Report of the Tobacco Policy Research Study Group on Tobacco Litigation

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Litigation is useful for both enforcing existing rights, and for showing the implications of legal principles derived from other types of cases to tobacco products. Thus:

- "Unfair" consumer practices are generally illegal, but only recently has this principle been applied to the factual context of cigarette sales to minors,¹ or to the sales of "Joe Camel" promotional items without health warnings.²

- Manufacturers of products that cause more harm than benefits, or which are sold to consumers who have not been effectively warned of the range and magnitude of the harm they cause, are generally required to compensate consumers when harm occurs. These principles have not until recently been applied to cigarettes – arguably the deadliest consumer product ever marketed.

- Employers are required to provide "a safe workplace"³ with various types of compensation provided to injured employees: the rights of afflicted non-smokers to invoke these remedies have increasingly been recognised in the past few years.⁴

- Obtaining money by fraudulent means is universally recognised as criminal: whether the American tobacco industry's longstanding pretence that it does not know whether smoking causes disease, and that it is actively engaged in good faith research to determine that question, constitutes a fraudulent scheme for encouraging smoking and increasing profits, is only now being investigated.^{5,6}

Because civil litigation does not require the active participation of either the executive or legislative branches of government, it may produce successes in tobacco control even where these other branches will not act. Thus although police may rarely enforce laws against selling cigarettes to minors, the expense and adverse publicity facing retailers sued for violating consumer protection laws as a result of such sales may cause these retailers to correct their practices.⁷ Whereas the influence of the tobacco industry may obstruct efforts to raise excise taxes, successful products liability cases can be equally effective in raising cigarette prices and thereby lowering demand. Similarly, the threat of employee claims for workers' compensation or disability benefits may lead employers to ban smoking, even in jurisdictions where strong clean indoor legislation is not politically feasible,

Unfortunately, litigation (and the threat of

litigation) can be used to thwart, as well as further, public health goals. The tobacco industry has sued activists, a news reporter, counties, cities and towns, and even the government of Canada.⁸ The tobacco industry seeks to show to the government and activists that expensive legal suits are the price to be paid for tobacco control activities. In fact, the industry prefers bluff to actual court cases, fearing decisions not in their favour. None the less, suits have the potential to discourage the bold action needed to curb the pandemic of tobacco induced disease and death.

The tobacco control community needs to be alert to the opportunities for using litigation affirmatively, and to marshal the human and financial resources to best exploit these opportunities. Defensively, advocates of tobacco control need to be able to distinguish serious litigation threats by the tobacco industry from mere bluffs, and to learn how best to counter the threats while exposing the bluffs.

This paper summarises the results of tobacco litigation in the United States, considers what more might be achieved, examines obstacles to successful litigation, and suggests ways to overcome them.

Background

Pioneering litigation in Massachusetts has led to a convenience store chain agreeing to require proof of age from young customers.⁷ Other store chains thereafter indicated willingness to take similar steps, even without being sued. But continued pressure, including additional suits, is needed to change community norms to end sales to children.

Towns and cities, and smoking control activists, are continually threatened with suits by the tobacco industry and its allies. As a result, many have backed off from taking the most effective actions possible. To remedy this situation they must have clear legal guidance available at little or no cost, as well as the promise of meaningful legal assistance if action is taken and a lawsuit actually follows.

A wide range of legal theories and compensation schemes have been invoked to protect or compensate non-smokers injured by tobacco smoke in the workplace.⁴ Where successful and publicised, these cases encourage the development of stronger no smoking policies even by employers not party to these

cases. None the less, most employees at risk do not know where to turn for help. An ongoing legal resource centre, broadly networked with local attorneys and widely known, could help redress this need.

Tobacco products liability suits have probably received the most attention, although they have yet to produce any decisive victories for tobacco control. Between 150 and 200 cases have been filed in the United States since 1982; about 50 of these are still pending. Cases have also been filed in Australia, Canada, Finland, and Northern Ireland.⁹ Many of these cases were dropped by the plaintiffs' attorneys, typically because they discovered factual or legal weaknesses specific to their plaintiffs (for instance uncertain diagnoses or the period allowed for filing such cases had passed), or because of a series of federal appellate court cases that precluded ("pre-empted") plaintiffs from basing their cases on the most promising legal theories. In June 1992 the United States Supreme Court cleared away most of these obstacles by ruling that claims based on deliberate deception by the tobacco industry or on their withholding important health information from the public can indeed go forward.¹⁰

Successful tobacco products litigation can raise tobacco prices, decrease the political influence of the tobacco industry by showing their knavery and their vulnerability, dramatically publicise the lethal effects of tobacco use by focusing public attention on individual victims, and require the tobacco companies to pay their share of public and individual subjects' health care expenses.¹¹ Research needs to be done on how to overcome jurors' hostility to smoker plaintiffs, as well as on which legal theories will be most viable.

