

THE RULERS OF LAWYERS

How the New Litigation Elite Threatens
America's Rule of Law



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By this point the interest of many in the press had been piqued. Yet, astoundingly, many of the lawyers proceeded to take the position that the details of their fees were none of the press's or public's affair, even though the fees had supposedly been earned by representing the public on official business. The *Fort Worth Star-Telegram*, *Baltimore Sun*, and *Milwaukee Journal Sentinel* all had to resort to legal action under open-records laws before they could get copies of the billing records for the suits in their states. The Wisconsin law firms, trying to keep the records secret, poignantly cited "ethical issues." Many lawyers asserted that since their fees were officially being paid directly by tobacco companies rather than deducted from states' settlements, no one had the right to object. "The attorneys' fees issue is really a non-issue," as Scruggs put it later.³¹

When the Milwaukee paper's open-records-law battle revealed the billing records for the state's lawyers, it became even more apparent why the lawyers had fought so hard to keep them private. The three private law firms representing the state had demanded \$847 million plus expenses, based on a promised 20 percent of the \$4 billion the state was slated to receive over twenty-five years. Although the Wisconsin lawyers had done very little of the heavy lifting in the national suit, they claimed to have spent a staggering 26,284 hours on the case. Even taking that claim at face value, their initial fee demand had worked out to an average rate exceeding \$32,000 an hour—which was more, as the *Ashland Daily Press* in northern Wisconsin pointed out, than the typical family in that part of the state earned in well over a year. All three of the firms had political associations, two Republican and one Democratic, a partner in

one of them being GOP governor Tommy Thompson's personal attorney (Democratic attorney general James Doyle had pushed the suit, with Governor Thompson coming on board after some initial reluctance). The governor had chosen to follow what his spokesman described as a less formal process of selection; and, in fact, an inquiry under the open-records law revealed that the state had spurned a law firm that had been interested in taking on the work for a lower fee.

Of the claimed hours, how many were reasonable and necessary? They included time spent purportedly by lawyers on matters more often handled by office administrators, such as setting up bank accounts and securing office space, furniture, and parking. By the lawyers' own accounting, their bill also included ample amounts of time spent on fee negotiations themselves, on working the press and scoping out the governor and other political players, and in preparing a constitutional challenge to proposed legislation in the state capital that would have curbed their fees (yes, they were getting paid for that, too). And expenses? Those turned out to include \$7,800 for a chartered plane to fly attorney Robert Habush, former president of the Association of Trial Lawyers of America (ATLA), round-trip from Florida to Washington (coach fare: \$906) and a stack of limo bills typified by an \$851 entry to whisk Habush from Milwaukee to Madison and back on May 5, 1997.

As public outcry mounted, the Wisconsin lawyers agreed to accept a mere \$75 million instead of the originally demanded \$847 million—a remarkable 90-percent-plus stand-down, rather as if a used-car dealer had initially tagged a vehicle at \$8,470 and then preemptively offered to

slice its asking price to \$750. Even at the lower figure, they were still set to make \$2,853 an hour based on their own report of hours worked. Meanwhile, the state had asked \$209 an hour as compensation for its own lawyers, the ones who worked full time for the government.³² In Texas, an official estimated that the fee award in his state exceeded \$105,000 an hour.³³

The Wisconsin lawyers were not alone in demanding a fortune in fees even though their state had basically just hitched a ride in the national tobacco litigation parade. Of the fifty states' cases, only two had reached trial (both settled before a verdict), which meant that in the other forty-eight states the lawyers generally did not face the biggest source of costs in an ordinary lawsuit. On the matter of legal research and pretrial paperwork, Minnesota and a few other lead states had put intense efforts into developing the case. By contrast, Illinois was a classic tag-along state: It hadn't taken any depositions and had done "relatively little" to advance its claims toward trial. That didn't stop arbitrators from awarding Illinois' lawyers \$121 million. Lawyers for New Jersey got \$350 million, though the *New Jersey Law Journal* found that they hadn't been involved in national settlement talks and had relied on a national law firm representing the state for "most of the substantive legal work, including court arguments" on their behalf.³⁴ In Missouri, another tag-along state, lawyers demanded \$480 million, then said they would settle for \$100 million. Attorneys for Michigan were given \$450 million, although arbitrators conceded: "Private Counsel's work in the Michigan state-

specific litigation was modest" and that "there was not substantial discovery taking place in the Michigan case at the time the National settlement occurred."

