



2007

## The "Tobacco Wars" - Global Litigation Strategies

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Georgetown Public Law and Legal Theory Research Paper No. 1071196

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298 JAMA 2537-2539 (2007)

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# The “Tobacco Wars” — Global Litigation Strategies

Lawrence O. Gostin, JD

THE FRAMEWORK CONVENTION ON TOBACCO CONTROL (FCTC) identifies civil and criminal litigation as a public health strategy and promotes international cooperation (reporting, technical assistance, and information exchange). Holding the tobacco industry accountable through civil and criminal liability serves a number of public health objectives: *punishes* companies for hiding known health risks, manipulating nicotine content, and misleading the public; *deters* and prevents future harmful behavior; *compensates* individuals and stake-holders for health care and other costs associated with smoking and exposure to environmental tobacco smoke (ETS); *raises prices*, resulting in lower tobacco consumption; *increases disclosure* of health risks, through labeling and advertising restrictions; and *promotes transparency*, by compelling discovery of internal industry documents.

Tobacco litigation frequently has been used as a method for promoting tobacco control in the United States. Litigation is less common outside the United States, but increasingly advocates have brought innovative lawsuits abroad. This commentary explores global tobacco litigation strategies, with 4 key elements: compensation/recovery, advertising restrictions, criminal liability, and public interest writ litigation.<sup>1</sup>

## Compensation/Recovery

Public health advocates have brought litigation to obtain compensation for illness and early death for individual smokers and workers exposed to ETS. Lawsuits have been filed individually and as class actions on behalf of large populations. In some cases, advocates have sought punitive damages to punish the industry for grossly unlawful conduct and to deter future wrongdoing.

**Individual Smokers.** Most individual smokers have not fared well in tobacco litigation. In one implausible Scottish case, a trial judge concluded as late as 2005 that the causal connection between smoking and disease was unproven.<sup>2</sup> Although a few plaintiffs in the United States have won substantial verdicts, the industry has often prevailed by claiming that smokers are personally responsible for their injuries. For example, in 2001, Finland's Supreme Court ruled against a deceased smoker because he had been aware of the risks.<sup>3</sup> In 2003, the Supreme Court of Norway exonerated the tobacco firm, Tiedemanns, of liability, even though the plaintiff claimed

he was physically addicted to nicotine.<sup>4</sup> In 2005, the Tokyo High Court dismissed appeals by ex-smokers and their bereaved relatives, finding plaintiffs did not conclusively prove that smoking caused their ill health.<sup>5</sup> Despite these setbacks, individual smoker cases are pending in Canada, China, and Sri Lanka. In China, for example, a smoker has filed suit against the State Tobacco Monopoly and the mainland's 24 major cigarette manufacturers, claiming that they are responsible for his addiction to cigarettes.

**Environmental Tobacco Smoke/Work Environments.** Workers and others exposed to ETS have had greater success in the courts than individual smokers, perhaps because persons exposed to secondhand smoke cannot be held personally responsible for their illness. As early as 1976, a New Jersey Superior Court ruled, “cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely on the same air supply.”<sup>6</sup> In 1992, an Australian state court made the first award outside the United States on behalf of a worker harmed by ETS.<sup>7</sup> Other Australian courts have followed this lead, such as an award against a cruise line that falsely advertised a nonsmoking cruise, and against a club whose workers were exposed to ETS for years.<sup>8</sup> Plaintiffs with asthma have also met with success in Australian courts, such as a ruling that a restaurant breached its duty to provide a safe environment after a customer experienced a severe asthmatic attack brought on by ETS.<sup>9</sup>

Workers exposed to ETS have also successfully litigated in Japan, Norway, and the United States. In 2004, the Tokyo District Court awarded damages to a municipal employee for passive smoking he was exposed to at his workplace.<sup>10</sup> In 2000, the Supreme Court of Norway upheld an award to a bartender who developed lung cancer after working for 15 years in a smoke-filled nightclub, even though she had been a long-time smoker.<sup>8</sup> In the United States, hundreds of cases of secondhand smoke exposure have been decided on theories ranging from negligence, workers' compensation, and disability discrimination to child custody and prisoners' rights. The 2006 surgeon general's report decisively linking secondhand smoke to cancer and cardiovascular disease will bolster these claims.<sup>11</sup>

