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IN THE OHIO SUPREME COURT

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CASE NO. 2006-1212

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CERTIFIED QUESTION OF STATE LAW  
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN  
DIVISION  
CASE NO. 3:06 CV 40010

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MELISA ARBINO,  
*Petitioner,*

v.

JOHNSON & JOHNSON, ET AL.  
*Respondents.*

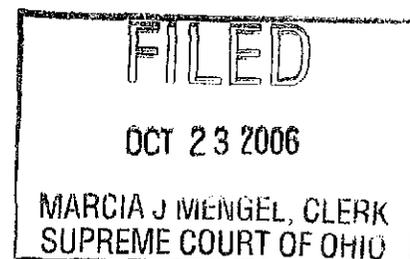
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MERIT BRIEF OF *AMICUS CURIAE* TOBACCO PUBLIC POLICY CENTER  
AT CAPITAL UNIVERSITY LAW SCHOOL IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE* AND SUMMARY OF ARGUMENT

*Amicus curiae*, the Tobacco Public Policy Center (“TPPC”), is a project of Capital University Law School, a tax-exempt non-profit institution of higher education founded in 1903 and based in Columbus, Ohio. The TPPC was established in February 2005 with funding from the Ohio Tobacco Prevention Foundation. It serves as a legal resource on tobacco control issues for public health advocates and policymakers, particularly within Ohio. The TPPC’s interest in this case arises from its goal of using the law to reduce and prevent tobacco use.

The TPPC is a member of the Tobacco Control Legal Consortium (“TCLC”), a national network of legal centers providing legal technical assistance to public officials, health professionals and advocates in addressing legal issues related to tobacco and health, and supporting public policies that will reduce the harm caused by tobacco use in the United States. The TPPC and the TCLC prepare legal briefs as *amicus curiae* in cases where their experience and expertise may assist courts in resolving tobacco-related legal issues of substantial significance. Recently, the TPPC and the TCLC joined in an *amicus curiae* brief submitted in United States v. Philip Morris USA, Civil Action No. 99-2496 (D.D.C., August 17, 2006). On behalf its member centers, the TCLC submitted an *amicus curiae* brief in the pending U.S. Supreme Court case Williams v. Philip Morris USA, No. 05-1256 (U.S. 2006). Because this case shares several significant issues with Williams v. Philip Morris USA, this brief borrows substantially from the *amicus curiae* brief submitted by the TCLC in that case.

Drawing on its expertise and experience regarding the intersection of the law, tobacco, and public health, *amicus curiae* TPPC endeavors in this brief to provide insight into the crippling impact that the limitations on punitive damages contained in R.C. § 2315.21 would have on litigation against the tobacco industry.<sup>1</sup> Despite the tobacco industry's decades-long conspiracy to defraud the public, which was recently documented in tremendous detail by the U.S. District Court in United States v. Philip Morris USA, R.C. § 2315.21 deprives those injured by the tobacco industry's misconduct to their right to a trial by jury by making litigation financially impossible. Without the potential for significant punitive damages, the tobacco companies will have no incentive to change their egregious conduct, which has been responsible for millions of deaths and injuries.

### STATEMENT OF THE CASE

This Court has agreed to answer certified questions of state law from the United States District Court from the Northern District from Ohio, Western Division, No. 3:06 CV 40010. The questions involve the constitutionality of certain sections of R.C. § 2315. This brief will address only the fourth question posed by the United States District Court: "Is Ohio Revised Code § 2315.21, as amended by Senate Bill 80, effective, April 7, 2005, unconstitutional on the grounds as stated by the Plaintiffs." R.C. § 2315.21 limits the amount of punitive damages that can be awarded in Ohio civil actions.

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<sup>1</sup> "Tobacco industry" can be defined in various ways. For purposes of this brief, the "tobacco industry" is synonymous with cigarette manufacturers who were defendants in United States v. Philip Morris USA, Civil Action No. 99-2496 (D.D.C., August 17, 2006).

## ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

### Proposition of Law

Ohio Revised Code § 2315.21, as amended by Senate Bill 80, effective, April 7, 2005, unconstitutionally limits punitive damages available in Ohio civil actions.

#### **I. The Punitive Damages Limitations Contained in Ohio Revised Code § 2315.21 Will Fail to Deter Misconduct by the Tobacco Industry and Other Similarly Situated Defendants, Frustrating the Purpose of Punitive Damages**

This Court has determined time and time again that punitive damages are meant not to compensate a plaintiff, nor to bring a defendant to financial ruin, but to serve as an example in order to deter future misconduct. See Dardinger v. Anthem Blue Cross & Blue Shield, 98 Ohio St. 3d 77, 102 (Ohio 2002); Wiles v. Medina Auto Parts, 96 Ohio St. 3d 240, 248 (Ohio 2002); Wightman v. Consolidated Rail Corp., 86 Ohio St. 3d 431, 439 (Ohio 1999) (“A large disparity [between compensatory damages and punitive damages] is allowable because a punitive damages award is more about a defendant's behavior than the plaintiff's loss); Moskovitz v. Mt. Sinai Med. Ctr., 69 Ohio St. 3d 638, 651 (Ohio 1994) (“The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.”).

With the tobacco industry and other large industries, the availability of significant punitive damages may be one of the only ways to deter egregious misconduct. As it currently stands, however, the limited punitive damages available under R.C. § 2315.21 are insufficient to serve as a significant deterrent to extremely wealthy defendants.

As discussed below, the tobacco industry has engaged in a decades-long scheme to defraud the public. This fraudulent conspiracy was outlined in meticulous detail in

United States v. Philip Morris USA, Civil Action No. 99-2496 (D.D.C., August 17, 2006) (Kessler, J.). Although the general outlines of this conspiracy have been known for years, the “scorched earth” litigation tactics of the tobacco industry have prevented most plaintiffs from ever reaching a courtroom. Thus, in those few cases against the tobacco industry that are able to proceed to trial, it is essential that significant punitive damages be available. Otherwise, the purpose of punitive damages – “to punish and deter certain conduct” – will be completely subverted. Moskovitz, 69 Ohio St. 3d at 651.

**A. As Confirmed by Numerous Court Decisions, the Tobacco Industry Engaged in a Decades-Long Scheme to Defraud the Public**

For years, the tobacco industry conspired to defraud the public and “falsely denied, distorted and minimized the significant adverse health consequences of smoking.” United States v. Philip Morris USA, Civil Action No. 99-2496 at 219 (D.D.C., August 17, 2006). This finding was contained in the 1,683 page opinion that Judge Gladys Kessler issued on August 17, 2006, detailing the history of the tobacco industry’s misconduct and finding that the industry had committed numerous violations of the Racketeer Influence and Corrupt Organizations (“RICO”) Act, 18 U.S.C. 1962(c) and (d). This conclusion followed what was arguably the most comprehensively litigated case in the history of the U.S. legal system. In all, the seven-year litigation “involved the exchange of millions of documents, the entry of more than 1,000 Orders, and a trial which lasted approximately nine months with 84 witnesses testifying in open court.” Id. at 3.

Judge Kessler’s conclusions, backed by thorough documentation, were blunt:

[This case] is about an industry, and in particular these Defendants, that survives, and profits, from selling a highly addictive product which causes diseases that lead to staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly, and with enormous skill and sophistication, denied these facts to the public, to the Government, and to the public health community. Moreover, in order to sustain the economic viability of their companies, Defendants have denied that they marketed and advertised their products to children under the age of eighteen and to young people between the ages of eighteen and twenty-one in order to ensure an adequate supply of “replacement smokers,” as older ones fall by the wayside through death, illness, or cessation of smoking. In short, Defendants have marketed and sold their lethal product with zeal, with deception, with a single-minded focus on their financial success, and without regard for the human tragedy or social costs that success exacted.

Id. at 3-4.

