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Notes

THE MANIPULATION OF PUBLIC OPINION BY THE TOBACCO INDUSTRY: PAST, PRESENT, AND FUTURE

ERIN MYERS

INTRODUCTION

From the first lawsuit brought against it in 1954,¹ the tobacco industry (hereinafter industry) has used its vast resources² to implement a series of successful strategies to defeat plaintiff claims.³ The industry has utilized its tremendous wealth to sway public opinion⁴ and encourage victorious litigation.⁵ This ability to influence the public may be a thing of the past as evidence continues to emerge indicating foul play among the industry giants. The resentful public sentiment resulting from the industry's fraudulent behavior has perpetuated unprecedented litigation which could inevitably lead to industry downfall.

Part I of this paper will examine the distinct phases of tobacco litigation and illustrate the effectiveness of the industry's various legal strategies with a primary focus on its manipulation of public opinion. The current shift in public opinion towards the tobacco industry and the industry's response will be examined in Part II. Part II will also examine the tobacco settlement previously proposed before Congress and the effectiveness of the industry's attempt to invoke public support. Throughout, this paper will explore both the effectiveness and morality of the tobacco industry's abuse of resources in swaying public opinion and its likelihood of success in the future.

1. *Lowe v. R.J. Reynolds Tobacco Co.*, No. 9673(C) (E.D. Mo. filed Mar. 10, 1954).

2. See Elizabeth A. Frohlich, Note, *Statutes Aiding States Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing an Identifiable Harm?*, 21 AM. J.L. & MED. 445, 445 (1995) (describing the tobacco industry as a \$45 billion per year industry).

3. See Tucker S. Player, Note, *After The Fall: The Cigarette Papers, The Global Settlement, and the Future of Tobacco Litigation*, 49 S.C. L. REV. 311, 313 (1998).

4. See *id.*

5. See *id.* at 313-19.

I. HISTORY OF PUBLIC OPINION IN TOBACCO LITIGATION

From 1954 to 1994, 813 claims were filed against the tobacco industry.⁶ Of these claims, only twenty-three were tried; and although the industry lost two cases at the trial level, both were overturned on appeal.⁷ Over the years, these cases have taken on distinct characteristics which have allowed the history of the cases to be broken into three waves.⁸ In each wave, the explanation for the lawsuits' failure is considered to lie more with jury sentiment than with legal opinion.⁹ In the first wave, the industry was able to evoke enough doubt among jurors to defeat the legal standard at the time which required that smoking be the actual and only cause of the plaintiff's injury.¹⁰ In the second and third waves, the risks associated with smoking were public knowledge. Therefore, juries began to assess more blame on individual plaintiffs who had made the conscious decision to smoke despite knowledge of the consequential health risks.¹¹ Aware of the significant connection between public opinion and success in the courtroom, the tobacco industry has taken drastic measures to elicit public support and assure successful claims.

A. *Public Opinion During the First Wave (1950-1970)*

During the first wave of tobacco litigation, the public's perception about smoking changed, as the links between smoking and cancer were discovered and publicized.¹² When the public began to discover that cancer was linked to smoking, smokers began to sue tobacco companies.¹³ As a result, the industry adopted a never-say-die litigation strategy in which it attempted to frustrate or settle all claims.¹⁴ First, the industry used its tremendous resources to force plaintiffs out of litigation by using delaying pretrial tactics.¹⁵ Second, the industry utilized scientific experts to frustrate plaintiffs' causation

6. See Elsa F. Kramer, Feature, *Waiting To Exhale: Tobacco Lawyers are Getting Burned by Damaging Industry Revelation. Can They Rise From the Ashes?*, 39 RES GESTAE 20, 20 (May 1996) [hereinafter *Waiting to Exhale*].

7. See *id.*

8. See Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 854 (1992) (coining the wave motif for the tobacco litigation history) [hereinafter *Sociolegal History*].

9. See Gary T. Schwartz, *Tobacco Liability in the Courts*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 131, 156 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

10. See *infra* notes 30-36 and accompanying text.

11. See *infra* notes 65-86 and accompanying text.

12. See *infra* notes 21-24 and accompanying text.

13. See *infra* note 25 and accompanying text.

14. See *infra* notes 27-41 and accompanying text.

15. See *infra* notes 27-29 and accompanying text.

claims.¹⁶ Finally, the industry used foreseeability as a defense to plaintiff suits by claiming that it had no knowledge that smoking caused cancer, thereby denying liability.¹⁷ As a result of these litigation tactics, the industry survived the first wave without sustaining much loss.

Before the first wave of tobacco litigation, health concerns played a small role in the public's perception of smoking.¹⁸ In fact, smoking had social status; it was viewed as young and cosmopolitan.¹⁹ Furthermore, smoking was portrayed positively in popular culture, as movie stars who smoked were considered cool and in control.²⁰ This social view changed dramatically as the first reports²¹ linking smoking and cancer were published in the early 1950s.²² Their publication in Reader's Digest proved significant as the findings were mass-marketed in a readable fashion to the average person.²³ Similarly, televised programs like Edward R. Murrow's "See it Now" expounded the health risks of smoking to a mass audience.²⁴ As a result of this increased public awareness of the dangers of smoking, many smokers began to sue the tobacco companies.

Hundreds of lawsuits ensued over the next twenty years,²⁵ but the industry was able to "score a knockout."²⁶ The industry responded to the onslaught of litigation with a united front and a never-say-die litigation strategy in which it refused to settle and appealed at every op-

16. See *infra* notes 30-36 and accompanying text.

17. See *infra* notes 37-39 and accompanying text.

18. See Joseph R. Gusfield, *The Social Symbolism of Smoking and Health*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 49, 54 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

19. See *id.* at 53.

20. See Robert L. Rabin & Stephen D. Sugarman, *Overview*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 3, 5 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

21. See Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS, AND CULTURE* 110, 112 (Robert L. Rabin & Stephen D. Sugarman eds., 1993) [hereinafter *Institutional and Historical Perspectives*]. Please note, much of the text of this article can also be found in Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *STAN. L. REV.* 853, 854 (1992), *supra* note 8. However, for the sake of clarity, each article will be cited to separately.

22. See Player, *supra* note 3, at 312.

23. See *id.* at 312 (discussing Roy NORR, *Cancer by the Carton*, *READER'S DIGEST*, Dec. 1952, at 7 (condensing Roy NORR, *Cancer by the Carton*, *CHRISTIAN HERALD*, Oct. 1952)). In the first article of the series published in Reader's Digest, "Cancer by the Carton," the author found that the deaths associated with tobacco use may eventually reach mass-epidemic proportions. See generally NORR, *supra*, at 7. In response, cigarette consumption among adults fell two years in a row. See *Institutional and Historical Perspectives*, *supra* note 21, at 112.

24. See *Institutional and Historical Perspectives*, *supra* note 21, at 112.

25. See *Sociolegal History*, *supra* note 8, at 857.

26. See Schwartz, *supra* note 9, at 131.

portunity.²⁷ First, the industry used its tremendous resources to force plaintiffs out of litigation. Since plaintiffs lawyers were working on a contingency fee basis, industry lawyers inundated the opposition with pre-trial litigation.²⁸ The industry used its vast resources to overburden plaintiffs financially with interrogatories and depositions, all in an attempt to deter plaintiffs and their lawyers from entering into seemingly futile, expensive, and lengthy litigation.²⁹ If the plaintiffs were able to gather the resources to survive such pre-trial tactics, the industry applied new tactics at the trial level.

