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## Tobacco Control And The Role Of Litigation: A Survey Of Issues In Law, Policy, And Economics

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# TOBACCO CONTROL AND THE ROLE OF LITIGATION: A SURVEY OF ISSUES IN LAW, POLICY, AND ECONOMICS

*Basil C. Bitas & Pedro P. Barros \**

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## SUMMARY

*This article examines the course of tobacco litigation in the United States and its implications for law and policy on both the national and international levels. In our view, the disparate legal traditions and attitudes of countries outside the United States will lead the majority of such states to opt for the direct and transparent regulation of tobacco activities through formal and perhaps consensual channels. This will likely promote effective tobacco control without the policy mix encompassing a period of prolonged litigation buttressed by settlement and regulation, which has characterized the U.S. process. Therefore, despite some increased litigation in the product liability area as a whole, the approach to tobacco control on the international level is likely to be characterized by the continuing, and, indeed, increased reliance on direct regulation rather than on ad hoc litigation, the efficiencies of the former approach having now become evident.*

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“People are not disturbed by things,  
but by the view they take of them.”

-Epictetus, in *Manual V*

### A. INTRODUCTION

Tobacco litigation as it has developed in the United States and increasingly abroad constitutes an “iconic” example of private, and in some cases state-supported, litigants using the courts as an ad hoc policy-making vehicle for mediating between the interests of an existing but controversial industry and evolving societal views and priorities. Such litigation has evolved over time in terms of its scope, magnitude, and sophistication. The intent of this article is to review the history and evolution of this litigation and to assess the extent to which it has served the broader public interest (defined as achieving public health objectives in a decentralized, but efficient manner).<sup>1</sup> This paper also assesses whether the U.S. experience can serve as a guidepost for future approaches to law and policy on the international level.

The first tobacco case in the United States was filed in 1954, with international developments following some thirty years later. The first case brought outside of the United States was filed in Australia in 1986, while Europe followed in 1988 with a case in Finland. Asia became active in the 1990s, with cases in Japan, Korea, and the Philippines. More recently, China has seen an initial case filed against the State Tobacco Monopoly in 2005. Latin America, particularly Brazil, has also witnessed the development of substantial tobacco litigation in recent years, further illustrating the gradual ripple effect of the U.S. litigation experience internationally. Accordingly, tobacco litigation no longer can be seen as a strictly U.S. phenomenon.

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<sup>1</sup> Stephen D. Sugarman, *The Smoking War and the Role of Tort Law* (Apr. 3 1998) (draft), available at <http://www.law.berkeley.edu/faculty/sugarman/jgfs.htm> (evaluating the role of tort law and inquiring as to whether tobacco deserves different treatment than other product sectors, such as alcohol, automobiles, and medicines).

The initial domestic case involved an individual smoker whose wife filed a wrongful death action alleging that her husband's illness was caused by smoking, a behavior resulting from the conduct, or rather misconduct, of the industry with regard to the design, manufacture, and marketing of the product.<sup>2</sup> Over time, plaintiffs developed a number of standard allegations, including a failure of tobacco companies to warn of the dangers of smoking as they relate to its health effects or addictive properties, and allegations concerning a defective product. Other claims that have gained increasing currency in recent years are fraud and misrepresentation. Much has been made of the strategy of the tobacco companies to contest these cases using all of the resources at their disposal, despite the fact that cigarettes remain a legal and highly regulated product.

The tobacco companies have been singularly successful in defending the vast majority of these cases not only due to their use (some would say "abuse") of the procedural playing field,<sup>3</sup> but also because judges and juries have looked at the merits of these cases and have found the notion of "consumer awareness" of the risks of smoking to be a compelling defense against liability on the part of the industry.

Awareness issues can relate to both the specific awareness of the plaintiff in the case or to the general awareness or "common knowledge" of the members of the ambient social context.<sup>4</sup> Both

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<sup>2</sup> See *Cooper v. R.J. Reynolds*, 234 F.2d 170, 173 (1st Cir. 1956) (where the plaintiff sought compensation for suffering, pain, and death of her husband, who died of lung cancer after allegedly relying upon representations in certain newspaper advertisements and television and radio broadcasts to the effect that "20,000 doctors say that 'Camel' cigarettes are healthful" and that such cigarettes "are harmless to the respiratory system").

<sup>3</sup> This tactic was put into use Michael Jordan, an attorney who successfully defended R.J. Reynolds ("RJR") in the 1980s. He described the dynamics as follows: "The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers. . . . To paraphrase General Patton, the way we won these cases was not by spending all of [RJR's] money, but by making that other son of a bitch spend all his." Graham E. Kelder & Richard A. Daynard, *Tobacco Litigation as a Public Health and Cancer Control Strategy*, 51 J. AM. MED. WOMEN'S ASS'N, 57, 58 (1996).

<sup>4</sup> In Continental Europe, the duty of diligence is commonly interpreted in a general,

types of awareness evidence can be brought to bear with varying degrees of vigor, depending on the nature of the allegations or the proposed defense.

Judges and juries have found credence in the “common knowledge” defense, meaning that as a member of the given community or society, the plaintiff knew or should have known of the risks of smoking. Both groups can relate personally to this line of argument, given their own membership in the community. In addition, the “common sense” awareness defense serves as an accessible counterpoint to the more technical aspects of the medical defense. The persuasive force of this evidence seems to lie in the general perception that consumers have enough information to assess accurately the costs and benefits of tobacco consumption.

Despite a history of success in defending these cases, the industry reached a substantial settlement in 1998 with the state governments in the United States concerning the alleged misconduct of the companies and the medical treatment costs associated with smoking-attributable diseases.<sup>5</sup> These cases and the related settlement, both of which are described in greater detail below, constituted a melding of law and policy that should be factored into tobacco control policies on the international level.

It is fair to ask why the industry found it necessary or advisable to seek an accommodation when its defense posture, winning record in the cases and overall legal position were indicative of a manageable risk. The answer to this question lies in the impact of certain aspects of the U.S. legal system on the

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objective manner rather than a specific, subjective manner. Conduct is compared to that of the reasonable person placed in similar circumstances and corrected with a moral/deontological note comprised of the *bonus pater familias* formula. See Michael Faure, *Economic Analysis of Fault*, UNIFICATION OF TORT LAW 311, 316.

<sup>5</sup> The Master Settlement Agreement (MSA) was signed on November 23, 1998 between 46 states and the four largest tobacco companies. R.J. Reynolds Tobacco Company, Master Settlement Agreement, <http://www.rjrt.com/legal/stateMSA.asp> (last visited Dec. 7, 2008). In 2004, certain states (e.g., Ohio, Maine, and Massachusetts) sued the tobacco industry for money owed under the terms of the Agreement. The dispute arose from a provision allowing the reduction of industry payments for business lost. Business Wire, U.S. Tobacco Settlement ABS Undaunted as States Pursue Payments (May 2, 2006), [http://findarticles.com/p/articles/mi\\_m0EIN/is\\_/ai\\_n26847106?tag=artBody:col1](http://findarticles.com/p/articles/mi_m0EIN/is_/ai_n26847106?tag=artBody:col1).

amounts at issue, the nature of the claims, and the ability to bring these elements together in the form of new liability theories backed by parties with significant political power and resources. Against a backdrop of declining social acceptance of smoking and new studies relating to nicotine and its propensity to cause “dependence,” these developments influenced the industry to act decisively to curb further litigation.

To summarize, our discussion will initially focus on the historical evolution of tobacco litigation in the United States (Section B) as divided into several distinct chronological phases or “waves.” Section C reviews the implications and impact of evolving tobacco litigation on regulation. Then, in Section D, the international diffusion of tobacco litigation is presented. A discussion of the likely evolution of tobacco litigation and its implications for regulation in countries other than the United States is set forth in Section E. Finally, Section F provides the concluding remarks.