Judge Kessler noted that many elements of the fraudulent conduct detailed in her decision are ongoing. See, e.g., id. at 877 (“Despite Their Internal Knowledge, Defendants’ Marketing and Public Statements About Low Tar Cigarettes Continues to Suggest that They Are Less Harmful than Full-Flavor Cigarettes.”); id. at 1397 (“Defendants Continue to Obscure the Fact that [Secondhand Smoke] is Hazardous to Nonsmokers.”). She concluded:

The evidence in this case clearly establishes that Defendants have not ceased engaging in unlawful activity. Even after the Complaint in this action was filed in September 1999, Defendants continued to engage in conduct that is materially indistinguishable from their previous actions, activity that continues to this day.

Although Judge Kessler’s decision is the most comprehensive and thorough legal history of the tobacco industry’s misconduct, other courts have similarly detailed the

tobacco industry's decades-long record of fraud. See, e.g., Williams v. Philip Morris USA, 127 P.3d 1165, 1181-82 (Or. Sup. Ct. 2006) ("Philip Morris, with others, engaged in a massive, continuous, near-half-century scheme to defraud the plaintiff and many others, even when Philip Morris always had reason to suspect – and for two or more decades absolutely knew – that the scheme was damaging the health of a very large group of Oregonians – the smoking public – and was killing a number of that group.")<sup>2</sup>; Engle v. Liggett Group, Inc., --- So. 2d. ---, 2006 Fla. LEXIS 1480, \*73-\*74 (Fla. Sup. Ct. 2006); Henley v. Philip Morris, Inc., 9 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004), aff'd, 18 Cal. Rptr. 3d 873 (2004); Boeken v. Philip Morris, Inc., 127 Cal. App. 4th 1640 (Cal. Ct. App. 2005).

**B. Significant Financial Penalties Were Not Available in United States v. Philip Morris USA**

Despite her comprehensive findings of tobacco industry fraud in United States v. Philip Morris USA, and her conclusion that the tobacco industry was continuing to engage in illegal conduct, Judge Kessler was unable to impose any substantial financial penalty on the defendants. As Judge Kessler explained:

Unfortunately, a number of significant remedies proposed by the Government could not be considered by the Court because of a ruling by the Court of Appeals in United States v. Philip Morris, USA, Inc., et al., 396 F.3d 1196 (D.C. Cir. 2005). In that opinion, the Court held that, because the RICO statute allows only forward-looking remedies to prevent and restrain violations of the Act, and does not allow backward-looking remedies, disgorgement (i.e., forfeiture of ill-gotten gains from past conduct) is not a permissible remedy.

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<sup>2</sup> The U.S. Supreme Court is currently reviewing questions relating to the punitive damages awarded in Williams v. Philip Morris USA. The facts of the defendant's misconduct, however, are not at issue in the appeal.

Applying this same legal standard, as it is bound to do, this Court was also precluded from considering other remedies proposed by the Government, such as a comprehensive smoker cessation program to help those addicted to nicotine fight their habit, a counter marketing program run by an independent entity to combat Defendants' seductive appeals to the youth market; and a schedule of monetary penalties for failing to meet pre-set goals for reducing the incidence of youth smoking.

U. S. v. Philip Morris USA, Civil Action No. 99-2496 at 3. Thus, although she had detailed a decades-long pattern of fraud and multiple violations of the RICO statute, Judge Kessler was able only to order changes in some marketing practices and to order that the tobacco industry desist from violating the RICO statute in the future.

Clearly, these limited remedies will not serve as a deterrent to future tobacco industry misconduct, especially given the immense profitability of its past pattern of fraud. The potential for significant punitive damages in private civil actions is needed to deter future industry misconduct.

### **C. Punitive Damages Are Necessary to Deter Tobacco Industry Misconduct**

As revealed by internal company documents, witness testimony, and judicial findings, the tobacco companies have long used their enormous wealth to make it exceedingly difficult for potential plaintiffs to find lawyers and nearly impossible for those that do to maintain their cases. Such behavior is evidenced by a now-infamous letter from R.J. Reynolds Tobacco Company counsel J. Michael Jordan to "Smoking and Health" lawyers. In the letter, Jordan wrote:

the aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and

expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his.

