THE TOBACCO WARS: A CASE STUDY

[This case] is about an industry . . . that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national health care system. Defendants have known many of these facts for at least 50 years or more. Despite that knowledge, they have consistently, repeatedly and with enormous skill and sophistication, denied these facts to the public, the Government, and to the public health community.


As a case study, the history of tobacco litigation demonstrates how the litigation strategies of public health advocates have evolved over time, largely in an effort to overcome defenses pointing to smokers’ personal responsibility. Those who are unfamiliar with the story of the tobacco wars are often surprised to learn how many of the restrictions on the industry that we now take for granted—including bans on outdoor advertising and the use of misleading terms like low tar—were achieved via litigation rather than direct regulation.

The First Wave of Tobacco Litigation

In the early 1950s, before the first lawsuit against the tobacco industry was filed, the cigarette was a cultural icon. Tobacco smoking was viewed as chic, promoted ubiquitously, and portrayed by sports and movie stars as an accouterment of the good life. Epidemiologists, however, were already reporting an association between cigarettes and cancer, and
these data were soon published in the popular media. The first tobacco lawsuit was filed in 1954, initiating what the torts scholar Robert Rabin called the first wave of tobacco litigation. During this first wave, from 1954 to 1973, approximately 100 to 150 cases were filed; very few of these cases ever went to trial, and none of the plaintiffs prevailed.

These first cases were filed principally under theories of negligence, breach of warranty, and misrepresentation. In retrospect, it is surprising that tobacco litigation was so unsuccessful. At that time, plaintiffs could not be considered to have assumed the risks voluntarily, because they had begun smoking without knowledge of the harmful effects. The misrepresentation claims, moreover, appeared powerful because industry advertisements trumpeted product safety: “Play Safe, Smoke Chesterfield. Nose, throat, and accessory organs not adversely affected” (1952); and “More doctors smoke Camelts than any other cigarette” (1955). Epidemiologists were still working out the problem of causation, culminating in 1964 with Luther Terry’s landmark surgeon general’s report on smoking. Ironically, around the same time that the surgeon general’s report was dramatically changing public opinion about smoking, the American Law Institute (ALI) all but absolved the tobacco industry from strict product liability. In the Restatement (Second) of Torts, the ALI stated, “Good [uncontaminated] tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful.”

The Second Wave

By the time of the second wave of litigation, from 1983 to 1992, cigarette smoking was becoming a hallmark not of elegance but of weak character and lower social class. The public had become far more health conscious, and cigarettes were thought to be a highly dangerous and addictive product. This new health consciousness was both a blessing and a curse for litigants. Although causation was easier to establish, plaintiffs could no longer claim ignorance of the health risks. Defense counsel portrayed plaintiffs as morally responsible for their own illnesses. Individuals, after all, made their own choice to smoke, fully apprised of the risks. Federal antitobacco regulation was used by the industry as a shield against litigation. The Cigarette Labeling and Advertising Act, enacted in 1965, required warning labels on cigarette packages. Defense counsel could point to those warnings as nearly definitive evidence that plaintiffs were informed of the risks.

During this second wave of litigation, nearly two hundred cases were filed, many under the new theory of failure to warn. This was a time
when litigants were making stunning advances in mass torts cases concerning products ranging from Agent Orange\textsuperscript{70} and DES to the Dalkon Shield contraceptive device and Bendectin. Despite marked changes in science, tort theory, and social attitudes, the results were the same. It was not until 1990 that a New Jersey jury awarded damages of four hundred thousand dollars to the estate of Rose Cipollone, a smoker who died of cancer at the age of fifty-eight. The jury verdict (which was overturned on appeal) was the first in the extensive history of tobacco litigation in which a plaintiff was awarded damages.\textsuperscript{71} To understand why the industry was so successful, it is important to examine its tactics.

\textit{“King of the Mountain”: Industry Tactics in the Tobacco Wars}

The aggressive posture we [the tobacco companies] have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs’ lawyers. . . . To paraphrase General Patton, the way we won these cases was not by spending all of [R. J. Reynolds’] money, but by making that other son of a bitch spend all his.