The second never-say-die tactic the industry instituted was the use of expert witnesses to frustrate plaintiffs' attempts to prove causation. Once litigation began, defense attorneys hired expert witnesses in an attempt to refute new-found medical evidence linking smoking and disease.³⁰ The legal standard at the time for a toxic tort claim placed the burden of proof on plaintiffs to prove both general and specific causation.³¹ Therefore, plaintiffs had to show that cigarettes were a cause of their injury and that the cigarettes *indeed did* cause their particular injury.³² In *Green v. American Tobacco Company*,³³ plaintiff and industry lawyers each presented eight eminent medical doctors to testify on their behalf.³⁴ The conflicting testimony left the jury with no choice but to find that smoking was *one of* the proximate causes of the victim's lung cancer.³⁵ This case is just one example of how the indus-

27. See Player, *supra* note 3, at 313; *Institutional and Historical Perspectives*, *supra* note 21, at 113.

28. See Player, *supra* note 3, at 313; *Institutional and Historical Perspectives*, *supra* note 21, at 113.

29. See Player, *supra* note 3, at 313; *Institutional and Historical Perspectives*, *supra* note 21, at 113.

30. See *Institutional and Historical Perspectives*, *supra* note 21, at 113.

31. See Schwartz, *supra* note 9, at 132. "General causation" involves proof of a generalizable effect of exposure to or use of a product. An inquiry into a question of general causation may yield three possible results: (1) the product always causes a particular injury, (2) the product never causes a particular injury, or (3) the product may or may not cause a particular injury depending on a number of factors beyond exposure to or use of the product. See *Kurcz v. Eli Lilly & Co.*, 160 F.R.D. 667, 677 (N.D. Ohio 1995). By contrast, "specific causation" requires examination of the *particular* facts surrounding a plaintiff's claim. "Even for those plaintiffs who are alleging the same injury, resolution as to one plaintiff's claims will do nothing to prove another plaintiff's claim." *Id.*

32. See Schwartz, *supra* note 9, at 132 (emphasis added).

33. 304 F.2d 70 (5th Cir. 1962). In this case, the plaintiff, who had smoked Lucky Strike Cigarettes everyday from 1924 to 1956, argued that "he had incurred lung cancer as a result of smoking defendant's product." *Id.* at 71-72.

34. See *id.* at 72.

35. See Schwartz, *supra* note 9, at 132 (citing *Green*, 304 F.2d at 71-72).

try used its resources to raise enough doubt as to causation to stop a successful plaintiff verdict.³⁶

The final litigation tactic utilized by the industry in the first wave, in addition to manipulating causation and using experts to frustrate causation, was the use of foreseeability as a defense to plaintiff suits. For example, in *Lartigue v. R.J. Reynolds Tobacco Company*,³⁷ the tobacco industry used foreseeability as a defense³⁸ to show that R.J. Reynolds could not be responsible for plaintiff's cancer because it did not know of the dangers of smoking at the time the plaintiff contracted cancer.³⁹

Although it was ultimately a change in the legal doctrine which ended the first wave of tobacco suits,⁴⁰ the industry's litigation tactics and manipulation of causation and foreseeability brought a cessation to such claims for nearly twenty years.⁴¹ The industry exited the first wave of litigation unscathed.

B. Public Opinion During The Second Wave (1980s)

In the 1980s, shifts in public opinion and industry tactics once again combined in another round of tobacco litigation.⁴² While the industry saw a cessation of litigation in the 1970s, several factors gave viability to lawsuits in the 1980s. The Surgeon General's 1964 report finding that cigarettes were an important public health hazard,⁴³ the

36. See *Green*, 304 F.2d 70 (5th Cir. 1962). See also Schwartz, *supra* note 9, at 132 (citing *Pritchard v. Liggett & Myers Tobacco Co.*, 350 F.2d 479, 482 (3rd Cir. 1965), as similar to *Green* because the jury, although presented with conflicting evidence, concluded that smoking Chesterfields was "one of the causes" of plaintiff's cancer).

37. 317 F.2d 19 (5th Cir. 1963).

38. See *Lartigue*, 317 F.2d at 35-40 (upholding the verdict on grounds that smoking risks were not foreseeable at the time the plaintiff developed cancer); Player, *supra* note 3, at 313-14.

39. See *Lartigue*, 317 F.2d at 39-40; Player, *supra* note 3, at 313-14.

40. See *Institutional and Historical Perspectives*, *supra* note 21, at 117. The change in legal doctrine occurred when Comment i to section 402A of the Second Restatement of Torts was changed to read, "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965). This was said to be the "death knell" for the first round of litigation. See *Institutional and Historical Perspectives*, *supra* note 15, at 117.

41. See *Institutional and Historical Perspectives*, *supra* note 21, at 118.

42. See Elsa F. Kramer, *Tobacco Defense Strategies*, 39 RES GESTAE 24, 24 (May 1996) (referring to Robert L. Rabin's comments on the tobacco industry's no-holds-barred strategy and juries' unsympathetic view of plaintiffs who freely made the choice to smoke) [hereinafter *Defense Strategies*].

43. See Player, *supra* note 3, at 314 (citing PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (Pub. No. 1103 (1964))).

Federal Cigarette Labeling and Advertising Act,⁴⁴ growth of public disdain for cigarette manufacturers,⁴⁵ and the success of cases against the asbestos industry all gave viability to lawsuits against the tobacco companies.⁴⁶ Despite increased viability of plaintiff suits, the industry once again utilized its resources to successfully defeat plaintiff claims;⁴⁷ however, the tactics used during the second wave were different than those relied upon during the first wave. First, since the second wave cases were brought on theories of strict liability, the industry focused on the dangerousness of the cigarette itself to defeat plaintiff claims.⁴⁸ Secondly, the industry manipulated and withheld scientific information on the dangers of smoking to influence public opinion.⁴⁹ Finally, the industry used the very public disdain towards smoking that it helped to create, to defend plaintiff claims on assumption of risk theories and to attack the character of individual plaintiffs.⁵⁰ Similar to the first wave, the combination of the three litigation tactics allowed the industry to exit the second wave unharmed.⁵¹

First, plaintiff claims in the second wave were primarily based on strict tort liability.⁵² Therefore, the industry was able to shift the focus of the suits from foreseeability to the dangerousness of the cigarette itself.⁵³ On one hand, the industry encouraged juries to focus on the dangerousness of cigarettes; on the other hand, the industry manipulated scientific research to hide the fact that cigarettes were in fact dangerous. For example, in response to the Surgeon General's 1964 report, the industry created a full page ad to run in local newspapers

44. Codified at 15 U.S.C. § 1331 *et. seq.* (1997). The Federal Cigarette Labeling and Advertising Act was originally enacted in 1956.

45. See Frohlich, *supra* note 2, at 450-51 (attributing growth in public disdain for the industry to the 1964 Surgeon General Report and the passage of the Federal Cigarette Labeling and Advertising Act in 1965). See also *supra* note 44.

46. See Frohlich, *supra* note 2, at 451 ("Toxic harm cases, especially the asbestos cases, had laid an important groundwork for possible suits against the tobacco industry.").

