

Tobacco Goes Back on Trial

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A Mississippi widow is one who hopes to gain from lessons learned in the earlier cases.

By WILLIAM GLABERSON

LEXINGTON, Miss. TOBACCO never grew in this part of the South. But Ella Mae Horton and her lawyers hope it will begin to die here.

Mrs. Horton is pressing a lawsuit against the American Tobacco Company that her husband filed last year when he learned he had lung cancer. He smoked American's Pall Mall cigarettes for 37 years and the suit, like scores of others against tobacco companies all over the country, charges that the cigarette maker is liable "for marketing a defective and unreasonably dangerous product."

Nathan Horton died in January. He was 50 years old. At the end, Mrs. Horton said, the cancer wracked his body. "But he had a good, strong mind and this is what he wanted: for it to be known what happened to him. And I want it too."

In this small town on the edge of the Mississippi Delta's cotton fields, and in dozens of other places across the country, a second wave of smokers' suits is slowly moving toward confrontation.

Although the earlier suits ended in victory for the tobacco industry, the lawyers pressing the new cases say they have learned from the losses, and contend they have a better chance this time. More than 120 cases are pending, and if the companies' winning streak should snap, critics say the outcome could reshape the tobacco industry.

Mrs. Horton's case and a much-

watched New Jersey suit that has been pending since 1983 are scheduled to go to trial this winter. At least a dozen cases are likely to go before juries next year, according to Richard A. Daynard, a Northeastern University law professor whose Tobacco Products Liability Project serves as an information clearinghouse for anti-industry lawyers.

Two years ago a handful of smokers'

suits drew intense press coverage. Anti-smoking advocates were predicting an avalanche of new cases from survivors of the more than 350,000 people who die each year from illnesses associated with smoking, according to some studies. Though no tobacco company has ever lost a smoker's case, the industry took the potential threat seriously. The tobacco companies spared no expense in mounting a defense, and legions of topflight attorneys fanned out over the country to take on the companies' former customers.

The efforts paid off. The industry won several key legal rulings and got favorable jury verdicts in two cases. The string of courtroom successes calmed investors, who had been jittery about the effect the suits would have on tobacco stocks. Now the stock market has virtually forgotten the liability issue, said Ronald B. Morrow, a tobacco analyst for Smith Barney.

At the same time, the expected avalanche of follow-up suits never materialized, and some of the tobacco companies are coming as close as they dare to ringing victory. R.J.R. Nabisco Inc., which makes Winston, Camel and Salem cigarettes, says that about 40 of the suits against it have been dismissed or withdrawn in the last year. (Statistics on tobacco litigation vary widely.)

Neither American Tobacco, which is a unit of American Brands Inc., nor its lawyers, nor the industry's trade association, the Tobacco Institute, would talk about the Horton suit or any other upcoming cases. "We do not discuss the pending product-liability cases either individually, collectively or hypotheti-

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The late Nathan Horton, left, with his wife, Ella, to his left, and family members at home in Lexington, Miss. in January.

Once Again, the Tobacco Industry Returns to Court

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cally," said Scott Stapf, assistant to the president of the Tobacco Institute. American Brands, which includes such household names as Sunshine Biscuits and Jim Beam distillers, said it never responds to questions about litigation.

THE anti-industry camp compares the current stage of tobacco litigation to the years of bitter asbestos trials that eventually drove the Manville Corporation and other companies to seek shelter in Chapter 11. The early losses contributed experience and evidence that will be used in later cases, says John F. Banzhaf 3d, a George Washington University law professor who has been working against the tobacco companies for years. He claims the industry maneuvered to get early trials in some of the cases it had the best chance of winning for public-relations reasons.

"If you look back at most new legal developments," he said, "you find that rarely do they win on the first, second or even the sixth case." He and others say the coming wave of trials will test the industry's defenses as never before.

For one thing, plaintiffs' lawyers are better prepared for the upcoming cases than they were for the three tobacco trials that made news two years ago, according to Northeastern's Professor Daynard. In two of those cases, he noted, the plaintiffs failed to prove that the people involved had died of tobacco-related illnesses. In a third case, which is still being-appealed, a judge ruled for the

industry before the jury had a chance to consider the case. Because the facts are different in virtually every case, class-actions are rare in product-liability controversies, and each suit is considered on its own.

The industry, opponents acknowledge, is no easy target. A series of legal rules make smokers' cases difficult to prove, and some recent court decisions have increased the uncertainty. Still unresolved, for example, is whether Congress absolved tobacco companies of the responsibility to do anything further to inform smokers of dangers when it required warning labels on packages in 1965. One appeals court has sided with the industry, holding that people cannot claim they were misled about the dangers of cigarettes once the warning program began. Several lower court opinions have sided with smokers on the issue.