## **B. HISTORY OF THE U.S. EXPERIENCE**

### ***I. Early Litigation - Core Structure of an Individual Case - 1950s/60s***

A typical tobacco case, dating back to the first cases in the 1950s, alleges that an individual began smoking at a young age, ignorant of the attendant health risks, and that subsequently such individual was unable to quit due to the addictive properties of the product. These allegations were further buttressed in the late 1980s and early 1990s by findings of the U.S. Surgeon General and the U.S. Food and Drug Administration, describing nicotine as an addictive drug.<sup>6</sup> Such allegations are often reinforced by claims of

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<sup>6</sup> See generally U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING – NICOTINE ADDICTION: A REPORT OF THE SURGEON GENERAL (1988), available at [http://www.cdc.gov/tobacco/sgr/sgr\\_1988/index.htm](http://www.cdc.gov/tobacco/sgr/sgr_1988/index.htm) (concluding that nicotine is the drug in tobacco that causes addiction and that the pharmacologic and behavioral processes caused by it is similar to drugs such as heroin and cocaine); Letter from David Kessler, Commissioner, FDA, to the Coalition on Smoking or Health (1995) (stating that the FDA had received “mounting evidence” that “the nicotine ingredient in cigarettes is a powerfully addictive agent” and that “cigarette vendors control the levels of nicotine to satisfy this addiction) in Kelder &

fraud and misrepresentation regarding the conduct of the companies and the alleged information asymmetries existing between the consumers and the industry. The prevailing information environment, including what consumers knew or could have known has, however, often served to blunt these claims, thereby yielding a powerful common sense “awareness” defense that vitiates such allegations.<sup>7</sup>

As one would expect, tobacco litigation often involves a number of medical submissions on both sides, with plaintiffs seeking to meet their burden of proof regarding causation. Plaintiffs must show that despite their knowledge of the health risks, the smoking of cigarettes, due to their inherent (defective) design or the actions of the companies in the marketing of the products,<sup>8</sup> was the proximate cause of the alleged damage, whether in the form of the illness or addiction, which in recent years has been claimed as an injury. The complexity or “multi-factorial” nature of the diseases at issue often makes the establishment of medical causation difficult for plaintiffs, leading in many cases to a so-called battle of the experts. Regardless of the liability theory,

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Daynard , *supra* note 3, at 58; accord Heikki T. Hiilamo, *Tobacco Control Implications of the First European Product Liability Suit*, 14 TOBACCO

<sup>7</sup> The milestone Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (1965), mandated that each packet bear the warning, “Caution: Cigarette smoking may be hazardous to your health.” Such legal innovation proved to be an important defense for the industry, leading to a doctrine of “preemption” with regard to certain claims based on a failure to warn. See *Cippollone v. Liggett Group, Inc.*, 505 U.S. 504, 505 (1992)(concluding that Parts V and VI that § 5(b) of the 1969 Act pre-empts certain of petitioner's failure-to-warn and fraudulent misrepresentation claims, but does not pre-empt other such claims or the claims based on express warranty or conspiracy). Public Health Cigarette Act of 1969, Pub. L. No. 91-222, 84 Stat. 87 (1970), later removed all tobacco advertising from radio and television.

<sup>8</sup> Sugarman, *supra* note 1 (giving the opinion that the tort liability threat distorted the industry's incentives to develop safer cigarettes, as improvements could buttress claims relating to the defective design of earlier cigarettes and their failure to be “state-of-the-art”); see Stephen D. Sugarman, & Agnes Rody Robb, *Suing the Tobacco Companies in the U.S. and Japan*, available at <http://www.law.berkeley.edu/faculty/sugarman/NIHON.htm> (discussing the impact of the consumer by mentioning the failure of such novel designs, like the “Premier” cigarette, which may have been “safer,” but was essentially rejected by consumers for a number of subjective reasons).

whether founded on negligence (or negligent failure to warn), fraudulent misrepresentation, or strict liability regarding the design of the product, the individual plaintiffs have generally been unable to meet their burden of proof regarding causation, injury, and damage.<sup>9</sup>

The combination of the “awareness” defense (i.e., that the plaintiff knew or should have known of the risks), coupled with the difficulties in proving medical causation, resulted in tobacco companies winning the vast majority of these cases. Even in regard to claims based on intentional or fraudulent misrepresentation, awareness evidence can be used to demonstrate that the plaintiff did not – or could not – reasonably have relied on the alleged misrepresentations, knowing them to be false as a matter of “common knowledge.” Similarly, claims based on negligent failure to warn or design defect have failed due to the companies’ ability to demonstrate that the alleged dangers were known.

## ***II. The Second Wave - Role of Document Production - 1988 to 1994***<sup>10</sup>

After the first wave of litigation in the 1950s and a brief spike in cases in the mid 1960s following the publication of the

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<sup>9</sup> See Sugarman & Robb, *supra* note 8 (reviewing causation and possible bases of liability for the tobacco industry).

<sup>10</sup> Marlo Miura, Richard A. Daynard & Jonathan M. Samet, *The Role of Litigation in Tobacco Control*, 48 SALUD PÚBLICA DE MÉXICO 121 121 (2006), available at <http://www.scielosp.org/pdf/spm/v48s1/a15v48s1.pdf>. (discussing the forced release of the industry’s internal documents as constituting “one of the most powerful consequences of the recent litigation”); Richard A. Daynard, *Tobacco Litigation: A Mid Course Review*, 12 CANCER CAUSES & CONTROL 383, 383-4 (2001).

U.S. DEP’T OF HEALTH, EDUC. & WELFARE, SMOKING & HEALTHY: REPORT OF THE ADVISORY COMMITTEE OF THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964) available at <http://profiles.nlm.nih.gov/NN/B/B/M/Q/> (reaching specific conclusions concerning the relationship between smoking and health in general); see also ROYAL COLLEGE OF PHYSICIANS, SMOKING AND HEALTHY (1962) (1962) (reflecting concerns similar to those set forth in the Surgeon General’s Report of 1964); see generally ROYAL COLLEGE OF PHYSICIANS & ACTION ON SMOKING & HEALTHY, FORTY FATAL YEARS: A REVIEW OF THE 40 YEARS SINCE THE PUBLICATION OF THE 1962 REPORT FOR THE ROYAL COLLEGE OF PHYSICIANS (2002), available at <http://www.rcplondon.ac.uk/pubs/books/ash/fortyfatalyears.pdf> (discussing the relationship between smoking and “cancer of the lung” and other diseases).



1964 Surgeon General's Report,<sup>11</sup> tobacco litigation abated until 1988 when the *Cipollone* case was filed, effectively starting a second wave of litigation that exhibited distinct characteristics from the earlier group of cases.<sup>12</sup>

In the new wave of litigation, plaintiffs attempted to prove the historical core allegations through increased reliance on industry documents produced as a result of discovery,<sup>13</sup> a procedural device whereby litigants are able to ask for documents from the other side in order to narrow and focus the issues. Indeed, document production has taken on epic proportions in the United States.<sup>14</sup> Some 30 million separate items were produced in the Minnesota attorney general litigation alone, a case in which the State of Minnesota sought to recover the amounts expended to treat "smoking-attributable" illnesses among the treatment populations of certain state-supported health plans.<sup>15</sup>

### ***III. The Third Wave - Class Actions – 1990s***

For the next wave of litigation a new approach began to take shape using the procedural device of the class action.<sup>16</sup> This

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<sup>11</sup> *Cipollone*, *supra* note 7, at 504 (involving a products liability suit against tobacco companies where for the first time, the jury was allowed to view tobacco companies internal documents allegedly outlining a strategy to mislead the public about the dangers of smoking).

<sup>12</sup> For example, the earlier cases focused primarily on the fact that smoking in general was unhealthy and that the Tobacco companies should have made this public knowledge; the new wave of cases focused on the same hazards, but shifted the burden to the Tobacco companies to prove that they did not *knowingly* mislead consumers and allege that the product was safe when in fact, it was not.

<sup>13</sup> *See generally* FED R. CIV. P. . 26-37 (concerning depositions and discovery); Miura, Daynard, & Samet, *supra* note 10, at 126 (resulting in plaintiffs' attorneys and the health movements organizing and pooling resources as more cases were filed).

<sup>14</sup> Miura, Daynard, & Samet, *supra* note 10, at 130 (with the Minnesota settlement securing from the industry a "roadmap" to its internal documents and a ten-year paid depository for the documents in Minnesota and Great Britain).

<sup>15</sup> *Id.*, at 122-124 (on the use of scientific evidence in tobacco litigation); *See generally* Stanton A. Glantz et al., *THE CIGARETTE PAPERS* (1996) (on creating a massive disclosure attitude of "secret" documents everywhere).

<sup>16</sup> *See e.g.*, *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA-22 (Fla. 11th Cir. Ct. Nov. 6, 2000), *rev'd*, 853 So.2d 434 (Fla. 3d DCA 2003) (holding that certification of state-wide class of 700,000 cigarette smokers was not warranted); *Castano v. The American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (holding that a multistate class

procedural innovation was accompanied by the development of “new” substantive claims, including those relating to non-smokers exposed to second-hand smoke (or Environmental Tobacco Smoke (ETS)) and smokers injured in fires caused by cigarettes, both of which tended to eliminate or deemphasize the role of the plaintiffs’ awareness and volition in causing the alleged damage.