47. See *id.*

48. See *infra* notes 52-53 and accompanying text.

49. See *infra* notes 59-64 and accompanying text.

50. See *infra* notes 65-85 and accompanying text.

51. See *infra* note 86 and accompanying text.

52. The theory of strict liability holds a defendant absolutely liable for harms suffered by plaintiffs "in situations in which social policy requires that the defendant make good the harm which results to others from abnormal risks" even though the defendant's acts themselves may not be illegal or blameworthy. 74 AM. JUR. 2D *Torts* § 14 (1974). "The basis of liability in such cases is the intentional behavior in exposing the community to the abnormal risk." *Id.*

53. See Player, *supra* note 3, at 315. Compare litigation tactics during the first wave, where the industry successfully defeated foreseeability claims with the use of experts and reliance on a constrained conception of foreseeability. See *supra* notes 37-39; *Institutional and Historical Perspectives*, *supra* note 21, at 115.

entitled "A Frank Statement to Cigarette Smokers"⁵⁴ that assured the public that tobacco manufacturers were interested in protecting the health of American citizens.⁵⁵

The ad also announced the industry's creation of the Council for Tobacco Research (CTR)⁵⁶ for the publicly-stated purpose of investigating fully the new information⁵⁷ that smoking was causally connected to lung cancer and disseminating its findings to the public.⁵⁸ In order to investigate, the powerfully wealthy industry selectively sponsored only the projects finding that smoking was not a health hazard.⁵⁹ If sponsored studies found otherwise, the CTR would stop funding.⁶⁰ In addition, the CTR filtered unfavorable results through a "Special Projects" division which was inundated with attorneys at every level to protect this information through the invocation of attorney work-product privilege.⁶¹ The industry was successful in hiding the unfavorable results by proclaiming that the purpose of the CTR was to gather expert witnesses for tort suits.⁶² Although the CTR was proven to be a public relations hoax forty years later,⁶³ this council was successful in ensuring victorious results for the industry throughout the

54. See Seong Hwan Kim, *California's Unfair Competition Act: Will it Give Rise to Yet Another 'Wave' in Smoking and Health Litigation?*, 35 SANTA CLARA L. REV. 193, 193 (1994). Apparently, the industry never ran the ad. See *Documents Reveal Tobacco Campaign Papers at Historical Society Show How Cigarette Makers Tried to Ease Health Fears*, MILWAUKEE J. SENTINEL, Feb. 22, 1998, at B5. Until early February 1998, the ad had never been seen outside the tobacco industry. See *id.*

55. See Kim, *supra* note 54, at 193 (citing Alix M. Freedman and Laurie P. Cohen, *Smoke and Mirrors*, WALL ST. J., Feb. 11, 1993, at A1).

56. See *id.* at 193-94. The tobacco industry established and funded the Council for Tobacco Research (CTR). See *id.* The CTR was originally named the Tobacco Industry Council (TIRC). See Player, *supra* note 3, at 323. The industry claimed that the CTR would be autonomous and "would fully investigate and disclose" its findings to the public. Kim, *supra* note 54, at 194.

57. In 1962, Congress' Investigative Advisory Committee concluded that "cigarette smoking [was] causally related to lung cancer, chronic bronchitis, emphysema and coronary artery disease." Kim, *supra* note 54, at 193 (citing PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, SMOKING AND HEALTH, REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (Pub. No. 1103 (1964))).

58. See *id.* at 193-94.

59. See *id.* at 195.

60. See *id.* (citing Alix M. Freedman & Laurie P. Cohen, *Smoke and Mirrors*, WALL ST. J., Feb. 11, 1993, at A1).

61. See *id.* at 195-96.

62. See *id.* Because information collected in preparation for litigation is afforded special protection, the tobacco industry could hide all adverse research through this division. See *supra* text accompanying note 61.

63. See *id.* at 194.

second wave by suppressing the connection between disease and smoking.⁶⁴

Finally, public disdain for smoking and smokers also had a significant impact on jury verdicts in the 1980s. The focus of the second-wave cases was the plaintiff's freedom of choice, and defense attorneys relied on this shift in public sentiment to win cases.⁶⁵ When warnings were mandated in 1965,⁶⁶ the public was slow to react. However, in the years following, the public began to attribute fault to smokers who chose to continue the habit despite the warnings.⁶⁷ By 1986, even though ninety-two percent of the public believed that smoking caused lung cancer,⁶⁸ this knowledge was outweighed by the strong public sentiment that plaintiffs had made the conscious decision to smoke.⁶⁹ Therefore, industry attorneys were successful in arguing that plaintiffs who ignored the clear and unequivocal warnings that smoking was hazardous to their health assumed the risk of getting cancer or other smoking related illnesses.⁷⁰ In effect, public knowledge of smoking dangers allowed the industry to successfully defeat plaintiff claims by arguing that the plaintiffs assumed the risk.

Moreover, by the 1980s, the movement against smoking which had sparked the first round of litigation had also added a moral tone to smoking.⁷¹ The public began to reason that if someone continued to smoke despite the widely-disseminated warnings, they lacked character because a sensible person would want to live a healthy life;⁷² therefore, smoking was not sensible.⁷³ Similarly, as reports surfaced in the 1980s about the possible harmful effects of second hand smoke,⁷⁴ non-smokers began to view smokers as "pariahs."⁷⁵ Although

64. See Player, *supra*, note 3, at 323-24 (explaining that the CTR's manipulation of its findings allowed the industry to keep "damaging findings" from plaintiffs).

65. See *Institutional and Historical Perspectives*, *supra* note 21, at 122.

66. See *supra* note 44 and accompanying text.

67. See Rabin and Sugarman, *supra* note 20, at 4.

68. See *id.*

69. See Gusfield, *supra* note 18, at 61.

70. See *Waiting to Exhale*, *supra* note 6, at 20. Assumption of risk is a defense to negligence and may be raised by the defendant when the plaintiff has given her/his express or implied consent, in advance, to take her/his chance with a known risk that is in some way the result of the defendant's conduct. See PROSSER & KEENTON ON THE LAW OF TORTS, 480-81 (W. Page Keeton et al. eds., 1984). This consent relieves the defendant of a legal duty that would normally be owed to the plaintiff for such conduct. See *id.* at 481.

71. See Gusfield, *supra* note 18, at 61.

72. See *id.*

73. See *id.*

74. See *id.* at 64 (citing SURGEON GENERAL, U.S. DEP'T OF HEALTH AND HUM. SERVICES, THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING (1986)); Rabin & Sugarman, *supra* note 20, at 3-4 ("side-stream" smoke is at least as rich in carcinogens as inhaled tobacco

public health campaigns contributed to this shift in public morals,⁷⁶ the industry's suppression of documents through the CTR⁷⁷ was crucial to the long-standing viability of this viewpoint. As discussed earlier, the creation of the CTR and invocation of attorney work-product privilege⁷⁸ allowed the industry to hide its knowledge of the addictive qualities of nicotine.⁷⁹ Therefore, the public was able to blame the foolish, undisciplined individual who made the choice to smoke despite warnings to the contrary.⁸⁰ The growing public disdain for smokers, in fact perpetuated by the industry through the CTR and the suppression of documents, aided the industry in its success against plaintiff claims.

The industry's lawyers took advantage of this shift in public opinion in litigation. They incorporated character assassinations of plaintiffs into their defenses highlighting any irresponsible behavior that could be linked to the resulting poor health condition.⁸¹ A character assassination was used by industry lawyers in *Galbraith v. R.J. Reynolds* to induce the jury into finding that the plaintiff's health condition was caused by factors other than smoking.⁸² Furthermore, since the industry was able to suppress its knowledge of the addictive qualities of nicotine,⁸³ it was able to withstand a plaintiff's addiction argument by pointing out that everyone knew someone was able to quit smoking.⁸⁴ Since juries could easily relate to this argument, it was often used by industry attorneys throughout the second wave. The manipulation of public opinion about smoking and smokers, the focus on the dangerousness of cigarettes, and the use of assumption of risk defenses and

smoke; reliable studies indicate that "passive smokers" have a significantly higher rate of lung cancer than those relatively unexposed to tobacco smoke).

