

**By Elizabeth M. Whelan
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Last week, a Los Angeles jury awarded a cancer-stricken smoker, 58-year-old Richard Boeken, more than \$3 billion from cigarette manufacturer Philip Morris. It was the largest judgment ever made in an individual smoker's suit against Big Tobacco.

Public health advocates applauded the verdict, saying it is high time that the industry be held accountable for decades of deception about the dangers of smoking. But this anti-tobacco verdict seems to have triggered a major backlash against anti-tobacco causes -- and against litigation against tobacco companies in particular.

Among political commentators, it is not just the Rush Limbaughs of the world who are irate. Wrote Kathleen Parker, a columnist for the Orlando (Fla.) Sentinel, "It's sad, but [Boeken] made a choice, and now he's trying to blame someone with big pockets for his poor judgment. Juries should not help people like this pick those pockets."

An editorial in the Salt Lake Tribune complained: "Where was this guy living when he puffed all those packs -- a deserted island? Certainly he was not living in the United States, where, for almost 40 years, cigarette packs have carried government warnings that tell smokers probably the only thing more harmful to your health than smoking would be standing in the middle of a high-level nuclear waste dump for 40 years."

The emerging sympathy for tobacco companies -- as well as a renewed faith in their economic strength and prospect for growth -- was evident this week when Florida overturned its ban on investments in tobacco stock, deciding that its pension plans would benefit from the predicted impressive increases in the value of tobacco stocks. The Boeken settlement was a victory for anti-tobacco activists, but it had one unintended consequence: Its sheer size led many to side with the tobacco industry, ignoring just how egregious its deceptions have been.

Those who condemn the Boeken verdict raise four points:

First, they say that a \$3 billion award is ludicrously inflated for any

misdeed, if in truth there was one to begin with.

Second, they argue that it is outrageous for a person who is "stupid" enough to smoke to be enriched by tobacco dollars when he becomes ill.

Third, they maintain that the cigarette industry has been harassed and punished enough lately, what with agreeing under pressure to pay more than \$200 billion to states as compensation for treating patients with smoking-related diseases, and acquiescing (at least in the case of Philip Morris) to FDA regulation. Parker's article is a prime example of this view: "The anti-tobacco zealots won't be satisfied, it seems, until they've achieved a de facto prohibition on smoking. Until they've driven Philip Morris and other cigarette makers out of business."

Fourth and most important, the critics of verdicts against tobacco companies maintain that smokers have long known all the dangers of smoking but still chose to smoke, and thus should assume all the responsibility for the health consequences of their habit. Limbaugh, for example, has cited the Boeken award as an instance of the legal system gone mad, emphasizing that "actions have consequences" and that the smoker, not the company, is responsible for the health damage caused by smoking cigarettes.

The issues raised by critics of the Los Angeles verdict -- and critics of lawsuits against cigarette companies in general -- are attractive and consistent with the American commitment to individual responsibility. Ultimately, however, they are flawed. A closer look at the actions of tobacco companies suggests that nearly any jury would have come to the same conclusion.

First, the \$3 billion award. The award granted to Boeken, who began smoking as a teenager in 1964, was divided into two parts: \$5.5 million in general damages and \$3 billion in punitive damages. In making the latter award, the jury recognized the enormous net worth of Philip Morris and decided that an award of this magnitude would be necessary to get the attention of the tobacco giant and force it to rethink its strategy on disclosure of health risks.

Presumably, the jury was also well aware that there was no way the \$3 billion award would stand. The tobacco company's inevitable appeal will bring the tag down dramatically.

More than an actual expectation, the size of the award is an indication of the jurors' response to what they learned in the courtroom. This jury heard witnesses document decades of industry deception. The jury saw documents that proved beyond a doubt that the industry was aware of the threat of lung cancer by 1950, if not before. Yet the industry publicly denied this causal association and made a largely successful effort to block the free flow of information about the dangers of smoking in the media -- by the sheer clout of its own advertising dollars. The jurors concluded that \$3 billion best approximated the degree of the damage done by Philip Morris.

Second, the purpose of jury awards is not to enrich sick smokers but to provide the tobacco industry with a clear economic incentive to adopt more responsible rules of corporate behavior in the future -- if indeed you can actually responsibly market a product that kills your customers when used as intended.

Third, the facts at hand do not support any argument that the industry has already been punished by paying for past misdeeds. The tobacco industry felt no economic pain in the misguided \$200 billion deal it cut with states to reimburse them for the healthcare costs of treating cigarette-related illnesses.

Indeed, the industry not only recouped those outlays simply by passing on the costs to cigarette smokers in the form of higher pack prices but also further enhanced the dependence of state treasuries on cigarette sales. If sales declined, cigarette manufacturers would have less money to give to the states for healthcare.

In effect, the deal was so favorable to Big Tobacco that it literally turned state governments into economic partners in the sale of the cigarettes, the leading cause of preventable death in the United States. The most accurate description of the settlement came from Martin Broughton, chief executive officer of Brown and Williamson (maker of Kool, Lucky Strikes and Capri cigarettes): "They want to be paid off and we want a peaceful life."

Indeed, Big Tobacco's settlement with the states was starkly different from settlements to which other corporations accused of malfeasance have agreed. In effect, tobacco companies paid the fine, passed on the costs of the fine to consumers and then resumed business as usual. It's as if a chemical company that had been covertly dumping poisonous material into a river and making people sick was finally caught and fined, and then -- immediately after paying up -- resumed its dumping. From this point of view, the settlement was a monetary payment by tobacco companies for permission to stay in business.

As to "accepting" FDA regulation, Philip Morris is simply acting in its best economic interests, knowing full well that the FDA has little power to affect the sale of cigarettes and hopeful that the so-called regulation will allow it to get the U.S. government to sanction any claims it might make in the future for a safer cigarette.

