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The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair

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DALE K. HANKS**

INTRODUCTION

Fundamental responsibilities of the civil justice system include: (1) making legal services available to victims of legal wrongs; (2) controlling litigation sufficiently to prevent a disparity of resources between the parties from significantly influencing the outcome; and (3) protecting litigants from harassment and undue invasion of privacy. In other words, it is the judiciary's responsibility to make litigation affordable and fair. The judiciary can meet this responsibility by exercising its statutory authority and inherent power.¹ The bar, as officers of the court, has a professional responsibility to be supportive, notwithstanding client opposition. The "Big-6" cigarette manufacturers,² in defending cigarette disease claims, have adopted strategies to undermine the civil justice system by making the litigation unaffordable and unfair.³

This Article is directed primarily to the trial court judge who is or may be presiding over a cigarette disease case. The authors will endeavor to alert the court to destructive defensive strategies, and offer suggestions for protecting the system against these deleterious practices.

To focus attention on the trial judge's responsibility, the authors ask the trial judge to assume that a suit has been filed in his or her court by a lung cancer victim against the Big-6 cigarette manufacturers (and their trade and research organizations); and, as soon as answers are served by the defendants, a motion by plaintiff is filed entitled "Motion for Access to the Civil Justice System," which includes the following allegations:

Plaintiff had great difficulty in securing the services of an attorney to represent him in this cigarette disease claim. When

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1. See *infra* § II.B.

2. Philip Morris, Inc.; R.J. Reynolds Tobacco Co.; The American Tobacco Co.; Brown and Williams Tobacco Corp.; Lorillard Inc.; and Liggett Group, Inc.

3. See *infra* § I & Appendices A & B.

plaintiff's attorney finally consented to represent him, it was on the condition that the trial court would exercise the following controls: (1) That the court would take control of the case to ensure that trial expenses, including those for discovery and expert witnesses, would not exceed the sum of \$50,000; (2) That unnecessary time demands on counsel would be eliminated; (3) That the trial on the merits would not take more than three weeks; and (4) That the case would be litigated in a way that the disparity in party resources would not significantly influence the outcome.

Plaintiff would show that the above controls are reasonable and would promote fairness and justice. Plaintiff will honor his commitment to his attorney by allowing him to withdraw if such controls cannot be exercised by the court. In such event, plaintiff will be without counsel and in effect denied access to the civil justice system.

Plaintiff prays that the court, or its appointed special master, undertake to devise a plan for pretrial discovery and the trial of this cause under which the above controls can be exercised, and to issue all necessary orders to implement such plan.

This Article will identify the problem created by the Big-6 cigarette manufacturers in all cigarette disease litigation. It will then point out the trial court's responsibility and power to address and solve that problem. Finally, this Article will offer specific suggestions on how the court can meet its responsibility in making cigarette disease litigation affordable and fair.

I. THE PROBLEM

Every year more than 300,000 Americans die from smoking cigarettes,⁴ and hundreds of thousands more become diseased and disabled. Most of them began smoking long before the first warnings appeared on cigarette packages in 1966. And in most of these instances a prima facie liability case can be made against the manufacturers of the cigarettes smoked by the victims, as well as against the other major American cigarette manufacturers and their trade organizations for civil conspiracy.

With all these prima facie cases out there, each with significant damage potential, one would expect there would be droves of lawyers signing up these cases and filing them. One would be wrong. There are no droves of lawyers handling cigarette disease cases; there is only a handful across the entire United States. The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their cases, no matter how hard they look.

4. PUBLIC HEALTH SERVS., U.S. DEPT. OF HEALTH AND HUMAN SERVS., SMOKING AND HEALTH: A NATIONAL STATUS REPORT (1986).

How can this be? People suffering from a cigarette disease often have viable claims with huge damages. Where are the lawyers? They are handling asbestos cases, DES cases, benzene cases, Agent Orange cases and Bendectin cases. They are not handling cigarette disease cases, and the reason why is simple: they cannot afford to. The cigarette manufacturers, through a national team of lawyers, have adopted a uniform strategy of defense designed to ensure that few lawyers can afford to take on a cigarette case, and that even fewer can see the case through to trial. In short, by making the cost of litigation so high, the cigarette manufacturers have closed the courthouse doors to most people who have gotten sick or died from using their products.

They have done this by resisting all discovery aimed at them, thus requiring a court hearing and order before plaintiffs can obtain even the most rudimentary discovery. They have done it by getting confidentiality orders attached to the discovery materials they finally produce, thus preventing plaintiffs' counsel from sharing the fruits of discovery and forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering, through written deposition, every scrap of paper ever generated about a plaintiff, from cradle to grave.⁵ And they have done it by taking endless depositions of plaintiffs, expert witnesses,⁶ and by naming multiple experts of their own for each specialty, such as pathology, thereby putting plaintiffs' counsel in the dilemma of taking numerous expensive depositions or else not knowing what the witness intends to testify to at trial.⁷ And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.⁸

All of these tactics expend the resources of plaintiffs' counsel, both from a financial standpoint and from a time standpoint. Of course this costs the tobacco companies a great deal of money too,

5. In *Duke v. R.J. Reynolds Tobacco*, No. E-122,149 (136th Judicial District, Jefferson County, Tex), a case in which the authors are plaintiffs' counsel, the defendants have noticed and taken 93 written depositions to get all of the decedent's school records, employment records, insurance records, and even records from her deceased husband's retirement account. They also have obtained all of decedent's medical records ever generated, including those pertaining to the birth of her children. They have gone so far as to attempt to take possession of all the actual tissue sample slides kept by the hospitals in which she was treated.

6. In two New Jersey cases, *Cipollone v. Liggett Group*, No. 83-2864 (D.N.J.) and *Dewey v. R.J. Reynolds Tobacco Co.*, No. L-071733-81 (Super. Ct., Bergen County, N.J.), the defendants deposed one of plaintiffs' experts, Dr. Jeffrey Harris, for 12 days and 10 days respectively. Telephone conference with Cynthia Walters, Budd, Larnern, Kent, Gross, Picillo, Rosenbaum, Greenberg & Zade, co-counsel for plaintiffs. (Nov. 4, 1988).

7. See, e.g., *infra* Appendix A(c), Statement of Don Barrett.

8. *Id.*

but clearly money is no object to them. The ordinary market forces that generally put outer limits on the amount a defendant is willing to spend in defense of a claim do not apply in tobacco litigation. The tobacco companies have shown time and again they are willing to spend whatever it takes to throttle all claims against them. They often boast about never having paid a dime in the settlement of a claim, and their uniform tactics are designed to make good on that boast. Recently, a tobacco industry lawyer, in a confidential memorandum explaining why several California cigarette liability cases were dismissed, revealed the industry's strategy:

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won those cases was not by spending all of [R.J.] Reynolds' money, but by making that other son-of-a-bitch spend all of his.⁹

Every lawyer who has handled a claim for a tobacco disease victim has met the same uniform defense tactics dictated by the tobacco companies' national team of lawyers. These tactics are implemented by local lawyers, who are hired by that team and who merely follow orders.

Among the lawyers representing plaintiffs in these cases are Marc Edell and Alan Darnell of New Jersey; George Kilbourne and Paul Monzione of California; Dan Childs of Pennsylvania; and Don Barrett of Mississippi. Kilbourne, Monzione, Childs and Barrett have prepared statements outlining their experiences in litigation against the tobacco companies, which are in Appendix A to this Article. Edell and Darnell have furnished sample motions for a protective order and sample affidavits, which are in Appendix B.

The tobacco companies have perverted the judicial system in such a manner as to deny citizens their fundamental rights of access to the courts and trial by jury. It is up to the courts, particularly the trial courts, to regain control of the litigation and to provide a forum in which citizens' rights can be determined based on the merits of their claims, not on the financial resources of the litigants.

9. 3.7 Tobacco Prod. Litigation Rep. 1.94, 3.621 (1988).

II. THE RESPONSIBILITY AND POWER OF THE COURT TO MAKE LITIGATION AFFORDABLE AND FAIR

A. *The Responsibility*

The responsibility of the trial court to ensure that litigation is affordable is set forth clearly and prominently in Rule 1 of the Federal Rules of Civil Procedure: “[These rules] shall be construed to secure the just, speedy and inexpensive determination of every action.”¹⁰

Most states have a similar rule. Texas, for example, has its own Rule 1, which reads:

The proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.¹¹

The numerical position accorded Rule 1 is not coincidental. Rule 1 is not merely a place holder, containing well-meaning but naive aspirations that are to be forgotten in the heat of real world litigation. As Professor Wright has put it, “[t]here probably is no provision in the federal rules that is more important than this mandate.”¹²

But to give life to this mandate in cigarette disease cases, the courts cannot adopt a purely passive role. They must become active participants and demonstrate their willingness to take control of the litigation, particularly in the discovery stage. For if they do not, it is almost certain the tobacco industry defendants will use their nationwide strategy to exhaust the resources of both the plaintiffs and their lawyers long before trial, denying them what Rule 1 promises, and leaving a whole class of plaintiffs without a remedy.

1. The Lessons of Thayer v. Liggett & Myers Tobacco Company—In late 1969, a tobacco products liability trial was conducted in the U.S. District Court of the Western District of Michigan, Southern Division, Judge Noel P. Fox presiding.¹³ The plaintiff was the widow, Leslie Thayer, who sued Liggett & Myers for the death of her husband from lung cancer at age forty-

10. FED. R. CIV. P. 1.

11. TEX. R. CIV. P. 1.

12. 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1029 (1987).

13. *Thayer v. Liggett & Myers Tobacco Co.*, 1.2 Tobacco Prod. Litigation Rep. 2.63 (W.D. Mich. 1970).

nine. She was represented by two lawyers from a five-member law firm. The defendant was represented by the largest law firm in western Michigan, along with another large law firm from New York City. After five weeks of trial, the jury returned a verdict in favor of the tobacco company.

Thayer is significant not because of the jury verdict, but rather because of the remarkable and instructive opinion Judge Fox wrote at the conclusion of the case. In his opinion, Judge Fox characterized Liggett & Myers' pretrial and trial strategy—including its “insatiable appetite for procedural advantage”—as having been designed to exploit the great disparity of resources between the defendant and the plaintiff.

