

Los Angeles Times

THURSDAY OCTOBER 2, 2003 SECTION A
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Tobacco Giant, in a Shift, Pays Victim

A \$2-million settlement in a fire case is a break from Philip Morris' policy of not yielding on individual claims. More suits could result.

By Myron Levin,
Times Staff Writer

CLEBURNE, Texas - Breaking with long-standing practice, tobacco giant Philip Morris has paid \$2 million to settle the case of a child who suffered disfiguring burns in a fire allegedly caused by a smoldering cigarette.

The agreement represents a breakthrough for plaintiffs after more than 20 years of fruitless litigation over cigarette fires. It also marks the first time that Philip Morris, the top U.S. cigarette maker, has agreed to pay damages in a personal injury case of any kind.

Mindful of the fate of the asbestos industry, cigarette makers have long refused to settle personal injury claims, fearing it would invite a tidal wave of suits. Philip Morris said its settlement in Texas did not signal a tactical shift, but industry foes said news of the agreement probably would attract more suits.

The settlement, reached secretly in May, resolved a nearly nine-year legal battle over responsibility for injuries to Shannon Moore, who was 21 months old and asleep in her car seat when her mother's parked Buick erupted in flames. She was burned over 77% of her body and had to have all her fingers amputated. She also lost her hearing from prolonged use of antibiotics to fight infections, and now, at age 13, has limited ability to speak.

In the suit filed in state court here, lawyers for the girl blamed the fire on the defective design of a Marlboro 100 cigarette, which like other brands is intentionally made to burn down to the

filter even when not being puffed. The lawsuit claimed that the child's mother, Shelly Moore, inadvertently allowed the cigarette to fall on the car seat, where it continued to smolder after she got out of the car.

Philip Morris contended that there was no proof a cigarette caused the fire, and that no matter the cause, Moore was to blame for leaving her child unattended.

The company settled after several failed attempts to get the case dismissed.

When the agreement was reached on May 6, Philip Morris insisted on a secrecy clause barring either side from disclosing why the case had been dismissed. After The Times learned of the settlement, the company waived the confidentiality provision.

Lynn Grisham, Shannon's lawyer, said the settlement provided "money today for a minor plaintiff who needed it terribly."

"While it's not enough to take care of the injuries she had, we were able to do away with the potential for lengthy appeals," he added.

Shelly Moore could not be reached for comment.

Tobacco companies in the past have reached some eye-popping settlements, agreeing to pay \$246 billion to the states to dismiss lawsuits filed by attorneys general. But none of the money was compensation for individuals claiming smoking-related injuries.

William S. Ohlemeyer, vice president and associate general counsel of Philip Morris USA, said the Altria Group Inc. subsidiary and three of its rivals last month made a negligible payment of \$800 - \$200 apiece - to resolve a flight attendant's claim of injury from secondhand smoke. "If you wanted to be technical, that was a settlement," Ohlemeyer said in an

interview. But he acknowledged that the Texas case produced the first settlement - and the only substantial one - ever paid to an individual by the firm.

Ohlemeyer said the deal did not herald a shift in legal strategy. "In product liability litigation ... our policy has been to defend cases," he said.

The Moore case was a "unique situation where we had an isolated opportunity to resolve a matter without trial," he said. That does "not prevent us from defending other cases in other places in the future, which is what we intend to do."

Ohlemeyer declined to elaborate on what made the case unique. However, the Johnson County district court in Cleburne, about 30 miles south of Fort Worth, has a reputation for being friendly to plaintiffs. Pre-trial motions by Philip Morris lawyers reflected their concern over how jurors might react to photos of the badly injured girl.

Richard Daynard, a Northeastern University law professor and head of the Tobacco Products Liability Project, an anti-smoking group, said news of the settlement should encourage more lawsuits. Despite some notable successes, he said, most plaintiffs' attorneys won't touch tobacco cases because of the industry's pledge not to settle and to appeal losses to the bitter end.

"This proves that they will settle, and I think it should cause plaintiffs' lawyers to rethink their aversion to bringing tobacco cases," Daynard said.

Andrew McGuire, executive director of the Trauma Foundation at San Francisco General Hospital and a top activist on the issue of cigarette fires, said he has long considered burn cases to be "the Achilles' heel of the tobacco industry ... because there's no way they can get around the fact that innocent children are burned and killed in these fires caused by their product."

"Finally having the first settlement signals to me that we're going to have a rash of these [lawsuits] happening in the future, and it's about time," McGuire said.

Cigarette smoking is widely recognized as the leading cause of premature death in the U.S. - as a result of tobacco-related disease. Less well known is that smoking materials - primarily cigarettes - are also the nation's biggest cause of fatal fires.

