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Roles of tobacco litigation in societal change

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Litigation plays at least six different roles in tobacco control. First, the most common and least dramatic role is ordinary enforcement of tobacco-control laws. Laws frequently ban sales to minors, smoking in public places, and certain types of advertising. The governments that impose these laws have the burden of enforcing them, which may involve litigation against violators. Second, too frequently governments enforce tobacco-control laws sporadically or not at all, creating the opportunity for NGOs either to bring law enforcement actions directly or to sue their governments to force them to do their job, depending on whether courts will permit NGOs to take such actions. Third, tobacco companies increasingly use litigation to thwart effective tobacco control legislation and programmes, typically arguing that constitutional provisions or other controlling law pre-empts such measures. Fourth, lawsuits and administrative proceedings have been brought by smoke-sensitive individuals against employers and places of public accommodation, seeking protection from secondhand smoke or compensation for illnesses caused or exacerbated by exposure to secondhand smoke. Fifth, many lawsuits have been brought by individuals, groups or classes of individuals, and third-party health care payers against the tobacco companies, seeking compensation for tobacco-caused illness, death, and/or out-of-pocket economic costs. Sixth, governments occasionally attempt to enforce general laws (e.g. against racketeering) against tobacco companies, alleging that deceptive and illegal practices by the industry have harmed the general public. Unlike ordinary law enforcement, these cases seek court orders requiring fundamental changes in the way these companies do business.

Each of these roles has implications for social change. Each will be discussed in turn, with the most attention devoted to the cases against the tobacco industry. We will also look at the role that legislation can play in encouraging or discouraging tobacco litigation. We will conclude with a brief discussion of how tobacco control would have been different in the past in the absence of litigation, and how litigation may affect the course and success of tobacco control in the future.

Law enforcement

While many tobacco-control objectives can be achieved through legislation, legislation is effective only to the extent that it is enforced. This is a major issue because many legislative initiatives seek to change customary social behaviour such as selling to minors and smoking in public places, while the tobacco industry has strong motivation and little compunction about evading legislative restrictions such as advertising bans and counter-smuggling measures on its own behaviour. Both public education and active enforcement are often necessary if these laws are not to be ‘dead letters’.

Enforcement can be accomplished through administrative measures (e.g. license suspensions or revocations) or through criminal or quasi-criminal (e.g. traffic summons-type procedures, civil fines) processes. Most enforcement activity does not involve extensive litigation, because the
facts are usually easy for the authorities to establish, and the level of sanctions typically low enough that it is not worthwhile for the wrongdoer to fight the charge. There are exceptions where the defendant, often supported by the tobacco industry, refuses to comply in order to force a legal challenge to the validity of the tobacco-control legislation (discussed below in Section 'Industry counter-attacks'), or in smuggling and tax-avoidance cases where the penalties sought may be very large.

**Litigation by NGOs to compel enforcement**

Many tobacco-control laws and regulations are rarely if ever formally enforced. Occasionally this is a good sign, as with laws restricting smoking in public places in the United States that are informally but effectively enforced through social pressure. However, where public support has not been mobilized behind the policy underlying the law, the failure of public authorities to enforce the law results in its being flouted by anyone who has incentive to do so. This characterized, for example, the status of sales-to-minors bans in the United States until the 1990s, restrictions on smoking in French restaurants until 2008, and bans on advertising in many countries since their adoption.

In the United States the doctrine of 'prosecutorial discretion' prevents private parties from forcing government action, but state consumer protection laws frequently allow public agencies to act as 'private attorneys general' in the public interest to require product manufacturers or sellers to obey the law. In Massachusetts, for example, a 1987 lawsuit brought by the Group Against Smoking Pollution of Massachusetts against Store 24, a local convenience store chain, alleging that they had sold cigarettes repeatedly to teenagers in violation of state law, resulted in Store 24 agreeing to demand positive identification from young people before selling them cigarettes as well as monitoring their own stores for compliance with the new policy. This was the first time that such a 'carding' requirement was imposed anywhere in the United States, and set a model for subsequent regulations. A similar approach was used in Bangladesh and in Mali, where NGOs obtained sanctions against tobacco firms that were engaged in illegal promotion and advertising (Rendezvous with Mahamane Cisse 2000).