Fourth, those who argue that individual smokers are responsible for their own smoking-related diseases are only partly correct.

There comes a point when an adult who is fully informed of the risks of smoking should be held responsible for developing a smoking-related disease. But even today, we have not reached the point where cigarette companies have sufficiently detailed the risks to allow a fully informed decision. And surely in the mid-1960s we were nowhere near the point of full disclosure.

Yes, in the Boeken case, an attorney for the tobacco industry broke industry precedent, going so far as to describe smoking as generally dangerous to health and conceding that the industry had failed to publicly acknowledge this danger. "These choices made by Philip Morris and the tobacco companies were the wrong choices," he said. "They fell out of step. They fought too long."

But this same attorney and his colleagues would argue that the hazards of smoking have been widely known for decades and the fact that the industry was denying them was irrelevant -- because no one believed the industry anyway. There are a number of flaws in this reasoning.

Between 1935 and 1964, scientists amassed a staggering amount of

evidence on the spectacular health risks of smoking. Meanwhile, the industry loudly denied all the reports, countering with its own scientists, who routinely described all tobacco warnings as "not proven."

The industry distorted and misrepresented the emerging data on cigarettes' dangers and promoted them as safe -- indeed, health promoting -- frequently using physicians in their ads to calm and soothe worried smokers. Most consumers believed that there was a legitimate controversy over the dangers of smoking, and for many that was enough to justify continuing to smoke until there was a consensus that the habit really did kill.

Even when Congress slapped the surgeon general's warning label on cigarette packs in 1965 (a move supported enthusiastically by the industry, as it believed that the labeling preempted any industry responsibility for further health warnings), the reality was that the label was too vague to do much good. Smokers remained blissfully unaware about how much they had to smoke, and how long they had to smoke, before risks became irreversible.

Further, smokers had no concept of the relative risks of smoking compared with other much-publicized risks, such as exposure to food additives and trace environmental pesticides and alcohol use. Cigarette companies have flourished in a culture that seems fixated on small or even hypothetical risks, which blur discussions of the actual, proven risks of smoking. Consumers hear that saccharin causes cancer (there is no evidence that it does) and that cigarettes cause cancer (they do) -- and eschew the Sweet'n Low, reasoning that giving up one out of two is good enough.

It is the failure of the industry to divulge the specific risks, including the fact that regular daily consumption of only four cigarettes a day is associated with a measurably increased risk of lung cancer, heart disease and other ailments; that a decade or more of smoking is associated with risks that may not be eliminated by cessation; and that the much-discussed increased risk of lung cancer is only the tip of the health-devastation iceberg. And though it is well aware of these other risks, the tobacco industry has never communicated the fact that cigarette smoking is a major cause of diseases ranging from blindness (macular degeneration, cataracts) to cervical, pancreatic, bladder and other cancers, male impotence,

infertility, osteoporosis and a full spectrum of cardiac and lung diseases.

The bottom line is that, even today, smokers who generically know smoking is bad have no concept about how bad it really is.

Arguing that everyone knows about the risk of lung cancer associated with smoking and that this obviates the need to know any more about risks -- because the threat of lung cancer should be enough to deter a smoker -- is like an automaker saying that since it notified customers that a car's tires were defective and could cause an accident, it was not necessary to inform them that there was a high likelihood that the engine would explode under conditions of normal use.

Then there's the fact that most initial smokers are under 18, many too young to fully comprehend any of this. Tobacco companies know this and for decades have sought new smokers by pitching their products to kids

Cigarette smoking is a form of addictive behavior. The industry has thus survived and thrived by marketing a dangerous product to children, who after months or years of smoking find it almost impossible to give up.

It is instructive to examine the post-trial commentaries from jurors involved in the Boeken and other cases in California that led to verdicts against Big Tobacco.

Jurors explained that before hearing the evidence in the case, they tended to think the industry should not be blamed. It was only after being exposed to the extraordinary tapestry of organized fraud, deception and disinformation engaged in by the industry over at least five decades that they began to place blame.

This attitude is best summed up by a 48-year-old man on the L.A. jury who said he "went into leaning toward [the tobacco company]." But documents showing that cigarette makers tracked smoking among kids helped change his mind. "They were selling a deadly, addictive drug to children," he told the press after the trial. He added that at first he was hesitant to award anything in the billions, but "then I thought about how many people these guys have killed. And I thought \$3 billion doesn't even begin to do justice for all the evil they've done."

Those who argue that the tobacco industry should not be held accountable are setting a corporate double standard. In this country we have strict product liability laws that serve one very important purpose: to provide a clear and distinct incentive to American corporations to keep their products safe -- or to make a heroic effort specifically to inform consumers as to what risks are possible. The cigarette companies have never met this standard of responsibility. More detailed, understandable risks are publicized about lawn mowers and cigarette lighters than about cigarettes. Why should tobacco companies be held to more lenient guidelines?

Those who argue that cigarette companies have reformed are also mistaken. Even today, the industry has revealed neither all the medical consequences of smoking nor the relative risks. And even if it did disclose all the risks associated with its product, should it then be excused from responsibility for 50 years of deception?

Yes, smokers should realize that their actions have consequences -- and smokers (particularly those who began smoking after 1980) should be assigned at least part of the blame for those consequences. But actions should have consequences for corporations as well, and cigarette companies must be put on trial for past misdeeds.

The more economically devastating the verdicts against tobacco companies are, the more incentive the industry will have to completely disclose (perhaps through informed-consent vouchers signed at purchase) what it knows about smoking and health. Only then, equipped with a full understanding of the risks of cigarettes, will future generations of smokers bear full responsibility.

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