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CORNERED: BIG TOBACCO AT THE BAR OF JUSTICE

BY PETER PRINGLE

HENRY HOLT, 1998

In *Cornered: Big Tobacco at the Bar of Justice*, investigative journalist Peter Pringle provides an engaging account of recent events leading up to the proposed national tobacco settlement of June 20, 1997. Pringle characterizes these events, beginning in 1993, as the "Third Wave" of tobacco litigation. While the settlement is currently stalled in Congress, the events described in *Cornered* will likely have far-reaching ramifications for the public interest and the legal system in general. The concessions of the once-unbeatable tobacco industry provide encouragement to private plaintiffs seeking to challenge other industries. Similarly, the Tobacco Wars have spawned a new phenomenon where states sue for reimbursement of expenses incurred because of industries' negative externalities. Pringle's book also provides a warning about the limitations of the traditional tort system in dealing with complex issues that affect large segments of the population.

Pringle explains that the tobacco settlement is the culmination of efforts by many different groups with conflicting motivations. For example, in Mississippi, Attorney General Mike Moore and tort lawyer Dick Scruggs sought restitution for medical costs of smoking-related illnesses. In Louisiana, a group of famous (or infamous) products liability and tort lawyers led by Wendell Gauthier attempted the largest class action suit in history. Whistle blowers like Merrell Williams and Jeff Wigand disclosed potentially damning information about the industry's knowledge of the addictive and harmful nature of its product. In addition, the federal government, the media, and public interest groups assisted in applying pressure to the industry.

Pringle gives the reader a brief summary of the history of tobacco litigation before the "Third Wave." The "First Wave" began in 1954 with the publication of Ernst Wynder's results from an experiment involving the effects of condensed tobacco smoke on mice. Wynder's results proved that tobacco smoke was a carcinogen in laboratory animals, prompting some scientists to search for a link between cancer and smoking in humans. These results also prompted the tobacco companies to fund research devoted to disproving a human link. This research was heavily supervised and often censored by tobacco industry lawyers. Pringle's discussion of the "First Wave" centers mainly on the work of Dr. Clarence Cook Little, a biologist who devoted his career to producing junk science for the industry. Pringle's focus on Dr. Little is a good method of personalizing the subject matter, but it also tends to oversimplify the science involved. A reader seeking a detailed discussion of the early clashes between the industry and public health groups should look elsewhere.

During the "Second Wave," from 1983 to 1992, the tobacco industry prevailed against claimants despite mounting scientific evidence of the detrimental

effects on health caused by smoking cigarettes. Pringle attributes their success to an ironclad assumption of risk defense and an army of attorneys. Pringle presents a 1987 case tried in rural Lexington, Mississippi as an illustration of the industry's defense strategy in action. Three plaintiff's attorneys brought suit on behalf of Nathan Horton, claiming that he developed inoperable lung cancer due to smoking two packs a day for thirty years. The tobacco company responded with what Pringle colorfully describes as the "Wall of Flesh" — an army of attorneys, paralegals, scientific advisors, researchers, private investigators, and public relations consultants. They performed background checks on all five hundred names in the Lexington courthouse's jury register. They also hired local leaders of the community as consultants. These consultants' duties consisted mainly of displaying support and friendship for the company in the courtroom.

The disparity in resources between plaintiffs and the tobacco industry existing in the "Second Wave" was clearly an important factor in the industry's success. Pringle's description of this case, however, implies that there is something untoward about a defendant using all legal means in its defense. There is no reason to assume that plaintiffs would not use some of the same aggressive tactics if they possessed the financial wherewithal to do so. Pringle's description of this case likely would have benefited from the input of tobacco industry officials. Unfortunately, because tobacco industry executives and lawyers refused to speak to him, Pringle is forced to rely on documents and second-hand accounts. Tobacco executives' reluctance to speak is understandable when one considers the current anti-smoking sentiment in Congress and in the United States in general. Thus, Pringle judges the industry in absentia.

The "Third Wave" of tobacco litigation was exemplified in April 1994, when the CEOs of the seven largest tobacco companies stood side by side before congressional subcommittee, raised their right hands, and swore to tell the truth about smoking. The tobacco executives uniformly stated their opinion that nicotine is not addictive. When pressed, some executives quibbled about the definition of addiction. Representative John Bryant of Texas viewed the tobacco executives' statements with great skepticism, saying that the industry's litigation strategy would be completely wiped out if the CEOs were to admit that nicotine was addictive. Pringle's account of this event ensures that the reader will fully appreciate the extent of tobacco industry denial.

FDA Commissioner David Kessler wrote a letter in early 1994 to the Coalition on Smoking or Health in which he alleged that tobacco companies routinely added nicotine to cigarettes in order to satisfy their customers' addictions. Once proven, this statement would provide an effective counter to the industry's assumption of risk defense, since the defense usually requires the element of conscious choice on the part of the plaintiff. In addition, nicotine manipulation could provide a basis for FDA regulation of tobacco as a drug or of cigarettes as a drug delivery device.

The best part of *Cornered* involves Pringle's explanation of the basis for Kessler's beliefs. An FDA investigation uncovered the existence of a genetically altered strain of tobacco plant referred to in Brown & Williamson documents as Y1. Grown in Brazil, this strain had more than double the nicotine of regular to-

bacco. The FDA was able to confirm that the plant had entered the United States via a shipment from the Cayman Islands to Brown & Williamson headquarters in Kentucky. Brown & Williamson officials admitted that they had used Y1 as a blending tool in some brands of their cigarettes. This admission led Kessler to conclude that Brown & Williamson was manipulating nicotine levels, thus implying that the company knew of nicotine's addictive nature. Pringle's account gives the reader an insider's look at the way federal regulatory agencies conduct investigations, and also provides some great background material about Kessler.