Judge Fox noted that Liggett & Myers was able to isolate the plaintiff's counsel by obtaining a sweeping protective order—on grounds that later proved illusory—which prevented plaintiff's counsel from revealing any information acquired through discovery to anyone other than five expert witnesses. Liggett & Myers, however, was under no such restraints. It had help from tobacco defense lawyers from around the country who were involved in similar cases. Judge Fox noted that the individual tobacco companies, who are in fact competitors in the marketplace, cooperate extensively to defeat cigarette-cancer cases, and therefore the “defendant could bring the aggregate of knowledge and experience in such cases possessed by the entire tobacco industry to bear on the lawsuit.”¹⁴

Judge Fox, relying heavily on Rule 1 of the Federal Rules of Civil Procedure, recognized the court's duty to promote justice and to prevent the disparity of resources between the parties from unduly influencing the outcome of litigation:

If a party appears to be exploiting its position for the purpose of concealment, delay or other reasons calculated to unduly disadvantage another party in the preparation or presentation of its case, then the court may take such actions into consideration in its procedural and evidentiary rulings.

The day is long past where lawsuits resemble trial by battle. Access to justice therefore cannot depend on weight of resources anymore than upon strength of fists. It is the duty of the courts to insure that wealth and power alone do not determine the lawsuits, and that those elements do not hamper an expedient, inexpensive determination of the merits of each case.¹⁵

Judge Fox concluded that the vast disparity of resources and the defendant's sophisticated exploitation of the situation approached a denial of due process that would compel the granting

14. *Id.* at 2.68 n.10.

15. *Id.* at 2.69.

of a new trial. He noted, however, that the point was moot, for the plaintiff could not afford further proceedings, her resources and those of her lawyers having been exhausted.

It has been said that “[t]hose who cannot remember the past are condemned to repeat it.”¹⁶ The lessons of *Thayer* should not be forgotten, nor the abuses repeated.

B. *The Power*

The trial court has substantial power to make litigation affordable and to ensure that the wealth of a party does not dictate the results of litigation. This power stems from the rules of procedure as well as from the judiciary’s historic and inherent power to ensure access to the civil justice system.

By exercising wide discretion in the use of its power, the trial court may become actively involved in the management and scheduling of pretrial discovery and the actual trial of the case.

1. *Pretrial Discovery*

a. *Exploitation by Wealthy Litigants*—Most would agree that the modern-day discovery rules are useful and necessary for the proper development of a case for trial. And yet, by their very nature, the rules pose an open invitation for overuse by even well-meaning lawyers who are fearful of overlooking something that may prove valuable to their case. But when unbridled and ruthless discovery is deliberately chosen as a strategy for exhausting the opponents’ resources, the results are inimical to our sense of fair play and justice, and fly in the face of Rule 1’s admonition.

Supreme Court Justice Lewis F. Powell, joined by Justices Stewart and Rehnquist, recognized this potential for abuse of the discovery rules:

We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate.¹⁷

This is happening in tobacco disease litigation, and the courts must regain control. In the words of Chief Justice Burger, “[t]he

16. 1 G. SANTAYANA, *THE LIFE OF REASON: REASON IN COMMON SENSE* (1905).

17. Order Amending Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, Stewart, Rehnquist, J.J., dissenting) (amending FED. R. CIV. P. 26, 33, 34, and 37, among others).

responsibility for control [of pretrial process] rests on both judges and lawyers. Where existing rules and statutes permit abuse, they must be changed. Where the power lies with judges to prevent or correct abuse and misuse of the system, judges must act.”¹⁸

b. The Rules of Civil Procedure—The Federal Rules of Civil Procedure grant the trial court a variety of methods to control pretrial discovery.

Rule 1, again, is the cornerstone. “The discovery provisions . . . are subject to the injunction of Rule 1 that they be ‘construed to secure the just, *speedy*, and *inexpensive* determination of every action.’ ”¹⁹ Rule 1 has been relied upon to allow the courts to participate actively in the discovery phase in order to keep the litigation manageable and to minimize expense and inconvenience of the parties.²⁰

Federal Rule of Civil Procedure 26(b)(1) allows the court, either on its own initiative or by motion of a party, to limit discovery because of its burdensomeness or cost, and the court may take into account the “limitations on the party’s resources.” As the advisory committee notes indicate, Rule 26(b)(1) “is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse.”²¹ Rule 26(b)(1) “contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis.”²²

Rule 26(c) allows the court to control, first, whether or not certain discovery will be allowed, and, if allowed, the method by which the discovery shall be obtained in order to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . .”²³ The Supreme Court has said that under Rule 26(c), “judges should not hesitate to exercise appropriate control over the discovery process.”²⁴

Rule 26(f) allows the court to set a discovery conference during which the court may establish the ground rules for discovery and issue a scheduling order.²⁵

Finally, Rule 37 sets forth a laundry list of sanctions the court

18. Address by Chief Justice Burger to American Bar Association Mid-Year Meeting, 6 (Feb. 3, 1980).

19. *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (emphasis in original).

20. *See Sonitrol Distrib. Corp. v. Security Controls*, 113 F.R.D. 160 (E.D. Mich. 1986).

21. FED. R. CIV. P. 26(b)(1) committee notes.

22. *Id.*

23. FED. R. CIV. P. 26(c).

24. *Herbert*, 441 U.S. at 177.

25. FED. R. CIV. P. 26(f).

may impose for abuse of discovery, ranging from the award of attorney fees to the striking of pleadings.²⁶

The Texas Rules of Civil Procedure contain similar provisions.²⁷

The rules of civil procedure do not leave a court powerless to prevent a wealthy litigant from abusing pretrial discovery to exhaust the opponents' resources. Far from it. They invest the trial judge with ample powers to control discovery and prevent abuse. Indeed, the advisory committee notes urge more involvement on the part of the trial judges. All that is needed is for trial judges to spend some time to become familiar with the litigation tactics of the tobacco industry and to exercise the necessary power to end the abuses.

2. *Trial*—In addition to controlling and managing pretrial discovery from the onset of a tobacco liability case, trial judges also must control and manage the trial itself. Needlessly long trials with manufactured complexity can sap the resources of a party and produce the same results as abusive pretrial discovery: citizens with valid claims cannot enforce them because lawyers cannot afford to take on such cases.

The length of trials was the subject of a recent study by the National Center for State Courts, which analyzed data from more than 1,500 trials in New Jersey, Colorado, and California courts.²⁸ Although finding much diversity among the courts, the study identified:

[A] number of policies and techniques that appear to be used in courts with shorter trial times, including identifying and dispensing with matters not truly in dispute, preventing repetitive testimony, imposing time limits on the time allowed for certain segments of trial, and enhancing the continuity of trials in progress.²⁹

The study concluded that trial length can be shortened without sacrificing fairness by increased judicial management of all phases of trial.

Trial courts can control the length and complexity of trials in several ways. They can limit the number of experts a party may use, particularly when the party proposes to use several experts in the same field of expertise, as the tobacco industry does with pathologists. They can impose a variety of time constraints, aimed at limiting the amount of time parties may use at trial.³⁰ And, courts

26. FED. R. CIV. P. 37.

27. TEX. R. CIV. P. 166, 166b(5), and 215.

28. NATIONAL CENTER FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS (1988).

29. *Id.* at 64.

30. For a good discussion of the use of time constraints to shorten trials, see Towers,

can and should take judicial notice that cigarette smoking has the capacity to cause lung cancer and other diseases, and should prevent the abuse of the “other potential causes” defense.³¹

In addition to those powers conferred by statute or rule, courts possess “inherent” powers, “not derived from legislative grant or specific constitutional provision, but from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities.”³² These powers may be called upon by the court “to aid in the exercise of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity. Inherent power of the courts has existed since the days of the Inns of Court in the common law English jurisprudence.”³³

The federal courts, too, recognize the existence of inherent powers on the part of trial courts.³⁴ Federal Rule of Civil Procedure 83 recognizes such residual power in its final sentence: “In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.”³⁵

If the specific powers of the trial court set forth in the rules of civil procedure are not sufficient to prevent abuses that are calculated to deny citizens access to the civil justice system, then a court surely would be justified in relying on its inherent powers to stop the abuses. Otherwise the promise of our judicial system—equal justice under law—would be a hollow one indeed.

We will now suggest some specific steps the trial court can take toward meeting its responsibility to make cigarette disease litigation affordable and fair.

III. IMPROVING AFFORDABILITY AND FAIRNESS BY TAKING JUDICIAL NOTICE THAT CERTAIN TYPES OF HARM ARE CAUSED BY CIGARETTE SMOKING

It is absurd to litigate the issue of whether cigarette smoking can cause lung cancer and certain other types of harm. This question was answered decisively long ago by the world’s medical and scientific community. No professional group which has studied the issue has reached a contrary conclusion.

Time Constraints, 6 REV. LITIGATION 175 (1987).

31. *See infra* §§ III & IV.

32. *Eichelberger v. Eichelberger*, 582 S.W.2d 395, 398 (Tex. 1979).

33. *Id.* at 398-99.

34. *See, e.g., Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 951 (9th Cir. 1976) (“The broad and inherent power of the District Court to regulate litigation before it is supported by abundant authority. . .”).

35. FED. R. CIV. P. 83.

The official position of the United States Public Health Service, after exhaustive study, is unequivocal that cigarette smoking is a major cause of lung cancer, as well as several other types of harm.³⁶ Congress, in effect, has adopted this position.³⁷ The public health officials of all fifty states concur. So does the World Health Organization.

Why ask jurors to spend countless hours listening to a few experts and lawyers, and then make an independent determination of a fact issue long put to rest by an overwhelming consensus of the world's medical and scientific community? Placing such a burden on a jury, as well as the civil justice system, cannot be justified.

Our nation has made an official finding: Cigarette smoking can and does cause lung cancer. Such finding has persisted for twenty-five years and should, as a matter of law, be deemed as not subject to *reasonable* dispute. Judicial notice should be taken that cigarette smoking can and does cause lung cancer.

Moreover, judicial notice should be taken of the other types of harm caused by cigarette smoking where a strong consensus has been reached and unequivocally adopted by the U.S. Public Health Service.

Where a trial court insists, a plaintiff can follow the traditional procedure for taking judicial notice under the provisions of the applicable rule of evidence which would call for a motion, a hearing and an order by the court. To take judicial notice under the applicable rule, the court must find that disease causation is indisputable, (not subject to reasonable dispute) and that such finding is verifiable.³⁸

Before the court begins its task of evaluating the medical and scientific evidence on diseases caused by cigarette smoking, a plaintiff should advise the court that the health effects of cigarette smoking have been the subject of more than 50,000 articles in professional journals; studied by many thousands of individual scientists; studied by many professional organizations with special competence; and studied by many governments and their agencies.

Obviously, the court, or its special master, could not possibly interview or take the testimony of the thousands of persons who could qualify as causation experts. To make its task manageable and more reliable, the court must give great weight to the findings, opinions and positions of professional organizations with spe-

36. See *infra* Appendix C.

37. Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 (1982 & Supp. IV 1986).

