In his infamous 1604 “Counterblaste to Tobacco,” King James I described tobacco use as

A custome lothsome to the eye, hatefull to the Nose, harmefull to the braine, dangerous to the Lungs, and in the blacke stinking fume thereof, neerest resembling the horrible Stigian smoke of the pit that is bottomlesse.

Despite this royal indictment, tobacco continued to be widely used over the following centuries, and it wasn’t until the 1950s, when scientists established a connection between tobacco use and cancer, that U.S. smokers, their families, and others began to try to hold the tobacco industry legally responsible for the adverse health effects of its products. From that point on, tobacco litigation swept across the twentieth and twenty-first centuries in waves.

The first wave of U.S. lawsuits against cigarette manufacturers (1950s and ‘60s) were cases brought by sick smokers, based mainly on theories of negligence, misrepresentation and breach of warranty. The tobacco industry’s main strategy was to deny a causal link between smoking and lung cancer (or any other disease). Another tactic was to create doubt in the minds of jurors as to who was to blame — the smokers or the companies? — and the smokers never won. The second wave of tobacco litigation (1970s through the early ‘90s), included more cases brought by individual smokers — this time based largely on legal theories of failure to

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The tobacco industry continues to use litigation (or the threat of litigation) to delay, disable and derail federal, state and local advances in tobacco control.

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warn and strict product liability. Again, in the vast majority of these cases, the tobacco industry prevailed, often by persuading juries that smokers used tobacco knowing the risks.

Only in the third wave of litigation, beginning around 1994, did the tide start to change. This wave included class action suits, where a large number of plaintiffs injured by tobacco products aggregated their claims, and medical cost reimbursement suits brought by states and insurance companies. Plaintiff sued under a wide range of legal theories, including fraud, intentional and negligent misrepresentation, violation of consumer protection statutes, strict liability, conspiracy, antitrust, and unjust enrichment or indemnity. This third wave resulted in the historic tobacco settlement agreements of the 1990s, the 2006 landmark decision in the U.S. government’s massive racketeering case against cigarette manufacturers (United States v. Philip Morris), and a raft of other lawsuits.

Successful litigation against the tobacco industry has resulted in significant rulings, leading (for example) to the massive public release of internal tobacco company documents and critical evidence about the tobacco industry’s fifty-year conspiracy to defraud the world about the health risks of tobacco products. At the same time, the tobacco industry continues to use litigation (or the threat of litigation) to delay, disable and derail federal, state and local advances in tobacco control. Court battles in general can be expensive, time-consuming, and labor-intensive, and many local and state governments lack the financial resources, capacity or political will to engage in litigation with an adversary as powerful and inexorable as the tobacco industry.

This Legal Update highlights the critical role that litigation plays in tobacco control. We include news on recent U.S. tobacco lawsuits, as well as an historic class action case in Quebec; salute a few of the legal champions who have represented clients against the tobacco industry; showcase several publications and resources related to tobacco litigation; and feature an “Ask A Lawyer” column on a tobacco control policy option that some local governments are concerned could be challenged in court. We also include other tobacco-related items of interest to the public health community.
Appeals Court Upholds FDA’s Right to Use Menthol Report

On January 15, 2016, the Court of Appeals for the D.C. Circuit overturned a lower court ruling that found three members of the Tobacco Products Scientific Advisory Committee had conflicts of interest that tainted the committee’s report on the health effects of menthol in cigarettes. The lower court also prohibited the U.S. Food and Drug Administration from relying on that report if the agency were to take action on menthol. Although the FDA was not barred from acting on menthol while this litigation was pending, the appeals court’s decision allows the FDA to rely once again on the committee’s report in a future regulation prohibiting menthol in cigarettes. Perhaps more importantly, this ruling allows tobacco control researchers who have testified against the tobacco industry, or have consulted for pharmaceutical companies, to serve on FDA advisory committees. This case is an important win for the FDA in the string of litigation that has followed the passage of the Family Smoking Prevention and Tobacco Control Act. State and local governments weary of waiting for the agency to act could consider prohibiting the sale of menthol products in their communities.

