



Cigarette makers once were so hard to beat in court that many top lawyers refused to take them on. Then a group of attorneys, mostly in small Southern towns, found new ways past tobacco's defenses — and now, the industry hinting about a deal.

# Tobacco's Trials

Don Barrett hailed from Lexington, Miss. and he liked to think of himself as a small-town lawyer—"slow thinking and slow talking," as he put it. He was a stocky man, relaxed and unpretentious. He spoke frequently in Southern aphorisms, such as the one he used to describe his ongoing, quixotic legal battles with the tobacco industry: "If you're going to fight the snake, kill the snake." In the plaintiffs' bar—the section of American lawyerdom that represents victims of airline crashes and sues big corporations when they sell faulty products—some of Barretts close friends were unabashedly rich, flying between trials and settlement conferences in private jets. Barrett, however, was decidedly not rich.

By Benjamin Weiser  
Photos by Danny Turner

Don Barrett with a courtroom exhibit. Tobacco Lawsuits have been his 'life's work'.

His basic problem was that he hadn't killed the snake. Since 1988, he had spent hundreds of thousands of dollars trying three smokers' cases against the tobacco industry. But he had not won a single dollar in damages. His failures sometimes threatened him with insolvency.

One day in November 1995, Barrett found himself in the skyscraper office of Marc E. Kasowitz, a Manhattan civil lawyer. Barrett and Kasowitz had recently concluded a settlement worth several hundred million dollars involving lawsuit over allegedly defective plumbing systems. Although they were on opposite sides, Barrett had come to like and Kasowitz, and he began to tell him about his "life's work," near obsession with tobacco lawsuits.

Barrett joked that he was looking forward to being paid for his work in the plumbing case, as that would "give me enough income to feed my tobacco habit for another few years." as he recalls the conversation.

Barrett said that he and his colleagues in the plaintiffs' bar were about to turn the corner: Barrett was involved in two innovative lawsuits, based on powerful new legal theories that might finally produce a big victory against the tobacco industry.

Kasowitz listened attentively and then said, "That's interesting. Is there no end to it?"

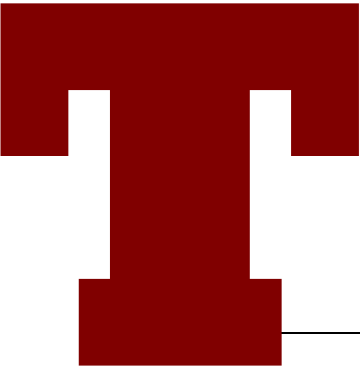
"There is no end to it," Barrett answered. it's going to be total defeat for the tobacco companies, because none have sense enough to realize that they could settle the cases fairly easily and stay in business."

Barrett explained that if the tobacco industry would agree to quit selling cigarettes to children, alter its marketing in fundamental ways, and pay some of the health care costs of smoking, "We could settle with one or two of them, anyway" But Barrett said that no company was smart enough to do that.

Barrett didn't know that Kasowitz represented Bennett



Mississippi Attorney General Michael Moore, front, with plaintiffs' lawyers Richard Scruggs and Michael Lewis at the Capitol in Jackson.



hey would have to negotiate in complete secrecy. If the other major tobacco companies learned that Liggett was about to break ranks, they would stop at nothing to block the settlement.

S. LeBow, an investor with a controlling interest in Liggett Group, the fifth-largest American tobacco company. In fact, Kasowitz's partner, Daniel R. Benson, had already suggested to him an idea that had been anathema in the tobacco industry for decades: a legal settlement that would allow LeBow and Liggett to put the threat of massive liability over smoking deaths behind them. LeBow wanted a deal in part because he was waging a hostile proxy battle to take over RJ. Reynolds Tobacco Co., the nation's second-largest cigarette maker. A settlement might help clear LeBow's path.

On December 5, Kasowitz and Benson took LeBow to lunch at Il Nido, a popular northern Italian restaurant in midtown Manhattan. LeBow authorized his lawyers to look into a settlement

A few days later, Kasowitz astonished Barrett by revealing that LeBow was his client. Kasowitz said they would have to negotiate in complete secrecy. If the other major tobacco companies learned that Liggett was about to break ranks, they would stop at nothing to block the settlement.

Barrett agreed to work on a deal. Although Liggett controlled only a small fraction of the tobacco market, a settlement would be an extraordinary symbolic breakthrough. Over several months, Barrett and two other attorneys met quietly with Liggett lawyers in Houston, New York, Memphis and Miami in March. Liggett announced the result. The company agreed to pay 5 percent of its pretax income for 25 years, up to a maximum of \$50 million a year, for smoking cessation programs around the country and to cover some health care costs incurred by states while treating indigent smokers. Liggett also agreed to voluntarily comply with Food and Drug Administration proposals to try to curb smoking by children and teenagers. In exchange, the company would receive assurances. pending federal court approval, that Liggett could not be sued by anyone

claiming wrongful death or illness stemming from addiction to cigarettes.

The deal rocked the tobacco industry Officials at the major cigarette companies denounced LeBow as an opportunist. Philip Morris Cos., the world's largest tobacco firm and the most defiant, declared that it would not settle. President Clinton called the deal "the first crack in the stone wall of denial" by cigarette makers.

Amid all the noise came a statement suggesting that perhaps Clinton was right.

In late March, Steven F. Goldstone, the CEO of RJR Nabisco Holdings Corp., under pressure from LeBow's takeover proposal, gave an interview to London's Financial Times newspaper. Was it possible, was it conceivable, that America's decades-long tobacco liability wars could be ended with a comprehensive settlement?

"I don't know of a way, but I do know that it isn't the kind of thing that the tobacco industry would try to obstruct, because we know that litigation is not good for our companies." Goldstone said. The legislative, executive, political, social and other sources" involved in the tobacco conflict could be "brought together to resolve this Issue," Goldstone suggested. For its part, he said, the tobacco industry did not have "such a fight-to-the-death mentality that it would ignore eminently reasonable solutions."