The use of class actions constituted an attempt to garner increased economic leverage by aggregating claims among individual smokers based on the assumption that there were common issues, typical throughout the class, and that adjudication as a class would therefore further the public policy aims of judicial economy and efficiency. The class action was an attempt to level the playing field between the industry and the plaintiffs, though the scope for misusing this procedural device to seek class status for frivolous or unsuitable claims has been great, leading most recently in the United States to the passage of the *Class Action Fairness Act* in 2005.<sup>17</sup>

No longer was the debate between a lone smoker and a powerful industry, but a clash between two powerful adversaries: the industry and a group of aggrieved smokers, whose claims in the aggregate could reach billions of dollars, including punitive damages awards authorized by the United States legal system. Beyond the litigants, the class action mechanism also attracted the attention of another powerful group: the Plaintiffs’ Bar. The

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would be decertified because district court failed to consider variation in state law affecting predominance and superiority), and *Broin v. Philip Morris Cos.*, 641 So.2d 888 (Fla. 3d DCA 1994) (involving an Environmental Tobacco Smoke (ETS) case with companies settling to pay \$300 million to a scientific research foundation to support federal legislation prohibiting smoking in international flights, among other concessions).

<sup>17</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4. Class actions face some natural difficulties in the tobacco area, including: i) the individual nature of the liability; ii) the cases becoming too large to handle; and iii) questions concerning the benefit to lawyers or their clients. *See generally* Richard O. Faulk, *Armageddon through Aggregation? The Use and Abuse of Class Actions in International Dispute Resolution*, 10 MICH. ST. DET. C.L.J. INT’L L. 205 (2001) (discussing the merits and problems of class actions); *see also* Richard A. Posner, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2003) (discussing the benefits and costs of class actions).

growing social disdain for smoking,<sup>18</sup> coupled with the high awards at issue, rendered the industry an attractive target and caused plaintiffs' lawyers to redouble their efforts to develop new and more sophisticated claims to bring a reputedly wayward industry to heel.

In addition, the contingency fees detailed *supra* provided a powerful economic incentive for plaintiffs' lawyers to take and promote these cases. Certain aspects of the United States legal system fueled the proliferation of tobacco litigation during the 1990s. Among these were the damages awards at issue,<sup>19</sup> stemming from procedural devices such as class actions for aggregating claims; the sanctioning by the U.S. legal system of punitive damages,<sup>20</sup> which could be highly disproportionate to the compensatory amounts at issue;<sup>21</sup> and the legal practice of taking cases on a contingent fee basis a practice highly restricted by most continental legal systems.<sup>22</sup>

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<sup>18</sup> The social pressure against tobacco benefited from several attempts from the FDA to regulate nicotine as a drug. *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) (holding that the FDA had no authority to regulate tobacco). Individual plaintiffs also turned their attention to the addictive nature of cigarettes by alleging that while they "chose" to smoke, they were not free to stop. The 29 Surgeon General's Reports on Smoking and Health published between 1964-2006 were also instrumental in sustaining this momentum.

<sup>19</sup> *See* Matthias Reimann, *Liability for Defective Products at the Beginning of the Twenty-First Century: Emergence of a Worldwide Standard?*, 51 AM. J. COMP. L. 751 (2003) (for a comparison with the rest of the world regarding product liability awards).

<sup>20</sup> In Continental Europe, modern theories of liability generally assume a compensatory function not a punitive one. This is a point stressed and criticized by the Law and Economics school. *See generally*, DAVID D. FRIEDMAN, *LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS* 206-211 (2000); STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 243-247 (2004) (on the economic rationale for punitive damages).

<sup>21</sup> CASS R. SUNSTEIN, REID HASTIE, JOHN W. PAYNE, DAVID A. ACHKADE, & W. KIP VISCUSI, *PUNITIVE DAMAGES: HOW JURIES DECIDE* (2002) (general view of the debate surrounding punitive damages); Thomas A. Eaton, David B. Mustard & Susette M. Talarico, *The Effects of Seeking Punitive Damages on the Processing Tort Claims*, 34 J. LEGAL STUD. 343, 343-44 (2005) ("Critics maintain that punitive damage awards are highly unpredictable, with large variations in size, and that juries are ill informed and poorly equipped to perform rational risk assessment.").

<sup>22</sup> *See* Reimann, *supra* note 19, at 823 n.385.

The confluence of a “socially” unacceptable industry, the prospects of substantial damages awards, and an active Plaintiffs’ Bar, all underwritten by contingent fee arrangements, spawned a type of legal “free-for-all” caricatured both at home and abroad in numerous television programs and movies. To paraphrase John Grisham, the reality was if not a “runaway jury,” a runaway legal system. Parties disagree as to whether this heightened activity has promoted the interests of tobacco control, improved the lives of those bringing the cases, and contributed to a constructive *modus vivendi*, or whether it has merely enriched lawyers on both sides and created a type of Mexican “stand-off” resulting in a misallocation of both intellectual and financial resources.<sup>23</sup> The more limited scope and volume of tobacco litigation in jurisdictions outside of the United States suggest that the favorable procedural context and related financial incentives were a major factor in the proliferation of these cases in the United States as opposed to elsewhere. Moreover, the overall societal welfare achieved in the United States in terms of resources expended and efficiencies gained remains questionable.

#### ***IV. The Third Wave Continues: Medical Cost Recoupment Litigation – 1994 and Beyond***

In developing new and more sophisticated claims, the Plaintiffs’ Bar sought to leverage the mechanisms for aggregating claims and to blunt the effect of “awareness” evidence, which convinced both judges and juries that individuals were responsible for their own situations when duly aware of the risks of a given behavior. The class action mechanism had achieved the aggregation of damages amounts, but still left plaintiffs vulnerable to arguments that smoking behavior and disease were largely individualized inquiries. As a result, the federal courts in the

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<sup>23</sup> See Daynard & Kelder, *supra* note 3, at 57; Miura, Daynard & Samet, *supra* note 10 (both reviewing the 50- year history of U.S. tobacco litigation from a public health, advocacy perspective, portraying litigation as a valid and important strategy for tobacco control and expressing enthusiasm about the efficacy and prospects of success for the “third wave” of litigation).

United States have not certified the majority of class actions. Instead they continue to be viewed as individualized claims that fail to meet the criteria of commonality, typicality, and predominance regarding the issues at hand, and as a result fail to further the broader goals of judicial economy and efficiency.

Under Rule 23 of the Federal Rules of Civil Procedure, class certification depends on the satisfaction of the criteria of numerosity, typicality, and commonality. The named plaintiffs must also demonstrate that they can adequately represent the class. For mass tort actions claiming monetary damages, plaintiffs must further demonstrate that the common issues “predominate” and that the class action mechanism is superior to other forms of dispute resolution in terms of efficiency and judicial economy.<sup>24</sup> The extent to which these last two criteria are fulfilled falls within the purview of judicial discretion; the individualized nature of smoking behavior, lifestyles, and disease, have, in the view of most federal courts, rendered these cases unsuitable for certification.<sup>25</sup>

The state courts have been somewhat more accommodating in certifying these cases, with the *Engle* case in Florida being the most notable example.<sup>26</sup> However, even a certified class becomes subject at a later stage to a series of mini-trials, where questions concerning the nature of each claimant’s disease, behavior, individual level of awareness, and resulting responsibility are examined. Accordingly, while the class action mechanism afforded a degree of leverage by creating blocks of claimants and high

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<sup>24</sup> “A class action may be maintained if Rule 23(a) is satisfied and if... (3) *the court finds* that the questions of law or fact common to the members of the class *predominate* over any questions affecting only individual members, and that a class action is *superior to other available methods for* fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3) (2008) (emphasis added).

<sup>25</sup> Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998) (suggesting the introduction of a Cigarette Card to make proof and trial development issues easier and to allow easier certification of such actions; smokers would register with the government thus making possible aggregations less complicated).

<sup>26</sup> See Class Representation Amended Class Action Complaint for Compensatory and Punitive Damages, *Engle v. R.J. Reynolds Tobacco Co.*, Case No. 94-08273 CA 22, 2001 WL 34133821 (Fla. 11th Cir. Ct. May 7, 2001) was filed on May 5, 1994. This was the first smokers’ class action suit filed to reach trial in U.S. history.

damages amounts, it failed to obviate the persuasive defenses developed to dissect the nature of an individual's claim and personal responsibility in respect thereof.

Given the lack of success of this approach, a new strategy emerged: asking for medical cost recoupment. Medical cost recoupment cases offered the prospect of high damages amounts, the active involvement of the state as a political support to the plaintiffs' bar, and a potentially viable means of blunting the effect of the defense's individualized evidence, whether based on awareness or personal medical history.