Illinois Court Voids $10.1 Billion Verdict Against Philip Morris in “Light” Cigarette Case

In November 2015, the Illinois Supreme Court voided an historic $10.1 billion verdict against Philip Morris USA in a long-running lawsuit accusing the company of misleading smokers about the health risks of “light” cigarettes. This class action case was brought in 2000 on behalf of 1.4 million Illinois smokers, who argued that the tobacco company’s marketing, using the terms “low-tar” and “light” cigarettes, deceived them into believing that these products were safer than regular cigarettes. In a 4-2 vote, the court said lower-level state courts lacked authority under Illinois law to re-impose the verdict (first rendered in 2003 and reinstated in 2014) against Philip Morris. The decision voids one of the largest U.S. verdicts related to smoking and secondhand smoke exposure rendered against a tobacco company. The case is Price et al. v. Philip Morris, Illinois Supreme Court, No. 117687. At this point, the only remaining options for Price appear to be (1) requesting a rehearing at the Illinois Supreme Court, or (2) filing a motion for certiorari, asking the U.S. Supreme Court to review the case.

Florida Jury Imposes $35 Million in Damages on R.J. Reynolds in Civil Lawsuit

Last fall, a Florida jury returned a $34.7 million verdict against R.J. Reynolds on behalf of the family of Garry O’Hara, a U.S. Air Force sergeant who earned the Bronze Star and died of lung cancer in 1996, at the age of 50 — 15 years after he quit smoking. The civil case is one of thousands stemming from the landmark Engle v. R.J. Reynolds Tobacco Co. class action against tobacco companies, in which a jury awarded damages of more than $145 billion to a nationwide group of plaintiffs with smoking-related disease, as well as family members of deceased smokers. Although the Florida Supreme Court set aside the damage award in the 2006 Engle case, it opened the door for droves of individual plaintiffs to file suits using the Engle jury’s findings — that smoking causes cancer, that nicotine is addictive, and that the tobacco companies sold defective and unreasonably dangerous products. The case is Colette O’Hara v. R.J. Reynolds Tobacco Co., First Judicial Circuit of Florida, No. 2007-CA-003065.
Quebec’s Tobacco Class Action
Largest in Canadian History

In June 2015, smokers won $15.6 billion (about $10.8 billion USD) in one of the largest tobacco class action lawsuits in history. Yet many in the U.S. tobacco control community focused on litigation within U.S. borders may be unaware of this historic litigation. Why? This landmark class action against three major tobacco companies took place in Quebec.

The Quebec litigation is notable for several reasons. It marked the first time tobacco companies have gone to trial in a civil lawsuit in Canada. Also, it involved two separate groups of plaintiffs: Quebec residents who suffered from lung cancer, throat cancer, or emphysema due to smoking and Quebec residents who claimed they were addicted to nicotine and could not quit using tobacco products. The two class actions were originally filed separately in 1998, but were consolidated in 2005.

More than one million Quebec residents were represented in this 17-year-long lawsuit. During the litigation, approximately 27,000 documents were filed as exhibits, 78 witnesses were called over 234 days of testimony, and deliberations took another six months. In his long-anticipated 276-page decision, Quebec Superior Court Justice Brian Riordan found that the three cigarette companies — Imperial Tobacco, JTI-MacDonald, and Rothmans, Benson & Hedges — caused injury, failed to inform customers of the risks and dangers of their products, and violated Quebec law by engaging in unscrupulous marketing. This fall, the Quebec Court of Appeal ruled in favor of the plaintiffs (tobacco victims) by ordering two of the three tobacco companies to pay a guaranteed deposit of $984 million (about $705.06 million USD), starting in December 2015, while waiting for the courts to rule on the merits of the case. All three tobacco companies have said they plan to appeal.