It has been just a few years since a group of Lawyers, mostly in small Southern towns, launched what has proved to be the most successful wave of litigation ever aimed at the tobacco industry and already people are asking a question that would have, until very recently seemed ludicrous: Is tobacco's endgame here?

At issue is whether the tobacco industry is poised for a comprehensive settlement, roughly along the lines of the Liggett deal, that would in one fell swoop resolve the multiple lawsuits and conflicts involving the

American companies' domestic cigarette business. Such a settlement would probably involve huge payments by tobacco companies that would, in effect, buy peace with the government, aggrieved smokers and their lawyers. Even if the price were tens of billions of dollars, it would be easily affordable for the industry, whose profits increasingly come from sales overseas.

For nearly half a century, despite hundreds of thousands of American deaths each year due to smoking, the tobacco industry has been nearly invulnerable in the US. Courts. Legal scholar Donald W. Garner once noted a "striking irony" as he put it "The industry that markets the most dangerous product sold in America is the only industry that has been completely sheltered from the storm of twentieth-century product liability" Until this year, approximately 800 suits had been filed against tobacco firms. About two dozen of those went to trial. But not once was a cigarette company forced to pay damages to a plaintiff.

Now the industry is on the defensive. What is different? Just about everything. After squashing lawsuits from individual smokers successfully for decades, Big Tobacco is facing much more formidable legal challenges from state governments and a national coalition of trial lawyers representing addicted smokers. The Clinton administration has declared war on tobacco, the FDA plans to regulate cigarettes and limit marketing to young people, and the justice Department has launched criminal grand

jury probes of the industry and its executives. During the last three years. the industry has sprung leak after leak. with damaging disclosures from whistle-blowers and internal documents surfacing in the news media and in highly publicized congressional hearings.

Crowning evidence of the new order includes both the Liggett settlement and a stunning verdict delivered four months ago, when a tiny Florida law firm won a \$750,000 judgment against one tobacco company, driving down tobacco industry stock prices and prompting plaintiffs' lawyers to declare that they would flood the nation's courts with thousands more suits, At least one Wall Street observer has painted a "doomsday" scenario "if the litigation dam breaks." For the first time, "we detect an unmistakable willingness by the industry to bargain, perhaps reflecting these litigation realities," Gary D. Black a tobacco analyst with Sanford C. Bernstein & Co., wrote in a September 3 report to clients.

Among the realities Black cites are "the sheer number of great plaintiff counsels ... who have joined this fight. and who have vast resources to continue the effort even if it takes years."

This sharp turn in the tobacco conflict is occurring amid vigorous debate about how America should manage what has become, in effect, the institutionalization of disaster. The evolution of mass-injury law has produced a situation where today, as the country mass produces products, it also mass produces liability.



**On April 14, 1994 seven top tobacco executives testified before Congress. One by one, they denied under oath that nicotine was addictive.**

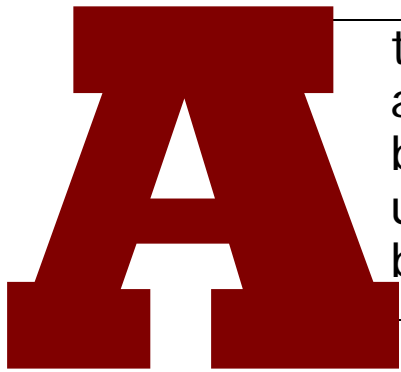
From asbestos to the Dalkon Shield to silicone-gel breast implants, American civil courts have faced successive waves of liability suits. Tobacco is the culmination of the trend. The latest tobacco suits claim to represent tens of millions of American smokers and more than a dozen state governments—potentially a greater share of American society than any previous class of alleged victims. So large and threatening have these lawsuits become that Congress may attempt to take the litigation away from lawyers and the courts altogether and impose a legislative solution, if only to ensure the survival of an industry that is so prosperously entrenched in the American economy, culture and political system; Philip Morris, for example, says it's America's largest corporate taxpayer.

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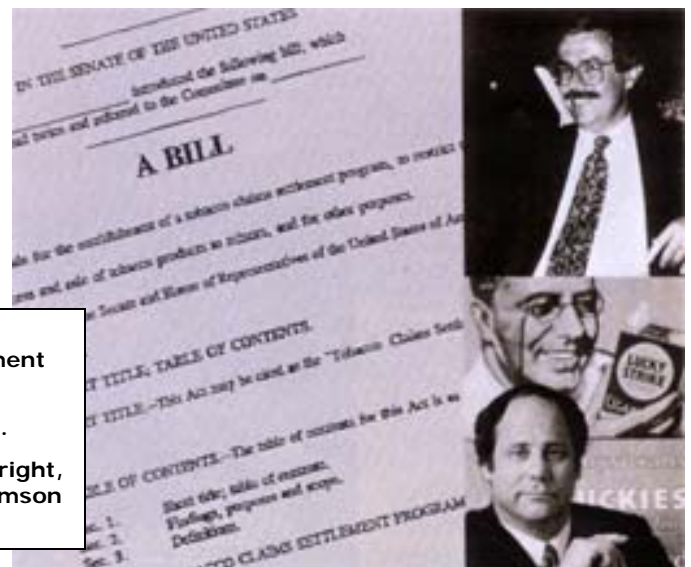
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Left, a proposal for the Tobacco Claims Settlement Act.  
Peter Castano top right.  
Woody Wilner, bottom right, took on Brown & Williamson and won.



Lawyer Wendell Gauthier, above, was inspired by the death of his friend Peter Castano, previous page.