Tobacco companies and executives regularly violate criminal prohibitions against reckless endangerment of life, and against fraudulent sales practices. Even prosecutors, however, can be intimidated by the tobacco industry's demonstrated willingness to spend whatever amount of money is needed to defeat legal actions against them. Incriminating evidence must be preserved, indexed, and made readily available to law enforcement agencies.

Research priorities

TOBACCO SALES AND MARKETING TO MINORS

A landmark Massachusetts case, *Kyte v Store 24 Inc*, was brought on behalf of two smoking teenagers who were illegally sold cigarettes by a convenience store chain.⁷ The suit sought to enjoin the stores from continuing to sell to minors, as well as plaintiffs' legal fees. This case was settled with the convenience store chain agreeing to demand positive identification from young would be tobacco purchasers. An attorney or researcher familiar with tobacco litigation and the *Kyte* case should investigate the laws banning tobacco sales to minors in each of the 50 states. In consultation with *Kyte* attorneys, the researcher should tailor a legal strategy to the needs of each state to assist lawyers seeking to bring *Kyte*-type litigation

against retailers in their home states. Ideally, this researcher should also be supported to provide ongoing strategic advice, produce briefs, and follow changes in the law in order to support the cases as they progress around the country.

Furthermore, whereas increasing public and professional attention is being paid to the marketing of tobacco products to children,¹² neither Congress nor the tobacco companies themselves are responding. Research is needed on whether and how state consumer protection laws (which typically prohibit "unfair or deceptive" business practices) can be used to limit these exploitive marketing practices.

BANS

Legal research is needed to support communities that wish to ban cigarette vending machines, billboards, advertisements on public transportation, and the distribution of free samples. Such research should examine the possible state and federal law challengers that are being brought against such municipal bans, and analyse the relevant case law. The researcher should then develop legal strategies to counter these arguments. When the tobacco companies fight back against municipal bans by taking communities to court, the researcher should be available to advise the communities on how to proceed. Support should also be available to enable the researcher to prepare briefs, follow new legal developments, and do additional research necessary to a particular case.

WORKPLACE ISSUES

Research is needed on the availability of various legal remedies for non-smokers afflicted with environmental tobacco smoke at their work. The research needs to catalogue the remedies available in each jurisdiction in the United States and elsewhere, publish this catalogue or handbook, and update it regularly. Timely research support is needed to provide afflicted employees and their attorneys with telephone consultations and copies of relevant legal materials.

Product liability issues

RISK/UTILITY THEORIES

Among the strongest arguments that can be made against tobacco companies in products liability suits are those based on the "risk/benefit" theory. Under this legal theory, if the risks involved in using a particular product exceeds its benefits, the manufacturer is liable for all resulting injuries. The advantage of this theory over fault based theories (such as "failure to warn") is that it is not possible for the defendant to turn the case into a trial of the plaintiff's fault in beginning or continuing to smoke.

The availability of this legal theory varies among different jurisdictions: in many jurisdictions in the United States and elsewhere, it is simply unclear whether this theory is

available for tobacco cases.¹³ Thus legal research is needed to document the current state of risk/utility theory in each jurisdiction, and to follow up the case law closely as it develops. Also, legal research is needed to assess the use of risk/utility theory in a potential alternative design case claiming that the tobacco companies should have marketed the design for safer cigarettes.

INDUSTRY DECEPTION ABOUT LOW TAR AND LOW SMOKE CIGARETTES

Legal research is needed to examine possible causes of action against the tobacco industry for deceiving the public in advertisements for low tar and low smoke cigarettes. The industry continues to promote low tar and low smoke cigarettes as if they were a healthier alternative to ordinary cigarettes, although there is no scientific evidence to support this claim. Also, smoking cessation experts have noted that many health conscious people switch to low tar or low smoke brands instead of stopping smoking, believing them to be healthier. A study of when and why long term smokers switched to low tar or low smoke brands is needed to prove this behavioural trend, as evidence of the results of the industry's deceptive promotion scheme. Such evidence could be beneficial in defeating the tendency of juries to blame victims of tobacco induced diseases.

JURY RESEARCH

In the United States, product liability cases are tried before six or 12 person lay juries. In their opening and closing arguments to the juries, plaintiffs' attorneys tend to tell stories about the evidence that focus on the defendants' fault, whereas defendants' attorneys tend to tell juries stories that focus on the plaintiffs' fault. Which of these stories dominates the jurors' thinking about the evidence turns both on the jurors' pre-existing beliefs, attitudes, and dispositions, as well as on the way attorneys present their stories. To date, many jurors in tobacco liability cases have focused on the stories involving the plaintiffs' fault, while largely ignoring the fault of the tobacco companies.

Attorneys in United States courts are entitled to dismiss a certain number of potential jurors without giving specific reasons. Thus attorneys who bring tobacco litigation would be aided by in depth mock jury studies that pinpointed what kinds of jurors are most likely to be predisposed to prefer a story involving the defendants' fault, as well as those most likely to blame the plaintiffs. These studies could also shed light on the most effective way to present arguments so as to turn the jury against the tobacco companies.