But there is a more fundamental question as well, according to many legal experts. They say juries cannot be convinced that the courts are the proper forum to resolve the issues raised by the tobacco cases. In attempting to sue the maker of a product that users know is dangerous, the smokers' lawyers are expanding the role of the courts more than most people want, said Victor E. Schwartz, an authority on product-liability cases. "The reaction of laymen is: 'It's the guy's own fault.' They think

the suits are frivolous," Mr. Schwartz said. If the tobacco cases succeed, he added, the courts would have a hard time closing their doors to suits by people who are shot by handguns or who drink too much.

A court clerk in Holmes County has already selected a pool of 200 potential jurors from which 12 will be selected to hear the Horton case. Lexington, the county seat, is about an hour's drive north of Jackson, Miss.; it seems remote from Old Greenwich, Conn., where American Brands has its headquarters. Lexington is the sort of place where everybody knows almost everybody else,

been warring over every point for months. The sparring will only intensify from now on.

The two sides don't agree on the most basic of issues. American Tobacco's former chief executive, Robert K. Helmann, testified in pre-trial proceedings, for example, that "[We] believe our product is not injurious to health." The Surgeon General's conclusion that cigarettes cause lung cancer, he said, is "dead wrong." The Tobacco Institute will only acknowledge that cigarettes "may or may not" cause health problems.

Mr. Barrett will argue that the advertising run by American in the 1940's and 1950's convinced Mr. Horton that the company's product was safe. The company spent millions on the ads. For a time, Pall Mall was the top-selling brand in America.

On television and in print, the company urged readers to "guard against throat scratch" with Pall Mall. It presented what it called "particular people" congregating in the healthful outdoors. American helped sponsor an industry group that ran "A Frank Statement to Cigarette Smokers" in The New York Times and other newspapers in 1954 telling readers that its members believed tobacco products were not harmful.

In testimony last summer, Mr. Horton explained the effect of the advertising he saw in his youth. Pall Mall, he remembered, would have a celebrity or a strong young man "with a cigarette in his mouth doing something...and it hadn't bothered him, so now, why could you think that a cigarette would bother you?"

With Mr. Upshaw in the lead, American is mounting an all-out defense. So far, according to Mr. Barrett, the company's lawyers have held 60 separate pre-trial hearings in cities around the country. One day in June the American team set up a deposition in San Francisco, the next day there was one in Minneapolis; the third day hearings were held in both St. Louis and Lexington. Mr. Barrett and his team have been spending a lot of time in airports.

American is expected to argue that Mr. Horton's choice to continue smok-

ing two packs of Pall Malls a day for 20 years after the Surgeon General's warnings was an independent decision the company can't be blamed for. Cigarette companies have traditionally urged that jurors hold people accountable for their own decisions.

MR. HORTON'S smoking habits aren't the only subject that American considers fair game. The company's lawyers have already asked wide-ranging questions about his sexual life and his work history. Mr. Barrett expects Mr. Upshaw to try to introduce evidence that Mr. Horton fathered children with women he was not married to and that there were times when his construction business was a failure. The industry often argues that such matters can be crucial to a case. A person's income and financial responsibilities can be important in setting damages, for example.

Tobacco-industry critics say the companies' lawyers routinely pry into private matters to show anyone who is thinking of filing suit how painful it can be to fight a determined adversary with deep pockets.

For now, Mrs. Horton is still convinced her suit is worth it. It gives her the chance, she said, to deliver the message to the tobacco industry that her husband wanted to send. "I would like them to think about the cigarettes," she said, "and how they're dangerous to people's health — and do something about them being dangerous to people's health."

and Nathan Horton was someone the residents might have waved to for years on the country roads.

A team of four lawyers is handling Mrs. Horton's case on a contingency basis. The attorney most visible in the courtroom will be Don Barrett, a life-long Lexington resident. His firm, Barrett, Barrett, Barrett & Patton, is in the pharmacy building opposite the courthouse. It is the only firm in town with more than one lawyer.

American Brands' lead lawyer will be James E. Upshaw, an "out of townner" here whose firm is the largest in neighboring Leflore County, half an hour to the north. Mr. Upshaw's firm is backed up by several other Mississippi firms, and by Chadbourne & Park in New York, American Brands' long-term advisers.