Some legal systems do permit NGOs to bring 'public interest' actions to require the government to enforce the law, including relevant constitutional provisions. The 1999 pioneering case in the Indian state of Kerala produced a judicial order applying the constitutional right to health protection by requiring the police to enforce a ban on smoking in public places. This was followed by a similar ruling by the Indian Supreme Court in November 2001, which led to action by government bodies throughout India banning smoking in public places (Murlidhar v Deora v Union of India and Others 2001). Another case in Uganda produced a settlement with the government to the same effect (The Environmental Action Network, Ltd. et al. 2000).

**Industry counter-attacks**

While the tobacco industry is quite litigious, it threatens more litigation than it brings. For example, in the United States it typically sends its lawyers to meetings of local legislative bodies that are considering strong tobacco-control measures. They 'inform' the lawmakers that the measures they are considering are beyond their jurisdiction; are unconstitutional; and/or are 'preempted' by higher state or federal law that are expressly or implicitly inconsistent with the proposed regulations, or else that simply 'occupies the regulatory field', leaving no room for local regulation. Sometimes the lawmakers back down and pass ineffective measures instead. Often, they go ahead with the strong measures, and the threatened lawsuits do not materialize. Occasionally the industry (typically acting through local stores, restaurants, or bars, whose legal

**Secondhand smoke cases**

Two types of cases exert pressure to change social norms in the direction of protecting non-smokers from exposure to secondhand smoke. Some cases, such as those brought under laws protecting disabled individuals, seek judicial orders requiring particular employers or proprietors
of places of public accommodation either to ban smoking outright, or at least to ensure that non-smokers can avoid exposure to secondhand smoke. Other judicial or administrative proceedings, such as workers’ compensation cases, achieve change indirectly by attaching a high price tag to neglecting to protect employees from secondhand smoke exposure.

In a 1980s case, a non-smoking social worker, supported by an NGO, sued the Commonwealth of Massachusetts to require it to provide her with a safe, that is, smoke-free working environment. A court ruled preliminarily that the common law right to a safe workplace would support injunctive relief; the state settled the case by providing non-smoking workplaces to all its employees. Actions brought under the Americans with Disability Act, the Rehabilitation Act, and various state and federal regulations imposing similar obligations upon governmental bodies and regulated industries, have established that workers and patrons of public accommodations whose medical conditions require smoke-free environments are entitled to them, and have ordered employers and proprietors to change their rules accordingly. Other American decisions have conditioned custody orders in divorce cases upon the custodial spouse not smoking and not permitting smoking, in places where the child is present (Sweda 2004).

Cases seeking financial compensation from employers, whether for illness or disability caused by exposure to secondhand smoke or for lost wages as a result of needing to leave a smoky workplace (or both), are more numerous and widespread. Successful cases have been brought in Sweden, Britain, and Australia, as well as the United States. Even a prior history of smoking has not disqualified claimants, so long as the secondhand smoke exposure was a substantial contributing cause of their illness or disability. In this area a few successful cases can have a broad-scale social impact. A 2001 Australian jury award of Aus$466 000 to a bartender who contracted throat cancer, combined with a handful of earlier less generous awards, led to a movement throughout Australia to ban smoking in restaurants, bars, and casinos. In Britain, a few modest awards led the government to rethink occupational safety rules and mandate protections for non-smokers (Daynard et al. 2000). In July 2006, the Supreme Court of Israel accepted an appeal from the Jerusalem Small Claims Court and awarded significant compensation to an individual who was exposed to secondhand smoke in a Jerusalem restaurant. Since then, hundreds of lawsuits have been filed (Siegel 2007). In the United States, the fear of such awards has resulted in insurers, legal counsel for employers, and groups representing building owners and managers urging their insureds, clients, and members to eliminate indoor smoking.

A number of cases have required disability insurers and pension plans to cover employees who were forced to leave the workplace because of smoke-related medical conditions. Others have required employers to pay back wages to employees who were fired for complaining about smoky working conditions or for refusing to work in these conditions. These have added to the pressure among employers and their insurers and counsel that prudence requires a smoke-free workplace.