Memorandum from Mike Jordan to S&H Attorneys (Apr. 28, 1988), at

[http://www.kazanlaw.com/verdicts/images/exb\\_d\\_sob.gif](http://www.kazanlaw.com/verdicts/images/exb_d_sob.gif) (last visited Oct. 9, 2006). See

also Haines v. Liggett Group, Inc., 814 F. Supp. 414, 421 (D.N.J. 1993) (citing this

letter). The tobacco industry's "scorched earth" litigation techniques have been a key

part of the industry's largely successful efforts to evade legal responsibility for its

misconduct.

Since few cases against the tobacco industry have proceeded to trial (and fewer have resulted in the award of damages, much less damages sustained on appeal), the tobacco industry has had little incentive to change its conduct. The result has been nothing short of a public health catastrophe. See, e.g., FDA v. Brown & Williamson Tobacco Corp., 539 U.S. 120, 125 (2000) (noting that cigarette smoking "is one of the most troubling public health problems facing our Nation today" and results in more than 400,000 deaths in the United States each year). The extent of the public health toll imposed by tobacco use may be directly tied to the fact that the tobacco industry has been able to avoid legal liability for its conduct. As our colleagues at the Tobacco Control Resource Center at Northeastern University Law School recently wrote:

[A]lthough the tobacco industry has had a number of adverse judgments against it, it has made payments to only four plaintiffs in the history of smoking and health litigation (as of this paper's writing). Under these circumstances, the tobacco companies have had no economic incentive to take proper safety precautions, and their prices have not reflected the actual cost of using their products. The result has been "too little care and . . . excessive output" – i.e., the continued sale of billions of packages of a

lethal product with revenues in the billions of dollars – coupled with consumers who have no recourse for the resultant harm.

Sara D. Guardino & Richard A. Daynard, Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages, 67 U. Pitt. L. Rev. 1, 37-38 (2005) (quoting A. Mitchell Polinsky, An Introduction to Law and Economics 97 (2d ed. 1989).

According to general principles of law and economics, a defendant's success at avoiding liability for past misconduct, as well as the profitability of its misdeeds, must be taken into account when damages are awarded. As noted in Mathias v. Accor Economy Lodging, punishment should be increased "when the probability of detection is very low (a familiar example is the heavy fines for littering) or the crime is potentially lucrative (as in the case of trafficking in illegal drugs)." 347 F.3d 672, 676 (7th Cir. 2003) (Posner, J.). Otherwise, the defendant will find it more profitable to pay the occasional legal penalty while continuing to engage in the wrongful or illegal conduct. In such cases, insufficient punitive damages fail to serve their purpose of deterring wrongful conduct. See Ciralo v. City of New York, 216 F.3d 236, 244 (2d Cir. 2000) (Calabresi, J., concurring) ("Since thieves will not always be caught, they must be penalized by more than the cost of the items stolen on the occasions on which they *are* caught. This 'multiplier' is essential to render a theft unprofitable and properly deter it. . . . [S]cholars have recognized that punitive damages can serve the same function in tort law.").

In the case of the tobacco industry, its rate of "detection" (in the form of plaintiffs' cases that are able to proceed to trial) is extremely low, and the profitability of

its fraudulent conduct has been enormous (as discussed below). Thus, significant punitive damages must be available in those few cases that actually do proceed to trial. See Guardino & Daynard, 67 U. Pitt. L. Rev. at 65 (“[I]n the rare instance that a smoking and health plaintiff is able to find an attorney, withstand the industry's onslaught of personal and financial attacks throughout the discovery process, obtain a judgment in its favor at trial and hold on to that judgment throughout the appeals process, it is imperative that the industry be compelled to pay a large punitive damages award.”). Otherwise, the tobacco industry – and other similarly situated industries – will have no incentive to cease their misconduct.

