

LITIGATION 101: TOBACCO POLICY

New York State



Litigation can be a powerful tool to either advance or hinder public health policy.

When driven by public-minded individuals and organizations against the tobacco industry, litigation can achieve objectives that are often challenging to attain through conventional policy-making processes. On the other hand, when employed by the tobacco industry, litigation can obstruct local, state, and national efforts to advance important public health policy.

This fact sheet describes the role litigation can play in advancing or hindering New York State's public health goals. It identifies tactics the commercial tobacco industry uses – often with just the threat of litigation – and provides tips on minimizing litigation risks. This is one of two fact sheets designed as primers for New York State public health professionals and advocates on how the litigation process works and the impact litigation can have on public health objectives. The companion fact sheet, [Litigation 101: The Court System, Public Health Policy, & New York](#)



State, provides an overview of the litigation process, including a look at New York State's court system and the way it functions.

Proactive Use of Litigation by the Public Health Community

The public health community has frequently turned to litigation as a means to promote public health goals. The current landscape of modern commercial tobacco control policy owes much to litigation, including the influential Master Settlement Agreement (MSA) and Judge Gladys Kessler's decision in *United States v. Philip Morris*.¹ Additionally, individuals filing lawsuits independently or through class actions have played a role in advancing public health goals through litigation.

Settlements

At any stage of the litigation process, the parties have the option to settle. A settlement is essentially a contract where plaintiffs agree to dismiss their case in return for something from the defendant, typically money or a commitment to take specific actions or refrain from certain actions. Settlements, like contracts, are legally binding agreements, and parties can seek court enforcement if necessary.

Proactive litigation against tobacco companies can further public health goals in several ways:

- Lawsuits can secure court orders or settlements compelling the tobacco industry to modify its practices. For example, the MSA imposes significant restrictions on commercial tobacco marketing, especially marketing aimed at children.
- Lawsuits can result in substantial damage awards and financial settlements that threaten the financial viability of commercial tobacco companies. For instance, New York's State Attorney General-led litigation against Juul, titled *The People of the State of New York v. Juul Labs*, resulted in settlements requiring Juul to pay over \$110 million New York State.²

Litigation can spotlight the harmful practices of the commercial tobacco industry and raise awareness of the negative health impacts of commercial tobacco. For example, the MSA led to the release of millions of pages of internal tobacco industry documents, exposing the industry's strategies for promoting its addictive and dangerous product.³

Class Actions

Class actions are a product of civil procedure rules, allowing the aggregation of claims from a group of people who have suffered the same or similar harms. Instead of pursuing numerous separate lawsuits, class actions consolidate the claims of many individuals into one lawsuit, with damages, if awarded, distributed among the class members. To proceed as a class, plaintiffs must first establish “class certification,” showing that common issues of fact and law exist among the class members.⁴ If liability requires individual determinations, for example, the court will not certify the class, and the litigation will proceed on an individual basis.

Class action lawsuits allow plaintiffs to aggregate their claims that would otherwise be too cost-prohibitive to bring individually, as well as protect against inconsistent judgments involving the same claims. Moreover, they can be a powerful tool for public health, as the combined damages of a class can reach millions or even hundreds of millions of dollars.

Companies, including the tobacco industry, often modify their policies and practices to avoid potential exposure from class action lawsuits.

Multidistrict Litigation and Toxic Torts

Similar in concept to class actions, multidistrict litigation (MDL) occurs when numerous cases with the same or similar claims are pending throughout the country. To streamline proceedings, these cases can be consolidated into one court. A judge will then handle joint motions or oversee bellwether (or test) trials. The outcomes of these proceedings will apply to the individual cases, which will continue as separate litigation. Notably, MDL can encompass both individual cases and class actions, allowing multiple separate class action lawsuits to be included within one MDL case.

Recent Public Health Litigation

- *The People of the State of New York v. Juul Labs* (2023): New York and six other states sued Juul Labs, Inc. (Juul), the manufacturer of popular electronic smoking devices, for illegal and fraudulent business practices. New York claimed that Juul misled consumers about the nicotine content of its products, improperly stated that they were a safer alternative to cigarettes, and engaged in marketing techniques that would appeal to minors without implementing policies that would prevent minors from purchasing their products. Juul agreed to pay the State of New York \$112.7 million in addition to altering its marketing and sales practices to better protect youth.⁵
- *Baltimore v. Phillip Morris* (2022): Cigarettes, the most common form of litter globally, are not biodegradable, despite popular belief. Tobacco companies added filters to cigarettes in the 1950s as a way of misleading the public into believing that filters protected users from tobacco-related harms.⁶ These filters, which look like they're made of paper, actually break down into toxic microplastics and significantly contribute to littering. The City of Baltimore filed a lawsuit against Philip Morris International and other major tobacco manufacturers, seeking to hold them accountable for cigarette litter. The claims include public nuisance, trespass, and violations of state and municipal laws. The city aims to recover damages, including past, present, and future cleanup costs for cigarette litter, along with punitive damages.



