

City University of New York (CUNY)

## CUNY Academic Works

---

Publications and Research

New York City College of Technology

---

2007

### Corporate Responsibility: The Case of Big Tobacco

Aaron Barlow

*CUNY New York City College of Technology*

[How does access to this work benefit you? Let us know!](#)

More information about this work at: [https://academicworks.cuny.edu/ny\\_pubs/29](https://academicworks.cuny.edu/ny_pubs/29)

Discover additional works at: <https://academicworks.cuny.edu>

---

This work is made publicly available by the City University of New York (CUNY).

Contact: [AcademicWorks@cuny.edu](mailto:AcademicWorks@cuny.edu)

# Corporate Responsibility: The Case of Big Tobacco

Aaron Barlow

On September 25, 2006, Federal Judge Jack Weinstein of the Eastern District of New York ruled that a class-action suit against the major tobacco companies can go forward. The suit, brought under the Racketeer Influenced and Corrupt Organizations (RICO) act, will argue that the tobacco industry conspired to keep smokers ignorant of the fact that there is no difference in disease rates for "light" or "low tar" cigarettes and regular cigarettes. And that constitutes fraud.

The ruling is a relief to me ... and not because I'm an ex-smoker who was conned into choosing "light" brands, but because I sat on a jury in a tobacco case before the same judge (and with the same lead defense attorney) not quite six years ago.

We ended up as a [hung jury](#). Though I did not believe that the tobacco companies could have been held liable in that particular case, I did feel that we had seen signs of malfeasance. This case may address them.

The case before us, brought by the Manville Trust, alleged that the tobacco companies had conspired to keep information away from smokers that would have lead them to quit.

The Trust, which tries to cover the expenses of disease caused by asbestos at Manville plants, claimed that the synergy between tobacco and asbestos raised the amount of disease, and that the tobacco companies should have to pay for part of that -- if they broke the law by hiding information. If they committed fraud.

## A Frank Statement to Cigarette Smokers

"Maybe it was wrong, maybe it was too much, but it was not a fraud." David Bernick, dapper and compact, paused and looked at the jury, gauging us with penetrating dark eyes for perhaps the last time. After seven weeks of testimonies, he was summing up, talking once more about the public relations campaigns waged over the years by American tobacco companies: Beginning with their 1954 "Frank Statement" pledging to make public health their highest priority, Bernick said, the tobacco companies had tried to "push back on political pressure, regulatory pressure." They had claimed they would conduct research on tobacco and disease, yet were soon doing little more than denying a material link between smoking and disease.



[Click to enlarge](#)

Had this constituted fraud? Had this industry, perhaps the most vilified in American history, criminally led people to smoke more and longer, adding to the suffering of millions? Bernick, representing Brown & Williamson and leading the team of tobacco-industry lawyers, had coordinated the difficult task of convincing us that they had not.

A wiry, black-haired man, Bernick, from the Chicago law firm of Kirkland & Ellis, had been leading big tobacco's defense from the edge of his chair. His client, with the other tobacco companies, was being sued by the Johns Manville Trust, the group responsible for asbestos-related disease contracted by Manville workers now that the company had gone bankrupt. Bernick, probably the best lawyer I can ever hope to see in action, was trying to make sure that even a vilified tobacco industry got the best representation possible -- and a fair trial.

According to Edward Westbrook, the Trust's lead lawyer (and nearly as good in the courtroom as Bernick), the lawsuit was brought because the tobacco companies should "pay their fair share" for disease caused by the particularly deadly combination of tobacco and asbestos. The Trust had taken on responsibility to pay for asbestos-related disease resulting from Manville products. Because cigarette smoking exacerbates such disease, the Trust felt that the tobacco companies should shoulder at least a part of the burden -- and so had brought suit.

Thirty-five days earlier, at the start of the trial, my sympathies had been completely on the side of the plaintiff. I had accepted the conventional wisdom that the tobacco companies, by digging in their heels about the relation between tobacco and disease, had increased the amount of disease. I had also believed that tobacco companies had acted against the public interest in much more nefarious ways. I saw Bernick as nothing more than a callous corporate lawyer obsessed with money and protecting his client. I imagined Westbrook as a representative of the angels, suing to insure justice.

Westbrook's law firm, Ness, Motley Loadholt, Richardson & Poole of Charleston, SC, had earlier successfully brought suit against any number of asbestos companies on behalf of sick workers. Slender, impeccably dressed, with curly brown hair and slight twitch at the left side of his mouth, he guided his team through an elaborate attack on the tobacco companies. He left little room for doubt: The industry had prevaricated, destroyed documents, played shell games, sucker-punched, and had done anything else it could to confuse the issue of the relation of tobacco to disease. I agreed with him. Still do. But did that mean the industry had committed fraud? That's what we had to decide.

From the time of their "Frank Statement," Westbrook said, the tobacco companies had combined to fraudulently impede the growth of public knowledge concerning the dangers of smoking. The "Frank Statement" itself, Westbrook told us, was essentially a set of lies, something the tobacco companies had never planned to follow. The main points of the "Frank Statement," signed by all of the major tobacco companies except Liggett & Meyers (now Liggett Group, Inc.) and published as an advertisement in hundreds of newspapers, were these:

- \* 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. **Frank Statement to Cigarette Smokers**

Speaking directly of lung cancer, the "Frank Statement" also said:

- \* That medical research of recent years indicates many possible causes of lung cancer.
- \* That there is no agreement among the authorities regarding what the cause is.
- \* That there is no proof that cigarette smoking is one of the causes.
- \* That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed the validity of the statistics themselves is questioned by numerous scientists.

Though they had knowledge and evidence to the contrary, Westbrook argued, the tobacco industry stuck to this argument for over forty years. It was not until the late 1990s that the tobacco companies finally admitted that a real link between cigarette smoking and lung cancer exists. The "Frank Statement," he told us, had been the start of the pattern of deceit that built to become the fraud that sparked this suit.

Over the course of the trial, Westbrook showed us all sorts of deceit, including the use of smoking machines which "proved" that "light" and "low-tar" cigarettes were better for smokers' lungs. The machines, as Westbrook made clear, did not smoke as people did, did not change the way they inhaled when they changed types of cigarettes. That people do this is something I knew from experience: I smoked a Camel straight much differently than I did a Vantage. That deceit, though, wasn't a major part of this particular case. Westbrook brought it up only because it helped establish a pattern. The fraud that concerned the Trust didn't rest on what type of cigarette had been smoked, only that more people had been conned into smoking longer.

"Pay your fair share." That was the first phrase Westbrook had written on his large display pad, and he had repeated it and emphasized it all the way through to his closing. But the case, as it evolved, had proven much more than an attempt to get the tobacco companies to pay for care of lung disease their products helped cause. "Pay your fair share" was only the tip of a gigantic iceberg.

