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Teamwork Brings Record $3 Billion Verdict Against Big Tobacco

Paralegal credited with mastery of millions of documents.

By Diana Digges

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A small-firm attorney who'd never tried a tobacco case won the largest verdict ever for an individual plaintiff against the tobacco industry on June 6. The Los Angeles jury found defendant Philip Morris liable on eight counts, awarding $5.54 million in compensatory and $3 billion in punitive damages to Richard Boeken - a cancer-stricken smoker and former heroin addict.

Attorney Michael J. Piuze won his historic victory with the help of a ponytailed paralegal named Ray Goldstein, the undisputed master of the mountainous arsenal of tobacco documents. Goldstein had helped attorneys win two other massive California verdicts against the industry - one for $51.5 million (later reduced to $25 million) and the other for $21.7 million. Goldstein strolled into town three weeks before the Boeken trial with a laptop full of documents and a crusading zeal that matched Piuze's own.

"Without Ray Goldstein, I was nowhere," said Piuze. "He knows where all the skeletons are buried, where all the best documents are. He did major triage."

From the 27 million pages of tobacco documents available as part of the states' settlement with Big Tobacco, Goldstein surgically plucked a hundred or so for Piuze to use.

And Piuze, no slouch himself, went to work. The products liability lawyer in him, accustomed to taking on California's toughest cases, was astonished by the wealth of documents at his disposal and the damnation they promised for the defendant.

"The documents told the story," said Goldstein. "But Mike was the maestro, who opened up the moral issue of the behavior of corporations, of corporations killing people. He elevated the trial to a higher level."

The Trial

Part of Piuze's passion for the case stemmed from his identification with his client. Like 57-year-old Boeken, Piuze had started smoking as a young teen and quickly developed a two-packs-a-day habit that he didn't quit until 20 years later.

Richard Boeken began smoking when he was 10 and was up to two packs a day by age 13. In October 1999 he was diagnosed with lung cancer, which metastasized to his spine in August 2000, then to his brain in December.

As a rock musician, Boeken had developed a three-month addiction to heroin, followed by a two-year dependency on methadone. He was also an alcoholic. But while the "character issue" looked like a liability, Piuze turned it around. By 1976, Boeken was clean and sober, having managed to kick heroin, methadone and alcohol. Yet he was unable to get off nicotine, despite repeated attempts to do so on his own, via hypnosis and in Smokers Anonymous.

This inability to quit nicotine underscored the tenacity of the drug compared to the other substances Boeken had managed to shake off. That such a highly addictive and harmful product was peddled by corporations that knew and hid its dangers was at the heart of Piuze's case. He had proof that his client had exercised the personal responsibility to successfully confront serious substance abuse. He also had proof that the tobacco industry had done exactly the opposite.

The plaintiff contended that Philip Morris never tested its product for carcinogenic effects, concealed the degree of danger of its product and conducted a disinformation campaign for more than 45 years to convince the public that the health risks were inconclusive. Further contentions included a failure to warn that light cigarettes were as dangerous as full-strength and a decision not to manufacture an "almost-safe cigarette" because the company did not want to endanger Marlboro's dominant market position.

But the defense was also compelling, and for more than 40 years it proved unbeatable. The industry's "assumed risk" argument was simple: Everyone, including Richard Boeken, has long known of the dangers of cigarettes, whether full-strength or light. It was Boeken's personal choice to smoke and the defense contended that by doing so, he accepted the responsibility for whatever health problems that behavior would cause.

"In order to win a case against the tobacco industry, you have to pierce this bizarre illusion that it's the plaintiff's fault, that it's the plaintiff who is on trial," said Goldstein.

Piuze knew the power of the personal responsibility argument. He knew his biggest obstacle would be juror attitudes. He doesn't usually use jury consultants and mock trials, but he did in this case, and the findings disheartened him.

Even in health-conscious California - and even after 10 years of anti-tobacco education - Piuze's own mock trials told him jurors are extremely receptive to arguments about personal responsibility and assumed risk.

"Both groups said the same thing: 'The guy knew, the hell with him.' Into the teeth of these negative advance reviews, we picked a jury and tried a case," he said.

Using internal documents from the tobacco industry, Piuze demonstrated a 45-year-history of fraud and deception by corporate executives. Included was the famous 1953 memo of tobacco executives planning in New York how to counter the threat to their business posed by health reports on the dangers of smoking in Readers Digest.