75. Gusfield, *supra* note 18, at 65 (The smoker as pariah is "someone to be excluded from casual sociability unless he or she abides by the rules of nonsmoking.").

76. See *supra* notes 53-55 and accompanying text.

77. See *supra* note 61 and accompanying text.

78. See *supra* note 62 and accompanying text.

79. See *Waiting to Exhale*, *supra* note 6, at 20; see also *infra* notes 66-69 and accompanying text. In fact, the industry was doing more than just suppressing information regarding the addictive qualities of nicotine. Evidence emerged that during this time period tobacco companies were working with biotechnology firms in Brazil to develop strains of tobacco with twice the normal level of nicotine. See *Biotechnology Firm Says it Helped Tobacco Interests Increase Nicotine Content*, 11 MEALEY'S LITIG. REPORT: TOBACCO 14, 14 (Jan. 1998).

80. See Gusfield, *supra* note 18, at 61.

81. See Player, *supra* note 3, at 316.

82. See *Institutional and Historical Perspectives*, *supra* note 21, at 121-22 (citing *Galbraith v. R.J. Reynolds*, No. C144147 (Cal. Nov. 20, 1995)). In this case, the defense focused on the fact that the plaintiff may have suffered from nonsmoking-related illnesses, such as heart disease; however, no autopsy had been performed. See *id.* at 121.

83. See *supra* note 79 and accompanying text; *infra* notes 94-96 and accompanying text.

84. See Player, *supra* note 3, at 318.

character attacks to defeat plaintiff claims allowed the second wave of litigation to end with plaintiffs failing to make a single recovery.⁸⁵ Although the growing mistrust of the tobacco industry was evidenced by a few minor adverse findings at the trial level, the industry's use of these litigation tactics in the second wave allowed it to escape virtually unharmed.⁸⁶

C. *Significant Events Shaping Public Opinion During the Third Wave (1990 – Present)*

Modern cases against the tobacco industry, comprising the third wave, have arisen because of foul play by the industry.⁸⁷ First, documents have exposed fraud by at least one major industry player.⁸⁸ Secondly, several industry employees have begun to testify about the widespread fraud in the industry.⁸⁹ These events have not only led to a resurgence of litigation, but also have raised public disdain for the industry to a new level.⁹⁰ Plaintiffs are bringing several new forms of claims against the industry which may prove to be more successful than first and second wave claims.⁹¹ At first glance, it appears that the industry may be losing its edge.

In the early 1990s, amidst rumors of foul play within the industry, specifically the abuse of the work-product doctrine, judges began threatening defense attorneys with orders to override this privilege.⁹² The industry's luck ultimately ran out in 1994 when several thousand pages of damaging internal documents were shipped anonymously to a professor at the University of California, San Diego.⁹³ Known as the

85. *Id.* at 319. Rabin marks the end of the second wave with *Cipollone v. Liggett Group*, 505 U.S. 504 (1992). See *Institutional and Historical Perspectives*, *supra* note 21, at 125. Although the defendants in *Cipollone* were ultimately victorious, this case does provide evidence of a shift in jury sentiment towards the tobacco industry. In *Cipollone*, the New Jersey jury did allocate 20% of the fault to the tobacco industry. See *id.* at 122-23. New Jersey, however, was a comparative fault state, and a plaintiff could not recover unless the defendant was found to be more than 50% at fault. See *id.* at 123. Since the jury's allocation of fault to the industry was only 20%, plaintiff did not recover any damages. In addition, the jury awarded \$400,000 in damages to the deceased's husband; however, the jury's award was overturned on appeal. See *Player*, *supra* note 3, at 319.

86. See *Player*, *supra* note 3, at 319.

87. See *Waiting to Exhale*, *supra* note 6, at 20-23.

88. See *infra* notes 94-95 and accompanying text.

89. See *infra* notes 115-23 and accompanying text.

90. See *Waiting to Exhale*, *supra* note 6, at 20-23.

91. See *infra* notes 104-39 and accompanying notes.

92. See *Waiting to Exhale*, *supra* note 6, at 20. In 1992, a United States District Court judge planned to release some of the industry's internal papers held by the CTR, but an appeals court upheld the industry's claim of privilege. See *id.* (citing *Haines v. Liggett Group, Inc.*, 140 F.R.D. 681 (D.N.J. 1992)).

93. See *Player*, *supra* note 3, at 322.

Cigarette Papers,⁹⁴ these documents proved the existence of widespread fraud by industry-giant Brown & Williamson and highlighted industry knowledge of both the addictive qualities of nicotine and the correlation between tobacco use and cancer.⁹⁵ For the first time, the fraudulent tactics of the CTR were brought to the attention of the masses.⁹⁶ The industry's suppression of scientific research was beginning to come to the forefront of public knowledge.

Moreover, in the spring of 1997, the Liggett Group, a small United States tobacco company who was facing bankruptcy, broke its united front with the tobacco industry to work with the Attorneys General.⁹⁷ This shifting of loyalty could prove more significant than the discovery of the Cigarette Papers, as the Liggett Group's testimony has confirmed fraudulent actions within the entire industry.⁹⁸ Liggett officials have offered evidence of industry-wide efforts to increase the levels of nicotine in cigarettes and to market directly to minors in its advertisements.⁹⁹ This knowledge of industry fraud has had a substantial effect on recent lawsuits.

For example, in *Carter v. Brown & Williamson Tobacco Co.*, a jury awarded \$750,000 in damages to the plaintiff.¹⁰⁰ In jury interviews following the trial, jurors characterized the defense attorney's attack of the plaintiff's character as abusive.¹⁰¹ Due to the growing knowledge of a deceitful tobacco industry, the successful litigation tactics employed in the second wave¹⁰² turned against the industry as public opinion shifted. Since the industry's fraudulent practices have been exposed, plaintiffs can have more confidence that their claims will succeed.¹⁰³

94. See generally STANLEY A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996).

95. *Waiting to Exhale*, *supra* note 6, at 20-21.

96. See *supra* note 63 and accompanying text.

97. See *Player*, *supra* note 3, at 330 ("The deal between Liggett and the Attorneys General provided protection for Liggett in exchange for establishing a fund to reimburse the states and for cooperating in the suits against all other non-settling tobacco companies.").

98. See *id.* at 331.

99. See *id.*

100. See *id.* at 338 (discussing *Carter v. Brown & Williamson Tobacco Corp.*, No. 95934CA (Fla. Cir. Ct. Aug. 9, 1996), *rev'd per curiam*, No. 96-4831, 1998 WL 323484 (Fla. Dist. Ct. App. June 22, 1998)).

101. See *id.* (citing Suein L. Huang et al., *Smoke Signal: Jury's Tobacco Verdict Suggests Tough Times Ahead for the Industry*, WALL ST. J., Aug. 12, 1996, at A1).

102. See *supra* notes 42-86 and accompanying text.

103. See *id.* at 331 (citing *Carter*, No. 95934CA (Fla. Cir. Ct. Aug. 9, 1996), as evidence of plaintiff success); *but see Carter*, No. 96-4831, 1998 WL 323484 (Fla. Dist. Ct. App. June 22, 1998), *rev'g*, No. 95934CA (Fla. Cir. Ct. Aug. 9, 1996) (possibly proving that plaintiffs should not have more confidence that their claims will succeed since *Carter*, No. 95934CA, was overturned).

