
MIXED RESULTS FROM RECENT UNITED STATES TOBACCO LITIGATION

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The startling March 2002 decision of the Supreme Court of Victoria in McCabe v British American Tobacco [2002] VSC 73 opens up the possibility of a flood of pro-plaintiff victories in Australian tobacco tort litigation. In light of this development, the mixed results of United States tobacco litigation in the past two years may be illuminating. Although some plaintiffs in the United States have recently scored dramatic trial court victories against tobacco companies, the tobacco litigation war is far from over. The eventual outcomes of several successful individual smoker cases in California, Oregon and Kansas, one large class action on behalf of Florida smokers, and one Florida second-hand smoke case will remain unclear until appeals are exhausted. In other States, tobacco companies continue to win individual tort cases, and prospects currently appear poor throughout the United States for claims by insurers seeking health care cost reimbursement, for lawsuits seeking to recoup from tobacco companies the taxes that are lost to cigarette smuggling, and for class actions on behalf of not-yet-ill smokers.

AUSTRALIAN PREAMBLE

Rolah Anne McCabe, a lung cancer victim, brought a tort claim against British American Tobacco Australia Services Ltd (successor to W D and H O Wills Australia Ltd) in the Supreme Court of Victoria, claiming, inter alia, that the defendants should have disclosed dangers they knew about cigarettes.¹ According to Eames J, in a decision handed down on 22 March 2002, the defendants' destruction of documents that were thought to be critical to helping the plaintiff to prove her case denied her the possibility of a fair trial and entitled her to a favourable judgment on the substantive tort liability claim, leaving only damages to be assessed. As at the time of writing, this case is on appeal.² In the recent case of *Sharp v Guinery (t/a Port Kembla Hotel & Port Kembla RSL Club)*³ a jury in a matter before the Supreme Court of New South Wales found in favour of a claimant, who charged that environmental tobacco smoke at the place

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¹ *McCabe v British American Tobacco* [2002] VSC 73.

² It is expected to be heard before the Victorian Court of Appeal in August 2002.

³ NSWSC 336

of her employment caused her laryngeal cancer.⁴ No appeal was taken. These important decisions are indicators that Australia could follow the United States as the nation next to experience a torrent of tobacco tort litigation.

INTRODUCTION AND BACKGROUND

In the United States tort claims were first brought against tobacco companies in the 1950s.⁵ The first wave of cases petered out by the early 1970s without a victory for the plaintiffs. A new wave, equally unsuccessful for plaintiffs, began in the 1980s. More recently a “third wave” began, with cases so numerous and so diverse that ocean metaphors may no longer be helpful. Whether we are in the middle of a third wave, a tidal wave, or overlapping third, fourth and fifth waves is hardly the point. The point, rather, is that some United States plaintiffs are beginning to enjoy some success against the tobacco companies. But whether that success should be considered substantial, how long it might last, and what public health benefits, if any, are being achieved are far less clear. This article addresses these questions in the context of updating United States tobacco litigation developments in the new millennium.⁶

⁴ See (2002) 176 MJA 113.

⁵ R L Rabin, “Institutional and Historical Perspectives on Tobacco Tort Litigation”, in R L Rabin and S D Sugarman (eds), *Smoking Policy: Law, Politics and Culture* (Oxford University Press, New York, 1993), p 110.

⁶ Different aspects of tobacco litigation and regulation have inspired extensive coverage, including numerous law review symposia devoted to the subject. See, eg, Symposium, “Sin Under Siege: The Legal Attack on Firearms, Tobacco and Gambling” (1997) 8 *Stan L & Pol’y Rev* 63 at 99 (including pieces on litigation’s role in controlling the use and sale of tobacco, and tobacco regulation in Japan); Symposium, “Tobacco Litigation and Regulation: The Settlement and Beyond” (1998) 27 *SW Univ L Rev* 379 (including pieces on tobacco advertising, the tobacco settlement, litigation and regulation issues); Dr Arthur Grayson Memorial Symposium, “Ending the Tobacco Wars” (1998) 22 *S Ill Univ LJ* 467 (including pieces on federal regulation, Medicaid litigation, tobacco advertising controls and the global settlement); Symposium, “Proposed National Tobacco Settlement Symposium” (1998) 29 *Univ of Toledo L Rev* 637 (including pieces on constitutional concerns with tobacco advertising restrictions, and on the impact of the national tobacco settlement on teens and the African-American community); Symposium, “Torts and Tobacco” (1999) 33 *Georgia L Rev* 693 (including pieces on the Mississippi tobacco settlement, on Attorney-General litigation, and prospects of State Court class actions); Symposium, “Transcript of the Florida Tobacco Litigation Symposium” (1999) 25 *Fla St U L Rev* 737 (discussing aspects of the Florida tobacco settlement of 1997); Symposium, “Tobacco Regulation: The Convergence of Law, Medicine and Public Health” (1999) 25 *Wm Mitchell L Rev* 373 (including pieces on the role of industry documents and legal strategies in litigation, on the impact of tobacco litigation on healthcare); Symposium, “Beyond Tobacco Symposium: Tort Issues in Light of the Cigarette Litigation” (2000) 27 *Pepp L Rev* 685 (including pieces on medical reimbursement lawsuits and tobacco litigation’s impact on tort cases involving guns and alcohol); Symposium, “Litigation” (2001) 33 *Conn L Rev* 1141 (including pieces on the governmental tobacco litigation and the role of Attorneys-General, and the regulation of tobacco by litigation); “Seventh Annual Clifford Symposium on Tort Law and Social Policy” (2001) 51 *DePaul L Rev* 183 (including pieces on role of private Attorneys-General, assessment of tobacco litigation results, and the finance and ethics of civil litigation after tobacco litigation); Symposium, “Engle v R J Reynolds Tobacco Co: Lessons in State Class Actions, Punitive Damages and Jury Decision-making” (2001) 36 *Wake Forest L Rev* 871 (including pieces discussing *Engle’s* influence on settlement of mass torts and on punitive damages). See also J Hanson and K Logue, “The Cost of Cigarettes: The Economic Case for Ex Post Incentive-based Regulation” (1998) 107 *Yale LJ* 1163; J D Hanson, K D Logue and M S Zamore, “Smoker’s Compensation: Toward a Blueprint for Federal Regulation of Cigarette

Early Litigation

Oversimplifying a bit, in the first wave of tobacco tort litigation, the industry took what turned out to be two very effective positions against individual claimants: (a) there is no proof that this plaintiff's individual injury was caused by smoking; and (b) if smoking is dangerous, and we don't believe it is, we didn't know anything about that danger when we made the cigarettes this plaintiff smoked. (Sometimes, if the victim changed brands over time, the defendant had a third argument – that there could be no proof that our product caused the harm that the plaintiff claims.)

By the time of the second wave of litigation, both the United States Surgeon General's famous 1964 Report⁷ on the dangers of smoking and the warning labels that the United States Congress ordered the industry to put on cigarette packages and advertisements⁸ were old news. The industry's legal arguments, again oversimplifying a bit, shifted somewhat with these developments. Although defendants typically continued to deny there was any connection between their products and the individual claimant's injuries, they also began to assert that, because of the warning labels and the general publicity given to the claimed dangers of smoking, smokers knew as much as the tobacco companies did. This is widely termed the "assumption of risk" defence, and in some jurisdictions cases were explicitly litigated on this basis. As a matter of doctrinal clarity, it would seem better to treat this argument as claiming that cigarettes are not defective products in terms of their warnings on the ground that buyers have been adequately warned (or, in the alternative, that even if a different warning should have been provided by the defendant, that failure is not causally connected to the plaintiff's loss because, given what the plaintiff knew, he or she surely would have continued to smoke even with that different warning). In any event, the defendants successfully squashed this second wave as well, perhaps in part due to their doggedly determined and expensive litigation strategies that forced enormous pre-trial expenses on plaintiff lawyers who dared to take on the tobacco companies.⁹

Manufacturers" (1998) 22 S Ill ULJ 519; P A LeBel and R C Ausness, Symposium, "Toward Justice in Tobacco Policymaking: A Critique of Hanson and Logue and an Alternative Approach to the Costs of Cigarettes" (1999) 33 Ga L Rev 693; R C Ausness, "Cigarette Company Liability: Preemption, Public Policy and Alternative Compensation Systems" (1988) 39 Syracuse L Rev 897; R C Ausness, "Compensation for Smoking-related Injuries: An Alternative to Strict Liability in Tort" (1990) 36 Wayne L Rev 1085; R C Ausness, "Paying for the Health Costs of Smoking: Loss Shifting and Loss Bearing" (1998) 27 SWU L Rev 537; R C Ausness, "Product Category Liability: A Critical Analysis" (1997) 24 N Ky L Rev 423; P A LeBel, "Beginning the Endgame: The Search for an Injury Compensation System Alternative to Tort Liability for Tobacco-Related Harms" (1997) 24 N Ky L Rev 457; P A LeBel, "Of Deaths Put on by Cunning and Forced Cause: Reality Bites the Tobacco Industry" (1997) 38 Wm & Mary L Rev 605. For a recent overview of tobacco litigation to about 1998, see M A Derthick, *Up in Smoke* (CQ Press, Washington DC, 2002). For current developments in tobacco litigation, visit the Tobacco Control Resource Center website at www.tobacco.neu.edu.

⁷ United States Department of Health and Human Services, *Smoking and Health, Report of the Advisory Committee to the Surgeon General of the Public Health Services* (1964).

⁸ 15 USCS § 1331 (West, 2002).

⁹ See generally R Kluger, *Ashes to Ashes: America's Hundred-Year Cigarette War, the Public Health and the Unabashed Triumph of Philip Morris* (Knopf, New York, 1996); J A Jenkins, *The Litigators:*

Recent Litigation

The current burst of individual tobacco tort litigation contains at least several new important twists. Before describing these cases, it is important to understand that many of the current individual plaintiffs actually began smoking before the Surgeon General's 1964 Report, before warnings were placed on the packages and on tobacco advertisements. For example, someone born in 1945 might have started smoking at age 15 in 1960, smoked for 35 years until she or he was diagnosed with lung cancer at age 50 in 1995, and sued soon thereafter. But, and here is the first twist, because of recently disclosed documents from the files of the tobacco industry,¹⁰ these plaintiffs believe they now have strong evidence to counter the claims that the industry made during the first wave. Plaintiffs now forcefully argue that the industry long knew, but kept secret, the fact that smoking was highly dangerous at a time when the general public was by no means clearly aware of this danger. Indeed, plaintiffs assert that the tobacco companies not only knew about the dangers of smoking but also knowingly and falsely claimed to the contrary.

These assertions support causes of action sounding not only in negligence and product liability ("defective warning") but also in fraud and intentional misrepresentation. The ability to allege and prove these latter sorts of grave wrongdoing is important for two reasons. First, proving that sort of misconduct is generally necessary to support the award of punitive damages that plaintiffs are now regularly seeking. Secondly, some plaintiffs are (and increasingly will be) precluded from resting their cases on a routine claim of failure-to-warn. This is because the United States Supreme Court has held that ordinary product-warning causes of action are effectively barred for years after 1969.¹¹

To be sure, many plaintiffs who started smoking before 1964 continued to smoke right through the release of the Surgeon General's Report and congressional-mandated warnings. But, and here is a second new twist, many claimants now argue, again based on documents obtained from tobacco company files, that the industry also knew and kept secret the fact that smoking was highly addictive, and that it deliberately preyed on minors by marketing tobacco products to children who became hooked before they were able to make any sort of rational choice whether to commence smoking.¹² Not only do these assertions

Inside the Powerful World of America's High-stake Trial Lawyers (Doubleday, New York, 1989), p 121.

¹⁰ See S A Glantz et al (eds), *The Cigarette Papers* (University of California Press, Berkeley, 1996).

¹¹ *Cipollone v Liggett Group Inc* 789 F 2d 181 (1986). This is because the court interpreted the national *Federal Cigarette Labeling and Advertising Act* as pre-empting State tort law from requiring warnings other than those Congress has mandated and which have appeared on all cigarette packages and print advertisements in the years since. This means that, as time goes by, and plaintiffs are those who began to smoke after 1969, their tort claims based on disclosure will probably have to be based upon fraud or misrepresentation theories that the Supreme Court said were not pre-empted by Congress.

¹² Claimants also rely, for proof of the addictive nature of cigarettes, on a more recent Surgeon General Report: see United States Department of Health and Human Services, *The Health Consequences of Smoking: Nicotine Addiction, A Report of the Surgeon General* (1988).

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bolster the plaintiff's legal claim, but they also, if proved, put the tobacco company defendant in a very bad light.

Note that in the most straightforward cause of action the plaintiff argues that he or she would never have started smoking but for the fact that the industry fraudulently portrayed smoking as glamorous when it knew it was addictive and lethal, and worse, it marketed its products in a way to hook the plaintiff while he or she was still a child. But, in yet another twist, some plaintiffs are now advancing a different sort of claim about what the industry said, or should have said, that avoids the addiction issue. These plaintiffs claim instead that the victim was an adult smoker who would have quit (early enough not to have become a tobacco victim) but instead switched to "light" (or "low tar") cigarettes because, it is alleged, the defendants intentionally misrepresented "low tar" cigarettes as safer when they are not and the defendants knew that to be so.