**D. Maximum Damages Available Under Ohio Revised Code § 2315.21 Will Not Deter Tobacco Industry Misconduct**

The fraud that kept individuals smoking for decades has allowed the top cigarette manufacturers to be some of the most profitable companies in the world. See Williams v. Philip Morris USA, 48 P.3d 824, 841 (Or. Ct. App. 2002) (noting that Philip Morris's “net worth is over \$17 billion, and its profits for the year closest to the trial were over \$1.6 billion, or approximately \$ 30.7 million per week.”); United States v. Philip Morris USA, Civil Action No. 99-2496 at 1501 (D.D.C., August 17, 2006) (“Defendants participated in the Enterprise’s overarching scheme to defraud smokers and potential smokers in order to maximize their profits by preserving and enhancing the market for cigarettes, to avoid costly liability judgments, to derail attempts to make smoking socially unacceptable, and to sustain the cigarette industry.”). The limited punitive damages available under R.C. § 2315.21 will not deter misconduct by the tobacco industry or other profitable industries.

Under R.C. § 2315.21(D)(2)(a), punitive damages are capped in most cases at two times the amount of compensatory damages awarded. This strict formula makes it mathematically impossible to impose punitive damages on large tobacco companies (or other large industries) that will serve as a meaningful deterrent. For example, as noted in the previous paragraph, the weekly profit of Philip Morris in 1996 was \$30.7 million per week. Thus, even if compensatory damages were calculated to be \$1 million (likely indicating extremely harmful conduct), punitive damages would be capped at \$2 million. That \$2 million equates to the profits garnered by Philip Morris in less than half a day of business. Given the company's successful record of deterring litigation with its "scorched earth" litigation techniques (as discussed in more detail below), it is likely that very few cases against it will ever reach a judgment. The potential of at most \$2 million in punitive damages – even if replicated a handful of times – would hardly impact the company's calculation of whether to engage in questionable conduct, especially if such conduct would be highly profitable.

Other large companies that generate profits at a similar rate would face similar cost-benefit analyses. R.C. § 2315.21 virtually eliminates tort law as a means of deterring wrongful conduct with respect to these companies.

## **II. Punitive Damages Limits in Ohio Revised Code § 2315.21 Will Make It Impossible for Litigants Injured by Tobacco Company Misconduct to Seek Redress**

### **A. Limits on Punitive Damages Violate the Right to Trial by Jury**

As this Court concluded in State ex rel Ohio Acad. of Trial Lawyers v. Sheward, strict limits on punitive damages violate the right to a trial by jury contained in Section 5, Article I of the Ohio Constitution. 86 Ohio St. 3d 451, 483-485 (Ohio 1999). Given that the “multiplier” limit on punitive damages contained in R.C. § 2315.21 is even lower than that addressed in Sheward, the principle of *stare decisis* dictates that § 2315.21 is similarly unconstitutional. See, e.g., Hedges v. Nationwide Mut. Ins. Co., 109 Ohio St. 3d 70, 76 (Ohio 2006) (“The doctrine of *stare decisis* provides continuity and predictability in our legal system.”).

In tobacco-related cases, the limits on punitive damages contained in R.C. § 2315.21 will violate a potential litigant’s right to a trial by jury in a very real way, because the limitations contained in the statute will make it financially impracticable to bring a lawsuit against the tobacco industry.

Given the tobacco industry’s continued reliance on “scorched earth” litigation techniques, the strict limitation on punitive damages contained in R.C. § 2315.21 makes it financially impossible to bring a lawsuit against the tobacco industry, despite its established history of fraudulent conduct. Moreover, these limits may encourage other well-funded defendants to engage in similar conduct to avoid legal liability for their misdeeds.

