SAID AND DONE

The tobacco companies have consistently sought to downplay or deny the ill effects of smoking—unless they're in court. Starting with the 1954 "Frank Statement to Cigarette Smokers," a full-page ad in which 14 tobacco companies and trade associations responded to concerns at the time, here's a look at key issues:

Excerpts From the "Frank Statement" (1954) "Recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings. ...Distinguished authorities point out that there is no proof that cigarette smoking is one of the causes. We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business. We believe the products we make are not injurious to health. We always have and always will cooperate closely with those whose task it is to safeguard the public health.... For more than 300 years tobacco has given solace, relaxation, and enjoyment to mankind. At one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence."	**Excerpts From Deposition of R.J. Reynolds Tobacco Co. President/CEO Andrew Schindler, Dade County, Fla. (1997)** Q. Is it fair to say the sentiments expressed in "A Frank Statement to Smokers" are essentially the same today, of, for example, your company? A. No ... Cigarette smoking is a risk factor for a number of diseases and, therefore, that means that it may be a cause of these diseases..."
Excerpts From the Tobacco Firms' Voluntary Advertising Code (1964) "No one depicted in cigarette advertising shall be or appear to be under 25 years of age; cigarette advertising shall not suggest that smoking is essential to social prominence, distinction, success or sexual attraction; nor shall it show any smoker participating in, or obviously just having participated in, a physical activity requiring stamina or athletic conditioning beyond that of normal recreation. ...There shall be no mail distribution of non-tobacco premium items bearing cigarette brand names, logos, etc., without written, signed certification that the addressee is 21 years of age or older, a smoker, and wishes to receive the premium."	Four months later, Viceroy cigarette ads depicted young tennis players lighting up after a hot game.. ... Three years after the Joe Camel ad campaign was launched, the percentage of Camel smokers under age 18 went from less than 1 percent to 33 percent. ... In 1993, Philip Morris launched the Marlboro Adventure Team, a $200 million, seven-month promotional campaign that consisted of "10 guys" who participated in rafting, dirt bike racing and horseback riding.
Tobacco Industry Agrees to Broadcast Ban of Cigarette Ads (1971) Philip Morris CEO Joseph Cullman, vowing that the industry would not shift its TV advertising money to other media, says the intent is to "adhere to the spirit and letter of the law."	Advertising expenditures for promotional items appealing to youths (key chains, T-shirts, caps) climbed from $5.6 million in 1970 to $756 million in 1993.... a 1994 analysis of television coverage of a car race sponsored by Marlboro found that its brand name was seen or mentioned 5,933 times, or 46 minutes total of the 93-minute program. ... In 1995, Philip Morris ads appear on closed-circuit TVs at Amoco convenience stores in Fort Wayne, Ind., and can be heard through speakers at the gas pumps.
Revealed During Congressional Oversight Hearings on Tobacco Products (1994) Brown & Williamson Tobacco Corp. released a statement saying that cigarette smoking is not addictive under the standards set forth in the 1964 Surgeon General's Report.	In a 1963 letter to a Brown & Williamson parent company executive, company counsel Addison Yeaman says, "We are, then, in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms."
R.J. Reynolds Tobacco Co. Wrongful Death Case (1997) A jury finds R.J. Reynolds not negligent and Salem cigarettes were found not to be "unreasonably dangerous and defective" and a legal cause of the death of Jean Connors during a trial in Jacksonville, Fla.	After the verdict is announced, Reynolds executive Daniel W. Donahue says, "Smoking ...has clearly been shown to be a risk factor for...lung cancer and heart disease. We've never denied that. There's no secret about that."

SOURCES: Court documents, Advocacy Institute

THE WASHINGTON POST

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LEVEL 1 - 1 OF 1 STORY

The Washington Post

May 11, 1997, Sunday, Final Edition

SECTION: OUTLOOK; Pg. C01

LENGTH: 2185 words

HEADLINE: Making Deals With the Devil; Beware of Big Tobacco's Tricks

BYLINE: Mike **Pertschuk**

BODY:

Next week, anti-tobacco advocates and industry representatives are expected to sit down for yet another round of negotiations in their search for the grand tobacco settlement. No matter what progress is made -- and the conditions right now are better for my side than ever -- I can't help but wonder how things might go wrong this time. You see, I've been there, and every time I've come away wishing that we'd done it differently. I'm not involved in these talks, but in 30 years of negotiating with tobacco lawyers and lobbyists, I think I've got a pretty good idea of their strategy: Give an inch and gain a decade -- or as much time as possible to continue doing business as usual.