The upshot, as will be detailed below, is that, one way or another, the plaintiffs' bar and the anti-smoking movement seem to be making some headway in converting these trials from occasions when the jury blames the victims to ferocious attacks on what many are now convinced is an evil industry. This changed climate not only makes the prospect of plaintiff victories greater, but it also has put the tobacco companies at risk of having very large punitive damage awards imposed on them.¹³

¹³ A legally very different strategy would be to claim that cigarettes are defective as to their design (and, worse, that the defendants knowingly made them that way). But the viability of this legal strategy is quite uncertain. Suppose, eg, that lawyers tried to show (completely contrary to the theory in the Oregon case discussed below, see text at n 41) that filtered cigarettes or "light" cigarettes are actually safer than unfiltered or other higher tar cigarettes and that their client, who smoked the latter, was the victim of a defectively designed product. Yet it is important to appreciate that this sort of claim is widely disparaged in the public health community. That is, the general belief in the tobacco-control community, supported by a variety of research, is that "light" or "mild" cigarettes are, in practice, as lethal as other cigarettes. Explanations for this are various. Many believe that individual smoker "compensation" undermines any potential reduction in harm that these design innovations might otherwise achieve – such as inhaling more deeply or smoking down closer to the end. It has also been shown that many smokers unintentionally hold the cigarette in a way that covers over invisible holes in the filter that might plausibly provide benefits if unblocked, holes that are not blocked when the Federal Trade Commission's smoking machines test the cigarettes and generate the "tar" level data shown in tobacco advertisements. Of course, if there really were a safer cigarette design, then failure to deploy that design would likely make existing cigarettes defective. The problem, however, is proving that such a design exists. Of late, various companies in the tobacco industry have been test-marketing new quasi-cigarettes that could possibly be safer. But not only is it unclear whether there will be market acceptance of these products by smokers (because these products generally don't taste, or feel, or burn like traditional cigarettes), it is equally unclear whether these new products would qualify as alternative designs for torts purposes. At the extreme, so-called "candy cigarettes" sometimes sold to children are much safer than regular cigarettes: candy cigarettes do not contain tobacco and do not burn, so while they may harm teeth, they do not cause cancer. Yet candy and regular cigarettes are surely two different products for torts purposes, so the failure to sell candy cigarettes instead of regular cigarettes cannot serve as a basis for finding regular cigarettes defective. Some tobacco-control advocates have charged that the tobacco industry "manipulates" the nicotine levels in cigarettes, and, if proved, it might be argued that this makes the products "defective". Nicotine, however, does not appear the cause of the main health harms from smoking, and so it is difficult to see how such "manipulation" would create a defective design for torts purposes. Providing a reliably steady level of nicotine for any given brand actually helps addicted smokers satisfy their craving in a consistent manner. Thus, "manipulation" evidence may help with legal theories based on failure to warn of addiction risks. But the failure of the tobacco

Along with successes in individually litigated tort claims have come additional varieties of tobacco litigation. These include class actions on behalf of smoker victims, class actions on behalf of current smokers not yet sick (but presumably at risk), claims for financial reimbursement from health care providers (including government health care providers), claims (both individual and class actions) by alleged victims of second-hand smoke, racketeering claims against the tobacco industry by the United States Government, claims of a variety of sorts brought in United States courts by foreign governments, and more.

Yet a more careful look is necessary before the tobacco industry is prematurely viewed as drowning in litigation. Based on recent litigation results, it is by no means evident that the industry is about to go under. To the contrary, although tobacco companies have been stung by some defeats (mostly not yet final), they continue to win a large share of the cases brought against them. Moreover, with one very important exception to be discussed below, the industry continues to adopt a no-holds-barred, full-defence, never-settle, litigation posture.

The next sections describe recent tobacco litigation in the United States and explain the quite uncertain future that litigation faces.

INDIVIDUAL SMOKER LAWSUITS

Plaintiff Victories

Carter

In March 2001 the Brown & Williamson Tobacco Corporation paid nearly \$1.1 million to an injured Florida smoker, Grady Carter, plus attorney's fees to his lawyer, Norwood "Woody" Wilner.¹⁴ This was the first time that any individual United States plaintiff actually received any money in a core tobacco products liability case, and therefore marks a major milestone in the history of tobacco litigation.

Carter v Brown & Williamson Tobacco Corp went to trial in 1996, and the jury eventually awarded Carter \$750,000 for compensatory damages (punitive damages were not sought).¹⁵ After more than four years of appeals, the added

companies to remove all nicotine from cigarettes is unlikely by itself to cause tort law to label cigarettes with nicotine as defectively designed products – since the reality again is that nicotine-free cigarettes are simply not the same product as regular cigarettes so far as most smokers are concerned. In sum, it appears that misconduct with respect to disclosure is probably the plaintiff side's best legal strategy, at least for now, although several of the successful cases seem to have been brought on a combination of theories in which it may be difficult to disentangle precisely the basis on which the jury made its decision.

¹⁴ V Wakefield, "Patience, Persistence Pay Off for Man Who Beat Big Tobacco", *Florida Times-Union* (Jacksonville, FL), 9 March 2001, p A1.

¹⁵ *Carter v Brown & Williamson Tobacco Corp*, *Florida Jury Verdict Reporter*, Ref No 96:9-50 (Sept 1996).

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interest increased the amount owed to Carter to almost \$1.1 million.¹⁶ Although a Florida appeals court had reversed the verdict in *Carter* in 1998, citing the expiration of the Statute of Limitations and other errors by the trial court in admitting evidence,¹⁷ in November 2000 the Florida Supreme Court reversed the appeals court decision and reinstated the jury verdict.¹⁸ In June 2001 the United States Supreme Court denied review of the case.¹⁹

As important as *Carter* may be, it is but one victory. Moreover, in terms of United States tort litigation and the dollars at stake for the industry, \$1 million is not a huge sum. Consider, then, what else is in the pipeline.

California

In California, in each of the past three years, a very substantial jury verdict has been won against tobacco companies. These cases are now in various stages of appeal.

In 1999 in *Henley v Philip Morris*, the jury awarded the plaintiff \$1.5 million in compensatory damages plus \$50 million in punitive damages, although the trial judge later cut the punitive damages to \$25 million.²⁰ Philip Morris' primary argument on appeal concerns a 1988 California statute that some have read to give tobacco companies tort "immunity", a statute that was repealed in 1998.²¹ The *Henley* appeal raises several questions: Is the statutory repeal retroactive? Were claims of the sort made in this case ever barred by the original statute? Is the original statute even relevant given the timing of the victim's injury and claim in the case? In late 2001 a California Court of Appeal upheld the \$26.5 million award, rejecting all of the defendant's arguments.²² The case has been appealed to the Supreme Court of California,²³ where the matter rests as of this writing.

In 2000 in *Whitely v Philip Morris*,²⁴ a San Francisco jury found that Philip Morris and R J Reynolds misrepresented the health hazards of their cigarettes and caused the lung cancer of 40-year-old Leslie Whitely.²⁵ The jury awarded Whitely \$972,200 in economic damages and \$500,000 in non-economic damages, and it awarded her husband, a co-plaintiff, \$200,000 for loss of

¹⁶ Wakefield, n 14.

¹⁷ *Brown & Williamson Tobacco Corp v Carter* 723 So 2d 833 (1998).

¹⁸ *Carter v Brown & Williamson Tobacco Corp* 778 So 2d 932 (2000).

¹⁹ M Silva, "Decision by US High Court Lets Smoker Keep \$1.1 Million", *Sun-Sentinel*, 30 June 2001, p B18; *Brown & Williamson Tobacco Corp v Carter* 121 S Ct 2593 (2001).

²⁰ *Henley v Philip Morris Inc* 93 Cal App 4th 824 at 827-828 (2001).

²¹ Cal Civ Code, s 1714.45 (the version in effect from 1 January 1988 to 1 January 1998). See also *American Tobacco Co v Superior Court* 208 Cal App 3d 480 at 486-488 (1989) (concluding that the statute created an "immunity" for manufacturers of the enumerated products, including tobacco products).

²² *Henley v Philip Morris Inc* 93 Cal App 4th 824 (2001).

²³ *Henley v Philip Morris Inc* 39 P 3d 512 (2002).

²⁴ (No 303184, Calif Super, San Francisco Co); see *Mealey's Litigation Report*, 1 June 2000, p 4; *Mealey's Litigation Report*, 6 April 2000, p 4.

²⁵ D J Opatrny, "Philip Morris, R J Reynolds Caused Cancer, Jury Says", *The Recorder*, 21 March 2000, p 3.

consortium.²⁶ The jury also found that because the defendants knew about the hazards of smoking and deliberately misled the public about those dangers, it was appropriate to award the plaintiffs \$20 million in punitive damages.²⁷ Both defendants have appealed the case to the California Court of Appeal.²⁸

In 2001 in *Boeken v Philip Morris Inc*²⁹ a Los Angeles jury awarded a plaintiff smoker with lung cancer \$5.54 million in compensatory damages plus an astounding \$3 billion in punitive damages against Philip Morris.³⁰ The trial judge promptly reduced the punitive damage award to \$100 million.³¹ Again the defendants sought to have the case thrown out based upon the special California statute noted above, but the trial judge concluded that the repeal of the State statute was retroactive.³² Although the plaintiff agreed to accept the \$100 million award, Philip Morris still intends to appeal the case.³³

Perhaps a definitive interpretation of the special California statute at issue in these cases will come in the case of *Naegele v R J Reynolds Tobacco Co*³⁴ now before the Supreme Court of California. *Naegele*, which has not yet been tried, reached the high court after a trial court and a Court of Appeal concluded that the repeal of the statute was not retroactive.³⁵ *Naegele* involves a smoker diagnosed with cancer prior to the repeal of the statute, and the lower courts further concluded that the original statute both applied to him and blocked his claim.³⁶ This case was argued before the Supreme Court of California in May 2002.³⁷

If the defendants win a sweeping victory in *Naegele* based on their most restrictive interpretation of the original statute and its repeal, then at least one, and perhaps all three, of the existing large California jury verdicts against the

²⁶ Opatrny, n 25.

²⁷ J Doyle, "Woman Who Won Tobacco Suit Dies", *San Francisco Chronicle*, 6 July 2000, p A21.

²⁸ Doyle, n 27. Leslie Whitely died in June 2000 of lung cancer.

²⁹ (No BC 226593, Calif Super, Los Angeles Co).

³⁰ A Gorman, "Smoker Agrees to \$100-Million Award; Courts: Lung Cancer Victim Chooses Not to Undergo a New Trial. Philip Morris Says It Will Still Appeal", *Los Angeles Times*, 22 August 2001, at California 2:1.

³¹ Gorman, n 30.

³² H Chiang, "Appeal On \$26.5 Million Tobacco Verdict; Philip Morris Seeks to Reverse Big Award Given to Ex-Smoker", *San Francisco Chronicle*, 22 August 2001, p A2.

³³ Gorman, n 30; see *Mealey's Litigation Report*, 24 August 2001, p 3.

³⁴ 1 P 3d 953 (2000) (granting review).

³⁵ 81 Cal App 4th 503 (2000).

³⁶ 81 Cal App 4th 503 at 508 (2000).

³⁷ Indeed, *Naegele* is by now not the only case before the Supreme Court of California concerning the interpretation of the original statute and its repeal. For example, *Myers v Philip Morris* involves a smoker diagnosed after the repeal of the statute but whose illness began to accrue before the repeal: "Product Liability", *California Supreme Court Services* (10 July 2001). The 9th Circuit has asked the California Supreme Court to review this case, and on 21 March 2001 the California Supreme Court agreed to review the certified question: see *Myers v Phillip Morris Cos* 2001 Cal LEXIS 1816. See also *Souders v Philip Morris Inc* 87 Cal App 4th 756 (2001) (holding tobacco manufacturers are not immune from liability in a personal injury and wrongful death action that accrued in 1999, after the 1998 amendments), review granted: see *Souders v Philip Morris Inc* 23 P 3d 1143 (2001). For an interpretation of the original California statute that favours plaintiffs without addressing consequences of its repeal, see S D Sugarman, "Tobacco Tort Litigation in California: A Better Understanding of Civil Code Section 1714.45" (2001) 38 *San Diego Law Review* 1051.

tobacco companies will be at risk. Such an interpretation could also mean that it will be some time before a new set of plaintiffs, who are free from the taint of the original statute, could emerge and attempt to continue the string of victories obtained in these three important cases. On the other hand, if the plaintiff side wins in *Naegele*, then not only might all three of the existing big victories hold up, but many more individual California cases now in the wings could reach trial and potentially add to the large load of punitive and compensatory damages now threatening the tobacco industry in California.

Of course, even if the plaintiff side wins in *Naegele* on the statutory interpretation question, that does not ensure that the three large verdicts will stand up in the face of other issues raised on appeal, or that the large amounts of punitive damages awarded in those cases will be upheld in full, or even at all. As already noted, only one of these cases (*Henley*) has so far been upheld by the Court of Appeal, and even there a hearing in the Supreme Court of California remains.

Oregon

Plaintiffs have also won two large verdicts in Oregon, which lies just to the north of California. In March 1999 a Portland, Oregon, jury awarded \$81 million, including \$79.5 million in punitive damages, to the widow of Jesse Williams, who died of lung cancer in 1997 at the age of 67 after smoking for 42 years.³⁸ In May 1999 the trial judge reduced the punitive damages award to \$32 million.³⁹ However, in June 2002 an Oregon Court of Appeals not only upheld the plaintiff's verdict, but also reinstated the full amount of punitive damages originally awarded. Philip Morris will seek further review of the case.⁴⁰

Recently, on 22 March 2002 an Oregon jury awarded the estate of Michele Schwartz, who died of lung cancer in 1999 after smoking low-tar cigarettes, \$168,000 in compensatory damages plus a huge \$150 million in punitive damages.⁴¹ In this case the plaintiff's attorneys claimed that Schwartz had switched to low-tar cigarettes because she had been fraudulently misled into believing that they were safer (and that she would have quit entirely had she realised that these "light" cigarettes were no safer than traditional types).⁴² Philip Morris has already announced that it will seek to have the verdict overturned.⁴³ The trial judge, however, rejected this effort, instead reducing the punitive damages award to \$100 million and thereby forcing Philip Morris to seek relief on appeal.

