president, by a legislative body, and by a court system. The court system is a fairly moderate player in that scheme at the time. But in protecting our freedom by separating power like that, the trade-off was that you have an (inaudible) political system—it's very difficult, especially this day and age . . . to get any fundamental legislative passed because of vested interests on both sides. [It's] much easier to spot something than it is to pass something in Congress.

So what's happened is . . . the court system has, by default, been given responsibility of solving [these problems]. A lot of these
problems, we weren't designed to do it; but nature is not going to allow that to exist nor is the political system. And that's what's happened here. . . . Not just the lawyers but judiciary in general, by default has had to make major fundamental decisions.

The civil rights, many of us enjoy, we wouldn't have if we had to wait on the legislative branches of the government . . . so I think the courts play a role—or not a judiciary in our system of government. It's a vital safety net that comes into play in times of political impasse. I think that's one of the reasons that you can see judiciary now being—or the judicial system, lawyers on both sides in courts being elevated in national congress. We're really the only ones solving problems. Everybody else is playing games.

**MR. WEBB:** But you see, for all of these years, I don't think anybody can make a political argument that the court system hasn't been working. You go back to the beginning of the modern era maybe, maybe strict liability, the mid-60s, the rules that we have, it's not the same as Civil Rights where you have a legislature—a legislature that refuses to act and you've got a serious fundamental constitutional problem.

Here you have a whole system that—you know, the statement and all of the other people we have, and it seems to be working, and I don't think you can suddenly say because of tobacco that we need to suddenly have all of these changes. We don't need a new statute passed in the middle of the night and the legislature to basically uneven the playing field. You know, so my point is that—it's that I'm concerned about—I believe in the jury system. I mean, I spend my whole life trying jury trials, and I believe most times—most times—juries get it right.

My concern is when you have a politically unpopular kind of company that's one point in history, tobacco, next year maybe somebody else, somebody else, I don't think you need to make all of these changes. You guys are doing real well in tobacco.

**MR. BARRETT:** I agree with you.

**MR. WEBB:** Wait a minute. I need to rethink it.

**MR. BARRETT:** I do. You know, that was the point I was making earlier, that we didn't—we didn't find anything revolutionary. We just went back to the basic law that's been part of this fabric of our judicial system for two-hundred years. I, too, love the jury system. Let's team one up.

**THE INSTRUCTOR:** I'm going to ask two questions, and then I will turn the questions over. My first one is: Where does this go from
here? What are the next steps? ... Where do you see other consumer situations going [later] down the road?

**Mr. Barrett:**

... 

I think that for the next foreseeable future, even the court reform movement is not going to touch consumer problems. If they outlaw class actions, then people all over the country are going to do just what we do in Mississippi.

Well, [if] we don’t have class actions. You get one-hundred or two-hundred people that have been defrauded by an insurance company. The insurance company charges twice as much for African-Americans than it does—than it does if I had it just because they can get away with it. They get caught, and, so, they can’t have a class action. Fine. We’ll take these hundred and we’ll go try them and see what the jury says about punitive damages. Then these corporations are going to be crying for a class action. When we get through that case, we’ll key up another one.

So the consumer fraud cases on American people are not going to tolerate consumer fraud. You know, people get—everybody gets chiseled a little bit. You get chiseled in your bank statements. You get chiseled by the telephone company. You get chiseled by your cell phone. Just a little bit, just enough to aggravate you. Not enough to file a suit, you know; but when you all come together, you can get to do that, to file suit and get—put a box—put a box out there, a jury box, and put twelve people in it, every one of them had it happen to [him].

I think the climate anywhere in the country in a proper case where you have real fraud, you’re going to have favorable verdicts. Corporations better look out.

**The Instructor:** My last question, this is [especially] for you guys who have been very successful in this area: Do you think other constitutional things about perhaps a plaintiffs’ side, an institute—not an institute—a thing that looks towards the range of issues to places where there needs to be education, like going back to your old law schools or—you know. [In sum,] where is some of this success going if it’s going anywhere?

**Mr. Barrett:** We were talking last night about that. I think that what Bob Clifford has done is a wonderful thing. Yeah, I thought about going back to the University of Mississippi.