New Staff Attorney Darlene Huang

Darlene Huang, our newest staff attorney at the Public Health Law Center, has a background in federal, state and local public health law, with a focus on tobacco control law. She calls upon this experience often at the Public Health Law Center, where she provides legal technical assistance on tobacco control issues to public health professionals and organizations, legal professionals, and advocates in Minnesota and throughout the United States.

Darlene comes to us from the U.S. Food and Drug Administration, where she served as an Institute of Medicine Tobacco Regulatory Science Fellow last year. Her work at the FDA included drafting and reviewing regulations, guidances and other regulatory documents, and responding to public comments the agency received on proposed regulations.

Prior to joining the Public Health Law Center, Darlene analyzed health care regulations at the Minnesota Department of Human Services, tracked legislation at the Minnesota State Capitol with the Fredrikson & Byron government relations practice group, and worked in conjunction with community partners to advance tobacco control policy at a Colorado county health department. During her graduate studies, Darlene also served as a research assistant at the Public Health Law Center.

Darlene holds a Bachelor’s of Science degree from Colorado State University, a Master’s in Public Health from the University of Minnesota and a law degree from Mitchell Hamline School of Law. Please join us in welcoming Darlene to the Public Health Law Center!
Ask A Lawyer

Q “I know some states have raised the minimum legal age to purchase tobacco products. Can they really do that? If we pass a “Tobacco 21” law, what are the chances we will get sued ... and lose?”

A On June 19, 2015, Hawaii became the first state to raise the minimum legal sales age (or MLSA) for tobacco products to 21. Effective January 1, 2016, Hawaii joined four other states (Alabama, Alaska, New Jersey, and Utah) with a legal sales age of 19, as well as an ever-growing list of communities that have raised the minimum age for tobacco (and related devices and products) to 21. On October 1, 2015, a group of ten senators introduced legislation for a federal MLSA of 21.

In 2015, the Institute of Medicine released a report that found that an increased sales age helps delay smoking initiation among youth, leading to lower smoking prevalence rates and millions of dollars in health care savings, and significantly increasing the length and quality of life across populations. The Institute also concluded that raising the minimum sales age today to 21 would result in a 12 percent decrease in tobacco use, approximately 223,000 fewer premature deaths, 50,000 fewer deaths from lung cancer, and 4.2 million fewer years of life lost for those born between 2000 and 2019. Studies have also shown that three quarters of U.S. adults favor raising the MLSA to 21 years (including seven in ten smokers), with similar support among the 18–21 populations — those who will be most affected by the change.

With clear justification and support for these restrictions, interest in “Tobacco 21” laws is likely to continue ... and to grow. But needing a policy and having the authority to actually adopt one aren’t always the same thing. Legal challenges — regardless of merit — are always a possibility. And while a law that raises the MLSA may be challenged on a number of grounds, “preemption” or “equal protection” may be most likely.

Preemption occurs when a higher level of government limits or eliminates the authority of a lower one. While federal law does not preempt state (or local) authority to set higher ages, a number of state tobacco control laws do limit local authority to regulate the sale and use of tobacco products. States and local governments need to assess whether local authority to increase the MLSA is limited, and, if so, the scope of the limitations. If preempted, a community can still show its support for higher statewide restrictions.

The Equal Protection Clause in the U.S. Constitution (and many state constitutions) provides that similarly-situated people are entitled to equal treatment under the law. When a law treats people differently, there must be a fair and logical basis for that difference. If a “rational relationship to a legitimate government interest” exists, age-based restrictions are usually upheld by our courts. Challenges to increasing the MLSA

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Consortium Resources

The Consortium has several online resources related to tobacco litigation, including summaries of significant tobacco-related lawsuits at the federal and appellate levels, and summaries of, and links to, amicus curiae briefs that the Consortium filed or joined in on several dozen significant tobacco cases. For example, the Public Health Law Center’s web page on tobacco litigation includes:

- **United States v. Philip Morris** (D.O.J. lawsuit)
  - *The Verdict Is In: Findings from United States v. Philip Morris.* A compilation of select quotes from the 2006 landmark decision in the U.S. government’s massive racketeering case against cigarette manufacturers. This compilation is divided into seven sections relating to specific topics in the decision of Judge Gladys Kessler of the United States District Court for the District of Columbia.
  - *Tips on Using The Verdict Is In: Findings from U.S. v. Philip Morris* (2012). This fact sheet takes a brief look back at the tobacco case that made history — *U.S. v. Philip Morris* — and provides tips on using resources such as the Consortium’s “The Verdict Is In” to locate critical evidence from the findings about the tobacco industry’s fifty-year conspiracy to defraud America and the world about the health risks of tobacco products.
  - *U.S. v. Philip Morris: Key Tobacco Industry Admissions* (2010) Summary of key tobacco company admissions resulting from *U.S. v. Philip Morris* — admissions likely to be of vital interest to other countries considering tobacco litigation.

- Information on the Master Settlement Agreement

- Information on the Minnesota Tobacco Litigation and Settlement


- Information about select federal and state tobacco lawsuits

- Related Consortium resources, including:
  - *Preemption: The Biggest Challenge to Tobacco Control* (2014) Detailed overview of how preemptive policies and legal challenges can block state and local advances in tobacco control and derail important tobacco control initiatives.
  - *Why Preemption is Bad for Tobacco Control* (2014) Brief overview of the ways in which preemption is used to weaken, impede, derail or defeat tobacco control measures — often in litigation.

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Other Select Tobacco Litigation Resources

UCSF — Tobacco Control Archives
The University of California San Francisco’s Tobacco Control Archives include Tobacco Litigation Documents, which contain complaints filed by the Attorneys General of 46 states, as well as decisions, memoranda and similar documents related to federal, state and regional tobacco litigation.

Tobacco Control Laws
A searchable database of tobacco control litigation decisions from courts around the world. This website is a project of the International Legal Consortium of the Campaign for Tobacco-Free Kids in collaboration with the O’Neill Institute for National and Global Health Law.

Tobacco.org
First launched in 1996, Tobacco.org is a free resource center that compiles news about tobacco control policies, tobacco products, the tobacco industry, tobacco lawsuits and related topics. It uses databases and computer programs to search news coverage around the world and posts it daily. Tobacco.org users can access information on tobacco litigation by visiting its website or subscribing to a daily email update.

Tobacco on Trial
A website documenting the history of litigation against tobacco companies, including details about important cases, timelines, narrative history, samples of tobacco media, and links to historical documents. The site serves as a permanent companion to the traveling exhibit Towards Health Through Justice, which is sponsored by the Tobacco Policy & Control Program at the Medical University of South Carolina.

Stories of Tobacco Litigation

What is an Amicus Brief?
Amicus curiae (“friend-of-the-court”) briefs are legal documents filed in appellate court cases by non-litigants with a strong interest in the subject matter. The briefs advise the court of relevant additional information or arguments that the court might wish to consider. Briefs can also focus the court’s attention on the implications of a potential holding on an industry, group, or jurisdiction not represented by the parties. The court has discretion to grant or deny permission of parties to file briefs as amici curiae. A well-written amicus brief can have a significant impact on judicial decision-making. Cases are occasionally decided on grounds suggested by an amicus; decisions may rely on information or factual analysis provided only by an amicus; and holdings may be narrower or broader than parties have urged because of a persuasive amicus brief. Drafting amicus briefs is a large undertaking, which requires weeks of work negotiating involvement, coordinating potential participants, researching issues, recruiting authors, and editing drafts.

