

Litigation Page information gathered from 2000 – 2005.

While the bulk of legal cases against the tobacco industry have been filed in the USA, tobacco lawsuits have also been issued in about 30 other countries. There are two principal types of lawsuit: individuals and groups of plaintiffs seeking compensation for damage to health caused by active and passive smoking; and governments or health insurers seeking compensation for the costs of treating smoking-related illnesses.

Australia

Rolah McCabe

In April 2002, British American Tobacco was ordered to pay \$700,000 AUD damages to a 51-year old woman with lung cancer, making this the first time a cancer victim had successfully sued a tobacco company outside the US.

The award to Rolah McCabe followed a ruling in the Supreme Court of Victoria that the case should go straight to an assessment of damages, without hearing the defence's arguments, because BAT had deliberately prevented her obtaining a fair trial by destroying key documents. BAT appealed the ruling and on 6 December, the Court of Appeal allowed the appeal and ordered a retrial. Prior to the Appeal Court decision, Mrs. McCabe died.

Date of information: (December 2002)

Myriam Cauvin

A 39-year old single mother suffering from emphysema is the plaintiff in two lawsuits against the tobacco industry in Australia. Myriam Cauvin began experimenting with tobacco products at ten years of age, was regularly smoking by 13-15 years of age, developed breathlessness by 26, was diagnosed with emphysema in her early thirties and was given a life-saving lung transplant on 11 September 2001. She receives a disability pension and will need to take medication for life. Ms Cauvin's principal allegation in the Common Law action against Philip Morris, British American Tobacco, Imperial Tobacco and RJ Reynolds is that "the companies engaged in a conspiracy to mislead, conceal and influence authorities to ensure the truth about the harmful effects of tobacco smoking was not revealed."

Ms Cauvin is also the plaintiff in an Equity Proceeding in which she seeks to have Philip Morris, BAT and tobacco retailers hand back \$200 million in unjustly collected taxes so that these monies might be used towards smokers' cessation and health care costs.

Date of information: (June 2002)

Class Action

A class action against three tobacco manufacturers has been dismissed by the Australian Federal Court but lawyers for the litigants say the fight is far from over. The court's full bench in a majority decision agreed with the companies' appeal that the class action could not continue because it did not comply with Federal Court rules. However, the three judges acknowledged the case could still proceed on an individual basis.

Six people began a class action, suing Philip Morris, WD and HO Wills, and Rothmans for damages, claiming the companies breached the Trade Practices Act

with misleading and deceptive conduct and negligence. They claim they have all contracted lung cancer because of the actions and conduct of the companies.

Date of information: (March 2000)

Brazil

Joao Lopes Lamenha Lins

A Brazilian court has ordered Souza Cruz, the Brazilian subsidiary of BAT, to pay \$27,500 (£18,250) to cover the medical bills of Mr Joao Lopes Lamenha Lins, who is suing the company. Mr. Lins, aged 42, contracted lung cancer and is seeking compensation of \$2.5m.

To date, Souza Cruz has won 11 lawsuits at the first instance and six others at appeal, losing none. In the above case, the suit has not yet been officially filed with Souza Cruz.

Date of information: (June 2000)

Canada

Joseph Battaglia

A small-claims court in Ontario has found in favour of a former tobacco salesman and has ordered a trial into claims that Imperial Tobacco Inc. manipulated the nicotine content of cigarettes in order to increase their addictiveness.

The plaintiff, Joseph Battaglia, is seeking C\$6000 in damages. He alleges that Imperial tobacco misled Canadians about the deleterious effects of low-tar cigarettes while increasing the nicotine levels in cigarettes to "frustrate his ability to quit, thereby putting his own health, and the health of millions of Canadians in jeopardy".

Battaglia has offered to settle the dispute for \$1 provided the industry admits it has misled the public about the detrimental health effects of low-tar cigarettes.

Date of information: (October 2000)

Canadian Government

In December 1999, the Canadian government filed a lawsuit in New York which alleged that the former RJR Nabisco Holdings Inc, including its then Canadian subsidiary, RJR-MacDonald Inc., took part in a conspiracy to smuggle Canadian cigarettes intended for export back into Canada in the early 1990s, thereby avoiding taxes on the product.

The government said it had lost tax revenues and incurred costs in fighting criminal activity as a result of the tobacco smuggling. Furthermore, massive cross-border smuggling frustrated the Canadian government's strategy to reduce tobacco consumption, especially among young people, and in 1994 forced the government to significantly reduce excise taxes.

In July 2000, Judge Thomas J McAvoy ruled that US courts are forbidden from enforcing foreign tax laws. He also said that Canada had failed to explain how it as a country had suffered injury from increased smoking rates among youth, which was one of the claims in the lawsuit. Following the ruling, the Canadian government filed a notice of appeal in the US Federal Court. The Canadian government stated that it was not trying to enforce Canadian tax laws through the US courts but repeated the

allegation that the US tobacco companies broke US racketeering law by their participation in tobacco smuggling.

Date of information: July 2000

Colombia

Colombian Government

Twenty-two Colombian States and the city of Bogota launched a legal action against Philip Morris in New York for their alleged involvement in a sophisticated conspiracy to smuggle cigarettes into Colombia. The lawsuit contended that Philip Morris engaged in a range of illegal acts including smuggling, wire fraud, money laundering, and the creation of a labyrinth of third-party payments and Swiss bank accounts in order to hide illegal acts.