**B. The Provision Limiting Punitive Damages to the First Plaintiff Compounds the Denial of the Right to Trial by Jury**

The unconstitutional abridgement of the right to trial by jury is further compounded by R.C. § 2315.21(D)(5), which provides that punitive damages are either unavailable or reduced if a previous plaintiff has been awarded punitive damages to the same course of conduct. This same situation was squarely addressed by this Court in Sheward:

Indeed, R.C. 2315.21(D)(1)'s violation of the right to trial by jury becomes particularly egregious when considered in conjunction with the added provisions of R.C. 2315.21(D)(3)...Under R.C. 2315.21(D)(3)(a), all tort victims are denied the right to have a jury determine punitive damages against a particular tortfeasor if, at some previous time, in any state or federal court, some tort victim or victims collected against that tortfeasor a punitive damage award the aggregate sum of which exceeds the amounts specified in R.C. 2315.21(D)(1). The constitutional right to have a jury determine both the liability and amount of punitive damages to be awarded thereby becomes a lottery prize, going to that victim or victims fortunate enough to be the first to win and collect it. All others simply lose their constitutional right to a jury trial as to punitive damages.

Sheward, 86 Ohio St. 3d 451, 485. The situation here is no different.

Given the immense scope of the tobacco industry's past misconduct and the immense profitability of that course of conduct, R.C. § 2315.21 provides virtual immunity for past misdeeds. This is a clear violation of the Ohio Constitution's right to a trial by jury, and it will only serve to embolden the tobacco industry and other similarly situated tortfeasors.

### **III. The Court Must Be Able to Consider Litigation Tactics in Assessing Punitive Damages**

#### **A. Tobacco Companies Use Wealth Strategically to Deter and Impede Litigation ("Scorched Earth" Litigation Tactics)**

The tobacco industry has been considered a pioneer in “scorched earth” litigation tactics. See, e.g., Christine Hatfield, The Privilege Doctrines - Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?, 16 Pace L. R. 525, 558 (1996) (“Throughout the examined history of litigation in which the tobacco industry has been a defendant, the industry has adopted a no-compromise litigation unique in the annals of tort litigation.”). From the time that the first concerns about smoking and health were raised, the policy of the tobacco industry has been to fight every lawsuit as aggressively as possible. The tobacco industry’s practices have included (1) never settling a lawsuit, (2) engaging in extreme investigation techniques, (3) destroying documents, and (4) filing motions for tactical advantage. All of these activities have been designed in part to increase the cost of litigation for the plaintiff to an unsustainable level.

One well-known example is Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992). In that case, the plaintiff won a verdict of \$400,000 at trial. Liggett appealed all the way to the Supreme Court, where the court held that the plaintiff’s claims based on negligent failure to warn were preempted by federal law, but remanded the case for consideration of fraud and misrepresentation claims. The plaintiff was forced by cost constraints to abandon the case, after spending approximately \$3 million. By the time the case was dropped, Liggett had already spent \$75 million on the litigation, more than 185 times the amount of the verdict. Robert L. Rabin, The Third Wave of Tobacco Tort Litigation, in Regulating Tobacco 176, 177-78 (Robert L. Rabin & Stephen D. Sugarman

eds., 2001). Liggett's conduct echoed the strategy employed by R.J. Reynolds to win litigation simply by outspending the other side and driving up litigation costs.

If defendants are successful at using their superior wealth to deter or outlast a large number of plaintiffs with legitimate claims (as tobacco industry defendants demonstrably have been), it is important for juries to take that information into account when calculating the appropriate level of punitive damages. Otherwise, wealthy defendants may find it profitable to adopt the abusive litigation tactics adopted by the tobacco industry. If punitive damages cannot be adjusted to take into account the defendant's wealth and the impact of the defendant's conduct, then "deep pocket" plaintiffs will be able to use their overwhelming wealth to deny potential plaintiffs access to the courts.

Some of the well-documented "scorched earth" litigation tactics of the tobacco industry are discussed in more detail below.

### **1. Never Settling a Lawsuit**

A central strategy for the tobacco industry's approach to litigation "is a lavishly financed and brutally aggressive defense that scares off or exhausts many plaintiffs long before their cases get to trial." Patricia Bellew Gray, Legal Warfare: Tobacco Firms Defend Smoker Liability Suits With Heavy Artillery, Wall St. J., Apr. 29, 1987 at 25. Those plaintiffs who proceed with their cases "are vastly outgunned," encountering the tobacco industry's "overwhelming strength and prowess at every turn." Id.