- See the Public Health Law Center’s web page on amicus curiae briefs, including:
  - Function and Role of Amicus Briefs in Public Health Litigation
  - A repository of tobacco-related amicus briefs organized, filed or joined in by the Consortium

- The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product that Defined America, Allen Brandt (Basic Books, 2007)

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• *A Question of Intent: A Great American Battle with A Deadly Industry*, David Kessler (Public Affairs, 2001)

• *Smoke in Their Eyes: Lessons in Movement Leadership from the Tobacco Wars*, Michael Perschuk (Vanderbilt University Press, 2001)

• *Civil Warriors: The Legal Siege on the Tobacco Industry*, Dan Zegart (Delta, 2001)

• *Tobacco War: Inside the California Battles*, Stanton A. Glantz & Edith D. Balbach (University of California Press, 2000)


• *Smoked: The Inside Story of the Minnesota Tobacco Trial*, Deborah Caulfield Rybak & David Phelps (MSP Books, 1998)

• *Ashes to Ashes: America’s Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris*, Richard Kluger (Vintage, 1997)

Ask A Lawyer

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for alcoholic products on equal protection grounds, for example, have not been too successful. Given the government’s legitimate interest in protecting public health and preventing youth access, and the research demonstrating the benefits of delaying initiation, similar results are expected for any challenges to laws that increase the MLSA for tobacco.

For states and many local governments, the difficult question is what should (or should not) be covered by the higher age restriction. Retail licensing and/or youth access laws often address:

• Sales and commercial distributions to underage individuals

• Procurement by or on behalf of underage individuals

• Use of false identification

• Age to sell (minimum clerk age)

For practical (and sometimes political) reasons, a jurisdiction may:

• Increase the age for legal sales to 21, while leaving the age to possess or use tobacco at 18;

• Provide alternative, “non-criminal” or “non-monetary” consequences for underage violations;

• “Grandfather” those who only became “underage” after the MLSA change; or

• Provide a specific exemption for underage employees.

While laws should match the needs and interests of the community, each of these approaches has pros and cons to consider.

For more information on these MLSA issues, read the Consortium’s publications:

• *Raising the Minimum Legal Sales Age for Tobacco*

• *Sample Resolution Supporting a Minimum Legal Sales Age of 21 for Tobacco Products*
Although attorneys have represented clients against the tobacco industry for decades, victories were few and far between until the 1990s. Over the last two decades, however, a growing number of plaintiffs have been successful in suing the industry. Below are just a few of the many U.S. lawyers who have challenged the tobacco industry in court over the years, including those who continue to take on tobacco cases today.

Public Health Advocacy Institute

The Public Health Advocacy Institute (PHAI) is a public health law research center, based at Northeastern University School of Law in Boston, Massachusetts, that dates back to 1979. A nonprofit legal center affiliate of the Consortium, PHAI researches public health law and policy; provides legal technical assistance; and conducts collaborative work at the intersection of law and public health, with an emphasis on tobacco control and childhood obesity. Since the early 1990s, PHAI has focused on tobacco litigation as a public health strategy through its Tobacco Products Liability Project and broader efforts to use law and policy to reduce the public health impact of tobacco industry products.

In 2014, PHAI established the Center for Public Health Litigation, a public interest non-profit law firm that specializes in public health-focused litigation targeting tobacco industry products, unhealthy foods, deceptive health marketing, and deceptive gambling practices. The Center works in tandem with a group of prominent Boston lawyers to pursue important public health cases, including cases against the tobacco

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Taking Big Tobacco to Court

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industry on behalf of the families of former smokers who have suffered devastating disease from cigarettes.

Tobacco Trial Lawyers Association

Founded in 1996, the Tobacco Trial Lawyers’ Association is a membership organization of trial attorneys and tobacco litigation specialists. Its membership roster includes attorneys throughout the U.S. Since 1998, Portland trial lawyer Charles (Chuck) Tauman, president of the Association, has specialized in tobacco litigation representing individuals and class actions against the tobacco industry in the trial and appellate courts of Oregon and Washington and before the U.S. Supreme Court.

Sharon Eubanks

Sharon Eubanks, now in private practice in Washington, D.C., worked 22 years as an attorney with the U.S. Justice Department. In her last six years there, she served as lead counsel for the United States in the massive legal challenge to tobacco companies’ deceptive practices under the Racketeer Influenced and Corrupt Organizations Act — the largest RICO enforcement action ever filed. From 2000 to 2006, Eubanks led a team in the ultimately successful federal tobacco litigation, U.S. v. Philip Morris et al. Following a nine-month trial, the federal district court found that the defendant tobacco companies committed fraud and were engaged in numerous racketeering activities in violation of federal law. See Public Health Law in the Trenches: United States v. Philip Morris (Sharon Eubanks at the Public Health Law Center, Feb. 19, 2010).