Stated succinctly, medical cost recoupment litigation takes a treatment population, such as a state-supported medical program, and, through statistics, ascribes a portion of disease and related treatment costs to the use of tobacco, the so-called "smoking attributable fraction."<sup>27</sup> It is no longer the smoker who brings the claim, but rather a third-party payor, such as an insurance company. As such, the notion of individual awareness is relegated to a secondary level. The state, or in some cases the managers of the health plan, such as Blue Cross/Blue Shield, simply claim that they are being left with a bill, or excess costs,<sup>28</sup> for which they are not responsible as a result of their own conduct. In so doing, they assert that individual awareness is not relevant to their claim, to the extent that their claim is separate and distinct from the individualized conduct of the treatment population. This makes this wave quite distinct from the first and second wave of litigation cases.

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<sup>27</sup> Miura, Daynard, & Samet, *supra* note 10, at 124.

<sup>28</sup> See Sugarman, *supra* note 1, at 5 (challenging the argument by advancing the idea that smokers "more than pay their way"); see e.g., Robert S. Goldfarb, Thomas C. Leonard & Steven M. Suranovic, *Are rival theories of smoking underdetermined?*, 8 J.ECON. METHODOLOGY 229 (2001); W. Kip Viscusi, *Cigarette Taxation and the Social Consequences of Smoking* 29-33 (Nat'l Bureau of Econ. Research, Working Paper No. 4891, 1994) (calling attention to the states "creative" calculation of medical costs); *contra*, Nancy Warring, *Hanson and Viscusi Dispute the True Cost of Smoking*, HARV. LAW BULL., Summer 1998, available at <http://www.law.harvard.edu/news/bulletin/backissues/summer98/article9.html> (pointing out the intrinsic limits of cost/benefit analysis in certain issues).

Medical cost recoupment cases introduced another crucial change. The initiative for bringing the case is with a third party health care payor, possessing enhanced political power. There was an implicit assumption that the marginal costs of individual behavior, whether in terms of tobacco consumption, health care utilization, and other similar lifestyle choices could somehow be “homogenized” into a broad statistical model. This failure to segment individuals to evaluate their behavior as economic actors was inconsistent with the traditional approach to these questions from both an economic and litigation perspective. It did, however, provide a powerful means for taking the focus off of both the individual and the state in terms of the “prophylactic” steps that could have been taken, whether through individual choices or prevention programs, and thereby blunted the effectiveness of the individualized defenses that had played a large part in company defense strategies up to that time. The manner in which the cases were brought and the ultimate settlement essentially constituted a cost shifting from health plans to the companies.<sup>29</sup> This was a profound development with significant implications for the policy making process and the overall balance between regulation and litigation.

Without wishing to be overly legalistic, the defense has countered that the claims are derivative of those of the individuals in the treatment population. As such, the state or medical fund must proceed in subrogation, or on a case-by-case basis, as an insurer and the defense should be entitled to all of the defenses it would have in any individual case. In such cases there is no “direct” action, to the extent that the damages claimed by the

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<sup>29</sup> See Daynard & Kelder, *supra* note 3 at 57 (arguing that third wave cases “could shift billions of dollars of health and productivity costs from families and third-party payers to cigarette companies, forcing increases in cigarette prices and consequent large drops in consumption, especially among children and teenagers;” though contending that this is an inefficient shift); Daniel Givelber, *Cigarette Law*, 73 INDIANA L.J. 867, 867-69 (1998) (claiming “one might assume that what the states are asking for is precisely what the progenitors of strict products liability envisioned: enterprise liability for the manufacturers of an inherently dangerous product,” in reality, this shift to the companies means no more than obliging them to “fully” internalize the social costs of tobacco sale); *contra* Sugarman & Robb, *supra* note 8, at 4-6.

medical program are too remote and derivative of those of the individual members of the treatment population. The exclusive remedy therefore lay in subrogation. This line of defense was well-founded in the body of domestic tort law at the time that the first cost recoupment case was brought in Mississippi in 1994. This case was later followed by some 49 other state cases.<sup>30</sup> Given the emerging legal doctrine, some states, including Florida,<sup>31</sup> passed legislation that allowed such cases to go forward by providing for a statutorily created “direct” action on the part of the state and denying the companies the right to raise individualized defenses.

The powerful mix of social and political forces provided an almost irresistible momentum for the states and the industry to seek an accommodation. With huge damages awards at issue and the state bureaucracies mobilized against the industry, the downside risk of a series of cascading billion dollar judgments constituted a risk that the industry could not afford to take. Negotiations with members of the Clinton White House began with a view towards seeking a global accommodation that would resolve the existing litigation and provide a set of ground rules and safeguards going forward to be ratified by an Act of Congress.<sup>32</sup>

The nature of the political process, together with the industry’s “sultry” reputation conspired, however, to torpedo these

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<sup>30</sup> Mississippi was the first state to sue tobacco companies in 1994. *In re Mike Moore ex rel. State of Mississippi Tobacco Litigation*, Cause No. 94-1429, 2006 WL 3804253 (Miss. Ch. May 30, 2006). The case was settled in 1997 and one year later three other settlements were reached with Florida, Texas, and Minnesota, generating a payment from the industry of \$35.3 billion for a period of 25 years, among many other obligations. These individual state settlements were followed by the MSA, covering the outstanding recoupment claims of the remaining 46 states. See *The Government and the Courts – Suing the Tobacco Companies*, <http://www.libraryindex.com/pages/2134/Government-Courts-SUING-TOBACCO-COMPANIES.html> (last visited Nov. 24, 2008).

<sup>31</sup> See Florida’s Medicaid Third-Party Liability Act, Fla. Stat. § 409.910 (Supp. 1994). See Jeremy Bulow & Paul Klemperer, *The Tobacco Deal*, 1998 BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 323, 334.

<sup>32</sup> THE MULTISTATE MASTER SETTLEMENT AGREEMENT AND LOCAL TOBACCO CONTROL: AN ANALYSIS OF SELECTED TOPICS AND PROVISIONS OF THE MULTISTATE MASTER SETTLEMENT AGREEMENT OF NOVEMBER 23, 1998 (Graham. Kelder & Patricia Davidson, eds., 1999) available at [http://www.tobacco.neu.edu/tobacco\\_control/resources/msa/msa\\_analysis.pdf](http://www.tobacco.neu.edu/tobacco_control/resources/msa/msa_analysis.pdf).



negotiations. The scope and nature of the historical allegations lodged against the industry caused Congress to up the proverbial ante until such time as the industry could no longer pursue the negotiations at that level. These discussions were eventually replaced by a direct dialogue with the states resulting in a more limited accord, the Master Settlement Agreement (“MSA”) of 1998, whereby the industry agreed to pay \$206 billion to the states over a twenty-five year period and to curb certain marketing practices in exchange for the dropping of all similar claims.<sup>33</sup>

The MSA provided less sweeping protections (e.g., no formal cap on punitive damages in tobacco cases), but that had the virtue of being self-contained, manageable, and conducive to immediate implementation.<sup>34</sup> Subsequently, medical cost recoupment cases brought by private health funds, as opposed to the states, have repeatedly failed on the grounds that there is no cause of action. Denied the political lever of state support and various forms of enabling legislation, plaintiffs have been unsuccessful as judges have begun to reassert and apply traditional legal doctrine to assess and dispose of these cases.

The MSA can be highlighted then as a consequence to a large extent of government power and the risks it posed to industry, rather than a result of clear-cut legal grounds alone. Without government power on the other side, the tobacco industry probably would have recovered the upper hand in litigation.

### ***V. Other Developments – The Federal and “Lights” Cases***

Despite the movement toward a new equilibrium between governmental authorities and the industry, culminating with the MSA and the dialogue it promoted, throwbacks to an earlier period of managing the tobacco industry through litigation persist. The

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<sup>33</sup> The MSA targeted tobacco advertising/sponsorship/merchandising and included specific provisions to regulate and curb youth access and restrict lobbying. It also created a National Foundation to study and develop programs on youth use and abuse of tobacco and to support educational programs to prevent diseases associated with tobacco product use. *Id.* (giving a more detailed analysis of the MSA).

<sup>34</sup> See Bulow & Klemperer, *supra* note 31, (making an exhaustive critical review of the MSA).

federal government, which was not a party to the MSA, brought a separate case against the industry filed on September 22, 1999 in the United States District Court for the District of Columbia. This case included claims for medical cost recoupment, fraud and misrepresentation, and racketeering, buttressed by the Racketeering Influenced Corrupt Organizations Act, known as RICO, a statute originally conceived to break up the criminal enterprises of organized crime.<sup>35</sup> The medical cost recoupment claims of the federal government's case have since been rejected, with only the RICO claims having survived.<sup>36</sup> Subsequently, these claims have been "defanged" pursuant to a ruling issued by the U.S. Court of Appeals for the District of Columbia on February 4, 2005, holding that the RICO statute does not support claims for "disgorgement," the government having claimed that the industry should "disgorge" its past profits in the amount of \$290 billion. This decision was allowed to stand by the United States Supreme Court, which denied certiorari on October 17, 2005.