The day after the summations, Judge Weinstein read the charge, giving us, for the first time, the heart of the case. Did the tobacco companies commit fraud and acts of racketeering that inflicted actual damage on the Manville Trust? That's what we jurors, he told us, had to decide. Not whether tobacco contributed to what the Manville Trust was paying for. Not whether or not it would be "right" for the tobacco companies to pay their fair share.

Before that day, throughout the weeks of the plaintiff's case, Westbrook and his team had provided us with a history of almost every aspect of the tobacco industry. As Bernick later described it in court:

[T]hey have attacked not just what we have said, what we didn't say, what we didn't do, how we designed cigarettes, how we marketed cigarettes. Every feature of our business for a fifty-year period of time has been open for scrutiny.

What we were shown by Westbrook was not pleasant. At best, the industry had hunkered down into a blindered attitude of "if there's no material proof of causation of disease, then there's no disease." At worst, the industry actively attempted to deceive the population and the government in order to keep people smoking. This deception would be the fraud the Trust was trying to prove. As Bernick put it:

This is a fraud case, not a maybe-you-should-have-done-something case. A fraud case. [T]he Trust says it was misled. It was misled in that it paid more than just the Manville liability. That is the core claim of the case. The Trust says it was hurt. Here is how you hurt us. Pay us.

If the Trust could show deliberate deception on the part of the tobacco industry that had misled it and had materially hurt it, then a case could be made that the tobacco companies should compensate the Trust.

Bernick, through his defense and the tobacco company witnesses, had consistently argued that what the tobacco companies had done did not amount to fraud:

Taking a look back ... From a PR point of view, the public statements that were made were probably too aggressive, and they were particularly aggressive by taking this issue of causation and using it from a PR point of view ... Was it a good idea to make science the subject of an aggressive PR campaign? ... Maybe it was a bad idea at the time ... Aggressive PR, anxious lawyers, 1979 campaign [a document called "The Continuing Controversy" and a press conference and PR campaign aimed at countering that year's Surgeon General's Report]: was that a good idea? No. And what happened to all of them? They all backfired. They destroyed our credibility, it is true, and we're living with it here today.

If it weren't fraud, he contended, then the tobacco companies couldn't be held responsible for anything at all connected with the Trust. And it was the Trust, after all, which had brought the suit. Not claimants against it, not sufferers of lung disease. The case was brought solely by the Trust due to damage it felt had been inflicted on it by the tobacco industry.

The Manville Trust had opened its doors in 1988, having been created out of the bankruptcy proceedings of Manville Corporation that began in 1982. As the Trust's website describes it:

The Trust was created as an independent organization to distribute funds as equitably as possible while balancing the rights of current claimants against those of future, unknown claimants. The Trust's mission is to "enhance and preserve the Trust estate" in order to "deliver fair, adequate and equitable compensation to (claimants), whether known or unknown." The Trust was established as a negotiation based settlement organization pursuant to Plan provisions which made it clear that claimants did not need to litigate or threaten to litigate in order to negotiate a fair settlement. [Manville Trust Website.](#)

Why should this Trust sue the tobacco industry? Where, specifically, were they hurt by the tobacco companies? According to a statement by the Alliance for a Fair Tobacco Settlement to the House Judiciary Committee on 2/5/98, they should sue because:

Asbestos litigation defendants [such as the Manville Corporation] have paid, and will continue to pay, tens of billions of dollars in compensation to injured asbestos workers. As a result, nearly 70% (by market share) of former asbestos manufacturers are now bankrupt. The asbestos trusts that stand in the shoes of those bankrupt companies pay as little as 10 cents on the dollar for their admitted liability. By contrast, the tobacco companies have paid nothing to asbestos workers injured by smoking. [KazanLaw](#)

The '10 cents on the dollar' paid continued to be true for the Manville Trust.

Steven Kazan, a lawyer with the firm of Kazan, McClain, Edises, Simon & Abrams of Oakland, California and a long-time representative for asbestos victims, testified at the same hearing that:

According to the Surgeon General, asbestos workers who smoke a pack a day are eighty-seven times more likely to die of lung cancer than nonsmoking Americans. This is eight times more than other smokers. [KazanLaw](#)

Thus, the argument that the plaintiff presented goes, the tobacco companies should take up some of the burden for the disease that the asbestos trusts are shouldering, especially since they had participated in a decades-long pattern of deception.

---

The defense countered with evidence that the Manville Trust had accounted for tobacco damage (and had never paid for it) in setting up its various payment schedules over the years of its existence. Furthermore, the purpose of the Trust was to pay for that portion of lung disease caused by Manville products only, not that caused by other asbestos companies, not that caused by tobacco. Bernick asked:

Have they ever paid more than Manville share? If they paid the Manville share they were doing what they were supposed to be doing. If they didn't pay more than the Manville share they have not paid for us. Not only did they cut Tobacco out of their payments exclusively, they have not come close to paying for the Manville share ...

If the Trust was paying only ten percent of what it had determined was the Manville share of lung disease, Bernick further inquired, then where had they paid for tobacco? And why should tobacco companies, then, pay the Trust?

Furthermore, Bernick continued, what had the tobacco industry done that had had a direct impact on the Trust? In his summation, Bernick quoted testimony by David Austern, formerly chief counsel for the Trust:

There were no direct contacts between the Tobacco industry and the Trust and thus, in no direct contacts between the Tobacco industry and the Trust was the Trust misled.

For the Trust to prove its case, then, it would have to show that the tobacco industry damaged it through something other than direct contact. The argument that the tobacco companies had acted fraudulently and that there were, in Westbrook's words, 'more and sicker claimants' as a result would prove to be the heart of their case.

None of us on the jury had any idea what would happen as the trial began on December 4, 2000. The judge had warned us that the case would last for eight weeks, and the survey we had filled out ran to more than thirty pages, but we had no comprehension of what we would face. We knew that this was a case against big tobacco and I, for one, was hoping for something that could allow us to force the tobacco companies to pay for at least a little more of the damage I believed they have done to our society. Though we had all promised to put aside our personal prejudices and judge fairly -- and I felt I could do that -- I am sure any number of the others waiting with me were hoping with me, too.

Only nine of us had taken chairs in the jury room an hour after we had been told to arrive that first day. The man who had complained loudly the day before that he would lose his job was gone, as were two others. A lot of replacements needed, I thought. But no: a Long Island Railroad train had killed someone on the tracks. Two jurors, delayed by the investigation, arrived a few minutes later, quickly followed by a replacement.