The lawsuit contended that Philip Morris's goal was to increase its market share and profits while evading taxes. Columbian officials argued that they have not only lost tax revenue but have also expended large sums of money in unsuccessful efforts to stop the smuggling. The lawsuit was seeking about £3 billion in damages.

The case was dismissed by a US District Judge in February 2002 on similar grounds to the dismissal of the EU lawsuit ruling that the plaintiffs had failed to show that recent legislation and court decisions had nullified the "revenue rule" - a long-standing legal standard barring one country from enforcing tax claims by other countries.

Date of information: (March 2002)

Ecuador

Ecuadorian Government

A US federal judge has dismissed a lawsuit brought by Ecuador, (together with similar suits by the governments of Belize and Honduras) seeking to hold US tobacco companies liable for tax revenues allegedly lost as a result of cigarette smuggling. The judge based his ruling on the Revenue Rule (see Canadian case above) which states that courts of one sovereign state will not enforce tax claims of another country.

The lawsuit filed by the government of Ecuador claimed that Philip Morris and RJ Reynolds had a long history of tax avoidance and smuggling in Latin America and elsewhere in the world. The lawsuit alleged that the US companies exported Ecuadorian tobacco products free of ordinary domestic taxes and then illegally brought them back into the country for sale. Had the case proceeded, the government had intended to draw on the testimonies of nearly two dozen tobacco industry executives who have struck plea bargains with US prosecutors on wire fraud and other charges in an investigation of tobacco sales practices outside the United States.

Date of information: (February 2002)

European Union

European Union Government

On 6 November 2000, the European Union filed a lawsuit against RJ Reynolds, Japan Tobacco (as successor to RJR International) and Philip Morris for violations of

the *Racketeer Influenced and Corrupt Organizations (RICO) Act*. The lawsuit alleged that the companies were involved in a massive, ongoing smuggling scheme.

The complaint stated that "the defendants have been engaged in a pattern of racketeering activity, including but not limited to, money laundering, wire fraud and mail fraud". It added: "Defendants have committed, and continue to commit, acts that constitute negligence, fraud, unjust enrichment, public nuisance, negligent misrepresentation, and conspiracy to conduct such torts." The lawsuit claimed that the companies had facilitated the smuggling of cigarettes into Europe, thereby increasing their market share of the cigarette market and expanding the worldwide market for contraband cigarettes.

The EU claims that tobacco smuggling is costing 2 billion euros (US\$1.7bn) a year in lost tobacco taxes. The tobacco companies contested the allegations and asked a European court to declare that the European Commission lacked authority to file a lawsuit in a US court.

In February 2002, a US District Judge dismissed the lawsuit, ruling that the plaintiffs had failed to show that recent legislation and court decisions had nullified the "revenue rule" - a long-standing legal standard barring one country from enforcing tax claims by other countries. Commenting on both the EU and Columbian lawsuits, Judge Nicholas Garaufis said they "clearly implicate the revenue rule in that they would necessarily cause this court to pass on foreign tax laws". The European Commission said it would appeal against the decision and would also widen its legal case to include money laundering charges on the basis of new evidence.
Date of information: (March 2002)

France

Richard Gourlain

A Court has ruled that the former state tobacco monopoly, Seita, was partially responsible for the death of a 60-a-day smoker. The victim, Richard Gourlain, died from lung and larynx cancer earlier this year, aged 49.

The judge held Seita entirely responsible for the harm caused to Gourlain between 1963-69, during which time Gourlain was a minor. He found Seita 60% responsible from 1969 until 1976, the year when warning labels were introduced. Thereafter, Gourlain alone was judged to be responsible for his subsequent illness. The court ordered a medical report into the cause of Gourlain's cancer on which it would base its decision on damages to be paid by the companies.
Date of information: (Dec. 1999)

Germany

German Government

Germany has become the second EU country to support the European Union's claim for compensation from tobacco companies. A finance ministry spokesman said: "We believe that it makes sense to join this EU claim. The losses are as painful for Germany as they are for other nations."
Date of information: (January 2001)

Guatemala

Guatemalan Government

A US federal judge has dismissed a lawsuit filed by the Republic of Guatemala against Philip Morris USA and other major cigarette companies, ruling that the claimed injuries were too remote to allow the case to go forward.

This was the first ruling from a United States court to decide the legality of claims brought by foreign governments. The ruling, by Judge Friedman, is significant because Judge Friedman has been assigned to decide the merits of all foreign government cost recovery cases in the federal courts. An appeal by the Government of Guatemala was also dismissed.

Date of information: (October 2001)

Ireland

Class action

Currently around 300 people in Ireland are suing the tobacco industry. Of these, 206 are part of a single class action. Following an inquiry into the activities of the tobacco industry, a Government committee recommended further legal action by the state. This is being considered by the Health Minister.

Date of information: (January 2001)

Workplace case

Fifty bar workers are suing their employers and the tobacco industry in the first personal injury claim of its kind. The plaintiffs, whose injuries include emphysema and lung cancer, are claiming that they were harmed directly as a result of smoking and indirectly by their working environment. The case is being handled by Dublin solicitors Ward and Fitzpatrick.