On August 17, 2006, the United States District Court for the District of Columbia, with regard to the remaining allegations, found that the defendant companies had been guilty of racketeering under the terms of the RICO statute. The Court further ruled, however, that RICO, as written, did not support a claim for monetary damages or for other similar monetary remedies (e.g., compulsory financing by the companies of education programs), particularly in light of the previous ruling on "disgorgement." The government's victory was therefore seen as pyrrhic, although public health advocates have stressed its significance:

The importance of today's decision will be minimized by the racketeering defendants, but the historic finding and remedies imposed by the Court will 1) forever brand the cigarette companies as racketeers; 2) energize trial attorneys and provide a powerful set of documentary and testimonial

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<sup>35</sup> Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2006).

<sup>36</sup> See Miura, Daynard & Samet, *supra* note 10, at 130.

evidence and findings of fact to bolster cigarette litigation; 3) undermine the credibility of the companies as they try to push into emerging markets around the world; and 4) serve as a powerful antidote to cigarette company attempts to portray themselves as responsible corporate citizens.<sup>37</sup>

The disposition of the Federal case suggests the courts have seen fit to allow these issues to migrate toward the legislative arena. However, there has been a recent move toward formulating a new type of case involving “light” cigarettes. These cases allege that the development of “light” cigarettes constituted a cynical strategy on the part of the industry to maintain the stock of smokers by promoting a “safer” cigarette, which was in reality just as harmful, if not more so, than existing products.

While certain individual cases involve “lights” issues, the allegations are, for the most part, predicated on consumer fraud. These involve claims among broad classes of consumers who allege that during a given number of years they purchased the product under false pretenses. These claims are formulated in terms of pure economic loss on the part of asymptomatic smokers who are claiming a refund in the event that the “light” cigarettes purchased did not provide a reduced level of harmfulness.<sup>38</sup>

Class actions in this area are subject to the hurdles mentioned previously and have therefore met with uneven success in terms of certification. One notable case, *Price v. Philip Morris et al*, decided in March 2003 by a judge in Madison County,

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<sup>37</sup> *U.S. Cigarette Companies Liable for Violating Federal Anti-Racketeering Statute: Background and Commentary* (August 17, 2006), available at [http://www.tobacco.neu.edu/litigation/cases/DOJ/kessler\\_decision\\_0806.htm](http://www.tobacco.neu.edu/litigation/cases/DOJ/kessler_decision_0806.htm).

<sup>38</sup> These cases were propelled by recent evidence or findings presented by several institutions, such as the U.S. National Research Council, the International Agency for Research on Cancer of the World Health Organization, the U.S. National Cancer Institute, and the U.S. Surgeon General; . Miura, Daynard, & Samet, *supra* note 10, at 1293; . Reimann, *supra* note 19, at 786 (explaining that pure economic loss does not generally allow actions for redressing pure economic loss, thus plaintiffs must turn to general private law.).

Illinois, yielded a multibillion verdict involving both compensatory and punitive damages. The judgment has since been overturned by the Illinois Supreme Court in a judgment rendered on December 15, 2005.<sup>39</sup> Plaintiffs' motion for a rehearing was denied in a ruling rendered by the same court on May 6, 2006 and the United States Supreme Court has since declined to review the case.

The "lights" cases reveal an evolving trend in tobacco litigation toward the use of novel legal theories as a basis for recovery for past industry behavior. Such an approach is open to question as the development and marketing of these products was undertaken with the medical community. It now centers on the manner in which "light" cigarettes were developed and whether the industry applied best practices with regard to their design, manufacture, and marketing. As the authorities and the industry move toward a greater degree of partnership in managing the externalities associated with cigarettes, these cases could play a useful role in an increasingly constructive dialogue between government and industry about how best to manage a "product that everybody loves to hate."<sup>40</sup> Whether an evolution from litigation in court to settlement agreements will eventually emerge is still too early to say.

### **C. ECONOMIC AND REGULATORY OUTCOMES OF THE U.S. EXPERIENCE**

#### ***I. Law and Economics***

The United States experience concerning recoupment litigation has set the stage for international tobacco litigation and offers lessons to the international arena. Medical cost recoupment

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<sup>39</sup> The Illinois Supreme Court noted that the Federal Trade Commission explicitly authorized the company to use descriptors such as "lights" and "low-tar." As such, Philip Morris could not be held liable for the use of those terms under section 10b (1) of the Illinois Consumer Fraud Act or under the Illinois Deceptive Practices Act. *See Price v. Philip Morris, Inc.*, 848 N.E.2d 11, 54 (Ill. 2005).

<sup>40</sup> *Schwab v. Phillip Morris USA, Inc.*, 449 F.Supp.2d 992, 1121-1132 (E.D.N.Y. 2006) (certifying a national class of "lights" smokers by alleging fraud and conspiracy under the RICO statute which suggests that the "lights" cases retain a certain level of political and legal vitality).

litigation, particularly as framed by the states, marked a concerted attempt to transform the underlying dispute into one centered on economic damage (i.e., aggregate economic costs to the third party health payor rather than “specific” payments for individualized, personal injury). The third party payors were claiming what was, in their view, pure economic loss, albeit one that was “derivative” of an underlying personal injury (i.e., the costs associated with the diseased population). This approach led to a reliance on statistical aggregates rather than individualized proof. It often resulted in a particular reliance on epidemiological data and, to some extent, reflected a collapsing of public health policy issues into an adjudicative setting.

Population attributable risk calculations, which underlie many of the damages calculations, sought to take epidemiological data, combined with smoking prevalence data, to generate a coefficient that could be applied against a “basket” of treatment costs to arrive at a damages amount.<sup>41</sup> While such figures could yield a broad measure of an estimated cost of smoking, they could not estimate the cost of conduct, or, in the plaintiffs’ view, alleged misconduct of the companies.<sup>42</sup> The latter was the crux of plaintiffs’ legal argument that through bad acts (i.e., misleading advertising, etc.) the industry had created excess smoking, which had in turn resulted in excess disease and associated medical costs. This conduct element was absent in plaintiffs’ early modeling exercises, but they later sought to address it, albeit unpersuasively.

In particular, since the health plans affect the behavior of the beneficiaries in a potentially relevant way, the decisions to initiate, quit, or continue smoking cannot be traced solely to

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<sup>41</sup> Such computations are based on regularities across the population and therefore do not take into account a particular individual or situation.

<sup>42</sup> See Bulow & Klemperer, *supra* note 31, at 39383. (“If the litigation against the companies were focused on truth seeking and a fair calculation of damages, then we would be less enthusiastic about legal protections. But none of the parties seems particularly concerned about relating payments to damages. That is why the up-front damage payments were based on how deep each company’s pockets were and not on its contribution to disease.”).

company activities.<sup>43</sup> Comparisons to reveal the effect of company conduct on consumption, and by extension disease and cost, could include smoking rates of individuals in environments with different levels of advertising and a certain level of insurance as well as between individuals with and without insurance, given a constant level of advertising. Even this analysis, however, fails to distinguish between “company conduct” and “company misconduct,” another potentially relevant aspect of plaintiffs’ legal argumentation and related damages calculations.

The main methodological problems with this approach lie in the identification of a clear control group. To trace clearly the effects of ‘misconduct,’ it is necessary to identify observable decisions or consequences that arise under ‘misconduct’ but not under ‘proper conduct,’ the mere act of selling cigarettes as a duly authorized, legal activity. To the extent that smokers’ illnesses can develop under either form of ‘conduct’ on the part of the companies, the mere onset of illness is insufficient to distinguish one case from the other. Plaintiffs’ usual approach implied that assessing the likelihood of developing an illness was a proxy for company misconduct, but it is unclear how to interpret the available information in order to isolate “unambiguous” misconduct of firms and the effect thereof from authorized commercial behavior. In short, plaintiffs’ aggregate damages theories masked the microeconomic analysis of consumer behavior and the contribution of company behavior (alleged misconduct) that would normally have been required to establish a colorable claim.