Such changes in the widespread viewpoint of the industry have left it ripe for downfall. Lawsuits against the tobacco industry in the third wave have taken on three distinct forms. States have instituted claims to recover Medicaid costs,¹⁰⁴ non-smokers have instituted class actions based on harm suffered from second-hand smoke,¹⁰⁵ and individual plaintiffs continue to file suit.¹⁰⁶

When the states began to bring suits for the recovery of Medicaid claims,¹⁰⁷ the industry realized it would most likely have to abandon its never-say-die litigation strategy and settle the claims. This settlement decision was based on the industry's knowledge of the likely success of state suits¹⁰⁸ which were much different in character than individual plaintiff suits.¹⁰⁹ The state suits focused on both the alleged fraud of the tobacco industry in withholding information from the public and on the independent financial harm the states have suffered in reimbursing Medicaid claims without undertaking any risk.¹¹⁰

The basis of a state claim is demonstrated by Florida's complaint in its 1995 case against the industry.¹¹¹ The complaint stated,

In the name of profits, cigarette manufacturers choose to ignore and suppress the truth about the hazards of cigarette smoking. As a result, Medicaid recipients have contracted smoking-related diseases including . . . cancer, emphysema, and heart disease. The care of these Medicaid recipients has placed a significant burden on the State.¹¹²

The complaint alluded to industry fraud by alleging that the tobacco industry is responsible for the diseases suffered by Florida Medicaid recipients since their use of cigarettes was foreseeable and intended by the industry.¹¹³ Since Florida suffered an independent harm in

104. See *infra* notes 107-27 and accompanying text.

105. See *infra* notes 128-34 and accompanying text.

106. See *infra* notes 135-39 and accompanying text.

107. For example, in 1994, the Florida Legislature passed a law which allowed the state to sue the tobacco industry for Medicaid expenses attributable to smoking. See Fla. Stat. §§ 16.59, 409.907, 409.910 (Supp. 1994).

108. See *Player*, *supra* note 3, at 341 (opining that the settlement "show[s] that the industry is no longer willing to fight until the bitter end").

109. See *Frohlich*, *supra* note 2, at 451-52 (describing the focus of the Medicaid suits).

110. See *id.*

111. See *id.* at 452-53 and 453 n.77 (citing Complaint, *State v. Am. Tobacco Co.*, No. 95-1466AO (Fla. Cir. Ct. filed Feb. 21, 1995)).

112. See generally, *Center on Budget and Policy Priorities Says Federal Government "Clearly Entitled" to Share of Medicaid Tobacco Settlement Payments*, 9 HEALTH NEWS DAILY 14 (1997) (citing Complaint, *State v. Am. Tobacco Co.*, No. 95-1466AO (Fla. Cir. Ct. filed Feb. 21, 1995)) [hereinafter *Center on Budget and Policy Priorities*].

113. See generally, *id.* (citing Complaint, *State v. Am. Tobacco Co.*, No. 95-1466AO (Fla. Cir. Ct. filed Feb. 21, 1995)).

which they had no choice but to pay the Medicaid costs, the state argued that the industry's assumption of risk defense should be rendered useless.¹¹⁴

The use of testimony by industry employees was significantly damaging in state suits because it had been used to prove industry fraud. Several former industry employees have agreed to testify against the industry in these state cases.¹¹⁵ For example, in the Mississippi Medicaid case,¹¹⁶ Jeffrey Wigand, a top research scientist for Brown & Williamson, testified that the industry refused to remove a known carcinogenic additive from cigarettes, that in-house lawyers hid potentially damaging research, and that the work-product privilege was abused among industry lawyers.¹¹⁷ Similarly, in the Minnesota Medicaid suit,¹¹⁸ Bennett LeBow, chairman of the Liggett Group, agreed to testify that the industry had knowledge of the addictive qualities of nicotine.¹¹⁹ Testimony by industry employees more often than not illustrated industry fraud.

Interestingly, former employees who have remained loyal to the industry have proven just as harmful as those who turned against it. During depositions for the Minnesota case,¹²⁰ former Philip Morris research scientist Thomas Osdene invoked his fifth amendment privilege 135 times.¹²¹ Although the industry wanted Osdene to answer questions because they claimed he had "nothing to hide," he consistently invoked the privilege when shown his own hand-written memos; one of his memos stated, "I believe the thing we sell most is nicotine."¹²² Although the industry attempted to keep Osdene's deposi-

114. See Frohlich, *supra* note 2, at 459.

115. See *Waiting to Exhale*, *supra* note 6, at 21-22.

116. *Moore v. Am. Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. Jackson County filed May 23, 1994).

117. See *Waiting to Exhale*, *supra* note 6, at 22 (discussing deposition testimony given in *Moore v. Am. Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. Jackson County filed May 23, 1994)).

118. *State v. Philip Morris, Inc.*, No. C1-94-8565 (Dist. Ct. Ramsey County filed Aug. 18, 1994).

119. See *Minnesota Trial Continues with Video of Deposition of Philip Morris Scientist*, 11 MEALEY'S LITIG. REPORT: TOBACCO 3, 4 (Jan. 1998) [hereinafter *Minnesota Trial Continues*]. A court official in the Minnesota lawsuit has also admitted 38,000 pages of never-released tobacco industry documents. See *id.* at 5. These documents are said to be the star attraction of the trial. See *id.*

120. *State v. Philip Morris, Inc.*, No. C1-94-8565 (Dist. Ct. Ramsey County filed Aug. 18, 1994).

121. See *Minnesota Trial Continues*, *supra* note 119, at 3. Osdene was able to invoke the 5th amendment privilege since he has been summoned to testify before a grand jury as part of a Department of Justice investigation of the tobacco industry. See *id.*

122. See *id.*

tion out of the trial, claiming that it was highly prejudicial, the judge deemed it admissible.¹²³ In sum, even loyal industry employees who try to protect the industry may be unable to continue to hide industry fraud.

Internal industry memos similar to the Cigarette Papers,¹²⁴ have also played a dramatic role in exposing industry fraud. For example, in the Minnesota trial, hundreds of damaging internal memos have been introduced into evidence.¹²⁵ In this case, plaintiff's attorneys attempted to fuel public disdain for the industry by posting the documents on the internet.¹²⁶ Furthermore, the industry was ordered to turn over 38,000 never-before-released industry documents to the state; the documents have been described as "the crown jewels of the conspiracy."¹²⁷ The compelled admission of internal industry memos has further exposed industry fraud.

In addition to state suits, tobacco litigation in the third wave has also taken the form of class action suits. Some of these suits have been based upon injuries caused by exposure to second-hand smoke.¹²⁸ In 1992, studies confirmed a correlation between Environmental Tobacco Smoke and lung cancer as well as with respiratory ailments in young children.¹²⁹ Due to such findings, class actions against the tobacco industry skyrocketed and took on many forms. Although challenged by the industry at their formation, generally courts have allowed the suits to go forward. Most recently, a class action has been filed on behalf of Louisiana residents who have suffered injuries due to second-hand smoke.¹³⁰ Plaintiffs named both tobacco manufacturers and retailers as defendants.¹³¹ Defendants sought to remove the case from state to federal court claiming that the plaintiff only joined the Louisiana retailers to avoid removal.¹³² However, the court denied the industry's motions for dismissal.¹³³ Since this case survived

123. *See id.*

124. *See supra* note 94.

125. *See Minnesota Trial Continues, supra* note 119, at 4.

126. *See id.* *See also Blue Cross and Blueshield of Minnesota Tobacco Website* (visited Sep. 3, 1998) <<http://www.mnbluecrosstobacco.com>>.