As J.F. Hind, an R.J. Reynolds director from 1979 to 1980, stated, the industry must “[v]igorously defend any case; look upon each as being capable of establishing dangerous precedent and refuse to settle any case for any amount.” J.F. Hind, Report Concerning Smoking and Health Prepared by RJR Employee Providing Confidential Information to RJR In-House Legal Counsel, to Assist in the Rendering of Legal Advice, and Transmitted to RJR Managerial Employee, Bates: 505574976-505574977, [http://tobaccodocuments.org/bliley\\_rjr/505574976-4977.html](http://tobaccodocuments.org/bliley_rjr/505574976-4977.html), at 50557-4977 (June 29, 1977). As a result, the tobacco industry has generally adhered to a strategy of fighting all lawsuits, whatever the cost, and never considering even a modest settlement.

## **2. Engaging in Extreme Investigation Techniques**

The tobacco industry has engaged in extreme investigatory techniques, again with the goal of making litigation as costly as possible for the other side. For example, one industry document instructs investigators working on smoking litigation for Philip Morris to interview the plaintiff’s co-workers, supervisors, neighbors, friends, relatives, schoolmates, teachers, and athletic coaches in order to learn about factors such as the plaintiff’s lifestyle. International Product Liability Conference 11/12-13/1992, Bates: 2501196322-2501196529, [http://tobaccodocuments.org/bliley pm/27390.html](http://tobaccodocuments.org/bliley_pm/27390.html), at 2501196360 (Nov. 1, 1992). Indeed, tobacco companies have been known to notice depositions of “anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses of family members, neighbors, and store owners in the neighborhood where plaintiff lived.” William E. Townsley & Dale K. Hanks, The Trial

Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair, 4 Tob. Prod. Litig. Rptr. 4.11 (1989). Such extensive discovery is geared far more at intimidating and outspending plaintiffs than at obtaining relevant or admissible evidence.

A document from a collection of discovery materials originating with Brown & Williamson Tobacco Company was prepared by the law firm of Jones, Day, Reavis & Pogue. It urges that a defense oriented pre-trial record be created that involves the "taking of extensive admission-oriented depositions" because this experience would impress "upon the plaintiffs, their lawyers, and their experts the seriousness of the commitment they must make in bringing these cases." Jones Day, Smoking and Health Litigation-Tactical Proposals, Bates: 680712261-680712337, <http://tobaccodocuments.org/ness/38741.html> (Aug. 10, 1985).

The "General Patton" strategy of sparing no expense to force the plaintiff to spend all of its money has been documented industry-wide as a means to discourage litigation. It is part of a pattern of conduct that helps the tobacco industry escape liability in the civil justice system.

### **3. Destroying Documents**

Although document destruction clearly violates the Model Rules of Professional Conduct (whereas some of the practices outlined above could be considered as stretching the boundaries of acceptable "zealous representation"), the tobacco industry has a history of engaging in this activity as well. Model R. Prof'l Conduct, R. 3.4 ("A lawyer shall not

. . . unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value [and a] lawyer shall not counsel or assist another person to do any such act. . . .”); see also Ohio Code Prof'l Resp., E.C. 7-27 (“Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce.”). Strict limits on punitive damages may mean that such conduct can be conducted with impunity. See Thayer v. Liggett Myers Tobacco Co., No. 5314, 1970 U.S. Dist. LEXIS 12796, at \*18 (W.D. Mich., Feb. 20, 1970) (noting that with knowledge that “plaintiff could not afford the luxury of a mistrial,” the defendant can “confidently risk tactics that would normally be deterred by this sanction.”).