Although annual deaths from such fires have dipped from nearly 2,000 in the early 1980s to between 800 and 900 in recent years, smoldering cigarettes still account for about one-quarter of U.S. fire fatalities. These fires also cause about 2,000 injuries and hundreds of millions of dollars in property losses each year. The vast majority of the fires occur in houses or apartments, rather than cars.

Although cigarettes appear to be simply tobacco rolled in paper, they are in fact carefully engineered to look, taste and smell a certain way - and to go on burning when not being puffed. That spares smokers the nuisance of relighting - and boosts sales because more cigarettes end up being consumed.

It also means that a cigarette rolling off the lip of an ashtray onto upholstery or a mattress can smolder undetected before bursting into flames.

Critics say that with only minor modifications, cigarettes could be less prone to start fires. They point out that unlike people who get sick from smoking, many fire victims share no responsibility for their injuries but just happened to be in the wrong place at the wrong time.

Yet relatively few cigarette fire suits have been filed, and all failed until now. The companies claimed fire-safe cigarettes were not technically or commercially feasible, and plaintiffs were unable to prove the availability of a safer alternative design.

Philip Morris essentially removed that hurdle by launching a more fire-safe version of its Merit cigarettes in 2000. The new version featured ultra-thin rings of paper on the regular wrapper to act as firebreaks, or "speed bumps," producing a slower and cooler burn.

The breakthrough occurred long

after the Moore fire and nearly six years into the lawsuit. But in a trial, Philip Morris would have faced questions about why it didn't introduce fire-safe cigarettes sooner - and why the company still hasn't used the technology in other brands. According to Grisham, Shannon's lawyer, the Merit development "was absolutely the most crucial factor in the case."

The fire broke out at about 6 p.m. on a Saturday in April 1992. Shelly Moore and her baby had just left a birthday party at an ice arena. They stopped at a drive-thru to pick up barbecue sandwiches for Moore's grandparents. Running late for a cookout at the home of one of Moore's aunts, she left Shannon in the car and went inside the grandparents' home.

A few minutes later, according to witness statements, one of Moore's sisters, looking from a window inside the home, saw the car engulfed in flames. By the time Shannon's car seat was yanked from the back of the car, she was horribly burned.

Leaving a small child unattended in a car is against the law in Texas and can be prosecuted as a felony under some circumstances. After an investigation, authorities cited Moore for a misdemeanor violation.

Although a city fire inspector determined a cigarette to be a likely cause, the evidence was highly circumstantial. Moore said she always used the ashtray, and there was no evidence to explain how a burning cigarette got onto the seat of the car.

In a deposition in 1996, Moore acknowledged that she had been using a faulty lighter that at times continued to flame after she lighted a cigarette and had to be blown out. Several witnesses testified in depositions that Moore told them she thought she had lighted a cigarette as she left the car, then absent-mindedly tossed the lighter on the seat.

Although the blaze occurred in Fort Worth, in Tarrant County, by the time the suit was filed in October 1994, Moore and her daughter had moved to Johnson County. Grisham sued Shelly Moore for negligence along with Philip Morris. He conceded this was, in part, a tactic to secure a favorable venue.

Over the course of the litigation, lawyers took dozens of depositions and

Philip Morris produced more than 100,000 pages of internal documents concerning its research and lobbying activities on fire-safe cigarettes.

The company filed several motions to dismiss the case, but all were rejected.

The settlement established a trust to be administered by a bank. "In no event shall the trustee make any distribution, direct or indirect ... to Shelly Moore," the trust agreement states.

More than half of the \$2 million will go for legal fees and expenses and for reimbursement of costs paid by Medicaid - leaving about \$650,000 in the trust, Grisham said.

Before the settlement, about 15 cigarette fire cases had been filed nationwide, and all were dismissed before trial.

The industry's success in the legislative arena has been even more striking. Throughout the 1980s and '90s, tobacco companies defeated numerous bills in Congress and state legislatures that would have required more fire-safe cigarettes. They succeeded by pouring millions of dollars into fire prevention projects, then calling on fire safety groups to support them in opposing the legislation.

Their victory string was snapped three years ago in New York state, where a bill was passed requiring all cigarettes sold in the state to meet a minimum fire resistance standard.

However, state officials and the tobacco companies are still wrestling over a test to determine whether a brand meets the law's requirements. The industry, which could be forced to comply with the measure as early as next summer, could still challenge the law in court.

Grisham expressed hope that the Moore settlement would contribute to creation of a national fire safety standard. "I believe it's not a matter of if it's going to happen," he said, "it's a matter of when."

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