

# MASSACHUSETTS LAWYERS WEEKLY

## 'Dream team' set to tackle tobacco cases

By: Kris Olson October 9, 2015



One of Lisa G. Arrowood's earliest memories is waking up to the sound of coughing coming from the bathroom. The source was her grandfather, a loyal smoker of Lucky Strikes, whom Arrowood watched succumb slowly over the course of 20 years, first to emphysema, then to lung cancer.

How serious was his addiction?

"Two days before he died, he told my dad, 'I wish I had the strength to sit up and have a cigarette,'" she recounts.

It would be an overstatement to say that's why Arrowood and two of her colleagues signed on as part of a "strategic alliance" among prominent Massachusetts lawyers and the Public Health Advocacy Institute — or PHAI — at Northeastern University to pursue cases against the tobacco industry.

That has more to do with their talents and experience, along with a perceived shift in the state's legal landscape toward plaintiffs in tobacco litigation.

Still, it won't hurt, in Arrowood's words, to be wearing "the white hats" in the long days and months ahead, fighting on behalf of the families of former smokers whose pain she knows all too well.

"Everyone has an example — an aunt, an uncle, a mother, a brother," she says. "It's a horrible way to die."

Now, the hope is that those families, along with some former smokers battling cancer and other tobacco-related diseases, can begin to be compensated for their pain and suffering.

"We have developed this litigation project in part because we believe there are many deserving victims who were not otherwise going to get justice," says Andrew Rainer, PHAI litigation director and former assistant attorney general and chief of the Massachusetts Environmental Strike Force.

### Effect of 'Evans,' 'Haglund'

Lawsuits against "big tobacco" are not as common as one might think. Florida has seen a number of individual cases, the progeny of a decertified class action, *Engle v. Liggett*. Otherwise, few plaintiffs and their attorneys have had the stomach or the resources to wage a years-long battle with no promise of a favorable outcome.

What has tipped the scales in Massachusetts is the Supreme Judicial Court's 2013 decision in *Evans v. Lorillard Tobacco Co.*, according to PHAI senior attorney Edward L. Sweda Jr. The *Evans* decision, Sweda noted in a column in *Lawyers Weekly* last year, built upon the SJC's 2006 opinion in *Haglund v. Philip Morris, Inc.*, which rejected the defense that the smoker himself should bear the cost of his decision to smoke.

PHAI and its team believe that Massachusetts law now is such that courts will look at the new, not-yet-addicted smoker as the relevant "reasonable man," for whom it was both technologically and economically feasible for the tobacco companies to manufacture a "safe" product, i.e., one with non-addictive levels of nicotine.

Instead of what the *Evans* court called a “reasonable alternative design,” consumers got a prolonged campaign of misinformation and obfuscation, as detailed at length in the complaint filed Sept. 21 in Middlesex Superior Court by PHAI and Samuel Perkins of Brody, Hardoon, Perkins & Kesten on behalf of Linda Troupe, a 35-year smoker of Winston and Kool cigarettes, and her husband, Carleton.

To treat her throat cancer, with which she was diagnosed in 2013, doctors had to remove Linda Troupe’s larynx, costing her most of her ability to speak with her four children and 11 grandchildren. She’s since started to learn to communicate with the help of an assistive device.

“Still, it’s a family tragedy for them,” says Perkins, who acknowledges that he and his clients are in for a “long haul.”

Even so, the warranty claim featured in *Evans* has provided a promising basis for taking cases beyond summary judgment, he says.

“I certainly think tobacco litigation in Massachusetts is the wave of the future,” Perkins says.

### **The team**

Attempting to ride that wave will be the “dream team” PHAI has assembled to combat what are likely to be phalanxes of tobacco company attorneys.

In addition to Perkins, PHAI has also enlisted newly installed Boston Bar Association President Arrowood and her Arrowood Peters partners, Kevin T. Peters and John “Jed” DeWick. They will be joined by Neil T. Leifer, a former partner of the Thornton law firm who served as a special assistant attorney general, leading the successful effort to recover the health care costs incurred by the state in caring for residents harmed by smoking. Also on the team are Leo V. Boyle, Michael B. Bogdanow and Valerie A. Yarashus of Meehan, Boyle, Black & Bogdanow in Boston. Boyle and Yarashus are past presidents of the Massachusetts Bar Association.

For Leifer, it will be an opportunity to return to the active practice of law after five years as a “bike mechanic,” he jokes.

In reality, after more than 26 years at what was then Thornton & Naumes, Leifer decided to act on his concern about the national child obesity epidemic.

He has been working in partnership with the Girls and Boys Clubs on a program based in Dudley Square that pairs youths with bicycles in an effort to promote cardiovascular health. He also teaches litigation-skills courses at Northeastern part time.