This sharp turn in the tobacco conflict is occurring amid vigorous debate about how America should manage what has become, in effect, the institutionalization of disaster. The evolution of mass-injury law has produced a situation where today, as the country mass produces products, it also mass produces liability. From asbestos to the Dalkon Shield to silicone-gel breast implants, American civil courts have faced successive waves of liability suits. Tobacco is the culmination of the trend. The latest tobacco suits claim to represent tens of millions of American smokers and more than a dozen state governments—potentially a greater share of American society than any previous class of alleged victims. So large and threatening have these lawsuits become that Congress may attempt to take the litigation away from lawyers and the courts altogether and impose a legislative solution, if only to ensure the survival of an industry that is so prosperously entrenched in the American economy, culture and political system; Philip Morris, for example, says it's America's largest corporate taxpayer.

Talk of tobacco's endgame is also taking place amid intense debate about the role of trial lawyers and their contingency fees. The lawyers behind the assault on Big Tobacco are the same "masters of disaster" who earlier took down asbestos makers. These lawyers are

the target of critics who want to reform the tort system to limit the damages and fees that can be collected in liability cases. In Congress, and during the recent presidential campaign, the plaintiffs' bar became an abstract demon of American politics, vilified as responsible for the suppression of business innovation, among other ills. The plaintiffs' bar also has become an emblem of irrationality as critics point to cases like the initial 1994 jury award of 822 million in punitive damages to an elderly woman who spilled scalding Mc-Donald's coffee on her lap. Lawyers suing the tobacco industry are motivated by one thing, says Wall Street analyst Blacic: "It's the money. The tobacco industry is the plumpest, juiciest, golden-egg layer of all time."

For their part, the plaintiffs' lawyers don't advertise themselves as selfless angels, but they argue that their lawsuits act as a catalyst for corporate regulation, particularly in an era of smaller government. The trial lawyers see themselves as watchdogs for the quality of middle-class life, guarantors of the individual's right to seek redress for corporate malfeasance or neglect. The plaintiffs' lawyers, some driving BMWs or Mercedes-Benzes, portray themselves as defenders of the little guy—in this case, nicotine-addicted Davids against Goliath tobacco.

"I know that the outside world thinks we're greedy hogs. As I see it, this is our chance to do some good for society and give something back," says Wendell H. Gauthier, a New Orleans anti-tobacco lawyer.

Whatever their motivations, there is no question that, through sheer relentless pursuit, the plaintiffs' lawyers have created a new paradigm for the tobacco industry during the last two years. "The plaintiffs' bar is peopled by lawyers who are permanently hungry," says Stephen Gillers, professor of legal ethics at New York University. They're like red ants at a picnic. There are an unlimited number of them, and if the food is good, they'll keep coming at you."

**It began** with a plane ride.

Two little-known Mississippi lawyers were flying to California in late 1992 to conduct a deposition. One was Don Barrett, the slow-talking lawyer from Lexington. The other was his friend Richard F. Scruggs, of Pascagoula, a plaintiffs' lawyer who had hit a few jackpots in his time, primarily in asbestos cases. Dick Scruggs owned a yacht, a Lear jet, and has said he has earned more than \$1 million a year after taxes.

Barrett, on the other hand, had taken out a second mortgage on his house and was finding it difficult to pay expert witnesses in his tobacco cases. Looking for help, he had called up Scruggs, a classmate from their undergraduate days at the University of Mississippi. Scruggs had agreed to pitch in, financially and intellectually. The two were heading to San Diego to depose David M. Burns, a pulmonary specialist who helped write key surgeon general's reports on smoking. The problem Barrett and Scruggs faced was that even though an expert like Burns might have a solid reputation and expansive knowledge, such testimony had never been enough to beat the tobacco industry at trial. It was a paradox: Scientific evidence was bountiful that smoking was harmful, victims were everywhere, experts were lined up to testify—yet the plaintiffs could not win. They could not surmount the industry's persuasive and brilliantly simple argument Smoking was voluntary, a matter of personal choice, and since smokers were aware of the hazards, the industry should not be held liable. Jurors in tobacco trials often agreed that the evidence showed smoking was dangerous, but they concluded at trial after trial that individual smokers were responsible for their own actions. On the plane, Barrett and Scruggs talked for several hours about how they might overcome the industry's personal-choice argument. They went round and round and finally they arrived at an intriguing idea: What if they could find a way in a lawsuit to get away from individual responsibility, to "step out of a smoker's shoes"? By avoiding the individual smoker as a plaintiff—his choices, his responsibilities—the lawyers

might evade the industry's most effective defense.

In time, the idea Barrett and Scruggs identified that day would revolutionize civil tobacco litigation in America. But at first, they struggled to identify a formula that would work.

Scruggs had once sued military contractors in a non-tobacco matter under the federal False Claims Act, which allows private parties to bring cases on behalf of the government, alleging fraud and misrepresentation. Scruggs and Barrett talked about the patients in VA hospitals who were sick or dying of smoking illness, and who were running up a government tab. These smokers were the victims of false claims by tobacco companies and the government was incurring the cost, they agreed. Perhaps they could sue on behalf of the government, saying it was the victim, not the individual smoker.

When they got off the plane, Scruggs called his law partner and asked him to research such a suit. It was tantalizing, but they decided that the approach probably would not work because of technical constraints in the false claims law. Barrett knew from bitter experience that the old approach didn't work. In 1988, he had represented the estate of Nathan Horton, a 50-year-old carpenter who for 30 years smoked Pall Malls and who died of lung cancer before the trial began. Barrett mustered evidence that Horton's illness was caused by excess pesticides that had contaminated tobacco in the cigarettes he smoked. It almost worked. Under state law, he needed nine votes, and the panel ended up hung, 8 to 4, in Horton's favor. He couldn't get the ninth vote he needed. "Close but no cigar," Barrett says.

Barrett had tried again in 1990. This time the judge let him blame Horton's cancer on his smoking, not on excess pesticides. The jury ruled against the defendant, American Tobacco Co. For a minute Barrett thought he had done it. But when the jury inexplicably awarded zero dollars in damages to Horton's family, Barrett was despondent. "His life was worth nothing."

