REGULATORY RENT-SEEKERS IN THE MEDIA, BAR, AND BUREAUCRACY

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I would like to speak briefly about three of my favorite groups: the media, plaintiffs' lawyers, and bureaucrats. The central issue is a question of power. Who has the power: members of the media, plaintiffs' lawyers, and bureaucrats (who think they know better than us), or us, as victims? Within regulatory schemes, firms use rent-seeking to take advantage of other firms and geographic locations to take advantage of other geographic locations. Of course, regulators and the media are perfectly happy to see private groups divided and conquered in this way because it enables them to maintain a certain hegemony over us as citizens.

A personal story will illustrate this point. The allowance trading system (ATS) has been a quite successful experiment in air quality improvement. Yet the *New York Times* recently criticized ATS on the ground that the costs of control had dropped since its inception.[1] The implied assumption is that, because the costs of cleanup had plummeted, the air quality must not have improved under the program. When I asked Assistant EPA Administrator Mary Nichols what she thought about the article, she replied that she had spent three hours trying to persuade the reporter not to take the approach used in the article. But, according to her account, he responded, "You are giving away all the power." When Mary asked him what he meant, he said, "You are giving away all the power to the private sector." There is an attitude among regulatory rent-seekers of "God bless the man who sues my client." Rent-seekers do not want to admit that air quality has improved because then EPA or NRDC would have nothing to do.

Now I want to explain how lawyers enjoy rent-seeking at our

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1. *See* Matthew Wald, *Acid-Rain Pollution Credits are not Enticing Utilities*, N.Y. TIMES, June 5, 1995, at A1.

expense. The felicitous little circle begins when the Public Citizen—or whoever it is—identifies a problem, real or imagined. More often than not, the problem is real. The question is how real and where it ranks. The press then expands this problem beyond its rightful bounds, an action which triggers government regulatory action. The bureaucratic action then triggers a massive class action on behalf of the nationwide class. But this nationwide class cannot be located because they are all of us. As a result, a fluid recovery is granted and is parceled back to the public interest group that brought the lawsuit in the beginning. Thus, the little circle continues.

I was introduced to this phenomenon early in the 1970s with the consumer class action suits brought for antitrust violations by state attorneys general. These triple-damage cases were a big business. The Supreme Court decided in *Illinois Brick* that consumers and state attorneys general could not sue anymore.[2]

Now, because those suits no longer are allowed, the plaintiffs' bar has engaged in Bank Card Late Fee cases.[3] The plaintiffs' lawyers file amicus briefs on behalf of state attorneys general, which then generate fluid recoveries. These recoveries are fed back to the public-interest group that filed the amicus brief on behalf of the plaintiffs' lawyers that brought the suit.

More recently, asbestos litigation[4] has driven some companies into bankruptcy.[5] The EPA helped start that. The public school system in this country spent between $20 and $30 billion cleaning up an imaginary risk. The list goes on and on. There was the Mosely case involving the exploding GM truck.[6] NBC's dramatization of the explosions with a few sticks of dynamite underneath the vehicle did it. Of course, the breast implant contro-

2. *See* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977)

3. *See* Harris v. Chase Manhattan Bank, N.A., 35 Cal. Rptr. 2d 733 (Cal. Ct. App. 1994); Copeland v. MBNA Am. Bank, 907 P.2d 87 (Colo. 1995) (en banc); Sherman v. Citibank (S.D.), N.A., 668 A.2d 1036 (N.J. 1995).

4. *See, e.g.*, Kellogg v. Asbestos Corp., 49 Cal. Rptr. 256 (Cal. Ct. App. 1996); Schulz v. Celotex Corp., 669 A.2d 404 (Pa. 1996).

5. Johns-Manville and Eagle-Picher Industries are two companies that are in bankruptcy proceedings caused by asbestos litigation filed against them. *See* Kevin Osborne, *Eagle-Picher Bankruptcy in Stalemate*, GREATER CIN. BUS. REC., Aug. 7, 1995, at 3; Benjamin Weiser, *Tort Reform's Peril, Legislation Could Mean Tight Limits on Liability*, WASH. POST, Sept. 14, 1995, at A1.

6. *See In Re* GM Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 765 (3rd Cir. 1995).

versy[7] cannot be overlooked.

Tobacco is a more recent example. A *Boston Globe* article reported on the ABC Day One story which helped coalesce all this. "It was just possibly the single-most effective piece of polemic reporting ever. Within weeks, the FDA's Kessler, who in effect had been competing with ABC, interviewing the same former tobacco company executives, announces an interest to closely regulate tobacco companies, as a matter of fact, as drug delivery devices."[8] Kessler is regulating tobacco as a device, not as a drug.

A federal judge in New Orleans accepted the largest class-action lawsuit in history, in which the plaintiff class included all those who believed they may have been injured by smoking cigarettes.[9] Now the federal prosecutors are presenting evidence to two grand juries of a criminal investigation. Defense lawyers also win in this game. Philip Morris quickly filed suit against ABC.[10]

The following is an excerpt from the testimony of Sidney Wolfe, who is the head of the health division of Public Citizen: "Most of [the FDA's] time and energy is wasted on drugs that do not even arguably offer an important advance."[11] So why do we have any drugs? Indeed, he went on to criticize the FDA as being much too lax in regulating medical devices.[12] Well, the problem has been straightened out by their actions relating to tobacco.

So this is the way the game goes, and it's a good game. We lawyers profit very well by casting consumers as victims not capable of making any decisions on risk or on price. I will close with my favorite quote of all from Commissioner Kessler. "It has become fashionable in some quarters to argue that women ought to be able to make such decisions (breast implants) on their own. If members of our society were empowered to make their own decisions, then, the whole rationale for the FDA would cease to exist."[13]

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7. *See, e.g., In Re* Silicone Gel Breast Implants Prods. Liab. Litig., 793 F. Supp. 1098 (J.P.M.L. 1992).

8. David Woush, *Apology Unaccepted*, BOSTON GLOBE, Aug. 27, 1995, at 73.

9. *See* Castano v. American Tobacco Co., 908 F. Supp. 378 (E.D. La. 1995).

10. *See* Philip Morris v. American Broadcasting Co., No. LX-816-3, 1995 WL 348375 (Va. Cir. Ct. May 5, 1995).

11. Janny Scott, *FDA Cuts Time It Takes to Test Unproven Drugs*, L.A. TIMES, Nov. 13, 1988, at 1.

12. *See id.*

13. Jeff Jacoby, *Raising False Doubts About Breast Implants*, BOSTON GLOBE, June 23, 1994, at 15.