38. FED. R. EVID. 201(b) and TEX. R. EVID. 201(b).

cial competence; and the findings, opinions and positions of governments and their agencies which have studied the health effects of cigarette smoking.

The court would be fully justified in finding that the professional organizations with special competence and governments and government agencies, in the aggregate, are sources whose accuracy (after their long, exhaustive studies on cigarette disease causation) cannot be reasonably questioned. The mere fact that the tobacco companies can produce a collection of individual experts to advance contrary views should not create enough evidentiary weight to make the dispute on causation a *reasonable* dispute.

Because the consequences of cigarette smoking have been studied so exhaustively and for so long, the court will need to take firm control of the hearing on plaintiff's motion to take judicial notice. In particular, the court will need to determine how much time is to be allotted to taking testimony and determine other methods of presenting evidence for the court's consideration. In fact, the court may wish to appoint a special master for assistance in evaluating the evidence to determine the types of harm as to which there is no reasonable doubt that cigarette smoking is a contributing cause.

If the court feels uncertainty as to whether or not judicial notice on causation is appropriate, then such uncertainty should be resolved in favor of the plaintiff in jurisdictions where appellate review is quickly available. In Texas, the taking of judicial notice on causation would influence discovery rulings, on which there is prompt appellate review by mandamus.³⁹

The taking of judicial notice on the capacity of cigarette smoking to cause lung cancer and other specific types of harm will be a significant step toward making cigarette disease litigation affordable as to time and expense.

IV. CONTROLLING BIG-6 ABUSE OF THE "OTHER POTENTIAL CAUSES" DEFENSE

A major contention of the Big-6 defendants in tobacco litigation is that plaintiff's cigarette disease could have been caused by agents or factors independent of cigarette smoke. The defense of "other potential causes," if properly pursued, is appropriate. However, the Big-6 have improperly used the defense as a discovery weapon to make cigarette disease litigation expensive, time consuming and oppressive.

39. See, e.g., *Jampole v. Touchy*, 673 S.W.2d 569 (Tex. 1984); *Crane v. Tunks*, 160 Tex. 182, 328 S.W.2d 434 (1959).

The Big-6 contend the “other potential causes” defense in a lung cancer case justifies discovery of the victim’s lifetime stress experiences, all personality traits, all genetic factors, all environmental exposures during the victim’s lifetime, as well as discovering everything ever taken into his body.

This discovery strategy (if allowed by the trial court, or not challenged by plaintiff) enables a cigarette manufacturer to scrutinize every minute of a person’s life, as well as that of his immediate family, ancestors and siblings. They claim this defense confers the right to scrutinize every school record from kindergarten through graduate school; every medical record ever made, whether with hospitals, mental institutions, physicians, pharmacists, insurance companies, or employers; and every scrap of paper that was ever generated by any employer, beginning with any part-time work as a teenager. As claimed, this defense would allow the Big-6 to interrogate everyone the smoker ever knew or who ever observed him.

Obviously, allowing such an abusive practice would make any litigation too expensive and unbearably oppressive.

The trial court can effectively prevent the Big-6 abuse of the “other potential causes” defense. To properly use this defense in a lung cancer case, defendants should first present adequate proof (a reasonable probability) that the other agents or factors in fact have the capacity to cause lung cancer independent of cigarette smoke; otherwise, any such agent or factor has no relevance, or such little relevance as to be excludable under Rule 403.⁴⁰

Actually, other probable causes for lung cancer, independent of cigarette smoke, are few in number. To raise a fact issue that a certain agent or factor is a probable cause of lung cancer, independent of cigarette smoke, requires that there be in existence sufficient data to support an expert opinion of causation.⁴¹

The court should adopt a procedure to identify all of those agents and factors which have the potential to cause the specific cigarette disease in question independent of cigarette smoke. Such other potential causes should be identified before a Big-6 defendant is permitted to engage in any discovery in furtherance of its “other potential causes” defense. Following such a procedure should pose little difficulty for the court, particularly if the court appoints a special master as its scientific advisor.⁴²

40. FED. R. CIV. P. 403 and TEX. R. CIV. P. 403.

41. *Viterbo v. Dow Chemical*, 826 F.2d 420 (5th Cir. 1987).

42. *See infra* Appendix D which contains a motion and an order which sets out a procedure for defusing Big-6 abuse of the “other potential causes” defense.

V. CONTROLLING DISCOVERY BY THE TRIAL COURT

To prevent Big-6 discovery abuse, it is absolutely necessary for the trial court to take control from the beginning, requiring that all discovery be approved in advance.

The court should decide: (1) whether a particular subject is discoverable, and if so, to what extent; (2) the specific persons who are to supply such discoverable information; and (3) the method of discovering the information, giving preference to the least expensive method that is adequate.

The following discussion will identify some particular subjects of discovery, and suggest appropriate controls by the trial court. The discussion will assume plaintiff is the cigarette disease victim.

A. *Plaintiff's Smoking History*

Defendants are entitled to discover the brands of cigarettes smoked; the dates each brand was smoked; the quantity of cigarettes smoked at various times; and perhaps other aspects of smoking behavior. The plaintiff smoker, of course, will be the best source of information for his smoking history. Only a few close family members will likely have significant information on his smoking history. The least expensive method of discovering such history is by interrogatories to plaintiff. Information from a non-party can be obtained by written deposition. All interrogatories and questions should be approved by the court before being propounded.

B. *Plaintiff's Addiction and Efforts to Quit Smoking*

Defendants are entitled to discover appropriate information on plaintiff's addiction, if alleged; his attitudes at various times about quitting smoking; and his efforts, if any, to quit smoking. Again, the plaintiff smoker would be the best person to supply this information. Other persons having any significant information would likely be limited to close family members. This information could be obtained through approved interrogatories and supplemented by plaintiff's oral deposition. Information from others can best be obtained by approved questions in written depositions.

C. *Plaintiff's Knowledge and Perception of the Risks Posed by Cigarette Smoking*

Defendants are entitled to discover plaintiff's knowledge (and sources where known), at various times, as to the types of harm that could be caused by cigarette smoking, and his perception of the risk of harm. Plaintiff's beliefs about cigarette disease dan-

gers, as well as the strength of such beliefs, would likely have changed considerably over a period of time. Plaintiff's relevant beliefs would include the probability of being disabled or killed by a cigarette disease, and the extent that probability could be reduced by quitting smoking.

Plaintiff's sources of information influencing his beliefs would be discoverable to the limited extent known. Importantly, our beliefs are often molded or influenced without our awareness.

The plaintiff smoker, of course, is by far the best source of information about his beliefs on given subjects at various times. Others may furnish information on such beliefs if they have been expressed or indicated by the plaintiff smoker.

Reviewing one's beliefs that have been held over a long period of time on various subjects is a time consuming exercise. Oral depositions would not be suitable to secure the best information available on this subject. Interrogatories and written questions would be more suitable, as well as less expensive, both in terms of time and money.

D. Discovery of Other Potential Causes of Plaintiff's Cigarette Disease

Earlier we pointed out Big-6 abuse of the "other potential causes" defense, and suggested appropriate trial court controls.⁴³ Once the court has identified other causes which have the potential to cause the cigarette disease in question, independent of cigarette smoke, defendants would be entitled to find out if the plaintiff smoker was ever exposed to such other potential causes. This information can best be secured from plaintiff through interrogatories. Discoverable information held by nonparties could be obtained by court-approved questions in written depositions.

E. Background Information on Plaintiff

Defendants should be allowed to obtain very general information on plaintiff's background such as his family history, formal education and employment history. This information can be obtained easily through interrogatories.

Plaintiff's employment records should not be discovered except as to exposure data, when available, that pertains to other potential causes of the disease in question. Answers to interrogatories can supply general information about plaintiff's employment history. Defendants should be prohibited from taking depositions, ei-

43. See *supra* §IV and Appendix D.

ther written or oral, of the employers, or even contacting such employers without prior approval of the court.

Defendants should be prohibited from discovering any of plaintiff's school records. Defendants can simply be furnished with background information as to schools attended, together with certificates and degrees.

F. Medical Information

Defendants can discover medical information pertaining to the cigarette disease in question, and other medical information reasonably related to plaintiff's claim. All other medical records and information should remain privileged and not subject to any kind of discovery. Discoverable medical information can be set out in a discovery order, and plaintiff ordered to furnish same.

The trial court should keep in mind that very little of plaintiff's medical history will have any relevance to his claim based on the cigarette disease.

G. Damages Information

Defendants would be entitled to discover information pertaining to plaintiff's contentions on the various elements of damages such as loss of earnings and earning capacity; medical bills; physical pain and mental suffering; impairment and disfigurement; loss of consortium; and, where applicable, wrongful death damages. This information can be obtained through interrogatories and by the production of medical bills and records on earnings, and supplemented by oral depositions to the extent allowed.

H. Limiting the Use of Oral and Written Depositions

Cigarette disease litigation can never be made affordable and fair unless the trial court severely limits the use of oral and written depositions by Big-6 defendants. Limitations must be placed on the number of depositions, their duration, and the subjects of inquiry. The discovery controls already discussed will greatly diminish the need for deposition discovery.

While controlling discovery on permissible subjects, the trial court should identify those subjects as to which discovery is forbidden. Defendants should be expressly prohibited from engaging in discovery of stress experienced by plaintiff during his lifetime, except that caused by the cigarette disease in question; from gathering information for a personality profile on the plaintiff smoker; from gathering information from insurance companies; and from conducting any type of private investigation of plaintiff or others

without timely apprising the court of same.

VI. CONTROLLING THE USE OF EXPERT WITNESSES

The trial court, in making cigarette disease litigation affordable and fair, must exercise considerable control over the use of expert witnesses. It will be necessary for the court to limit the number and kinds of experts; to determine what information each testifying expert must furnish to the opposing party; and to determine when oral or written depositions are to be allowed, and if allowed, to determine appropriate limitations as to scope and duration. Many potential experts needed by cigarette disease victims will be unavailable unless reasonable time restraints are imposed by the court.

Potential medical experts will include those involved in the examination, diagnosis, and treatment of the cigarette disease victim. The records pertaining to such examinations, diagnosis and treatment should be furnished by plaintiff to defendants at cost.

If a treating physician is to be called as a witness, Texas courts, pursuant to Texas Rule of Civil Procedure 166b(2)(e)(4), can require that the physician furnish a report setting out the information discoverable under Rule 166b(2)(e)(1).⁴⁴ No further discovery should be made of treating physicians except by court order.