A 1969 memorandum from Murray Senkus, a R.J. Reynolds chemist who ultimately became its Director of Scientific Affairs, to R. J. Reynolds General Counsel Max H. Crohn states: “We do not foresee any difficulty in the event a decision is reached to remove certain reports from Research files. Once it becomes clear that such action is necessary for the successful defense of our present and future suits, we will promptly remove all such reports from our files.” Murray Senkus, Memorandum Concerning Scientific Reports Prepared by R. J. Reynolds Scientist Working on Behalf of the Legal Department Legal Counsel for the Purpose of Providing Confidential Information to Assist in the Rendering of Legal Advice and Concerning Activities Performed on Behalf of the Legal Department, Bates: 500284499, [http://tobaccodocuments.org/bliley\\_rjr/500284499.html](http://tobaccodocuments.org/bliley_rjr/500284499.html) (Dec. 18, 1969).

More recently, in pretrial discovery during the U.S. Department of Justice RICO litigation, the court sanctioned Philip Morris for violating its own document retention policy in self-serving ways by destroying potentially important e-mails. Judge Kessler wrote:

Despite the lengthy submissions and explanations, there is no question that a significant number of emails have been lost and that Philip Morris employees were not following the company's own internal procedures for document preservation. What is particularly troubling is that Phillip Morris specifically identified at least eleven employees who failed to follow the appropriate procedures, and that those eleven employees hold some of the highest, most responsible positions in the company. These individuals include officers and supervisors who worked on scientific, marketing, corporate, and public affairs issues that are of central relevance to this lawsuit.

Specifically, they include, among others, the Director of Corporate Responsibility, the Senior Principal Scientist in Research Development and Engineering, and the Senior Vice President of Corporate Affairs. All but one of the eleven employees were noticed for deposition by the United States.

United States v. Philip Morris USA, Inc., No. 99-2496 at 2 (D.D.C., Memorandum and Opinion, July 21, 2004). The Court also noted, “it is astounding that employees at the highest corporate level in Philip Morris, with significant responsibilities pertaining to issues in this lawsuit, failed to follow Order #1, the document retention policies of their own employer.” Id. at 4.

#### **4. Filing Motions for Tactical Advantage**

Tobacco defendants are infamous among plaintiff's attorneys for filing a bewildering number of motions. One internal industry document instructs that “it is critical to file a series of motions in limine before each trial,” to gain the “slight tactical advantage found in forcing plaintiff's counsel, on the eve of trial, to respond to such

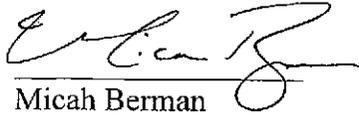
motions and to formulate alternative trial strategies in the event that any of defendants' motions are granted." Jones Day, Smoking and Health Litigation-Tactical Proposals, Bates: 680712261, <http://tobaccodocuments.org/ness/38741.html> (Aug. 10, 1985). This advice comes perilously close to violating Federal Rule of Civil Procedure Rule 11, which prohibits filing motions for "any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigation." Fed. R. Civ. P., R. 11.

All of these tactics are used to increase the cost of litigation to plaintiffs' attorneys and to make it as expensive as possible to bring a lawsuit against the tobacco industry. Many of these tactics also constitute misconduct in and of themselves and deserve to be taken into account when determining the appropriate level of punitive damages. R.C. § 2315.21 does not allow consideration of these factors in a meaningful way, because of the "multiplier" limit constraining punitive damages awards. As a result, R.C. § 2315.21 may inadvertently encourage such abusive conduct by the tobacco industry and other similarly situated defendants.

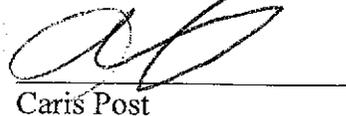
## **CONCLUSION**

*Amicus* respectfully requests that the Court find that R.C. § 2315.21, as amended by Senate Bill 80, is unconstitutional. Such a finding would accord with this Court's previous rulings and would allow punitive damages to serve their traditional function of deterring harmful and egregious misconduct.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

A copy of the foregoing has been served this 23<sup>rd</sup> day of October, 2006, by U.S.

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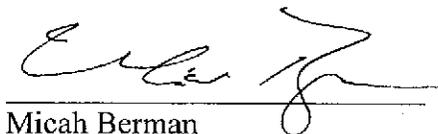
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