³⁸ P O'Neill, "Judge Cuts Damages in Portland Tobacco Suit," *The Oregonian*, 14 May 1999, p A1.

³⁹ O'Neill, n 38.

⁴⁰ A S Green, "Tobacco Firm Loses Ruling on Damages", *The Oregonian*, 6 June 2002, p A1.

⁴¹ A S Green, "Jurors Award \$150 Million in Smoking Case", *The Oregonian*, 23 March 2002, p A1.

⁴² Green, n 40.

⁴³ Philip Morris Companies Inc, Press Release, "Philip Morris USA Will Appeal Oregon Jury's Damage Awards to Smoke's Estate", 22 March 2002, available at http://www.philipmorris.com/pressroom/press_releases/oregonappeal.asp.

Kansas

In June 2002 a Kansas trial came to an end with a large victory on behalf of David Burton, who smoked for more than 40 years, beginning around 1950, and eventually lost his legs to a circulatory disease that he blamed on cigarettes. Tried in federal court (which is somewhat atypical in these tobacco tort cases), Burton was awarded nearly \$200,000 in compensatory damages by the jury and \$15 million in punitive damages by the trial judge.⁴⁴ This decision surely will be appealed.

Florida

Near the end of 2001 a second plaintiff (that is, second to Grady Carter discussed above) won a relatively small award in Florida. In *Kenyon v R J Reynolds Tobacco Co*⁴⁵ a Florida jury awarded an injured smoker \$165,000 in medical expenses for treating chronic obstructive pulmonary disease and lung cancer after finding that the cigarettes he smoked were defectively designed.⁴⁶ The jury declined to award the plaintiffs money for punitive damages or for pain and suffering. Reynolds promptly filed a motion to set aside the verdict, however, where the matter stands as of this writing.⁴⁷

Defence Victories

In contrast to the eight plaintiff victories described above, during the past three years the tobacco industry has continued to achieve more victories in individual tort claims brought by smokers or their heirs.

I have uncovered nine recent defence jury verdicts from seven States: in 2001 in New Jersey,⁴⁸ New York,⁴⁹ Ohio⁵⁰ and South Carolina;⁵¹ in 2000 in

⁴⁴ A Shafer, "Judge Awards \$15M in Tobacco Case (Associated Press): available at <http://www.washingtonpost.com/wp-dyn/articles/A24889-2002Jun21.html>.

⁴⁵ (No 00-5401, Fla Cir, Hillsborough Co).

⁴⁶ D Karp, "Man Gets \$ 165,000 in Tobacco Lawsuit", *St Petersburg Times*, 12 Dec 2001, p B3.

⁴⁷ Karp, n 46.

⁴⁸ On 16 May 2001, after four days of deliberation, a New Jersey jury found defendant tobacco companies not liable for the lung cancer and death of Constance Mehlman, who had stopped smoking 30 years before her death in *Mehlman v Philip Morris* (No L-1141-99[MT], NJ Super, Middlesex Co). Claims in the plaintiff's complaint included: (1) products liability (design defect); (2) fraud/constructive fraud; (3) breach of implied warranty; (4) consumer protection; (5) negligence; and (6) conspiracy: see *Mealey's Litigation Report*, 25 May 2001, p 10.

⁴⁹ On 16 January 2001 a New York jury brought in a defence verdict in *Apostolou v American Tobacco Co* (No 34724/2000, NY Sup, Kings Co). This defence verdict seemed to be based on "assumption of risk"; the jury had earlier agreed that smoking caused the victim's lung cancer: C Francescani, "Cig Firms Cleared in B'klyn Cancer Death," *New York Post*, 17 January 2001, p 20. Plaintiff's attorneys have indicated an intent to appeal: N L Katz, "Jury Clears Cig Makers, Rules That Smoke Killed Plaintiff, Who Accepted Risk," *Daily News*, 17 January 2001, p 1.

⁵⁰ On 5 October 2001 a federal jury found that tobacco companies were not liable to decedent, who smoked between 1950 and 1965, and was diagnosed with lung cancer in 1992 in *Tompkin v American Tobacco Co* (No 5:94:CV1302, ND Ohio). The jury found in favour of all defendants: see *Mealey's Litigation Report*, 15 October 2001, p 16.

⁵¹ On 6 February 2001 a South Carolina federal jury found in favour of Brown & Williamson Tobacco Co in *Little v Brown and Williamson Tobacco Corp* (No 2-98-1879-23, D SC), a case in which a woman sought compensation for her late husband's alleged smoking-related injuries. Earlier, the federal trial court had granted a directed verdict motion in favor of R J Reynolds.

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Mississippi⁵² and New York;⁵³ and in 1999 in Louisiana,⁵⁴ Missouri⁵⁵ and Tennessee.⁵⁶ And in 2000 a Florida judge overturned a jury verdict in favour of the plaintiffs.⁵⁷ Moreover, from the second half of 2001 alone, I have identified six decisions by trial judges in the States of Connecticut,⁵⁸ Illinois,⁵⁹ Kentucky,⁶⁰ Louisiana,⁶¹ Michigan⁶² and Ohio⁶³ in which the judge has either dismissed the

⁵² In July 2000 a Mississippi jury rejected claims that R J Reynolds should be held liable for the fatal lung cancer of a three-pack-a-day smoker: see *Nunnally v R J Reynolds* (No 92-270-CD, Miss Cir, Desoto Co).

⁵³ In June 2000 a Brooklyn New York jury in *Anderson v Fortune Brands Inc* (No 4281/97, NY Sup, Kings Co) rejected the claim that 30 years of smoking was a substantial cause of plaintiff's lung cancer.

⁵⁴ In July 1999 a Louisiana jury found, 11-1, that American Tobacco and R J Reynolds were not responsible for the death of Robert Gilboy, a long-time smoker, finding that too many other factors could have contributed to Gilboy's death: see C Baughman, "Tobacco Win Based on Lifestyle Choices", *Saturday State-Times/Morning Advocate*, 10 July 1999, p A1.

⁵⁵ In 1999 a Missouri jury found that Brown and Williamson was not responsible for the death of Charles Steele of Vandalia, Mo, a factory worker who began smoking in his late teens or early 20s, smoked one-and-a-half to two packs a day, and died at 55: see Anon, "KC Jury Acquits Tobacco Firm in Cancer Death; Lawyer Says He Has No Plans to Appeal", *St Louis Post-Dispatch*, 4 May 1999, p B5.

⁵⁶ In 1999 a Tennessee jury found that Philip Morris, R J Reynolds and Brown & Williamson were not responsible for the deaths of James Karney and Florence Bruch: see R Johnson, "Big Tobacco Not to Blame for Deaths, Local Jury Says", *The Commercial Appeal*, 11 May 1999, p A1. The jury found partial fault to R J Reynolds and Brown & Williamson for the death of Bobby Newcomb, but because it also found that Newcomb held 50% of the responsibility, no damages could be recovered under Tennessee law.

⁵⁷ On 12 October 2000 a Tampa, Florida, jury found in favour of the plaintiff in *Jones v R J Reynolds Tobacco Co* (No 2D01-412, Fla App, 2nd Dist), a lung cancer wrongful death case. Jones' wife smoked more than a pack a day for more than 40 years and was diagnosed with lung cancer and died in 1995: see J Testerman, "Jury: Tobacco to Blame in Death", *St Petersburg Times*, 13 October 2000, p 1B. The jury found that cigarettes were defectively designed, but that the tobacco defendants did not conspire to defraud, and awarded plaintiffs over \$200,000, including \$141,000 for medical and funeral costs and \$59,000 for loss of consortium, but did not award punitive damages. After finding that certain deposition testimony was incorrectly submitted to a jury, the trial judge granted R J Reynolds' motion to set aside the verdict and ordered a new trial on 28 December 2000: see D Karp, "Judge Sends Smoking Suit Back to Trial", *St Petersburg Times*, 29 December 2000, p 1B. The trial judge's order is still on appeal: see *Mealey's Litigation Report*, 15 October 2001, p 18.

⁵⁸ On 13 November 2001 a Connecticut State judge granted a directed verdict motion in a tobacco wrongful death case after rejecting a defective product claim: *Dujak v Brown & Williamson Tobacco Co* (No 01-00728225-S, Conn Super, Parke Co). Sferrazza J rejected the claim that cigarettes are unreasonably dangerous or defective just because nicotine can cause harm, stating that whether cigarettes' danger outweighs their social benefit is a legislative, not judicial, decision: see *Mealey's Litigation Report*, 21 December 2001, p 3.

⁵⁹ On 25 September 2001 United States Magistrate Brown J dismissed a smoker's strict liability and negligence suits against Philip Morris in *Abdishu v Philip Morris Inc* (No 98 C 1310, ND Ill), after finding that, as a matter of law, the plaintiff failed to present admissible evidence that to a reasonable degree of medical certainty his condition was more likely than not to have been caused by Philip Morris cigarettes: see *Mealey's Litigation Report*, 15 October 2001, p 15.

⁶⁰ In *Watkins v R J Reynolds Tobacco Co* (No 98-130, ED Ky), United States District Judge Coffman J of the Eastern District of Kentucky dismissed a wrongful death case after finding that tobacco is not a defective or unreasonably dangerous product as a matter of law: see *Mealey's Litigation Report*, 21 December 2001, p 14.

⁶¹ On 12 July 2001 *Scott v R J Reynolds Tobacco Co* 2001 US Dist LEXIS 10014, was dismissed by United States District Judge Clement J, on the basis that the plaintiff failed to bring suit within the statutory period prescribed by State law.

⁶² On 20 November 2001 United States District Judge Enslin J of the Western District of Michigan

complaint brought against a tobacco company or directed a verdict in favour of the defendant. In addition, in 2001 federal appeals judges in Texas upheld dismissals of tobacco claims in two cases.⁶⁴

Sometimes defendants have won because the plaintiffs failed to prove a causal connection between smoking and the claimed injury.⁶⁵ Sometimes plaintiffs have opted for a theory of liability that the courts reject (for example, that cigarettes cannot be deemed defective products merely because of the enormous danger they create).⁶⁶ Some victims continue to lose, in effect, on grounds of “assumption of risk” – that they well knew of the dangers of smoking, regardless of what the defendants did say or might have said about their products.⁶⁷ Some victims run foul of special State statutes protecting tobacco companies analogous to the now repealed California statute noted above.⁶⁸ Since almost all of these are trial court victories for the tobacco companies, the most important thing for the purposes of this analysis is not the legal technicalities but rather the number of ongoing victories by the industry in so many States. In short, the combination of highly effective lawyering on behalf of plaintiffs and seemingly strongly anti-tobacco attitudes of juries that we have witnessed on the west coast (in California and Oregon), in Florida, and most recently in Kansas has yet to be duplicated elsewhere.

CLASS ACTIONS ON BEHALF OF INJURED OR DECEASED SMOKERS: ENGLE

United States law recognises the right of certain groups of plaintiffs to band together in class actions. In the personal injury area, however, these sorts of claims are fairly uncommon. One serious problem facing nationwide class actions is that tort law in the United States is a matter of State law. Hence,

dismissed *Booth v R J Reynolds Tobacco Co* 2001 US Dist LEXIS 19263, a wrongful death case, after finding that the claims were barred by the *Michigan Products Liability Act*, s 2949(a).

⁶³ On 30 September 2001 United States District Judge Smith J dismissed *Worthington v R J Reynolds Tobacco Co* (No C-2-97-261, SD Ohio), a smoking injury case, after finding that the dangers were common knowledge when the decedent started smoking: see *Mealey's Litigation Report*, 12 November 2001, p 10.

⁶⁴ On 6 December 2001 the Fifth Circuit affirmed the dismissal of a wrongful death case after finding that removal was proper and the claims were pre-empted by the *Texas Civil Practice and Remedies Code*, s 82.004: see *Green v R J Reynolds Tobacco Co* 274 F 3d 263 (2001). On 28 December 2001 the Fifth Circuit affirmed the dismissal of a personal injury case, reasoning that the claims were barred by, among other things, the *Texas Civil Practice and Remedies Code*: see *Hughes v Tobacco Inst Inc* 278 F 3d 417 (2001).

⁶⁵ See, eg, nn 48, 50, 52 and 55.

⁶⁶ See, eg, nn 58, 60 and 63.

⁶⁷ See, eg, n 49.

⁶⁸ See, eg, nn 62, 64. In a rather unusual case, on 28 November 2001 the Seventh Circuit dismissed loss of consortium claims in a tobacco injury case after finding that Indiana law reserves loss of consortium claims for couples in a valid civil marriage contract at the time of injury: see *Doerner v Swisher Int'l Inc* 272 F 3d 928 (2001). In 1991 the plaintiff divorced her husband, who smoked Swisher cigarettes, was diagnosed with tongue cancer in 1995 and died in 1997: see *Doerner v Swisher Int'l Inc* 272 F 3d 928 at 929-930 (2001).

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differences between State laws on certain issues could lead to different outcomes for members of the same class.