Each party will be using, subject to court approval, a number of testifying experts who have not provided health care services to the plaintiff. While varying from case to case, such experts may include a pulmonary specialist; a radiologist; a pathologist; an addiction expert; an epidemiologist; a toxicologist; an advertising or marketing expert; a public relations expert; a behavioralist; an economist; and a state-of-the-art expert, or medical historian, on matters relevant to the civil conspiracy and fraud causes of action, and claims of gross negligence. With such a large variety of potential experts, the court must restrict the parties to only one expert in each field; prohibit or severely limit depositions of experts; and carefully limit the duration of each expert's testimony.

Assuming the court has taken judicial notice that cigarette smoking causes the cigarette disease in question, the court should prohibit any testifying expert from suggesting, directly or indirectly, that cigarette smoking is not an established cause of such disease. In other words, defendants would not be permitted to present experts who would contradict in any way judicially noticed facts.

The court should require that a major portion of the expert tes-

44. TEX. R. CIV. P. 166b(2)(e)(4) and TEX. R. CIV. P. 166b(2)(e)(1).

timony be furnished by video deposition. Requiring expert testimony by video deposition will decrease the time demands on experts and shorten the trial. In time, video depositions taken in other cases can be utilized, thereby making the litigation even more affordable as to time and expense.

The jury is entitled to receive expert testimony that is understandable in content, and presented with as much brevity as clarity will permit.

The busy trial court judge may find it helpful to appoint a special master to prepare a proposal for controlling the use of experts in a manner to make the litigation affordable and fair.

VII. IN CAMERA MONITORING OF LITIGATION ACTIVITIES

In making cigarette disease litigation affordable, the trial court will have taken a major step toward preventing a disparity in party resources from substantially influencing the outcome of the litigation. But even more needs to be done.

In resisting cigarette disease claims, the Big-6 have engaged in certain activities offensive to the civil justice system.⁴⁵ In a Mississippi case, the American Tobacco Company hired local citizens as "jury consultants." This practice points out the need for the trial court to be alert to any efforts to improperly influence the jury, or to contaminate the jury panel.

Private investigations by the Big-6 into the personal lives of litigants appear to be a routine practice. The trial court has a duty to protect litigants from tactics that offend ordinary sensibilities. When one avails himself of the civil justice system, he does not consent to an unreasonable invasion of privacy.

Community surveys, with their potential for abuse, have reportedly been conducted by tobacco defendants. Such behind-the-scene activities, as conducted in the past by members of the Big-6, constitute good cause for close *in camera* monitoring by the trial court. Full disclosure of such activities can be required of Big-6 attorneys of record, as officers of the court. The trial court can require periodic affidavits by Big-6 executives to uncover any activities not made known to their attorneys of record.⁴⁶

The trial court, when appropriate, can take whatever action is reasonable and necessary to protect the integrity of the civil justice system.⁴⁷

45. See *infra* Appendix A.

46. See *infra* Appendix E.

47. See *infra* Appendix F.

CONCLUSION

The trial court is responsible for making litigation affordable and fair. To meet this responsibility in cigarette disease cases, the trial court must take firm action to counter oppressive litigation tactics that are routinely employed by the Big-6 cigarette manufacturers. Liberal use should be made of special masters.

Suggested action by the trial court includes taking judicial notice of the types of harm caused by cigarette smoking; defusing the Big-6 abuse of the "other potential causes" defense; controlling the scheduling, methods, and breadth of discovery; controlling the use of expert witnesses; and conducting an *in camera* monitoring of litigation activities in order to detect and correct any deleterious practices.

Unless deterred, the Big-6 tobacco companies will continue their abuse of the civil justice system until all of their adversaries are crushed. The only possible deterrent is a courageous and resourceful judiciary. The ball is, indeed, in its court.

APPENDIX A

A. Statement of Daniel G. Childs

Daniel G. Childs, being duly sworn according to law, testifies as follows:

1. I, Daniel G. Childs, am an attorney at the law firm of Joseph D. Shein, P.C., in Philadelphia, Pennsylvania, located at 235 S. 17th Street, Philadelphia, PA.

2. I became involved in tobacco litigation in December 1985, with the filing of two cases against various tobacco manufacturing companies, including American Tobacco, Philip Morris, and R.J. Reynolds. These defendants were represented by Baskin, Flaherty, Elliott & Mannino of Philadelphia and Chadbourne & Parke of New York (American Tobacco); Shook, Hardy & Bacon of Kansas City, Arnold & Porter of Washington, D.C., and Dechert Price & Rhoads of Philadelphia (Philip Morris); and Womble, Carlyle, Sandridge & Rice of Winston-Salem and Rawle & Henderson of Philadelphia (R.J. Reynolds).

3. In June 1988 we went to trial against American Tobacco on one of our cases. During trial, lawyers from American contacted at least one of plaintiff's experts the evening before he was to testify, without notifying plaintiff's counsel or the court.

4. For nearly three years I have been engaged in preparing these cases for trial, and have been amazed at the discovery tactics used by opposing counsel. For example:

a. Depositions last for days. A widow/plaintiff was questioned about dating men subsequent to her spouses death. Her daughter was asked what she told her psychiatrist, and what her psychiatrist told her.

b. Numerous irrelevant depositions are noticed and taken in every possible jurisdiction. A classmate is deposed in Florida to testify what a football coach told the varsity team. The decedent was never on that team. Neighbors are questioned about the decedent's skeet shooting and what he made skeet out of. Next door neighbors are deposed. Records from all corners of the country are gathered.

c. Numerous expert witnesses were listed in defendant American Tobacco's pretrial for a case which went to trial in June, 1988. Only four were called as witnesses.

d. Defendants make it extremely difficult to take any depositions of corporate personnel. Depositions noticed by plaintiff are unilaterally postponed.

e. Every effort is made by the defendants to uncover every "piece of dirt" on the client. Fights with children, run-ins with the law, etc. are all looked for. However, with regard to discovery, defendants' position is that "what's mine is mine, what's yours is negotiable."

f. Every effort is made to ensure that the plaintiffs' counsel around the country do not communicate about discovered materials. Even if counsel are given identical materials, the defendants take the position that these counsel should not be able to discuss such materials.

g. Materials produced are often totally irrelevant, and sometimes border on the absurd. E.g., trade journals on bovine lactation.

5. The defendants in these cases have spared no expense. Numerous out of town attorneys show up for routine hearings. Pleadings are voluminous. Every issue brought to the court's attention is revisited over and over. Costs to plaintiff's counsel are staggering.

6. From my experience, the best possible pretrial course which could be effected by a court would be to set firm pretrial deadlines with blocks of time set out for either side to do discovery. Courts should actively be involved with scheduling discovery. Protective orders should be discouraged, as they prolong discovery by prohibiting sharing of information. Experts should be limited by the court; depositions should be limited by the court; and out of town depositions should be discouraged absent a showing of good cause and offer of proof.

B. Statement of Paul M. Monziona, Esq.

Paul M. Monziona, Esq., being duly sworn according to law, testifies as follows:

1. That I am an attorney at law duly licensed to practice before the courts of the State of California and the Commonwealth of Massachusetts and am a member of the Law Offices of Melvin M. Belli, Sr., 722 Montgomery Street, San Francisco, California 94111.

2. As a member of the Law Offices of Melvin M. Belli, Sr., I have been involved in tobacco litigation representing various plaintiffs since approximately 1981. Although I have filed several cases on behalf of plaintiffs against various tobacco companies, only one has made it to a jury verdict conclusion, namely, *Galbraith v. R.J. Reynolds Tobacco Company*, tried in Santa Barbara, California, in 1985. The *Galbraith* case was the first cigarette product liability case to come to trial in over twenty-five years, and until very recently, was the only cigarette case to reach a jury verdict since the cases of the early 1960s.

3. The *Galbraith* case was brought as a personal injury case on behalf of Mr. John Galbraith with a claim for loss of consortium on behalf of his wife, Elaine Galbraith. While the litigation was pending, Mr. Galbraith died, and the action was amended to include his heirs in a wrongful death action. Mr. Galbraith's estate was probated to bring a survivorship action under appropriate California law.

4. There were approximately six law offices representing the Defendant, R.J. Reynolds Tobacco Company in the *Galbraith* case. The principle attorneys were the Law Offices of Lawler, Felix & Hall in Los Angeles, California, with Thomas Workman and John Nyhan as the trial attorneys. The Law Firm of Archibald & Spray, in Santa Barbara, California, acted as local counsel. There was also a New York law firm, an outside law firm which was corporate counsel for R.J. Reynolds Tobacco Company, and the Law Offices of Jones, Day, Reavis & Pogue, a member of which was admitted *pro hac vice* and acted as co-trial counsel. During the actual trial, R.J. Reynolds had three trial attorneys at counsel table, and at any given time, it was reported that there were approximately thirty-two attorneys actively involved in the preparation and/or actual trial.

5. The tactics of defense counsel in the *Galbraith* case were typical of those I observed in previous cases. Initially, subpoenas were sent out to any and all institutions of any kind with which Plaintiff and/or his family had any connection, such as, all of Mr. Galbraith's former employers dating back to the time that Mr. Gal-

braith was a very young man and all of the financial records pertaining to any and all businesses in which Mr. Galbraith had any interest. Any and all of his medical records, or psychiatric records, and school records were also subpoenaed. Through demands for production of documents, Defendants also obtained Christmas cards, family diaries, phone logs, lists of members who attended family weddings and/or birthdays, and several other such items.

6. Once Defendant had obtained all of this documentary discovery, the Defendants then began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States. Defendants deposed anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived. These depositions would last for hours, and very little, if any, relevant or admissible evidence would be obtained. In one instance, counsel for the parties flew to Arizona to depose the invalid, former and elderly spouse of Mr. Galbraith. This deposition was taken in her living room. Mrs. Galbraith, John Galbraith's widow, was deposed for approximately ten days. Mrs. Galbraith's mother was deposed for several days. In all, thousands of hours were spent in depositions, at tremendous costs and inconvenience to counsel for Plaintiff.

7. Defendants justified these depositions by arguing that the nature of cancer as a disease required that they obtain any and all information possible regarding whether Mr. Galbraith ate red meat, or used pesticides in his garden and other such remote subjects. Such discovery is obviously designed to harass plaintiffs and make these cases more costly than they need to be.

8. At the same time that Defendants were conducting burdensome and unreasonable discovery, they were objecting to the vast majority of interrogatories propounded by Plaintiff, and causing Plaintiff to file motions to compel discovery responses. Most of Plaintiff's motions to compel discovery were granted by the trial judge, but only after great time, inconvenience, and expense.