Our first encounter was in 1965. I was a young and inexperienced lawyer working for the Senate Commerce Committee. We were considering the first bill to require a warning label on all cigarette packs. The committee had completed its first formal hearings on smoking, which had been dominated by scientists dredged up by the Tobacco Institute to testify that the hazards of smoking were not yet proven: All was "mere statistics."

My assignment was to summarize the evidence against smoking. Because I was suspected of holding a bias against the industry, several committee members suggested that I meet with industry lawyers to assure that my report would be fair.

It was not exactly a negotiation -- an inquisition might be more like it. There we sat in the paneled chambers of the law firm of Arnold, Fortas and Porter, one green staffer versus 15 or so of the most elegantly credentialed, politically sophisticated attorneys in Washington.

One after another, the tobacco lawyers informed me that my straightforward summary of the medical literature was invalid. As in a jury trial, they said, I could only include evidence presented at the committee's formal hearings. Phrase by phrase, word by word, I was intimidated into transforming my scientific account of the case against smoking to equivocating mush.

Only later did I realize that I'd been tricked: Congressional committees, unlike courts, are free to consider any source of information in their deliberations -- whether or not that information is part of the formal hearing record.

That was nothing compared to what happened when we sat down to negotiate the actual language of the labeling bill. The industry lawyers assured me that nothing in the bill would change the possibility that the companies would later be held liable for personal injury. Once again, they knew what we didn't know: that the labels would be useful as evidence that the public had been adequately warned about tobacco's dangers. Our attempts to protect the public had instead helped protect the companies for three decades against lawsuits.

In 1969, when I was staff director of the commerce committee, I helped negotiate the legislation to ban cigarette advertising on television and radio. The tobacco industry went along with the ban, eager to get rid of the anti-smoking counter-ads that had been mandated by the Federal Communications Commission -- both because they were beginning to erode the ranks of smokers and because they were keeping the issue in the public eye.

As part of the bargain, Joseph Cullman, then CEO of Philip Morris, solemnly vowed that the industry would not shift its massive expenditures on television advertising to other media such as magazines, newspapers and promotional events. But over the past 20 years, there has been more than a tenfold increase in tobacco advertising and promotional expenditures. And the mandatory anti-smoking advertisements are gone.

So perhaps the public should take some modest comfort in knowing that I am nowhere near the negotiating table this time around. I certainly take comfort in knowing that those who now face the tobacco lawyers include staunch public health advocates, whose focus is on the prevention of future injury rather than simply on compensation for past wrongs. And, of course, today the starting point for these negotiations is very different.

For a start, the truth is out -- and out of the mouths of the tobacco men themselves: In April, the Liggett Group, Inc., the firm that brought America Lucky Strikes and Chesterfields, confessed that its officers and lawyers had lied in denying that tobacco caused cancer and that nicotine was addictive. They also admitted that their advertising and marketing had deliberately targeted young people, women and minorities.

And just two weeks ago, a federal judge in tobacco's home state of North Carolina held that the Food and Drug Administration has broad authority over the marketing of cigarettes, like any other drug delivery devices. That decision was swiftly followed by the Supreme Court ruling that let stand Baltimore's 1994 ban on tobacco and alcohol billboard advertising

Meanwhile, 26 state attorneys general are now suing tobacco companies for the costs of providing Medicaid for ailing smokers, as well as punitive damages. These lawsuits, along with class-action and individual liability cases, have brought the tobacco lawyers back to the bargaining table -- and focused public attention on the problem.

So, for tobacco control advocates, these are hopeful times.

But they're also treacherous times, and, as an expert in how not to negotiate with big tobacco, I'm happy to offer some unsolicited advice to the people who now sit across the table from tobacco's lawyers:

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* The industry is a lot smarter at selling cigarettes than you are at unselling them. At each stage of the tobacco control movement, we have thought we have found the combination of education and regulation that would transform tobacco use into rare and bizarre public behavior.