Barrett worked his tobacco cases from the ground up. While other lawyers depended on fancy focus groups and mock trials to try various legal theories and evidence presentations, Barrett would go to Billy Zeigler's barbershop on Spring Street and gently question customers about their attitudes toward smoking. Over the years, the more he had talked at the barbershop, the more he had learned that ordinary people in a town like Lexington thought smokers were responsible for their own choices. The fact that Barrett kept trying cigarette cases anyway, he laughs, "is probably more of an ode to my stupidity than anything else."

Realistically, Barrett could not afford too many more defeats. The more Barrett thought about it, the more he believed that evading the personal-choice defense was key. After the plane ride with Scruggs, as he prepared for his next tobacco trial, he kept asking himself: How can I get out of the smoker's shoes?

An answer emerged in the town of Clarksdale, Miss., where plaintiffs' attorney Michael T. Lewis was watching Jackie Thompson, the mother of his secretary, die of heart disease. A heavy smoker, Thompson was waiting for a heart transplant. Lewis ran a small, two-person law firm with his wife, Pauline. They had no experience

with tobacco cases. Lewis wanted to sue on Thompson's behalf, but dropped the idea after researching the dismal history of such suits. Lewis felt frustrated and angry at the inability of the legal system to hold the tobacco industry accountable.

One day in the spring of 1993, as Lewis rode down the elevator of a Memphis hospital, where he had just seen his secretary's mother for what would prove to be the last time, an idea struck him like a thunderbolt. The woman had exhausted her personal assets, and her care was now being covered by state Medicaid funds. (With the heart transplant, the cost of her illness eventually exceeded \$1 million, Lewis says.) "The idea just came to me unbidden that we ought to get a small measure of justice by suing on behalf of the state of Mississippi to recover not only Jackie's Medicaid money but all the other money the state of Mississippi had spent" on similar patients, Lewis recalls.

Lewis saw the tobacco companies as the enemy and didn't hide his motivation: "It was a way to bring them down, to make them pay, to punish them, to destroy them."

He mulled the plan for a few weeks, then in June 1993 contacted Michael Moore, a law school classmate from Ole Miss who had become the state attorney general. Moore liked the Medicaid idea, and referred Lewis to another Ole Miss law school classmate—Scruggs, who had once worked with Moore's office to recover the costs of asbestos abatement in state buildings.

By this time Scruggs was in Greenville, Miss., where he was helping with Barrett's latest tobacco trial. Their client was Anderson Smith, who had been institutionalized in a psychiatric hospital, diagnosed as a paranoid schizophrenic. While hospitalized, Smith began to smoke, and given that he could not make decisions by himself—doctors said he had the mental age of 7—Barrett felt the industry could not possibly

succeed with its standard defense that Smith freely chose to smoke and was aware of the risks.

Lewis drove over, watched the court proceedings for the afternoon, then visited both lawyers at the Hampton Inn.

Lewis laid out his concept about a Medicaid suit. Barrett and Scruggs described their earlier efforts to find a way to get out of the smoker's shoes, but this seemed like the best idea yet. As Barrett puts it "The state of Mississippi has never smoked a cigarette. It was like 'Eureka!'"

A short time later, Barrett and Scruggs lost the Smith case after the judge wouldn't let them use their evidence about Smith's mental capacity. But now they were more energized than ever. With Moore's encouragement, Barrett, Scruggs and Lewis went to work on the Medicaid plan. There were 500,000 people in Mississippi on Medicaid, Scruggs said; about 200,000 had smoking illnesses. "If we do it for one, we might as well do it for all."



Gauthier decided to fashion a suit around addiction. He calculated that there were tens of millions of addicted smokers in the U.S. and that such a class action case could be worth billions of dollars.

**In New Orleans** at around the same time, Wendell Gauthier also discovered what would prove to be a second, complementary track for evading the tobacco industry's traditional defenses. As with Michael Lewis, his inspiration arose from the smoking-related death of a friend. Peter J. Castano, 47, a local criminal defense attorney and Gauthier's best friend, had died of lung cancer. After his funeral in March 1993, Castano's widow had asked Gauthier whether he could sue the industry for the family. Gauthier's first response was no. The odds of winning were too low.

Gauthier was one of the nation's leading mass-injury lawyers. He had pioneered the use of mock trials to prepare for civil suits. He had built a courtroom in his office, complete with an American flag and a judge's bench, where mock trials could be held for three juries at a time; their deliberations could be secretly observed through a camera hidden behind the eye of a man in a painting on the wall. Gauthier used the facility to forecast how he would do at trial—and he usually did pretty well. His \$10.1 million trial verdict stemming from a 1982 Pan Am jet crash outside New Orleans was for years the largest single verdict in an air crash case. He also led the team that negotiated the \$220 million settlement in the 1986 fire that killed 96 people at San Juan's Dupont Plaza Hotel

In the months after Castano's death, Gauthier kept thinking about a way to take on tobacco. He kept on his desk a judge's opinion blasting the tobacco industry for concealing facts about the dangers of smoking. But it wasn't until early 1994 that two separate events

produced his epiphany. On February 25, FDA Commissioner David A. Kessler announced that the FDA was investigating allegations that the tobacco industry manipulated the level of nicotine—the addictive ingredient in cigarettes—to keep people smoking. Three days later, ABC's "Day One" news magazine made similar charges, and further asserted that tobacco firms spiked cigarettes with nicotine to sustain smokers' addictions. (ABC later apologized for certain claims made on the show, but defended the allegation that nicotine was controlled to hook smokers.)

Gauthier decided that the industry's manipulation of nicotine was the best way to rebut its claim that smokers knew their risks: Addiction was a risk that the industry had not warned about. If the industry secretly maintained nicotine at addictive levels, smoking was no longer a matter of personal choice; the industry was seeing to it that smokers could not stop.

Gauthier decided to fashion a lawsuit around addiction. This would not be a personal-injury or wrongful-death case—it would not seek damages for cancer, heart disease or other injuries stemming from smoking. It would instead seek damages for mental distress, the cost of nicotine patches and of attending smoking cessation clinics, and other problems arising from addiction alone.