Even State class actions are problematic in many tort settings. Most obviously, each victim has suffered individualised harm and hence, if individualised justice is to be provided, an individual claimant's damage award could not be determined in a single class action. Perhaps even more importantly, for many torts cases, and clearly for tobacco cases, the factual situations of victims differ markedly: When did the plaintiffs start smoking? What was known by the industry and by the plaintiffs at that time? Did plaintiffs become addicted? Did plaintiffs try to quit smoking? What was the actual cause of the harm claimed? These and others are all matters that could have an impact on the outcome of a case and could not be determined in a single class action. Finally, where a very large amount of money is at stake, some outspoken judges have argued that it is unfair to defendants to have all potential claims aggregated against them in a litigation setting that risks the company's entire wealth.⁶⁹

Nevertheless, the plaintiffs' bar and some judges have identified certain common issues – concerning industry misconduct and the general causal connection between smoking and disease – that might be tried initially as part of a class action in torts cases. The official understanding among lawyers and judges is that if the plaintiffs win on the common issues, then the remainder of the litigation can proceed to be litigated on an individualised basis. The theory justifying the partial class determination is that, once the common issues have been decided, the remaining individualised determinations could be efficiently made.

For most types of personal injuries for which class actions have been approved, this scenario of some issues decided on a class basis followed by loads of individual, but shorter, trials has proved largely theoretical. This is because, in practice, mere class certification (or perhaps plaintiff victory on one or more initial class issues) has promptly yielded a class settlement plan agreed to by lawyers on both sides.⁷⁰ These settlement plans typically sacrifice carefully determined individualised justice solutions for each plaintiff for quicker and cheaper-to-administer rough-justice awards, perhaps giving the most seriously injured a forum for a more careful calculation of their awards. Of course, alert disgruntled members of the class can usually opt out and sue on their own. In the tobacco industry, however, it remains quite unclear whether the defendants would ever agree to any sort of administrative compensation arrangement as part of a settlement, rather than insisting upon individual litigation of the damages of every single claimant.

In any event, so far, with one extremely notable exception, class actions on behalf of injured smokers or their heirs have not been successful. The one exception is the much-written-about *Engle* case from Florida.⁷¹ In *Engle* a class

⁶⁹ See *Castano v American Tobacco Co* 84 F 3d 734 at 748 (1996), quoting *Re Rhone-Poulenc Rorer Inc* 51 F 3d 1293 (1995).

⁷⁰ J E Gardner, "Book Note" (2000) 60 *Geo Wash L Rev* 547 (describing mass torts cases and its incentives for settlement, citing the Agent Orange, Fen Phen and other toxic tort cases).

⁷¹ *Engle v R J Reynolds Tobacco Co* (No 94-08273 CA-22, Fla Cir Ct, 6 November 2000).

action claim on behalf of Florida smoker victims was certified by a trial court on the understanding that the jury would first try two common issues: (a) What sorts of diseases are caused by smoking (the “general causation” issue)? and (b) Did the industry engage in such despicable conduct as to be liable for punitive damages, and if so, how much?⁷² In July 1999 the jury found that smoking cigarettes causes various diseases, that smoking is addictive, and that the industry is liable for punitive damages.⁷³ A year later in July 2000 the *Engle* jury awarded an incredible \$145 billion in punitive damages, allocating portions of that total to specific tobacco defendants.⁷⁴ The jury also handled the individual claims of three named plaintiffs, finding that they were damaged by the wrongful behaviour of the defendants and determined specific amounts of compensatory damages to which they were entitled, and very recently an additional member of the *Engle* class has his compensatory damages set at a staggering \$37.5 million (\$25 million for him and \$12.5 million for his wife).⁷⁵ The entire *Engle* matter is now on appeal and its future as a class action, as well as the individual awards made under it, are quite uncertain..

There are several troubling aspects to the punitive damages award in *Engle*. First, assume the punitive award is supposed to represent the appropriate penalty for misconduct with respect to Floridians. But with Florida having less than 10 per cent of the smokers in the United States population, this suggests the possibility that copycat lawsuits in other States might generate total punitive damages of well over a trillion dollars. That is an amount that it is implausible for even the wealthy tobacco industry to pay. Indeed, the \$145 billion jury award itself is an unprecedented sum in United States litigation history, and it too would almost surely drive the tobacco companies into bankruptcy if they had to pay it out in one lump sum.⁷⁶ Although many tobacco-control advocates would be delighted with a bankrupt tobacco industry, it is by no means clear that punitive damages awarded against enterprises are meant to have such consequences.

⁷² See B H Barr, “*Engle v R J Reynolds: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*” (2001) 28 Fla St UL Rev 787 at 807 (describing the *Engle* trial plan).

⁷³ F E McGovern, “*Engle v R J Reynolds Tobacco Co: Lessons in State Class Actions, Punitive Damages, and Jury Decision-making Settlement of Mass Torts in a Federal System*” (2001) 36 Wake Forest L Rev 871 at 873.

⁷⁴ McGovern, n 73, at 874. Specifically, the jury awarded punitive damages of \$73.96 billion against Philip Morris; \$36.28 billion against R J Reynolds; \$17.59 billion against Brown & Williamson; \$16.25 billion against Lorillard Tobacco; and \$790 million against Liggett Group, with the remaining \$144.8 billion to be paid by the Council for Tobacco Research and the Tobacco Institute. The American Tobacco Institute is a lobbying organisation representing five of the six American tobacco companies: see A Leichtman, “The Top Ten Ways to Attack the Tobacco Industry and Win the War Against Smoking” (1994) 13 St Louis U Pub L Rev 729 at 738, n 31.

⁷⁵ For details on the three initial individual awards see Barr, n 72, at 810; for an analysis of the most recent award on behalf of John Lukacs and his wife see M Aronson, Aronson Washington Research, *Industry Report*, 11 June 2002 (on file with author).

⁷⁶ See M A Crowley, “Notes and Comments: From Punishment to Annihilation: *Engle v R J Reynolds Tobacco Co – No More Butts – Punitive Damages Have Gone Too Far*” (2001) 34 Loy LA L Rev 1513. If they were allowed to pay out the award over time, by raising the price of cigarettes, they might well afford it. Notice that this in effect means that a later generation of hooked smokers would pay for the tort awards given to earlier generations.

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Moreover, awarding punitive damages before compensatory damages are awarded is quite unconventional, particularly because, in broad terms, the widespread view in the United States is that the relationship between compensatory and punitive damages is to be taken into account in determining whether the level of the punitive damages is legally valid.⁷⁷ Finally, absent a settlement, it would seem impossible to pay out any of the punitive damages to any one individual claimant until the compensatory awards for all individual claimants are determined. Otherwise, how could it be decided what share of the \$145 billion each plaintiff should receive?

In any event, after the tremendous publicity that accompanied the initial victories by plaintiffs in *Engle*, the case has settled down into predictable, and seemingly endless, technical legal skirmishes. The matter is very likely to wind its slow way up to the Supreme Court of Florida for a final resolution. There, the Florida high court might dismiss the whole matter on the basis that the case never should have been a class action in the first place. Or it might uphold everything the trial court and jury have decided to date. Or it might find some, not completely fatal, errors and send the matter back for further proceedings. Given the uncertainty of the outcome in the Supreme Court of Florida, there is little to be done now but to wait. After unsuccessful efforts by the defendants at the end of 2000 to move the whole case from State to federal court,⁷⁸ there were no further well-publicised developments during 2001. No doubt various briefs and motions were being prepared and perhaps filed, and some developments may possibly unfold in 2002.

Whether appellate courts will allow cases like *Engle* to be brought in other States remains uncertain.

CLASS ACTIONS ON BEHALF OF SMOKERS NOT YET CLAIMING TOBACCO-RELATED DISEASES

Some years ago, a number of high-powered personal injury law firms banded together to bring a national class action on behalf of current smokers who, as of then, did not appear to have any smoking-related disease.⁷⁹ The legal theory of the case was that these plaintiffs had been lured into smoking, mostly when they were children, and now they are highly at risk of grave future harm.⁸⁰ However, at least two things might presently be done for them. First, they could be subject to regular medical monitoring, to try to determine the earliest onset of tobacco-related disease.⁸¹ Such a discovery might allow for more effective treatment and

⁷⁷ See generally Barr, n 72, at 813-820.

⁷⁸ *Philip Morris Inc v Engle* 529 US 1144 (2000) (denying certiorari).

⁷⁹ *Castano v American Tobacco Co* 160 FRD 544 (1995). See generally P Pringle, "The Chronicles of Tobacco: An Account of the Forces That Brought the Tobacco Industry to the Negotiating Table" (1999) 25 Wm Mitchell L Rev 387 at 392; P Pringle, *Comered: Big Tobacco at the Bar of Justice* (Henry Holt & Co, New York, 1998); C Mollenkamp et al, *The People Vs Big Tobacco* Bloomberg Press, New York, 1998). See generally J G Fleming, "Preventive Damages" in N J Mullany (ed), *Torts in the Nineties* (LBC Information Services, Sydney, 1997), pp 56-71.

⁸⁰ *Castano v American Tobacco Co* 160 FRD 544 (1995).

⁸¹ *Castano v American Tobacco Co* 160 FRD 544 (1995).

possibly frighten the smoker into quitting. Secondly, the class could be offered a range of free smoking-cessation options and programs (that are currently often available only for a fee). In addition, these plaintiffs could be awarded substantial punitive damages, and their lawyers, of course, might be awarded legal fees.

This case, *Castano v American Tobacco Co.*,⁸² was not successful for the plaintiffs. The trial court certification of the class was reversed by the federal Court of Appeals for the Fifth Circuit for some of the reasons earlier discussed about the possible inappropriateness of class actions for big money torts cases.⁸³ Nonetheless, the lawyers in the *Castano* group pledged to bring a series of mini-*Castano*, or “Son of *Castano*”, cases in individual States around the country.⁸⁴ Indeed, cases like this have been filed in many jurisdictions.

However, most State and federal courts either refused to certify or have decertified attempts at State-wide class actions.⁸⁵ Yet these sorts of claims have not been completely abandoned.

One, *Scott v American Tobacco*,⁸⁶ continues to move slowly along the litigation process in Louisiana. In 1998 a State appeals court affirmed the trial court’s certification of a class action suit against the tobacco companies for medical monitoring costs.⁸⁷ But as of 2001, defendant tobacco companies were still seeking a stay order from the Supreme Court of Louisiana.⁸⁸

A second, *Re Tobacco Litigation Medical Monitoring Cases*,⁸⁹ had a rocky pre-trial history in West Virginia and has now turned sour for plaintiffs. Early in 2001 an inadvertent reference to the issue of addiction resulted in mistrial.⁹⁰ Later, the trial judge allowed the case to proceed as a class action.⁹¹ However, near the end of 2001 the jury found that even though smokers have an increased risk of contracting certain diseases, the tobacco companies were not liable because they had not engaged in wilful, wanton and reckless conduct in the design, manufacture and sale of their cigarettes.⁹² The jury seems to have accepted the plaintiffs’ claim that there is a beneficial medical monitoring system available that the defendants might plausibly be ordered to pay for had they been shown to have acted badly enough. Interestingly enough, both of these jury findings appear to run counter to the current mainstream public health

⁸² 160 FRD 544 (1995).

⁸³ 84 F 3d 734 (1996).

⁸⁴ See Barr, n 72, at 804. S E Kearns, “Note: Decertification of Statewide Tobacco Class Actions” (1999) 74 NY UL Rev 1336 at 1354, n 101 (“Certification motions are pending or have been decided in the following jurisdictions: Alabama, Arkansas, California, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia and Wisconsin”).

⁸⁵ Kearns, n 84.

⁸⁶ 959 F Supp 340 (1996).

⁸⁷ *Scott v American Tobacco Co* 725 So 2d 10 (1998).

⁸⁸ *Mealey’s Litigation Report*, 14 May 2001, p 6.

⁸⁹ (No 00-C-6000 WV a Cir, Ohio Co).

⁹⁰ *Mealey’s Litigation Report*, 9 April 2001, p 7.

⁹¹ *Mealey’s Litigation Report*, 9 April 2001, p 7.

⁹² *Mealey’s Litigation Report*, 26 November 2001, p 3.

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wisdom – that is, that the industry has acted despicably, but that, given current technology, medical monitoring (beyond the routine physical examinations that people regularly have anyway) is not sensible.

In any event, apart from the possible future success of the remaining Louisiana case, this sort of litigation currently does not seem very promising for plaintiffs. This lack of promise has not stemmed the flow of all such cases, however. For example, a similar suit was filed in Oregon in late 2001.⁹³ Moreover, a new set of class actions on behalf of smokers not claiming to be ill has recently been filed across the nation in which plaintiffs, who smoke “light” cigarettes, are asking for their money back, claiming that these products are not safer than, and are perhaps more dangerous than, traditional cigarettes.⁹⁴

HEALTH CARE REIMBURSEMENT CASES

State Attorney-General Cases

In the mid-1990s States began to sue tobacco companies.⁹⁵ The basic claim was that the States have had to incur substantial health care expenses due to tobacco-related diseases, and that the States should be reimbursed for those costs – which, given the largely private nature of the United States health care system, primarily involved the public costs of treating indigent smokers.⁹⁶ For these advocates, misconduct of the industry naturally obligated the industry to pay for the health care costs in question. Mississippi was the first State to file suit in 1994, and 40 of the 50 States had filed similar suits seeking Medicaid reimbursements by 1997.⁹⁷

As a matter of law, however, the case was not so simple. To be sure, the State as health care provider, like any health care provider, might have “subrogation” rights against the tobacco companies.⁹⁸ These subrogation rights are probably

⁹³ *Low v Philip Morris Inc* (No 0111-11895, Ore Cir, Multnomah Co). On 19 November 2001 a medical monitoring class action was filed on behalf of Oregon residents who have smoked more than a pack of cigarettes a day for longer than five years, seeking to establish a medical monitoring, smoking cessation and education class to prevent the effects of smoking-related diseases: see *Mealey's Litigation Report*, 26 November 2001, p 4.