The tobacco industry resorted to an unusual but highly effective strategy during the first two waves of tobacco litigation: aggressive and uncompromising litigation.\textsuperscript{72} First, the industry was relentless in pretrial maneuvering, attempting to delay trials endlessly and deplete plaintiffs’ resources. Since plaintiffs’ lawyers were characteristically situated in small firms and practiced on a contingency basis, they could not cope with large up-front expenses preceding a trial. The industry adopted a conscious policy of devoting vast resources to their legal defense, never settling a case, and always fighting to the bitter end. For example, the Cipollone case produced twelve federal opinions and cost the plaintiff’s attorneys roughly $4 million; the attorneys withdrew from the case before it went to trial a second time.\textsuperscript{73} Second, the industry adopted a no-holds-barred defense in which it probed the moral habits of the plaintiff, urging juries to find personal blameworthiness. Since risks of cancer and heart disease develop over decades, it was easy for defense counsel to examine every possible behavioral risk factor. What was intended to be an adjudication of corporate responsibility became a searching examination of the plaintiff’s morality. Finally, the industry consistently disputed the health risks. A 1972 memorandum outlined the industry’s strategy of “creating doubt about the health charge without actually denying it; and advocating
the public’s right to smoke without actually urging them to take up the practice.”

The Preemption Battle: The Cigarette Labeling Act and Rose Cipollone

The Cigarette Labeling and Advertising Act of 1965, subsequently amended as the Public Health Cigarette Smoke Act of 1969, preempted state regulation based on “smoking and health.” Following Rose Cipollone’s jury verdict, the Supreme Court granted certiorari, setting the stage for the landmark decision in *Cipollone v. Liggett Group* (1992). The Supreme Court, in a plurality decision authored by Justice John Paul Stevens, held that the 1969 Act preempted tort claims based on “failure to warn and the neutralization of federally mandated warnings to the extent that those claims rely on omissions or inclusions in the [manufacturers’] advertising or promotions.” However, the act did not preempt tort claims based on express warranty, intentional fraud and misrepresentation, or conspiracy. The Supreme Court’s decision thus left ample room for tobacco litigation based on theories of misinformation and deceit. During the third wave, plaintiffs succeeded in ways that scarcely could have been imagined.

The Third Wave

For much of the Twentieth Century, tobacco defendants enjoyed, in effect, a tort-free zone to market their deadly products. Plaintiffs in tobacco products liability cases generally pleaded causes of action such as negligence or the implied warranty of merchantability without success. The tobacco lawyers countered with “blaming the victim defenses,” such as contributory negligence and the assumption of risk; themes that resonate with the individualism at the core of American culture. Juries were predisposed to agree with the tobacco industry’s arguments that smokers made a personal choice to run well-known risks of cancer and other diseases. *Parens patriae* litigation [by states’ attorneys general] avoided previously intractable issues such as foreseeability, causal indeterminacy, and negligence-based defenses. The states could not be tarred with user-oriented defenses because they had never smoked a single cigarette.


The third wave of tobacco litigation began with a dramatic revelation. On May 12, 1994, Professor Stanton Glantz at the University of California, San Francisco medical school received an anonymous shipment
of more than ten thousand pages of internal industry documents (later found to have been sent by a paralegal at the law firm representing Brown and Williamson Tobacco). The “Tobacco Papers” contained damaging evidence of the tobacco industry’s actual knowledge and intent to deceive.\textsuperscript{79} Despite the industry’s public claims, the Tobacco Papers demonstrated that executives understood the health effects of smoking, the addictive quality of nicotine, and the toxicity of pesticides contained in cigarettes. Moreover, the industry had intentionally manipulated the nicotine content of cigarettes and marketed their products to young people. These documents, and others obtained through press reports and discovery, would be used with great effect in the ensuing litigation—which was marked by class actions and claims by governmental plaintiffs and other third-party payers for medical cost reimbursement in addition to individual smoker lawsuits.\textsuperscript{80}

\textbf{Medical Cost Reimbursement}

Governments and other payers who sought reimbursement for the costs of tobacco-related illnesses played a dominant role in the third wave. State attorneys general filed direct claims against the tobacco industry for reimbursement of public expenditures to pay for the treatment of tobacco-related illness. Following the original Medicaid reimbursement suit, filed by Mississippi in 1994,\textsuperscript{81} most states joined the litigation. In 1997, the tobacco industry and the attorneys general reached a painstakingly negotiated settlement that was contingent on congressional action to grant the industry immunity from certain forms of litigation. In exchange, the states would receive $368 billion over twenty-five years. However, attempts by Congress to satisfy the settlement’s condition ultimately failed. A bill sponsored by Senator John McCain, deemed unacceptable by the industry, would have increased the tax on cigarettes, raised the settlement amount, and altered the civil immunity provisions.\textsuperscript{82} As a result, RJR-Nabisco withdrew support for federal tobacco legislation, and the bill died in committee.

