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Editorials

Resisting tobacco industry abuse of the legal process

In an infamous and revealing memo, an RJ Reynolds Tobacco Company lawyer crowed about how Reynolds had gotten a plaintiffs' law firm to drop several smoking-and-health lawsuits: "To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son-of-a-bitch spend all of his."¹

This same calculation applies, regardless of whether the tobacco companies are using the legal process to exhaust plaintiffs and their attorneys, non-governmental organisations, media, or scientists seeking to document and publicise the dangers of tobacco use or the behaviour of the industry,²⁻⁶ local governmental bodies considering whether to adopt tobacco control measures,⁷ or state agencies attempting to execute existing tobacco control policies.⁸ So long as the industry can, by spending its own money, impose substantial costs upon tobacco control agents (whether in the form of money and time spent on responses or countermeasures, or of hassles and the fear of personal embarrassment), the industry can – merely by making a credible threat to do so – discourage many potential agents from taking effective actions, and others from getting involved in tobacco control at all.

The article by Aguinaga and Glantz⁸ in this issue of *Tobacco Control* describes a previously unreported application of the tobacco industry's use of financial muscle to enable it to disrupt and intimidate: the use of "public records" or "freedom of information" acts to force government agencies which have taken, or even contemplated, tobacco control actions to bare their internal records to the tobacco industry. While the article does not document any resultant surrenders or compromises by such agencies, it does show that government bureaucrats who take actions displeasing to the tobacco industry face a level of hassles, hostile scrutiny, and possible public ridicule of difficult-to-explain decisions that they would not face were they more compliant or located other branches of the bureaucracy. Obviously, actions not taken (or watered down) as a result of fear of hassles or embarrassment are difficult to document, and probably impossible to quantify, in this and other tobacco control arenas.

Unfortunately, there is a fine line (at best) between appropriate use of the legal process to defend one's rights, and the abuse of the legal process to intimidate one's opponents. A genuine belief in the legal validity of one's specific claims, plus a genuine desire for the results of prevailing on them, is sufficient (though perhaps not necessary) to avoid a finding of abuse, regardless of the harm that asserting these claims imposes on others. Absent direct evidence of intent, which is rarely available, a claim must be patently frivolous for a court to find abuse.

Nonetheless, courts often have discretion in applying procedural rules (including disclosure rules)... and nobody likes a bully. Tobacco industry overreaching has been well documented,⁹ and judges have commented unfavourably on tobacco industry litigation tactics.¹⁰⁻¹³ Several courts

have explicitly preferred the public interest in complete and accurate information about the dangers of tobacco use over Brown and Williamson's asserted property interest in documents copied from their files by a former paralegal.^{12,14,15} Continuing disclosures about nefarious tobacco industry behaviour will doubtless make many judges even less willing to countenance questionable procedural claims where their effect will be to impede tobacco control efforts.

Another ground for optimism is based on the underlying economics of the legal abuse process. Abuse of legal process works only where the abuser can "divide and conquer" its potential opponents. As the tobacco control movement becomes larger and bolder, the balance of power is shifting: the tobacco industry may soon decide that it must conserve its legal resources for the fight for its own survival.^{16,17}

RICHARD A DAYNARD

Northeastern University School of Law
400 Huntington Avenue
Boston, Massachusetts 02115, USA

- 1 Memorandum from J Michael Jordan to Smoking and Health Attorneys, 29 April 1988, quoted in *Haines vs Liggett Group, Inc*, 814 F Suppl 414 (DNJ 1993).
- 2 DeJong R. A defeat of the tobacco industry. *World Smoking and Health* 1992; 17: 23.
- 3 *Philip Morris vs American Broadcasting Company*, No LX-816-3 (Richmond Va: Cir Ct 1994) (\$10 billion libel suit filed against television network and its reporters for suggesting that the industry "spiked" cigarettes with nicotine).
- 4 *B&W vs Jacobson*, 644 F Suppl 1240 (D Ill 1986), affirmed 827 F 2d 1119 (7 Cir 1987) (\$5 million verdict for asserting that B&W had adopted a strategy to appeal to children; \$3 million affirmed, largely because the reporter's assistant had destroyed notes of conversation with B&W representatives).
- 5 Skolnick AA. Burning mad tobacco firms turn up heat on major news media. *Newsletter of the National Association of Sciencewriters* 1994; 42: 1-5.
- 6 DiFranza JR. If the science is irrefutable, attack the scientist. *Tobacco Control* 1992; 1: 237-8.
- 7 Haines TW. Puyallup reverses smoking ban after lawsuit. *Seattle Times* 1994; Dec 20: B1.
- 8 Aguinaga S, Glantz SA. The use of public records acts to interfere with tobacco control. *Tobacco Control* 1995; 4: 222-230.
- 9 Townsley W, Hanks D. The trial court's responsibility to make cigarette disease litigation affordable and fair. *Tobacco Products Litigation Reporter* 1989; 45(5): 4.11-4.36.
- 10 *Thayer vs Liggett & Myers Tobacco Company* (WD Mich 1970). *Tobacco products Litigation Reporter* 1986; 1(2): 2.63-2.81 ("disparity in resources between these parties, plus the sophisticated and calculated exploitation of the situation by the defendant, approach a denial of due process").
- 11 *Haines vs Liggett Group, Inc*, 814 F Suppl 414 (DNJ 1993).
- 12 *Maddox vs Williams*, 855 F Suppl 406 (DDC 1994) (criticising "a course of conduct...so patently crafted to harass those who would reveal facts concerning B&W's knowledge of the health hazards inherent in tobacco").
- 13 *Minnesota vs Philip Morris Inc* Minn Dist Ct 1995). *Tobacco Products Litigation Reporter* 1995; 10(3): 2.69-2.72 ("To paraphrase a paraphrase, it is not the intent of this court to allow either party to win by spending all of the court's money").
- 14 *Maddox vs Williams* (Mass Super Ct 1994). *Tobacco Products Litigation Reporter* 1994; 9(6): 2.168 ("the public interest in the flow of information" led the court to decline to compel the author's attendance at deposition).
- 15 *Maddox vs Williams* (Kent Dist Ct 1995). *Tobacco Products Litigation Reporter* 1995; 10(2): 2.46-2.47 (B&W's interest "is not as strong as the right of the public to know whether or not B&W has withheld information concerning the dangers of smoking").
- 16 Daynard RA. Catastrophe theory and tobacco litigation. *Tobacco Control* 1994; 3: 59-64.
- 17 Daynard RA. The third wave of tobacco products liability cases. *Trial* 1994; November 30: 34-40.