With regard to the estimates themselves, plaintiffs offered numbers considered only as ranges to prove the precise magnitude of damage. It is here that one sees the potential nexus between public health policy and the adjudicative process. Estimates that

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<sup>43</sup> Goldfarb, Robert, Leonard & Suranovic, *supra* note 28, at 232-33 (summarizing rational/non-rational smoking theories that reflect the complexity of calculations and models and focus on smoker behavior rather than company conduct); *see also* Gary S. Becker & Kevin M. Murphy, *A Theory of Rational Addiction*, 96 J. POL. ECON 675 (1988).

could have been used to formulate broad tax and regulatory strategies were offered as measures of damage between litigants. Expert submissions from the defense often highlighted this point, signaling the misuse of these statistical tools and constructs for the designated purposes, but allowing that they could be useful in other contexts, such as the public policy forum.

As the disputes with the states shifted from the courtroom to the negotiating arena, these broad measures of alleged damage became more appropriate benchmarks for discussion. They set the stage for the implementation of a new *modus vivendi* between the states and the industry, incorporating the settlement of the outstanding claims, while at the same time setting rules concerning marketing and future reporting requirements concerning consumption, particularly among juveniles. Within this broader policy context, the disputes between the states and the industry had turned into an argument about the cost of doing business and the appropriate level of the associated tax.

Today the MSA lays out the ground rules between the companies and the states as to future compensation and required conduct. While the implementation of this agreement is monitored through formal channels, one wonders whether this type of a negotiated accord provides the level of procedural transparency and predictability that a similar piece of legislation might have offered, particularly given the twenty-five year time horizon.

## ***II. The Interplay of Litigation and Regulation -- The Rulemaking Process***<sup>44</sup>

In the recoupment cases, litigation was essentially used to promote “consensual rulemaking,” albeit with a coercive element, namely the threat of multi-billion dollar judgments supplemented by punitive damages. In settling these cases, the states took a realistic view of the role of tobacco in society, recognizing its role as a highly flexible source of budgetary revenue and acknowledging that a substantial percentage of the population will choose to smoke irrespective of the marketing activities undertaken by the companies. The accommodation reached in the MSA amounted to an “atonement” by the industry for past activities viewed through a modern-day lens concerning appropriate standards of corporate morality and, more importantly, established a compact for managing a popular yet hazardous product. It acknowledged the economic dislocation that would be caused by “emasculating” an industry overnight, with the attendant implications for employment and the reallocation of industrial capacity. In short, the MSA constituted the melding of law and politics with the “art of the possible” to manage evolving economic and social realities.

Assuming that the states sought to act in a benevolent manner to address a pressing public health problem,<sup>45</sup> it is worth

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<sup>44</sup> This interplay has been widely discussed under the title of “Regulation through Litigation” as it relates to risky products and products liability where regulatory standards have fallen short. The issue is whether litigation is needed to pursue regulation. See Doug Bandow, *Litigative vs. Legislative Democracy*, THE CATO INSTITUTE (March 20, 2000), available at [http://www.cato.org/pub\\_display.php?pub\\_id=4752](http://www.cato.org/pub_display.php?pub_id=4752) (noting the inefficiency of litigation, stressing that political regulatory silence remains a valid posture that should be respected and not necessarily interpreted as a political failure); *contra generally* Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO L.J. 693 (2007) arguing that jurors and courts are institutions that provide a necessary avenue for intervention). The Illinois Supreme Court ruling in *Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E. 2d 801 (Ill. 2005) has been interpreted as a blow against the regulation through litigation movement.

<sup>45</sup> Anti-smoking groups advocate the prohibition of tobacco sale as a solution. This approach would probably be effective but would raise certain problems, namely the creation of a black market and problems of a “paternalistic” nature.



examining both their rationale and approach. The justification for government intervention of this type usually results from some form of market failure regarding the inefficient dissemination of information and the management of the resulting externalities (costs) to society.<sup>46</sup> The typical policy response to such a situation would be to raise prices through a tax increase to cover the estimated cost of the externality.<sup>47</sup>

In the present situation, the states increased the cost of the product on the front-end via litigation and then imposed a tax on the back-end through the settlement.<sup>48</sup> From the range of policy instruments that were at the disposal of the states, it would appear that they opted for the lever that was most politically and/or socially acceptable (i.e., suing the companies) but perhaps least efficient in terms of the overall cost of implementation and associated transaction costs.<sup>49</sup> A contrary view holds that the political leverage of the companies in the various state legislatures rendered the judicial route the best and, in some respects, the only means for effecting far-reaching “regulatory” change in the industry.<sup>50</sup> Accordingly, there is a nexus between regulation and litigation with the appropriate balance lying, to some extent, in the eye of the proverbial beholder.

In an important paper by J. Bulow and P. Klemperer

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<sup>46</sup> Goldfarb, Leonard, & Suranovic, *supra* note 28, at 237 (discussing the efficient dissemination of information); Viscusi, *supra* note 28, at 33 (enumerating savings arising from the shorter life expectancy of smokers); *contra* Hanson & Logue, *supra* note 25, at 1185-1223; Warring, *supra* note 28 (identifying two main market failures: i) if smokers were fully informed of the smoking risks/companies’ misconduct they would change/have changed their decisions and ii) there is an externalization of part of the smoking social costs to the smokers’ insurers; which justify imposition of liability on the tobacco companies).

<sup>47</sup> Viscusi, *supra* note 28, at 2-3 (for a presentation of possible justifications for the use of taxes).

<sup>48</sup> *Id.* at 9-11; Sugarman, *supra* note 1 (nothing that this illegitimate “tax windfall” may produce a consequence --- an open season against all risky products).

<sup>49</sup> Viscusi, *supra* note 28 at 29-33.

<sup>50</sup> *Contra* Wagner, *supra* note 44, at 694-695 (claiming a political process failure with regards to risky products with the Courts becoming a “supplemental institutional mechanism for making products safer” rather than an “illegitimate end-run around the political process” as most leading scholars believe).

entitled “The Tobacco Deal,” the authors contend that the crucial trade-off for the companies as set forth in the MSA was between liability protection and increases in cigarette taxes.<sup>51</sup> While taxes were undesirable, the companies were able to use the agreement as a coordination device, to set prices closer to the monopoly level. In so doing, the recoupment litigation, and specifically the MSA, recognized the reality of industry concentration and pricing power while using the same to impose a heightened control over industry activities, such as advertising. These were far-reaching compromises and trade-offs to be reached through litigation rather than regulation.<sup>52</sup>

**D. STRATEGIC AND ANALYTICAL  
CONSIDERATIONS OF THE U.S. EXPERIENCE  
FOR THE INTERNATIONAL SPHERE**

As one considers the growing activism on the international level with regard to both tobacco control and litigation activity,<sup>53</sup> the following questions can be posed:

- (a) To what extent must, or should, the U.S. experience be replicated on the international level to bring tobacco/cigarettes,<sup>54</sup> a product with obvious

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<sup>51</sup> Bulow & Klemperer, *supra* note 31, at 33810 (“The central trade-off was that the companies would accepting an increase in cigarette taxes in return for liability protections.”).

<sup>52</sup> *Contra* Bandow, *supra* note 46 (arguing against the use of litigation to establish policy); Wagner, *supra* note 44, at 695.

<sup>53</sup> David M. Cutler & Edward L. Glaeser, *Why Do Europeans Smoke More Than Americans?* (Nat’l Bureau of Econ. Research, at’l Working Paper No.12124, 2006) (Bureau of Econ. Research, Working Paper No. 12124, 2006) (speculating that tobacco litigation may prove useful in raising the consciousness of the dangers of smoking, thereby yielding a social benefit from litigation to the extent that the dissemination of such information could not be achieved through consensual bargaining). *See* POSNER, *supra* note 17, at 383-385 (discussing the social benefits of litigation).

<sup>54</sup> The U.S. experience regarding tobacco litigation may also inform the debate concerning other public health issues, such as obesity and alcohol. *See, e.g.*, The Public’s Health and the Law in the 21<sup>st</sup> Century, Fifth Annual Partnership Conference, June 12-14, 2006, available at <http://www2.cdc.gov/phlp/conferencecd2006/overview.>; *see also* Amy N. Fairweather & James F. Mosher, *Implications of Tobacco Litigation for Alcohol Policy*, Paper delivered at the 131st Annual Meeting of the American Public Health Association (November 17, 2003) available at [www.cslep.org/publications/APHA2003](http://www.cslep.org/publications/APHA2003)

externalities but substantial natural demand, into conformity with current societal norms?

- (b) Does the U.S. litigation experience and the evolving social, economic, and commercial equilibrium arising therefrom offer a platform for addressing the “tobacco issue” internationally in a more forthright and economically efficient manner than has been the case in the United States?
- (c) Do evolving standards of corporate responsibility, increasing globalization, and the tobacco industry’s desire to project unified messages and to apply consistent behavioral norms offer opportunities for transparent regulatory action in which litigation would be one of many levers, but not necessarily the preferred one, given its inherent inefficiency?