Gauthier realized such a novel theory would not be worth very much even if he won at trial. From a pure damages perspective, the wrongful death of a high-powered lawyer like Castano might be worth tens of millions of dollars, to

compensate the family for his lost earnings and lost life. But an "addiction-only" claim, for any smoker, might be worth only in the thousands of dollars—the cost of a nicotine patch or addiction treatment, perhaps. What lawyer, working on a contingency fee, would pursue that?

Gauthier decided that the way around this problem was to bundle together a huge number of addiction-only suits into a national class action, a mass tort in which large numbers of victims with similar injuries stemming from similar causes are addressed at one time. Gauthier calculated that there were tens of millions of addicted smokers in the United States—such a class action case could be worth billions of dollars.

On March 18, 1994, Gauthier took some friends to dinner at Emeril's, a Creole restaurant in the warehouse district of New Orleans. His companions were leading plaintiffs lawyers in town to work on breast implant litigation. As they talked, the lawyers remarked about the smoke wafting through the restaurant, and how much it bothered them. Several of the lawyers had a story to tell about the impact of smoking on their personal lives: Ralph I. Knowles Jr., of Atlanta, had a father suffering from emphysema; Daniel E. Becnel Jr., of New Orleans, had lost his father to cancer; Leslie J. Bryan, of Atlanta, said both her parents had suffered smoking-related heart attacks.

Gauthier seemed the most distraught. He talked about Castano, as well as his own three daughters, now in their twenties, who all had smoked as teenagers. One of them still smoked,

sometimes in front of Gauthier's young grandson, which drove Gauthier crazy.

Gauthier began to describe his idea about addiction and a class action lawsuit. To make it work, he needed a large group of plaintiffs' lawyers to spread the risk and the expense—lawyers like those around the table.

Because he didn't want to engender any false optimism, he cited the case of attorney Marc Edeli, whose firm had spent millions unsuccessfully pursuing a tobacco case. "My thought was, 'Why would anybody want to get in it?'" Gauthier recalls.

But another Louisiana lawyer at the table, Calvin C. Fayard Jr., looked right at Gauthier and interjected: "Don't tell me how we can lose. Tell me how we can win."

The other lawyers agreed. The class action idea was appealing. As Gauthier remembers, "They wanted in."

**Gauthier set out** to build an unprecedented force of private plaintiffs' lawyers. The size and staying power of the group would be critical because the tobacco industry was united and typically spent huge sums to defeat its opponents. Gauthier would also have to persuade the nation's top plaintiffs' attorneys to set aside their historical differences over how mass-injury cases should be fought. There were two schools of thought, and the two factions had bickered so bitterly over the years that it could be said at times that the enemy of the plaintiffs' bar was not corporate America but the plaintiffs' bar itself.

This internal feud centered on one question: Was it better to bundle huge numbers of mass-injury cases together, as Gauthier planned in tobacco, or to try only the strongest cases individually?

On one side were lawyers like Stanley M. Chesley of Cincinnati, class action specialists who argued that their strategy delivered justice to the greatest number of potential victims. They held that a class action was more efficient than old-fashioned trials, which were expensive and could drag on for years during appeals. Class actions also gave defendants incentive to settle since, in a single act, all suits against a firm or industry could be resolved. Some deals even at tempted to close off future cases.

But many traditional trial lawyers felt the class action lawyers were too quick to settle, and did so for pennies on the dollar, at the expense of their clients. The trial lawyers believed they could win substantial verdicts, sometimes in the millions of dollars, for clients who might receive only a fraction of that amount in a class action settlement. One such lawyer, Ronald L. Motley of Charleston, SC., barely hid his scorn for the class action settlements reached by Chesley and lawyers like him. The "Chesley-ites," as Motley put it, were the "lawyer-diplomats who sue for peace before there's a war."

For his anti-tobacco army, Gauthier tried to recruit the best and brightest from each faction. Some of his earliest calls went out to Chesley and other leading class action litigators, such as Elizabeth J. Cabraser and Dianne M. Nast. From the traditional trial lawyer side, Gauthier recruited Russ M. Herman of New Orleans, who had been president of the Association

of Trial Lawyers of America (ATLA), a powerful lobbying group in Washington. Gauthier enlisted other big hitters, like Baltimore asbestos lawyer Peter G. Angelos, owner of the Orioles; and John O'Quinn, of Houston, whose net worth was placed by Fortune magazine at half a billion dollars. He also wanted Motley, a rugged attack dog of a lawyer who calls himself a "crazy tank commander" and came to see that Gauthier had "a wonderful political ability to meld together disparate philosophies. He is truly our Eisenhower."

Soon Gauthier had persuaded 60 law firms to join the Castano class action. Each pledged \$100,000 to support the effort, and many firms sent lawyers to staff the Cantano war room, a headquarters office established on the 30th floor of the Energy Centre at 1100 Poydras St. in downtown New Orleans.

Gauthier also wanted to add D.C. attorney John P. Coale to the team. Coale's detractors branded him a media hound and accident chaser. After the Union Carbide chemical disaster at Bhopal in 1984, Coale jetted off to India and signed up 60,000 clients, winning him the derisive nickname "Bhopal Coale." But Gauthier liked Coale's philosophy that a mass-injury lawsuit had to be fought like "a huge war" on many fronts, with plaintiffs' lawyers wearing "different hats"—legal, political, even PR. In the tobacco suit, Coale said, the plaintiffs would have to win the PR battle or Philip Morris would dominate. Coale wanted to organize a media blitz, using internal tobacco company documents and whistle-blower interviews to influence future jurors and create an environment in which tobacco firms would feel

pressure from stockholders and politicians to settle. Coale told Gauthier "You're not just fighting a corporation; this time you're fighting the biggest media machine in the world. The only reason that a lot of people smoke today is because of the media blitz."

Coale understood how the press worked. He also had good contacts in the FDA and would be able to monitor the agency's probe into the industry's use of nicotine, which could produce evidence for their case. Coale knew his way around Capitol Hill, too, and could follow the efforts of the new Republican majority's push for tort reforms that might threaten their ability to win punitive damages.