In the wake of federal failure, four states reached a new settlement with the tobacco industry for a total of $40 billion.\textsuperscript{83} As the cost of case-by-case settlements mounted, the industry negotiated a Master Settlement Agreement (MSA) with forty-six states and six U.S. territories. The agreement, concluded in 1998, required industry to compensate states in perpetuity, with payments totaling $206 billion through the year 2025; created a charitable foundation to reduce teen smoking;
disbanded the Council for Tobacco Research (an industry group that sought to undermine objective scientific studies on the health risks of smoking); provided public access to documents through the Internet; and restricted outdoor advertising, the use of cartoon characters, tobacco merchandising, and sponsorship of sporting events. The industry received civil immunity for future claims brought by the states themselves but not for individual or class action lawsuits on behalf of smokers. Cigarette manufacturers and other stakeholders later challenged the lawfulness of the MSA on constitutional and antitrust grounds and on the basis of the unlawful exclusion of Indian tribes from the negotiations. However, none of these suits was successful, and the MSA has been consistently upheld.

The success of state attorneys general against the tobacco industry encouraged other groups to seek medical expense reimbursement. The most promising attempt was a lawsuit by the federal government to recoup health care expenditures for past and future treatment of tobacco-related illnesses. The U.S. Department of Justice, in a statutory claim brought under the federal antiracketeering statute known as RICO, sought to enjoin tobacco companies from engaging in fraudulent or other unlawful conduct and to force companies to “disgorge” $280 billion in proceeds from their past unlawful activity. In a severe blow to the government’s case, the U.S. Court of Appeals for the D.C. Circuit held in 2005 that disgorgement was not an available remedy because RICO provided jurisdiction only for forward-looking remedies aimed at future violations. The Justice Department subsequently reduced its damages request from $130 billion to $10 billion, leading health advocates and Democratic lawmakers to accuse the White House of improper political interference. In the end, the trial court ruled that companies had conspired to deceive the public but that it was not permissible to impose billions of dollars in fines. In 2006, federal judge Gladys Kessler, exercising judicial authority under RICO to prevent future violations of the statute via court order, ordered the defendants to stop using deceptive terms such as low tar and light and to include “corrective disclosures” on their product labels and advertising acknowledging, for example, that the industry manipulated tobacco products to increase addiction. As of this writing, the precise content of the corrective disclosures was the subject of continued litigation, with tobacco companies arguing that Kessler’s order exceeded the proper scope of judicial authority under RICO and violates their First Amendment rights.
The courts have been openly hostile to medical reimbursement suits by private parties. A court rejected a claim by individuals acting as private attorneys general to recoup Medicare costs.92 And eight federal circuits have ruled against suits by labor unions and other private third-party payers to recoup health care costs for treatment of tobacco-related illnesses.93 Even foreign countries have sought to obtain costs expended by their public health care systems, thus far without success.94 Perhaps the most surprising plaintiffs were bankrupt asbestos companies, which had been found liable for causing lung cancer in workers. These companies sued the tobacco industry for contributions to the lung cancer burden that juries had attributed solely to asbestos, but they too have met with little success.95

Class Actions

Tobacco litigants have also adopted class action litigation as a third-wave strategy. In 1994, nonsmoking flight attendants filed a class action against tobacco manufacturers alleging that they suffered injuries caused by inhalation of secondhand smoke in airplane cabins. The court certified the class (a step crucial to the success of class action litigation),96 and the parties reached a settlement for a $300 million medical foundation; the settlement permits individual lawsuits.97

The judiciary, however, has thus far thwarted the most ambitious class actions. In Castano v. American Tobacco Company (1996),98 the Fifth Circuit Court of Appeals decertified a class of all nicotine-dependent smokers in the United States because variations in state law would render adjudication of aggregated claims impracticable. Similarly, in Engle v. Liggett Group (2006), the Florida Supreme Court affirmed a lower court’s decision to throw out the largest punitive damage award in the history of cigarette litigation, $1.45 billion. The court also affirmed decertification of the class because individualized issues, including proof of causation and apportionment of fault among the defendants, predominated over issues common to the class.99 Courts in other jurisdictions have also rejected class action tobacco suits.100

Individual Claims By Smokers

The tobacco industry also continues to face litigation from individual smokers in the third wave. Plaintiffs in Oregon101 and California102 have won substantial verdicts, and numerous individual suits are pending.103
Although the *Engle* decision was initially cast as a victory for the tobacco industry, the court’s ruling opened the door for individual claims by Florida smokers. The Florida Supreme Court ruled that the jury verdict with regard to the defendant manufacturers’ conduct was binding on Florida courts adjudicating subsequent individual claims by so-called *Engle*-progeny plaintiffs. Because the defendant cigarette manufacturers were found liable for negligence, products liability, fraud, and breach of warranty, members of the decertified class were able to move forward with individual claims without needing to establish these elements independently, resulting in some significant damage awards for plaintiffs. In 2015, a federal circuit court dealt a major blow to this strategy, finding that the Florida courts had interpreted the *Engle* jury findings against the tobacco industry so broadly as to amount to the “functional equivalent of a flat ban” on tobacco, which U.S. Congress has repeatedly declined to adopt.