All there, we were ushered into the large, high-ceilinged courtroom, rather drab though once, possibly, spare and elegant. Now it was cluttered with computers, easels, and a variety of high-tech gee-gaws. The judge's bench, to our left as we entered, raised him higher even than we were in the two-tiered box. The witnesses would be lower than he and to his right. Two rows of tables stabled the lawyers, that nearest to the judge being for the plaintiff's. Separate lighting over the gallery kept the audience in gloom compared to the bright overhead fluorescents above the rest of us. Lots and lots of electronic cables connected devices all over the room, including new flat computer screens, the best one for the judge, one lesser model for the witness, and two or three on each set of lawyer tables. A huge screen (back projection) faced the jurors with two small speakers sitting on the floor right before it. The screen, we would soon discover, was too large to provide good definition, especially for video testimony. A replacement for the old overhead projectors, an "elmo," sat in front, to the judge's side of the screen. It ran through the laptop computers set up at the far end of the plaintiff's lawyer's tables and, in the first row of the gallery, for the defense.

Judge Weinstein told us, as we filed in and stood before our chairs, that we could sit, that everyone else was standing as a courtesy to us. We did, keeping our eyes on the judge. A tall man in his seventies with little hair but bushy brows, he looked like a hungry bird of prey draped with an expensive suit that did not hang well. Though he would keep his courtroom firmly in control

throughout the trial, he didn't mind, we soon discovered, closing his eyes. On the rare occasion when he might have dropped off for a second and might have woken thinking he had missed something important, he asked for it again, or had it read back by the court reporter. Through the long weeks of testimony, everyone, not just the judge, but all the jurors and all the lawyers (except for Bernick, who never lost his intensity, no matter what was happening, and Westbrook, who was too controlled and careful to let it happen), sometimes had to fight off sleep. Sitting, not moving, just listening, we learned, can be extremely fatiguing.

That first day, as we tried to make ourselves comfortable in our swivel chairs, we all noticed how intently the lawyers were watching us. Thereafter, at least a couple of the dozen and more pairs of legal eyes were always upon us. We got used to this, eventually, but it could be disconcerting. Though they had found as much out about us as they could, we were still an unknown quantity to them, and would be, until the end of the case. In a very real sense, we scared them, for so much of what they were doing depended on us, this unpredictable gathering of twelve.

We were a diverse group, ranging in schooling from a Ph.D. to no education at all, in income from a banker on down to nothing. In race we were descended from the Middle East, Africa, the Caribbean, Mexico and Europe. Who amongst us, the lawyers were asking themselves, would have influence on whom? How did we feel at the start? Could we change our opinions? Could we, ultimately, be trusted to act fairly and impartially?

---

Over the course of the trial, we heard a great deal of testimony, both live and on videotape. Among the live witnesses were Julius Richmond, a former Surgeon General of the United States, Jeffrey Wigand, the man on whom the movie *The Insider* is based, James Heckman, a Nobel laureate, and parades of anti-tobacco campaigners and tobacco company loyalists. We also listened to what must have been hundreds of excerpts from documents as they were "published" to the jury by lawyers from both sides. In addition, we stared at demonstratives as simple as stacks of painted cardboard boxes and as complex as a panel of dials connected to computers that adjusted charts shown on the screens.

Because we had been instructed not to talk about the case, we spent our time in the jury room analyzing the ties the various lawyers wore and imitating their personality quirks. We made jokes about witnesses and squabbled about who had ordered what for lunch. Still, attitudes toward the case seeped out.

By the second week of the trial, it had become apparent where most of us stood, even though we said nothing directly about the case. Juror 2, an ex-Marine about my age at the time (late 40s), was most clearly leaning toward acquittal. Juror 7, a man of Iranian background, tilted toward the plaintiff, as I did. As, I suspect, did most of the others. I expected that, once deliberations started, we would have quite a split, and I looked forward to the argument. Each day I waited and listened, hoping the plaintiff's lawyers would give me the ammunition I would need at my side during the forthcoming debate.

About the experts, after introduction via their bona fides, the judge would intone, "He [or she] may give his [or her] opinion." The importance of expert testimony to a court of law, we were discovering, is extremely high. The judge later commented upon this in the charge:

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. There is an exception to this rule for those witnesses who, by education and experience, have special knowledge in some art, science, profession, or calling. They may state their opinions as to relevant and material matters, in which they profess to have such knowledge, and may also state their reasons for the opinion.

Most of the testimony in the case came from such witnesses, a long list of whom talked to us for one side or the other, most of whom had testified in numerous other cases. The lawyers loved taking them through their credentials, and, where they could, loved deriding the credentials of opposing experts, hinting, about some, that they were more professional witnesses than they were experts.

One reason they talk so much about credentials, one lawyer later told me, is that the jurors too often never get beyond the credentials and dismiss what the witness says when they find the expert's credentials discredited. Or credit what they say because of credentials.

One witness for the Trust, for example, a professor at Harvard Law School named Jon Hanson, was sneered at by the defense because he had never taken the bar exam and, therefore, had never practiced law. He was also criticized because he had never presented his "Behavioralist" views in peer-reviewed journals and had no formal scientific or statistical training.

### **Experts, RICO, Semantics**

"Peer review" became a mantra for both sides as they extolled the expertise of their witnesses. Both sides seemed besotted with the achievements of their witnesses and the esteem they were held in by their colleagues. Everybody who testified for either side was an insider of some sort. There were no loners, no one working against the main currents of their professions. Outside of Hanson's "Behavioralism," no unpopular or minority opinions were going to be part of the case on either side.

Even Hanson had impeccable credentials within his primary field. He was criticized only because he stepped outside of it, crossing boundaries from Economics to Psychology. Even the plaintiff's legal team seemed unsure of what to do with Hanson's ideas. They let him run through them quickly, and did not provide the back-up that could have made his testimony stronger. Had they thought to pair him with a Psychologist/Statistician, for example, they could have strengthened his testimony. They never even allowed him to fully explain the tenets of his new "Behavioralist" school of thought, perhaps feeling it was, after all, too untested. The defense tried to make him look foolish, just another Don Quixote tilting at windmills. In general, they succeeded, even though they never really attacked the core of what he was saying.

The value that the lawyers placed on the actions and opinions of experts was most readily apparent in the direct and cross-examination of Jeffrey Harris, a physician and an MIT professor with a Ph. D. in Economics.

Harris wanted to show that the tobacco companies, by obscuring the scientific epidemiological evidence linking tobacco to disease, had directly affected the quit rates of smokers. To do this, he examined the quit rates of a group of insulators (who worked with asbestos) studied by Dr. Irving Selikoff of New York's Mount Sinai Hospital starting in 1962. It was Selikoff who, in 1967, first established the link in lung disease between asbestos and tobacco. According to Selikoff, an asbestos worker who smoked had a 90-times higher chance of getting lung cancer than did someone who neither smoked nor worked with asbestos. This rate, he showed, is much, much higher, too, than that for someone who only either smokes or works with asbestos solely.