Defending Against Litigation from the Tobacco Industry

Just as the public health community uses litigation to advance public health goals, the tobacco industry employs it to impede or halt public health initiatives. The commercial tobacco industry frequently initiates lawsuits against federal, state, and local policies, typically raising issues such as preemption, commercial free speech, and regulatory takings.⁷ For instance, the tobacco industry unsuccessfully challenged New York City's flavored tobacco product sales restriction in 2009, arguing that the ordinance was preempted by federal law.⁸

New York City's win regarding its restriction on flavored tobacco sales proved to be influential, and an indicator of future rulings. The tobacco industry has challenged similar ordinances in jurisdictions in the First, Ninth, and Eighth Circuit Courts of Appeal, and it has lost consistently over the past decade.

That said, the tobacco industry's litigation does indeed retain high-powered law firms that can wage effective and, at times, intimidating lawsuits. In 2012, the small village of Haverstraw, New York, enacted an ordinance banning the display of tobacco products in stores that are accessible to minors. The tobacco industry sued, arguing that by preventing the display of tobacco products, Haverstraw unlawfully restricted industry communications with its customers, thereby violating the First Amendment. Instead of fighting the tobacco plaintiffs in court, Haverstraw voluntarily rescinded the ordinance.⁹

Still, simply because the industry sues does not mean the industry is justified in its claims. Many laws challenged by the commercial tobacco industry are eventually upheld in court.¹⁰ Despite this, it is important to consider the risks and benefits of litigation before taking a course of action that is likely to result in a lawsuit. Some of those considerations are outlined here:

- **Cost and Time:** Litigation is expensive and time-consuming, often taking months or even years to resolve and incurring costly attorneys' fees and discovery expenses. In addition, it can result in public relations costs if embarrassing documents come to light or litigation is unsuccessful.
- **Precedent:** A loss in court can lead to undesirable precedents, especially if a higher court issues an opinion that hinders public health goals.
- **Unpredictability:** Even the best lawyers cannot accurately predict litigation outcomes. Litigation involves not only considering the facts and legal principles at issue, but also understanding the disposition of a judge or jury.

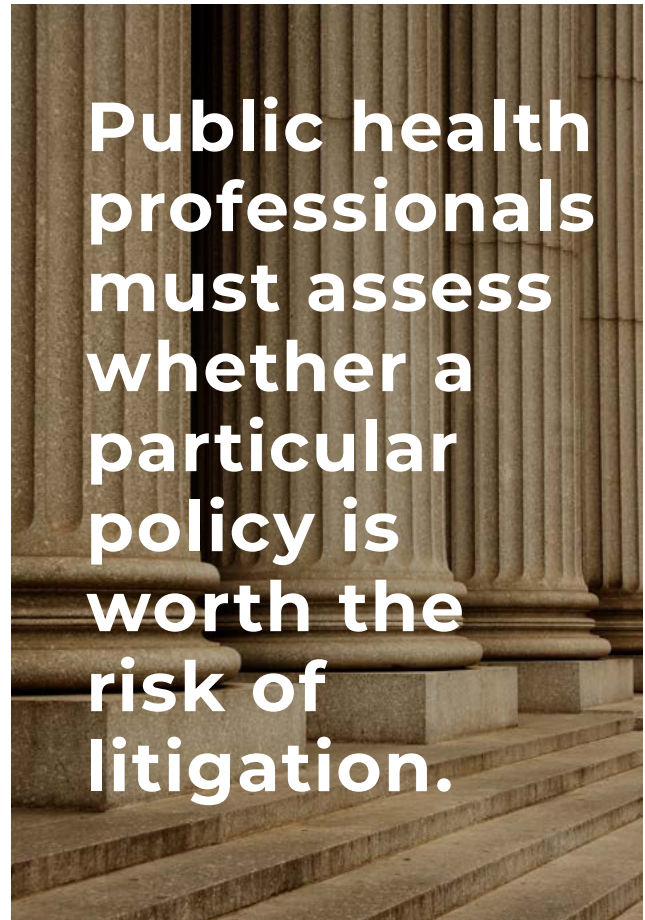
Importantly, the industry is aware of these challenges and uses the threat of litigation to dissuade jurisdictions from pursuing vital public health laws. The commercial tobacco industry often sends threatening letters if a city is considering a policy that may impact its profits.

These threats are often enough to sway jurisdictions, as they understandably want to avoid lengthy litigation against a well-funded adversary and the associated risks.

