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PUTTING THE 1997 SETTLEMENT INTO CONTEXT

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INTRODUCTION TO THE TRANSCRIPT OF THE
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PUTTING THE 1997 SETTLEMENT INTO CONTEXT

PAUL A. LEBEL*

On August 25, 1997, the five leading cigarette manufacturers in the United States agreed to pay to the State of Florida \$11.3 billion in settlement of litigation that had been instituted in February 1995. Originally put forward as a Medicaid cost recovery action, the litigation evolved into a wide-ranging claim that the tobacco companies had violated the Racketeering Influenced Corrupt Organization Act (RICO), thus opening the door to penalties such as the disgorgement of all profits generated by the corrupt practice—the sale of cigarettes. During jury selection for the trial of the action in the Circuit Court in West Palm Beach, Florida, Governor Lawton Chiles announced the settlement resolving the dispute. The settlement involved a massive payment to the State and an agreement to change tobacco marketing practices in ways that would protect future generations of Floridians from the adverse health effects of tobacco products.

On November 17, 1997, the Florida State University College of Law was honored to host the Symposium on the tobacco litigation settlement that appears in this issue of the Florida State University Law Review. Almost immediately after this historic agreement was announced, some of the attorneys who represented the State attacked the fee portions of the settlement, thereby diverting attention from the significant public policy benefits obtained from the tobacco industry. This Symposium, entitled “The Florida Tobacco Litigation: Fact, Law, Policy, and Significance,” offered an opportunity to draw attention to those benefits and to explore the strategy and the tactics that led to this victory.

The Symposium presented the considerable talent of the litigation participants who were instrumental in securing the settlement. The Symposium allowed us to present the background of this innovative litigation using the words of the public officials, private attorneys, and legal academics who were responsible for translating general rules and theories into concrete results.

The story of this litigation recounts a three-way relationship: the relationship among the legal system, public health concerns, and tobacco. That relationship is complex and often frustrating. For the last three decades or more, the adverse health effects of tobacco products have been incontrovertible although, sad to say, not uncontroverted.

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The legal developments pertaining to smoking and health during much of the last three decades have tended to be modest in scope and slow in arrival, as a listing of the most prominent measures reveals. The Surgeon General of the United States has issued periodic reports about smoking and health, with the scrutiny recently expanded to include other tobacco products besides cigarettes. In 1965, Congress required cigarette packages and advertisements to carry warnings. Congress placed restrictions on broadcast advertising, but strong evidence suggests that this was offset by the loss of anti-smoking public service announcements that were required under the Fairness Doctrine, and by the substantial cost savings the tobacco industry enjoyed by avoiding the expense of this advertising media. Restrictions have also been placed on smoking in particular places, including airline flights, as a result of federal legislation and enclosed public places protected by state and local indoor clean air legislation. Over the three-decade span, sporadic tort and products liability litigation was instituted against the tobacco industry, but the expense of the litigation was immense and the results were virtually always in favor of the industry.

If one had painted a picture as recently as three years ago of how the legal system was dealing with the relationship between tobacco and health, the picture would have been a not-very-crowded still life. Today, the picture is quite different. Today, the picture is more of an action-adventure film. The pace and the scope of litigation have increased dramatically. Even more significant is the focus on finding a global resolution of the smoking and health problem, a resolution that combines industry accountability with the reduction of the harm that would otherwise be inflicted on future generations of our citizens.

We see those efforts in regulations by the Food and Drug Administration at the federal level, and in the settlement negotiations leading to the federal legislative consideration that received so much attention in the late spring and summer of 1997. More to the point of this Symposium, the litigation system has become a site of considerable activity in defining the relationship between the manufacturers of tobacco products and the public health. In particular, Florida has been at the forefront of the most significant recent litigation developments that are changing the nature of that relationship.

Our focus in the Symposium was on a particular aspect of that relationship, the Medicaid recovery litigation that resulted in the \$11.3 billion settlement between the State and the tobacco industry at the end of August 1997. To put that litigation into context, however, it may be helpful to understand that there are three avenues of tobacco litigation, all of which have been pursued aggressively and successfully in Florida.