**Lawsuits against tobacco companies seeking money damages**

The power of the tobacco industry to block most forms of effective tobacco control legislation in the United States led advocates to seek other venues in which the industry could be held accountable and encouraged to change its behavior. Money damage lawsuits at first seemed an odd strategic choice, since the connection with societal change was not obvious. Nevertheless, the Tobacco Products Liability Project began advocating for such lawsuits as a tobacco control strategy in 1984, and gradually persuaded the public health community of its merits (Daynard 1988).

Tobacco products liability suits offer at least six potential social benefits. First, since smoking causes over $100 billion in health care and lost income costs (and untold billions more in suffering by the victims and their families) each year in the United States alone, shifting any substantial fraction of this burden to the manufacturers through successful lawsuits would force them to raise prices dramatically. Since the demand for cigarettes is somewhat price-elastic, especially among children and teenagers, increased prices would result in reduced consumption, especially among youth. This is precisely what has happened as a result of the settlements in 1997 and 1998 of lawsuits against the industry brought by state attorneys general seeking reimbursement of state-borne tobacco-caused health-care expenditures. Consumption among 12th grade students in the United States has declined by more than one-third (Fountain 2001).

Second, the publicity from these lawsuits would dramatize for the public the fact that smoking injures and kills real people, not just statistics. This has been enhanced by the industry’s public relations response to these cases— that anyone so heedless as to smoke cigarettes after the Surgeon General warned of the dangers has only himself or herself to blame for whatever grave illness ensues. This response has until recently been quite effective for the industry in discouraging adverse jury verdicts, but it severely undercut its marketing campaign to confuse and distract smokers and potential smokers from thinking about the deadly consequences of using their products.

Third, fear of such lawsuits, and especially of large punitive damage awards, might motivate tobacco executives to change the way they do business. Indeed, the threat of punitive damages is now very real, with for example a $79.5 million award in an Oregon case. Concern about product liability awards is frequently cited by manufacturers of other products as reasons for including graphic warnings, altering product designs, or even withdrawing particularly dangerous products from the market. In the case of cigarette manufacturers, such concern might lead them to stop denying that smoking causes addiction, disease, and death, or stop targeting their marketing efforts at young people, or perfect and implement cigarette designs that would be somewhat less deadly. Although tobacco liability suits began in 1954, it was not until such cases started winning in 1996 that the industry’s behavior began to change. The ‘voluntary’ changes to date have been modest and mostly cosmetic, but movement is finally perceptible. The companies no longer deny the connections between smoking and various diseases, and actually admit the connection on their websites, but they do nothing else to publicize these connections. They have refocused their marketing target from children and teenagers to college-age young adults. They have also actively embarked on research and development of less toxic cigarettes.

Fourth, the ‘discovery’ process, which permits parties in lawsuits to demand copies of relevant internal documents from opposing parties and even non-parties, has unearthed millions of pages of industry documents, many of which are quite incriminating. In particular, they demonstrate that the companies knew since the 1950s that smoking caused cancer and other diseases, yet continued to pretend the contrary, actively suppressing or refusing reports that they believed to be true (Glantz et al. 1996). Since these documents became available in the mid-1990s largely as a result of aggressive discovery by the lawyers for the State of Minnesota’s case against the industry (as well as the heroic, if illegal, removal and dissemination of documents by a tobacco company paralegal named Merrell Williams), they have been instrumental in persuading juries to focus on the misdeeds of the industry rather than the weakness-of-will of the smokers. Equally important, their wide availability on the Internet and in public depositories and publication in numerous media stories has helped make the industry a political pariah, making anti-tobacco legislation possible in many states. Nor has the effect been limited to the United States: major document-based studies of industry misbehavior in Britain, the Middle East, and with respect to the World Health Organization, among others, has increased the determination and effectiveness of tobacco control advocates throughout the world (Zeltner et al. 2000).

Fifth, the money from verdicts and settlements can be used to reimburse individuals and third-party health-care payers for injuries and expenses caused by the tobacco industry and its products. Some money from the states’ settlements of their Medicaid reimbursement cases is being devoted
to tobacco-control activities. Although this represents only a small percentage of the approximately $10 billion per year that the states are receiving from the industry, it has nonetheless greatly increased the total amounts that the states are spending for tobacco control. An additional $1.5 billion resulting from the 1998 'Master Settlement Agreement' between 46 states and the industry has gone to the American Legacy Foundation which funds tobacco-control activities on the national level.