9. Tobacco litigation cases can be brought cost effectively, but not if defendants and their counsel are allowed to engage in what is obviously an approach designed to dissuade and deter plaintiffs from bringing other cases and to force plaintiffs to dismiss these cases rather than try them. From my experience in these cases, it would be in the interest of all parties if trial judges would require status conferences shortly after responses to complaints are filed and work with the attorneys in setting up manageable discovery schedules under the inherent powers of the court to manage their own calendars and to supervise the litigation. An orderly process

of discovery should be imposed whereby defendants are limited to obtaining only that information which bears directly on the issues in the case, and if remote depositions or other remote discovery is requested by defendants, the trial court should require a showing of good cause before plaintiffs are put through the time, inconvenience and expense of such discovery.

C. Statement of Don Barrett

Don Barrett, being duly sworn according to law, testifies as follows:

1. My name is Don Barrett. I am one of the attorneys who tried the *Horton v. American Tobacco Company* case (Holmes County, Mississippi, Circuit No. 9050), which resulted in a hung jury in January of 1988.

2. I am also lead counsel in *Wilkes v. American Tobacco Company*, (Holmes County, Mississippi, Circuit No. 9383), which was filed in December 1987, and which has not yet come to trial.

3. I am well aware of the openly abusive tactics employed by the cigarette industry. In the *Horton* case, the cigarette company defendants took 107 depositions, many of out-of-state persons, and used only two of them at trial. They asked endless questions purportedly to establish some occupational or environmental causation of Mr. Horton's cancer, even though their own medical experts had already told them that there was no medical basis for such a defense.

4. In the ongoing *Wilkes* case, defense counsel has advised me that they presently plan to take between 45 and 135 fact witness depositions.

5. As far as expert witnesses are concerned, the defendants listed approximately twenty expert witnesses of their own, and only used four of them at trial.

6. The various tobacco companies work in concert on these cases. For example, one of the defense lawyers in *Horton* told me that R.J. Reynolds took a very active role in the *Horton* defense, even though R.J. Reynolds was not even a named defendant, and that R.J. Reynolds spent more money on the *Horton* case than did the real defendants.

7. The *Horton* defendants never voluntarily answered any discovery. Each time the plaintiffs' lawyers had to force the answers from the defendants with motions to compel. On one occasion the American Tobacco Company (ATC) was ordered by the court to produce its list of ingredients in Pall Mall cigarettes. ATC filed an emergency appeal to the Mississippi Supreme Court, rather desperately complaining that this list was a priceless "trade secret," the disclosure of which would be devastating to the company. The Mississippi Supreme Court ordered the list produced, under a tight protective order. Then, at the trial, ATC's corporate representative himself produced the list for the jury and testified that there was nothing secret about any of the ingredients, and they were glad to share this list with the public.

8. I strongly believe that the only effective and efficient way to

stop these discovery abuses is for the trial court to condition the discovery depositions demanded by the tobacco company upon the payment by the tobacco company of all of the plaintiffs' expenses, including attorneys' fees. Rule 1 of the Federal Rules of Civil Procedure says the rules "shall be construed to secure the just, speedy and inexpensive determination of every action." Rule 26 of the Federal Rules of Civil Procedure is identical to Rule 26 of the Mississippi Rules of Civil Procedure in that both provide for "allocation of (discovery) expenses" by the trial court. The official comment to the Mississippi Rule 26 states:

This provision would permit the court, as justice dictates, to reassign the usual financial burdens of discovery. For example, a court might condition discovery demanded by party A upon the payment by A of all or part of party B's expenses, including attorneys' fees.

9. Requiring the tobacco company to pay a plaintiff's expenses and legal fees for the discovery demanded by the tobacco company will act as an automatic governor to prevent abusive discovery and make more temperate the use of discovery depositions by the defendants. The knowledge of the tobacco company that it cannot run a plaintiff out of the litigation with oppressive discovery will keep much of the useless discovery from taking place.

D. *Statement of George W. Kilbourne*

1. *Declarant*—George W. Kilbourne being duly sworn according to law, testifies as follows: I am a solo practitioner with an office located at 3755 Alhambra Avenue, Martinez, California 94553. I make this Declaration in such capacity and in support of an article detailing the tactics of tobacco companies in furtherance of their objective in attempting to make tobacco litigation too expensive for the ordinary plaintiff and the small office.

2. *History of Involvement*—I first became involved in tobacco litigation in 1980, in representing the widow of Harold Browner, who died of lung cancer caused by the synergistic effect of inhalation of asbestos fibers and tobacco smoke. Since then, I have had up to fifteen cases on file involving the same problem. At the present time, I have fourteen cases on file in Contra Costa County, California, all synergism cases. The cases are all stayed by the California Court of Appeals, First District (San Francisco) until it rules on a Petition for Writ of Mandate brought by tobacco companies under Section 1714.45 of the California Civil Code (A section enacted in 1987, on the last day of the legislative session purporting to do away with tobacco products liability suits. Two attorneys from Covington & Burling, Washington, D.C., representing The Tobacco Institute, assisted in drafting the statute).

3. *Case Types*—All of the cases I have, except one, are asbestos/smoking synergism cases, filed in Alameda County, California or Contra Costa County, California. The lone Alameda County case (*Root*) was dismissed at the direction of the client after the discovery practices invaded her privacy so much that she could not take it. (The intensive questioning on the reason for her son's suicide was too much.) The other case was filed in San Diego County. It is on hold pending determination of the Petition for a Writ of Mandate, referred to above. The cases have involved six major cigarette manufacturers, two cigar manufacturers (Culbro and Swisher) and one pipe tobacco case (Culbro). Each of the defendants has both local counsel, and out-of-state counsel. Shook, Hardy & Bacon of Kansas City, Missouri appear on cases involving Philip Morris, represented locally by two firms, Brown & Williamson and Lorillard. R.J. Reynolds (RJR) was originally represented by the Brobeck office in San Francisco and Jacob, Menninger & Finnegan of New York. In quick succession, RJR fired Brobeck when it lost a motion to remand from federal court, hired Morrison & Forrester (San Francisco), then fired that firm for the same reason, hired Lawler, Felix & Hall (Los Angeles), then hired Pillsbury, Madison & Sutro (who represented Ameri-

can) when the three Lawler attorneys went to Pillsbury, Madison & Sutro. Currently RJR is represented by Howard, Rice (San Francisco) and the Womble firm of Winston-Salem, (N.C.). Philip Morris always appears at deposition with local counsel and a lawyer from Washington. American appears by Pillsbury, Madison & Sutro and New York counsel. Liggett appears with local counsel (Lillick) and New York counsel. Swisher appears with local counsel and New York counsel. Culbro appears with local counsel and New York counsel (Jacob).

4. *Discovery*—Discovery practices of all defendants follow the same pattern. A deep investigation is made of the plaintiff, the entire family and relatives. This is done by using an investigative firm from Los Angeles with local connections. Inquiries are made up and down the street, of all known friends (e.g. such as who attended decedent's funeral, ex-wives, fishing buddies). Typically, plaintiffs are kept under surveillance from a van, and their activities monitored (e.g. contacting their minister or place of employment).

Oral depositions of plaintiffs are searching and in depth. Reasons are given in discovery motions which show that each area has been well thought out. A check list is used, which is thirty to forty pages long. Each attorney deposing a plaintiff has a dossier on the plaintiff, complete with family tree, work history, psychological profile, and such other material as is available.

After the plaintiff's deposition, the defendants then depose every person whose name comes up, either in-state or out-of-state. In *Browner*, twenty-eight such depositions were taken; in *Sahli*, twenty-three; in *Page*, eighteen; in other cases, a lesser number, but the cases are not as far along. (In *Sahli*, a person was contacted in Alaska who had not seen the parties for over ten years. In *Browner*, a deposition was taken of a man who had seen Browner on only two occasions in twenty years outside his job at Juvenile Hall. The witness said he had never seen Browner smoke. There is a rule against smoking at Juvenile Hall. One of the two times he visited Browner when Browner was in an oxygen tent dying. The only other time was when he ran into Browner at Safeway, where they chatted for about five minutes.)

Typically, all records are obtained regarding the decedent or plaintiff. Elementary school records from the 1930s from a small town in Kentucky were obtained. When an objection was made, the explanation was that he might have had a health course in the elementary grades. All employment records of every job ever held are obtained.

The entire residence history is obtained, on the ground that the

plaintiff/decedent may have lived near an industrial complex, inhaled smog, used pesticides, lived in a house with a coal stove, or with chemicals in it, etc., *ad nauseam*.

The entire medical history is sought, on the ground that the victims condition could have been caused by something else. This includes juvenile shot records and the history of juvenile and adult diseases, including any that could have been sexually transmitted.

Expert depositions are brutal and long. Dr. Bordow, for instance, who testified in *Galbraith* for Belli was deposed for four days, three of which failed to mention the decedent, and covered the exact same area as his deposition in *Galbraith* and his trial testimony. The psychologist was deposed for three days covering sentence by sentence the statements in his written report. (In one four-hour session, Grady Barnhill of the Womble firm consumed three cigars, not by smoking them, but by eating them!) The defendants themselves have a long list of experts and typically will ask one doctor, such as an oncologist, if he relies on the cell-type determination of a pathologist in structuring his treatment. This has the effect of increasing the necessity to call the pathologist, and increase the cost of litigation.

On the other hand, no tobacco company will answer even simple questions such as its structure, corporate history, or insurance coverage. More information can be obtained by getting an annual report than what the lawyers will give up in discovery. When discovery is tendered, it is always done so with the proviso that the information be given under a protective order, and only for use in the instant case. This, of course, requires motions in every attempt at discovery and increases the cost enormously.

5. *Tactics*—No cases have been taken to trial. However, as trial approached, several motions for summary judgment were filed. The present stay is the result of one such motion for judgment on the pleadings. (In *Sahli* three attempts were made, resulting in inconsistent rulings by the trial judge.) One strange tactic has emerged in cancer cases. The cancer type is always accused of being some strange, nonsmoking type. This has been the position of the tobacco companies successively in *Browner v. R.J. Reynolds Tobacco Co.*⁴⁸, *Sahli v. Manville Corp.*,⁴⁹ *McCuan v. Fireboard, Inc.*,⁵⁰ *Galbraith v. R.J. Reynolds Tobacco Co.*,⁵¹

48. No. 186-692 (Contra Costa City, Cal. Super. Ct. 1981).

49. No. 230512 (Cal. Super. Ct. filed May 14, 1987).

50. No. 288330 (Contra Costa City, Cal. Super. Ct. July 3, 1986).

51. No. 144417 (Cal. Super. Ct. Dec. 18, 1985).

(Belli), *Cipollone v. Liggett Group*,⁵² (Edell) and *Marsee v. United States Tobacco Co.*⁵³ (smokeless tobacco). It has now been learned that several consultants are hired until a spurious diagnosis is found which differs from all others, and it then becomes the diagnosis of the named “expert.” In every cancer case that has gone to trial or approached trial, this clearly illegal, immoral and unethical manufacturing of evidence has occurred. (This should be compared to the tactics of defendants in *Galbraith* and *Horton* where jury tampering was charged against them, but never proved.)

