



Litigation Against the Tobacco Industry

Lawsuits against the tobacco industry can be used to hold tobacco companies responsible for their wrongdoing and offer several potential benefits.¹

Compensation: Lawsuits offer the prospect of large monetary awards which can help cover smoking-related medical costs and provide some compensation to government-financed health care systems or injured individuals. If successful, such suits can force the tobacco companies to pay for some of the harm caused by their products, thereby forcing them to raise prices which in turn can lower smoking rates.

Strengthening Regulatory and Legislative Action: Litigation against the tobacco industry calls public attention to various industry abuses and highlights public health hazards that the industry has concealed or government regulators have failed to address.

Publicity: The filing of cases, pre-trial proceedings and the trials themselves can all attract substantial media coverage, which in turn can energize tobacco control efforts at the grass-roots level and in legislatures and regulatory bodies. Media coverage is also important because it tends to de-glamorize the tobacco industry and exposes corporate wrongdoing, which can be helpful in the effort to change social attitudes about smoking.

Document Disclosure: Where legal systems permit substantial "discovery" -- by which litigants can demand relevant internal information and documentation from other litigating parties -- lawsuits have uncovered internal tobacco industry documents that have shed light on public health dangers

and tobacco industry strategies. Not only can these documents assist in litigation, they can also assist legislative and regulatory efforts.

Changing Company Behavior: In addition to money, plaintiffs -- especially government plaintiffs -- may be able to demand changes in tobacco company behavior. In the U.S. experience, states were able to negotiate limited changes in tobacco marketing practices during settlement discussions.

The U.S. Experience

The U.S. tobacco lawsuits that have garnered international attention for extracting billions of dollars from the tobacco industry are the product of a decades-long effort to hold tobacco companies accountable in the U.S. legal system. Not a single one of these early lawsuits was successful. Of the more than 800 personal injury claims against tobacco companies filed between 1950 and 1993, none was settled, only 23 were tried and in the one case where the plaintiffs won at the trial level, their victories were overturned on appeal. The companies were successful during this early round of litigation because:

- the industry launched the most aggressive and costly defense possible, refused to enter into settlement negotiations, resisted court orders to supply documents and sought to delay trials in order to wear out the plaintiff's side financially and emotionally; and
- even as they denied that smoking caused health problems, industry lawyers successfully argued that smokers were aware of the purported risks of smoking. Smokers, they said, voluntarily decided to smoke

and thereby "assumed the risk" of smoking.

Nevertheless, the early wave of lawsuits did uncover important documents, focused attention on the companies as wrongdoers and gained some media attention. Beginning in the mid-1990s, a new round of lawsuits was filed by states and a coalition of law firms. These suits had two main organizing principles:

Medical Cost Reimbursement: U.S. states filed lawsuits seeking reimbursement for the medical care costs of publicly insured victims of smoking-related disease. They also charged violation of anti-trust and consumer protection laws. Private insurance companies and labor union health-care funds sued the tobacco companies on theories similar to the states' suits.

Class Actions: Victims joined together to file class action suits (suits in which many parties with similar cases join their claims in one action). Some of these suits emphasized the issue of addiction and asked for relief in the form of compensation and smoking cessation programs. Others focused on the harm which the industry's products and misbehavior caused to large numbers of smokers and nonsmokers. Both types of class actions relied heavily on previously disclosed industry documents showing past industry knowledge of the dangers of cigarettes (including addiction), as well as intentional industry misconduct such as the manipulation of nicotine levels. These lawsuits caused the industry serious concern and inflicted damage on its' stock valuation and public image. As part of an attempt to settle virtually all of the outstanding litigation

by U.S. states, by the end of 1998 the industry had entered into settlements with all of them. The companies agreed to pay out more than \$10 billion per year in perpetuity, abide by some limited marketing restrictions and place in the public domain some 35 million pages of internal company documents. The industry also settled a class action lawsuit brought on behalf of nonsmoking flight attendants, agreeing to pay \$300 million for a research trust fund.

Since then, the industry has suffered a series of legal setbacks. The U.S. Department of Justice has filed a lawsuit against the companies seeking changes in company practices and to recover money spent by federal health programs to treat tobacco-caused diseases. Juries in the states of California, Oregon and Florida have found the tobacco companies liable for damages caused to individual smokers, as well as for substantial punitive damages. And, most dramatically, a jury in a Florida class action found the conduct of the entire U.S. cigarette industry sufficiently reprehensible to invoke punitive damages.

