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The Role of the Once-confidential Industry Documents

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THE ROLE OF THE ONCE-CONFIDENTIAL INDUSTRY DOCUMENTS†

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I want to start out by saying what a privilege it has been for our team at Robins, Kaplan, Miller & Ciresi to represent both the State of Minnesota and Blue Cross and Blue Shield of Minnesota in this case. It has been a particular privilege, given the principled stand that the state and Blue Cross, as evidenced here today by Skip[1] and Andy,[2] have taken at times when it was very much "the road less traveled" nationally.

In 1994, when we filed suit we knew that the tobacco industry had been in litigation for fifty years and never lost a single case. We also believed that one of the keys to the tobacco industry's success over the years had been their success in hiding and not producing their internal documents.

Litigation against the tobacco industry started in the 1950s, when the first epidemiological studies linking smoking and lung cancer were published. In 1954, the first lawsuit was filed. In the 1950s, virtually no internal tobacco industry documents were produced. The same was true in the 1960s and the 1970s. In the 1980s, a personal injury lawsuit was filed in New Jersey, the *Cipollone*

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1. *See* Hubert H. "Skip" Humphrey, III, *The Decision to Reject the June, 1997 National Settlement Proposal and Proceed to Trial*, 25 WM. MITCHELL L. REV. 397 (1999).

2. *See* Andrew P. Czajkowski, *The Making of a Lawsuit: A Health Plan Perspective*, 25 WM. MITCHELL L. REV. 379 (1999).

action.[3] Documents were produced in that case, and it was really the first glimpse into the internal workings of the tobacco industry.

Between the *Cipollone* case and other personal injury cases in the 1980s, about 1,700,000 pages of documents were produced. Then came 1994 and the Merrill Williams documents that you heard Peter Pringle talk about.[4] These were sensational documents. In numbers, they amounted to about 4,000 pages. Back in 1994 when we were starting out, many lawyers around the country, including some of the colorful characters that Peter Pringle described,[5] were saying that no more document discovery was necessary. But our instincts told us that the documents that were in the public domain in 1994 were only the tip of the iceberg and that the best documents were still hidden in the tobacco companies' files and with the tobacco companies' lawyers.

The Minnesota document production netted about thirty-five million pages of documents in four years of litigation. Many millions of them were written in the 1950s, 1960s and 1970s, hidden in tobacco company files for decades, but never produced despite the ongoing litigation.

Now, you might ask, how do you review thirty-five million pages of documents? We did it the only way we knew how, which was one page at a time, using a phenomenal team of senior lawyers from our firm. The tobacco companies delayed producing the documents as long as possible. When the trucks started rolling in to the Minneapolis depository,[6] there were times when so many documents were piling up in the depository that, I don't know if you remember that old "I Love Lucy" show where Lucy and Ethel are working on the assembly line, boxing, I think it was chocolates, and the line starts going faster and faster . . . well, that's how we felt. Further, the only way to charitably describe a lot of the documents that were produced would be "pure junk." For example, we were given thousands and thousand of pages that we had to wade

3. *See* Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487 (D.N.J. 1988).

4. *See* Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table,* 25 WM. MITCHELL L. REV. 387 (1999).

5. *See id.* at 388-91.

6. *See* State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. July 14, 1995). The order mandated the establishment of a depository within thirty miles of the Minneapolis/St. Paul International Airport "for timely and efficient control and management of discovery in this action. All documents produced by any party to this action shall be deposited therein." *Id.* at 2.

through on tobacco beetles—the insect variety.

But mixed in among those papers we would find some gems, like the handwritten document by Thomas Osdene, a senior research official at Philip Morris.[7] When he testified in pre-trial discovery in our case about this document and others, he pleaded the Fifth Amendment. The first line of the document says, "[S]hip all documents to Cologne . . . ."[8] Cologne, Germany is where Philip Morris maintains a research facility called Institute fuer Biologische Forschung ("INBIFO"). The work done there is, in large part, for the United States' operations. By doing the work in Cologne, the industry was able to keep the documents offshore. Line number two says, "[K]eep in Cologne."[9] Line number three says, "OK to phone and telex," and then in parenthesis, "these will be destroyed."[10] Line number six says, "[I]f *important* letters or documents have to be sent please send to home – I will act on them and destroy."[11]

In the end, we copied about one to two percent of the documents that were sent to the Minneapolis depository. There is a second depository in Guilford, England, where the BAT[12] group of companies produced their documents. The collection we copied became known around the country as the "Minnesota Select" set of documents. Literally every other state in litigation—including Mississippi, Florida and Texas, which have settled their state actions—now have the "Minnesota Select" set to assist in pursuing their actions.

The depository is now open to the public,[13] and it is being used, not just by other litigants, but also by researchers, public health professionals, and tobacco control professionals. We copied the one to two percent with a very precise purpose in mind and that was to use the documents for trial exhibits. But there is a

7. *See* PM 1000130803. Documents in the depository are identified by Bates number. This article will also utilize the Bates number for identification purposes.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* (emphasis in original).