Date of information: (January 2000)

Israel

Class action

In an unprecedented settlement, the Dubek cigarette company has agreed to pay compensation for health damage to 78 plaintiffs, ranging from US\$144,000 to \$5,280. In the class-action suit, the awards are intended to reflect the severity of the health problems the individuals faced. Under the agreement, to be approved by the government, plaintiffs will agree not to pursue further legal action against the company.

Dubek has not conceded any guilt for causing harm but has agreed to allocate annual sums to a special fund, to provide compensation for smokers who have acquired smoking-related illness during the past 7 years, and fund anti-smoking campaigns. Dubek promises under the agreement not to sell cigarettes from vending machines, and not to add substances to cigarettes unless approved by the US Food and Drug Administration. In order to fund the compensation scheme, Dubek has requested that the government remove maximum price controls on cigarettes and also set minimum prices so that imported cigarettes would not be significantly cheaper than local brands.

Date of information: (November 2000)

Italy

Italian Government

The Italian government has announced that it will be filing a racketeering lawsuit against Philip Morris and RJ Reynolds following the action taken by the European Commission.

Date of information: (January 2001)

Workplace case

In the first case of its kind, two bank managers of the French bank Parisbas based in Milan, have been found guilty of manslaughter, following the death of an employee who was exposed to tobacco smoke at the bank. A 35-year old woman with severe asthma, was forced to work in a smoky environment despite frequent written requests to move to a cleaner environment. She collapsed and died of an acute asthma attack after months of working in a small, windowless office with habitual smokers.

Although there is no law against passive smoking in Italy, in 1996, the constitutional court ruled that smoking should only be allowed in the workplace in specially designated rooms or adequately ventilated smoking areas.

Date of information: (June 2002)

Netherlands

Doewe Egberts

A 55-year old man suffering from chronic emphysema is suing RJ Reynolds, Philip Morris, British American Tobacco and the Dutch company Doewe Egberts, claiming additives in cigarettes ruined his health.

Date of information: (December 1999)

Workplace case

A district court has ruled that employers must guarantee that non-smoking staff have a working environment completely free of tobacco smoke. In a landmark judgment, the Breda district court upheld a postal worker's complaint that her exposure to tobacco smoke at the city's sorting office infringed her right to work in a smoke-free environment. Nanny Nooijen had complained since 1993 about tobacco smoke in the sorting office. She had experienced health problems including asthma.

In 1997, her employers, PTT Post, created a separate non-smoking area but Ms Nooijen took legal action to enforce a completely smoke-free working environment. The court ruled that Nanny Nooijen's employers were bound by the constitutional rights of citizens to protection of "physical integrity" and "health" to provide such conditions. They failed to satisfy this right under employment law which obliges employers to ensure that workplaces cause no harmful effects on employees' health.

Date of information: (May 2000)

New Zealand

Janice Pou

A New Zealand woman dying of lung cancer is suing British American Tobacco for NZ\$330, 000, in what is believed to be the first case of its kind in New Zealand. The civil claim by Janice Pou alleges that the tobacco company's negligence caused her to become addicted to cigarettes at the age of 17 and subsequently to contract lung cancer.

Date of information: (June 2002)

Peru

Peruvian Government

The government of Peru is seeking legal advice with the view to suing US tobacco companies for the damage they have caused to the health of the Peruvian nation.

Date of information: (January 2001)

Saudi Arabia

Saudi Arabian Hospital

A leading Saudi hospital has filed a lawsuit against 10 international tobacco companies, seeking \$10bn compensation for treating lung disease. Companies named in the lawsuit include Philip Morris, BAT, Britain's Imperial Tobacco and Egypt's Eastern Tobacco, plus four others. "

The hospital is seeking \$10bn compensation because in the 25 years since it was set up, it had to go out of its way to treat diseases caused by smoking," said Ahmed al-Tuwarjiri, the hospital's lawyer. The hospital filed the lawsuit after an out-of-court settlement had been postponed indefinitely by the companies. .

Date of information: (December 2001)

Spain

Class action

Nine associations representing 4,339 patients with throat cancer, all former smokers, have sued Altadis SA, the company formed from the merger of France's Seita and the Spanish former state monopoly, Tabacalera. This is the first collective lawsuit against the Franco-Spanish company.

Two lawyers who are co-ordinating the collective lawsuits have assembled medical reports for each plaintiff including a statement by a medical specialist highlighting that tobacco is the cause of the laryngeal cancer. This case differs from other class actions in that the lawyers are not seeking individual compensation but economic compensation for each of the associations, to provide rehabilitation services for the patients. Most of the patients have had to undergo a laryngectomy. Since the Spanish healthcare system does not pay for rehabilitation in people who had had a laryngectomy, the associations are looking for money to improve facilities and employ speech therapists and social workers.

Date of information: (April 2000)

Andalucía Government

The government of Andalucía, in southern Spain, has become the first European government body to sue the tobacco industry for the cost of treating smoking-related diseases. The government claims that in 2001 it spent £200m - 8.5% of its health bill

- treating sickness caused by smoking. The writ names five tobacco companies, including Philip Morris and Brown & Williamson.

Date of information: (February 2002)

South Korea

Workplace case

Parents of a 30-year-old female worker at a branch of the National Agricultural Co-operatives Federation have launched a court battle over passive smoking, claiming that their daughter died of asthma brought on by other people's tobacco smoke at her workplace.

Date of information: (June 2000)

Turkey

A woman with lung cancer is suing TEKEL, the Turkish tobacco monopoly. This is the first such case in Turkey.