6. *Cost of litigation*—The cost of tobacco litigation is excessive. The tactics result in running up the cost astronomically on every case. I was sent an in-house memorandum from the Womble firm—it came in a blank envelope—acknowledging the practice of running up the cost to make the litigation too expensive, especially for solo practitioners. I have been in other complex litigation—asbestos, welding fume and friction asbestos. They are expensive, but only the welding litigation has even approached what defendants do to run up the cost of litigation.

7. *Recommendations*—If the civil justice system is to survive, it is recommended that direct and immediate steps be taken to preserve it, including the following:

- a. Designate the litigation as complex, such as under Rule 19, California Judicial Council Guidelines;
- b. Place the cost of delay and increase in complexity on the perpetrator and enforce it;
- c. Set out, when a case is filed;
 - 1) Pleading standardizations;
 - 2) Limits on the number of depositions;
 - 3) Limits on the length and content of depositions;
 - 4) Standardize and limit interrogatories;
 - 5) Limit experts in number, designation and content of depositions;
 - 6) Limit law and motion;
 - 7) Provide limitations on investigative work;
 - 8) Provide sanctions for harassment.
- d. Investigate the manufacturing of evidence, such as dealing with the cell-type manufacture as a fraud on the court;
- e. Limit *pro hac vice* admission of out-of-state counsel;
- f. Limit issuance of commissions for out-of-state depositions;

52. No. 83-2864 (D.N.J.).

53. No. 84-2777 (W.D. Okla. Nov. 13, 1984).

- g. Adopt a realistic attitude on issuance of protective orders;
- h. Deal with refusals to produce reasonable discovery with sanctions including contempt;
- i. Limit lawyer participation (twenty-five lawyers for the defense, ten from out-of-state, showed up at the trial court level on the argument on the judgment on the pleadings. Twenty-seven appeared at argument on the petition for writ of mandate before the Court of Appeal.)
- j. Severely limit use of trade secret arguments on additives. The defendants' attorneys switch law firms representing different brands at the drop of a hat, but then argue that each brand has its own trade secrets.⁵⁴ This seriously hampers discovery, and showing causation, not to mention the effect on research.

54. In California, Evidence Code Section 1060 extends a trade secret privilege only if it "will not tend to conceal fraud or otherwise work injustice." It is submitted that it is being used both ways. CAL. EVID. CODE § 1060 (Deering 1986).

APPENDIX B

*A. Sample Affidavit in Support of Plaintiff's Motion for Protective Order and Setting Forth Compliance with Local Rule 15(c)*⁵⁵

Alan M. Darnell, of full age, being duly sworn according to law, deposes and says:

1. I am an attorney-at-law of the State of New Jersey, am a shareholder in the firm of Wilentz, Goldman and Spitzer, a Professional Corporation, and have been responsible for the handling of the within matter since its inception.

2. In this case, plaintiff, Ann Marie Barnes, the widow of Raymond Barnes, alleges that her husband's death from lung cancer was caused by many years of cigarette smoking. To date, defendant, R.J. Reynolds has taken twenty-five depositions of various members of Mr. Barnes' immediate family, his relatives, and his acquaintances.

3. Plaintiff and her counsel did not seek relief from this court during the long ordeal imposed by the above depositions. However, plaintiff's counsel received notices to depose ten additional people.

4. In an effort to satisfy the requirements of local rule 15(C), on September 17, 1986, I spoke to Alan Kraus, an attorney with the firm of Riker, Danzig, Scherer, Hyland & Perretti, counsel for R.J. Reynolds in this matter. I requested that R.J. Reynolds not take the additional depositions for the reasons that they were cumulative. I also represented to Mr. Kraus that plaintiff has no present intention of calling these persons to be witnesses at the time of trial; moreover, the persons set forth were not named by plaintiff in her answers to interrogatories as persons with relevant knowledge of the within matter. I also requested Mr. Kraus to adjourn any depositions scheduled prior to the return day of this motion (October 20, 1986) and informed him that I would be making this motion. Mr. Kraus informed me that R.J. Reynolds would adjourn the depositions scheduled prior to October 20, 1986, but would not withdraw the deposition notices and subpoenas issued regarding the additional persons.

5. Because "enough is enough," and because R.J. Reynolds is not precluded from interviewing the persons in question, and obtaining signed statements from them, and indeed, subpoenaing those persons to testify at time of trial, and will thus suffer no prejudice if the depositions in question are barred, plaintiff re-

55. This sample affidavit was taken from *Barnes v. R.J. Reynolds Tobacco Co.*, No. 84-56(AET) (D.N.J. filed Sept. 22, 1986).

spectfully requests this court to order that the depositions in ques-
tion not be taken.

B. Sample Motion for a Protective Order⁵⁶

Legal Argument— The requested discovery is unreasonably cumulative and unduly burdensome. Therefore, a protective order should issue that discovery not be had.

The general rule is that parties may obtain discovery regarding any matter relevant to pending litigation.⁵⁷ However, the district court has historically had broad power to prevent discovery abuse.⁵⁸ District courts have traditionally balanced the merits of the discovery request against the burden of the request to the aggrieved party.⁵⁹ A protective order for the aggrieved party is the appropriate judicial response to prevent unduly burdensome requests.⁶⁰

As discovery abuses became more frequent, the balancing test was codified in a 1983 amendment to the Federal Rules of Civil Procedure. F.R.C.P. 26(b)(1) now provides a caveat to the general scope of discovery:

The frequency or extent of use of the discovery methods . . . shall be limited by the court if it determines that: (i) *the discovery sought is unreasonably cumulative or duplicative*, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) *the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought*; or (iii) *the discovery is unduly burdensome or expensive*.⁶¹

The 1983 amendment was intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse.⁶² To withstand judicial scrutiny, the information sought through discovery must not only be relevant, but also must be of “sufficient potential significance” to justify the time and expense involved.⁶³

Defendant’s most recent discovery requests do not meet this standard. Defendant has conducted exhaustive depositions of several individuals associated with Mr. Barnes. Defendant has deposed Mr. Barnes’ wife; his seven children; his two brothers; his

56. This is a sample motion for a protective order taken from *Barnes v. R.J. Reynolds Tobacco Co.*, No. 84-56 (AET) (D.N.J. filed Sept. 22, 1986).

57. FED. R. CIV. P. 26(b)(1).

58. *Jones v. Pennsylvania Greyhound Lines*, 10 F.R.D. 153, 154 (E.D. Pa. 1950); *Essex Wire Corp. v. Eastern Elec. Sales*, 48 F.R.D. 308, 310 (E.D. Pa. 1969).

59. *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292 (E.D. Pa. 1980); *Superior Coal Co. v. Ruhrokohle, A.G.*, 83 F.R.D. 414, 422 (E.D. Pa. 1979).

60. FED. R. CIV. P. 26(c).

61. FED. R. CIV. P. 26(b)(1) (emphasis added).

62. *Id.* comment.

63. *In re Convergent Technologies Sec. Litig.*, 108 F.R.D. 328, 331 (N.D. Cal. 1985).

sister; his two sisters-in-law; two brothers-in-law; a daughter-in-law; his wife's two aunts; and his aunt and an uncle by marriage. Moreover, defendant has conducted long and searching depositions of at least five other acquaintances of Mr. Barnes. These individuals were politically, professionally or socially associated with Mr. Barnes. All deponents testified at length regarding Mr. Barnes' involvement with his family; his church-related activities; his involvement in local politics; his professional life; and his social activities.

Dissatisfied with the testimony presented, defendant has now noticed ten more individuals to be deposed in this case. These individuals are also asserted to be political, social and professional acquaintances of Mr. Barnes. Although these persons no doubt have some knowledge concerning the life of Raymond Barnes, plaintiff seriously doubts that these witnesses will provide any useful information that has not already been established again and again by prior deponents. Mr. Barnes was actively involved in community affairs throughout his lifetime. He had many professional, political and social acquaintances. Undoubtedly, all these persons would be competent to provide relevant testimony to defendants.

However, common sense dictates that there is a point at which such a discovery procedure lacks merit. Defendants have volumes of testimony regarding all aspects of Mr. Barnes' life. Defendants are of course free to interview any individual regarding his or her contacts with Mr. Barnes. However, there is no good reason to depose more individuals on these issues. Plaintiff has no present intention to call any of the ten individuals noticed as witnesses at trial. Therefore, any information gained at further depositions will be cumulative and unnecessary, adding nothing to the disposition of this case.

Finally, the requested discovery unduly burdens plaintiff and demonstrates defendant's desire to use its superior financial resources as a tool to thwart the litigation process. Discovery is expensive, in terms of time and money. While defendants may have the attorneys and support staff to accommodate its discovery desires, plaintiff certainly does not. It is patently unfair to require plaintiff's attorney to spend the time and money preparing for and participating in ten more depositions that will only yield cumulative information that defendant has had ample opportunity to previously procure. Plaintiff, therefore, urges this Court to say, "enough is enough," and issue an Order preventing the requested recovery.

*C. Sample Affidavit in Opposition to Motion to Take
Depositions Out of State*⁶⁴

Alan M. Darnell, of full age, being duly sworn according to law, deposes and says:

1. I am an attorney-at-law of the State of New Jersey, am a shareholder in the firm of Wilentz, Goldman & Spitzer, a Professional Corporation, and am one of the attorneys responsible for the handling of the above matter.