First there was public health education; then an awareness campaign, aimed at school-age children; then warnings on packages, followed by warnings in advertising; then there were counter ads and a ban on broadcast advertising; then bans on smoking in the workplace and in public places; and all along there were periodic excise tax increases. All helped. None have produced decisive results. And some that were initially effective now seem less so, as the numbers of young smokers has begun to rise after more than a decade of decline.

So the lesson is this: Even when the tobacco industry agrees to them, regulatory schemes may not work. And whenever they begin to work, the tobacco hucksters have all the guile and hired talent in the world to figure out how to subvert them. So make sure that the FDA has broad enough authority to go back to the drawing board whenever, to design new regulatory measures based upon what we learn.

* This year's victory could be next year's sellout.

For three decades, tobacco control advocates have had high ambitions: a smoke-free society and an end to all cigarette advertising and promotion. But we've been modest in our immediate objectives, aiming for warnings in advertising, small increases in cigarette taxes and restrictions on marketing that is targeted at young people. Perhaps we were spooked by the economic and political power of the tobacco lobby. I sure was.

But now Goliath seems comatose -- stunned by stones from an army of Davids made up of public health advocates and community activists, scientists and physicians, trial lawyers and state attorneys general, investigative reporters, politicians, document leakers and campaign-money protesters. Together, they have brought so much deceit to public attention that tobacco has become poison to electoral politics. Just remember what happened to Bob Dole during the last campaign, when he pleased his tobacco industry contributors by questioning whether tobacco was that much more harmful than milk.

So, recognize that, for the first time, you are bargaining from a position of strength not weakness. And shake off, as I could not, the unnerving feeling that you are facing an omnipotent power. By all means, get all you can to protect future generations of children. But don't stop there. While today's youngsters will provide the next generation of casualties and deaths from tobacco, 400,000 adults are now dying prematurely from tobacco-related diseases each year. Before they get sick, they model their behavior for their own children. And, until clean air laws are extended to cover all public places, nonsmokers will continue to be exposed to secondhand smoke.

So, while you're at the table, don't forget initiatives like the proposed Occupational Safety and Health Administration rule barring smoking in all workplaces. And exact public promises from the industry to call off its lobbyists from all the state capitals where they are working to preempt local clean indoor air ordinances and vending machine laws.

* Righteous indignation is not a strategy.

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As David Kessler, the former FDA commissioner who launched the Clinton administration's tobacco mission, says: keep your eye on the public health, not on your moral virtue. Of course, any tobacco executives who lied and conspired to subvert the public's health should be punished -- and the lawyers who abetted their conspiracy should be disbarred. If this is what the industry negotiators seek to avoid, forget it.

While at least some of the trial lawyers and state attorneys general at the table are understandably focused on extracting the largest sum possible from the companies for their clients and constituents, the public health objectives should be higher -- and focused on the future. Having devoted much of my career to preventing tobacco companies from targeting young smokers and from keeping adults smoking, I put measures to achieve comprehensive regulation of the industry ahead of the heady temptation to bankrupt companies and impoverish stockholders.

Besides, at least one economist has estimated that the industry could afford to pay $ 30 billion a year or more before it begins to lose money.

* Don't leave the Third World vulnerable.

The miseries spawned by tobacco around the world began in the United States -- and it is still the prime source. Yet international tobacco control has received little attention from U.S.-based advocates and government officials. Less-developed countries will be the next great battlefields for tobacco, and nothing you negotiate should disarm you or your overseas colleagues for those battles.

What about just walking away from the table, as some tobacco control advocates have suggested? Let the FDA and FTC use their existing authority. Let the court cases run their natural course. Isn't that the only way to avoid Congress's close embrace with the tobacco lobby?

Maybe, but I've got a couple of cautions for those who are ready to toss the negotiations:

The current public outrage on industry wrongdoing will surely fade and change its focus. And when the heat is off, politicians find ways to repay their generous campaign contributors. The tobacco lobby still possesses matchless economic resources and political influence.

