

# UP IN SMOKE: THE TOBACCO SETTLEMENT IN WISCONSIN

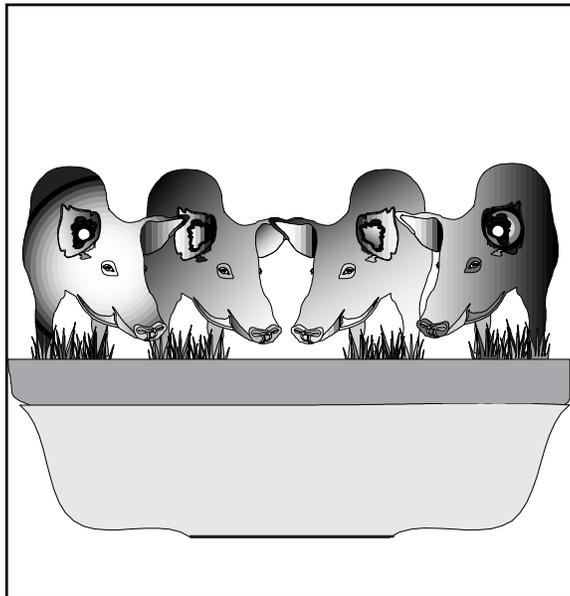
THOMAS W. STILL

**M**eet Dennis Hall, full-time dad and part-time soldier in Wisconsin's Tobacco Wars.

Hall thought he was done with lobbying — which had carried him as far away as Saudi Arabia and Kuwait, and even landed him on the front page of the *Wall Street Journal* in 1991 — but something happened to change his life: He caught his 14-year-old daughter smoking.

Most parents would settle for an extended grounding and some stern lectures about the dangers of smoking, but Hall went further. He decided to help out a friend whose Madison-based company, Learning Multi-Systems Inc., had come up with a computer-based program to teach middle- and high-school aged kids about the consequences of smoking, drinking, sex and drugs. It's a multi-media CD called the "Body Awareness Resource Network," or BARN, which is designed to give kids a sense of what happens when they make the wrong choices.

"I knew that it worked and I was impressed with what I saw," said Hall, 50, who works for a Middleton retailer full-time and only lobbies a few days per week. "So I set



out to help spread the word. I wanted my daughter and others like her to have this in the schools."

The program developed by Learning Multi-Systems had been tested by the UW-Madison and by schools in other states, and had even won awards from groups such as the American Medical Association and the National Cancer

Institute. But only 30 or so schools in Wisconsin were using it; mainly, Hall concluded, because they didn't have the money to take a chance on new technology.

That all changed when Wisconsin won the jackpot: \$5.9 billion over 25 years as its share of the national tobacco settlement.

Suddenly, everyone with a half-lit idea for how to stop adults from smoking and to keep kids from starting was descending on the Wisconsin Legislature like suitors for a spinster with a gigantic dowry. Governor Tommy Thompson proposed a modest increase in smoking prevention spending in his 1999-2001 budget, but the ante kept rising as the budget

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bill worked its way through the Joint Finance Committee, the Assembly and the Senate. Some legislators wanted to spend \$50 million per year on everything from “Don’t Smoke” TV commercials to paying people to lecture schoolchildren on the dangers of smoking. For \$50 million, one Capitol wag observed, the state could hire “Butt Police” to stand on street corners and snatch cigarettes from the mouths of teen-agers.

The BARN program could have been set up in 450 of the state’s middle and high schools for \$1.8 million, Hall told lawmakers, counting the training of teachers. When the state Department of Public Instruction said it would pick up that cost, BARN’s price tag dropped into the hundreds of thousands of dollars. Hall eventually convinced members of Joint Finance to spend about \$150,000, enough to give the program a start. He wasn’t complaining about that decision — but he did wonder how lawmakers were proposing to spend the other \$49 million and change.

“They didn’t have any concrete direction in which to go,” Hall said. “They were basically saying, ‘Let’s go spend the money,’ but no one seemed to have a good idea how. They weren’t answering the question, ‘What works?’”

What really surprised Hall, however, was his phone call from the Dark Side of the Force.

“An attorney representing the tobacco companies heard about my work and asked if I would be interested in working for them,” Hall recalled. “I said, ‘Thanks, but no thanks. I was flattered that someone noticed, but, to me, that would have been an absolute conflict of interest. It certainly wouldn’t have looked good in my daughter’s eyes.’”