127. *See Minnesota Trial Continues, supra* note 119, at 4.

128. *See Defense Strategies, supra* note 42, at 24. For example, a group of airline flight attendants were granted certification to file a class action suit claiming injury caused by second-hand smoke on the job. *See id.* (discussing Tobacco Merchants Ass'n of the United States v. Broin, 657 So.2d 939 (Fla. Dist. Ct. App. 1995)).

129. *See Rabin and Sugarman, supra* note 20, at 3.

130. *See generally Center on Budget and Policy Priorities, supra* note 112 (referring to Young v. Am. Tobacco Co., Inc., No. Civ. A. 97-3851, 1998 WL 42589 (E.D. La. Feb. 3, 1998)).

131. *See Young*, 1998 WL 42589 at *1.

132. *See id.*

133. *See id.* at *2.

industry tactics, it is significant for stretching responsibility to tobacco retailers for knowledge of the dangers of second-hand smoke.¹³⁴

Individual claims comprising the third type of third wave lawsuits have already been successful. For example, in June 1998, a Florida jury ordered Brown & Williamson to pay \$1 million to the family of a man who died from smoking Lucky Strikes for almost fifty years.¹³⁵ "This verdict marks the first time a tobacco company has been ordered to pay punitive damages in a smoking liability case."¹³⁶ Interestingly, one of the arguments used by the plaintiffs was that Brown & Williamson conspired with other tobacco companies to hide the health risks of smoking from the public.¹³⁷ Through the introduction of "mountains"¹³⁸ of industry documents, plaintiffs were able to support this conspiracy argument and reach an unprecedented verdict.¹³⁹ Whether this verdict will start a trend of individual suits in tobacco litigation remains to be seen. Inundated with litigation, whether in the form of state suits, class actions, or individual suits, the tobacco industry became aware that it had to work quickly to implement a new strategy for survival.

II. MODERN TACTICS OF THE TOBACCO INDUSTRY IN MANIPULATING PUBLIC OPINION

The recent public disclosure of wide-spread fraud among the tobacco industry has raised contempt for the industry to a new level. Consequently, the modern era of tobacco litigation has changed drastically. For the first time, the industry had to reconsider its never-say-die litigation strategy of the past and negotiate a settlement.¹⁴⁰ The industry nonetheless has continued to manipulate public opinion in its quest to gain support. As a result, public interest in tobacco issues is now more politically-charged than ever.¹⁴¹ Most likely, the industry

134. *See id.* at *1. The plaintiffs claimed that retailers should be liable in tort if they knew of the defect in the cigarettes they were selling. *See id.*

135. *See* Ron Ward, *Tobacco Company to Pay \$1 Million - Largest Tobacco Verdict Ever*, DAILY RECORD, June 11, 1998, at 3C (discussing Maddox v. Brown & Williamson Tobacco Corp., No. 97-3522-Ca. Div. CV-H (Cir. Ct. Duval County June 10, 1998)).

136. *Id.*

137. *See id.* The jury assessed \$500,000 in compensatory damages and \$450,000 in punitive damages. *See id.* The family had asked for \$850,000 in compensatory damages and \$16 to \$42 million in punitive damages based on Brown & Williamson's net worth of \$843 million. *See id.*

138. *Id.*

139. *See id.*

140. *See infra* notes 14-41, 52-85 and accompanying text.

141. *See infra* notes 52-85 and accompanying text.

will attempt to take advantage of the political debate to invoke public sympathy.

A. *National Tobacco Settlement*

In June of 1997, the industry and State's Attorneys General announced a proposed national settlement with the tobacco industry.¹⁴² Realizing the fate ahead, the industry knew it had to somehow reach a settlement in which it could limit its liability. The industry recognized an ambush of state lawsuits could devastate its finances and render it bankrupt¹⁴³ much like the ill-fated asbestos industry of the 1980s.¹⁴⁴ Likewise, the states were willing to settle in order to establish a uniform resolution of the tobacco issue and to avoid wasting time and resources fighting the industry's litigation tactics.¹⁴⁵ Aware of the vital importance of public opinion to its future, the industry launched a grass roots campaign to foster public support.¹⁴⁶ Since a national settlement would ultimately require Congressional approval, the industry attempted to create an informed citizenry to exert pressure on its representatives.¹⁴⁷ However, the industry's use of "populist and anti-Washington" tactics did much more than inform the public.¹⁴⁸ In fact, the tobacco resolution was similar to the industry's past attempts to manipulate public opinion in many ways.

B. *The Marketing of the Tobacco Resolution*

The Tobacco Resolution was introduced to the public through a mass advertising campaign designed to invoke public sympathy for the industry.¹⁴⁹ Hoping to influence public opinion,¹⁵⁰ the industry prepared comprehensible articles on the dangers of smoking, dissemi-

142. See Player, *supra* note 3, at 339.

143. See *id.* at 341.

144. See Patrick J. Hagan, et al., *Totaling Up the Costs of Asbestos Litigation: Guess Who Will Pay the Price?*, 9 TEMP. ENVTL. L. & TECH. J. 1, 2 (1990) (maintaining that "at least seven" manufacturers of asbestos or asbestos-containing products went bankrupt as a result of the 1980s asbestos litigation).

145. If the States sustained their Medicaid suits to judgment, they would undoubtedly expend vast resources to fight the industry's no-holds-barred litigation tactics previously used in the first three waves of litigation.

146. See *infra* notes 149-69 and accompanying text; Philip Morris Inc. et al., *The Tobacco Settlement: What's in it for You? What's in it for Us?* (visited Mar. 10, 1998) <<http://www.tobaccoresolution.com>> [hereinafter *What's in it for You?*].

147. See *What's In It For You?*, *supra* note 146.

148. *Big Tobacco Goes on the Offensive*, CARROLL COUNTY TIMES, Apr. 10, 1998, at A5 [hereinafter *Big Tobacco*].

149. See *supra* notes 146-48 and accompanying text.

150. See Philip Morris Inc., et al., *Tobacco Industry Begins Advertising to Build Understanding of Comprehensive Resolution* (visited Mar. 10, 1998) <<http://www.tobaccoresolution.com>>

nated through the widely-distributed Reader's Digest, similar to the tactics used in the second wave¹⁵¹ and, televised spots to educate the citizenry about the settlement.¹⁵² The industry's damage-control tactics were similar in content and character to the full page ads the industry ran after release of the Surgeon General's famed 1964 report.¹⁵³ Its vast resources allowed the industry to finance prime-time commercials¹⁵⁴ and to create a website¹⁵⁵ to exert significant influence on public opinion.

The industry's commercials and website stressed that the tobacco companies would not be immune from lawsuits.¹⁵⁶ And, the funds from the proposed \$368.5 billion settlement would go towards campaigns to reduce youth smoking and for medical research to cure smoking-related illnesses.¹⁵⁷ Since the average citizen would most likely do nothing more to inform her or himself, these commercials were an effective means of convincing potential future jurors to soften their views of the industry. However, if viewers were convinced by the commercial to visit the industry's website, they would be even further indoctrinated with industry rhetoric.

The website immediately attempted to appeal to the public with the title, "The Tobacco Settlement: What's in it for You? What's in it for Us?"¹⁵⁸ The website began by highlighting that the "agreement imposes unprecedented legal and financial burdens upon us Even though these recommendations place extensive demands upon our industry, we are willing to except them Indeed, we have made concessions that give up our constitutional rights."¹⁵⁹ This appeal to public sympathy was fraudulent in many ways. First, there was vivid awareness within the industry that it may be headed for bankruptcy if

(defining the ad campaign as a public education campaign) [hereinafter *Tobacco Industry Begins Advertising*].