Selikoff, as a result of his work with the insulators, campaigned for them to stop smoking. Harris felt that, if he could show that the insulators subsequently quit at a higher rate than other people did, he could also show how strongly the tobacco companies' promotional campaigns and denials of a material link between tobacco and disease had negatively affected people's desire to quit.

When he compared the quit rate of the insulators with that of various control groups (though there was not a really adequate control: Harris had to use a variety of means of establishing a control group, all open to question), Harris found that they, indeed, had a higher quit rate. Through various calculations, he was able to estimate to his own satisfaction how much more disease, and how many more claimants against the Trust, existed because the tobacco companies had subverted stop-smoking campaigns with their own counter-campaigns.

As this was the heart of the Trust's case, its basis for saying it had been damaged by the tobacco companies, the defense worked hard to demolish Harris's conclusions. Through a statistician, William Wecker, and economist James Heckman, they attacked Harris's model from all sides, most critically on the ways its base date was compiled. "Garbage in, garbage out," they claimed.

Harris had started his comparisons with 1962, the year Dr. Selikoff started working with the insulators. Right away, he saw a significant difference in quit rates, which he accounted to Selikoff's expert influence. Wecker took the same data back further, to the early fifties. What did he find? The insulators already had a significantly higher quit rate than any of the other groups used as a control.

But Harris was so linked to the influence of Selikoff that he could not see that the insulators, if left to their own devices, might still have had a higher quit rate. It makes sense: The insulators had been working with asbestos for years, and a huge percentage of them smoked. They would know that they were coming down with lung disease at a high rate. It is only natural that many of them would have wanted to put down a habit that they could see affected their lungs.

The tobacco companies could have argued that, once they saw what cigarettes could do, some people were going to quit, no matter what anyone said,

especially tobacco companies. This argument would have special weight given the historical situation. Cigarette smoking skyrocketed in World War I, continued to grow more slowly, then skyrocketed again during World War II. As lung disease takes decades, to appear, it would only have been in the early 1950s that the dangers of cigarettes would have become graphically apparent to most Americans. The decline in smoking since, though hastened by various scientific discoveries and summaries such as the 1964 Surgeon General's Report, might have taken place even without them. People are not stupid; they saw the connection between smoking and disease before being told of it.

So invested were they in the roles and impacts of experts that individual volition was not considered by either side. The closest anyone came to this was another Harvard Law professor, W. Kip Viscusi, who argued that, morally speaking, it was fine for people to smoke, as long as they had all the information about smoking before them. He based his argument on a "rational consumer" ideal. The problem with his rather naïve assertion is that decisions to smoke are not rational, but emotional. No simple balancing of pros and cons has ever led anyone to take up cigarettes.

---

Through the weeks, Westbrook painstakingly presented his case — and Bernick tried to destroy it. We jurors thought of them as well matched: Even their summations proved equally powerful. Neither was more convincing than the other, which is to say that each was extremely convincing. It was only as the judge read us the charge, therefore, that most of us were finally able to start dispassionately considering the case on its merits, to start making up our own minds.

The charge, given by the judge to the jury once testimony was over, tried to encapsulate all we had heard within the context of the specific applicable laws. In it, Judge Weinstein outlined the case for us:

The Trust contends that Defendants have injured it through an agreement to distort the body of public knowledge. It claims that the tobacco industry created doubt about the dangers of smoking in general and the combined effects of tobacco and asbestos in particular, and falsely promised to research and tell the truth about all phases of tobacco use and health without any intention of doing so. The Trust claims that beginning in the mid-1950s, the tobacco companies agreed to a scheme in which they would collectively attempt to reassure the public that it was safe, and acceptable to smoke and that the hazards of smoking had not been proven despite their knowledge that smoking was both dangerous and addictive. It contends that steps in this scheme were the publication of the "Frank Statement" nationwide in 1954 and the creation of the CTR (then called the Tobacco Industry Research Committee). The Trust contends that aspects of this agreement continue through today.

The Trust also claims that by the mid-1960s the tobacco companies knew, or should have known, that the combination of tobacco and asbestos is extraordinarily dangerous; the tobacco industry targeted its marketing directly at blue collar workers, including asbestos-exposed smokers, and opposed attempts to reduce smoking among those workers.

The Trust contends that as a result of this tobacco industry misconduct, fewer of its claimants quit smoking than would have been the case had they appreciated the true risks that they faced by smoking,

and, in some cases, more of them began smoking. The Trust claims that many of the claimants who were deceived by the tobacco industry into continuing (or starting) to smoke developed injuries, or more severe injuries, payable by the Trust, and that the Trust properly paid those claims.

According to the charge, the tobacco companies could be found guilty in this lawsuit under any or all of three elements: First was the RICO Act, specifically United States Code Title 18, Section 1962(c), reading:

It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity.

Secondly, Section 349 of New York's General Business Law, the New York Consumer Protection Act:

Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.

The third was Common Law Fraud, whereby a plaintiff can sue to recover damages resulting from alleged fraud and deceit on the part of the defendant.

Judge Weinstein broke each element down further into items that all had to be proven, by a preponderance of the evidence (as demanded by law for the first element) or by clear and convincing evidence (for the second and third elements), for the defendants to be found guilty.

Under the RICO statute, the judge wrote, we would have to prove all of the following:

1. That an enterprise existed;
2. That an enterprise affected interstate commerce;
3. That the defendant (which may be a corporation) was associated with or employed by the enterprise;
4. That the defendant engaged in a pattern of racketeering activity by committing the requisite related and continuous acts of mail fraud or wire fraud;
5. That the defendant conducted or participated in the conduct of the enterprise through that pattern of racketeering activity; and
6. That the predicate acts caused injury to the Trust's business or property.

Furthermore, #4 above would not be proven unless all of the following elements of it were proved:

1. There was a scheme or artifice to defraud or to obtain money or property by materially false and fraudulent pretenses,

representations, or promises;

2. The defendant knowingly and willfully participated in the scheme or artifice to defraud by materially false and fraudulent representations or promises, with knowledge of its fraudulent nature and with specific intent to defraud those who ultimately did become claimants of the Trust knowing they would be likely to be compensated for their disease;
3. In execution of that scheme to defraud by false and fraudulent pretenses, representations or promises, the defendant used or caused the use of the mails or wires;
4. The Trust justifiably relied in that it was misled into paying the portion of those claims caused by the alleged fraudulent conduct of the defendants;
5. Trust claimants justifiably relied upon the alleged false and fraudulent representations or promises; and
6. The Trust's injuries resulted from its justifiable reliance.