Individual nonsmokers have also successfully sued over exposure to secondhand tobacco smoke. Although these plaintiffs have faced difficult legal hurdles in proving causation, a 2006 surgeon general’s report decisively linking secondhand smoke to cancer and cardiovascular disease has bolstered their efforts. With the formation of the Tobacco Trial Lawyers Association (a network that shares information, expert witnesses, and tactics), stricter judicial case management, and new rules regarding work-product discovery that protect lawyers’ strategies developed during previous cases from discovery during new suits, individual lawsuits may be reemerging as a force in the tobacco wars, though the target may not always be the tobacco industry itself. In 2013, for example, a California trial court awarded modest damages to a family who sued their neighbors, landlord, and homeowners association, arguing that their neighbors’ heavy smoking on sidewalks and a patio adjacent to their home was exacerbating their son’s asthma. Litigation can thus exert pressure on businesses and other public and private entities to adopt nonsmoking policies as a means to protect nonsmokers from harms caused by secondhand smoke.

**Punitive Damages**

The future of large punitive damage awards (and the powerful incentives they create) is uncertain in both class action and individual suits, as excessive awards may violate the constitutional guarantee of due process. The Supreme Court has suggested (without actually deciding) that
punitive damages (intended to punish the defendant and deter others from engaging in similar conduct) should not exceed compensatory damages (tied to lost earnings, pain and suffering, medical costs, and other expenses incurred by the plaintiff) by more than a single-digit ratio, but state courts have subsequently upheld jury awards far surpassing this limit. The Supreme Court partially addressed this issue when it threw out a $79.5 million Oregon verdict against Philip Morris in a 2007 case. The Court held that the Fourteenth Amendment’s Due Process Clause bars state court juries from using punitive damage awards to punish defendants for harm done to nonparties. The Court reasoned that such awards deprive the defendant of a fair chance to defend against claims of absent victims whose circumstances are unknown. However, the Court sees no problem with allowing evidence of harm to nonparties as a means of showing reprehensibility, as long as the jury does not punish defendants for such harms.

The tobacco wars have been a stunning, and highly unexpected, public health success. Considering that numerous tobacco suits over several decades failed to clear the obstacle of smoker responsibility, the Master Settlement Agreement is a remarkable achievement. Additionally, the MSA’s ban on outdoor advertisements, cartoon characters, merchandising, and sports sponsorship has reduced the omnipresent images of tobacco in American culture. Industry documents obtained through litigation have been used to great effect by antismoking advertising campaigns like the Truth campaign, which has emphasized the duplicitous nature of tobacco industry practices and the disregard that companies have for their consumers, rather than smoking-related health harms alone.

Yet despite the undeniable benefits of the litigation, the victory is tarnished in several respects. First, the financial settlement offered a missed opportunity for investment in smoking prevention. Unfortunately, the states have used the discretionary funds primarily for general education, social programs, tax relief, and other political priorities. States are spending less than two cents of every dollar in tobacco revenue from the MSA and tobacco taxes to fight tobacco use. Meanwhile, for every dollar spent by states to reduce tobacco use, the industry spends eighteen dollars to market tobacco products. Second, disbanding the Council for Tobacco Research actually may be advantageous to the industry. The council had become a vehicle for discovering harms from tobacco use and, eventually, industry concealment of those harms, which rebounded to the disadvantage of tobacco companies. Third, advertising restrictions agreed to in settlements still permit ample scope
for creative industry promotion in multiple forums accessible to young people. Cigarette advertisements were still pervasive in sporting activities, which reach a wide television audience, until Congress took action in 2009.\textsuperscript{118}

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. In 2009, shifting public opinion and the diminished power of the tobacco industry made it possible for Congress to adopt the Family Smoking Prevention and Tobacco Control Act, sweeping federal tobacco legislation that granted the FDA the authority to regulate advertising, packaging, and even the content of tobacco products. This case may be instructive for those who seek to use litigation to encourage healthier eating, an issue discussed further in chapter 12.