At least the lawyers for the tobacco companies were straightforward; they wanted him working with them instead of against them. But Hall won’t talk about his dealings with the private lawyers who won Wisconsin’s case against Big Tobacco, other than to say, “I wasn’t always amused by those guys, either.”

He’s not alone. For every Dennis Hall, who took on a second job so he could help market

an anti-smoking tool he believed in, there were many more people on both sides who saw the tobacco settlement in less idealistic terms. That included some of the special interests who wanted the Legislature to throw money at the problem, regardless of results, and it also included the lawyers who represented the state.

It’s often said that people who represent themselves in court have a fool for a lawyer. Much the same thing can be said about high-priced attorneys who handle their own public relations.

Had they tried to design a PR campaign to make themselves look arrogant, avaricious and secretive, the three private law firms that represented Wisconsin in the national tobacco case could not have done a more splendid job.

Years from now, communications professors may still be reciting the textbook case of how Wisconsin’s tobacco lawyers turned a very good thing — winning billions of dollars for the state and its taxpayers — into a public relations debacle for themselves and their firms.

Lest you think me unduly harsh or unfair, a stipulation: The three firms hired by Thompson and Attorney General Jim Doyle to do Wisconsin’s heavy lifting in the tobacco case did a fine job of lawyering the case. Wisconsin got its fair share of the settlement, even though other states filed earlier and had a head start.

How the three firms handled the case is not the problem. It’s what happened after the settlement that made them look like spoiled children banging their spoons on the table. At the same time, it has raised questions about how Wisconsin plans to spend its tobacco windfall — and whether it will ever see all or even most of that \$5.9 billion.

Most of the story is, by now, all too familiar. The lead lawyers for the three firms — Habush, Habush, Davis and Rottier of Milwaukee; Brennan, Steil, Basting and McDougall of Janesville; and Whyte, Hirschboeck, Dudek of Milwaukee — first tripped alarm bells by asking for \$847 million

in fees. That represented 20 percent of Wisconsin's share of the settlement, as Thompson and Doyle had agreed in a 1997 contract (since ruled illegal; more on that later) with the state.

The firms later said \$847 million was basically a negotiating figure. An early estimate of 50,000 hours worked was dropped to less than 25,000, and the \$847 million became \$75 million (that's still \$3,000 per hour) after the firms brokered their own deal with the tobacco companies. The firms' time and expense records might never have been released if not for the decision of three media organizations, including the *Milwaukee Journal-Sentinel* and the *Wisconsin State Journal*, to file suit under the state open records law.

That fee deal was reached a few days before Dane County Circuit Court Judge Dan Moeser ruled illegal the firms' contract with the state. The chronology of what happened is important, because it raises questions about the state's long-term ability to collect the \$5.9 billion it has won only on paper.

Spokesmen for the three firms said the fee settlement — reached June 17 and formalized the following day — had nothing to do with Moeser's ruling on June 21. In fact, attorney Dan Rottier of the Habush firm said it was "simplistic" to suggest the firms settled the fee dispute out of a fear that Moeser might rule against them.

"The fee issue was so much more complicated than that," said Rottier, who explained that Wisconsin's lawyers were worried about the long-term solvency of the tobacco firms and not spreading their fee payments over many years.

"We simply didn't want to drag this out," Rottier said.

But if other factors were so important, why did the firms — specifically, Rottier — repeatedly phone Moeser's office to learn when the decision would be released?

In an interview, Moeser said Rottier had been "checking very regularly" with his office about when the ruling would be made. Those checks became almost daily as the ruling became imminent, Moeser said.

On Friday, June 18, Moeser's court clerks told Rottier the judge's ruling would be out Monday, June 21.

"They knew when it was coming out — but they didn't know what it (the ruling) would be," Moeser said. "They're good lawyers, so I'm guessing they wanted to settle before my decision came out. They would have lost some bargaining power afterward. I'm sure they wanted to settle before my decision came out."

Rottier insisted that was not the case and chastised the state's news media for daring to suggest otherwise. "There's a much larger analysis" that involves the fiscal health of the tobacco companies, he said. But he didn't deny ringing Moeser's phone off the hook.

"I probably called the court five times over a period of several weeks," he said. "The only thing I was ever told was that the briefs were in. That's no different from what I would ask the court in any case."

Rottier said he continues to be "puzzled" by media interest in the lawyer fees, and suggested most reporters are missing the larger story.

"It's not malicious, but (much) of the coverage has been off base," he said. That "larger picture" includes pending class-action lawsuits

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against the companies, a decline in Philip Morris stock since the first of the year, RJR-Nabisco planning to spin off its tobacco interests, and various federal actions that could reduce the size of the state settlements.