12. The term BAT Group refers to the British entities that, over time, have been either affiliates or the corporate parent of Brown & Williamson. These entities include B.A.T. Industries p.l.c. and/or British-American Tobacco Co., Ltd.

13. The depositories will remain open pursuant to the terms of the settlement. *See* Consent Judgment at 6, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, 1998 WL 394336, at *3-*4 (Minn. Dist. Ct. May 8, 1998).

wealth of information in the depository that is untapped.[14] We welcome you all to visit it.

Getting the documents produced was a long, hard road, as you might imagine. The tobacco companies objected to almost all of our document requests. The tobacco company lawyers played endless word games with our requests. Here are some of the words that we used in our document requests that the tobacco companies' lawyers told us they just did not understand: "smoking and health"; "the properties and effects of nicotine"; "advertising, marketing or promotion of cigarettes"; "document destruction policies"; "addictive target levels of nicotine"; and "minimum levels or doses of nicotine."

Those of you who are lawyers know that, unfortunately, word games are often played in litigation these days. The tobacco company lawyers took this to new extremes. We would go to meet and confer with the tobacco companies' lawyers, and they would show up, filling the room with their lawyers. We were forced to bring motion after motion to compel the production of the documents. There were more than a dozen appeals including two to the United States Supreme Court on discovery issues.[15]

One of the issues to go to the U.S. Supreme Court was the production of document indexes created by the tobacco companies' lawyers.[16] There was an extraordinary amount of data in these indexes, and they proved to be invaluable in assisting us in targeting documents and breaking privilege. To give you an idea of just how extensive these indexes were (and these were all prepared long before our case started in 1994), R.J. Reynolds, just one company, eventually told us it had spent $90 billion creating its index.[17] We fought for sixteen months to get those indexes. It took eight court orders just from the trial court, and unsuccessful appeals by the industry to the Minnesota Court of Appeals, the Minnesota Supreme Court, and the U.S. Supreme Court before the indexes were

14. *See* Michael Ravnitzky & Jeanne Weigum, *Filtered or Unfiltered Information: Choices in How to Make the Minnesota Tobacco Document Depository Records More Accessible to the Public*, 25 WM. MITCHELL L. REV. 715 (1999).

15. *See* R.J. Reynolds Tobacco Co. v. Minnesota *ex rel.* Humphrey, 517 U.S. 1222 (1996) (mem.); Philip Morris Inc. v. Minnesota *ex rel.* Humphrey, 118 S. Ct. 1384 (1998) (mem).

16. *See R.J. Reynolds Tobacco Co.*, 517 U.S. at 1222 (mem).

17. *See* Transcript of Proceedings at 45, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565 (Minn. Dist. Ct. Sept. 12, 1995).

turned over.[18]

Another pivotal discovery battle was a battle over documents that the tobacco industry claimed were either attorney-client or work-product privileged. From the beginning of the case, we believed that these would be the best documents. The tobacco company lawyers appeared to be immersed in the science of the industry. Their attorneys appeared to be directing scientific research in an effort to conceal that science by claiming that it was protected by the attorney-client privilege. As the litigation progressed, we knew we were on the right trail because we started finding documents showing the unusual involvement of lawyers at the tobacco companies. One was a handwritten note, from 1978, that was found in the files of senior officials at the Lorillard Tobacco Company.[19] It appears to be notes taken at a meeting of tobacco industry officials. Paragraph number one says, "[W]e have again 'abdicated' the scientific research directional management of the industry to the 'lawyers' with virtually *no* involvement on the part of scientific or business management side of the business."[20]

Another 1978 document was written by a senior official at the Council for Tobacco Research (CTR), which was supposed to be the research trade organization of the industry. In the first paragraph, it says, "I think CTR should be renamed Council for Legally Permitted Tobacco Research, CLIPT for short."[21]

The tobacco companies took the battle over privileged documents, as they did with the fight over indexes, to the U.S. Supreme Court where they lost one more time.[22] In the end, and actually very close to the end of our trial, about 40,000 privileged documents were produced. These documents were eventually produced to us because the courts found that many of the documents were not privileged in the first instance; for example, they were science, not legal advice.[23] The courts also found that many documents should be produced pursuant to what is known as the crime-fraud

18. *See* Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 493 n.71 (1999) (detailing the appeals and rulings by various courts regarding the document indexes).

19. *See* Lorillard 01346204.

20. *Id.* (emphasis in original).

21. CTR SF 0800031.

22. *See* Philip Morris Inc. v. Minnesota *ex rel.* Humphrey, 118 S. Ct. 1384 (1998) (mem).

23. *See* State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, slip op. at 9 (Minn. Dist. Ct. May 9, 1997).

exception to privilege.[24] If there is an ongoing crime or fraud, the courts will strike claims of privilege for documents relating to that crime or fraud.