Date of information: (September 2000)

Uganda

Thomas Okumu & Vincent Oribi

A lung cancer victim who attempted to sue BAT and Mastermind Tobacco has had his case struck out by the High Court. Mr. Thomas Okumu had attempted to sue on his behalf and on behalf of all cigarette smokers and nicotine dependent persons. However, the judge ruled that Mr. Okumu had failed to comply with the law in putting his "philanthropic ideas in motion" and that his action would be "put on hold".

However, the same judge declined to strike out another suit filed by Vincent Oribi against BAT and Supermatch. The plaintiff claimed that he was misled by the health warnings on cigarette packets into starting to smoke. Justice Katusi ruled that it could not be determined without evidence whether the danger of smoking was so great that the plaintiff was so foolhardy and unreasonable to expose himself to it. The action has been allowed to proceed to trial.

Date of information: (December 2000)

UK

Alfred McTear

Alfred McTear smoked 60 cigarettes a day and died in 1993, aged 48, one year after he was diagnosed with lung cancer. Before he died he began legal proceedings against Imperial Tobacco. Mr. McTear's widow, Margaret, continued with the legal action after the death of her husband and sued Imperial Tobacco, the manufacturer of the cigarettes smoked by Alfred McTear, for £500,000 in damages. The case began in October 2003 and a ruling by Lord Nimmo Smith was finally made on 31 May 2005. The judge ruled that, in his opinion, Imperial Tobacco was not responsible for the death of Alfred McTear.

Date of information:

Workplace: Michael Dunn

A croupier, backed by the GMB union, is suing his employers after he contracted asthma which he claims was caused by the casino's smoky atmosphere. Non-smoker Mickey Dunn claims Napoleons casino in Leicester Square, London, failed to install adequate ventilation.

Date of information: (January 2000)

Workplace: Colette Comstive

A mother who claimed that passive smoking affected her unborn child's health has won a battle for compensation. Colette Comstive said her son Matthew, suffers asthma and recurring chest infections after she was forced to work in a smoky office during her pregnancy. Despite her complaints, her employer, the catalogue company Great Universal Stores (GUS), failed to move her to a smoke-free environment at its office in Burnley. Following a four-year legal fight, the boy was awarded £5,000. GUS, which denied liability, also agreed to pay £5,800 costs.

Date of information: (June 2000)

For an overview of the legal position regarding smoking in the workplace, see section 2 of the [ASH guide to Smoking in the Workplace](#). This includes details of the following case studies:

UK Workplace

Dryden vs Greater Glasgow Health Board (1992)

Dorrington vs Waltons & Morse (1997)

Joan Clay (case brought under Social Security Act) (1990)

Veronica Bland vs Stockport Metropolitan Borough Council (1993)

Elizabeth Ashby vs Chartered West LB Ltd. (1995)

Beryl Roe vs Stockport Metropolitan Borough Council (1995)

Sylvia Sparrow vs St. Andrews Homes Ltd. (1998)

Group action against Gallaher and Imperial Tobacco

On 26 February 1999, the first group action, consisting of 52 people with lung cancer who were suing two British tobacco companies, was brought to an end. The decision followed a ruling by the judge that 36 of the lung cancer sufferers could not continue their case against Gallaher and Imperial Tobacco because they had been diagnosed with the disease more than three years before suing.

Lawyers acting for the 52 plaintiffs had agreed to represent them on a "no win, no fee" (conditional) fee basis. However, when the judge assigned to the case (Lord Justice Wright) ruled that the majority of the plaintiffs were time-barred, the lawyers decided that the risks of pursuing the case with so few remaining plaintiffs were too great.

The cases

The legal action centred on 52 living lung cancer victims who were suing Gallaher and Imperial Tobacco (and the defunct Hergal) for damages due to negligence.

The plaintiffs argued that the companies were negligent in failing to reduce tar levels and the harmfulness of their product when it first became clear that smoking causes lung cancer in the late 1950s. The plaintiffs argued that they were exposed to 'negligent tar' (the extra tar that should have been removed) from the 1950s onwards and that this had materially contributed to their lung cancer. As in all personal injury cases the plaintiffs were faced with a series of hurdles:

They were required to:

- show the companies had a duty to reduce tar
- show the duty was breached
- show that the plaintiff was harmed
- show that the breach of duty caused or materially contributed to the harm to the plaintiff.

The 52 cases were to be heard as a 'group action' with 10 'lead cases' covering the range of conditions and smoking histories in the group. The others would have been 'stayed' (put on hold) pending the outcome of the lead cases and then re-examined in the light of the results of the lead cases. In 1997 Mr Justice Wright was appointed as the judge to hear the cases through to their conclusion.

Expected damages award

If the case had gone to full trial, the lung cancer sufferers, if successful, might have expected to win damages of £25-65,000 each depending on their suffering and loss. If 50 cases had won £50,000 each this would equate to £2.5 million, a relatively small sum (at least compared to the cost of fighting this case). However, around 30,000 people get lung cancer and die as a result of their smoking history each year in Britain. A substantial fraction of these could have valid claims against the tobacco companies. If 10,000 lung cancer victims sought compensation each year and received £50,000, that would equate to £500 million per year. The combined profits of Gallaher and Imperial in 1997 were £645 million. While these calculations are illustrative, they explain why the tobacco companies put so much effort into defending these cases with huge legal teams and why their share prices rose following the collapse of the UK litigation.