Gauthier's biggest concern was putting Coale in the same room as trial lawyer Russ Herman. Herman hated the fact that Coale was proud of being an ambulance chaser, thought it reinforced the worst stereotypes of plaintiffs' lawyers.

When Herman was president of ATLA in the late 1980s, he and Coale had gotten into a bitter dispute over the propriety of soliciting clients after big disasters. At one point, Coale snidely suggested in a newspaper interview that Herman and other ATLA leaders were ashamed of being plaintiffs' lawyers, and privately wished they had gone to Harvard Law School and into the legal establishment

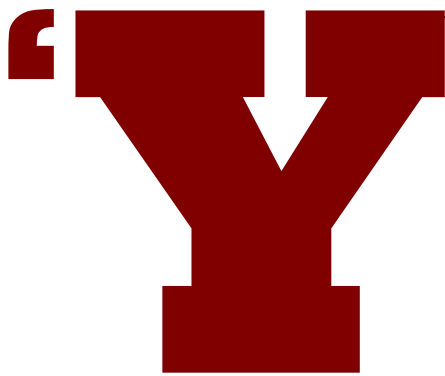
Outraged, Herman snapped back in another press interview, calling Coale a "cesspool."

A few weeks before the Emeril's dinner, CBS's "60 Minutes" ran a profile of Coale in which the lawyer seemed disarming. When correspondent Ed Bradley pronounced Coale a "vulture" who would circle in and "pick the bones" when people suffered misfortune, Coale replied genially, "No ... I pick the bones of the corporation bastards who did it to

these people. That's the bones I'm picking."

When Gauthier finally told Herman that Coale would be joining them, Herman recalls "there were a lot of people scared" about what might transpire at that first meeting. But both men made it work. Within months, Coale was disseminating industry documents to reporters and sympathetic members of Congress. As for the feud with Herman, that soon disappeared. Months later, when Coale and Herman bumped into each other on a New Orleans street corner near the federal court, the two men, both quite large and wearing conservative business suits, threw their arms around each other with great gusto and began to dance in a circle, with Herman calling out. "Cess! Cess!" It was an echo of his notorious "cesspool" insult—only this time, it was a term of endearment.

On March 30, 1994, Gauthier's team filed the Castano class action in federal court on behalf of "all nicotine dependent persons" in the United States. (Later a federal appeals panel threw out the national class action; the Castano group reified in more than a dozen state courts.) As Gauthier had envisioned, the suit was limited to the harm caused by addiction. Citing the potential "class" of tens of millions of smokers, the suit asserted that "a class action is superior to other available methods." The document was signed by Gauthier, followed by a long list of lawyers from the many firms he had enlisted.



You're not just fighting a 'corporation' Coale said, 'you're fighting the biggest media machine in the world. The only reason that a lot of people smoke today is because of the media blitz.'

**In Mississippi,** state Attorney General Moore had often a clear signal from his state legislature that it would not pay for his novel Medicaid suit, which might cost as much as \$5 million. But Dick Scruggs and Ron Motley were willing to front the money from their private practices.

The April 14 appearance by seven top tobacco executives before a congressional subcommittee catalyzed Moore. He thought the testimony—particularly denials under oath that nicotine was addictive—was "the biggest lie ever committed before Congress. I called right then and told Dick and Motley and the crew to get the case ready—we're going to file."

They did, on May 23, in the Chancery Court of Jackson County.

Moore also wanted to enlist other states to file similar Medicaid actions. He, Scruggs, Barrett and the other private lawyers wanted to do it quietly; they feared the industry might try to get state legislatures to block such suits. Scruggs knew their task would be complicated by political issues: Unlike recruiting from among the private bar, they were now trying to persuade elected officials, sometimes in states where tobacco was king.

Moore lobbied his counterparts at national meetings, often asking Scruggs to accompany him. Scruggs remembers a meeting in San Antonio that summer, where they got an enthusiastic response from West Virginia Attorney General Darrell McGraw Jr., who filed a Medicaid case on September 19. Scruggs also spoke with the attorneys general of

Louisiana and Massachusetts; both states later filed suits. Florida and other states sued as well.

The Medicaid strategy generated headlines and earned strong support from the anti-tobacco movement. Still, Moore knew the risks were high. "There was no one who told me this was a good idea from a practical or political point of view," he recalls. The suing attorneys general tended to be Democrats, the party with the strongest ties to the plaintiffs' bar. But the governors of some states were Republicans, the party that had developed strong ties to the tobacco industry and had supported tort reform measures to curb lawsuits by plaintiffs' attorneys. Moore, for instance, soon found himself at loggerheads with Mississippi's Republican governor, Kirk Fordice, who went so far as to sue Moore to block the Medicaid suit—a matter that is still pending in the state Supreme Court

**When lawyers** from the 60 firms enlisted by Gautier held their first big strategy session at the Windsor Court Hotel in New Orleans, four of them broke away one evening and headed for Antoine's restaurant in the French Quarter.

It was a kind of encounter group, a chance to talk philosophy, examine what they were doing.

The four were Turner W. Branch of Albuquerque, Michael Gallagher of Houston, Francis H. "Brother" Hare Jr. of Birmingham, and Scott Baldwin of Marshall, Tex. All four represented the traditional trial bar and were skeptical of class actions. They were veteran lawyers who had

litigated big cases against automakers, drug companies, asbestos firms. They were impressed by the group Gauthier had assembled; they admired his vision. But they were concerned about some of the "classers," as one called them, in the group. Branch says he wanted to make sure that no one tried to "steal" the Castano case and "turn it into a runaway class action, where the client be damned and attorneys be enriched."

Gallagher worried about how it would look if they reached a settlement with the tobacco industry in which each addicted smoker got only a few dollars. He could see the headlines: "Lawyers get a bejillion dollar fee—and the individual plaintiffs get very little." Such results, he said, fueled the fires of tort reform in legislatures and Congress.