151. See *supra* note 23 and accompanying text.

152. See generally Ceci Connolly, *Big Tobacco to Fight Legislation with Ad Blitz, Lobbying Network*, WASH. POST, Apr. 30, 1998, at A6.

153. See *infra* note 43 and accompanying text.

154. See generally Connolly, *supra* note 152. See also Philip Morris Inc. et al., *The Tobacco Resolution: Advertising* (visited Mar. 10, 1998) <<http://www.tobaccoresolution.com>> (containing links to the television ads).

155. See generally Philip Morris Inc., et al., *The Tobacco Resolution* (visited March 30, 1998) <<http://www.tobaccoresolution.com>>. This site includes the text of the proposed settlement, a series of commonly asked questions with the industry's response, a cover page which explains the industry's reasons for entering the settlement, and links to print and television ads.

156. See *What's in it for You?*, *supra* note 146.

157. See *id.*

158. See *id.*

159. *Id.*

it did not settle its claims and cap liability.¹⁶⁰ Secondly, the “extensive demands”¹⁶¹ placed on the industry by the settlement paled in comparison to the effects of the potential litigation facing the industry. Through settling, the industry could avoid attorney costs¹⁶² and the threat of unprecedented punitive claims assessed by an unforgiving public. The industry also hid the fact that \$368.5 billion was only twenty-five percent of the industry’s total resources.¹⁶³ Although the tobacco industry was aware that the settlement was its last vein of existence, it attempted to elicit public sympathy with a mis-characterization of the facts.

The website also addressed what the settlement would mean for the public. Once again, the industry attempted to elude the public with clever language. For example, the web page claimed that the industry would “NOT” be granted immunity.¹⁶⁴ According to the Coalition for Workers in Health Care, however, the proposed liability caps were a creative way to achieve immunity from lawsuits.¹⁶⁵ Because industry payouts of legal judgments were capped at \$5 billion per year,¹⁶⁶ plaintiffs would presumably have to wait decades before receiving their judgments. Furthermore, in the cases being tried after the \$5 billion cap was met in a given year, defense attorneys would likely argue that the industry was overburdened financially by the payouts, in an attempt to invoke juror sympathy for the industry. If that strategy was successful, plaintiffs suing after the \$5 billion annual cap was met would be denied recovery. As a practical result, the industry would be immunized from suit.

The industry also attempted to paint itself as a patron of the public. It appealed to the public to protect this mass employer who “make[s] valuable contributions to the U.S. economy [by providing] hundreds of thousands of jobs [and paying] billions of dollars in

160. Cf. Player, *supra* note 3, at 341 (describing the settlement as the industry’s “last desperate attempt to avoid the tsunami of [looming] claims”). The proposed settlement would cap liability at “33% of the annual industry-based payment [and thereby] limit [] the amount of compensatory damages which [would] be paid each year.” *Id.* at 340; see also Philip Morris Inc., et al., *Proposed Settlement: Title VII: Civil Liability*, § B(9) (visited Mar. 10, 1998) <<http://www.tobaccoresolution.com>>. Furthermore, the excess of claimant awards over \$1 million would roll into the next year. See *id.* All settling tobacco companies would share all payments. See *id.*

161. See *supra* note 159 and accompanying text (describing the industry’s conception of the demands the settlement placed upon it).

162. See Player, *supra* note 3, at 340.

163. See *id.* at 341.

164. See *What’s in it for You?*, *supra* note 146. But see Player, *supra* note 3, at 339.

165. See *Tobacco Road Settlement II: Groups React to McCain Bill*, American Political Network Health Line, Mar. 31, 1998, available in WESTLAW, APN-HE database.

166. See *What’s in it for You?*, *supra* note 146.

taxes.”¹⁶⁷ It urged the public to support the agreement and put an end to the “decades of fruitless conduct, where no one wins.”¹⁶⁸ In fact, since the 1950s, it has been the industry who has won repeatedly by draining the resources of the private plaintiff who attempted to bring suit.¹⁶⁹ When presented with the need to appeal to the public, however, this past abuse of litigation tactics was never mentioned. In an attempt to foster public sympathy, the industry once again resorted to fraud to gain the support of the masses.

C. Congressional Response

An important contingency in any proposed settlement with the tobacco industry was the requirement of Congressional approval. Considering the politicized nature of tobacco issues,¹⁷⁰ along with the growing unpopularity of the industry,¹⁷¹ it was not surprising that Congress made changes to the settlement. Although the industry had been able to buy political support in the past through extravagant campaign contribution,¹⁷² such tactics did not enjoy as much success today since politicians did not want to be labeled industry-friendly.¹⁷³

Congress's Commerce Committee responded to the original settlement with a \$516 billion deal which afforded less protection against liability for the industry and would raise the cost of cigarettes.¹⁷⁴ Congress based its reasons for the increased deal on the need to satisfy its constituents.¹⁷⁵ According to Representative Robert Matsui, the increase was promulgated because “people want us to hit [tobacco] hard.”¹⁷⁶ Although the proposed settlement would have increased the cigarettes tax by \$1.10 per pack, it was believed that constituents would favor the increase due to their “deep-seated mistrust” of the industry.¹⁷⁷ Furthermore, research indicated that people did not have

167. *Id.*

168. *See id.*

169. *See supra* text accompanying note 27.

170. *See generally* Jonathon Weisman, *Tobacco Settlement “Is Dead:” RJR Sparks Revolt by Industry Against Expensive Senate Deal; Firms Spurn More Talks; Clinton, Congress Vow to Fight; Efforts To Reach National Agreement All But Collapse*, *BALT. SUN*, Apr. 19, 1998, A1.

171. *See* John Harwood and Jeffery Taylor, *Tobacco’s Maneuvers Could Further Fracture GOP*, *WALL ST. J.*, Apr. 13, 1998, at A24 (describing “runaway antitobacco [(sic)] sentiment” as the driving force behind the settlement).

172. *See Big Tobacco, supra* note 148.

173. *See generally* Weisman, *supra* note 170 (describing bi-partisan fear of being labeled an industry-supporter).

174. *See* Harwood and Taylor, *supra* note 171.

175. *See id.*

176. *See id.*

177. *See id.*

the same cynical view of tobacco taxes as they may have of increases in property or sales taxes.¹⁷⁸ Ultimately, the public's reaction to increased cigarette costs came down to their desire to punish the tobacco industry.

D. *The Tobacco Industry's Walkout*

Due to its patterns of past fraudulent conduct, it is no wonder that the tobacco industry's decision to walk out of settlement hearings was viewed with skepticism.¹⁷⁹ It is widely believed that the decision to leave the talks was a ploy to invoke public sympathy for an industry who was treated unfairly by Congress.¹⁸⁰ This belief is supported by the industry's manipulation of public opinion throughout the settlement process.¹⁸¹ For example, an industry press release described the advertising campaign as a "just the facts" education seminar to encourage public support of the settlement;¹⁸² however, the education provided was selective. The industry used the advertising/education campaign as a ploy to encourage the public to blame Congress if the settlement did not work.

Statements by industry representatives following the walkout suggested that the industry did use the advertising campaign to encourage the public to blame Congress for any settlement failure.¹⁸³ For example, Nicholas G. Brookes, chairman and chief executive officer of Brown & Williamson, placed the blame for the settlement failure on Congress. According to Brookes, "Partisan politics, the absence of White House leadership and an obsession for punishing the industry have all but destroyed any hopes of achieving a workable solution."¹⁸⁴ The industry's use of its public education campaign to manipulate the public into blaming Congress for the resolution's failure is simply a continuation of its use of deceptive strategies.