Document disclosures

Tobacco litigation forms an important part of tobacco control because it puts a requirement on the tobacco companies to release internal documents, many of which are likely to be very revealing in terms of what the companies knew about the harmful effects of smoking many years ago.

Had the UK group action against Imperial and Gallaher gone ahead, much of the time between the preliminary hearings and the full trial would have been taken up with 'discovery' - the exchange of thousands of pages of documents. These documents are not made public unless and until they are used in court. The discovery process in US litigation has led to the release of thousands of incriminating tobacco industry documents.

Timing

The actions began in 1992 and initially the lawyers tried to get Legal Aid for the plaintiffs. However, Legal Aid was refused and the cases were then brought under

Conditional Fee Agreements (CFAs are 'no-win, no fee' agreements) and the first hearings were in December 1996.

There were a series of procedural hearings including a special hearing in December 1998 on the eligibility of those plaintiffs that sued more than three years after their cancer was diagnosed - this is a 'limitations hearing'.

Limitations (time-barred cancer sufferers)

The 1980 Limitations Act requires plaintiffs to bring actions within three years. 36 of the 52 plaintiffs commenced their action more than three years after the diagnosis of lung cancer. However, Section 33 of the Act allows the judge to exercise discretion and allow cases to proceed if he believes this would be in the interests of justice. In making this decision, the judge will consider many factors, including:

- Length of delay and reasons why the plaintiffs did not sue earlier
- Unfairness to defendants because of lost evidence
- Defendants' role in creating delay
- Strength of overall case

Lord Justice Wright chose not to take into account any of these factors and stuck rigidly to the three-year time limit, thus debaring the majority of plaintiffs from the case.

Plaintiffs' approach to the litigation

The plaintiffs wanted the substantive issues to be heard in court, to establish negligence on the part of Gallaher and Imperial Tobacco, and to win damages for the 10 lead cases. Such a victory would have established precedents for the other victims within the group action and would have had significant implications for the 30,000 people per year who contract lung cancer as a result of smoking.

Tobacco industry approach

From the start, the apparent tobacco industry strategy has been to prevent the cases ever coming to a full hearing by using procedural blocking tactics. The aim of the companies was to attack the financial viability of the action. They said that they would never settle the cases out of court and argued that they had a 'meritorious defence' on the substantive issues.

Tobacco industry blocking tactics

- Block legal aid - succeeded
- Prevent litigation as a group action and require individual litigation - failed
- Hold plaintiffs solicitors responsible for tobacco industry costs if the action is unsuccessful - failed
- Tried to apply a gagging order - initial success, then failure at the Court of Appeal
- Prevent new plaintiffs joining the group - failed
- Block 36 plaintiffs because they sued more than three years after diagnosis - succeeded
- Argue for plaintiffs' costs to be allocated in proportion to number of cases won - issue not resolved because of the collapse of the case following the limitations' hearing

ASH view

The case was important because, had it gone to full trial, it would have dealt with the conduct of tobacco companies faced with increasingly clear and authoritative statements regarding the dangers of its product. The central point in the case concerned the responsibility that tobacco companies have to minimise the harm they cause.

Although it is widely accepted that there cannot be a 'safe' cigarette, cigarettes can be modified to be less or more dangerous. We believe that the companies are under a duty to do all they can to reduce the hazardousness of their products. We believe the manufacturers did not do this.

Future Action

Following the collapse of the group action, it is difficult to foresee how tobacco litigation will proceed in the UK.

However, it's worth remembering that it took years' of legal action in the US before the tobacco companies lost a case.

Prior to 1997 the companies declared that they would defend every single case but by mid 1997 they were negotiating a settlement to limit future litigation.

The US litigation may also help British litigants: now that so many incriminating documents against the American tobacco industry are in the public domain, it will become increasingly difficult for other tobacco companies to defend themselves. Another possible outcome is for health authorities to take legal action against the tobacco industry. A preliminary investigation by the NHS Confederation has already been undertaken and it is possible that further legal action will be taken at a future date.

Date of information: March 1999

USA

Workplace case: New Orleans riverboat casino

A class-action lawsuit on behalf of a group of casino workers was settled in June 2002. About 1,000 current and former employees of a New Orleans riverboat casino will receive \$2.6m in compensation for ailments caused by passive smoking. The employees alleged that the ventilation system on the vessel was faulty and re-circulated smoky air through the casino, making them sick. The casino would shut down the air intake valves on hot, humid days to help keep the vessel cool, the suit said, meaning that no fresh air was coming in to dilute the air where an estimated 25 percent to 35 percent of the customers were smoking. The suit claimed that employees suffered respiratory illnesses ranging from occupational asthma to sinusitis, bronchitis and other infections and ailments, some of which were severe enough to require hospitalisation.

Date of information: (June 2002)

US tobacco settlements

There have been three main types of litigation in the USA: State Attorneys General suing for recovery of Medicaid; class actions alleging a variety of injuries (addiction,

passive smoking, etc.) and numerous individual actions. In addition, the US federal government, through the Department of Justice, has filed a lawsuit against the tobacco industry.

