

# SYLLABUS

## Course 241.4 / Sec. 1 TOBACCO LITIGATION: LEGAL THEORY AND PROCEDURAL APPROACHES

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BERKELEY LAW SPRING 2012  
Mondays 10:00-12:40 Room 115

### Course Description

From early individual product liability cases in the 1960s, through class actions in the 1990s, subsequent federal and state government RICO prosecutions, and contemporary “mass tort” aggregation and consumer fraud litigation in the 21st Century, claims for smoking-related personal injury and economic loss against the major American tobacco companies have taken many forms. Every conceivable legal theory and every available procedural alternative has been tried, at least once, in both the federal and state courts, and challenging Constitutional and due process issues relating to regulatory preemption, 7th Amendment jury trial rights, punitive damages, and standing have all been addressed by appellate courts (including 5 Supreme Court decisions) in the Tobacco litigation context. “Tobacco Litigation” can literally be said to have nine lives. This course will use the common fact pattern and course of industry conduct presented by the manufacture, marketing, promotion and sale of cigarettes in America from the 1950s to the present to explore these nine aspects: 1. “traditional” individual product liability suits; 2. mass tort aggregation; 3. class actions; 4. unfair practices/consumer fraud litigation; 5. Civil RICO/conspiracy prosecution by the U.S. Dept. of Justice; 6. State Attorneys General prosecution and \$206 billion settlement; 7. punitive damages class actions and individual cases; 8. Regulatory initiatives (FDA lawsuits and restrictions); and 9. how the doctrines of preemption and issue preclusion have shaped smokers’ injury cases. All assigned readings will be supplied as handouts or are available online. Topics and materials may be updated to reflect new developments.

### CLASS

### ASSIGNMENT

JANUARY 9, 2012

READING:

Introduction to Course:

- The Tobacco Litigation Landscape: 1954-2012

1. Jan. 4, 1954 newspaper advertisement “A Frank Statement to Cigarette Smokers” ([www.tobacco.org/History/540104frankhtml](http://www.tobacco.org/History/540104frankhtml));
2. “Engle Verdict Tracker” ([info.courtroomview/engle-verdict-tracker](http://info.courtroomview/engle-verdict-tracker)).

**CLASS****ASSIGNMENT**JANUARY 23, 2012

- “Good Tobacco”: A Classic Product Liability Conundrum

READING:

1. *Green v. American Tobacco Co.*, F.2d 70 (5th Cir. 1962); 325 F.2d 673 (5th Cir. 1963); 391 F.2d 97 (5th Cir. 1968); 409 F.2d 1166 (5th Cir. 1969);
2. *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096 (D. Ariz. 2003).

JANUARY 30, 2012

- Preemption and Attrition: Introduction to Key Weapons in the Defense Arsenal

READING:

1. *Cipollone v. Liggett Group*, 505 U.S. 504 (1992);
2. *Haines v. Liggett Group*, 814 F. Supp. 414 (D.N.J. 1993).

FEBRUARY 6, 2012

- Class Actions and Tobacco Litigation: When Worlds Collide

READING:

1. *Castano v. R.J. Reynolds Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996);
2. *R.J. Reynolds Tobacco Co. v. Engle*, 672 So.2d 39 (Fla. App. 1996).

FEBRUARY 13, 2012

- The Limits of Regulation and the Power of Politics

READING:

*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); Attorneys General \$206 Billion Tobacco Master Settlement Agreement ([oag.ca.gov/tobacco/msa](http://oag.ca.gov/tobacco/msa)).

FEBRUARY 27, 2012

- The Consumer Fraud Initiative I

READING:

1. *Altria Group, Inc. v. Good*, 555 U.S. 70 (2008);
2. *In re Tobacco II Cases*, 46 Cal. 4th 298 (2009).

MARCH 5, 2012

- The Consumer Fraud Initiative II

READING:

1. *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402 (D. Me. 2010);
2. *Cleary v. Philip Morris, Inc.*, 656 F.3d 511 (7th Cir. 2011);
3. *Donovan v. Philip Morris USA*, 268 F.R.D. 1 (D. Mass. 2010).

MARCH 12, 2012

- The Feds Go to War Against Tobacco: The Civil RICO Litigation

READING:

*United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (skim only); 566 F.3d 1095 (D.C. Cir. 2009).

CLASS	ASSIGNMENT
<p><u>MARCH 19, 2012</u></p> <ul style="list-style-type: none"> <li>Civil RICO Litigation II: injunction and enforcement/ a regulation revival</li> </ul>	<p><u>READING:</u></p> <ol style="list-style-type: none"> <li><i>United States v. Philip Morris USA, Inc.</i>, 793 F. Supp. 2d 164 (D.D.C. 2011);</li> <li>TBA.</li> </ol>
<p><u>APRIL 2, 2012</u></p> <ul style="list-style-type: none"> <li>Punitive Damages I: The <i>Simon</i> Class Concept</li> </ul>	<p><u>READING:</u></p> <ol style="list-style-type: none"> <li><i>In re Simon II Litigation</i>, 211 F.R.D. 86 (E.D.N.Y. 2002); 407 F.3d 125 (2d Cir. 2005);</li> <li>Cabraser, “<i>Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication</i>,” 36 Wake Forest L. Rev. 979 (Winter 2001).</li> </ol>
<p><u>APRIL 9, 2012</u></p> <ul style="list-style-type: none"> <li>Punitive Damages II: Mrs. Williams’ War</li> </ul>	<p><u>READING:</u></p> <ol style="list-style-type: none"> <li><i>Philip Morris USA v. Williams</i>, 549 U.S. 346 (2007);</li> <li><i>Williams v. Philip Morris, Inc.</i>, 176 P.3d 1255 (Ore. 2008), cert. granted, 553 U.S. 1093 (2008), cert. dismissed, 556 U.S. 178 (2009);</li> <li><i>Williams v. R.J. Reynolds Tobacco Co.</i>, 2011 Ore. LEXIS 881 (December 2, 2011).</li> </ol>
<p><u>APRIL 16, 2012</u></p> <ul style="list-style-type: none"> <li><i>Engle</i> and its Progeny I: The <i>res judicata</i>/preclusion legacy of the <i>Engle</i> class action trial</li> </ul>	<p><u>READING:</u></p> <ol style="list-style-type: none"> <li><i>Engle v. Liggett Group, Inc.</i>, 945 So. 2d 1246 (Fl. 2006);</li> <li><i>Bernice Brown v. R.J. Reynolds</i>, 611 F.3d 1324 (11th Cir. 2010).</li> </ol>
<p><u>APRIL 23, 2012</u></p> <ul style="list-style-type: none"> <li><i>Engle</i> and its Progeny II: Preclusion, due process, and the Seventh Amendment in the <i>Engle</i> Class members’ follow-on cases</li> </ul>	<p><u>READING:</u></p> <ol style="list-style-type: none"> <li><i>R.J. Reynolds Tobacco Co. v. Jimmie Lee Brown</i>, 70 So.3d 707 (Fla. App. 2011);</li> <li><i>Federal Engle Progeny Cases</i>, “Order on Preclusive Effect of <i>Engle</i>” (M.D. Fl. 12/2011).</li> </ol>
<p><u>APRIL 24, 2012</u></p> <ul style="list-style-type: none"> <li>The <i>Engle</i> Progeny Cases: reflections and prognostications</li> </ul>	<p><u>READING:</u></p> <p>TBA</p>