The oldest of those efforts is traditional tort litigation, typically involving one claimant seeking to establish that the wrongful conduct of an identifiable individual or firm caused specific harm for which the claimant is entitled to compensation. We can trace serious efforts to hold tobacco companies liable to individual smokers or their survivors in this state to nearly forty years ago. Florida was among the first of the states to allow federal courts to certify questions of state law to the state supreme court.¹ One of the first questions certified was whether Florida would recognize a strict liability claim for relief under an implied warranty theory of liability against a tobacco company in a case filed by a smoker in federal district court in 1957. The Supreme Court of Florida answered the question in the affirmative in the case of *Green v. American Tobacco Co.*² However, the Fifth Circuit Court of Appeals subsequently upheld a judgment entered on a verdict for the tobacco company in a second trial of that case.³ Even in the early days of tobacco litigation, the defenses asserted against a smoker proved to be every bit as critical an element in the resolution of those cases as was the underlying theory of liability. Indeed, only recently has any significant progress has been made by plaintiffs on the individual-smoker-litigation front. That progress occurred in *Carter v. Brown & Williamson Tobacco Co.*,⁴ a case that resulted in a \$750,000 verdict for the plaintiff in a circuit court in Jacksonville, Florida.

Carter is really the first time that traditional tort litigation, the first strand of tobacco-related litigation, has threatened to turn the tide against the unfailing success rate of the tobacco industry in claims by or derived from individual smokers. There had been a couple of oddities along the way. The famous, or perhaps more accurately, infamous, *Cipollone* case⁵ from New Jersey saw a short-lived verdict for the family of the deceased smoker who originally filed the claim. But ten years of litigation ultimately left the surviving children and their attorneys with a United States Supreme Court ruling that said they could start all over again, but with neither the resources nor the energy to do so.⁶

Another smoker victory, *Horowitz v. Lorillard, Inc.*,⁷ resulted in a \$2 million verdict for the plaintiff to compensate him for harm that he alleged was attributable to a particular brand of cigarette.⁸ Dur-

1. See FLA. STAT. § 25.031 (1945).

2. 154 So. 2d 169 (Fla. 1963).

3. See *Green v. American Tobacco Co.*, 409 F.2d 1166 (5th Cir. 1969).

4. No. 95-00934-CA (Fla. Duval Cty. Cir. Ct. Aug. 9, 1996).

5. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

6. See *id.* at 530.

7. No. 965-245 (Cal. San Francisco Cty. Sup. Ct. Sept. 1, 1995).

8. The Supreme Court of California recently denied review of an intermediate appellate court decision upholding the judgment entered on the verdict for the plaintiffs. See

ing the 1950s, P. Lorillard, the manufacturer of Kent cigarettes, decided to incorporate a filter into the cigarette, apparently trying to carve out a new market niche. There was one small problem—the filter was made of asbestos.

The obvious point to make about the asbestos-filter cases is that they constitute a relatively small subset of the universe of smoking-related harms claims. Isolated instances of plaintiffs' successes in these cases are a weak signal that the dynamics of this first category of tobacco litigation are shifting. If we are going to detect that sort of signal, we do not have much to observe other than the Carter case in Jacksonville. Even there, we need to recognize that subsequent attempts to replicate that plaintiff victory have failed, at least thus far.⁹

Another avenue in which Florida's tobacco litigation has led the way is in class action treatment of tobacco-related harms. Instead of seeing tobacco and health issues as inviting litigation plaintiff by plaintiff and claim by claim, class action suits attempt to use procedural innovations for aggregating claims and claimants. In so doing, there are effects on both the litigation dynamics and the substantive possibilities that become available.

Class action suits can help to level the litigation playing field between claimants and a very profitable industry historically willing to spend whatever was required to defeat individual smoker claims. Substantively, class action suits hold out the promise of establishing a base from which one might approach the question of which remedy is appropriate from the broader perspective of whether any single plaintiff can prove by a preponderance of evidence that his or her injury was actually and proximately caused by a particular defendant.

At the federal level, class action treatment of smoking-related harms is effectively dead, pending a revision of the Federal Rules of Civil Procedure. Recent decisions of the federal courts of appeals and the Supreme Court of the United States have virtually gutted class action possibilities in the federal judicial system as far as mass tort litigation is concerned.¹⁰

Horowitz v. Lorillard Inc., No. A072695 (Cal. Ct. App. Aug. 12, 1997), cert. denied, 66 U.S.L.W. 3604 (U.S. May 18, 1998) (No. 97-1459).

9. The next two cases tried by the attorneys who represented the plaintiffs in Carter resulted in defense verdicts. See Raulerson v. R.J. Reynolds Tobacco Corp., 95-1820-CA (Fla. Duval Cty. Cir. Ct. May 5, 1997); Karbiwinyk v. R.J. Reynolds Tobacco Co., No. 95-04697-CA (Fla. Duval Cty. Cir. Ct. Oct. 31, 1997).

10. See Amchem Prod., Inc. v. Windsor, 117 S. Ct. 2231 (1997) (finding class action certification inappropriate for settlement purposes of asbestos-related claims); Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (disapproving certification of a class of smokers in a nationwide class action against tobacco companies).