The scale of litigation is enormous: all of the major tobacco companies are having to defend hundreds of cases. At 31 December 2001 British American Tobacco had 4,419 product liability cases pending against it (down from 4,740 cases in December 2000). In a bid to settle the bulk of the litigation, a settlement was proposed on 20 June 1997 and its terms were strengthened and developed into a proposal for legislation, the McCain Bill. This bill was rejected by the Senate in June 1998 and new proposals were tabled.

In November 1998, a new settlement was announced the Master Settlement.

Class action

Florida Class Action - The Engle case

This is the first class action on behalf of smokers to go to trial. The case was originally filed in 1994 as an action on behalf of all US smokers but a Florida state appeals court limited the class to smokers in Florida. In March 1998, Judge Robert Kaye was assigned to the case. The class action became known as the Engle case, named after the lead plaintiff, a paediatrician who contracted emphysema. Howard Engle is claiming damages on behalf of 40,000 to 50,000 Florida residents made ill through smoking.

In July 1999, the jury found tobacco manufacturers guilty of making a defective and addictive product, and for conspiring to hide the dangers of smoking. The industry was also found potentially liable for punitive damages.

On 3 September 1999, a Florida appeals court ruled that any damages claims in the class action would have to be assessed one smoker at a time. This was considered a victory for the tobacco firms because it removed the possibility that they would be hit by a massive punitive damage award that could have ranged from £200 billion to £500 billion. The same court subsequently agreed to reconsider this ruling, re-opening the prospect of huge punitive damages being awarded against the industry.

In response, the tobacco companies appealed to the Florida Supreme court to block the punitive damage award. The appeal charged that the trial was "unconstitutional" and exposed the industry to a "devastating, potentially bankrupting" verdict. The Supreme Court rejected the tobacco companies' damages appeal.

The second phase of the trial, to determine the level of compensatory damages began on 1 November 1999. On 7 April 2000, the jury found the defendants liable for the injuries to three representative class members. The jury awarded \$6.9 million in compensatory damages to lung cancer victim Mary Farnan and to the widower of Angie Della Vecchia who died of lung cancer in the summer of 1999, aged 53. A third award of \$5.7 million to plaintiff Frank Amodeo may be subject to the statute of limitations.

The third and final phase of the trial began in May when the jury began to hear further testimonies. They will then determine a lump sum punitive damages award for the entire class of injured Florida smokers. The possibility of a huge damage award has raised the prospect of bankruptcy for the industry. Furthermore, court rules state that defendants have to post a bond, equal to the amount of damages awarded,

before they can appeal. This prompted the Florida legislature to pass a bill limiting the amount of any bond to \$100m or 10% of the tobacco companies' net worth, whichever is the lower sum. The measure is designed to protect the revenue due to Florida (and to other states) from the 1998 Master Settlement which required the tobacco companies to pay \$206bn over 25 years. In the case of Florida this amounts to \$13bn or \$500 million a year. This means that the tobacco companies are unlikely to be made bankrupt by the Engle punitive damages award although they could be significantly harmed by the verdict. The case is now being appealed.

Despite the class action being subject to appeal, one of the plaintiffs who has bladder cancer and is not expected to live to see the appeal resolved, was granted the right to have his case heard before a jury before he dies. John Lukacs, aged 76, also lost his tongue due to oral cancer. On 11 June 2002, a jury awarded him \$37.5 million in compensatory damages. This is the first in perhaps tens of thousands of individual trials to determine compensatory damages for Engle class members. Richard Daynard, a professor at Northeastern University School of Law and Chair of the Tobacco Products Liability Project noted that, "Despite the industry's insistence that it will win on appeal, every sign points to the Engle verdict and the enormous Florida class surviving the appellate process." "The Florida Supreme Court twice declined to intervene in the Engle trial and decertify or otherwise alter the class," said Mark Gottlieb, an attorney with the Tobacco Products Liability Project at Northeastern University School of Law. "And the Third District Court of Appeals probably would not have allowed the Lukacs case to move forward if it had plans to dismantle the Engle class in the pending appeal." For further information see background briefing

US Justice Department lawsuit

On 22 September 1999, the United States Justice Department filed a multi-billion dollar civil lawsuit against the tobacco industry in an effort to recoup money spent by the federal government on health care for smoking-related illnesses. The lawsuit also sought to force the industry to finance smoking education and cessation programmes. Meanwhile, the Justice Department dropped the long-standing criminal investigation into the industry.

The federal government spends approximately \$20 billion a year treating smoking-related diseases, and statutes of limitations permit the government to go back three years to recover costs under the Medical Care Recovery Act and six years under the Medicare law governing health payments for the elderly. The suit also includes a civil RICO (Racketeer Influenced, Corrupt Organizations Act) charge, which has no statute of limitations, and will allow the government to seek a portion of any "ill-gotten" tobacco industry profits. The complaint alleges that in the 1950s the tobacco companies conspired to defraud and mislead the American public and to conceal information about the health effects of smoking. The US Attorney General, Janet Reno, said: "For more than 45 years, the cigarette companies conducted their business without regard to the truth, the law, or the health of the American people."

The Department of Justice lawsuit is similar to those filed, and settled, by the states for more than \$200 billion. While the state suits recovered funds paid out under the Medicaid programme - a joint state and federal programme - it did not recover funds paid out solely under federal programmes such as Medicare.

The Judge appointed to the case, Judge Gladys Kessler, set a trial date of January 2003.

However, in September 2000, Judge Kessler dismissed two of the US government's four claims. She ruled that the government could not use the Medical Care Recovery Act to try to recover government expenses related to sick smokers but allowed the two claims under the racketeering law to go ahead.