If you walk away from the table, remember that not all the good things we're now predicting will happen. As last week's Florida verdict finding R.J. Reynolds not liable in the death of a heavy smoker demonstrates, the courts may not always be kind to smoking's victims. Future presidents and FDA commissioners may not have the courage to stand up to the tobacco industry without a congressional mandate. They never did before Kessler.

The industry negotiators have been driven to the table by their investors, whose holdings have been depressed by the threat of massive court awards that could bankrupt the companies. The investors want that threat removed now -- and are not so concerned about the future sales of cigarettes. That's why now's the time to extract more from this industry than we ever have before: $ 1 billion a year for a counter-advertising campaign targeted at children; nationwide nonsmoking regulations in the workplace; marketing and advertising restraints beyond the FDA regulations (which have already been put on hold by the Greensboro District Court); funding support for anti-tobacco coalitions in every state; and a direct congressional mandate for the FDA to police tobacco as a drug, which will sustain action against tobacco by future FDA commissioners and presidents.

Today, unlike 30, or even 10 years ago, there are senators committed to tobacco control, ready to filibuster any bill that would subvert the public health, and 76 staunch House members organized in the Congressional Task Force on Tobacco and Health. We have a president who has made his mark standing up to the tobacco lobby, and an army of tobacco control advocates who have learned from our past mistakes. This time, perhaps history will not repeat itself.

So, to the negotiators I say, carpe diem. But in all events, do as I say, not as I did.

Mike Pertschuk served on the Federal Trade Commission from 1977 to 1984, including four years as chairman. He is co-director of the Advocacy Institute, which trains community-based issue advocates.

GRAPHIC: Illustration, vincent x. kirsch for The Washington Post

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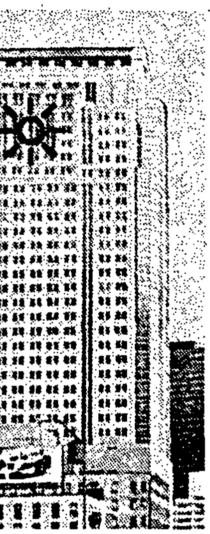

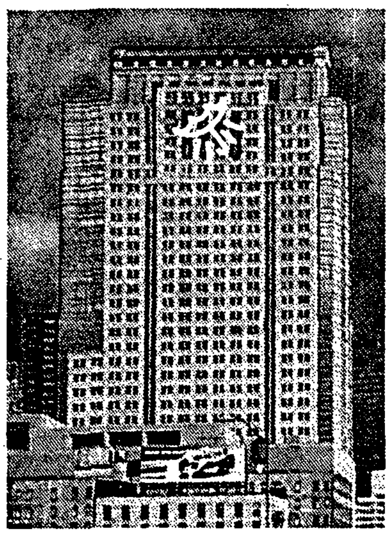

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nore free to move to another, and the opened to outside uence. Until 1985, no ermitted to enter the visited; now village g to expand their 45 th foreigners.

In 1987, after a visit I made to Tibet, and after subsequent conversations with the exiled Dalai Lama, discussions were arranged between his emissaries and Chinese Government officials. Unfortunately, the Tiananmen Square tragedy aborted the initiative.

In spite of our differences, China and the United States must continue to pursue ways to co-exist peacefully and productively. In addition to summit meetings, ordinary Americans and Chinese can help. For example, more than 100,000 Chinese students have attended American universities since 1979, providing an invaluable cultural and intellectual exchange for both countries.

Only through continued dialogue at many levels can we resolve differences and build a foundation for better understanding. □

BOB HERBERT

Tobacco's Secrets

Joe Camel may be gone and the Marlboro Man may be breathing his last, but those crafty tobacco company executives are as committed as ever to their life's work, which is the spread of their virulent product to as many people on the planet as possible.

So it is heartening to hear that Congress is not likely to act before next year on the proposed settlement between the tobacco companies and state attorneys general. The companies can hardly wait to have the deal approved, which tells you something.

The deal would grant the companies immunity from liability for several decades of miserable behavior even though the full extent of the misbehavior is not yet known. The Attorney General for Minnesota, Hubert H. Humphrey 3d, who opposes the settlement and is sitting on 33 million pages of internal tobacco industry documents that, by court order, have not been made public. Some of the documents are said to contain explosive information on a variety of matters, including efforts by tobacco industry officials to conceal what they knew about the dangers of smoking and to recruit underage smokers. Mr. Humphrey has urged the Senate Judiciary Committee to subpoena the documents.