**Mr. Scruggs:** You know, most of the organizations—
MR. BARRETT: Let me say something else—let me say something else. No publicity, no nothing had already (inaudible) $25 million to the University of Mississippi. No (inaudible). No big atrocious scholarship. No big atrocious stadium. Just 25 million bucks needed to use it to educate the kids of this city. That's what he would like.

MR. SCRUGGS: (Inaudible)—thanks to them. There are many organizations that I'm a member of, some that I'm not, that go plaintiffs' lawyers, generally centers on sharing information about—about different opportunities, different theories, different parts of evidence, different expert witnesses they've had experience with in the form of a workshop is how to do it better, how to make them try a better case, that sort of thing. . .

There's very little discussion in my experience, at least, about how to use the law for, not necessarily for social change, but what effect this particular litigation is going to have on the law, generally, you know, society. Those things are discussed, but they're not discussed in a formal or organized way, in my experience, and I think it should.

The tobacco litigation—Dan and I and a lot of those people prominent in that litigation were besieged by people with all sorts of [ideas]—sue the gaming industry, the alcohol [industry]. You name it, everything. All sorts of ideas like that for social interest.

They thought we had a lot of money. We got all this know-how. This organization that we demonstrated, and so we were some sort of (inaudible). . . . I came up with three basic criteria for taking on a case. I guess I have the luxury of doing this now because I have some (inaudible) and I don't have to take slip and fall cases.

One is that the corporate tort cases have to involve public health and public welfare on a mass scale, generally on a mass scale, on a national scale, like tobacco, like HMO. Like the lovely Americans who are affected by healthcare. . . . The Y2K bug or something like that, it's got a mass effect but doesn't hurt anybody's health or general welfare. . . . It's a big deal, but it's not.

The second criteria is that there has to be some sense—some sense of moral outrage. Some company who manufacture[s] the product, they screw it [up]. . . . They don't really have a motive. I'm not going to get involved with the case because there needs to be some sense of moral obligation before I'm going to take it.

And, third, I think most important, is that I think it has to be just this—there has to be some ability in the court system to address it, like tobacco, HMO, things like that to me. There are other cases I didn't get involved in, the gun case because I didn't think convincing the court to get 200 million guns off the street. Maybe over time it
might, but obviously the court system addresses that. . . . But there needs to be some ability of the court system to remedy the problem.

So those are sort of the three criteria that I need before I jump into a case. I think most of my colleagues are of the similar mind. If you go back to the basic question, there's not a think tank like [an] institute or . . . organizations. You sit around making policy terms. They're both workshop policy work.

**Question:** I've always been very, very curious as to why the states agreed to [immunity] and why especially private lawyers representing the states [agreed to it]. I wanted to ask some people that might actually be able to address that. . . .

**Mr. Scruggs:** That was the most controversial aspect and likely, so, it's a good question. The concept of immunity—the term immunity sounded awful. My friend Alex Friedman from the *Wall Street Journal* coined that term, talking about terms of settlement and becoming the match for everybody. Don't just give the tobacco industry the ability to immunity for civil liability.

They weren't given immunity. They were given some protections from mass tort aggregations like class actions and punitive damages. And the reason they were was not to give them something that they didn't deserve, but it was to preserve our ability to control the industry.

A large enormous verdict, like the *Engle* verdict in Florida, for example, for that verdict to stand up, $147 billion, it's going to bankrupt them. Okay. So great. But is that really what you want? Because you're going to have a brand-new group of villains stepping into their shoes. There are fifty million Americans addicted to cigarettes, already smoking. There's going to be brand-new villains stepping into the shoes of these guys, many of them have the same investments, selling cigarettes without a beat, with absolutely no (inaudible) because the existing four companies will wash themselves off in bankruptcy or dissolve and reform some other way. They have no civil liability.

And then you've got a whole new set of players with no liability that can sell cigarettes with no restraints, with no obligation to addiction to smoking, with no marketing restrictions, with no ability to use the legal system to get at.