Another serious threat to the industry came in May 1994. Mississippi attorney general Mike Moore, with the aid of products liability lawyer Dick Scruggs, filed a suit for reimbursement of state Medicaid expenses in treating smoking-related illnesses. Mississippi's claims were based on restitution, unjust enrichment, indemnity, public nuisance, and equity doctrines. The tobacco companies could not use the assumption of risk defense in this type of case because the state of Mississippi could not choose to smoke. Over the next few years many state attorneys general brought similar suits, increasing the pressure on Big Tobacco. Overall, Pringle does an adequate job in explaining the legal theory behind the state suits. He devotes very little of his book, however, to the efforts of the attorneys general, which seems peculiar considering that they played a prominent role in both the legal claims and in the settlement. Pringle prefers to focus on Dick Scruggs when discussing the state suits.

Pringle does provide a detailed description of the efforts of Wendell Gauthier and Peter Castano, both New Orleans attorneys and close friends. In 1993, when Castano died of lung cancer due to smoking, Gauthier decided to form a joint enterprise with about sixty law firms in order to challenge the tobacco industry. Each law firm pledged $100,000 a year as working capital for their suit. Many of the lawyers involved had developed reputations as scourges of industry; a select few had earned formidable nicknames like the "King of Torts," the "Master of Disaster," and the "Asbestos Avenger." To be sure, some of these lawyers were motivated by the public interest, but most were attracted by the huge profit potential. Pringle does not pull any punches when describing the lavish lifestyles and huge egos of certain members of the group. For example, Pringle attributes the origin of the term "ambulance chaser" to Melvin Belli. Belli once complained that the term was not strictly accurate because he always reached the scene of accidents before ambulances. Pringle also emphasizes the cutthroat competition between tort lawyers in obtaining clients with his description of the lawyers' maneuverings after the Union Carbide disaster in Bhopal, India.

Seizing on the recently publicized claim that the industry manipulated nicotine levels, the group decided to file a blockbuster class action suit representing all smokers in the United States. They felt confident of victory due to the fact that tobacco companies could not use their traditional assumption of risk defense if it were proven that nicotine was addictive. Unfortunately, the Fifth Circuit Court of Appeals decertified the class action on May 23, 1995. Some members of the group responded to this setback by filing smaller suits against the tobacco industry in courts all over the country. Other members of the group are currently di-

versifying into suits against gun manufacturers.[1] In devoting a substantial portion of his book to Gauthier's group, Pringle emphasizes the importance of a private litigation explosion in forcing the tobacco industry to the bargaining table. Some readers may feel, however, that Pringle is placing too much emphasis on private efforts, considering that Pringle later admits that Dick Scruggs and the state attorneys general were the prime movers behind the settlement.

Pringle devotes a chapter to the negotiations involved in drafting the tobacco settlement. Ultimately the reader is left with the impression that each side was seeking to extract the maximum benefit for itself. This is the ideal of bargaining in most situations, but in this case the parties intended the result of their bargaining to be enacted into federal law — effective against the entire nation. With so much at stake, it was absurd to think that the parties could effectively represent themselves and the public at large. Under the terms of the settlement, the industry agreed to pay a total of $368.5 billion over the first twenty-five years. After the first twenty-five years the industry would pay $8.5 billion rising to $15 billion annually. The industry also agreed to substantially all of the FDA's proposed rules concerning underage smoking. In exchange, the industry escaped direct FDA regulation of nicotine as a drug. The industry also won a prohibition on punitive damage awards and class actions.

Critics quickly attacked what they perceived as a sweetheart deal for the industry. The industry could obviously afford to pay more, considering Wall Street's favorable reaction to the deal. Tort lawyers not privy to the deal complained that punitive damages were necessary in order to make it worthwhile to bring suits against the companies. Public interest groups deplored the prohibition on FDA regulation. Congress refused to enact the settlement into law. Pringle concludes *Cornered* with the observation that reliance on the legal system had reached its limits in the tobacco controversy. In making this observation, Pringle alludes to the larger point that public policy should be dictated by legislatures rather than by parties concerned solely with their own interests. This point is indisputable. Parties have difficulty in representing adverse interests and they also have an incentive to compromise with their opponents; indeed, successful bargaining necessarily results in compromise. Congress is ideally suited to represent the public interest and does not need to bargain with the industry for concessions.

Cornered is a must-read because it presents an entertaining account of the legal system's victory over one of the most powerful industries in the United States. It is also an important work due to its documentation of events that are likely to have a significant impact on the development of the public interest and the law in general. Many of the tactics used against the tobacco companies can be used against other industries that impose large external costs on the public. For example, officials in New Orleans and Chicago, apparently inspired by the

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[1] *See* Paul M. Barrett, *Other Cities May Follow New Orleans In Antigun Suit, but Fight Will Be Hard*, WALL ST. J., Nov. 2, 1998, at A16. Wendell Gauthier is featured prominently in this article concerning a suit by the city of New Orleans against gun manufacturers for reimbursement of expenses incurred in dealing with gun violence.

success of state tobacco claims, have brought suits against gun manufacturers on similar theories.[2] Philadelphia and Los Angeles are also considering suits.[3] The settlement should also fortify private plaintiffs with the knowledge that any defendant, no matter how successful in litigation, might someday be defeated.

Brenden J. Murphy

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[2] *See* Paul M. Barrett, *Chicago Sues Gun Makers in Battle's Second Shot*, WALL ST. J., Nov. 13, 1998, at A3.

[3] *See id.*