But Hare and Baldwin were coming around to the idea that a class action might be a useful tool in tobacco cases, where traditional trial methods had not succeeded.

As Hare put it, "You're never going to win these damn cases," so maybe the class action alternative was not so bad after all.

Hare also was attracted by the possibility that a class action settlement could be negotiated that would include remedial action like a nationwide medical monitoring program to track smoking illness, a "public interest" result that could not be obtained in a traditional trial.

Still, Hare said he was concerned about what might happen if the tobacco industry actually offered a deal. Limiting their suit to

addiction was a brilliant way to get into court and overcome the traditional industry defenses. But in any settlement, the tobacco industry would likely demand an end to all litigation—suits over cancer, heart disease, emphysema, secondhand smoke, the Medicaid costs, everything. On the other hand, if the Gauthier team could deliver that kind of all-inclusive deal, an end to the legal uncertainty that beset the industry, Gauthier's group would have enormous leverage; it was the kind of deal Wall Street would love.

The trouble was, if they sought to settle claims that went beyond addiction, Hare said, other plaintiffs' lawyers with suits against the industry would complain that they were being undercut. Under the rules of class actions, if they made a deal that went beyond addiction and a judge approved it, other suits by smokers could be foreclosed.

In the end, Hare concluded that what mattered most was whether the Castano lawyers could deliver the best deal for their client—in this case, the class of addicted smokers.

**The combined,** growing threat of the Castano and Medicaid lawsuits gave rise to the landmark Liggett deal, the crack in tobacco's wall.

On March 12, 1996, Wendell Gauthier summoned the lawyers from his consortium of 60 firms to New Orleans for a secret vote on the proposed settlement. On the same day, Scruggs and Mississippi Attorney General Moore were in Washington, working the telephones to round up the votes of the state attorneys general who had filed Medicaid suits. Each group

was in continual contact with Liggett lawyers in New York.

The Castano vote took place in a large conference room on the 23rd floor of the Windsor Court Security guards stood outside as the lawyers listened to two of the Castano negotiators, Barrett and Richard M. Heimann, as they described the proposal.

During the discussions that followed—in a signal of the tensions rising within the plaintiffs' bar as their campaign against tobacco yielded early successes—one lawyer raised persistent concerns about whether they were getting the best deal possible.

Russ Herman abruptly stood up, bluntly interrupted, and took the floor. As if he were making some great closing argument Herman declared passionately that they should recognize the significance of this potential deal—the first settlement ever, curbing the sale of cigarettes to minors. The lawyers should say yes—now.

With the Liggett lawyers listening in on the phone from New York, Herman dramatically called for a vote and a roar of "ayes" went up.

It took a few extra days for the attorneys general to complete their portion of the deal.

"The tobacco industry has lived for too long with the possibility of financial catastrophe from product liability lawsuits that could destroy the industry," LeBow said later in a press release. "Liggett's assets will no longer be held hostage by the tobacco litigation, and we will be free to run our business without this distraction."

**Five months later,** on August 9, in a Duval County courtroom in Jacksonville, Fla., six

jurors filed into their box and listened as a clerk read aloud their verdict in the matter of Carter v. Brown & Williamson Tobacco Corp.: liability for the lung cancer of Grady Carter is found against the tobacco defendant Total damages: \$750,000.

Two obscure North Florida trial lawyers, Norwood "Woody" Wilner and his partner, Gregory H. Maxwell, celebrated with their client; a 66-year-old former air traffic controller who had smoked Lucky Strikes and other cigarettes heavily for more than 40 years. They were unlikely victors—the two lawyers had spent more than a decade at the defense table representing the asbestos industry, winning case after case for their clients by arguing that plaintiffs' cancers or emphysemas were not from asbestos but from smoking. Finally Wither and Maxwell had asked each other, Why not sue the tobacco industry? Without substantial expenditures or new legal theories, they had done what had seemed nearly impossible for decades: They had stayed in a smoker's shoes, sued a tobacco company, and won.

Coming on the heels of the Liggett settlement; their verdict sent tobacco shares tumbling on Wall Street—Philip Morris, which had nothing directly to do with the Jacksonville case, saw its stock fall about 14 percent in one day.

The Jacksonville verdict seemed to be evidence of how much was changing in the battle between plaintiffs' lawyers and the tobacco companies. It was hard to know precisely what had changed, what was cause and what was effect. But clearly public attitudes were shifting and clearly they were being influenced by a new

fountainhead of internal tobacco industry documents and whistleblower allegations that the industry had been well aware of the hazards of cigarettes since the 1950s and had concealed what it knew. In the Carter case, the jurors told reporters afterward that one of the most important factors in their decision had been damaging internal company documents presented in evidence at trial.

To at least some extent, the Jacksonville verdict could be traced to the ongoing work of lawyers in the Medicaid and Castano groups, who had supplied Wilner and Maxwell with many of the tobacco industry documents they used at trial. Since 1994, Dick Scruggs and others had been facilitating the emergence of documents and of such prominent industry whistle-blowers as Jeffrey Wigand, a former executive of Brown & Williamson, and Merrill Williams, a paralegal at the company's defense firm. Wilner and Maxwell also consulted with Motley and Barrett and used documents and depositions from Barrett's earlier tobacco cases.

The Jacksonville verdict was a shock, but it might prove to be only the beginning:

Confident that they had found a way to win old-fashioned tobacco liability cases, Wilner and Maxwell have nearly 200 such cases pending, to be tried one after another, with the next one set to begin in April 1997.

**"The tectonic plates** on which rests the issue of the continuing role of cigarette

smoking in American society are now shifting," wrote Wall Street tobacco analyst Jay Nelson, of Brown Brothers Harriman & Co., on August 26, after the Jacksonville verdict. The varied and intensified legal and political pressure on the industry gave rise to serious speculation about a tobacco end-game, what Nelson called "a Grand Compromise."