Eric Johnson, an aide to Mr. Humphrey, said that if Congress and the American public "get their hands on this information, the tobacco deal that's on the table now will be dead."

Simply stated, the interests of the public and the interests of the tobacco industry are in conflict. The tobacco companies want to sell as many cigarettes and make as much money as possible. But when the industry is doing well the inevitable result is that enormous numbers of people are succumbing to lung cancer, throat cancer, emphysema, heart disease and other terrible illnesses.

The tobacco companies have never acknowledged their role in this carnage and have never acted in good faith in their dealings with the many generations of customers they have so assiduously sought.

"The proposal that's on the table now is a sweetheart deal for an outlaw industry," said Mr. Humphrey.

His assessment was echoed by Representative Henry Waxman, a California Democrat and longtime tobacco adversary. "It's a very good deal for the industry," said Mr. Waxman. "They get virtual immunity from liability, which is remarkable for an industry that has lied to the American people for 40 years. Their corporate conduct has been abysmal. Now they want immunity. And their executives will get a windfall of hundreds of millions of dollars when their stock goes up."

The windfall comment was a reference to a recent report from the Institute for Policy Studies in Washington

The sweet deal that smells bad.

that said a handful of top tobacco executives will likely see a $200 million increase in the value of their stock options if the current proposal is approved. It has also become clear that the companies plan to cover their collective carcinogenic butts by passing on the allegedly enormous costs of the settlement to consumers in the form of higher cigarette prices. And tobacco lawyers and accountants are already piecing together unconscionable tax schemes designed to reduce the total liability called for in the settlement.

Tobacco companies have a heads-I-win, tails-you-lose approach to negotiating. They are great at it. And they are great at dealing with Congress, which is awash in tobacco cash. There are reasons why tobacco money has flowed for so many years into the pockets of politicians in every part of the country, including such great tobacco-producing regions as Manhattan, Brooklyn and the Bronx.

The fix is almost in, but time is not on the side of the industry. What the tobacco companies fear more than anything is that their carefully concealed account of their own sins, their internal record of their deliberate and sinister corporate deeds, will somehow be dragged into the light of day.

That is exactly what needs to happen. As Congressman Waxman asserted, it makes no sense to consider immunity before that account is made known. You don't make a decision on whether to offer amnesty before you know what really happened.

Mr. Humphrey has two huge repositories of tobacco industry documents, and he will likely soon have more. If Congress is interested in the truth about tobacco, it will have a look at that historic trove. □

NYT Sun 8/10/97 15E

Judge Limits Tobacco Biz Defense

By Eddie Dominguez
Associated Press Writer
Thursday, July 31, 1997; 8:32 a.m. EDT

WEST PALM BEACH, Fla. (AP) -- The judge in Florida's landmark tobacco lawsuit dealt cigarette makers a severe blow by ruling that the industry could not use its best defense: that the public was aware of the dangers of smoking.

Wednesday's ruling left one tobacco attorney wondering: Why have a trial?

``This case is a sham," said Philip Morris Cos. attorney Peter Bleakley. ``All they have to show is the product caused the injury. They have to prove that cigarette smoking causes disease. He appears to have held that's all they have to prove."

Florida is among more than two dozen states suing the industry to try get reimbursed for the costs of treating sick smokers on Medicaid. Jury selection is scheduled to begin Friday. It will be the first state suit to go to trial unless a settlement is reached.

Circuit Judge Harold Cohen, citing a 1994 law that makes it easier for the state to sue tobacco companies, said industry lawyers must limit their defense to ``we didn't do it" and that cigarettes are not a defective product.

In addition, the judge barred evidence about the state's involvement in manufacturing and marketing of cigarettes through the prison system. He also ruled that the industry could not try to show the state was unfairly targeting tobacco because regulators don't apply the same scrutiny to alcohol and gambling.

Bleakley said he was not sure if the industry would appeal

Cohen's ruling.

It was also unclear what impact the judge's ruling would have on a potential settlement. Gov. Lawton Chiles and Attorney General Bob Butterworth have met with tobacco executives to discuss settling the case but the sides remain far apart and have proceeded toward trial.