Sixth, the fact that, at least in the United States, cigarettes annually produce far more financial harm than revenue creates the ongoing possibility that a flood of individual cases or class actions will bankrupt the industry. While the consequences of bankruptcy are somewhat unpredictable, it is likely that a bankruptcy court would not permit the companies to continue selling cigarettes as part of a reorganization plan if the new cigarettes were likely to create as much liability as the ones that sent the companies into bankruptcy. This would create an important opening for public health organizations, which could advise the court of changes in cigarette design and marketing necessary to reduce the potential for future liability (Gottlieb and Daynard 2002).

While most cases continue to be brought by individuals, class actions and third-party reimbursement cases have also been filed. Class actions permit a large number of similarly situated individuals to be represented by a few named plaintiffs: any legal judgment on the common issues rendered in the case applies equally to the named and unnamed class members. The only tobacco class action settlement thus far was on behalf of a nationwide class of flight attendants who had been exposed on the job to secondhand smoke. The settlement provided $300 million for a foundation to fund medical research on smoke-related illnesses, and eased the legal burden for flight attendants to seek individual damages (Broni Settlement Agreement 1997). Another case, on behalf of Florida smokers who contracted tobacco-caused diseases, produced three landmark jury verdicts: the first found that smoking caused 20 diseases, and held the industry liable on a number of grounds, including conspiracy to defraud their customers and to fraudulently conceal health information (Engle and Reynolds Tobacco Co. 1999); the second awarded an average of $4 million in compensatory damages to each of three named smokers; the third awarded the class $145 billion in punitive damages. While the punitive damages award to the class was overturned, the Florida Supreme Court in 2006 allowed lawsuits by individual plaintiffs to proceed in an expedited manner. While the tobacco industry had successfully discouraged most lawyers from bringing cases in the past by its scorched earth litigation tactics, these two class actions brought by the same husband-and-wife team (Stanley and Susan Rosenblatt) demonstrated that the industry could be defeated by talent, determined, but only modestly funded attorneys.

In another class action, a Louisiana jury ordered tobacco companies to fund a ten-year quit smoking campaign for smokers in that state (Finch 2008). Other class actions have been brought seeking refunds of money spent by smokers who were induced to smoke "low tar" cigarettes on the fraudulent representation that they were safer. In 2009 the US Supreme Court ruled that federal law did not present an obstacle to the pursuit of these "low tar" consumer fraud cases.

Third party reimbursement cases are predicated on the fact that the tobacco industry knows that most smoking-induced medical costs are not paid by the smokers themselves. Since the companies know that they cause financial injury to third parties (states, health insurers, etc.), they should be liable for the costs that flow from the design of their unreasonably dangerous products and from their deceptive conduct. Litigation pioneered by Mississippi and Minnesota, and later brought by most other US states as well, resulted in mostly favourable judicial decisions and the resulting multi-billion dollar settlements already mentioned (Master Settlement Agreement 1988). Unfortunately, American courts have almost uniformly rejected all subsequent cases brought on the same theory, ruling that the third party's financial injuries were too "indirect", and distinguishing the opposite decisions in the state cases on unconvincing (but nonetheless authoritative) grounds. Thus, private health insurers, union health and welfare funds, foreign governments, and even the US federal government, have all had their reimbursement claims rejected by US courts. Such litigation brought by the Canadian province of British Columbia is, however, proceeding to trial, as is similar litigation brought by a major private health insurer in Israel.

The tobacco industry has not always been content to take its chances in court. In the United States the industry has been a prime – but usually hidden – sponsor of "tort reform" efforts, which seek enactment of state or federal laws changing the legal principles applied by the court so as to make lawsuits against the industry more difficult or even impossible. Such a statute prevented tobacco litigation in California for ten years, until it was repealed in 1998. The industry also supports procedural changes with similar effects, such as: (1) laws providing only a modicum of regulation, while 'preempting' claims that could otherwise be brought against the industry; (2) the 'Class Action Fairness Act', which removes class actions against them from state courts, where they have sometimes been successful, to federal courts where they were thought more likely to be dismissed; (3) proposed state legislation to prevent public airing of documents obtained in discovery; (4) proposed bans on the use of class actions or punitive damages in litigation against the industry; and (5) proposed state or federal laws limiting attorneys fees in tobacco litigation so as to discourage competent practitioners from taking these cases. However, laws facilitating the state lawsuits against the industry were passed in Florida, Massachusetts, and Maryland in the mid-1990s. The constitutionality of similar law passed in the Province of British Columbia was upheld by the Canadian Supreme Court in 2005 (Imperial Tobacco Co. Ltd. v. British Columbia 2005).