There are attempts underway to reinvigorate the class action strategy within various states.¹¹ When the class is composed of smokers and those claiming damages derivative from the claims of the smokers, however, the problems of proof under traditional tort doctrines may merely be postponed, rather than cured, by class action treatment.

The picture may look different and more promising to plaintiffs in the secondhand or passive smoking setting. As with the individual smoker traditional tort litigation category, the most significant of developments occurred in litigation pursued in Florida. The secondhand smoke class action on behalf of the airline flight attendants, *Broin v. Philip Morris Companies*,¹² resulted in a settlement, thus deferring the resolution of what still may turn out to be problematic proof propositions about the causation, harm, and exposure levels presented by passive smoking cases.

The focus of this Symposium, the Medicaid cost recovery lawsuit that was ready for trial in West Palm Beach in the summer of 1997, was significantly different from the other two methods of attempting to impose responsibility on the tobacco industry for harms attributable to its products. We examined litigation in which the state is the plaintiff rather than individual smokers or their survivors, or those who have been exposed to environmental tobacco smoke. Here, the theory of damages is not individual harm, but instead is the secondary expense that the state must incur in providing Medicaid treatment for smoking-related harms suffered by its citizens eligible for such treatment. The underlying paradigm of legal responsibility is not so much the tort notion of one party inflicting harm on another party but one in which the responsibility is grounded on a perception of tobacco products creating a public health cost for which the manufacturers who reap immense profits must bear a legal responsibility. Finally, we explored litigation where the paradigm shift from traditional tort concepts of harm and causation to a public health theory of liability opens the door to remedies designed not just to compensate for past harms or expenses, but to open up the possibility of obtaining remedies that offer some hope of reducing the magnitude of the insult to the public health that tobacco products cause.

This Symposium brought together a wide array of talent and commitment of people who have been at the center of the case on behalf of Florida's citizens. The speakers included the highest public officials of the State who set out on this course a number of years ago

11. See, e.g., *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. 3d DCA 1996) (upholding class certification for all Florida citizens and residents who suffer harm as a result of addiction to cigarettes containing nicotine).

12. No. 91-49738-CA (22) (Fla. Dade Cty. Cir. Ct. Oct. 10, 1997) (settlement agreement).

and who stuck to that course in spite of criticism and obstacles. We also heard from a number of private attorneys who represented the State in a fashion that has earned them the nickname of the "dream team" in popular accounts of the litigation. That label is certainly well-deserved, in the sense that they played above the rim in this litigation. Circuit Judge Harold Cohen, who presided over this litigation, recently described the "extraordinary and magnificent job" done by these attorneys as "[s]ome of the best lawyering this court has ever experienced."¹³ We were fortunate to be joined by legal academics whose sophisticated understanding of the application of both traditional and innovative legal concepts added to the theoretical and the practical construct employed in this litigation.

It is fitting that the first set of remarks of this Symposium were delivered by Lawton Chiles, Governor of the State of Florida. Governor Chiles is a distinguished public servant whose vision and steadfastness furthered the successful resolution of this litigation.

Governor Chiles had a long and distinguished career as a legislator before becoming Florida's chief executive. He served in the Florida Legislature as a member of the House of Representatives for eight years and the Senate for an additional four years. In 1970, he was elected to the United States Senate, where he served three terms. As a senator, he rose to positions of influence where his concern for the problems of our state and our nation could be directed toward positive results. He chaired the Special Committee on Aging in the 96th Congress. In the 100th Congress, he chaired the Senate Budget Committee, and was able to sound the call for greater fiscal responsibility on federal budgetary matters. He was elected Florida's Governor in 1990, and was reelected in 1994.

Governor Chiles's special concern for children has been a constant refrain of his public career. He helped to create the National Commission to Prevent Infant Mortality, and served as chair of that commission. The Healthy Start program,¹⁴ initiated during his first term as Governor, has made prenatal care and medical screenings available to every mother in this state, lowering infant mortality by nearly twenty-five percent and bringing it to its lowest level in our state's history. In a very real sense, the tobacco litigation that is the subject of this Symposium ties together many of the important themes of public policy that have marked his career. We began this Symposium with the comments of Governor Lawton Chiles.

13. *State v. American Tobacco Co.*, No. CL 95-1466 AH (Fla. Palm Beach Cty. Cir. Ct. Nov. 12, 1997) (order quashing liens filed by counsel and directing parties and counsel to comply with attorney fees provisions of settlement agreement).

14. See FLA. STAT. § 383.011 (1997).