Suits Outside the United States

In the past few years a number of governments outside of the United States have filed suit against the tobacco companies.² In some countries, individuals have sued the industry by themselves or in class actions. As of May 2000:

- The Marshall Islands and the Canadian province of British Columbia have filed suits in their home courts against the tobacco industry seeking medical cost reimbursement. Israel's largest health fund has filed suit seeking medical cost reimbursement from U.S., British and Israeli tobacco companies.
- Class action suits seeking an array of damages from tobacco multinationals

and/or their subsidiaries have been filed in home country courts in Australia, Brazil, Canada, India and Nigeria. In Israel, a class action suit has been filed against Dubek, the Israeli tobacco company.

- Individuals and small groups have filed suit against tobacco companies in Argentina, Australia, Brazil, Canada, Finland, France, Germany, Ireland, Italy, Japan, Netherlands, Norway, Poland, South Africa, South Korea, Sri Lanka and Turkey.
- Colombia's provincial governments have filed suit against Philip Morris alleging that the tobacco company defrauded the governments of billions of dollars in revenues through a complex smuggling and money-laundering scheme. The government of Ecuador recently filed a similar suit which charged both Philip Morris and R.J. Reynolds with avoiding taxes through smuggling, while Canada is suing R.J. Reynolds for its alleged involvement in a smuggling operation which helped undercut government tax policies.³
- The governments of Bolivia, Guatemala, Nicaragua, Panama, Ukraine, Venezuela, several Brazilian states, as well as the Canadian province of Ontario, have all filed suits in the United States seeking health care cost reimbursement from U.S.-based tobacco companies. In December 1999 Guatemala's case was thrown out by the presiding judge on the grounds that the government could not prove "direct injury" from the actions of the companies⁴ — the same judge later dismissed the Nicaragua and Ukraine cases as well.

Until the ruling against Guatemala, many legal analysts believed that the United States was the most desirable forum due to its liberal discovery rules and the absence of a requirement that

losing litigants pay the winner's costs, among other reasons.

How non-U.S. suits fare will partly depend on where they are filed. Legal systems' rules of discovery and compensation differ. Some countries' legal systems may not permit successful prosecution of a civil case against the tobacco industry, while others may not be equipped to handle such large cases, especially given the industry's strategy of stonewalling, delay and non-compliance with judicial orders. On the other hand, most legislatures have the power to adopt enabling statutes (as British Columbia has done) to deal with some of these hurdles, and even conservative jurists may be moved to act when confronted with the tobacco industry's outrageous misconduct and its consequences.

Conclusion

Litigation against the tobacco industry, while offering significant potential benefits, requires significant expertise and resources and may not be a viable strategy in all legal systems. Ultimately, the decision to undertake litigation will depend upon a careful examination of the laws and legal framework of each country. Even where prospects for legal success are dim, litigation may be valuable in encouraging regulatory or legislative change.

Resources on the World Wide Web

Tobacco Products Liability Center
<http://www.tobacco.neu.edu/>

Roberta B. Walburn, "The Prospects for Globalizing Tobacco Litigation," *WHO's International Conference on Global Tobacco Control Law: Towards a WHO Framework Convention on Tobacco Control*, New Delhi, India, 7 January 2000
<http://www.who.int/toh/fctc/delhi/delhipapers.html>

¹Graham E. Kelder and Richard Daynard, "The Role of Litigation in the Effective Control of the Sale and Use of Tobacco," *Stanford Law & Policy Review*, Vol. 8, 1997.

²Carrie Johnson, "Wave of Foreign Tobacco Suits Hits U.S. Shores," *Legal Times*, 23 November 1998.

³For details, see http://www.public-1.org/story_01_052300.htm and Meg Richards, "Ecuador Files Tobacco Suit," Associated Press, 6 June 2000, and <http://www.nsrca-adnf.ca/english/smuggling.html>

⁴Bill Miller, "U.S. Court Rejects Guatemala Suit: Judge Says It Cannot Prove 'Direct Injury' by Cigarette Makers," *Washington Post*, 31 December 1999.