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**Class Actions.** Class actions, which aggregate a large number of individualized claims into 1 representational lawsuit, increase efficiency, lower litigation costs, and deter wrongful behavior by industry. Although class actions have been a hallmark for successful consumer litigation in the United States, courts recently have curbed their use in tobacco cases. In *Engle v Liggett Group*, for example, the Florida Supreme Court threw out the largest punitive damage award in the history of cigarette litigation totaling \$145 billion.<sup>12</sup> Class actions have also been tried in other countries, such as in Australia, Brazil, Ecuador, and Spain, but often without success. In 2000, Dubek, Israel's only cigarette manufacturer, settled a class action lawsuit by smokers who developed health problems.<sup>13</sup>

**Medical Cost Reimbursement.** Two central hurdles to success in tobacco suits—the industry's overwhelming resources and the issue of the plaintiff's personal responsibility—are overcome in medical cost-reimbursement cases. Governments and other payers seeking recompense for the costs of tobacco-related illnesses are not at fault and have substantial resources. In 1998, 46 US states negotiated a Master Settlement Agreement, which required industry to compensate states in perpetuity, with payments totaling \$206 billion through 2025. The success of the Master Settlement Agreement encouraged other groups to seek medical expense reimbursement.

The US government brought the most promising litigation for reimbursement of Medicare and Medicaid costs for smoking-related diseases. However, in 2005, the Department of Justice reduced its damages request from \$130 billion to \$10 billion, leading public health advocates to charge the White House with political interference. The US courts, moreover, have been openly hostile to medical reimbursement suits by private parties, such as labor unions. To date, the US courts have been equally dismissive of claims by foreign governments, such as Guatemala, Nicaragua, and the Ukraine. In 2006, the European Court of Justice permitted the European Community to seek reimbursement in US courts.<sup>14</sup>

Despite the lack of success in the United States, medical cost-reimbursement suits are pending in the Grand Islamic Court in Saudi Arabia and elsewhere. In Canada, the Supreme Court recently cleared the way for major litigation by the province of British Columbia seeking \$10 billion in health care costs.<sup>15</sup>

**Punitive Damages.** In the United States, plaintiffs' attorneys often seek punitive damages designed to punish the industry and discourage wrongful behavior. In the United Kingdom, for example, the largest expected damage award from a successful case would be approximately £100 000 (~US\$209 000), which is far too low to have a salutary effect on the tobacco industry.<sup>8</sup> However, the US Supreme Court has recently suggested that excessive awards may violate the Constitution. In 2007, the Court threw out a \$79.5 million Oregon verdict against Philip Morris, holding that the Fourteenth Amendment's Due Process Clause bars juries from punishing defendants for harm done to nonparties.<sup>16</sup>

## Advertising Restrictions

Tobacco control litigation is increasingly being used to hold the tobacco industry liable for misleading advertisements and promotions. In 1991, the Federal Court of Australia in New South Wales held that tobacco industry advertisements disputing the harmful effects of secondhand smoke were deceptive and restricted the dissemination of these advertisements.<sup>8</sup> In 2007, the Supreme Court of Canada upheld the Tobacco Act, which placed severe limitations on tobacco advertisements.<sup>17</sup> The Court held that although the disputed provisions did breach the tobacco companies' right to freedom of expression, the government's actions were justified and constituted a reasonable limitation of that right.

The US Supreme Court stands virtually alone in defending the constitutionality of commercial speech. In 2001, the Court struck down comprehensive regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars in *Lorillard Tobacco Co v Reilly*.<sup>18</sup> Massachusetts had placed a variety of restrictions on outdoor advertising, point-of-sale advertising, retail sales transactions, transactions by mail, promotions, sampling of products, and cigar labels. "The broad sweep of the regulations," said the Court, "indicates that the Attorney General did not carefully calculate the costs and benefits associated with the burden on speech imposed by the regulations."<sup>18</sup> The Court overturned the regulations even though they were designed to protect children and adolescents.

## Criminal Liability

Internal tobacco industry documents demonstrate that executives knew the health hazards, misled the public, targeted youth, and manipulated the nicotine content of cigarettes. When markets in highly regulated countries became less profitable, the tobacco industry aggressively sought out markets in the poorest, least-regulated countries. Consequently, public health advocates have turned to claims of criminal actions to hold companies and their executives accountable for knowing for perpetuating intentional harms on the most vulnerable populations.