Under the Consumer Protection Act, it would have to be shown that:

1. The challenged act or practice was consumer-oriented and that claimants to the Trust were consumers of products (here cigarettes) sold by the defendant;
2. The challenged act or practice occurred after June 19, 1980 in the State of New York;
3. The challenged misrepresentation through act or practice was misleading in a material way; and
4. The Trust suffered actual injury as a result of the challenged acts or practices.

For Common Law Fraud:

1. The particular defendant made a representation of material fact to claimants of the Trust;
2. The representation was untrue;
3. The particular defendant intended to deceive claimants to the Trust knowing they would be likely to be compensated for their diseases, and those who would be likely to compensate claimants;
4. Claimants to the Trust believed and justifiably relied upon that particular defendants' statements, and the Trust relied in that it was

misled into paying the claimant for illnesses caused in whole or in part by that particular defendant, and that such reliance by the claimant and by the Trust was reasonable; and

5. As a result, the Trust sustained pecuniary loss.

The judge went on in the charge to detail the defense:

Defendants contend that from the moment it opened its doors in 1988, the Trust has been fully aware of synergy between tobacco and asbestos and the relative contribution of each to the diseases for which the Trust pays compensation.

Each defendant denies that it engaged in a scheme to distort public knowledge concerning tobacco and asbestos; denies that the Trust or the Trust's claimants relied on misrepresentations concerning tobacco and asbestos; and denies that the Trust was injured by anything the defendants did.

The tobacco companies responded to the charge against them by saying that, among other things, when "the Manville Trust opened, Manville Trust started to pay their share. Not everybody else's share. Not tobacco's." Therefore, in the view of the defense, the tobacco companies owed the Trust nothing.

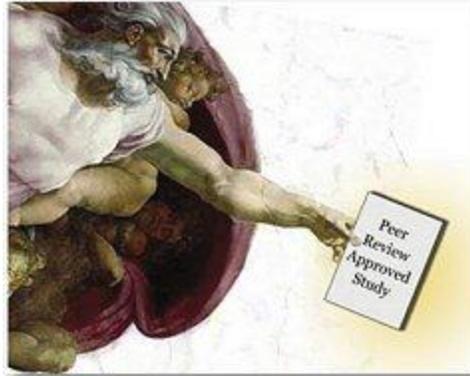
Now, as the judge was concluding, I was being forced to face what had been becoming increasingly apparent: the Trust did not have a case.

One of the last things that the judge told us was that the 'fair share' the Trust wanted the tobacco companies to pay was 145 million dollars — or thereabouts. Later, once the trial had ended, defense lawyers would tell us that the Trust would have asked for additional billions in damages, had we found for it.

---

Once the judge had finally finished reading the fifty-page charge to us, we were led back to the jury room to begin our deliberations. As a former teacher, my fellow jurors thought that I might be a good choice for foreperson, and I was so elected.

As I looked at my fellow jurors, I realized that I had indeed changed my mind about the case. It seemed clear: On no basis could I agree to convict the tobacco companies. The case against them, in all its aspects, was just too weak. Had there been fraud? Perhaps there had been attempts at deception, but I could not see how they amounted to fraud, especially as the deceptions would have had to hurt someone directly for them to amount to fraud. Sure, millions of people have been harmed — have been killed — by tobacco, but did that take place because of deceit by the tobacco companies? I could not think so. I, for one, had started smoking fully aware of the dangers of tobacco. I couldn't blame the tobacco companies for my own stupid decision. When I had quit for the final time twenty years later, I had no more information about tobacco than when I had started.



However, I was aware of fraud beyond the purview of our instructions from the judge: We weren't considering whether or not the tobacco companies had fraudulently promoted "light" and "low-tar" cigarettes as a healthier alternative to their regular products. It was the role of the tobacco companies regarding smoking as a whole that we had been asked to consider. Too bad, I thought to myself.

Still, I had to ask myself, who in their right mind would look to the tobacco companies for information about tobacco? Of course the companies would defend smoking — and would offer products designed to keep smokers smoking. One of the things the judge had said was that the "claimants must exercise ordinary intelligence in relying. The Trust must exercise intelligence to be expected of an organization in its position in relying." Only someone lacking common sense — lacking ordinary intelligence — would rely on tobacco companies for information about tobacco. And the Trust? With all its access to doctors and lawyers? No organization like that could ever be expected to honestly rely on an industry like tobacco for information about its products.

Still, making it seem like we were doing something for our own health by smoking "light" and "low-tar" cigarettes had been effective. I knew so from my own struggles before I had finally stopped smoking. Often, I had rationalized that what I was doing when I smoked my "light" cigarettes wasn't quite so unhealthy — even though I knew that I smoked more of them and pulled harder on them.

---

To find for the plaintiff, it would have to be shown that the Trust had been materially damaged — that it had spent extra money — because of fraud perpetrated by the tobacco companies. As the Trust couldn't even make a convincing case that it had paid tobacco's share of the disease it was paying claimants for, it surely couldn't be argued that it had been harmed by big tobacco's deceit.

I wasn't yet emotionally comfortable with my decision, but I had told the judge I would be fair and impartial. Now, my task as foreperson would be to try to get others to be so, too. If they could actually be fair and impartial, I felt they would come to believe as I did. No matter how reluctant they might be, they would be forced to accept, as I had, that the Trust, in fact, did not have a case.

One of the mistakes that I made, perhaps my biggest, was in assuming too much acuity on the part of my fellows. Most of us had paid attention to the judge as he read his charge, and had understood the gist of what was expected from us. One, however, as I started going over the charge for us again as a group, said we weren't supposed to be doing it that way. We should each be reading the charge alone, she said, coming to our own conclusions, then voting.

I had no idea why she said this. She shook her head, and said that she, anyway, was going to read it on her own. The rest of us could do as we liked. Stumped, I looked at the others.

"Should we go on, or wait for her to read?" I asked. We went on, and she read on her own.

Only days of frustrating deliberation later did I realize what had happened, that she has interpreted "unanimity" (in complete accord) in the charge as "anonymity" (unknown). Had I recognized this earlier, I would have taken the time to explain the difference to her. I would have taken us through the judge's instructions at the beginning of the charge, something I did not then do, for we had just heard them and they had seemed quite clear and not open to dispute.