Another interesting tactic used by the tobacco industry to elicit public support for its position was the claim that the settlement

178. *See id.*

179. *See* Weisman, *supra* note 170.

180. *See id.*

181. *See supra* notes 149-69 and accompanying text.

182. *Tobacco Industry Begins Advertising*, *supra* note 150 (quoting Steven C. Parrish, senior vice president of Philip Morris Inc.).

183. *Cf. What's in it for You?*, *supra* note 146 ("[The] President and Congress have a unique opportunity to chart a new direction by passing comprehensive federal legislation on a national tobacco settlement. . . . We're ready to work to make the agreement final . . .").

184. Weisman, *supra* note 170.

taxes¹⁸⁵ would put it out of business by creating a black market for cigarettes.¹⁸⁶ Although the public believed this to some extent,¹⁸⁷ the industry's black market arguments did not gain much support in Washington. White House domestic policy chief Bruce Reed stated that "the industry's 'arguments aren't convincing, and their credibility is low to begin with.'"¹⁸⁸

The political nature of tobacco issues influenced other settlement arguments as well. In order to invoke public support, the tobacco issue had been framed in terms of an effort to reduce youth smoking.¹⁸⁹ Both politicians and the industry relied on this argument to appear as the most noble patron of the public.¹⁹⁰ The industry's stance that it wanted to reduce youth smoking, however, was hypocritical. In fact, the very reason that youth smoking was an issue was a result of the industry's direct marketing to minors. Knowing that nicotine was addictive, the industry intentionally targeted youths in order to increase sales.¹⁹¹ Furthermore, under its proposed settlement, the industry did not have to institute any marketing restrictions on international sales.¹⁹² It could continue to market to minors in other countries in the same way it targeted minors in the United States. If the industry was truly concerned with the health of young individuals, it should not have to draw a distinction between an American youth and a foreign youth. Once again, the industry provided the American public with lip service of a noble cause. Considering the industry's continued use of deceptive public relations tactics, it is no wonder that its sudden claim to curb youth smoking was viewed with skepticism.

185. One week before the walkout, the Senate Commerce, Science and Transportation Committee approved a \$1.10 federal tax increase per pack of cigarettes. *See id.*

186. *See Big Tobacco, supra* note 148.

187. *See Philip Morris Inc., et al., Americans Do Not Support Congressional Action on McCain Legislation According to New Survey: Current Proposal Seen as Not Likely to Reduce the Levels of Youth Smoking* (visited Mar. 10, 1998) <<http://www.tobaccoresolution.com>> (citing the creation of a black market for cigarettes as one of the public's biggest concerns about the proposed settlement).

188. Harwood and Taylor, *supra* note 171.

189. *See Tobacco Industry Begins Advertising, supra* note 150 ("When [the American people] learn the facts, we believe they will increasingly come to view that the proposed resolution makes sense *and will also make important and immediate contributions to lowering youth smoking . . .*" (emphasis added)).

190. *See Harwood and Taylor, supra* note 171 (describing Congress' reliance on the reduce-youth-smoking-with-the-settlement proposition); *What's in it for You?*, *supra* note 146 (describing the industry's reliance on the reduce-youth-smoking-with-the-settlement proposition).

191. *See supra* note 99 and accompanying text.

192. *See Philip Morris Inc., et al., Proposed Settlement: Title I: Reformation of the Tobacco Industry* (visited March 30, 1998) <<http://www.tobaccoresolution.com>>.

The industry also argued that if Congress drove it out of business hundreds of thousands of Americans would be out of work.¹⁹³ The industry wanted to be viewed as a champion of the American people as a mass employer. Once again, however, this tactic was unsuccessful since mistrust of the industry was at an all-time high.¹⁹⁴

Although many industry employees are not at fault for its misconduct, the industry as a whole has been characterized as evil and deserving of punishment. Whether the public's resentment for the industry is so strong as to outweigh any sympathy for employees who face the possibility of losing their jobs is yet to be determined.

The success of the industry's decision to walk out of the settlement talks is uncertain. The predominant mistrust and disdain for the industry among the public and politicians alike is unquestionably a detriment to the industry.¹⁹⁵ With resentment for past tactics at an unprecedented level, it is possible that a tobacco settlement will move through Congress without the presence of tobacco attorneys. The effects of the walkout on public opinion inevitably will advance public disdain for an already unpopular industry.¹⁹⁶ Since every move the industry made was viewed with skepticism, a walkout provided further evidence of foul play.

193. Cf. *What's in it for You?*, *supra* note 146 (claiming that the proposed resolution would allow "tobacco companies [to] continue to employ hundreds of thousands of Americans"). See also *Big Tobacco*, *supra* note 148 (citing industry as arguing that Congress' proposed bill would drive farmers, retailers and small business people from their jobs because of competition with black market dealers).

194. See Harwood and Taylor, *supra* note 171 (describing public opinion as "runaway antitobacco [(sic)] sentiment").

195. See *supra* notes 171-78 and accompanying text.

196. The tide has not only turned against tobacco, it keeps rising. Realization of this prompted the companies to seek the so-called 'national settlement' last June. It also pushed them to negotiate \$30 billion in settlements of state lawsuits, and it surely played a role in the decision . . . to cease participation in the legislative process. *Tobacco's Pique: Industry Walkout is a Constructive Step*, STAR TRIB. (MINNEAPOLIS-ST. PAUL), Apr. 20, 1998, at 12A.

The industry walkout sparked anti-industry comments among members of Congress. See generally, Bara Vaida, *U.S. Congress' Drive for Tobacco Bill Not Dead Despite Industry Walkout*, AFX NEWS, Apr. 9, 1998, available in WESTLAW, USNEWS database. Senator John McCain said, ". . . [I]f the tobacco companies do not go along with this agreement or the final agreement (sic), public opinion will clearly not be on their side." *Id.* Speaker of the House Newt Gingrich had a similar reaction to the walkout: "I don't think any serious person is going to take tobacco companies' claims about anything seriously for a long, long time." Alison Mitchell, *For Tobacco, A Big Gamble*, N.Y. TIMES, Apr. 10, 1998, at A1.

III. CONCLUSION

It is estimated that 494,000 annual deaths are attributable to smoking.¹⁹⁷ This confirmed link between smoking and terminal illness has encouraged litigation against the tobacco industry for almost half a century. Throughout the litigation process, however, the tobacco industry has relied on fraudulent tactics to ensure successful results. Over the years, the industry matched its litigation and public relations strategies with the prevailing sentiment of the day. The industry suppressed information as to the addictive qualities of nicotine in an attempt to advance public opinion that smokers assumed the risk of contracting disease. Such a reliance on public opinion, however, turned against the industry when occurrences of wide-spread fraud became public information. Although the tobacco industry has attempted to invoke public sympathy by proclaiming abusive tactics by Congress, or by establishing itself as an advocate against youth smoking and mass employer of American citizens, public resentment for past fraud appears to outweigh any sympathy. Due to the magnitude of this resentment, the industry, who relied on the citizenry to survive an onslaught of litigation, may be pushed out of existence by the very same people.

197. See Rabin and Sugarman, *supra* note 20, at 3-4 (citing U.S. DEP'T HEALTH & HUMAN SERV., SURGEON GENERAL'S REPORT chpt. 2 (1986)).