Mr. Upshaw said it was inappropriate to talk about the case. Said Mr. Barrett: "We think they should bear their fair share for the misery and death their product caused — and that they knew their product caused."

Mr. Barrett and Mr. Upshaw are not likely to argue much about whether Mr. Horton suffered from the disease his doctors say he got from smoking cigarettes. His wife will explain, as she did quietly the other day in the house he built for the family, how he faded away through the last year of his life. The man who had run his own small construction business, in the end, was so weak that he was afraid to walk out of the room alone. The jurors will also watch Mr. Horton himself, in chilling videotaped testimony his lawyers recorded just before he died. He explained what it was like to die of lung cancer (see box).

Mr. Barrett and Mr. Upshaw, who are old friends, are not likely to agree on much else in the courtroom, however. The opposing legal teams have

Smoking Suit Scoreboard

According to analysts at Smith Barney, as of May 12, 1987.

158 smoking liability suits had been filed against the tobacco companies since 1978, most in 1985 and 1986. (Approximately 36 of these cases involved asbestos as well as tobacco.) Of the 158 cases,

14 are known by Smith Barney to have been dropped by the plaintiffs,

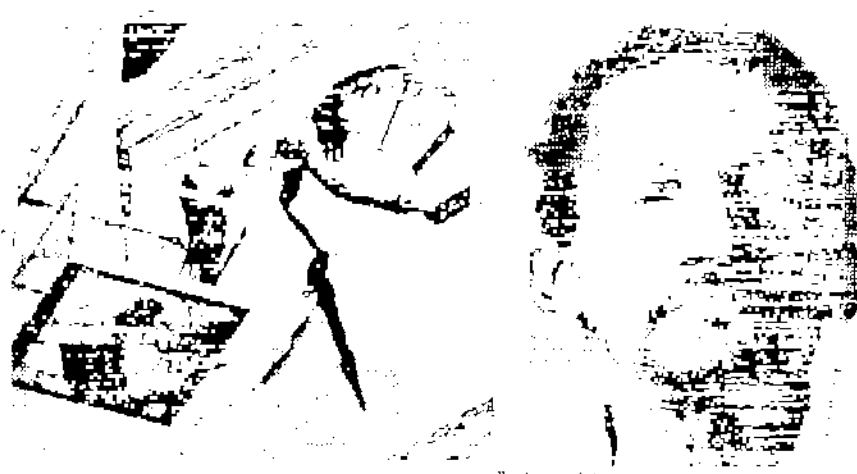
2 were dismissed because the statute of limitations expired,

4 have been decided by juries in favor of the tobacco companies.

1 of the four is scheduled to be retried on a different issue starting in October.

3 trials so far are set for 1988.

135 other cases are still pending, but no trial dates have been set.



Left, John Hays paints the clock on the Holmes County Courthouse in Lexington, Miss., where the trial will be held. Right, Nathan Horton.

'ONE MORNING, I'M GOING TO BE GONE'

Nathan Horton, his widow says, sued the American Tobacco Company so that people would hear what had happened to him after 37 years of cigarette smoking. On December 4, 1986, in a videotaped session with lawyers, he talked about his illness. Seven weeks later, he died. These are his words:

"Each day, everything gets a little worse and a little worse. I have pain now everyday....They don't ever stop. The medicine that I take, it slows it down, but not enough that I know that the pain is not there....It's hard to explain the pain. You know it's there. It--it. I don't know just how to put it. It ain't like a pain where somebody hits you or something like that, it's a sickening pain, where you can't sleep half the time.

"...I asked [the doctor] how it was looking, and he said, 'Looking bad.' And I asked him just how bad, and he said, 'Well, you're looking at months.'

"I said, 'I thought you said it was two years.'

"He said, 'No, it's months now.' He said, 'Didn't nothing go as well as we had planned.'

"...[Y]ou, well, you go through so many changes until I don't guess nobody could ever...I guess I cried for a week. One morning I just cried with my pain. It wasn't going to help me no way, the crying. I just woke up, and I said, 'Well, whatever it be, let it be,' and I just said, 'Well, I wake up in the morning, now,' and I say 'Well, I done made another one,' and that's the way I, that's the way I try to take it now. I--I don't even--I don't even think about yesterday and I don't even worry about tomorrow. I--I just, 'Well, I hope I do okay today.' And that's one of the reasons why...I be scared to go to sleep. Sometime I'm feeling bad, I--I just really won't go to sleep. I fight it, because I feel like that--well, like I tell my wife sometime, I say, 'One morning you're going to wake up, and I'm going to be gone, you know,' and she says she knows."