However, Leifer never let his law license lapse and had been looking around for “interesting work.”

“I decided [the tobacco litigation] was the right way to reengage,” he says.

When he joins forces with the trio from Arrowood Peters, Leifer will not be the only one bringing tobacco litigation experience to the table.

For the past decade, Peters has worked on *Donovan v. Philip Morris*, a class-action suit headed to trial in federal court in January after the SJC in 2009 recognized a novel claim on behalf of those who have not yet become ill but are at a heightened risk due to prolonged use of tobacco — more than 20 “pack-years,” or the equivalent of at least a pack a day for 20 years.

The suit seeks to compel the tobacco giant to fund a court-supervised program of using low-dose CT chest scans to detect lung cancer early, which would greatly improve long-term prognoses.

“I have a lot of knowledge and understanding not only about liability theories but also about how big tobacco tries these cases: spare no expense, burn down their standing crops, and plow their fields, Carthage-style,” Peters says.

Arrowood and DeWick, meanwhile, bring backgrounds in complex civil litigation, having represented clients in medical-malpractice and other catastrophic injury cases. This also will not be the first time that they have squared off against deep-pocketed corporations.

While one of their clients is the family of James Flavin Jr., a former Filene’s and Staples executive who died of lung cancer in 2012 after smoking Newport cigarettes for more than 40 years, another is Newton Realtor Patricia Greene, who was diagnosed with lung cancer in 2013, 25 years after she had stopped smoking Marlboro cigarettes.

The “general managers” who assembled the team are PHAI’s staff attorneys: Rainer, who is also of counsel at Brody, Hardoon, Perkins & Kesten, and Executive Director Mark Gottlieb, who got “hooked” on public legal advocacy as a student in PHAI President Richard A. Daynard’s toxic torts class at Northeastern School of Law. He would join PHAI’s staff upon graduating in 1993.

By then, PHAI had long had the cigarette companies in its crosshairs. Founded in 1979 as the Clean Indoor Air Educational Foundation, the group initially focused on second-hand smoke. It became the Tobacco Control Resource Center in 1992.

Around that time, Gottlieb notes, the organization was “very active” in trying to start national class-action suits against tobacco companies. For about two decades, it also hosted annual conferences at Northeastern School of Law, which brought together plaintiffs’ lawyers and public health experts.

Known as PHAI since 2006, its mission is “to improve the understanding, commitment and effectiveness of policymakers and lawyers in protecting the public health,” according to its website. In addition to tobacco, PHAI hopes to use the civil justice system to address the marketing of unhealthy foods to children.

Independent of his work with PHAI, Rainer also will have a seat at counsel table when a class-action suit initially filed 17 years ago, *Aspinall v. Philip Morris*, finally goes to trial later this month in Suffolk Superior Court. At issue is whether the marketing of Marlboro Lights as “light” cigarettes that deliver “lowered tar and nicotine” is a deceptive trade violation of G.L.c. 93A, §§ 2 and 9.

Rainer says PHAI sought out “high-quality talent” to represent Flavin, Greene and the Troupes — and any subsequent plaintiffs who surface — in the hopes that, if they could prevail on the initial three or four cases, post-*Evans*, “mere mortals” would be more inclined to bring similar claims in the aftermath.

### **The opposition**

No one who has signed on to PHAI’s efforts is deluded about the long road ahead, one that will be paved, Peters notes, with hundreds of thousands of pages of production.

While the SJC decisions in *Evans* and *Haglund*, and U.S. District Court Judge Gladys Kessler’s near 1,700-page decision in *U.S. v. Philip Morris*, provide a playbook, the tobacco companies, aware of the precedents, have no doubt begun to develop a game plan of their own.

“It remains to be seen whether there are additional defenses to the warranty claim as the litigation moves forward,” Perkins says.

The PHAI team expects to be outnumbered. Peters notes a recently published article on the Donovan case, which listed a number of large firms — Arnold & Porter; Latham & Watkins; Mayer Brown; Munger, Tolles & Olson; Shook, Hardy & Bacon; and Weil, Gotshal & Manges — that declined to comment for the story.

For Gottlieb and Rainer, nothing puts the challenge that lies ahead in perspective quite like an unearthed 1988 memo in which an R.J. Reynolds executive brags about “the aggressive posture we have taken regarding depositions and discovery,” which “in general continues to make these cases extremely burdensome and expensive for plaintiffs’ lawyers, particularly sole practitioners.”

The executive continues by paraphrasing Gen. George S. 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."

The PHAI team isn't necessarily expecting that level of ruthlessness.

"The firms on the other side are very good; they are fine lawyers," Leifer says.

But they also are ready to roll up their sleeves.

"These are comprehensively litigated cases," Leifer says. "There's a lot of work to be done. But these are very serious injuries and I think very meritorious cases."

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