So our motive in protecting the industry, although that's not really the term, was so that we can control the industry. We can control the villains at the head of the table. We couldn't control the villains that were stepping into their shoes. . . .
QUESTION: Thank you very much for coming here. I'm a physician, not an attorney; although, [on] August 13th, I'm going to start down that road. My question goes to the HMO issue. About five years ago I was attending a medical conference and spoke with a defense attorney; and as I saw (inaudible) they said everything you talked about is broad, basically monetary, will not keep people from buying them.

They basically told me there's nothing you could do. Lied to me. Basically said, you know, there's no lawyer that's going to beat them because a country that is new that regards tort reform, these people, the insurance companies, . . . the politicians, they're not going to stand for a lawsuit. They seem to think they're totally shielded. There's nothing you can do. How can you change that?

MR. SCRUGGS: The problem with the HMO litigation and the prognosis that your friend gave you about how it's going to be is not inaccurate because of the publicity. The insurance company essentially is deemed or [has] been granted the immunity from many of their acts. . . . For example, if a physician refuses because he's paying say the bonus amount to do it or a hospital refuses to recommend tests; and as a result of that refusal, you die. Let's say, it's a chest x-ray. If you had the x-ray, he would have detected lung cancer or at an early stage. Going back to it or something that would save your life but he refused to do it and the person dies as a result of not having that test, the most you can get out of the HMO is [the cost] of that x-ray. No cost for damages.

So there is absolutely no financial incentive or legal incentive for these insurance companies. . . . Not all these companies think the same [but] there's no incentive whatsoever. There's no downside for them saying, no, absolutely, no. You create all this bureaucratic procedure (inaudible). Hopefully it will go away.

There's no threat of punitive damages. We've been given a very narrow window by the Supreme Court—(inaudible)—that talks about a judiciary obligation to disclosure. They're going to promise you an insurance policy that is quality healthcare when they've got in place procedures that you don't know about, make sure you don't get it. Okay. That's a disclosure case. And that little narrow window of opportunity right now is what we're having to do against these companies.

The deck is stacked against us. The federal judiciary in the (inaudible) case, the United States Supreme Court's feeling is that the judiciaries are not going to solve this problem. The (inaudible) decision, this is a congressional problem. Congress created this scheme. This is
Congress's problem. Congress is going to delegate it. They're going to pass something more than. (Inaudible).

So we have an uphill battle against HMOs, but we have an uphill battle against tobacco and against asbestos and against the insurance industry.

**Question:**

. . . .

When it came to settlement time in Mississippi, Florida, Texas, specifically Texas, how much really were the AG's themselves . . . AG's kept coming out . . . [saying] we're the ones running the show. This is our litigation. The trial lawyers work for me, for us. How much do they really? How much [were] the settlements driven by trial lawyers versus driven by the AG's?

**Mr. Barrett:** The AG's did. The AG's did. The AG's did it.

**Mr. Scruggs:** It was a team effort. Every bit of a team effort. You give and take. There were about a half dozen AG's who were involved in every bit as much as we were whose ideas were employed every bit as much as ours, and they made the ultimate decision. So they're the ones who took the risk.

We made a lot of money as a result of it. It's not what we set out to do. It was never an opportunity to make money. They had—especially guys like Mike (inaudible) and Bob (inaudible) and even Dan Morales in Texas, Grant Woods in Arizona, Scott (inaudible) in Massachusetts. Those are the AG's who ran the risk.

After two years, remember there [were] still five cases—after two years of litigation. When it looked like all of a sudden the company is going to settle, twenty more AG'S got in. You know, the settlement discussions were announced later on, another twenty got in. But as to about the six or seven pioneer attorney general, they were, every day, as involved as we were. They were calling the ultimate shots. They were running a huge political risk.

**Mr. Webb:** I was in Texas. . . . We're all down there ready to go to trial, and all of a sudden we're in Dallas the next day . . . I mean, there's nothing wrong with this. The outside plaintiffs' lawyers—I have a great influence over my client. That's all right. Mark, I don't know—the fact on the outside—the outside lawyers, in this case plaintiff's lawyers, they have had a great influence over Dan Morales as the attorney as they're trying to come up with $15 billion that's going to put money in their pockets as lawyers. To anyone's wildest imagination, Mr. Webb, you ultimately earn as a living in law school—but in my judgment—in my judgment, I never saw once any of those outside
lawyers do anything more than represent their client as aggressively as they should, but it doesn't mean that they—I don't want to speak across the country.