Managing Litigation Risk

Public health professionals and localities must carefully assess whether a particular policy is worth the risk of litigation. To help manage these risks, they can take several steps:

- **Form a relationship with attorneys:** Attorneys can provide useful legal advice and guidance throughout the development of a policy. Identifying an in-house attorney or contracting with an outside attorney early in the policy-making process may prevent legal challenges down the road.
- **Protect privilege:** *Non-privileged* materials are potentially discoverable in litigation. Documents and attorney communications are confidential, protected by the attorney-client privilege. This privilege covers confidential communications made for the purpose of giving or seeking legal advice. Sharing such communications with external parties may waive the privilege.
- **Work through legal issues in advance:** Even attorneys who are not public health specialists can do a legal assessment of a policy early on and identify potential legal problems. When attorneys are involved from the beginning, they can help modify the policy to achieve its goals while minimizing legal risks. Organizations like the Public Health Law Center can also provide background material and information on common legal hazards and claims. For summaries of significant commercial tobacco lawsuits over the last few decades, check out the Public Health Law Center's online [Litigation Tracker](#).
- **Assess risk tolerance:** It's important to carefully evaluate the risk of potential lawsuits, the likelihood of losing, and the associated costs of litigation. Public health professionals and localities need to consider whether pursuing the policy is still worthwhile despite these risks. Often, the policy's significance and public health benefits will outweigh the potential legal challenges. Making these decisions in advance will help avoid last-minute scrambling if a lawsuit is filed.



The commercial tobacco industry leverages litigation and the fear of lawsuits to obstruct critical public health initiatives from even taking off. However, by proactively managing and minimizing risks, public health professionals can conserve resources, thwart the industry's litigious tactics, and continue to advance essential public health policies.

Conclusion

Proactive litigation against the commercial tobacco industry can lead to important public health victories just as industry-led litigation can derail hard-won public health policies. Regardless, litigation is an inescapable part of the modern world, and public health professionals and advocates must stay informed about the litigation landscape and its impact on public health policy.

If you're working on New York State commercial tobacco control issues and need assistance, contact the Public Health Law Center at (651) 290-7506 or PHLC.NYS@mitchellhamline.edu.

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Endnotes

- 1 For more on the MSA and Judge Kessler's opinion, see A Complex Achievement: The Tobacco Master Settlement Agreement, in LOOKING BACK TO MOVE FORWARD: RESOLVING HEALTH & ENVIRONMENTAL CRISES (2020), <https://www.publichealthlawcenter.org/sites/default/files/resources/A-Complex-Achievement-The-Tobacco-Master-Settlement-Agreement-Chapter-3.pdf>; *The Verdict Is In: Findings from United States v. Philip Morris*, Tobacco Control Legal Consortium (2006), <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-verdict-is-in.pdf>.
- 2 See Public Health Law Center, *Juul Settlement US Map - New York*, <https://www.publichealthlawcenter.org/resources/juul-settlement-state-map/New%20York>.
- 3 These documents can be accessed at <https://www.industrydocuments.ucsf.edu/tobacco/collections/msa>.
- 4 See *generally* Fed. R. Civ. P. 23, N.Y. C.P.L.R. 901. For example, a class must satisfy prerequisites to proceed as a class: (a) numerosity – the class must be composed of enough individuals so that proceeding as a class advances justice, (b) commonality – the questions of law and fact that the class has in common predominate over questions affecting

individuals, (c) typicality – the claims and defenses of the lead plaintiff must be typical of the class, (d) adequacy – the lead plaintiff must adequately represent the interests of the class, and it must be demonstrated that a class action is superior to other available methods for adjudication of the controversy. *Id.*

- 5 See Public Health Law Center, *Juul Settlement US Map - New York* (2023), <https://www.publichealthlawcenter.org/resources/juul-settlement-state-map/New%20York>.
- 6 Karen Evans-Reeves et al., *The “Filter Fraud” Persists: The Tobacco Industry is Still Using Filters to Suggest Lower Health Risks While Destroying the Environment*, 31 TOBACCO CONTROL e80-e82 (2022), doi: [10.1136/tobaccocontrol-2020-056245](https://doi.org/10.1136/tobaccocontrol-2020-056245).
- 7 The Public Health Law Center has created resources covering these subjects and more, available here: <https://www.publichealthlawcenter.org>.
- 8 See, e.g., U.S. Smokeless Tobacco Company v. City of New York (2009), <https://www.publichealthlawcenter.org/litigation-tracker/us-smokeless-tobacco-company-v-city-new-york-2009>.
- 9 See, e.g., *Haverstraw, N.Y., Pulling Plug on Tobacco Display Ban*, CSP DAILY NEWS (July 17, 2012), <https://www.cspdailynews.com/tobacco/haverstraw-ny-pulling-plug-tobacco-display-ban>.
- 10 Public health professionals should also bear in mind the corollary proposition: that the commercial tobacco industry has not yet sued over a policy does not imply that it cannot or will not prevail if it chooses to do so in the future.