Even lawyers for states that joined the action at a late stage—well after a critical mass had formed, making it clear that some deal to resolve the case was likely to be forthcoming—claimed that their legal representation had been unusually risky, thus supposedly justifying a fee enhancement. And while many lawyers also claimed that their contributions had been supercreative—the analogy of top Hollywood stars or rock singers at the peaks of their careers was often put forth—the reality was that much of the effort had been the same sort of crashingly routine scutwork that goes on in other litigation. The *Baltimore Sun's* successful open-records demand, for example, revealed that of the legal work Peter Angelos wanted Maryland taxpayers to reimburse at \$30,000 an hour, nearly a quarter had actually been performed by lawyers he'd hired from a temp agency at \$21 an hour.³⁵ It was like reselling tap water at the price of French perfume.

The fee demands were even closer to pure profit because lawyers could write off so many of the costs of prosecuting the suit as separately reimburseable expenses. These could be made to include not only meals and travel, hired experts, and jury consultants but also simple office overhead, given that a separate office with phones and staff could be established to handle the tobacco work. The Texas lawyers billed more than \$30 million in expense claims that included charter aircraft, a \$952 lunch and \$300 coffee service, and more than \$100,000 for the services of a PR firm.³⁶ They had also quietly hired many of the nation's best-known law profes-

22. Thomas Scheffey, "Jedi Blumenthal," *Connecticut Law Tribune*, December 1, 1999, quoting Richard Blumenthal; Thomas Scheffey, "Winning the \$65 Million Gamble," *Connecticut Law Tribune*, December 8, 1999; "After the Lion's Share," February 5, 2000, quoting David Golub.
23. Tim O'Brien, "A \$350M Boardwalk Bonanza," *New Jersey Law Journal* (September 27, 1999).
24. Michael Perlstein, "Tobacco Attorneys' Huge Fees Questioned," *New Orleans Times-Picayune*, May 17, 2000, quoting Richard Ieyoub.
25. Carolyn Lochhead, "The Growing Power of Trial Lawyers," *Weekly Standard*, September 23, 1996, quoting Mississippi assistant attorney general Trey Bobinger, cited at Dertnick, *Up in Smoke*, p. 107.
26. Editorial column by Chio attorney general Betty D. Montgomery, December 4, 1998, online at Montgomery's Web site, <http://www.ag.state.oh.us/civilrms/columns/settlement.htm>, visited November 10, 2001.
27. Betsy Z. Russell, "Tobacco Money Gets Closer to Idaho," *Spokane Spokesman-Review* (October 24, 1999), quoting Idaho official Brett DeLange.
28. "Still a Health Threat," *New York Times*, November 24, 1998.
29. Sandra Torry, "Huge Fees for Anti-Tobacco Lawyers," *Washington Post*, December 12, 1998, quoting John Coale.
30. "Multi-Billion Dollar Lawyers' Windfall in Tobacco Cases," CNN.com, December 12, 1998, quoting Robert Kerrigan.
31. "Regulation by Litigation: The New Wave of Government-Sponsored Litigation," Manhattan Institute Center for Legal Policy conference proceedings, June 22, 1999, remarks of Richard Scruggs; according to Martha Dertnick, *Up in Smoke*, p. 185, many of the state fee settlements paid by the industry have remained entirely secret. For an overall fee estimate of \$13 billion, see Thomas Edsall, "Lawyers Get Tobacco Fees Early," *Washington Post*, February 14, 2001.
32. *Milwaukee Journal Sentinel* coverage, July 13, 1999, and other dates; *Ashland Daily Press*, April 8, 1999.
33. Sheila R. Cherry, "Litigation Lotto," *Insight* (March 11, 2000), quoting state senator Troy Fraser.
34. Tim O'Brien, "A \$350M Boardwalk Bonanza," *New Jersey Law Journal* (September 27, 1999).
35. "Temps Did Most Work in Tobacco Case," AP, June 29, 2000.
36. Carlos Sanchez, "Costs Claimed by Lawyers in Tobacco Case Include \$300 for Coffee Service, \$952 for Lunch," *Fort Worth Star-Telegram*, February 21, 1998.
37. Susan Borreson, "Making Pennzoil Look Paltry," *Texas Lawyer* (January 26, 1998), and Sanchez, above.
38. Glen Justice, "In Tobacco Suit, Grumbings Over Legal Fees," *Philadelphia Inquirer*, October 4, 2000.
39. Clay Robison, "Coryn Moves in On Anti-Tobacco Lawyers," *Houston Chronicle*, April 27, 2000; Brenda Sapino Jeffreys, "As Tobacco Lawyers Return Money, Questions Remain," *Texas Lawyer* (June 9, 2000); Miriam Rozen, "Smoke-Filled Room," *Dallas Observer*, September 17, 1998. Further information can be found at overlawyered.com, September 1-3, 2000.
40. See references in fn 39.
41. Jon Burstein, "Lawyer Wants \$34 Million for Working 118 Hours on Florida's Case Against Tobacco Companies," *Fort Lauderdale Sun-Sentinel*, July 14, 2000