⁹⁴ Telephone interview with Steve Sheller, the lead lawyer in these cases, on 3 April 2002. On 18 December 2001 an Illinois State court found that plaintiffs who seek to recover the purchase price of light cigarettes meet the requirements of class action status in *Howard v Brown & Williamson Tobacco Corp* (No 00-L-136, Ill Cir, Madison Co). For yet a still different type of case that perhaps is not exactly a class action, see *Lennon v Philip Morris* (No 102396/2000, NY Sup, NY Co), a case in which Lennon and other smokers claimed that defendant tobacco companies had violated *New York General Business Law* (the Donnelly Act) by engaging in price fixing and other anti-competitive activities. On 9 October 2001 New York Supreme Court Justice Ramos J granted a motion to dismiss the proposed tobacco price-fixing class action after finding that the smokers failed to sufficiently state a claim: see *Mealey's Litigation Report*, 10 December 2001, p 4.

⁹⁵ Barr, n 72, at 799.

⁹⁶ Barr, n 72.

⁹⁷ Barr, n 72, at 799-800.

⁹⁸ See M S Quinn, “Subrogation, Restitution and Indemnity: The Law of Subrogation. By Charles Mitchell” (1996) 74 *Tex L Rev* 1361.

provided for by health insurance contracts or statutes, and even if not, they might well be awarded to health care funders by the courts as a matter of equity. What this means is that if a smoker successfully sues a tobacco company for tort damages and wins money damages that include his or her health care costs, the insurer who initially paid those costs is entitled to reimbursement. Indeed, even if the victim fails to sue, the insurer might be able to rely on its subrogation rights to sue on the smoker's behalf in order to obtain its reimbursement. But this sort of subrogation-based lawsuit by the health care funders would depend upon the smoker having a successful individual tort claim against the tobacco company defendant, and these are precisely the types of legal hurdles that anti-tobacco advocates were trying to avoid in their State health care reimbursement lawsuits. Rather, they wanted to be able to win merely by proving generalised tobacco company misbehaviour and group harm to the State budget.⁹⁹

At first glance, it may seem that these simple facts (if proved) might state a cause of action for restitution. A more careful examination of the law of restitution suggests otherwise: simply put, the State's claim does not have a sufficiently direct connection to the alleged wrongdoing to support a conventional claim for restitution.¹⁰⁰

These legal niceties did not stand in the way of some State Attorneys-General filing suit, however. As these health care reimbursement lawsuits spread to more States, lawyers began to add other legal theories to their complaints. For example, some charged that the companies violated State consumer protection laws,¹⁰¹ some charged that the defendants encouraged the violation of State laws governing sales to minors, some charged violation of the antitrust laws, and so on.¹⁰² The publicity about these lawsuits continued to emphasise reimbursement for health care costs, causing some to question the existence of any sensible connection between the sort of damages the States sought to recover and plausibly valid theories being advanced. After all, companies that violate the sales-to-minors laws or the consumer protection laws probably ought to be liable to States for certain penalties independent of whether it is the State or the federal government which happens to pay for indigent health care.

In the end, there never was a genuine test of the legal merits of these cases. During the late 1990s the tobacco industry was working to achieve what was then ironically termed a "global" settlement of its legal problems on all fronts inside the United States (but not around the globe).¹⁰³

⁹⁹ M Orey, *Assuming the Risk: The Mavericks, the Lawyers and the Whistle-blowers Who Beat Big Tobacco* (Little Brown & Co, Boston, 1999).

¹⁰⁰ See Z Levine, "Should Tobacco Manufacturers Be Liable to the State for the Medicaid Costs of Treating Smoking-related Illnesses? Evaluating the Unjust Enrichment and Restitution Claims of the Medicaid Reimbursement Lawsuits" (1995) (on file with author).

¹⁰¹ G L Wilson and J A Gillmer, "Minnesota's Tobacco Case: Recovering Damages Without Individual Proof of Reliance Under Minnesota's Consumer Protection Statutes" 1999) 25 Wm Mitchell L Rev 567; M Ciresi, "An Account of the Legal Strategies That Ended an Era of Tobacco Industry Immunity" (1999) 25 Wm Mitchell L Rev 439.

¹⁰² See M G Bianchini, "The Tobacco Agreement That Went Up In Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation" (1999) 87 Cal L Rev 703 at 712.

¹⁰³ Barr, n 72, at 801.

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When a tentative “global” settlement was finally reached and sent to the United States Congress for its required approval, the settlement had the support of Attorneys-General from across the nation.¹⁰⁴ However, as anti-tobacco advocates attached tougher and tougher conditions to the settlement as the plan moved through Congress, the tobacco industry eventually withdrew its support and the deal collapsed (to the dismay of some tobacco-control leaders and to the delight of others).¹⁰⁵

During the time that the global settlement effort was being undertaken, the tobacco industry initiated settlements of the health care reimbursement claims with States whose cases were approaching trial.¹⁰⁶ As part of that effort, the industry settled cases brought by the Attorneys-General of Mississippi for \$3.4 billion, Florida for \$11.3 billion, and Texas for \$14.5 billion.¹⁰⁷ Minnesota settled for \$6.5 billion only after its trial had gone all the way to closing arguments, and was the last State to achieve an individual settlement with the industry.¹⁰⁸

In the wake of the failed overall settlement, however, a more modest settlement was eventually reached with all the State Attorneys-General in November 1998, making it unnecessary for any of those State officials to demonstrate the legal validity of their lawsuits.¹⁰⁹ The details of this so-called “Master Settlement Agreement” (MSA) have been described elsewhere.¹¹⁰ The

¹⁰⁴ Barr, n 72, at 801 (describing the initial settlement agreement as accepted by the Attorneys-General of 40 States).

¹⁰⁵ Barr, n 72, at 802. See also M Pertschuk, *Smoke in Their Eyes* (Vanderbilt University Press, Nashville, 2001).

¹⁰⁶ Barr, n 72, at 802.

¹⁰⁷ Barr, n 72.

¹⁰⁸ Barr, n 69.

¹⁰⁹ Barr, n 69.

¹¹⁰ See, eg, W H C McKay, “Reaping the Tobacco Settlement Windfall, the Viability of Future Settlement Payment Securitization as an Option for State Legislatures” (2001) 52 Ala L Rev 705. Recent litigation with respect to the MSA has been of two very different sorts. On the one hand, various parties for very different reasons have sought to challenge the MSA itself. These claims have so far failed. For example, in Kentucky a group of plaintiffs claiming to be representative of persons suffering from tobacco-related illnesses and recipients of Medicaid benefits, moved to intervene to assert claims to the settlement proceeds 16 months after entry of final judgment reflecting the Master Settlement Agreement. Plaintiffs claimed money paid by the tobacco company in excess of actual Medicaid costs incurred by Kentucky. On 12 June 2000 the trial court denied intervention as untimely, and the Kentucky Supreme Court affirmed on 20 December 2001: *Arnold v Commonwealth; Ex rel AG* 62 SW 3d 366 (2001). Also, in *Mariana v Fisher* (No 1:01-CV-2070), filed on 31 October 2001, Mariana and other smokers filed suit against the Pennsylvania Attorney-General in the United States District Court for the Middle District of Pennsylvania, alleging that the Master Settlement Agreement violates provisions of the *Sherman Antitrust Act*: see *Mealey's Litigation Report*, 18 February 2001, p 7. Finally, in *A D Bedell Wholesale Co v Philip Morris Inc* A D Bedell and 900 other cigarette wholesalers in the class action asserted claims under the *Sherman Act*, challenging sections of the Master Settlement Agreement that allegedly creates an output cartel that imposes draconian monetary penalties for increasing cigarette production beyond 1998 levels and effectively bars new entry into the cigarette market. In 2000 the United States District Court for the Western District of Pennsylvania found that Bedell failed to state a claim under the *Sherman Act* because antitrust immunity applies to settlement agreements reached between private actors and the government and dismissed the case: *A D Bedell Wholesale Co v Philip Morris Inc* 104 F Supp 2d 501 (2000). On 19 June 2001 the Third Circuit upheld the dismissal: *A D Bedell Wholesale Co v Philip Morris Inc* 263 F 3d 239 (2001) (*A D Bedell Wholesale Co Inc v Philip Morris Inc* (No 00-3410, 3rd

main features include annual payments to the States by the tobacco industry of about \$25 billion plus the agreement by the industry to restrict its advertising and promotional activities in various ways.

Private Health Insurer, Union Health Plan, and the United States Government as Health Insurer Cases

Having seen the States file lawsuits sounding in health care reimbursement, many other parties who provide health care services to smokers also decided to sue.

In Minnesota, such a suit by the State's largest private health insurer (Minnesota Blue Cross and Blue Shield) was combined with the State Attorney-General's lawsuit. And, in 1998, when settling with the State, the tobacco companies also settled with the insurer for nearly \$500 million (plus attorneys' fees), the uses of which are still in doubt as of this writing.¹¹¹

Otherwise, however, the tobacco industry has vigorously fought these health care cost reimbursement cases, and has been successful in nearly all of them. Plaintiffs in these cases have been not only private health care insurers and unions providing health care benefits to members (in effect, as health insurers), but also governments that provide health care. These governments include both the United States Government (recall that the lawsuits of the Attorneys-General were only on behalf of State governments) and the governments of other countries. Of course, these latter governments might have sued in their own country's courts, and some have.¹¹² But many sued in the United States, perhaps because United States law was potentially more favourable to them than is their own law and/or because United States personal injury lawyers were willing to file and handle these cases on a contingent fee basis that avoided legal expenses absent a victory or settlement.

As it has turned out, however, nearly all United States courts have been quite unresponsive to these health care reimbursement claims, regardless of what sort of health care provider or funder brings suit. For example, in mid-2001 a federal Court of Appeals in *SEIU Health & Welfare Fund v Philip Morris Inc*¹¹³ affirmed the dismissal of suits filed by labour union health funds. The court found the lawsuits to be "too remote, contingent derivative, and indirect to survive".¹¹⁴ With this decision, eight of the 12 United States federal circuits had ruled against suits by labour unions and others attempting to recoup funds spent on health care for individuals with tobacco-related illnesses.¹¹⁵ A case brought

Cir). On 7 January 2002 the United States Supreme Court decided not to review the case: *A D Bedell Wholesale Co v Philip Morris Inc* 122 S Ct 813 (2002). On the other hand, State officials have brought "enforcement" actions under the MSA, claiming that its provisions have been violated.

¹¹¹ See D Blanke, 28 March 2002 (email correspondence on file with author).

¹¹² D Blanke, "Toward Health With Justice: Litigation and Public Inquiries as Tools for Tobacco Control", pp 33-43, available online at http://tobacco.who.int/repository/stp69/final_jordan_report.pdf.

¹¹³ 249 F 3d 1068 (2001).

¹¹⁴ 249 F 3d 1068 at 1076 (2001).

¹¹⁵ 249 F 3d 1068 at 1079 (2001). In a somewhat similar case brought by the Johns Manville Personal Injury Settlement Trust, *Falise v American Tobacco Co* (No 99 CV 7392, ED NY), against the

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by a United States Native American Tribe recently met the same fate.¹¹⁶ Indeed, claims by other Minnesota health insurers were dismissed in late 2001, as they failed to win what Minnesota Blue Cross and Blue Shield had earlier garnered in settlement.¹¹⁷

Foreign government health care reimbursement claims have also not succeeded. At the same time it affirmed the dismissal of union health care plans, the court in the *SEIU* case also affirmed the dismissal of suits filed by the Governments of Guatemala, Nicaragua and the Ukraine.¹¹⁸ The court also found the foreign governments' lawsuits to be "too remote, contingent derivative, and indirect to survive".¹¹⁹ 2001 also saw Ecuador's Government dropping its lawsuit against United States tobacco companies for economic losses caused by lung cancer and other tobacco-related illnesses, after the Miami judge overseeing the case stated that he would dismiss the case if the plaintiffs did not voluntarily withdraw the complaint.¹²⁰ Although not all non-United States governments have given up (for example, new law suits or announcements of intended lawsuits came in 2001 from the governments of Tajikistan, Kyrgyz and Peru), the future of such litigation is not particularly promising.¹²¹

Even the United States Government was rebuffed in 2001 on its own health care reimbursement lawsuit. Although a different strand of the United States legal claim remains, as discussed below, the federal district judge in charge of the case tossed out claims that, based on federal statutes and federal payment of health costs for smoking-related diseases, sought reimbursement from the tobacco companies.¹²²

There has been one plausibly important exception to this trend. In mid-2001 in *Blue Cross & Blue Shield of N J Inc v Philip Morris Inc*¹²³ a Brooklyn, New York, jury found the defendant tobacco companies liable for unfair and

tobacco industry seeking \$160 million reimbursement for health care costs of asbestos workers was declared a mistrial on 25 January 2001 after the jury deadlocked (reportedly 10-2 in favour of the tobacco companies); see *Mealey's Litigation Report*, 29 January 2001, p 3.