Following the presidential election in November 2000 it was anticipated that the Bush administration might seek to settle the case. The Attorney General John Ashcroft did press for a settlement but the talks collapsed and no new talks are scheduled. Meanwhile, the latest budget increased funding for the case to \$25 million. In the latest exchange of pre-trial documents, the Justice Dept. has set out a series of demands regarding the marketing, manufacture and sale of tobacco products. These will be vigorously opposed by the tobacco companies.

Food and Drug Administration jurisdiction over tobacco

In 1996, the Food and Drug Administration issued wide-ranging regulations governing the marketing of cigarettes and smokeless tobacco, particularly its impact on youth. The FDA argued that tobacco products are a sophisticated system for delivering a drug, nicotine, which has a profound effect on the function of the body - the usual basis for FDA jurisdiction over a drug. In April 1997, a federal judge in North Carolina upheld the FDA's authority to regulate tobacco and its methods of sale, while denying its jurisdiction over advertising. But in August 1998, a three-judge appeals panel reversed the judge's ruling, saying that Congress did not explicitly grant such authority to the FDA. The matter went before the US Supreme Court in December 1999.

On 21 March 2000, the US Supreme Court ruled, by a narrow 5-4 majority, that the FDA did not have jurisdiction to regulate tobacco. This was due to a combination of factors, namely that:

The relevant legislation (the Food Drug and Cosmetic Act) which defines the terms of reference of the FDA was not completely clear on the point; a series of earlier Congressional decisions which did not recognise the FDA's authority; and the FDA's own previous claims that it did not have jurisdiction over tobacco. However, nothing in the decision challenges the basic fact that tobacco is characterised as a harmful delivery system for a potent addictive drug.

The problem of regulating this uniquely harmful substance has now been passed back to the US Congress.

Individual Actions

Individual actions against the tobacco companies were not affected by the \$206bn settlement with the states' Attorney Generals. Consequently, cases continue to come before the US courts.

Patricia Henley

In February 1999, Patricia Henley, a 52-year old ex-smoker with lung cancer, was awarded a record US\$50 million in punitive damages against Philip Morris plus \$1.5 million compensation. She had sought \$975,000 in compensation and \$15m in compensation. Mrs Henley had claimed that Philip Morris had failed to put health warnings on cigarette packs when it knew of the dangers of smoking and had also concealed what it knew about the addictiveness of nicotine.

This was the first time that a jury had awarded an amount higher than the sum sought. A judge subsequently ruled that the punitive damages - which are meant to punish a company for its behaviour - be halved to \$25m, arguing that the \$50m was excessive. However, he did not overturn the verdict, saying that "the evidence was fully sufficient to support the jury's finding in every respect".

Jesse Williams

A month later, another record was broken when a jury in Oregon ordered Philip Morris to pay \$81 million to the family of Jesse Williams who had smoked Marlboro cigarettes for 40 years before he died. In this case, the punitive damages amounted to \$79.5m.

Philip Morris appealed against both verdicts. Tobacco analysts have suggested that the stream of damaging company documentation released in the past few years through tobacco litigation could have influenced the jury rulings.

On 5 June 2002, an Oregon appeals judge reversed a lower court ruling against Philip Morris that had reduced damages awarded to the family of Jesse Williams, sending the case back to the original trial court to re-enter the jury's \$80 million judgment. This is the first case in which an appeals court has reinstated a jury award rather than siding with a lower court decision in reducing the size of the award. In reinstating the original damages, the appeals court found jurors had ample evidence to support the \$80 million award and rejected arguments that the size of the punitive damages awarded was limited by previous product liability judgments. As a result, jurors were not bound by mathematical formulas and were free to award what they thought was rational, according to Judge Anna Brown, who wrote the opinion for the three-justice panel. "In this case, defendant's net worth is over \$17 billion and its profits for the year closest to the trial were over \$1.6 billion, or approximately \$30.7 million per week. The jury's award...is equal to a little more than two and a half weeks' profit," Brown wrote.

Charles Steele

A number of judgements have been made in favour of the tobacco companies. In Memphis, Tennessee, a jury ruled that three tobacco companies charged with conspiracy, fraud and negligence, were not responsible for the deaths of three life-long smokers. A major issue before the jury was whether the statute of limitations covering such claims had expired. Days later, a jury in Kansas City, Missouri, found Brown & Williamson not responsible for the death of Charles Steele, who had died of lung cancer. Mr Steele's family had contended that Brown & Williamson was liable for the allegedly defective design of its Kool brand. Proving that cigarettes are designed defectively, however, requires showing that the company could have made a safer cigarette and that the plaintiff would have smoked the brand, both difficult burdens of proof.

Leslie Whiteley

On 21 March 2000, a California jury ruled that Philip Morris and RJ Reynolds had misrepresented the health dangers of cigarettes and it ordered the companies to pay \$1.7m in compensatory damages to lung cancer victim Leslie Whiteley and her husband. The jury also found the two companies had acted with malice and subsequently awarded an additional \$20 million in punitive damages. This case is particularly significant because the plaintiff began smoking in 1972 three years after

health warnings began appearing on cigarette packs. Tobacco companies had assumed that government health warnings would help shield them from liability.