The suits by Florida and other states helped spur the industry to agree to a proposed $368 billion national settlement, which requires congressional approval.

Florida legislators passed a law in 1994 that laid the foundation for the suit. The state Supreme Court upheld the central part of the law that strips the industry of many of its best defenses, including that smokers share the blame for their tobacco-related illnesses.

Cohen's ruling sparked one of the tensest moments to date in the pretrial hearings. Attorneys for the state and tobacco companies argued angrily after industry lawyers told the judge his decision was ``wrong.''

``I'm laying out what I think the ground rules should be. And I know the industry disagrees with me,'' Cohen said. ``This is a very unique statute. I don't think there is anyone anywhere else operating under this.''

Industry lawyers want to use the testimony of individual Medicaid recipients to refute the state's contention that cigarette makers deceived consumers about the risks of smoking or that they failed to warn the public about the dangers of smoking.

``That's an essential part of our case,'' Bleakley said.

The industry is accused of manufacturing a defective product and conspiring to conceal the defect. The state must prove that the industry either failed to warn the public, deceived smokers or could have manufactured a safer cigarette.

The industry has tried repeatedly in pretrial motions to introduce the defenses they were stripped of by the state law. They have failed each time.

LAW

Flight-Attendants Tobacco Trial Nears

By MILO GEYELIN
Staff Reporter of THE WALL STREET JOURNAL

Few people took Miami plaintiffs lawyers Stanley and Susan Rosenblatt seriously when they filed the nation's first class-action lawsuit against the tobacco industry six years ago.

The husband and wife team work out of cramped offices across the street from the Dade County Courthouse, and the couple had never tried a tobacco case. But today, as jury selection begins in their trial on behalf of 60,000 current and former nonsmoking flight attendants, they will face off with a battalion of tobacco-industry lawyers.

The reason: Their suit, alleging that secondhand smoke in aircraft cabins caused a multitude of illnesses, is the biggest case ever to go to trial against the $45-billion-a-year industry. The Rosenblatts are seeking $5 billion in damages. And their lead plaintiff, Norma Broin, is far more sympathetic than the smokers who have sued the industry in the past: A flight attendant who never smoked, she was diagnosed in 1989 with lung cancer, now in remission, after 14 years flying for American Airlines.

'Pandora's Box' May Open

"It would be irresponsible to discount the importance of this case," says Martin Feldman, a tobacco analyst with Smith Barney. A plaintiffs victory, he says, could "open a Pandora's box" of litigation over alleged injuries from secondhand smoke in confined workplaces.

The Rosenblatts, a self-described "ma and pa" legal team with nine children and his and hers Volvos, were never expected to take the Broin case this far. They operate a five-lawyer firm that specializes in medical-malpractice and personal-injury suits. Well known in Miami, where Mr. Rosenblatt, 60 years old, hosted a legal-affairs interview show on public television in the early 1980s, the two had never handled a class action before.

"The conventional wisdom was 'nice try,' " says antitobacco activist Richard Daynard, head of the Tobacco Products Liability Project at Northeastern University. "I expected the case to go away."

At first, it seemed that it might. Dade County Circuit Court Judge Robert P. Kaye ruled early on that the flight attendants' exposure to secondhand smoke and susceptibility to illness varied too much for the case to proceed as a class action. But a Florida appeals court reversed that decision.

In the trial, the Rosenblatts first will have to prove that secondhand smoke causes heart and lung disease and that the tobacco industry committed fraud by concealing that information. If the Rosenblatts prevail at this stage, the jury will determine damages. The judge then will devise a procedure, as yet undetermined, for dividing up any damages among the flight attendants.

Judge Kaye has signaled that, if the case gets that far, he will likely require thousands of separate trials to determine whether secondhand smoke caused each flight attendants' injuries and how much money to award. The procedure could bog down in a series of minitrials that could easily overwhelm the Rosenblatts' small law firm. Already, they have spent $700,000 to $800,000 getting the case ready for trial, Mr. Rosenblatt says.