2. There comes a point in all human endeavors, including litigation, that fundamental fairness demands that one say "enough already." Accordingly, plaintiff's counsel submits this Affidavit in opposition to defendant, Brown & Williamson Tobacco Corporation's motion, returnable on December 20, 1985, for an order directing that the following depositions be taken out of state:

a. Paul McHugh, an alleged employee of Merrill, Lynch, Pierce, Fenner & Smith, Inc. Defendant's Notice of Motion indicates that Mr. McHugh presently lives in New York and was a co-worker of Wilfred E. Dewey.

b. Phillip Colon, another employee of Merrill, Lynch, Pierce, Fenner & Smith, Inc.

c. Jacob Weissman, M.D., identified in defendant's moving papers as Chief Medical Officer of Merrill Lynch. According to the Notice of Motion submitted by defendant, the alleged purpose of this deposition is to explain the medical records of Mr. Dewey generated at Merrill Lynch.

d. David Marshall, M.D., identified in defendant's moving papers as Medical Director of Sanders Associates, Inc., a former employer of Wilfred E. Dewey. Presumably, the purpose of this deposition is to similarly explain any medical and health records of Wilfred Dewey generated while Mr. Dewey was employed at Sanders Associates, Inc.

e. Defendant seeks to depose the Custodian of Records for Varo, Inc., a Texas corporation which is identified as a former employer of Mr. Dewey. Apparently, defendant requires that such employment records be identified.

f. Defendant seeks to depose Frederick Corbett, a California resident, who presumably was a friend of Mr. Dewey.

g. The defendant seeks to depose Terry Corbett (presumably Frederick Corbett's wife), also a resident of California and apparently another friend of Mr. Dewey.

3. Plaintiff's counsel received the Notice of Motion to direct the taking of depositions out-of-state on December 5, 1985. On December 6, 1985, plaintiff's counsel received a Notice to take the depositions of three additional persons who reside in the State of

64. This sample affidavit was taken from *Dewey v. R.J. Reynolds Tobacco Co.*, No. L-071733-81 (Super. Ct., Bergen County, N.J.).

New Jersey, namely, Joseph Rubacky, Grace Rubacky and Ruth Gallo. Presumably, these persons met Wilfred Dewey some time before his death from cancer.

4. In addition to all of the above depositions that have just been noticed, several days ago, plaintiff's counsel received a Notice to continue the deposition of Claire Dewey (the wife of the decedent). Claire had already been deposed on February 21, 1983—almost three years ago.

5. Thus far in this litigation, defendants have scheduled or deposed twenty-three witnesses. If one adds to that number the seven persons that are the subject of the within application by the defendant to this court, we have a total of thirty witnesses to be deposed in this litigation. However, as demonstrated by past history, there is absolutely no indication that these thirty persons will be all the persons that defendants will depose. Presumably, if defendants choose, they could depose the acquaintances of the acquaintances of Mr. Dewey; they could depose the children of the acquaintances of Mr. Dewey, and so forth and so on *ad infinitum*. Presumably, during the course of Mr. Dewey's short tenure on this earth, he met hundreds of people who presumably could be deposed by the defendants.

6. It appears that defendants' strategy of deposing everyone on this earth who knew the plaintiff is not confined to this litigation. In the case of *Galbraith v. R.J. Reynolds Tobacco Co.*,⁶⁵ the case currently being tried to a jury in California, a newspaper notes that:

The *Galbraith* case also shows how a corporation using its legal resources can overwhelm a private plaintiff. The Reynolds' legal team has filed thousands of pages of motions and briefs in the case, far more than the Galbraiths. Reynolds' lawyers took several dozen lengthy and expensive depositions, or court-ordered sworn statements, from every person they could find who had any contact with Galbraith, including a woman he divorced more than 40 years ago, distant relatives and former supervisors.⁶⁶

7. This court has previously issued a Solomon-like decision on a similar application previously made by defendants in this litigation. After lengthy argument of counsel in a previous motion, the court required defendants to pay the travel and hotel expenses of plaintiff's attorney. Although the court permitted the Defendants to take the depositions of Sam and Evelyn Bender in Texas, defendants chose not to schedule that deposition to date; although

65. No. 144417 (Cal. Super. Ct. Dec 18, 1985).

66. Newark Star-Ledger, Nov. 29, 1985.

this court permitted the defendants to go to New Hampshire to depose the friends and supervisor of Mr. Dewey while Mr. Dewey worked at Sanders Associates, Inc. defendants in this application seek to return to New Hampshire to depose the Medical Director at Sanders Associates, Inc. There is no reason set forth why that deposition could not have been taken in July of 1985 when the other New Hampshire depositions took place.

8. Moreover, if the purpose of the depositions of the Medical Directors of Merrill Lynch, Sanders Associates, and Varo, Inc. (three former employers of the decedent) is to authenticate those companies' medical records that may pertain to Mr. Dewey, a more appropriate procedure would be to submit those medical records to plaintiff's counsel to determine whether the authenticity of those records can be stipulated. If there is a dispute over the interpretation of portions of those medical records that are relevant to this case (presumably, whether Mr. Dewey stubbed his toe or sprained his back is not germane to this case although defendants may so argue), then, and only then, might a deposition of these Medical Directors be appropriate. Moreover, there is no showing in the moving papers of defendant that the current Medical Directors of these companies had any personal knowledge whatsoever of Mr. Dewey.

9. Thus, plaintiff repeats what was said initially in this Affidavit: "Enough already." The time has come for this court to forcefully demonstrate to the defendants that their superior financial resources cannot be used as a tool to thwart fundamental fairness. If this court allows the depositions sought by the defendants to go forward, there is no doubt whatsoever in plaintiff's mind that they will be back to the well on another occasion to take still more depositions.

10. Accordingly, plaintiff requests that the defendant's motion to take out-of-state depositions be denied or, if allowed, that the court establish conditions to make sure that defendant's superior financial resources not be allowed to pervert the fundamental proposition that all persons should have equal access to the courts of this state.

APPENDIX C

A. *Judicial Notice*

1. *Plaintiff's Motion to Take Judicial Notice*—Plaintiff asks the court to take judicial notice of the various types of harm caused by cigarette smoking, and would show the court the following:

a. Plaintiff would show that this is a products liability case in which plaintiff contends that his lung cancer was caused by cigarette smoking, and further contends that cigarette smoking causes many types of harm, and the risk from smoking cigarettes outweighs the benefits from smoking cigarettes, thereby rendering them unreasonably dangerous and therefore defective.

b. Plaintiff would show that the health effects of cigarette smoking pose a major public health problem that has been studied extensively for more than thirty-five years. The major public health agency of this nation is the United States Public Health Service, headed by the U.S. Surgeon General. The U.S. Public Health Service has made express findings that cigarette smoking is a cause of death; lung cancer (including epidermoid carcinoma, small cell carcinoma, adenocarcinoma and large cell carcinoma); cancer of the larynx; cancers of the oral cavity which include malignant tumors of the lip, tongue, salivary gland, floor of the mouth, mesopharynx, and hypopharynx; cancer of the esophagus; cancer of the bladder; cancer of the kidney; cancer of the pancreas; coronary heart disease; chronic obstructive lung disease, including chronic bronchitis, emphysema, and chronic obstructive pulmonary disease and allied conditions, without mention of asthma, bronchitis or emphysema; complications of pregnancy, including spontaneous abortion, premature delivery, fetal death and perinatal death; and addiction.

Such cause and effect relationships between cigarette smoking and the above types of harm are generally known throughout the United States, as well as being generally known by public health authorities throughout the world. Such cause and effect relationships, with the benefit of the vast amount of human data whose accuracy cannot reasonably be questioned, are capable of accurate and ready determinations. Such accurate and ready determinations have been made by the U.S. Public Health Service on behalf of this nation and such determinations can be identified in official public reports of the U.S. Public Health Service made pursuant to law.

Plaintiff moves that the court review the findings of the U.S. Public Health Service from its official reports made pursuant to law and determine the various types of harm that have been found

to be caused by cigarette smoking. The plaintiff further moves that the court take judicial notice that such cause and effect relationships will be deemed to exist for all purposes in this cause.

WHEREFORE, plaintiff prays that a hearing be set on this motion and that after such hearing the court take judicial notice of the various types of harm caused by cigarette smoking, as found by the U.S. Public Health Service, and for such other orders as the court deems appropriate.

2. *Order Taking Judicial Notice*—The court, having considered such motion and the opposition thereto, is of the opinion that such motion, to the extent stated herein, should be granted.

Where the U.S. Public Health Service has made an express finding that a certain agent or factor is a cause of death or other type of serious harm, the trial court should find, subject to the defenses stated herein, that such cause and effect relationship is not subject to reasonable dispute, requiring the trial court to take judicial notice of such cause and effect relationship.

However, the court should permit an opposing party to defeat the taking of judicial notice by producing evidence from which the judge of the trial court makes one or more of the following findings:

- a. That such express finding of the U.S. Public Health Service has been withdrawn;
- b. That the existence of such cause and effect relationship has not been adequately studied; or
- c. That a significant segment of the relevant medical and scientific community is of the opinion, based on reasonable medical or scientific probability, that such cause and effect relationship does not exist.

The taking of judicial notice, under such circumstances, that a certain agent or factor can cause death or other types of serious harm, serves societal values, as well as the proper functioning of the civil justice system. Our society regards life as sacred. Where our most responsible public health officials expressly find that a certain agent is causing death, or serious harm, it is appropriate that the judicial system accept such finding, unless the judge of the trial court finds one of the above disqualifying factors.

The taking of judicial notice, under such circumstances, provides sufficient safeguards for an aggrieved party having a vested interest in the accused agent of death or serious harm. In the trial court, such aggrieved party can defeat the taking of judicial notice by obtaining a fact-finding by the trial judge on at least one of the above qualifying factors.

Another avenue for an aggrieved party who in good faith be-

lieves his product, or other agent, is not a cause of death or serious harm, is to present appropriate evidence to persuade public health officials and the relevant medical and scientific community. Truth and justice, in such instances, will best be served by requiring any such aggrieved party to persuade a significant segment of the relevant medical and scientific community rather than judges and jurors.

Applying the foregoing criteria for taking judicial notice under such circumstances, the court hereby finds that the U.S. Public Health Service has made an express finding, contained in official public reports, that cigarette smoking is a cause of each of the following types of serious harm, including death:

Death; lung cancer (including epidermoid carcinoma, small cell carcinoma, adenocarcinoma and large cell carcinoma); cancer of the larynx; cancers of the oral cavity which include malignant tumors of the lip, tongue, salivary gland, floor of the mouth, mesopharynx, and hypopharynx; cancer of the esophagus; cancer of the bladder; cancer of the kidney; cancer of the pancreas; coronary heart disease; chronic obstructive lung disease, including chronic bronchitis, emphysema, and chronic obstructive pulmonary disease and allied conditions, without mention of asthma, bronchitis or emphysema; complications of pregnancy, including spontaneous abortion, premature delivery, fetal death and perinatal death; and addiction.