Richard Boeken

On 6 June 2001, a Los Angeles jury awarded Richard Boeken, a smoker with lung cancer, \$5.5 million in compensatory damages and \$3 billion in punitive damages against Philip Morris. On 9 August 2001 the trial judge reduced the punitive damage verdict to \$100 million. This remains the biggest single award made to an individual. However, the case is under appeal and Richard Boeken died in January 2002 without having received any of the damages award.

David Burton

In February 2002, a US federal jury ordered RJ Reynolds and Brown & Williamson to pay almost \$200,000 to a Kansas smoker who lost both his legs to a circulatory disease. David Burton, of Kansas City sued the two tobacco companies in 1994, alleging they hid the dangers of smoking from the public, even though they knew cigarettes were dangerous to human health.

In June 2002, a federal judge awarded Mr. Burton \$15 million in punitive damages, noting that Reynolds' conduct was highly blameworthy and deserving of significant punishment. "The evidence does not reflect that Reynolds has repented of its ways. It's only grudging - and questionably sincere - concessions to the scientific evidence have been wrung from it through settlements of hotly contested lawsuits," said Judge John W. Lungstrum. The Judge said that the fact that Reynolds concealed the addictive nature of tobacco was "particularly nefarious". He added: "It persists in its free-choice mantra. Reynolds has not even said in any sincere and convincing fashion that it is sorry for what it did or what happened to Mr. Burton. In many respects, this is the most disturbing aspect of this case and one which merits stiff punishment." The Burton case is the first in which a federal judge has awarded punitive damages against a tobacco company. For further information on this case see background report and link to the legal opinion.

California Supreme Court ruling - August 2002

A ruling by the California Supreme court may have a bearing on the outcome of future and existing tobacco litigation in the State. In 1988, California enacted a series of laws that gave the tobacco companies immunity from most lawsuits. Ten years later, the laws were repealed. On 5 August 2002, the high court ruled that the state's repeal was not retroactive. Therefore, the law continued to provide immunity for tobacco companies in product liability actions, but only from 1988 to 1998 when the statute was in force. The ruling has been hailed as a partial victory for the tobacco companies. Company lawyers said they would review the court's decision to see how it affected recent verdicts. However, lawyers representing plaintiffs said that while the decision shields tobacco companies from product liability during the 1988-98 period, it does not protect them from allegations of fraud, such as manipulating cigarettes to make them more addictive.

Individual lawsuits concerning 'light' / low tar cigarettes

A recent development in American tobacco litigation has been the filing of lawsuits against tobacco companies for misleading consumers about the health impact of 'light' or low tar cigarettes.

Research by industry and independent scientists has shown that after switching to lights, smokers continue to regulate their nicotine dose by drawing deeper, inhaling more often and even blocking with their fingers the air dilution holes in cigarette filters. As a result of this pattern, known as compensation, the theoretical benefits of lower-tar cigarettes are reduced or eliminated.

During the last couple of years, tobacco companies have begun putting information about the compensation phenomenon on their Web sites. Two of the three top U.S. manufacturers--Philip Morris and Brown & Williamson Tobacco Corp.--also print a small disclaimer in their ads, noting that tar and nicotine intake vary with the way people smoke. However, industry documents have revealed that the companies were aware of compensation more than thirty years ago.

In March 2002, a jury in Portland, Oregon ordered Philip Morris to pay \$168,000 in compensatory damages and \$150 million in punitive damages to the estate of a woman who smoked the company's low tar Merit brand. Michelle Schwartz died of lung cancer at the age of 53. The jury found that Philip Morris had made false claims to the effect that light cigarettes were less harmful than regular brands. The jury also found that the company's Merit cigarettes were "defective and unreasonably dangerous". Philip Morris is expected to appeal.

Similar cases are pending in almost a dozen states and are expected to be filed in others.

Price Fixing Lawsuit

A lawsuit filed on behalf of two cigarette wholesalers accuses the world's largest cigarette manufacturers of having illegally fixed prices for at least 17 years. The lawyers are seeking class action status which would allow them to represent all wholesalers and distributors hurt by the alleged price fixing. The lawsuit, filed in a Washington federal court, is not seeking a specific amount of damages but could amount to billions of dollars and involves alleged violations of international law and federal anti-trust law. The suit names as defendants Philip Morris, RJ Reynolds, Brown and Williamson (American subsidiary of BAT), Lorillard Tobacco and Liggett Group.

Tobacco Farmers sue Manufacturers

American tobacco farmers have sued cigarette manufacturers for \$69 billion in a lawsuit which contends that the companies conspired to undermine the federal system that regulates tobacco prices. The suit also contends that the industry cheated farmers and quota owners in its 1998 settlement with 46 states. The growers allege that cigarette companies violated anti-trust laws by operating as a cartel to keep the purchase of domestic tobacco leaf low. Although the US Department of Agriculture administers the quota, it is calculated according to how much leaf the cigarette makers plan to buy, the amount they plan to export and the amount stored in warehouses. The suit alleges that the industry conspired to keep the quota low, manipulating cuts that have, over three years, reduced by half the amount of flue-cured tobacco that farmers are allowed to grow.

A tobacco industry appeal against the class action status has been rejected by a US appeals court. In July 2002, the court in Richmond, Virginia, ruled for the growers, paving the way for a jury trial. The ruling allows all other quota holders to be included, which could result in up to 500,000 plaintiffs being represented.

Date of information: 2000 and 2005