And in going after secondhand smoke, the Rosenblatts are also wading into relatively new scientific territory. The centerpiece of their case, says Mr. Rosenblatt, is an Environmental Protection Agency finding in 1992 that secondhand smoke is a known human-lung carcinogen with no safe level of exposure. The Rosenblatts also plan to cite a recent Harvard Medical School study that found increased risk of heart disease among nonsmoking women exposed to secondhand smoke.

The tobacco companies are expected to argue, as they have in a separate lawsuit challenging the EPA finding, that numerous workplace studies have found no statistical association between secondhand smoke and lung cancer. And the risks of developing cancer from secondhand smoke are lower than from electromagnetic radiation or diesel exhaust, both of which the EPA has declined to classify as human carcinogens, the companies contend.

The Rosenblatts also face another hurdle: proving that levels of secondhand smoke were high enough in airplane cabins to cause lung and heart disease. The companies plan to argue that other factors, such as cosmic radiation, could be responsible, and there is scant statistical data on which to rely. (Smoking was banned on domestic airline flights in 1990.)

But Mr. Rosenblatt and his wife Susan, 46, are a formidable team who have landed multimillion-dollar verdicts before and aren't afraid to go their own way. They have been outspoken critics of settlement talks between the industry and antismoking forces now under way to limit current and future tobacco lawsuits. And later this year, the Rosenblatts are scheduled to take another class-action suit to trial, seeking damages on behalf of all ill and allegedly addicted smokers in Florida.

Commanding Presence

A part-time actor while in law school at the University of Miami, Mr. Rosenblatt cuts a commanding courtroom presence and is relentlessly pugnacious. Mrs. Rosenblatt is a seasoned appellate lawyer. Last week she won a ruling allowing the use of 16 confidential documents taken from a law firm by a paralegal working for Brown & Williamson Tobacco Co., the U.S. unit of London-based B.A.T Industries PLC. Among the documents: a 1963 memo by former Brown & Williamson general counsel Addison Yeaman acknowledging that nicotine is an addictive drug.

And one more factor will weigh against tobacco: The industry will not be able to raise its standard defense that smokers are responsible for their behavior and assume the risk of lighting up. Nonsmoking flight attendants made no such choice.

"We don't have as strong a case on personal responsibility and free choice," says one tobacco defense lawyer involved in the case. "That's the trade-off: We have good science but we lose part of our traditional defense."

THE WALL STREET JOURNAL
MONDAY, JUNE 2, 1997

Tobacco Talks Are Stalled On Liability

By ALIX M. FREEDMAN
And SUEIN L. HWANG
Staff Reporters of THE WALL STREET JOURNAL

The landmark tobacco-settlement talks have been put off until negotiators in the antitobacco camp have resolved an intense internal fight over whether to give the tobacco industry full immunity from punitive damages.

The widening rift over punitive damages now represents the biggest threat to reaching an agreement, people familiar with the matter say. The disagreement both reflects philosophic differences over how harshly to treat the beleaguered tobacco industry and negotiators' own political – and highly volatile – calculations about the potential risks of settling with Big Tobacco.

Small Team, Big Case

Jury selection begins today in a huge trial on behalf of 60,000 flight attendants who allege secondhand smoke caused health problems. Article on page B7.

Richard Blumenthal, Connecticut's attorney general, who heads the negotiators' subcommittee on liability, said that the 32 attorneys general suing the tobacco industry have rejected any restrictions on an individual smoker's ability to sue tobacco companies. In an interview yesterday, he said: "The united stand that we took at the last negotiating session was that we wouldn't interfere with basic individual rights."

At a mininum, Mr. Blumenthal's view is shared by state officials in Iowa, Connecticut, Minnesota, Wisconsin and Maryland. And speaking out for the first time, Matt Myers, the lead negotiator representing several major health groups, also assailed the tentative agreement to restrict the ability of current and future smokers to sue. "Neither I, nor the public-health community, could support an agreement that cuts back on the rights of individuals to sue and recover," he said yesterday.

Spearheading the drive to make concessions on liability are Mississippi Attorney General Mike Moore and Richard F. Scruggs, a plaintiff's lawyer who represents 20 of the 32 states suing the tobacco industry for the costs of treating smokers with tobacco-related ailments. Mr. Scruggs yesterday emphasized that a majority of states favor the moratorium on punitive damages, in exchange for the industry's regulatory and financial concessions envisioned under the settlement plan.