In examining these questions, juxtaposing the U.S. litigation experience against the evolving international legal environment provides insights concerning opportunities for managing what is universally acknowledged as a significant public health problem.<sup>55</sup> This is particularly helpful given the range of economic interests of seminal national importance at issue,

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AlcoholLitigationpaper.pdf

<sup>55</sup> See generally U.S. Dep’t of Health & Human Services, *The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General*, at i (2006), <http://www.surgeongeneral.gov/library/secondhandsmoke/report/fullreport.pdf> (“[T]his twenty-ninth report...documents the serious and deadly health effects of involuntary exposure to tobacco smoke.”); World Health Organization, *World Health Organization, WHO Framework Convention on Tobacco Control 1* (2reprint 2005003), available at [http://www.who.int/tobacco/framework/WHO\\_FCTC\\_english.pdf](http://www.who.int/tobacco/framework/WHO_FCTC_english.pdf) (recognizing in Preamble “that “[T]he spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation....”); Benjamin Mason Meier, *Breathing Life into the Framework Convention on Tobacco Control: Smoking Cessation and the Right to Health*, 5 YALE J. HEALTH POL’Y L. & ETHICS 137, 137-41 (2005) (noting the direct mal-effects of smoking, of secondhand smoke, and of tobacco production, and emphasizing that “[t]his threat to global health...cannot consciously be ignored”).

including budgetary flexibility, employment, and the allocation of productive capacity.<sup>56</sup>

Tobacco litigation has spread to diverse parts of the world, albeit with less scope and intensity than in the United States. The preoccupation of international institutions with tobacco control issues and related policies has however become a hallmark of the world stage. Since 1980, the European Union has enacted more than twenty instruments addressing the tobacco question, including directives, decisions, resolutions, and recommendations.

A careful reading of such documents reveals the preoccupation of the EU with balancing regulatory policy concerning public health with the values and functioning of a free market economy. Such concerns are manifested in the key legal texts, where the first reference/first legal basis advanced is linked to the protection of the common market and the associated free flow of goods. This point is clearly set forth in Directive 2001/37/EC of the European Parliament and of the Council of June 5, 2001, wherein Article 13<sup>o</sup> provides that the consumption, sale, and importation of tobacco products in conformity with this Directive cannot be forbidden or restricted.<sup>57</sup>

Tobacco control policies and measures implemented on the

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<sup>56</sup> See Gijsbert van Liemt, *The World Tobacco Industry: Trends and Prospects* 21-22, 25, 29 (Int'l Labour Office Working Paper No. 179, 2002), available at <http://www.ilo.org/public/english/dialogue/sector/papers/tobacco/wp179.pdf> (explaining the economic dependence of certain sectors of the population on the tobacco industry).

<sup>57</sup> The expansive coverage of such regulatory instruments includes the following issues: i) youth smoking; ii) workplace protection; iii) the protection of non-smokers in general; iv) tobacco and product specifications, including tar, nicotine, and associated ISO (International Standards Organization) measurement methods; v) labeling, promotion, sponsorship, publicity; and vi) environment and sensitive spaces). These instruments are particularly useful in that they (1) raise a legitimate question as to the necessity of using litigation as a gap-filling technique to supplement regulatory policy, and) (2) examine whether other similar justifications exist to support the efficiency of litigation in this sphere. This point is clearly set forth in Directive 2001/37/EC of the European Parliament and of the Council of 5, June 2001, wherein Article 13<sup>o</sup> (providing that the consumption, sale, and importation of tobacco products in conformity with this Directive cannot be forbidden or restricted). See W. Kip Viscusi, *Regulation of Health, Safety and Environmental Risks* 3-4 (Nat'l Bureau of Econ. Research, Working Paper No. 11934, 2006), available at <http://www.nber.org/papers/w11934>.

international level have therefore sought to balance public health objectives with economic considerations. An examination of the interplay of law and economics in the U.S. litigation context, particularly in terms of the scope and evolution of the cases brought, and the impact thereof on the current commercial, economic, and regulatory *modus vivendi* can aid policymakers in assessing the implications of this regulatory dynamic.

When considering the possible international implications of U.S. tobacco control, one needs to acknowledge the specific conditions of the legal system of the home country. The United States has a unique approach to litigation, particularly as it relates to mass torts and product liability claims. The courts have been propelled to the center of the debate, with litigants seeking to vindicate their rights before judges vested with great discretion over the scope and progress of the proceedings and lay juries capable of meting out substantial monetary awards. This primacy of the judicial system in arbitrating among the various societal stakeholders might or might not be consistent with systems that have adopted a more regulatory and administrative approach to managing issues of broad societal significance, such as those in Europe, and to some extent Asia.<sup>58</sup>

## E. INTERNATIONAL IMPLICATIONS OF THE U.S. EXPERIENCE

### *I. History of the International Experience*

A detailed analysis of the international experience is beyond the scope of this article,<sup>59</sup> but a few analytical and strategic points can be made. As tobacco litigation reached its second wave in the United States with the *Cipollone* case of 1988 and the use of

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<sup>58</sup> See W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts* 36 (Harvard Law Sch. Discussion Paper No. 291, 2000), available at <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1079&context=harvard/olin> (“The results in this article highlight the fact that there is a serious problem in the way the [U.S.] courts address matters pertaining to health, safety, and environmental risks.”).

<sup>59</sup> See Consortium, European Comm’n, Tobacco or Health in the European Union: Past, Present and Future (2004) available at [http://ec.europa.eu/health/ph\\_determinants/life\\_style/Tobacco/Documents/tobacco\\_fr\\_en.pdf](http://ec.europa.eu/health/ph_determinants/life_style/Tobacco/Documents/tobacco_fr_en.pdf) (on the European tobacco scenario).

extensive document production, it was just beginning internationally. The first case was filed in Australia in 1986 and then in Europe in 1988. The *Aho* litigation in Finland<sup>60</sup> involved an individual smoker and incorporated a number of the standard allegations. Since then, diverse forms of litigation have proliferated internationally. Individual cases, class actions, recoupment cases, and, most recently, “lights” cases, have all been filed in Israel, while Spain and France have seen both individual cases and recoupment actions.

The relative absence of contingent fee arrangements, the generally lower amount of damages awards<sup>61</sup> (Israel constitutes an exception),<sup>62</sup> the limited existence of class action statutes, and the existence of a professional judiciary as opposed to a jury system, have all served to contain the scope and magnitude of tobacco litigation outside the United States. Developments are not static however. Class action proposals have been formally adopted in Sweden and proposed in both Finland and France. “Lights” litigation is developing in Italy, alleging the deceptive nature of the term “lights” prior to the prohibition of its use on cigarette packaging as mandated by the EU Directive 2001/37/EC.

In a manner broadly similar to the experience in the United States prior to the MSA, the industry continues to have significant success in defending these cases from both a procedural and substantive perspective. As cases similar to those filed in the U.S. decades earlier are brought in Europe and elsewhere, firms have been able to leverage their U.S. courtroom experience and related litigation strategies. The critical issue going forward will be the extent to which the U.S. experience will be replicated before a realistic societal *modus vivendi* can be reached. That is, to what extent will the experience abroad reflect a prolonged and intensive

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<sup>60</sup> Cipollone, *supra* note 7.

<sup>61</sup> See Tobacco Lawsuits Outside the U.S., [http://www.philipmorrisinternational.com/PMINTL/pages/eng/busenv/Int\\_litigation.asp](http://www.philipmorrisinternational.com/PMINTL/pages/eng/busenv/Int_litigation.asp) (last visited Nov. 24, 2008).

<sup>62</sup> This is the case between Pentti Aho and the companies Oy Rettig Ab and Suomen Tupakka – British American Tobacco Nordic which the Finnish Supreme Court ultimately dismissed the case in 2001 after years of wrangling. See Hiilamo, *supra* note 6, at 22-24.

period of litigation involving successive waves of individual cases, class actions, and, finally, medical cost recoupment cases brought by national health services, sickness funds or large health plans possessing significant political leverage?

Much is made of industry attempts to penetrate the markets of the developing world in order to expand markets and secure market share. In pursuing these objectives, the tobacco industry is increasingly sensitive to both the public relations and real costs of the U.S. experience just as companies in other industry sectors, such as Microsoft, have factored their U.S. experience into their approach abroad. Therefore, if faced with litigation against politically backed agents, at the light of U.S. experience, one may expect firms will actually look for some sort of settlement. If this perception has some element of truth and it becomes perceived by national health services and sickness funds, such legal actions may become self-fulfilling prophecies.