### **Foreman and the Holdout**

Among the points he had made to us, and that I should have reiterated, were these:

- \* It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find them from the evidence in the case.
- \* Statements and arguments of counsel are not evidence in the case, nor is anything I say.
- \* The law does not permit you to be governed by sympathy, prejudice or public opinion.
- \* You must disregard any reports on the subject matter of this suit that you have read, seen or heard through the newspapers or otherwise, or other media, or other information about tobacco or asbestos that you have learned outside the courtroom.
- \* In evaluating the evidence, you can rely on your own recollection or notes or ask to see any physical evidence introduced or ask to have any portions of any witness's testimony read back to you.
- \* Your verdict must be unanimous on each question on the verdict sheet.
- \* You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors.
- \* If it becomes necessary during your deliberations to communicate with the Court, you may send a note by a bailiff, signed by your foreperson or by one or more members of the jury.

Though he did not mention the concept of jury nullification specifically, aside from saying that we must follow the law, the judge did instruct us that "If you

have any notion of your own as to what the law is or should be, disregard it." Knowing just a little about jury nullification, I wanted to steer away from it. It seemed to me that the only safe course in this case was for us to concentrate on the law, not to decide that we could take matters into our own hands and ignore the law.

We were dealing with a highly charged issue where emotions can lead us more often than sense does. If we did not anchor our discussions in evidence and law, there was no way we were ever going to get to a verdict. This I was sure of.

---

Careful not to try to impose my own new views on my fellow jurors, I started our deliberations by commenting that, if we could agree that tobacco had not "caused injury to the Trust's business or property" (element one), that the Trust had not "suffered actual injury as a result of the challenged acts or practices" (two), or, as put in the third element, the Trust had not "sustained pecuniary loss," then we could find for the defendants and ignore everything else, saving a great deal of time. Everyone but the one reading on her own nodded. If we could agree that damage had occurred, on the other hand, I continued, then we would be well on our way to reaching a point where we could decide against the tobacco companies.



All of the jurors but the one willingly accepted this as a prudent method, especially once the carts of evidence were wheeled in and we were faced with the sheer volume of information we would have to plow through. That one still insisted that she be allowed to reread the charge alone.

We discussed our course for a while, then she said she would read on her own no matter what we said, and join in our group discussion later. This, it turned out, was a mistake; a jury should always be conducting its activities together.

"Can anyone think of any way the Trust was directly hurt by the tobacco companies — and remember that to hurt the Trust means to hurt it financially."

We discussed possible ways this could have happened for a time, even trying to suppose that damage to claimants could become financial damage to the Trust. But, no, we determined, even if more claimants and those more ill were coming to the Trust, it had never been established that the Trust was paying for tobacco's share.

We discussed ways the Trust could have been misled by the tobacco companies. Was there information the tobacco companies had, but

withheld? No, we established, the Trust had access to as accurate medical data as the tobacco companies.

By the end of that first day of deliberations, ten of us, to my surprise, had come to the conclusion that damage to the Trust had not been established. I discovered that most of the jurors, as I had, had made their minds up as the judge was reading the charge. Like me, they had decided that the Trust had not established its case. The eleventh juror said she was leaning our way. Only the one who had insisted on reading on her own, who had absented herself from discussion, had not given an opinion. She said she would not until after the weekend. We adjourned, feeling confident that we would be able to come to a verdict quite soon and quite painlessly.

On Monday, when we rejoined our discussion, the eleventh juror, who rode the train back and forth with juror 8, the one who had been reading, said she was less sure than she had been, and would like to read the charge by herself, too. The two of them had already been reading, we discovered, since 7:30 that morning, having taken an early train in so they could go over the charge. Without much more comment to the rest of us, once we had gathered as a whole, the two continued their reading.

The rest of us, having nothing to do, sent a note to the judge, asking if we could either have a separate room for the readers, or could take the day off, leaving the two to examine the charge at their leisure. The majority of us did not feel comfortable intruding on the desire of the two to study. We wanted them to talk, to tell us how they felt, but only when they were ready.

The judge sent a note back, telling us we had to stay together and work together.

---

After lunch, the two seemed ready to talk. Tell us your views, I asked them. If they are different from the rest of ours, convince us that you are right.

"They have to be guilty," said one.

"There was fraud," said the other.

"And what about the destroyed documents?" asked the first.

Even if there were fraud, did it harm the Trust? And, as to the documents destroyed, would they have provided the Trust with any information it did not have?

They looked at us and, for a time, seemed to be listening, but soon they went back to studying their copies of the charge. Rarely did they look up after that, even as the rest of us talked to them and around them. They paged back and forth, then back and forth again, heads down.

Every once in a while, one or another of us would draw one of them out and try to get a discussion going. We explained that the burden of proof lay with the plaintiff, and that, were we to convict, we would have to find that proof.

"Show it to us," we pleaded. "Help us find it." I went through all of the letters in evidence from tobacco companies to consumers. Others tried to help them in other ways. Yet all the two jurors did was continue paging back and forth through the charge.

We all knew why they didn't respond. They couldn't. The evidence they believed in was not there. They, however, could not give up their position. The tobacco companies were bad. To acquit them, then, would be a travesty. Unable to articulate — let alone find — support for their position, they were reduced to paging back and forth through the charge, and back and forth again.

They never even brought up the deception the tobacco companies had used, the deception that their "smoking machines" somehow reflected the way humans smoke.

Our attempts to engage them went on for four extremely frustrating days. We continued to try to get them to debate. But they were not going to agree to acquit the tobacco companies, and that was that.

Help us, we pleaded. Take us through your argument.

"There was fraud," they said. "And they sold cigarettes." "But," I responded, "the charge says, 'You may not hold any defendant liable merely for the manufacture and sale of cigarettes, regardless of any personal feelings you have about cigarettes.'"

"But they destroyed documents."

"How, then, did that destruction affect the Trust?"

No answer.

Because they were so engrossed in the charge, we decided to use it, too, trying to get them to discuss things with us.

We talked about the meanings of "racketeering activity," of "enterprise," and I read from the charge:

"Pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter [October 15, 1970] and the last of which occurred within ten years ... after the commission of a prior act of racketeering activity...

An enterprise is defined as a group of people, entities or corporations who are associated together for a common purpose in a course of conduct.

This group does not have to be a separate legally recognized entity, such as a partnership or corporation.

It may be organized for a legitimate and lawful purpose, or it may be organized for an unlawful purpose.

The Trust alleges that there was one enterprise in this case consisting of, at various times,

- (a) The Council for Tobacco Research (CTR) formerly known as the Tobacco Industry Research Committee (TLRC).
- (b) The Tobacco Institute.
- (c) All of the defendants — Brown & Williamson Tobacco Corporation, American Tobacco Company, Liggett Group, Inc., Lorillard Tobacco Company, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, and a British American Tobacco holding corporation of Brown and Williamson and other tobacco companies....