“We just wanted to make sure, with all that, that we’re treated fairly,” Rottier said.

But if the lawyers for the state are worried about collecting their fees — what does that say about the state’s chances of actually collecting the \$5.9 billion that everyone seems so eager to spend? Is it possible that a collapse of Big Tobacco could leave the state committed to a lot of extra spending on anti-smoking programs, but no money to pay for it? Is this Rottier’s “larger picture?”

Madison attorney Ed Garvey suspects the answer is “yes.” Garvey is the 1998 Democratic candidate for governor who represents three state legislators who filed suit to block the \$847 million fee agreement. He believes the tobacco companies may not be able to pay off all the lawyers, divide \$246 billion among the 43 states that are part of the national settlement, and withstand possible suits by the federal government. He notes that some tobacco companies have even looked into floating bonds to pay the lawyer fees. In time, he suggested, more companies may spin off their tobacco operations or file bankruptcy.

“It’s like the lawyers in the asbestos and breast implant cases,” Garvey said. “They won the case, but then they had to go to bankruptcy court and stand in line.”

One of the biggest threats to Wisconsin’s ability to collect its money is the likelihood of a federal tobacco suit asking for reimbursement for Medicare costs. A study by the American Economics Group Inc., commissioned by Philip Morris, showed that Wisconsin could lose \$81.3 million per year if the federal suit is successful.

“The feds initially tried to take 57 percent of the settlement payments, but that failed,” said Jerry Slaske, a Milwaukee public-relations man who does work for Philip Morris. “Now

they want to file a Medicare suit. In addition, the feds want to increase the excise tax on cigarettes by 55 cents a pack, which would also lower settlement payments to Wisconsin.”

Under the settlement agreement, payments to the states decrease as cigarette volumes go down. The federal suit and higher taxes would combine to reduce those sales volumes. That might be a great thing for the nation’s health, but it would be a bad thing for people counting on Wisconsin’s tobacco money rolling in.

“If the state wants to fully benefit from the settlement with the tobacco industry, the feds need to butt out,” Slaske said.

In short, the windfall of the century may not happen. And the fondest wishes of the tax-and-spend crowd will go up in smoke.

Amid the din and drone of the special-interest pleading in Madison and elsewhere, a few voices are being raised in support of the proposition that the only legitimate use for the settlement money — whether it’s \$5.90 or \$5.9 billion — is to repay the taxpayers who advanced it in the first place.

Taxpayers have borne much of the cost of treating tobacco-related illnesses over the years, whether that treatment was provided through the federal and state Medicaid programs or local public health departments. The settlements in the state-by-state tobacco cases are reimbursements for dollars already spent, not money that should be used to finance more government programs or to pay for unproven stop-smoking programs.

The states sued the tobacco companies on the theory that they were entitled to “reimbursement” for the losses they incur in treating smokers who get sick. But are there losses? Most states collect far more in tobacco taxes than they pay out in medical costs to treat smoking-related illnesses. Only when other societal costs are calculated, such as private health costs and lost productivity, does the true cost of smoking emerge. But those are costs absorbed by the private sector — not the

government. So why not return as much of the settlement as possible to those who are really hurt by smoking?

Writing in the May edition of *Reason* magazine, Jacob Sullum noted that a great irony of the government War on Tobacco is that government is the biggest profiteer. Last year, the tobacco industry's profit on a pack of cigarettes sold in the United States was 23 cents. On the same pack, the federal government collected 24 cents in taxes and the states collected an average of 36 cents. In Wisconsin, the tax-per-pack is 59 cents. In 1997-98, the state collected \$257.1 million in revenues on all tobacco products, including cigarettes.

Nationally, more than 70 percent of the net proceeds from tobacco sales goes not to Big Tobacco but to Big Government. Perhaps that's why anti-tobacco politicians rarely, if ever, call

for an outright ban on smoking. It would cost their governments too much money.

While the legislators and the lawyers try to guess what happens next with the tobacco settlement, people like Dennis Hall are waiting for the chance to do a lot of good for a little money. He's heard the rumors that it might be hard to collect on the tobacco settlement, and hopes lawmakers and special interests don't try to spend money they don't yet have.

"Prudent people will not spend all that money before they've got it," Hall said. "It's the old adage about not betting on the come. The state should make sure that it looks out for the best interests of the taxpayers, of course, while spending what they can on proven prevention strategies."

But that's just the advice of a foot soldier. It remains to be seen if the generals are that smart.