"Punitive damages could torpedo this deal; in order for this settlement to work, the majority of states . . . have to work

Please Turn to Page A10, Column 1

Continued From Page A3

their will on the minority," Mr. Scruggs said. The lawyer further charged that state officials' shifting political agendas have made a complex settlement process even more difficult. He said that when it was controversial to sue the tobacco industry, most attorneys general demurred – but in recent months they jumped in when it became politically popular to do so. "Now it's politically risky to settle," he said. "It takes more courage to make peace than war."

Industry leaders **Philip Morris** Cos. and **RJR Nabisco Holdings** Corp. have been negotiating with lawyers for the states and individual smokers as well as public-health representatives for the past two months. The talks mark an unprecedented turning point in the four-decades-long history of tobacco litigation, since the $45 billion industry has until now adamantly refused either to settle lawsuits or to concede that smoking causes cancer.

The latest dispute could derail a final settlement, however, since the industry has made it increasingly clear that it will reject any deal that forces it to pay a dime in future punitive damages. Mr. Scruggs says that the attorneys general are, by and large, willing to grant the industry protection from class-action lawsuits and to limit how much the industry has to pay annually to fund liability judgments.

But people on the tobacco side say they were stunned last Thursday when they learned that attorneys general were backing away from several other aspects of the proposal on civil liability that had been tentatively agreed to. The original proposal would have sharply restricted the ability of current smokers and individuals with secondhand smoke claims to bring lawsuits. And it would have placed even tougher limitations on future smokers seeking compensation for the most common tobacco-related illnesses. Although the industry has indicated it is willing to eliminate the distinction between current and future smokers, people familiar with its thinking say no compromise is possible on punitive damages.

"We can't live in an environment where the word 'punitive' is in anyone's vocabulary," said one person on the tobacco side. "Boards of directors are saying to tobacco managements that you can't responsibly run a company being subjected to punitive lawsuits. We're not going to fold on this issue."

This individual added that the industry has told the other side not to come back to the table until it has arrived at a final term sheet and put it in writing. "That was our response to their moving the goal post the other day."

Even if the industry doesn't succeed in eliminating punitive damages under a settlement, it still hopes to gain some relief on Capitol Hill. Senate Republicans are pushing product-liability legislation that would cap punitive damages – including those in tobacco cases – at $250,000, or twice the sum awarded in compensatory damages, depending on which is lower. Though some Democrats have pledged to fight the measure, one of its co-sponsors, Senate Majority Leader Trent Lott, who is also Mr. Scruggs's brother-in-law, could seek a floor vote within a few weeks.

The differences over liability come in the wake of some progress by both sides on the contentious issue of how much regulatory authority to give the Food and Drug Administration over nicotine, the addictive ingredient in cigarettes. Both sides have indicated that they would support a plan enabling the FDA to regulate cigarettes as drugs but requiring congressional approval before the agency could take any action that would effectively ban cigarettes.

Another division within the antitobacco camp also is looming – this one between state officials and private lawyers who have brought their own claims against the industry. Both sides say that setting the precise amount of money the industry will pay out, now pegged at more than $300 billion, has been deferred until there is consensus on other issues. But people familiar with the matter say that while the state officials want two-thirds of any industry payout, the plaintiffs lawyers – represented by the lead lawyers in a massive class-action lawsuit that was later decertified – are seeking half of the take.

Despite the obstacles, individuals on both sides of the talks are predicting that discussions will resume a week from today.

They say they are also betting that an agreement that has the backing of the majority of states ultimately will be submitted to the White House. If necessary, a separate report reflecting the views of dissidents will also be included – leaving the White House to decide.

But over the weekend, President Clinton's top health-policy maker sent a cautionary signal to Mississippi's attorney general and others pressing to strike a deal with the tobacco companies: Don't assume the Clinton administration will quickly endorse a tobacco settlement.

"We're totally focused on public health, not corporate profits," asserted Donna Shalala, secretary of health and human services, in an interview. "If there's an agreement, there isn't going to be any immediate embrace of the plan."

–Bruce Ingersoll contributed to this article.

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