**Enforcement of laws prohibiting deceptive conduct**

Tobacco companies, like all other legal entities, are subject to general restrictions against obtaining money dishonestly. In the state context these generally include laws outlawing 'unfair or deceptive acts or practices in commerce'. State attorneys general, and often private litigants as well, may bring lawsuits to enjoin tobacco companies from continuing to engage in such behaviour. Indeed, the state lawsuits, though they principally sought money damages for Medicaid reimbursement, almost all sought injunctive relief under these state consumer protection acts. In response to these claims, the resulting settlements, including the November 1998 Master Settlement Agreement, contained several provisions restricting various tobacco industry marketing techniques. These included bans on outdoor advertising and the distribution of merchandise that advertised tobacco products, as well as limitations on sponsorship of concerts and other public events (Daynard et al. 2001). Similarly, the class actions addressing 'low tar' cigarettes seek, in addition to refunds, injunctions against the companies' continuing the deceptive practice of labelling cigarettes 'low tar' when they are no less dangerous than 'regular' cigarettes.

Federal law has an even more powerful instrument against businesses like the tobacco companies whose success depends on deceiving their customers. The Racketeer-Influenced and Corrupt Organizations Act (RICO) allows the United States Department of Justice to seek judicial orders fundamentally changing the way the industry does business. Private RICO actions are also available to compensate for economic losses but not illness or death. In August 2006, US District Court Judge Gladys Kessler ruled that the tobacco companies did violate RICO, and ordered them to modify their practices in various respects (Guardino et al. 2007). In 2009 her findings were upheld by the US Court of Appeals for the District of Columbia.

Furthermore the discovery, mostly through documents uncovered in the Minnesota litigation, of the industry's deep involvement in smuggling cigarettes to many countries formed the basis for lawsuits by several governments against cigarette manufacturers. In July 2004, Philip Morris
International agreed to pay the European Commission $1 billion, and also agreed to a series of measures to avoid future involvement in smuggling. In July 2008, Rothmans Benson Hedges was fined $100 million under Canada's federal Excise Act, while Imperial Tobacco agreed to pay a $200 million fine.

**Going forward**
The Framework Convention on Tobacco Control recognizes in Article 4.5 that 'Issues relating to liability, as determined by each Party within its jurisdiction, are an important part of comprehensive tobacco control.' Article 19.1 elaborates on this: 'For the purpose of tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and civil liability, including compensation where appropriate.' The remainder of Article 19 encourages the parties to share relevant information and provide mutual assistance, as well as suggesting that the Conference of the Parties come up with additional ways to support activities related to liability.

In light of Article 19 and of the widespread publicity that tobacco litigation, especially in the United States, has received, litigation in the twenty-first century is likely to spread worldwide, raising consciousness of the dangers of tobacco use and of exposure to tobacco smoke, and of the nefarious role played by cigarette manufacturers, even in countries where tobacco use and marketing is currently uncontroversial. Litigation will be increasingly used by NGOs to force governments and tobacco companies to take existing laws seriously, and to obtain judicial orders making public places smoke-free. NGOs and health departments will become increasing adept at drafting laws that can withstand industry legal attacks, and defending them when these attacks arrive. Countries other than the United States will begin holding tobacco companies responsible for the health care costs attributable to their products and conduct. As a result, prices will increase, consumption will decline, and some of the damages paid will fund tobacco-control programmes. Some tobacco companies may find their way into bankruptcy court, giving public health authorities and NGOs new opportunities to shape how tobacco products get manufactured and marketed. Finally, more vigorous efforts can be expected to require tobacco manufacturers and their executives to avoid illegal conduct, and a wide range of legal sanctions, civil and criminal, can be anticipated.

**References**


