

Appendix 14.2

History of Tobacco Product Litigation

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History of Tobacco Product Litigation

When the nation's first Surgeon General's report on smoking and health was released in 1964, litigation against cigarette manufacturers over the health effects of their products had been ongoing for 10 years. It would take 30 more years until tobacco litigation began to have a deep impact on the landscape of tobacco control.

The 2000 Surgeon General's report, *Reducing Tobacco Use*, reviewed the history of litigation approaches (U.S. Department of Health and Human Services 2000, Chapter 5). That review included an overview of "Private Law as a Means of Risk Control" as well as three waves of tobacco litigation starting in the 1950s up through the time of the report in 2000.

The history of the state attorneys general cases is discussed in Chapter 14 and the 2000 Surgeon General's report. Additional background on the history and initial impact of these cases was provided in a 2004 supplement to the *Health Promotion Practice* journal. The historic context of these cases and the Master Settlement Agreement (MSA) that resulted from them is provided (Niemeyer et al 2004; Seffrin 2004).

Niemeyer and colleagues (2004) provide a background on the state attorneys general lawsuits and the legal discussions that led up to the cases and the MSA settlement. This paper and others in the 2004 *Health Promotion Practice* supplement provide an analysis of how the MSA impacted tobacco control over the first 5 years after the settlement. As noted by Seffrin (2004), the evaluation of the impact of the MSA needs to be considered as the aftermath of the failed effort of the state attorneys general to complete a broader and more comprehensive public health set of actions based upon the June 1997 settlement of their lawsuits against the tobacco companies. That settlement resulted in a comprehensive national tobacco control bill proposed by Senator John McCain, chairman of the Senate Committee on Commerce, Science, and Transportation in April 1998. When the bill failed, the state attorneys general returned to negotiations and what emerged was the 1998 MSA. The 2004 supplement to *Health Promotion Practice* analyzes the initial impact of the MSA; however, Seffrin (2004) notes that comparing the MSA to the 1997 settlement yields startling contrasts. Some examples of the elements in the proposed legislation that did not become parts of the later MSA are:

- Earmarking \$2.5 billion every year for tobacco prevention and control—on top of the revenue from the uncommitted funds each state was to receive;
- Permanent funding for public education about tobacco prevention and cessation without restrictions as to its content;
- Funding to charities to replace the dollars they would have received from the cigarette companies;
- Greater restrictions on tobacco marketing than those included in the MSA;
- Granting the U.S. Food and Drug Administration broad powers to regulate tobacco product manufacturing, distribution, and marketing (language in the bill was the basis for future 2009 legislation); and
- Assessing penalties of up to \$2 billion annually if the companies failed to reduce youth smoking by 30% in 5 years and 60% in 10 years.

In a commentary, Koplan (2004, p. 179S) noted that clearly there have been successes and positive impacts, but he noted that the answer to the magnitude of the impact is "yet to be determined," and other observers (Niemeyer et al. 2004) have noted that the greatest disappointment with the MSA has been the lack of sustained funding of state comprehensive tobacco control programs using the settlement funds (see Chapter 14).

United States v. Philip Morris, Inc. **(Department of Justice Case)**

Chapter 14 provides a summary of the civil suit against the major U.S. tobacco companies in the U.S. District Court for the District of Columbia. Additional background on the case can be found at <http://publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/united-states-v-phillip-morris-doj-lawsuit>

On August 17, 2006, the U.S. District Court for the District of Columbia issued its Final Opinion and

Order. The legal citation is *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006), *aff'd in part & vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009) (per curiam), *cert. denied*, 561 U.S. ___, 130 S. Ct. 3501 (2010). For helpful summaries of key aspects of Judge Kessler's 2006 Final Decision, see *The Verdict Is In: Findings from United States v. Philip Morris Collection* (<http://publichealthlawcenter.org/topics/special-collections/verdict-findings-united-states-v-philip-morris-collection>).

Class Actions

A public health perspective looks to factors that may influence the health of populations rather than focusing on the health of individuals. Similarly, a class action seeks to address similar injuries suffered by multiple plaintiffs against a common defendant or defendants (Federal Rules of Civil Procedure, Rule 23[b][3]). Tobacco class action litigation allows many more individuals an opportunity to be considered by the civil justice system than if they proceeded individually (Guardino and Daynard 2005). Because defendants in tobacco litigation have executed a litigation strategy that deliberately deters potential plaintiffs by creating great and unnecessary expense for plaintiffs who challenge them, only an extremely small percentage of those whose health is affected by tobacco products have proceeded as individual plaintiffs (Guardino and Daynard 2005).