Another internal memo on the history of the Council for Tobacco Research clearly stated it was merely an "industry shield," set up in 1954 as the Tobacco Industry Research Committee. The CTR, which was promoted as an independent scientific research group, was in fact funded by the tobacco industry "to refute unfavorable findings or at a minimum to keep the scientific question open," according to a 1976 industry memo.

A Shift In Strategy

By the time Boeken's case rolled around, the industry had been forced to shift its strategy. Since it was no longer possible to cast doubt on the health risks of smoking, the defendant placed greater emphasis on assumed risk and personal responsibility.

To buttress that argument, Philip Morris hired historian Elizabeth Cobbs Hoffman who analyzed coverage of smoking in the Los Angeles Times from 1950 to 1993, finding 37 positive articles about smoking, and 2,700 negative ones, according to Piuze.

From the defense point of view, the notion that the plaintiff, smart enough to be making $250,000 to $300,000 a year selling gas and oil securities, would not know that cigarettes were dangerous was unbelievable.

But outside of the courtroom, industry executives had acknowledged that the "free choice" argument evaporated in the face of addiction, as indicated in memos introduced at trial.

A 1980 internal Tobacco Institute memo stated: "Shook, Hardy [principal industry attorneys] remind us 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.'"

And memos from Philip Morris' own top researchers in 1958 and 1959 mentioned ingredients known to be carcinogens at the time and discussed in great detail the psychological nature of addiction.

Armed with these documents, it wasn't hard for Piuze to demonstrate that his client was, indeed, addicted and thereby dismantle the industry's assumed risk argument: Boeken had started smoking at age 10 and was smoking two packs a day by age 13 - long before he could be considered legally capable of exercising free choice. His ability to quit heroin - contrasted with his inability to kick the cigarette habit - only strengthened the argument that he was addicted.

Piuze further undermined the industry's credibility by spotlighting their blatant lies to Congress.

"This was their pitch at trial: 'Anyone who says they didn't know [cigarettes are bad for you] is lying.' So I asked professor [Cobbs-Hoffman] to look at a clip of the seven CEOs testifying under oath in 1994 before Congress. Every one of them says cigarettes are not addictive and don't cause lung cancer. They lie, then they lie, and then they lie some more," said Piuze.

In his cross-examination of Cobbs-Hoffman, Piuze focused on the implications for society of that denial. He elicited from the witness a cynical picture of corporate executives whose indifference to truth and morality was taken for granted by the public.

> *Piuze:* ***As a historian, have things gotten so out of hand that the populace should listen to the head of one of the largest corporations in the world and just say, that guy is a lying sack? Is that how far it's gone? Is that where we are historically?***
>
> *Hoffman:* ***I think that is where we are historically with this corporation...***
>
> *Piuze:* ***Do you think - I'm going to feed you two easy ones. Number one, it's good to know right from wrong, isn't it?***
>
> *Hoffman:* ***I believe so.***
>
> *Piuze:* ***It's good to have a moral center in this country, isn't it?***
>
> *Hoffman:* ***I believe so.***
>
> *Piuze:* ***Do you think there is any trickle-down effect into the population when the president of one of the largest corporations in the world, by your own reckoning, shouldn't be trusted, shouldn't be believed, and what he said should not even be taken at face value? How does that contribute to the moral climate of our country today?***
>
> *Hoffman:* ***It's not good. It's not good.***

Piuze contrasted the industry's denial with the death toll from the product itself.

"So, while the company is basically saying, 'You were fools for listening to us' as their defense, 400,000 people in the United States die from their product every year," said Piuze.

In short, Piuze took the individual plaintiff out of the trial and concentrated on making society's case against the industry.

"Piuze needed to demonstrate that this was not just a medical case, but something much broader - 8,000 people dying every week from cigarettes. That was the context. The subcontext was that Philip Morris makes $100 million a week in domestic profits. The moral perspective was front and center in this trial," said Goldstein.

The Trial-In-A-Box

The crusading zeal is so great and the documents so damning that Piuze has made hundreds of them available on the CD Rom "Tobacco Trial-In-A-Box." It is available for free to any plaintiff's attorney taking on Big Tobacco. He celebrates the fact that he is following a tradition of sharing information initiated by attorneys who pioneered much of the successful third wave of anti-tobacco litigation.

The Trial-In-A-Box concept brings down the costs and reins in the intimidation. A package of tried-and-true resources, it includes all the pleadings, depositions, transcripts and evidence from the Boeken trial - and relevant documents from other trials.