¹¹⁶ *Acoma Pueblo v American Tobacco Co* (No Civ 99-1049M/WWD). On 30 July a New Mexico judge dismissed the recovery action filed by Indian tribes, which alleged that defendants marketed unreasonably dangerous products and concealed/misrepresented the dangerous nature of the products, causing plaintiffs to incur overwhelming costs for treatment of tobacco-caused illnesses: see *Mealey's Litigation Report*, 14 September 2001, p 17. The court dismissed the suit after finding that the plaintiff's injuries are too remote as a matter of law and preclude both recovery of damages and the right to proceed.

¹¹⁷ See D Blanke, 28 March 2002 (email correspondence on file with author).

¹¹⁸ *SEIU Health & Welfare Fund v Philip Morris Inc* 249 F 3d 1068 (2001).

¹¹⁹ *SEIU Health & Welfare Fund v Philip Morris Inc* 249 F 3d 1068 at 1076 (2001).

¹²⁰ GLOBALink (email update on file with author).

¹²¹ On 1 January 2001 the Government of Peru began recruiting legal advisers to assist in its intended suit against United States tobacco companies for the cost of treating tobacco-related illnesses. See GLOBALink email update (on file with author). On 24 January 2001 the Kyrgyz and Tajikistan Republics filed suit alleging that, by concealing information about health hazards caused by smoking, the tobacco industry prevented the former members of the Soviet Union from properly treating smoking-related injuries: *Kyrgyz Republic v Brooke Group, Ltd, Republic of Tajikistan v Brooke Group, Ltd*, Nos not yet assigned (Flr Cir, Miami-Dade Co).

¹²² *United States v Philip Morris Inc* 156 F Supp 2d 1 (2001); *United States v Philip Morris Inc* 153 F Supp 2d 32 (2001).

¹²³ 178 F Supp 2d 198 (2001).

deceptive business practices and ordered the defendants to pay Empire Blue Cross and Blue Shield \$17.8 million, marking the first case in which a third party has successfully won compensation from the tobacco industry in a fully litigated trial. Punitive damages were not sought.¹²⁴ The Brooklyn jury also awarded \$11.8 million to Empire under an alternative claim that lets the insurer “stand in the shoes of its members”, with the proviso that Empire would receive the larger of the two awards if both survive on appeal.¹²⁵ Prior to proceeding to trial, defendants had sought a writ of mandamus from the Second Circuit Court of Appeals to force federal district judge Weinstein J to apply the remoteness rule that has previously barred third-party suits in all the other cases.¹²⁶ The Circuit Court denied the writ.¹²⁷ As of this writing, it is unclear whether defendant tobacco companies will appeal the verdict, in view of the fact that the damages awarded were so modest compared to the \$3 billion sought by plaintiff insurers. On the other hand, it also remains unclear whether the law applied in the case will be followed outside of Weinstein J’s courtroom.¹²⁸

SECOND-HAND SMOKE SUITS

Ever since scientific evidence emerged blaming environmental tobacco smoke (ETS) for serious injuries and deaths to non-smokers, there has been much talk of, and some legal action on, the so-called second-hand smoke front.¹²⁹ These cases are attractive in the sense that, as non-smokers, these victims are not easily deemed to have assumed the risk of smoking, and that is especially true if they have been involuntarily exposed to smoke on the job.¹³⁰ Other considerable difficulties confront these claims, however.

First, proving that a person is the victim of environmental tobacco smoke is probably much more difficult than proving the causal connection for a smoker plaintiff, if for no other reason than the general science demonstrating a causal connection between ETS and disease is not nearly as robust as is the scientific proof of harm to smokers.¹³¹

¹²⁴ A Feuer, “A Jury Orders Tobacco Companies to Pay Millions to Blue Cross”, *New York Times*, 5 June 2001, p B4.

¹²⁵ “A Jury Orders Tobacco Companies to Pay Millions to Blue Cross”, *New York Times*, 5 June 2001, p B4.

¹²⁶ *Mealey’s Litigation Report*, 29 October 2001, p 6.

¹²⁷ *Mealey’s Litigation Report*, 29 October 2001, p 6.

¹²⁸ On 19 October 2001 Weinstein J held that the plaintiffs were entitled to retain its \$17 million jury award and to obtain interest from the day of that award: *Blue Cross & Blue Shield of NJ Inc v Philip Morris Inc* 178 F Supp 2d 198 (2001); see *Mealey’s Litigation Report*, 29 October 2001, p 6. In an usual twist, a new health care reimbursement case seems to have been brought in August 2001 in Tennessee on behalf of Medicaid recipients to recover damages from tobacco companies for smoking-related illnesses: see *Myers v Liggett & Myers Inc* (No 00C1773, Tenn Cir, Davidson Co), although it is unclear whether the real claimant in the case is the State.

¹²⁹ Leichtman, n 74, at 735-741.

¹³⁰ R L Cupp Jr, “A Morality Play’s Third Act: Revisiting Addiction, Fraud and Consumer Choice in ‘Third Wave’ Tobacco Litigation” (1998) 46 Kan L Rev 465 at 471-477.

¹³¹ In addition, as with smokers themselves, the realistic prospects of individual victory will most likely be restricted to lung cancer or perhaps one or two other signature diseases of smoking. Hence, although both smoking and ETS cause a great deal of heart disease, eg, showing that a heart disease

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Secondly, if workplace exposure is the basis of the ETS harm, it is almost certain that no single brand, and hence no single manufacturer, can be identified as the culprit. As a result, such cases will have to be brought against several tobacco companies and include a claim for some sort of market-share-based liability. While market-share liability has been accepted in the United States,¹³² there is actually rather little experience with it. The use of market-share liability has been most developed in a series of cases concerning one pharmaceutical drug (DES),¹³³ and the problems with determining market share in that setting have proved very substantial.¹³⁴

Thirdly, as during the first wave of individual tobacco cases, it may well be difficult to show that the industry knew more and earlier about dangers, and that it should have warned consumers. Furthermore, there is the related problem of showing that it is the tobacco companies who should have taken action, rather than the claimant's employer. In the United States, workers' compensation laws nearly always preclude a tort claim against the employer, so tort claimants will probably have to demonstrate that the industry knew about dangers from ETS that neither they nor their employers knew about.

Flight attendants with lung cancer seem good candidates to pursue these second-hand smoke claims. Imagine a flight attendant with lung cancer whose off-work life exposed her or him to hardly any tobacco smoke, but who worked for years in smoke-filled aeroplanes. A particularly appealing flight attendant of this sort might be a Mormon who could perhaps easily and convincingly show not only that she never smoked but also neither her family nor her friends smoked and that she did not frequent bars and other places where people smoked (given Mormon beliefs about smoking and alcohol). In such a case, a jury might well be quite convinced that her lung cancer was caused by ETS encountered on the job.

And indeed a woman with seemingly just those characteristics was named the lead plaintiff in a second-hand smoke class action filed in 1997 on behalf of a class of over 60,000 flight attendants.¹³⁵ That case, *Broin v Philip Morris*,¹³⁶ settled during the course of the trial in 1997. The tobacco industry agreed to pay \$300 million in lieu of punitive damages to pay for research studies relating to tobacco-related disease¹³⁷ and \$50 million to plaintiffs' attorneys.¹³⁸ Class

victim's problems were caused by smoking or ETS would probably be a daunting task since many other causes for heart disease exist: see R F Cochran Jr, "Beyond Tobacco Symposium: Tort Issues in Light of the Cigarette Litigation: From Cigarettes to Alcohol: The Next Step in Hedonic Product Liability?" (2000) 27 Pepp L Rev 701 at 709.

¹³² See *Sindell v Abbott Laboratories* 607 P 2d 924 (1980). See also D M Schultz, "Market Share Liability in DES Cases: The Unwarranted Erosion of Causation in Fact" (1991) 40 DePaul L Rev 771 at 782-785.

¹³³ See, eg, *Stevens v Owens-Corning Fiberglass Corp* 57 Cal Rptr 2d 525 at 540 (1996) (holding that market share liability is not applicable to asbestos cases); *Cummins v Firestone Tire & Rubber Co* 495 A 2d 963 at 971-972 (1985) (holding that market share liability cannot be used against tire rim manufacturers).

¹³⁴ See *Hymowitz v Eli Lilly & Co* 73 NY 2d 487 (1989).

¹³⁵ *Broin v Philip Morris Companies* (No 91-49738 22, Fla Cir, Miami-Dade Co).

¹³⁶ *Broin v Philip Morris Companies* (No 91-49738 22, Fla Cir, Miami-Dade Co).

¹³⁷ R C Ausness, "Litigation and Compensation: Paying for the Health Costs of Smoking: Loss

members, however, received no payments. But they were entitled to go forward with their compensatory damage claims on somewhat favourable terms: defendants agreed to waive *Statute of Limitation* defences and to carry the burden of proof in claims involving lung cancer, chronic bronchitis, emphysema, chronic obstructive pulmonary disease or chronic sinusitis.¹³⁹

The *Broin* settlement set a final date by which cases taking advantage of the settlement provisions had to be filed, and that date has now passed. No clearly reliable estimate of the total number of *Broin* claims has been released, but it appears to be more than 1,000 and perhaps more than 3,000.¹⁴⁰ The plaintiff lost the first of these claims to be tried. In April 2001 a Miami jury held in *Fontana v Philip Morris*¹⁴¹ that cigarette makers were not liable for the potentially fatal lung disease of a flight attendant exposed to tobacco smoke on the job.¹⁴² A possible explanation for this result is that the plaintiff's current treating physician was not called to testify, as the only member of her medical team who did testify was her radiologist.¹⁴³ Also, Fontana is an atypical plaintiff because she has sarcoidosis, a rare lung disease of unknown origin.¹⁴⁴

Regardless, *Fontana* was hardly a promising start on the plaintiff side for these individual flight attendant ETS cases. Moreover, in recent years at least two other individual ETS cases have been won by the tobacco industry.¹⁴⁵

Shifting and Loss Bearing" (1998) 27 Sw U L Rev 537 at 545.

¹³⁸ D W Garner, "The Ward, Kershaw and Minton Environmental Symposium: 'Up in Smoke: Coming to Terms with the Legacy of Tobacco'" (1998) 2 J Health Care L & Pol'y 15 at 32.

¹³⁹ "New Phase for Tobacco Fight; Companies Take Complaint Over Judge's Ruling in Flight Attendants' Case to Appeals Court", *Broward Daily Business Review*, 12 September 2001, p A9.

¹⁴⁰ "New Phase for Tobacco Fight; Companies Take Complaint Over Judge's Ruling in Flight Attendants' Case to Appeals Court", *Broward Daily Business Review*, 12 September 2001, p A9 (estimating that over 3000 cases have been filed).

¹⁴¹ *Fontana v Philip Morris Inc* (No 00-01731 CA [09], Fla Cir, Miami-Dade Co).

¹⁴² "Jury Clears Big Tobacco; Ex-Flight Attendant's Case Was First Involving Second-Hand Smoke; Jurors Cite Lack of Convincing Evidence", *Sun-Sentinel*, 6 April 2001, p A1.

¹⁴³ "Jury Clears Big Tobacco; Ex-Flight Attendant's Case Was First Involving Second-Hand Smoke; Jurors Cite Lack of Convincing Evidence", *Sun-Sentinel*, 6 April 2001, p A1.

¹⁴⁴ "Jury Clears Big Tobacco; Ex-Flight Attendant's Case Was First Involving Second-Hand Smoke; Jurors Cite Lack of Convincing Evidence", *Sun-Sentinel*, 6 April 2001, p A1.

¹⁴⁵ See Anon, "Tobacco Not Liable in 2nd-Hand Smoke Case", *The Commercial Appeal*, 20 March 1998, p A2 (reporting that a Muncie, Indiana, jury found that the tobacco industry was not liable for the cancer death of Mildred Wiley, a non-smoking nurse exposed to second-hand smoke at a veteran's hospital). In *Estate of Butler v Philip Morris Inc* (No 94-5-53, Miss Cir Ct 2d Jud Dist filed 1992), on remand to State court in *Butler v R J Reynolds Co* 815 F Supp 982 (1993), a Mississippi jury found that the tobacco industry is not liable for the cancer death of Burl Butler, a devout Christian who never smoked, but who operated a barber shop in Mississippi where his customers frequently smoked. A specialised subset of ETS cases concerns prisoners: Anon, "Tobacco Industry Not Liable in Second-hand Smoke Death", *The Commercial Appeal*, 3 June 1999, p A15. For some recent examples, see *Alvarado v Litscher* 267 F 3d 648 (2001)(rejecting qualified immunity defences in a prison inmate's environment tobacco smoke action after finding that the prisoner sufficiently alleged deprivation of federal rights). But see *Rogers v Dallas County Jail* (No 3-01-CV-1693, M, N D Texas, 2001) (dismissing an environmental tobacco smoke case asserted by an inmate after finding that the claims are frivolous); *Jones v Kearney* (No 00-818-JJF, D Del, 2001)(dismissing an environmental tobacco smoke exposure case after finding that a prisoner had limited exposure to smoke). For a discussion of litigation over ETS in other contexts see E L Sweda Jr, "Litigation on Behalf of Victims of Exposure to Environmental Tobacco Smoke: The Experience from the USA" (2001) 11 European J of Pub Health 201.