A week later, Wall Street analyst Gary Black suggested that if the number of states participating in the Medicaid actions grew—by this fall, the plaintiffs numbered more than a dozen states, including Maryland, and cities like New York and Los Angeles—then the result could be an "unprecedented threat ... These alone could bankrupt the industry." Industry opposition to any settlement continued to soften. Martin Broughton, chief executive of Brown & Williamson's parent company, said that a legislated settlement was a "common sense" way to solve the industry's problem.

For the Castano and Medicaid group lawyers, who claimed to represent tens of millions of smokers and more than a dozen state governments, any such compromise would require them to weigh the interests of their clients against broader public and policy questions. This was not something plaintiffs' lawyers normally did. For the lawyers in both groups, the shift represented both an opportunity and a continuing source of internal tension.

Some in the plaintiffs' bar were already thinking like policymakers:

Behind the scenes, Scruggs floated a proposal known as the Tobacco Claims Settlement Act of 1996. Under terms of the act, Scruggs says, the tobacco industry would pay some \$160 billion over 20 years to partially reimburse state Medicaid costs and fund independent research and public education programs on the dangers of smoking. The industry would have to divulge its own tobacco research, and FDA proposals to curb sales to minors would become law.

In return, Congress would pass a law ensuring that the industry would not be subjected to FDA regulation, or to suits from smokers or states, for 20 years. In pending cases, damages that could be recovered would be capped.

Scruggs says he had support from Senate Majority Leader Trent Lott (R-Miss.)—who happens to be his brother-in-law. Lott told Scruggs that while he would not become directly involved in the talks between the parties, if a satisfactory deal was reached, Lott would be willing to help enact the legislation necessary to put it in place.

Tobacco officials publicly denied authorizing any congressional settlement talks. Philip Morris, in a statement, said the company intended to "vigorously defend" all of its lawsuits and played down any chances of a deal.

The talks came as a complete surprise to many Castano lawyers, some of whom first read about the proposal in the Wall Street Journal.

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ellon thought Clinton would have to sign it. 'This will be one of the great pieces of legislation in the century, if you believe as I do that tobacco is the scourge of our society.'

Gauthier contacted Scruggs, who assured him that Castano lawyers would participate in any future negotiations. Some Castano lawyers were supportive; others were concerned, even upset. To them, the idea of agreeing to any settlement in which Congress would ban future lawsuits was abhorrent — it contradicted everything they had fought for in the long-standing battles in Congress over tort reform.

Castano leaders talked about the settlement proposal during a conference call in September. One lawyer on the phone, Maury Herman, Russ's brother and law partner, urged his colleagues to keep their objections to such an overarching deal private. They had remained united thus far, and if they started going after each other now, their critics would portray the lawyers as motivated by greed. "It would be sharks circling sharks eating sharks," Maury Herman told his colleagues.

Several weeks later, the Castano lawyers journeyed back to New Orleans for another strategy meeting at the Windsor Court. One hot topic was the Jacksonville verdict, which had electrified the group. During one session, Thomas E. Mellon Jr., an intense, curly-haired lawyer from Doylestown, Pa., gave an enthusiastic presentation in which

he suggested that the time might be right to launch yet a new wave of tobacco litigation, ratcheting up the pressure even more.

Mellon told the group that the tobacco industry was embattled. Public sentiment was coming their way. There might be grand jury indictments against tobacco executives or their companies and, in 1997, a movie version of John Grisham's anti-tobacco novel, *The Runaway Jury*, was scheduled for release. Mellon suggested that the Castano lawyers flood the courts with thousands of new cases by individual smokers. The litigation would swamp the tobacco industry.

At day's end, Mellon and some other Castano lawyers adjourned to the hotel lounge on the second floor. Sipping iced tea, white wine and O'Doul's nonalcoholic beer, the group began talking about Scruggs's proposed congressional deal, the Grand Compromise. As they went around the table, almost everyone agreed that they were against any settlement that imposed a ban on future lawsuits. But Mellon, of all people, dissented. He had a background in public policy as a former federal prosecutor. He wondered if the others might be underestimating the political attractiveness of such an endgame.

"If you are president of the United States, and Congress gives you this act," Mellon told the group, as he listed the potential benefits contained in the proposed legislation, how could Clinton say no? The president would have to look at the bigger picture. "It is just clear to me that that piece of legislation has to be signed," Mellon said, as he recalls it.

One lawyer present was Hugh Rodham, President Clinton's brother-in-law and a member of the Castano team. Mellon turned to Rodham and asked what he thought. After all, the president had opposed tort reforms that he saw as unfair to consumers; he had vetoed a tort reform bill.

Rodham's response, recalls Mellon, was that the president would never sign a bill that restricted the right of citizens to sue.

But Mellon thought Clinton would have to sign it. "This will be one of the great pieces of legislation in the century, if you believe as I do that tobacco is the scourge of our society," Mellon recalls saying.

Listening to all this was Brother Hare, the old-line trial lawyer from Birmingham. He felt uncomfortable. He was certain he would not support a deal in which Congress—rather than a court—restricted the right of individuals to

sue. Yet he agreed with Mellon: Politically, Clinton might have to sign such a bill.

Hare found himself thinking less in his classic role as a lawyer and more like some social architect, as he put it later. When he represented a single client, Hare focused narrowly on his client's interests and "the public interest be damned." When he joined the Castano group, he had accepted an enlarged view of his "client"; now he was trying to fashion a solution

for tens of millions of people—smokers he had never met and never would meet.

Yet, if Hare thought a congressional solution was the best thing for the country, even if it deprived the plaintiffs' bar of the right to sue, what should be his position?

Like so many of his colleagues these days, he felt torn even trying to answer the question. "I'm now aware that I'm making decisions

that are political, philosophical—that sort of thing," Hare says, "rather than just the case of a lawyer with an individual client. And that troubles me."

*Benjamin Weiser, a reporter on The Post's investigative staff writes frequently about legal and financial issues. Post staff writer John Schwartz contributed to this article.*