It is a counterpunch of sorts to the longstanding practice of the tobacco industry to bury the opposition by driving up costs, a practice made clear in yet another internal memo - this one written in 1988 by R.J. Reynolds attorney Mike Jordan to Smoking and Health attorneys:

"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".

Piuze said he spent $400,000 in preparation for trial. Much of it went to witnesses and a jury consultant, as well as to Goldstein, who was with him every day in trial, hooked up to his database.

"Whenever a document was needed, Ray would come back with it in five minutes," said Piuze. "This was not a bare-bones case. We had witnesses from England, Miami, Providence and Washington State."

Piuze believes that such cases could be conducted in the future for $250,000. And cooperation among plaintiffs' attorneys is helping to bring the costs down. He borrowed from Madelyn Chaber who borrowed from Woody Wilner and so on.

He also brought in some critical members of Chaber's trial team. In addition to Goldstein, he also praises the work of Holly Hostrop who did all the legal writing for the Boeken case.

"Teamwork is a concept we pay lip service to in the plaintiffs' bar, but in this case, it was really true," said Piuze. "This material was unearthed in cases brought by the attorneys general. Who went through the millions of documents? Lots of really diligent lawyers around the country. The stuff didn't come out all at once."

Piuze pointed out that despite the recent winning streak by plaintiffs' attorneys, Big Tobacco still prevails in most of its cases, a fact that deters many small-firm attorneys.

"The intimidation factor cannot be overstated," said Piuze. "These are second- and third-tier lawyers taking referrals, and you have to understand that everyone is afraid the rug will be pulled out from under them at the last minute. They're afraid George Bush will declare immunity [for the industry]."

Philip Morris declared the verdict an "outrage" and filed motions for reversal and mistrial. On August 9th, Judge Charles McCoy reduced the punitive damages portion of the award to $100 million - a week's profit for Philip Morris' domestic operations. However, he rejected the tobacco giant's motion to reverse the verdict or declare a mistrial. In his 27-page ruling, he wrote, "Philip Morris' conduct was, in fact, reprehensible in every sense of the word, both legal and moral."

Can plaintiffs' attorneys unschooled in tobacco litigation handle these cases? Piuze did, of course, but he is no ordinary lawyer. Named by California's Daily Journal as one of the state's 100 most influential attorneys, he has a reputation of taking and winning the state's toughest cases.

For other plaintiffs' attorneys keen to jump into the game, it's tough but getting easier, according to Richard Daynard, of Northeastern University's Tobacco Products Liability Project. The cost of getting cases to trial is dropping and juries are increasingly siding with the victims, he said.

"Plaintiffs have achieved a 30 percent success rate for individual claims reaching trial since 1999, a rate that is more than sufficient to encourage first-rate attorneys to bring these cases in the future," said Daynard. Whether they can do so in venues other than California, Florida and Oregon is still an open question.

"These are the trailblazing states. What we may see happen first is a series of victories in states like California and Florida before the climate changes a bit," said Edward Sweda, senior attorney with the Tobacco Products Liability Project at Northeastern University. "If you can get past the basic defense of personal responsibility - as defined by the industry for consumers, but not for manufacturers - if you can get beyond that, I think you'll see some victories in various states around the country."

The real question is whether attorneys can bring in the victories without Ray Goldstein, the "***bad news for big tobacco paralegal***."

"Small-firm attorneys can do this," insisted Goldstein. "The documents tell a simple tale. I felt our trial against Philip Morris was like a battle of master puppeteers. On one side was the defense, the invisible puppeteer in sky and their marionette lawyers. On our side, we had more like a ventriloquist act, me with Michael sitting up on my knee. But he was no dummy. He used these documents in such a very nice way."

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Verdict: $5,539,127 Compensatory damages; $3,000,000,000 Punitive damages
State: California **Type of case:** Product liability
Trial: 31 days **Deliberations:** 9 days
Status: Reduced by judge to $100 million
Case name: Boeken v. Philip Morris, Inc. **Date of verdict:** June 6, 2001
Plaintiffs' attorneys: Michael J. Piuze, of Law Office of Michael J. Piuze in Los Angeles.
Of-counsel: John Keiser, solo in Kaneohe, Hawaii, Holly Hostrop, solo in Carlsbad, Calif.
Defense attorneys: Maurice A. Leiter and John L. Carlton of Arnold & Porter in Los Angeles.