Howard Crystal

For close to a decade, Howard Crystal, while a partner at Meyer, Glitzenstein & Crystal, represented six national nonprofit public health organizations in advocating for appropriate remedies in U.S. v. Philip Morris. The court allowed third-party public health groups, who had a vested interest in the outcome of the litigation, to join the suit and file briefs with the court. These groups (also known as the Intervenors — the Tobacco-Free Kids Action Fund, American Cancer Society, American Heart Association, American Lung Association, Americans for Nonsmokers’ Rights, and National African American Tobacco Prevention Network) — and their legal counsel, Howard Crystal, prevailed in this marathon court battle, when a number of strong remedies were eventually imposed against the tobacco companies.

Janet Mangini

In 1992, San Francisco attorney Janet Mangini launched a lawsuit against R.J. Reynolds on the grounds that the company was specifically marketing its cigarettes to children through the use of the Joe Camel advertising campaign. According to her lawsuit, Camel cigarette sales to teenagers surged from $6 million to $476 million in the four years after Joe Camel advertisements were introduced in 1988. The lawsuit was settled in September 1997, with R.J. Reynolds agreeing to disband its Joe Camel advertising campaign and to release internal marketing documents about the advertising campaign.

Stanley and Susan Rosenblatt

Stanley and Susan Rosenblatt are Miami trial attorneys who in 1991 took on the uphill battle of suing the tobacco industry. The husband and wife team represented 60,000 Flight attendants in a $5 billion class-action suit against five major cigarette makers for illnesses blamed on secondhand tobacco smoke in airplane cabins (Broin v Philip Morris, 1997). A settlement was reached in 1997, where the industry agreed to pay $300 million to establish a medical research foundation dedicated to support research on the health risks of secondhand smoke. They followed this successful litigation by winning a $145 billion judgment against U.S. cigarette companies in another class action — this time on behalf of 500,000 Floridians who also claimed adverse health effects due to smoking (Engle v. R.J. Reynolds, 2007).
Upcoming Events

Please visit the Public Health Law Center’s website at www.publichealthlawcenter.org for news on upcoming Consortium webinars and archived recordings of past webinars.

Community Anti-Drug Coalitions of America Annual Leadership Forum
Feb. 1–4, 2016
National Harbor, MD

CADCA’s 26th annual National Leadership Forum is a 4-day training conference for community-based substance use prevention professionals, coalition leaders, educators, and addiction researchers. This event, which includes SAMHSA’s 12th Prevention Day, brings together more than 2,700 participants representing community anti-drug coalitions from all regions of the country.

Read more about CADCA’s annual conference.

Society for Research on Nicotine & Tobacco 22nd Annual Meeting
March 2–5, 2016
Chicago, IL

The Society for Research on Nicotine & Tobacco’s 2016 meeting is focused on cutting edge research on nicotine and tobacco.

Read more about SRNT’s annual conference.

National Summit on Smokeless & Spit Tobacco
April 18–20, 2016
Albuquerque, NM

The 8th National Summit on Smokeless and Spit Tobacco is the only national conference devoted to sharing the science of, and solutions for, the smokeless and spit tobacco problem. This year the summit also addresses issues related to e-cigarettes and similar products.

Read more about the Smokeless & Spit Tobacco National Summit.

Reduce Tobacco Use Conference
April 25–26, 2016
Washington, D.C.

The Virginia Foundation for Healthy Youth and Prevention Connections is sponsoring the 12th annual National Reduce Tobacco Use Conference to showcase the latest in tobacco-use prevention, reduction, and cessation with youth and young adults.

Read more about the Reduce Tobacco Use conference.