Most of the cases thus far have alleged that the industry has aided and abetted massive smuggling schemes to avoid taxes and duties on tobacco products. These claims have been successful in Canada and Europe, but not in the United States. In 2004, Philip Morris International agreed to pay \$1 billion over 12 years to settle European Union charges that it aided cigarette smuggling, costing governments billions of euros in tax revenue.<sup>19</sup> In 2007, the Canadian tobacco firm JTI-MacDonald and its former president, Edward Lang, were ordered to stand trial on allegations that they organized a tobacco smuggling scheme defrauding the government.<sup>20</sup>

However, foreign government suits brought in US courts have not been successful on the technical grounds that an 18th-century common law rule bars US courts from enforcing foreign tax laws. In 2001, the Second Circuit Court of Appeals dismissed Canada's suit against the RJ Reynolds

Companies and the Canadian Tobacco Manufacturers Council. The Canadian government alleged that the defendants facilitated the smuggling of tobacco products into Canada, thereby evading taxes and duties, and claimed \$3 billion under the treble damages provision of a racketeering statute. Although the smuggling alleged by Canada was never repudiated, the suit was dismissed. In 2005, the same court rejected a European Commission claim of smuggling by the tobacco industry, relying on the Canadian case.<sup>21</sup>

### Public Interest Writ Litigation

To overcome the barriers of traditional tort litigation, litigators have used the creative tool of “public interest writ litigation,” which is an action in equity to enforce fundamental constitutional rights. This form of litigation relies on human rights theories embedded in national statutes and constitutions affording citizens a right to health, life, and a clean environment.

The High Court of Bangladesh, for example, struck down British American Tobacco’s “Voyage of Discovery” promotional campaign, which used a yacht. The High Court found that the campaign was unconstitutional because the yacht constituted an advertisement for the tobacco company—any cigarette advertisement without appropriate health warnings offended the constitutional right to life.<sup>22</sup>

Public interest writ litigation has also been successful in India. The High Court of Kerala held that the constitutional right to life included freedom from public smoking and smoking-related disease.<sup>23</sup> The court found that public smoking constituted air pollution and a public nuisance. The Supreme Court of India granted a public interest writ filed by the President of the Mumbai Regional Congress Committee against the Union of India and major Indian tobacco companies. The Court ordered Indian states to immediately ban smoking in many public arenas, such as hospital buildings, educational institutions, libraries, court buildings, public conveyances, and public offices. At the same time, the court directed major urban police commissioners to report on their enforcement of advertising restrictions and health warnings.<sup>24</sup>

Public interest writ litigation has also been successfully used in the Republic of Uganda to curtail tobacco use. In 2002, the High Court of Uganda declared secondhand smoke a violation of the rights to life and to a clean, healthy environment.<sup>25</sup> Stemming from that decision, in 2004, country-wide smoke-free regulations went into effect.<sup>1</sup>

In 2007, the organization Non-Smokers’ Rights Association of Nepal filed 2 writ petitions in the Supreme Court concerning advertising and promotions. Both cases are pending. One petition sought to enjoin a concert organized by the tobacco company Surya Nepal, which would have promoted its tobacco brands. A second petition, based on articles in the interim Constitution of Nepal and the FCTC, urged the government to call off a 5-year sponsorship deal between Surya Nepal and the Cricket Association of Nepal.

The petition further asked for an order to stop any advertising, promotion, or sponsorship until the pending anti-tobacco act was passed.

### The Tobacco Wars

Tobacco litigation has been a public health success, but the success has only gone so far. Perhaps the most important effect of tobacco litigation was to transform public and political perceptions about risk and responsibility in smoking, making clear what manufacturers knew, how they concealed this knowledge, and how they manipulated consumers. Tort law has reframed the debate from personal to corporate responsibility. However, the industry still manages, at least in the political realm, to alter the discourse to one involving freedom of choice for the smoker, the evils of “big government,” unfair taxation, and the influence of trial lawyers.

Now that the tobacco industry is aggressively seeking new markets in the poorest, least-regulated countries, litigation will take on new importance. The most promising strategies will use a human rights framework, arguing that tobacco is so detrimental that it violates the rights to health, life, and a sanitary environment.

**Financial Disclosures:** None reported.

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