Thus, in order to prove this element, the Trust must prove, by a preponderance of the evidence, that a defendant was connected to the enterprise in some meaningful way, and that the defendant knew of the existence of the enterprise and nature of its racketeering activities.

Juror 8, the one who had been recalcitrant from the start, then said something like, "It says, then, that only two things have to be proven, not all of those things, like you said."

"No, there have to be two acts of racketeering activity — in addition to the other things."

"I don't think that's what it says." She showed us another passage:

A defendant engages in a pattern of racketeering activity if it commits at least two racketeering acts, sufficiently related and continuous to constitute a pattern, within ten years of each other. In addition to finding relatedness and continuity, you must find that at least one predicate act was committed after October 15, 1970, the effective date of the federal statute.

To prove a pattern of racketeering activity, the Trust must prove, by a preponderance of the evidence, that at least two of the alleged racketeering acts were connected by a common scheme, plan or motive.

You must also find that the racketeering acts amount to, or pose a threat of, "continuing fraudulent activity."

There must be at least two specific acts of mail or wire fraud which you unanimously find by a preponderance of the evidence were committed by the particular defendant in order to satisfy this element.

The Trust alleges that the defendants committed mail fraud and wire fraud by making misrepresentations directly and indirectly to workers who smoked and were exposed to asbestos and have made or will make claims against the Trust.

"Don't you understand?" I asked. "That's just a part of the whole, a part of what has to be proven."

"It says only two is enough."

"Enough for that part. But that is only part."

"That's not what it says," she insisted. "It says two is enough."

But that **IS** what it says, and we showed her where. She did not respond, but went back again to paging through the charge. I began to think that she was willfully playing dumb, but put that idea out of my mind.

"Please," I said, "show us the proof that these charges are true. Let us discuss this." I then made my offer to read the letters, to try to find two written to asbestos workers.

As I looked through the evidence for them, the two dissenting jurors paged further into the charge, or back, and, once again, said nothing. Or said, "But there was fraud." or "But they destroyed documents."

Someone read another passage from the charge to them:

"Fraud" is a general term which embraces the various means which are resorted to in order to gain an advantage over another by false representations....

A representation or statement is "fraudulent" if it was known to be false when made and if it was made with the intention to deceive.

"Show us the fraud, give us specific examples," this juror pleaded. But the two just turned their pages and kept their heads down. "There was fraud. We know it."

And they were right, by my estimation. But it had not been fraud that affected the Trust in a material way.

In another try, someone read:

The Trust must prove by a preponderance of the evidence that the Trust was injured in its business or property by reason of each defendant's violation of the mail fraud and/or wire fraud statutes.... The Trust must show that had there been no wrongdoing by that particular defendant, the Trust would not have suffered injury.... The Trust prove a direct relation between the injury asserted and the injurious conduct alleged as to each particular defendant.... The Trust must prove by clear and convincing evidence that the claimants to the Trust justifiably relied upon the misstatements and the Trust justifiably relied on the alleged misrepresentation in that it was misled into paying for the portion of these claims caused by fraudulent conduct of the defendant.

"Help the Trust, please, help us see the proof that the Trust has provided. Tell us where to find it."

Nothing. Just more paging.

---

As we continued, discussion devolved upon a tag team comprised of four, jurors 1, 2, 7 and me, each alternating as the bad guy, the best friend, the impartial adjudicator and the teacher, trying to get the two dissenters to present their

case, to do anything at all but page back and forth through the charge. The two holdouts, jurors 5 and 8, might scowl, or nod and follow for a time, as one or another of us tried a new role on them. Eventually, though, each would bow her head and begin flipping back and forth once more through the pages before them, as though these could save them, as though a revelation could arise through the words, bringing them the message that could, by itself, justify their position.

Though they joined in from time to time, the other six jurors let the tag team bear, or bring, the brunt of the action. A couple of them were clearly getting too frustrated to trust themselves in trying to draw forth discussion.

I had made my debut in the devil's role on the second day of deliberation, exploding when I first sensed us falling into the repetitions that would lead to our downfall. My hope was to shock the holdouts into recognition that they either had to give in or begin trying to convince the rest of us. That they had to start seeking evidence showing the defendants guilty. The burden was on them, as surrogates for the plaintiff, to present the preponderance needed for conviction.

All I managed was to bother those on my side, for I'd yelled, "You're playing games; you're f\*\*\*\*\* with us by just sitting there." Later, juror 1 told me he understood what I had been trying to do but was disturbed by my language. Others took me aside, too.

### **Only through Law . . .**

The next day, it was that same juror 1's turn to play the heavy, though he brought a civility to the role that my act had lacked. Finally, though, when he realized he was getting nowhere, he pulled out copies of a letter he had written to the judge and passed them around:

Your Honor:

As a juror on this John's Manville Asbestos Trust vs. Tobacco Companies case, I would like to lodge a complaint against certain jurors who "mised" the court (including both plaintiff and defense councils) by lying in their statements that they could render a "fair and Impartial" verdict and that they could follow the "Rules and or Charges" as set by Your Honor.

These jurors are uncooperative in that:

1. They will not present to us a list of claims substantiating their opinions so that they can be debated,
2. They will not answer specific charges to the affirmative or negative,
3. Will not request specific transcripts to clarify the questions,
4. Are not interested in accepting statements made by individuals of the Trust (will not listen to the words if they are contradictory to their feelings),

5. Will not analyze charts or demonstratives to explain their views, and
6. Are constantly throwing "What ifs" rather than accepting the evidence as presented to us.

Their views are that the Tobacco companies lied to the public, hid or destroyed evidence and generally thwarted all attempts to and were successful in blocking "Anti-Smoking" Campaigns thus deceiving and misleading the Claimants and The Trust into certain actions. They make these claims without demonstrating evidence presented to us these past weeks. They feel that since Tobacco is a major contributor to Lung Cancer, the Tobacco companies should pay (under any Their views are that the Tobacco companies lied to the public, hid or destroyed evidence and generally thwarted all attempts to and were successful in blocking "Anti-Smoking" Campaigns thus deceiving and misleading the Claimants and The Trust into certain actions. They make these claims without demonstrating evidence presented to us these past weeks. They feel that since Tobacco is a major contributor to Lung Cancer, the Tobacco companies should pay (under anycircumstances) damages in an unspecified amount.

Thus, these jurors, because of their "Deception and Misleading Representation" to the court, are causing these deliberations to continue on without meaning or without a chance of arriving at a unanimous decision.

I respectfully request that Your Honor intervene into this dilemma so as to avoid any regrettable acts.

He said he was going to send the letter in to the judge, for he now was sure that the two were not going to cooperate in helping us move to the required unanimous verdict.