In respect to the above types of harm as being caused by cigarette smoking, the U.S. Public Health Service has made its findings in various Annual Reports prepared by the Surgeon General on the health consequences of cigarette smoking. These reports were prepared and submitted to Congress pursuant to law. Such findings include the following:

- a. "Cigarette smoking is the chief, single, avoidable cause of death in our society and the most important public health issue of our time." 1984 Report of the Surgeon General at p. vii.
- b. "Cigarette smoking is the major single cause of cancer mortality in the United States." 1982 Report of the Surgeon General at p. v.
- c. "Cigarette smoking is the major cause of lung cancer in the United States." 1982 Report of the Surgeon General at pp. 5, 62, 145.
- d. "Cigarette smoking is the major cause of laryngeal cancer in the United States." 1982 Report of the Surgeon General at pp. 77, 145.
- e. "Cigarette smoking is a major cause of cancers of the oral cavity in the United States." 1982 Report of the Surgeon General at pp. 6, 89, 146.

“Cancers of the oral cavity include malignant tumors of the lip, tongue, salivary gland, floor of the mouth, mesopharynx, and hypopharynx.” 1982 Report of the Surgeon General at p. 78.

f. “Cigarette smoking is a major cause of esophageal cancer in the United States.” 1982 Report of the Surgeon General at pp. 7, 101, 146.

g. “Cigarette smoking is a contributory factor in the development of bladder cancer in the United States.” 1982 Report of the Surgeon General at pp. 7, 113.

h. “Cigarette smoking is a contributory factor in the development of kidney cancer in the United States.” 1982 Report of the Surgeon General at pp. 7, 122.

i. “Cigarette smoking is a contributory factor in the development of pancreatic cancer in the United States.” 1982 Report of the Surgeon General at pp. 7, 132.

j. “Cigarette smoking is a contributory factor in the development of bladder, kidney, and pancreatic cancer in the United States.” 1982 Report of the Surgeon General at p. 146.

k. “Cigarette smoking is a major cause of coronary heart disease in the United States for both men and women.” 1983 Report of the Surgeon General at pp. 6, 127.

l. “Cigarette smoking is the major cause of chronic obstructive lung disease in the United States for both men and women. The contribution of cigarette smoking to chronic obstructive lung disease morbidity and mortality far outweighs all other factors.” 1984 Report of the Surgeon General at p. 8.

m. “The chronic obstructive lung diseases (COLD) that are causally related to cigarette smoking include chronic bronchitis, emphysema, and chronic obstructive pulmonary disease and allied conditions, without mention of asthma, bronchitis, or emphysema.” 1984 Report of the Surgeon General at p. 185.

n. “Cigarette smoking is the major cause of COLD morbidity in the United States, and 80-90% of the COLD in the United States is attributable to cigarette smoking.” 1984 Report of the Surgeon General at pp. 9, 136.

o. “Cigarette smoking is the major cause of COLD mortality for both men and women in the United States.” 1984 Report at pp. 10, 210.

p. “Smoking by pregnant women increases the risk of spontaneous abortion, premature delivery, fetal death, and perinatal death.” 1981 Annual Report of the Surgeon General at p. 170.

q. “Increasing levels of maternal smoking result in a highly significant increase in the risk of abruptio placentae, placenta previa, bleeding early or late in pregnancy, premature and prolonged rupture of the membranes, and preterm delivery—all of which carry

high risks of perinatal loss.” 1980 Annual Report of the Surgeon General at p. 11.

r. “Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.” 1986 Annual Report of the Surgeon General at p. 7.

s. “Involuntary smoking can cause lung cancer in nonsmokers.” 1986 Annual Report of the Surgeon General at p. 107.

t. “Cigarettes and other forms of tobacco are addicting Nicotine is the drug in tobacco that causes addiction.” 1987 Report of the Surgeon General at p. 9.

As a further basis for taking judicial notice the court finds that cause and effect relationships between cigarette smoking and the above types of harm are generally known throughout the United States, as well as being generally known by public health authorities throughout the world; that such cause and effect relationships, with the benefit of the vast amount of human data whose accuracy cannot reasonably be questioned, are capable of accurate and ready determination; that such accurate and ready determination has been made by the U.S. Public Health Service on behalf of this nation and such determination can be identified in official public reports of the U.S. Public Health Service made pursuant to law.

Having announced the court’s holding on the taking of judicial notice of various types of harm caused by cigarette smoking, the court will give defendants an opportunity, as to each such type of harm, to present evidence for the court’s consideration on any of the following stated disqualifying factors:

a. That such express finding of the U.S. Public Health Service has been withdrawn;

b. That the existence of such cause and effect relationship has not been adequately studied; or

c. That a significant segment of the relevant medical and scientific community is of the opinion, based on reasonable medical or scientific probability, that such cause and effect relationship does not exist.

If, after the presentation by defendants of evidence on any of the above disqualifying factors, the court finds for the defendants as to any of the enumerated types of harm, then plaintiff’s motion to take judicial notice, as to such types of harm, will be overruled. However, as to those types of harm to which the court fails to make a finding of one or more of such disqualifying factors, plaintiff’s motion will be granted, and an appropriate order taking judicial notice will be entered.

In addition to finding the taking of judicial notice appropriate under TEX. EVID. CODE section 201, the court finds that it would be unfair to require a plaintiff in a products liability case to en-

gage in a contest with the cigarette manufacturers on the issues of causation that have been studiously and exhaustively considered for over thirty-five years, and definitively resolved by the U.S. Public Health Service, with no disagreement by any significant segment of the relevant medical and scientific community. Moreover, the litigation of such causation issues, when the herein criteria have been met, would place an unreasonable burden on our civil justice system.

The court will set a hearing, not less than sixty days from date, to give defendants an opportunity to present evidence on the above stated disqualifying factors.

APPENDIX D

A. "Other Potential Causes" Defense

1. Plaintiff's Motion for a Discovery Order on "Other Potential Causes"

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff moves for an order whereby the court will control all discovery pertaining to defendants' use of the "other potential causes" defense, and would show the following:

In this cause the defendants will endeavor to show that plaintiff's lung cancer could have been caused by agents and factors, independent of cigarette smoke. While such defense of "other potential causes" can be appropriately asserted, the defendants have in the past claimed such defense as their justification for conducting abusive discovery practices which make cigarette disease litigation unaffordable and unfair.

Such discovery abuse can be stopped only if the trial court takes charge of all discovery pertaining to the "other potential causes" defense, including the ordering of procedures for identifying those other causes which may be properly asserted.

WHEREFORE, plaintiff moves that the court enter an order setting out procedures for identifying other potential causes of plaintiff's lung cancer, independent of cigarette smoke; and then controlling all discovery as to the identified other potential causes; and for such further orders as the court may deem appropriate to make this litigation affordable and fair.

2. Order on "Other Potential Causes" Defense

The court held a hearing on plaintiff's motion for an order to control defendants' discovery efforts to support their contention that plaintiff's lung cancer could have been caused by agents and factors, independent of cigarette smoke. After considering such motion, the court is of the opinion that the motion, to the extent provided herein, should be GRANTED.

The court finds that defendants are entitled to assert as a defense that plaintiff's lung cancer could have been caused by agents or factors, independent of cigarette smoke.

The court finds that no agent or factor can be considered as a potential cause of lung cancer unless there is sufficient expert opinion evidence that such agent or factor has the capacity to cause, or contribute to cause lung cancer, independent of cigarette smoke.

It is ORDERED that no discovery of other potential causes of plaintiff's lung cancer be conducted except as allowed by written

order after the other potential causes have been identified through the procedure set forth herein.

To identify other potential causes of lung cancer, as to which defendants want to make discovery, the court hereby **ORDERS** the following procedure be followed:

(a) On or before ninety days from the date of this order each defendant is **ORDERED** to identify each agent and factor which it contends has the potential to cause, or contribute to cause lung cancer, independent of cigarette smoke;

(b) No agent or factor shall be listed by a defendant under the above paragraph (a) unless such defendant presents expert opinion evidence supported by either credible epidemiologic data or credible data on long-term animal studies;

(c) That such expert opinion evidence shall be presented by affidavit of a qualified expert with the supporting epidemiologic and toxicologic data attached; or by expert opinion contained in a learned treatise with such opinion supported by the epidemiologic or toxicologic data required under (b) above;

(d) Within thirty days after being served the information produced by a defendant under the above (a),(b), and (c), plaintiff shall serve on each such defendant his objections, if any, and thereafter the court will make its ruling by written order on such contentions and objections.

It is further **ORDERED** that the procedure set forth in the above (a), (b), (c), and (d) shall be followed as to each agent and factor which a defendant contends involves contributory negligence by plaintiff and further contends has the potential to contribute to cause lung cancer, whether or not independent of cigarette smoke.

It is further **ORDERED** that on the trial of this cause no suggestion be made, either directly or indirectly, that plaintiff's lung cancer could have been caused by any agent or factor other than those agents and factors identified pursuant to this order, and to which plaintiff was subjected as shown by proof offered at trial.

APPENDIX E

A. Order on In Camera Monitoring of Litigation Activities of Defendants

The court finds good cause to believe that defendants, in their defense against plaintiff's claim in this case, may engage in activities which may include an undue intrusion into plaintiff's personal life; or which may have the potential for exerting an improper influence on prospective jurors; or which may give defendants an unfair advantage because of a disparity in party resources.

Therefore, it is ORDERED that each attorney of record for the various defendants file with the court, under seal on the first day of February, May, August, and November of each year a report disclosing the following information:

- a. name and address of each person (or entity) providing any services, or engaging in any activities pertaining to this litigation;
- b. name and address of the employer of each such person or entity;
- c. a description of such services and activities, including the dates and places performed;
- d. the amount and purpose of each charge for such services and activities; and
- e. a description of any written material, film, tape or computer input generated by reason of such services and activities.

It is further ORDERED that the chief executive officer of each defendant file with the court, under seal, an affidavit on the first day of February, May, August and November of each year stating:

- a. whether or not the above reports filed by the attorney of record make a full disclosure of all services and activities pertaining to this litigation known to such defendant or its agents; and
- b. that a careful inquiry has been made to determine the accuracy of the contents of the affidavit.

APPENDIX F

A. Order on Plaintiff's Motion for Access to the Civil Justice System

The court held a hearing on Plaintiff's Motion For Access To The Civil Justice System. After duly considering such motion, the court is of the opinion that the motion, to the extent provided herein, should be GRANTED.

The court finds there is good cause to believe this cigarette disease case cannot be litigated on the merits unless the court devises a plan to make the litigation affordable and fair. The court further finds that it is under a duty to devise and implement such a plan.

It is therefore ORDERED that defendants refrain from conducting any discovery in this case except as may be authorized by written order after a discovery and trial plan has been prepared by the court, or on its behalf by a special master.