Although most class action cases against tobacco manufacturers have failed, plaintiffs have achieved some significant successes as well. One such success was a class action suit consisting of an estimated 60,000 nonsmoking flight attendants who had been exposed to tobacco smoke at work and had suffered diseases or disorders resulting from this exposure. The class members alleged that by concealing the health risks of exposure to tobacco smoke and misinforming the aviation industry and the public about these risks, the cigarette manufacturer defendants engaged in fraud and misrepresentation, breach of implied warranty, negligence, and conspiracy (*Broin v. Philip Morris, Inc.*, No. 91-49738 CA [22] [Fla., Dade Cty. Oct. 31, 1994], *cited in* 9.5 TPLR 2.147 [1994]). The case was settled after a partial trial held in Miami, Florida, in 1997. Provisions of the settlement included an agreement that the defendants would support legislation to ban smoking on all flights originating or landing in the United States, which subsequently happened by congressional actions (see Chapter 2, "Fifty Years of Change 1964–2014"). In addition, a \$300 million settlement fund was established to create a foundation to "sponsor scientific research with respect to the early detection and cure of diseases asso-

ciated with cigarette smoking," and another \$49 million was paid to the plaintiffs' attorneys to cover their fees and costs (*Broin v. Philip Morris, Inc.*, [1997]).

The same attorneys who handled the class action for the flight attendants also filed another nationwide class action (later limited to Florida residents) against tobacco manufacturers on behalf of addicted smokers suffering from a disease caused by smoking (*Engle v. R.J. Reynolds Tobacco Co.*, No. 9408273 CA [20] [Fla., Dade Cty. Oct. 31, 1994], *cited in* 9.3 TPLR 3.293 [1994]).

The trial court devised a multiphase trial plan under which the case would advance to a subsequent phase only upon a showing of success by the plaintiffs. Phase I consisted of a trial on the general liability of the defendants to the class and took nearly a year to complete. In 1999, it resulted in a verdict finding that the defendants' cigarettes were addictive and caused 20 diseases, and that the defendants committed fraud and engaged in a conspiracy to conceal and misrepresent the health effects of smoking (Gottlieb and Daynard 2001). In the next phase, three class representatives' cases were tried before the same jury resulting in verdicts for all three plaintiffs, averaging more than \$4 million each for compensatory damages, lost wages, medical costs, and pain and suffering (Gottlieb and Daynard 2001). The next phase on classwide punitive damages resulted in a \$145 billion verdict for punitive damages against the tobacco manufacturer defendants (Gottlieb and Daynard 2001). On appeal to the Florida Supreme Court, the award for punitive damages was reversed. Rather than establishing an additional, individual case phase of the class action, the court decertified the class prospectively, but allowed the former class members to file individual lawsuits against the class defendants and benefit from the jury's liability findings. Consequently, the former class members did not have to prove that cigarettes were addictive, smoking causes any of the diseases where causation was found by the jury, cigarettes were unreasonably dangerous, the defendant manufacturers were negligent, or that they conspired to withhold material information (*Engle v. Liggett Group*, 945 So.2d 1245 [Fla. 2006]). Around 8,000 individual cases were filed in 2007 and 2008. Trials are ongoing and, to date, have resulted in approximately a 2–1 ratio of plaintiffs' verdicts to defense verdicts (Table 14.2.1).

In addition to an agreement between the plaintiffs' attorneys and three of the defendants in this class action pertaining to limits on appeals bonds, a trust fund of \$710 million was established in 2001 to benefit members of the class (*Engle v. R.J. Reynolds Tobacco Co.*, No. 9408273 CA 22 [Fla. 11th Cir. 2001]). By 2009, this resulted in a payment of \$13,016 to each of 42,553 class members who had filed a timely claim (Engle Trust Fund 2009).

Table 14.2.1 Verdicts in initial 5 years of *Engle* progeny trials

Year	Plaintiff verdicts	Defense verdicts	Total
2009	8	2	10
2010	13	9	22
2011	16	7	23
2012	19	5	24
2013	15	11	26
Totals	71	34	105

Note: Totals as of December 31, 2013.

Another class action involved a coalition of more than 50 law firms working together seeking to represent all addicted smokers in the United States (Pringle 1999). This case sought medical monitoring for all addicted smokers, but the court did not allow the parties to continue as a national class (*Castano v. American Tobacco Co.*, 84 F.3d 734 [5th Cir. 1996]). Attorneys involved with *Castano* then filed class action lawsuits with similar theories in nearly half of the states, but they failed to reach trial in all but one instance (Kearns 1999). The one success was *Scott v. American Tobacco Co.*, 2009-0461 (La. App. 4 Cir. 2010); 36 So. 3d 1046; 2010 La. App. LEXIS 569, in which a jury verdict resulted in the court order for cigarette manufacturers to pay more than \$240 million to fund smoking cessation services for a class of Louisiana smokers.

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