One example of the type of documents we found in the privileged documents, or so-called privileged documents, had the title, "Lung Cancer—Smoking Studies."[25] It was written by Allen Rodgman, a scientist at RJR. The date of the document is September, 1955. The document was a compilation of various studies about cancer and smoking. Among other things, this document recapped studies indicating that "[t]he increased frequency of lung carcinomas in all civilised [sic] countries is thought to be connected with the increased consumption of cigarettes which has taken place . . . ."[26] It also cited studies indicating that "the risk of developing cancer of the lung was approximately 50 times as great among those smoking 25 or more cigarettes per day as nonsmokers."[27] This document sat in the lawyer's files for forty years while the industry continued to claim that it was not proven that smoking caused lung cancer.

I have told you about just a few examples of the document wars we fought literally every day of the litigation. When we got to trial, and when the industry witnesses continued to testify along their party line, for example, "smoking isn't addictive," we could show internal documents where the tobacco industry scientists admitted that smoking was addictive.[28] We could show internal documents that pointed out why the industry publicly denied their product was addictive. One such document is from the files of the Tobacco Institute, the industry's public relations arm. In it, the name Shook, Hardy & Bacon (which is one of the industry's main national law firms) emerges: "Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as 'free choice' if the person was 'addicted'"[29]

When industry witnesses testified at trial that nicotine is not a drug, an argument that the industry is making today in a number

24. *See id.* at 28-31.
25. *See* RJR 502815280.
26. *Id.* at 289.
27. *Id.*
28. Examples include: BAT 110070791; B&W 689033415 and 665043966.
29. TIMN 0107823.

of forums, including their effort to stave off FDA regulation, we could show documents like the 1969 document written by William Dunn, who was known at Philip Morris as the "nicotine kid." In it, William Dunn says, "I would be more cautious in using the pharmic-medical model—do we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous FDA implications to having such conceptualization go beyond these walls."[30]

At trial, when the industry witnesses testified that they did not manipulate nicotine, we had a document from the files of R.J. Reynolds detailing how RJR was reverse-engineering the Marlboro cigarette to find out why Philip Morris was increasing sales so dramatically with its Marlboro brand.[31] Reynolds concluded, in 1973, that the reason was that Philip Morris had increased the pH level of the cigarettes, which led to a higher percentage of free base nicotine in the cigarettes. The result was that Reynolds embarked on its own research and development program to duplicate the Marlboro cigarette.

When the industry witnesses testified at trial that it is not proven that cigarettes cause lung cancer—and yes, they still take that position in court[32]—we showed what the industry really believed dating back to the 1950s. A document called, "Report on Visit to U.S.A. and Canada,"[33] written by three British scientists who came to the United States in 1958 and held a series of meetings with virtually every tobacco company in the United States, summa-

30. PM 1003289921.

31. *See* RJR 500991002.

32. Even in 1998, Geoffrey C. Bible, chief executive officer of Philip Morris Inc., testified in the Minnesota trial, as follows:

> Q: Did you go to your fellow CEOs and say, "Let us join together and get a blue ribbon panel of scientists to tell us does smoking cause disease?" Did you do that?
> A: No, I did not do that, because I really felt that everybody in the world believes smoking causes disease.
> Q: You don't; do you, sir?
> A: I don't know.
> . . . .
> Q: Do you know how many have died as a result of smoking?
> A: How many people have died?
> Q: Died.
> A: I don't know if anybody has died. I just don't know, no.

Transcript of Proceedings at 5734-36, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, 1998 WL 85584, at *17-*18 (Minn. Dist. Ct. Mar. 2, 1998).

33. *See* BAT 105408490.

rized the view of the people they met. They reported that, with one exception, H.S.N. Greene, the individuals with whom they met "believed that smoking causes lung cancer, if by 'causation' we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link."[34] This document sat in the industry's files for almost forty years. If this document and thousands of others had been produced back in the 1950s when the litigation was beginning, and the industry was winning cases with its claim that smoking did not cause lung cancer, the history of the tobacco litigation would have been rewritten over the past few decades.

I want to leave you with one piece of testimony from the trial. It is an example of how the documents were used at trial. The witness was Scott Appleton, who was a Brown and Williamson executive who flew into town to testify. Mike Ciresi was cross-examining him with a document that described how Brown and Williamson was planning to essentially launder scientific research through the lawyers so that Brown and Williamson could claim privilege over the documents and the research. After going through the document at some length, Mike asked the witness, "Well sir, what's being proposed is a ruse because in the operational context there wasn't going to be any attempt to distinguish what were and were not litigation documents, correct?"[35] The answer was, "Well I don't know the term you are using, a 'ruse.' I don't know what that means."[36] Mike asked, "You've never heard that?" The answer: "No, I'm sorry."[37] Questioned again, "You have never heard that?" The answer (and this is one of those memorable moments from trial) was, "Maybe it is a Minnesota term."[38]

We were sitting at counsel table saying to ourselves, "It's a ruse, you betcha. Welcome to Minnesota."

34. *Id.* at 492.

35. Transcript of Proceedings, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, 1998 WL 172993, at *30 (Minn. Dist. Ct. Mar. 2, 1998).

36. *See id.* at *31.

37. *See id.*

38. *See id.*