SUING FOR THE COST OF SMOKING CESSATION PROGRAMMES

Legal research is needed to assess the best way to package small claims against tobacco

companies to recover the cost of a smoking cessation programme. If such claims became common, they would provide a major nuisance to the tobacco industry, which would have to pay its legal counsel to defend against each claim. More importantly, it would provide an endless source of publicity about the addictive nature of tobacco, as well as reminding smokers that they are victims – not beneficiaries – of the tobacco industry.

Thus it would be very beneficial to tobacco control advocates to have a state by state handbook explaining how to bring these small claims, both substantively and procedurally, as well as to have a knowledgeable person available for consultation by telephone.

Additionally, this is one area of tobacco litigation that may be amenable to a "class action", as attendance at smoking cessation class, or use of a smoking cessation device, effectively shows one's nicotine addiction, and individual damages – the cost of the programme or device – are easily quantified. Thus, the traditional reasons why courts in the United States have been reluctant to combine the product liability claims of many individual subjects in a class action may not apply here. A detailed legal memorandum, or law review article, analysing the availability of a class action in this circumstance would prove very useful.

SHOWING THE DIFFERENCE THAT TRUTHFUL DISCLOSURE WOULD HAVE MADE

Tobacco litigation has largely been predicated on the failure of tobacco companies to fully reveal the possible dangers of smoking, or on their affirmative misrepresentation of the safety of their products. Jurors tend to confuse current levels of public awareness about smoking and health with public awareness in years past, and to doubt that additional specific information would have deterred the plaintiff from smoking.

To focus the jury on how little reliable health information was available in the 1940s and 1950s, when most plaintiffs began smoking, as well as on the tremendous difference there would have been in the public's attitude toward smoking had the industry told the truth in those years and since, the jury should hear an account of how smoking behaviour and the associated mortality would likely have developed, had the industry told the truth about the dangers of smoking when they first learned of them. A study by a social historian reconstructing what 20th century smoking behaviour and public attitudes towards smoking and health would have been had the tobacco industry told the truth instead of issuing propaganda and disinformation would be very useful.

CRIMINAL SANCTIONS AND INCRIMINATING EVIDENCE

Legal research is needed to investigate the advisability of seeking criminal sanctions against tobacco companies for producing a

lethal product, or for fraudulently representing that they were actively investigating the possible dangers of tobacco use and would promptly and accurately inform the public of the results.⁵ Specifically, research should be directed towards examining the criminal statutes in each state to determine which statutes provide the best basis for criminal claims such as reckless endangerment or fraud.

Also, it is important for prosecutors, plaintiffs' attorneys, and public health advocates to develop a central computerised database of incriminating tobacco industry documents that have been revealed in the course of earlier cases, through investigative journalism, or otherwise. To this database newly discovered documents, publicly available documents, news items, and advertisements can be added.

Conclusion

Tobacco litigation research has been and continues to be underfunded, largely because of a widespread aversion to personal injury litigation among likely funding sources. Much useful tobacco litigation, however, both offensive and defensive, have nothing to do with personal injuries. Furthermore, even product liability litigation is not being urged because it is the way to compensate consumers, but to advance tobacco control goals.

Many of the research priorities detailed here could best be accomplished not simply by funding one time library research projects, but by supporting one or more ongoing legal backup centres. These centres would be responsible not only for developing and updating the relevant material, but also for providing timely advice and assistance to smoking control advocates and attorneys. We must recognise that tobacco product litigation is an essential tool in decreasing tobacco consumption – an overriding public health goal.

- 1 Kyte v Philip Morris Inc. *Tobacco Products Litigation Reporter* 1987; 2 (9): 2.208.
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- 3 Lee v Massachusetts Department of Public Welfare. *Tobacco Products Litigation Reporter* 1986; 1 (2): 2.88–2.84.
- 4 Daynard RA, Sweda EL. Redress for injury caused by environmental tobacco smoke. *Trial* 1992; March: 50–3.
- 5 Haines v Liggett Group Inc. *Tobacco Products Litigation Reporter* 1992; 7 (1): 2.1–2.14.
- 6 *Tobacco on Trial* 1992, April 30.
- 7 *Tobacco on Trial* 1991 August 15.
- 8 Daynard RA. Recent developments in tobacco litigation: 1991. *Tobacco Control* 1992; 1: 37–45.
- 9 *Tobacco Products Litigation Reporter* 1992; 7 (1): 9.1–9.13.
- 10 Cipollone v Liggett Group Inc. *Tobacco Products Litigation Reporter* 1992; 7 (2): 2.29–2.87.
- 11 Daynard RA. Tobacco litigation as a cancer control strategy. *J Natl Cancer Inst* 1988; 80: 9–12.
- 12 Waxman H. Tobacco marketing, profiteering from children. *JAMA* 1991; 266: 3185–3186.
- 13 Daynard RA. Controlling cancer by suing companies: the potential for India in the light of the U.S. experience. In: Gupta PC, Hamner JE, Murti PR, eds. *Control of tobacco-related cancers and other diseases, international symposium, 1990*. Bombay: Oxford University Press, 1992.