They said, "Go ahead." He handed his letter to the marshal. The judge responded that he could not intervene in jury deliberations.

Later, juror 7 took a turn playing the bad-guy role, spicing his anger with pleading, wheedling. Juror 2, when it came to him, managed, even as he shouted, to weave in the self-deprecating humor we had come to associate with him. Neither got any real response.

Once, when one of the dissenters finally said something, claiming that "The tobacco companies should have done something," I wrote, in big block letters on a pad on an easel: "Silence Not A Crime."

But that did not help.

On the fifth and final day of deliberation, juror 1 came in with another letter he wanted to send to the judge:

Your Honor:

Many of the jurors are trying diligently to resolve differences, disputes, or interpretations of the charges. We are experiencing difficulties with understanding (explaining) such words as: justifiable reliance, deception, ordinary intelligence and preponderance of evidence....

There is difficulty in accepting that, under our system, an individual is *innocent* until proven *guilty* beyond a reasonable doubt.

We would also request if you can clarify to the jury if:

1. "Silence" or "Inaction" can be grounds to cause an individual to be found guilty
2. Can "Silence" or "Inaction" be relied upon by an individual to cause that individual into performing a harmful act and then stating that the "Silence" or "Inaction" are the cause of the harm inflicted on the individual?

These are the hurdles that face us. If we cannot unanimously agree on what the charges are, how can we render a unanimous decision?

We have attempted in many ways to review and debate all charges. Most recently a stand was taken to first assume guilt and asked that the plaintiff's case be presented, point by point. In most jurors thoughts, the *preponderance of evidence* for the defense, far outweighs the evidence for the plaintiff. But if there are jurors who feel that even one piece of evidence brought on the plaintiff's side is enough to find guilt, then this jury will never arrive at a unanimous decision!

In addition, I feel that some jurors do not care how long the deliberations take. Getting paid by their employer for not having to work "*Is A Good Thing.*" It might be helpful if we are held longer and or asked to arrive earlier so that this Jury Duty is not easier than going to work! Although this would harm those individuals who are really attempting to resolve this case.

---

The final explosion came from none of us four, but from juror 12, who had never before raised his voice. It happened like this:

Juror 2, at that moment the heavy, was pacing and waving his arms, expostulating while juror 7 leaned over and whispered in juror 8's ear, entreating that she listen, that she try to follow the logic of the argument we were trying to present. Suddenly, juror 8 pulled away and shouted at juror 2.

"You're only angry because I'm a woman and won't do as you say."

Stunned silence. And, I thought, the end. If their arguments were headed that way, there was no sense in continuing.

"All right," I said, silencing juror 2 who, after gaping at juror 8 for a moment, was starting to respond to her in kind. I grabbed my pad and pen and wrote as I spoke, "that's enough. Let's send it in." I read what I had been writing: "We cannot reach unanimity."

While I was speaking, juror 12, suddenly red-faced, shouted, "If this keeps up, somebody is going to kill someone."

Juror 8 turned and screamed at him, "Don't you threaten me. Nobody threatens me."

"I didn't threaten you." Juror 12 thrust his head forward, an angry bulldog. Juror 8, seeming to ignore him, started writing.

"I heard what you said." She folded her paper, opened the door, and handed it to the marshal outside.

"Do we all agree with this?" I held up my paper. For the first time, everyone nodded. I relayed my paper, too, to the marshal.

Tom Hays, writing for the Associated Press (1/25/01), took up the story:

A judge declared a mistrial Thursday in a high-stakes tobacco trial after getting a note from a juror warning that deliberations were so strained that one juror had threatened to kill another.

"I have an obligation to jurors to protect them," U.S. District Judge Jack Weinstein said.

The last of three notes sent to Weinstein on the fifth day of deliberations read, "Juror has made threat against other juror to kill" if they have to be "here much longer."

Juror [8]—one of two holdouts in a 10-2 deadlock favoring the tobacco industry—told reporters she wrote the third note after a male juror threatened that if deliberations lasted another day, "one of us would be killed." **Hayes** (Full quote no longer available in abridged online version).

---

That we could not reach a verdict indicates to me the power of the popular vilification of tobacco over our legal system. In a system of supposed equal justice, tobacco companies are not equals, are no longer judged on what they have done, but on who they are. Others are deliberately taking advantage of that, for their own purposes. And, however noble those purposes may be, this is wrong.

It was never the tobacco companies that made cigarette smoking such a rage amongst Americans. The product satisfied — and still satisfies, for some — a perceived need. The tobacco companies never created that need, only fed off of it. That they panicked, and reacted extremely poorly (after promising to act so well), when the health problems of their products first arose to scientific perception is no different from what dozens of other industries have done in similar circumstances.



In many ways, tobacco is no more a 'rogue industry,' as it has been called, than is, say, the aluminum siding industry. Has it been discovered that tobacco companies did bad things? Sure. The same can be said of any company—or any individual—that comes under scrutiny as close as that faced by tobacco. Did the tobacco industry commit criminal acts? Sure. So has every company, and every individual at one time or another. Did the tobacco industry's crimes amount to racketeering? Certainly not according to the standards set by Judge Weinstein that the Trust attempted to meet.

Perhaps it did, however, by legal standards that could be presented in a different lawsuit. As I have said, we weren't asked to consider the fraud connected with "light" and "low tar."

Should the tobacco companies pay for the damage caused by their product? Absolutely, I would have said when this case began. Certainly, the companies have a moral obligation to the users of their products, and certainly they have failed to live up to that obligation. But should such an obligation be enforced by law? About that, I have my doubts — but could be convinced either way. That's why I am glad this new RICO case concerning "light" and "low tar" is going forward.

The issue surrounding tobacco touches on everything from the role of government in regulating commerce to questions of business ethics, to debates over the concept of national health care, to the role courts should or shouldn't play in shaping our evolving social compact. Simply defining tobacco companies as the devils in this national tragedy will never lead to real solutions to the problems related, both directly and indirectly, to tobacco concerns. The same is true in a myriad of situations where the easy way is to find a villain and heap the blame there, when the real problem is much more complex, and the real blame lies across a much broader segment of our society. Yet the tobacco companies have acted irresponsibly, at best, and have hurt millions of lives.

The Manville Trust could have tried its suit again, given the mistrial. It has not. Other cases have been brought, however, and the tobacco companies have managed to come out of them without too much damage. There are more, including the RICO case that Judge Weinstein has just let go forward. If a verdict is reached against the tobacco companies, the industry may well capitulate and settle others.

I want to see the tobacco companies brought down—but only through law, not in spite of it, as two of our jurors seemed to believe should happen.

---

**ePluribus Media contributors:** JeninRI, cho, standingup, roxy, greyhawk