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Independent of *Broin*, another flight attendant later sought to mount a class action case, this time against Northwest Airlines for damages allegedly caused as a result of Northwest's policy that exposed its employees to second-hand smoke on certain international flights.¹⁴⁶ Yet in late 2001 class certification was denied and summary judgment for the defendants was granted.¹⁴⁷

On the other hand, just as it took many years and many false starts for plaintiffs to even begin to win individual smoker cases, it could also be that ETS victories will begin to come only after a series of early defeats. And sure enough, in June 2002, the first plaintiff's victory was won in a United States tort case involving second-hand smoke.¹⁴⁸ This involved former flight attendant Lynn French, a member of the *Broin* class, and she alleged that her years of service on smoke-filled aeroplanes caused her to suffer from chronic sinusitis. Although the defendants protested that there is no evidence that the plaintiff's condition resulted from passive smoking, the jury found to the contrary. Moreover, even though the plaintiff's lawyers asked for just under \$1 million in compensatory damages, the jury awarded \$5.5 million. If the trial judge upholds the verdict, the defendant tobacco companies (who presumably will be liable for the award based on market share) will surely appeal. Whether this victory will open the door to a large number of other successful flight attendant cases remains to be seen.

BOLDER CLAIMS BY THE UNITED STATES AND OTHER GOVERNMENTS

The United States Lawsuit

During Bill Clinton's Presidency, the United States Department of Justice filed a sweeping lawsuit against the tobacco industry.¹⁴⁹ As already noted above, the portion of that lawsuit seeking the reimbursement of health care costs for tobacco-related diseases was dismissed by the trial judge.¹⁵⁰ But the more threatening part of the case was retained with a potential trial date set for mid-2003.¹⁵¹

This remaining claim is based upon the Racketeer Influenced Corrupt Organization (RICO) statute,¹⁵² initially adopted by the United States Congress to permit federal prosecutors and certain civil lawsuit plaintiffs to more easily

¹⁴⁶ *Duncan v Northwest Airlines Inc* (No C98-130Z, WD Wash).

¹⁴⁷ *Duncan v Northwest Airlines Inc* 203 FRD 601 (2001).

¹⁴⁸ W McQuillen, "Tobacco Companies Must Pay Flight Attendant \$5.5 Mln (Update3)": available at http://quote.bloomberg.com/fgcgi.cgi?T=marketsquote99_news.ht&s=APQ.EmhT4VG9iYWNj; G Winter, "Jury Awards \$5.5 Million In a Secondhand Smoke Case", *New York Times* (National Edition), 20 June 2002, p A16.

¹⁴⁹ *United States v Philip Morris Inc* No 99- CV2496 (DDC filed 22 September 1999).

¹⁵⁰ *United States v Philip Morris Inc* 156 F Supp 2d 1 (DDC, 27 July 2001); *United States v Philip Morris Inc* 153 F Supp 2d 32 (2001).

¹⁵¹ *United States v Philip Morris Inc* 116 F Supp 2d 131 (2000) (denying tobacco defendants' motion to dismiss the government's RICO claims).

¹⁵² 18 USC § 1962 (2001).

bring organised crime groups to justice.¹⁵³ The provisions of this “racketeering” law are rather ambiguous, and its application to the tobacco industry perhaps outside the vision of the law’s drafters. Yet RICO has already been applied in civil cases to parties other than those who are publicly understood to be organised crime figures.¹⁵⁴ It seems safe to say that if the United States Government could prove that the tobacco industry had engaged in a widespread conspiracy to commit seriously wrongful acts, it probably will have proved a RICO violation. Indeed, perhaps a lesser showing will suffice, and the government has announced that it is seeking to recover the tobacco companies’ “ill-gotten gains” or profits since 1954, with interest.¹⁵⁵

The Clinton Administration had initially earmarked \$23 million in support of the lawsuit.¹⁵⁶ When George W. Bush became President, his Administration was not as supportive of the tobacco suit.¹⁵⁷ On 29 June 2001 the Administration announced that it would go ahead with the case but would seek a settlement with the tobacco companies.¹⁵⁸ As of this writing, no settlement has emerged, and the Department of Justice has, in March 2002, released a series of public health remedies it says it will try to obtain in the case.¹⁵⁹

Canada and European Union Lawsuits

A different sort of attack on the tobacco industry has been mounted by both the Government of Canada and the European Union (with the support of several member governments). Both of these claims, brought in United States courtrooms, argue that the tobacco industry actively co-operated with smuggling activities that evade excise taxes, thereby denying the plaintiffs huge amounts of tobacco excise taxes that they would have otherwise collected.¹⁶⁰ The public health push behind these cases includes at least two further concerns. One is that smuggling means lower-priced tobacco products and that means more sales, more smoking and more tobacco-related diseases.¹⁶¹ The second is that when nations are hit by smuggling, it makes it difficult for them to raise tobacco taxes, a measure their governments may well wish to adopt nowadays for public health

¹⁵³ See generally G R Blakey, “Symposium Law and the Continuing Enterprise: Perspectives on RICO: Forward” (1990) 65 Notre Dame L Rev 873.

¹⁵⁴ See, eg, *National Organization for Women v Scheidler* 510 US 249 (1994) (holding that RICO can be applied to non-economic enterprises, including anti-abortion protesters).

¹⁵⁵ M J Sniffen, “US Sues Tobacco Industry; ‘Fraud and Deceit’ Alleged”, *Chicago Sun-Times*, 22 September 1999, p A1.

¹⁵⁶ E Lichtblau, “Reno Goes Public in Tobacco Fund Fight; Congress Challenging Lawmakers’ Attempts to Resist Paying for the Government’s Lawsuit, The Attorney General Threatens to Drop the Case”, *Los Angeles Times*, 6 October 2000, p A1.

¹⁵⁷ Aronson Washington Research, “Justice Department Unveils Desired Remedies in Tobacco Case”, 11 March 2002 (on file with author).

¹⁵⁸ M Kaufman and D Eggen, “US to Seek Settlement in Tobacco Suit; Anti-Smoking Activists Accuse Justice Dept of Capitulation”, *Washington Post*, 20 June 2001, p A1.

¹⁵⁹ J R Wilke, “US to Seek Tough Restrictions on Cigarette Marketing, Sales”, *Wall Street Journal*, 11 March 2002.

¹⁶⁰ *Attorney General of Canada v R J Reynolds Tobacco Holdings* 103 F Supp 2d 134 (000); *European Community v R J R Nabisco Inc* (No CV 01 5188, ED NY, 2000).

¹⁶¹ *Attorney General of Canada v R J Reynolds Tobacco Holdings* 103 F Supp 2d 134 (000); *European Community v R J R Nabisco Inc* (No CV 01 5188, ED NY, 2000).

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reasons.¹⁶²

Thus far, however, these two pieces of litigation have not fared well. In June 2000 a federal district court dismissed Canada's suit against the R J Reynolds Companies and the Canadian Tobacco Manufacturers Council.¹⁶³ The Canadian Government had alleged that the defendants had aided and abetted the smuggling of tobacco products into Canada, thereby evading taxes and duties,¹⁶⁴ and aimed to claim as much as \$3 billion under the treble damages provision of RICO.¹⁶⁵ The federal district judge dismissed the suit on the grounds that Canada's effort to collect evaded taxes and duties was prohibited by the 18th century common law "revenue rule" that bars United States courts from interpreting or enforcing the tax laws of foreign countries.¹⁶⁶ In mid-2001 the Canadian Government filed an appeal, arguing that the revenue rule does not apply because the evaded taxes are simply part of the damages Canada suffered as a result of the defendants' use of the United States mails to further a smuggling scheme.¹⁶⁷ But near the end of 2001 a panel of the federal Court of Appeals for the Second Circuit sided with the tobacco industry by a two-to-one vote and affirmed the dismissal.¹⁶⁸

In late 2000 in *EC v RJR Nabisco*¹⁶⁹ the European Commission filed a massive smuggling complaint against the tobacco industry in the United States District Court for the Eastern District of New York, alleging RICO violations. In mid-2001 the District Court judge dismissed the lawsuit, ruling the Commission itself suffered no direct injuries since the actual losses were suffered by the individual European Union nations.¹⁷⁰ Later in 2001 the European Commission refiled its complaint, this time on behalf of the European Union and 10 European Union nations: Italy, Germany, France, Spain, Portugal, Greece, Belgium, The Netherlands, Finland and Luxembourg.¹⁷¹ In February 2002 the District Court once again granted defendants' motions to dismiss.¹⁷² The plaintiffs' RICO and common law claims based on the defendants' smuggling scheme were dismissed with prejudice, but RICO and common law claims based on the defendants' money-laundering transactions were dismissed without prejudice to replead.¹⁷³ Hence, the future prospects for these smuggling-inspired lawsuits are cloudy at best.¹⁷⁴

¹⁶² *Attorney General of Canada v R J Reynolds Tobacco Holdings* 103 F Supp 2d 134 (2000); *European Community v R J R Nabisco Inc* (No CV 01 5188, ED NY, 2000).

¹⁶³ *Attorney General of Canada v R J Reynolds Tobacco Holdings* 103 F Supp 2d 134 (2000).

¹⁶⁴ *Attorney General of Canada v R J Reynolds Tobacco Holdings* 103 F Supp 2d 134 at 137-138 (2000).

¹⁶⁵ *Mealey's Litigation Report*, 29 October 2001, p 12.

¹⁶⁶ *Attorney General of Canada v R J Reynolds Tobacco Holdings* 103 F Supp 2d 134 at 139-144.

¹⁶⁷ *Mealey's Litigation Report*, 21 December 2001, p 14.

¹⁶⁸ *Attorney General of Canada v R J Reynolds Tobacco Holdings Inc* 268 F 3d 103 (2001).

¹⁶⁹ (No CV 01 5188, EDNY, 2000).

¹⁷⁰ *European Community v R J R Nabisco Inc* 150 F Supp 2d 456 (2001).

¹⁷¹ See *European Community v Japan Tobacco Inc* 2002 US Dist LEXIS 2506 (2002).]

¹⁷² *European Community v Japan Tobacco Inc* 2002 US Dist LEXIS 2506 (2002).

¹⁷³ *European Community v Japan Tobacco Inc* 2002 US Dist LEXIS 2506 (2002).

¹⁷⁴ Apart from these major government initiatives against the tobacco industry, one can also find miscellaneous litigation by States against tobacco companies that will not be discussed here. For example, on 1 August 2001 the Washington Attorney-General sued a Philippine tobacco company, alleging that it failed to place money into escrow account to comply with State tobacco regulations:

TOBACCO INDUSTRY AS PLAINTIFF

In addition to fighting litigation brought against it, cigarette manufacturers and their allies (such as tobacco retailers) have also taken the offensive by attacking a wide variety of legislative attempts to regulate tobacco products. The industry scored its perhaps most important victory in 2000 in *FDA v Brown & Williamson Tobacco Corp.*,¹⁷⁵ when the United States Supreme Court, in a five-to-four vote, declared that the Food and Drug Administration (FDA) lacked the authority to regulate tobacco, thereby sweeping aside many proposed national regulations. Many of the proposed regulations had been envisioned as part of the failed “global” settlement. Although some of those controls were “voluntarily” agreed to by the industry as part of the Master Settlement Agreement with the State Attorneys-General, nonetheless this decision was a sharp blow to those who foresaw FDA regulation as a vital step in reducing tobacco consumption in the United States.¹⁷⁶ Interestingly enough, the tobacco-control movement in the United States had not been solidly behind the FDA regulatory initiative, as some advocates found specific FDA proposals to be too weak and others stood by the view that local, rather than national, regulation was the best hope for tobacco control in the long run.¹⁷⁷

In mid-2001 the tobacco industry won yet another victory in the United States Supreme Court. In *Lorillard Tobacco Co v Reilly*,¹⁷⁸ the Supreme Court invalidated State regulations restricting tobacco advertising within 1,000 ft of schools and playgrounds. The court held, five-to-four, that the federal *Cigarette Labeling and Advertising Act* (CLAA)¹⁷⁹ pre-empts State regulations such as those adopted in Massachusetts as to cigarettes. As to other tobacco products such as cigars, the court ruled, six-to-three, that such restrictions violate the tobacco companies’ First Amendment right to free speech, given the record presented in the case.¹⁸⁰ These holdings sharply curtail the ability of State and local government to regulate tobacco advertising, and also make highly uncertain the fate of any national legislation on tobacco advertising that the United States Congress might adopt. The “free speech” aspect of the case has also been pointed to by United States negotiators who, siding with tobacco companies, seek to weaken considerably the proposed international tobacco control treaty that is currently in the process of negotiation.¹⁸¹

The potentially sweeping reach of the *Reilly* decision has already been shown

Washington; Ex rel v Earth Tobacco Corp (No not yet assigned). On the same day, the Attorney-General also filed suit against domestic tobacco companies for the same failure to comply: *Washington v Single Stick Inc* (No 012 014240, Wash Super, Thurston Co).

¹⁷⁵ 529 US 120 (2000).

¹⁷⁶ D Kessler, *A Question of Intent: A Great American Battle With a Deadly Industry* (Public Affairs Press, New York, 2001).

¹⁷⁷ See Pertschuk, n 105.

¹⁷⁸ 533 US 525 (2001).

¹⁷⁹ 15 USCS § 1331 et seq.

¹⁸⁰ *Lorillard Tobacco Co v Reilly* 533 US 525 (2001).

¹⁸¹ See S D Sugarman, “International Aspects of Tobacco Control and the Proposed WHO Treaty”, in R L Rabin and S D Sugarman (eds), *Regulating Tobacco* (Oxford University Press, New York, 2001), p 245.