- (Alan Dershowitz); Bob Van Voris, "Tobacco Road Not Gold for All," *National Law Journal* (December 28, 1998-January 4, 1999), (Richard Daynard).
42. David Rice, "Wicker Aide Calls for the Disclosure of Attorney's Fee," *Winston-Salem Journal*, April 25, 2000.
43. *Regulation by Litigation*, p. 24, remarks of Mike Wallace and Richard Scruggs.
44. Orey, *Assuming the Risk*, p. 265.
45. Scott Shane, "Lawyers' Tobacco Suit Fees Divisive," *Baltimore Sun*, December 24, 2000.
46. Janet Elliott, *Texas Lawyer* (March 27, 2000); "Tough Questions: Taking the High Road," *National Jurist* (October 2000) quoting Frank Newton.
47. Matt Fleischer, "And to the Victors Go the Spoils. Right? Not always," *National Law Journal* (April 17, 2000).
48. Pamela Coyle, "Lawyers Reap Big Money from Big Tobacco," *New Orleans Times-Picayune*, February 6, 2000.
49. Bill Ainsworth, "Lungren Now a Paid Advocate for His Former Foes," *San Diego Union-Tribune*, March 14, 2001.
50. Lawrence W. Schonbrun, "Class Actions: The New Ethical Frontier," *Manhattan Institute Civil Justice Memo* 30 (November 1996).
51. "Regulation by Litigation," comments of Eliot Spitzer.
52. "Regulation by Litigation," comments of John Langbein.
53. "Tobacco and Torts" (editorial), *St. Petersburg Times*, December 19, 1998 ("almost disgusting"); "Lawyers' Tobacco-Suit Fees Invite Revolt," *USA TODAY*, May 22, 2000; "All Aboard the Gravy Train" (editorial), *St. Louis Post-Dispatch*, September 17, 2000; "Busting the Fee Bonanza" (editorial), *St. Louis Post-Dispatch*, December 18, 2000; "Wizard of Oz Justice" (editorial), *Capital Times*, September 30, 1999.
54. Having long exoriated opponents of the tobacco litigation, the newspaper's editorialists finally acknowledged in an editorial in early 1998 ("Billion-Dollar Legal Fees," *New York Times*, February 11, 1998) that at least in theory plaintiffs' lawyers might be set to receive excessively high fees, raising the specter of an undesirable public "backlash" against the effort as a whole. Over the next several years, as arbitrators announced their series of astounding fee awards for lawyers representing New York and many other states, the paper did not see fit to devote any further editorials to the subject of lawyers' tobacco fees.
55. The research for this book, for example, at one point encountered a hurdle when the author discovered that the site that had previously hosted a full copy of the text of the MSA had taken it down, and that results from a major search engine found no other copies of the document online. Some weeks later it reappeared, hosted at a different site.
56. Dertnick, *Up in Smoke*, pp. ix, 175-76.
57. Master Settlement Agreement ss. IX(d)(2)(B), (E), and (F).
58. Jonathan Gruber and Jonathan Zinman in "Youth Smoking in the U.S.: Evidence and Implications" (Cambridge, Mass.: *National Bureau of Economic Research Working Paper* 7780, July 2000).
59. Dwight R. Lee, "Will Government's Crusade Against Tobacco Work?" (Washington University in St. Louis: *Center for the Study of American Business Contemporary Issues Series* 86, July 1997), pp. 11-12.
60. Mike Mailes, "The Culture War Against Kids," *Altmet.org*, May 22, 2001. "[i]n the four years after Joe's advent, every survey showed teenage smoking declined—down 19 percent among high schoolers from 1988 to 1992, twice as