The attorney generals are the client, but the lawyers have an enormous impact on ultimate destruction and resolution to cases. That's true of all case in my judgment. I don't think there's anything wrong with that.

To get the last word, I think, there's a substantive difference when you read the legislative and political history in the Florida statute and compare that ongoing lobbying with plaintiffs, defendants, [and] companies—people do in various legislature around the country, I think there's a substantive difference when you look at the actual facts. It's not being disingenuous.

**The Instructor:** As a timekeeper, I'm willing to take just a minute or two for final thoughts about this conversation, an overview on this topic as we started.

**Mr. Reid:** Thanks a lot. I was fortunate enough to be here yesterday, and it's not often that you get to hear people talk about what you do in such a way, about what the four of us do. It sounded a lot different yesterday hearing all of your academic talk about it.

It's great, but I really don't have anything to add. I think this is just a great opportunity, and I hope that the more conversations they can have between people doing some of the stuff and people thinking about it—I think it's great. I appreciate it.

**Mr. Scruggs:** I also appreciate being able to speak, and I want to thank Bob and all here today for holding the fort down here. I think that the ideas that have been discussed this morning are major ideas that are going on in the American civil justice system right now. We've heard the criticisms from some of the questions, some of the points, you heard the best responses at least the four of us are capable of giving.

This is—you're getting a glimpse here of how the game is played, and it changes every six months or every year, and there's always somebody with a new idea. That's the beauty of law. It's a great time to be a lawyer. I'm enjoying myself and I enjoy being here and discussing this with everybody else.

**Mr. Webb:** . . . I made a joke that I don't like to reflect on things. The fact is: This last four or five years, this has been some big litigation in this country. More money involved in this case than anything in American history, and I don't honestly know whether it's been a part of history that it happened. I think we're too close to it. That's
why I started by asking whether is—there any profound impact by the court.

For example, is there a real profound impact on the tort system on basic principles of law. Some of the concepts we talked about, whether the courts should be filling the void when the legislature or the regulatory agency doesn’t perform the way other people want, these are pretty important issues in our country today.

The fact that we brought people together to talk about it, I’m glad to be a part of it.

MR. BARRETT: My favorite historical American figure is William Jennings Bryan, three-time democratic nominee for the president, a great statesman and a fine lawyer, a populist. In 1915, he came to Chicago. . . . He came to the Chicago Chamber of Commerce and talked to them, and I’m sure they were sitting on the hands at the end of it, but he told them—what he told them really goes to the heart of what I believe what we’ve been talking about for the last day. I get to share this every now and then with the jury . . . but I want to share it with you. It will take me a second.

He said that the corporations are entitled to the same fair treatment at the hands of the jury, which flesh and blood citizens are entitled. But we would be foolish, indeed, if we failed to take note of the striking difference between flesh and blood people and what he called “corporate people,” that is corporations. I’d like to read this. He says: First, there’s a difference in the purpose of creation. God made man and placed him upon his footstool to carry out (inaudible). Man created corporations as a moneymaking machine. When God made man he didn’t make the tallest man that much taller than the small. He didn’t make the strongest man all that much stronger than the weakest. But when the law creates the corporate person, that person may be a hundred, a thousand, ten thousand, a million times stronger than God made man. When God made man He set a limit to his existence. So if you were a bad man, you weren’t going to be bad long. But when the corporation was created, the limit on it was raised that sometimes it projects itself through generation after generation. When God made man, He gave him a soul and warned him that in the next world he would be held accountable for what he’s done in the flesh. But when man created the corporation, he could not endow that corporation with a soul. So the (inaudible) punishment here, he need not fear the hereafter. And this man-made John had been put forth to compete with the God-made man. We must assume that man in creating the corporation had in view the welfare of society; and the people who create must retain the power to restrict, to control, and it
must be to punish. We can never become so enthusiastic over the corporation, over its uses, over its possibilities as to forget that God made man first (inaudible) to be considered.

MR. WEBB: I move to strike.