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by the end of 2001, when in *Jones v Vilsack*¹⁸² a federal Court of Appeals held that an Iowa State law regulating cigarette product promotion is also pre-empted by the CLAA. The Iowa law had sought to prohibit retailers from giving away tobacco products and from providing free goods and other concessions in exchange for purchase of tobacco products.¹⁸³ But the Eighth Circuit concluded that such activities are protected “promotions” under the federal statute.¹⁸⁴

Yet another attempt by a State to control tobacco marketing failed in June 2001 when a federal district judge invalidated a New York State statute that sought to ban mail-order, Internet and telephone tobacco sales.¹⁸⁵ The lawsuit was brought by Brown & Williamson Tobacco Corp, which claimed it had plans for a multi-million dollar catalogue campaign to market its cigarette brands.¹⁸⁶ The judge ruled that New York’s effort interfered with “interstate commerce” and therefore ran foul of the United States *Constitution*.¹⁸⁷

A further tobacco industry victory came in late 2001 when a federal district judge invalidated a local regulation aimed at smoking in public places in response to a lawsuit filed in the name of a tavern association.¹⁸⁸ The judge concluded that the county that enacted the rules had acted beyond its legal authority.¹⁸⁹ Although cases like this latter one may not be especially important as a doctrinal matter, they reveal the ready willingness of pro-tobacco forces to turn to the courts whenever they are thwarted in the regular political process.

On the other hand, at least two tobacco control measures have been initially upheld in court in the past two years, despite vigorous attacks by cigarette companies. Perhaps most importantly, late in 2001 a First Circuit Court of Appeals panel (on a two-to-one vote) found valid a Massachusetts statute requiring tobacco manufacturers to reveal to the general public information about the ingredients in their products.¹⁹⁰ Overturning the district court decision, the judges concluded that even the disclosure of what might otherwise be viewed as a trade secret does not run foul of either the “commerce clause” or the “takings clause” of the United States *Constitution*.¹⁹¹ However, before the year was out, the three-member panel agreed to withdraw its opinion and to have the case reheard by the entire circuit (en banc),¹⁹² where the matter stands as of this writing.

In another win for tobacco control, a California judge in late 2000 upheld the constitutionality of the State’s 1998 Proposition 10, which imposed an additional

¹⁸² *Jones v Vilsack* 272 F 3d 1030 (2001); see *Mealey’s Litigation Report*, 10 December 2001, p 12.

¹⁸³ *Jones v Vilsack* 272 F 3d 1030 at 1032 (2001).

¹⁸⁴ *Jones v Vilsack* 272 F 3d 1030 at 1036 (2001).

¹⁸⁵ *Santa Fe Natural Tobacco Co v Spitzer* 2001 US Dist LEXIS 7548 (2001).

¹⁸⁶ *Santa Fe Natural Tobacco Co v Spitzer* 2001 US Dist LEXIS 7548 (2001).

¹⁸⁷ *Santa Fe Natural Tobacco Co v Spitzer* 2001 US Dist LEXIS 7548 (2001).

¹⁸⁸ *Dutchess/Putnam Rest & Tavern Ass’n v Putnam County Dep’t of Health* 178 F Supp 2d 396 (2001).

¹⁸⁹ *Dutchess/Putnam Rest & Tavern Ass’n v Putnam County Dep’t of Health* 178 F Supp 2d 396 (2001).

¹⁹⁰ *Philip Morris Inc v Reilly* 267 F 3d 45 (2001).

¹⁹¹ *Philip Morris Inc v Reilly* 267 F 3d 45 (2001).

¹⁹² *Mealey’s Litigation Report*, 10 December 2001, p 16.

50-cent tax on cigarettes and directed the money to early childhood development programs. In the face of a barrage of legal claims asserted by tobacco retailers,¹⁹³ the court found that the tax does not violate the single subject rule and does not impose an illegal double tax on other tobacco products.¹⁹⁴

The overall point to emphasise here is that tobacco litigation is by no means limited to cases in which the tobacco companies are defendants, and therefore litigation must be viewed as a tool available to both sides of the tobacco-control question.

CONCLUSION

Based upon recent United States tobacco litigation it seems fair to draw the following conclusions:¹⁹⁵

1. Individual and class action law suits based in tort and brought by injured smokers or their heirs face an uncertain future. The large jury verdicts in California, Oregon and Kansas and the Florida class action case (*Engle*) are presently the most important major litigation threats confronting the industry, and if they hold up they could unleash a storm of subsequent cases. Not only are there are lots of already-filed individual and class action cases in the early stages of litigation,¹⁹⁶ but also a potentially staggering number of additional individual cases could be brought if plaintiff victories become routine and much easier to achieve. And, yet, so long as some or all of the industry losses at the trial court level might still be overturned on appeal, it is not possible to make a reliable prediction as to how this branch of the litigation will eventually play out. The same is true for the second-hand smoke cases. Now that one flight attendant has won a large verdict in a Florida courtroom, prospects are at least much brighter for the up to 3,000 additional flight attendants who have also sued. Yet, one cannot reliably predict the future based upon one jury decision.
2. Health care reimbursement claims and class actions by non-yet-ill smokers do not look especially promising at the present time.
3. Government lawsuits alleging grave wrongdoing by tobacco companies are of somewhat doubtful legal strength, even if tobacco misconduct could be demonstrated in court. The European Union and Canadian smuggling cases are jeopardised by a reluctance by United States courts to appear to be enforcing the tax laws of other nations. The outcome of the United States Government's RICO case is uncertain because of both the murky nature of

¹⁹³ A Roth, "Challenge to Extra Cigarette Tax Denied; Judge Upholds Its Use for Children's Benefit", *San Diego Union-Tribune*, 16 November 2000, p A3.

¹⁹⁴ Roth, n 193. See also *California Association of Retail Tobacconists Inc v California* (No 732079, Calif Super, San Diego Co).

¹⁹⁵ For another appraisal of United States tobacco litigation that is similarly sceptical about its social benefits see R L Rabin, "The Tobacco Litigation: A Tentative Assessment" (2001) 51 *DePaul L Rev* 331.

¹⁹⁶ See Blanke, n 112, pp 31-32; N Zuckerbrod, "Smoker of 'Lights' Seeks Billions", *San Francisco Chronicle*, 26 March 2002, p A4.

RICO itself and questions about what sort of deal the Bush Administration might accept in a settlement.

4. The tobacco industry's successful litigation counter-attack has cast a large cloud over many otherwise currently popular tobacco-control strategies at the State and local level. At the national level, the prospects of strong legislation are in doubt both because of the traditional political clout of the tobacco companies with the United States Congress and because of the United States Supreme Court's apparent eagerness to give constitutional "free speech" protection even to tobacco advertising posted on huge billboards located directly across from schools and clearly aimed at children.
5. The public health effects of the Master Settlement Agreement are uncertain. Alas, there is reason to be sceptical about whether the advertising and promotional restrictions that were agreed to have had a significant impact.¹⁹⁷ Instead, the most important feature of the settlement has probably been the financial payments that the tobacco companies are making to the States.

First, those payments over time have resulted in a significant increase in the price of cigarettes. There is, in turn, good reason to believe that this price increase reduces tobacco consumption, and that a substantial share of that reduction is in the form of quits, non-starts, or non-relapses with decidedly positive public health benefits.¹⁹⁸ Of course, in theory if not in practice, it is much simpler to achieve these effects simply by raising tobacco taxes, rather than going the convoluted route of indirectly "in effect" raising taxes via litigation settlements (without the need to pay huge legal fees as has happened in the Attorneys-General cases).

An important second feature of the payments made under the Master Settlement Agreement concerns how the money is actually spent. Many tobacco-control activists have argued that a substantial share of the funds should go to support anti-smoking efforts, and they have complained bitterly when many States have decided to use most or all of the funds for other purposes. Interestingly enough, if one really believes that the point of the settlement was to reimburse State health care costs for tobacco-related diseases, then that would be the logical way to spend the funds. But, of course, the taxpayers had already put up the money to pay for those costs, and future funding for such care was surely going to be provided regardless of the settlement. From this viewpoint, therefore, the settlement funds would appear to be appropriately given back to taxpayers in the form of a tax reduction or refund (which some States have actually done).

¹⁹⁷ See F Chaloupka et al, "The Impact of Cigarette Advertising on Youth Smoking", available at http://tigger.uic.edu/~fjc/Presentations/Slides/impact_on_youth.pdf (finding that partial advertising bans would be ineffective due to use of substitution and the need for more comprehensive bans); C King III and M Siegel, "The Master Settlement Agreement with the Tobacco Industry and Cigarette Advertising in Magazines" (2001) 345 *New England Journal of Medicine* 504 (concluding that the Master Settlement Agreement has had little impact on tobacco advertisement in youth-oriented magazines).

¹⁹⁸ F J Chaloupka, M Wakefield and C Czart, "Taxing Tobacco: The Impact of Tobacco Taxes on Cigarette Smoking and Other Tobacco Use", in Rabin and Sugarman, n 181, p 39.

Or, if that is too radical, then the funds would seem logically spent on the next-highest spending priorities of the States—which might, or might not, include tobacco-control programs. And in many States this is exactly how the funds have been considered, with tobacco-control programs getting little, if any, of the payments. However, at least in a few places the moral claims and political clout of the anti-tobacco forces have caused a substantial amount of funds to be directed their way. And in such States, this increased spending on tobacco control is properly treated as a consequence of tobacco litigation.

Beyond the MSA payments (their tax-like effects on smokers or would-be smokers and the tobacco-control efforts they fund), how is the United States tobacco litigation record to be appraised to date from the public health perspective? One positive claim from the public health point of view is that tobacco litigation, whether successful or not, brings bad publicity for the industry and keeps evidence of tobacco company misdeeds before the public.¹⁹⁹ This bad publicity in turn, it might be argued, can facilitate at least two sorts of positive changes. First, it might force the industry itself to undertake changes in its behaviour that further public health goals, and secondly, it might pave the way for tougher legislation and regulation that big tobacco, in its weakened state, can no longer thwart.

And yet it is not obvious that either of these possible outcomes has occurred in the United States. To be sure, some tobacco companies claim to have changed their ways and now admit that smoking is dangerous and that children should not smoke.²⁰⁰ But many anti-tobacco advocates argue that the various superficially pro-public health stances that have been taken by some tobacco companies are mere gestures without important impact. For example, Philip Morris' talk and actions concerning youth smoking and youth access controls are generally seen this way.²⁰¹ Moreover, at least so far, no serious new regulatory initiative in the United States Congress has come anywhere near to being enacted into law.

On the other hand, it is true that several individual States have adopted tobacco-control measures in recent years. Yet, some new State clean indoor air laws are actually rather weak (and often pre-empt potentially much stronger local laws).²⁰² Still, it is important to acknowledge that at least some States recently have significantly raised their tobacco taxes over the strong opposition of the tobacco companies.²⁰³ This legislative option has, of course, always been open, and furthermore, these taxes might seem politically easier to enact nowadays in any event because American voters increasingly are non-smokers. Nevertheless, some will argue that, by helping to change public opinion about tobacco companies, the bad publicity generated by litigation has facilitated the

¹⁹⁹ See Blanke, n 112, p 44.

²⁰⁰ See Philip Morris USA, *Youth Smoking Prevention*, available at <http://www.philipmorrisusa.com/DisplayPageWithTopic.asp?ID=75> (stating “As the manufacturer of a product intended for adults that has health risks, we have a responsibility to help prevent kids from using it”).

²⁰¹ See generally, Slade, “Marketing Policies”, in Rabin and Sugarman, n 181, p 72; N A. Rigotti, “Reducing the Supply of Tobacco to Youths” in Rabin and Sugarman, n 181, p 143.

²⁰² See P D Jacobson and L M Zapawa, “Clean Indoor Air Restrictions: Progress and Promise” in Rabin and Sugarman, n 181, p 207.

²⁰³ See T Zellers, “Sinful Tax?”, *New York Times*, 17 March 2002.

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adoption of these higher taxes.

And then again, it is not entirely clear that whatever change there has been in public attitudes towards tobacco companies is primarily attributable to tobacco litigation. After all, the treasure trove of documents that were leaked to University of California anti-tobacco activist Professor Stanton Glantz²⁰⁴ did not become public through litigation – although it must be admitted that these papers were in the hands of lawyers when leaked because of litigation concerns. In the same vein, the prominent tobacco executive who went public about what he viewed as his company’s misdeeds²⁰⁵ – whose story was portrayed in the film *The Insider* – did not do so initially as part of any litigation. Yet he, too, then became connected to the litigation effort of the Attorneys-General. The Minnesota Attorney-General’s willingness to press on with his case against the tobacco companies until the very final days of trial did help generate yet another mass of industry documents that have become available to the public, although, even here, it is not obvious that these documents provide a great deal of additional damning evidence beyond that which was already available from other documents.²⁰⁶

But this close analysis of specific claims about tobacco litigation may miss the wider point. Perhaps the most prominent contemporary mantra of the tobacco-control community is the need to change the social norms around smoking. And, for at least some in that community, tobacco litigation, and the publicity it brings, has played, and can continue to play, a significant role in that effort.

²⁰⁴ Glantz et al, n 10.

²⁰⁵ P J Hiltz, *Smoke Screen: The Truth Behind the Tobacco Industry Cover-Up* (Diane Publishing, Collingdale, 1996), p 144.

²⁰⁶ R L Rabin, “The Third Wave of Tobacco Tort Litigation”, in Rabin and Sugarman, n 181, pp 203-204.