## ***II. Systemic Considerations***

As nations outside the United States evaluate the best manner of addressing the “tobacco issue” from a public health and societal perspective,<sup>63</sup> they should take the existing systemic balance into consideration.

As has been outlined above, the United States is uniquely hospitable to litigation. Given the relative aversion to centralized, regulatory solutions, litigation is seen as a valid and important means of arbitrating among diverse and often divergent societal interests. Accordingly, mass tort litigation and the procedural devices necessary to prosecute it (i.e., document discovery, class actions, and contingent fees) have developed into pillars of the system. Within this matrix, the judge is vested with great discretion to ensure that such devices are used in a consistent manner. Such

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<sup>63</sup> The first victory against the tobacco companies in Italy was the Stalteri case, in which the court awarded plaintiff 200,000 Euros. In Italy’s first judgment against the tobacco companies, the court awarded Plaintiff Stalteri only 200,000 Euros. *Italian high court rules for smoker’s wife*, UNITED PRESS INT’L, Nov. 6, 2007, available at [http://www.upi.com/NewsTrack/Top\\_News/2007/11/06/italian\\_high\\_court\\_rules\\_for\\_smokers\\_wife/1194/](http://www.upi.com/NewsTrack/Top_News/2007/11/06/italian_high_court_rules_for_smokers_wife/1194/).

control over the process can be far-reaching, casting the judge in the role of gatekeeper. For instance, it is the judge who decides whether the requirements for class certification in mass tort cases claiming monetary damages have been met. This is a wide grant of authority but one consistent with a system in which litigation has gained currency as a recognized means for vindicating collective rights.

The primacy of litigation in the U.S. system as a substitute for, or supplement to, regulation may also explain the melding of the two as reflected in the MSA. Within the U.S. system, litigation can assume a “gap-filling” role,<sup>64</sup> the contours of which can vary depending on the industry at issue. The recognition of the growing encroachment of litigation on the regulatory field resulted in the passage in February 2005 of the Class Action Fairness Act, a law designed to channel class actions to the federal courts where certification can be more difficult to secure than in the parallel state system.

In contrast to the U.S. system, which is often described as case-specific and litigation-driven, continental legal systems and those derived there from tend to be more regulatory and administrative in nature.<sup>65</sup> With regard to tobacco control policies, this is reflected in consistently high levels of excise taxes<sup>66</sup> and the use of advertising bans in countries, such as Norway, Finland, and Sweden dating back to the 1960s. More recent bans have been introduced in Ireland, Spain, Italy and Portugal. Issues of broad

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<sup>64</sup> Damages claimed in Israeli cases filed since 1998, involving medical cost recoupment or “lights” issues have sought recoveries equivalent to several billion U.S. dollars. GeneralCologne Re Litigation Outside the U.S. 17 (2000), *available at* [http://www.facworld.com/FacWorld.nsf/doc/TobaccLitROW/\\$file/ROWtoblitig.pdf](http://www.facworld.com/FacWorld.nsf/doc/TobaccLitROW/$file/ROWtoblitig.pdf).

<sup>65</sup> See e.g. Hiilamo, *supra* note 6, at 27 (“The Finnish experience was that litigation does not stand alone as a means to achieve public health policy goals. Litigation complements a broader approach to tobacco control policymaking by stimulating national debate over the role of smoking in society. Thereby it may well move the policy agenda. ... [After all]... despite its legal loss, the litigation contributed to subsequent tobacco control legislation in Finland.”).

<sup>66</sup> This gap-filling role is related to “a piece-meal approach” towards codification. In Europe, due to a more extensive use of regulation, there is less room for this role of litigation. Regulation makes also even more difficult to find strong legal as well as economic basis for such litigation.



societal significance are shifted to the regulatory sphere with litigation being left to address individualized disputes.

Within this matrix, code-based legal systems establish the judge as the agent of the legislature. His or her role is to apply the code without recourse to discretion or to do so using far less discretion than that exercised by U.S. counterparts. The question then arises as to whether a more expansive and hospitable framework for litigation, including class action legislation, would be consistent with the existing institutional balance. Importation of specific procedural tools on a piecemeal basis may upset settled societal compromises concerning the role of regulation and litigation without offering a suitable, predictable alternative.<sup>67</sup>

This is not to say that legal systems should not evolve to address increasing industrial complexity, only that such considerations must be made in context. In the same manner that the United States has trimmed back access to the courts through the Class Action Fairness Act, expanded access to the courts in jurisdictions outside the United States may be in order. Indeed, we may be witnessing a convergence, with the United States seeking to limit access to courts and jurisdictions outside the United States seeking to expand access. Such decisions have distinct implications for maintaining the balance between regulation and litigation, harmonizing disparate economic interests, and maintaining predictability within the system.

Such theoretical considerations will play out against the class action statute recently promulgated in Sweden, the current proposals in France, and the broader discussions concerning the efficacy of enacting an EU-wide class action statute.<sup>68</sup> These developments will have significant implications for the ebb and flow of litigation both nationally and internationally and will stimulate a re-evaluation of the appropriate role of the legal system in addressing social policy issues.

Starting from different endpoints in the spectrum, litigation

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<sup>67</sup> Reimann, *supra* note 19, at 810 n.305.

<sup>68</sup> Cutler & Glaeser, *supra* note 53 at § IV, tbls. 2 & 3. (demonstrating that both regulatory instruments and excise taxes are higher in Europe).

versus direct regulation as means to adjust norms to society's values, the two approaches seem to be converging in their outcome.

### ***III. Tobacco Control Policy and Litigation***

In light of the differences between the legal system in the United States and elsewhere and, conversely, the proposals relating to class actions that may promote a convergence, the question arises as to how tobacco control measures can be best managed and implemented. The U.S. experience suggests that a strategy of accommodation, where legitimate economic and societal interests can be recognized and balanced is the path dictated by increasing globalization, instantaneous communications, and the growing power of consumer groups. Will the rough accommodation taking hold in the United State be achieved internationally without passing through similar phases of litigation and the attendant (mis)allocation of resources?<sup>69</sup>

A parallel concern is whether the current arrangements and identifiable trends in the United States constitute the contours of an emerging "equilibrium" in the relations among government, society, and industry or merely a lull in litigation activity. Soaring health care costs will continue to exert pressure on health care systems and spur government efforts toward cost containment. In addition, changing consumption patterns in the population may lead companies to adopt different business strategies that may or may not collide with government priorities and related approaches to corporate governance and social policy priorities. Such an analysis, particularly as it relates to future scenarios and the attainment of a stable equilibrium, is predicated on viewing tobacco as a product that will continue to exist irrespective of regulatory policy due to underlying demand. to do so using far less

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<sup>69</sup> See generally Reimann, *supra* note 19 (for the main characteristics of U.S. and European legal traditions); see also Rudolf B. Schlesinger, Hans W. Baade, Mirant D. Damaska & Peter E. Herzog, *COMPARATIVE LAW: TEXT & MATERIALS* (5th ed. 1988) (for a classical in-depth analysis); see generally George P. Fletcher & Steve Sheppard, *AMERICAN LAW IN A GLOBAL CONTEXT: THE BASICS* (2005) (for a U.S. legal tradition-focused perspective).

discretion than that exercised by U.S. counterparts. If one accepts this proposition together with the view that notions of corporate governance and behavior have evolved,<sup>70</sup> then the focus should be on achieving the new *modus vivendi* without imposing dead weight costs on society. A balance of power must exist before a meaningful compact can be reached. In this regard, Article 19 of the WHO Framework Convention on Tobacco Control sets a useful benchmark:<sup>71</sup>

#### Article 19 - Liability

1. For the purpose of tobacco control, the Parties shall consider taking legislative action or promoting their existing laws, where necessary, to deal with criminal and, civil liability, including compensation where appropriate.
2. Parties shall cooperate with each other in exchanging information through the Conference of the Parties in accordance with Article 21 including:
  - (a) information on the health effects of the consumption of tobacco products and exposure to tobacco smoke in accordance with Article 20.3(a); and
  - (b) information on legislation and regulations in force as well as pertinent jurisprudence.
3. The Parties shall, as appropriate and mutually agreed, within the limits of national legislation, policies, legal practices and applicable existing treaty arrangements, afford one another assistance in legal proceedings relating to

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<sup>70</sup> A brief look at the websites of the largest tobacco companies shows the industry's intention to cooperate with governments, to help and take part in regulatory instruments, and to disclose recent research and other relevant materials.

<sup>71</sup> World Health Org., WHO Framework on Tobacco Control, *supra* note 55, at 17; accord Lawrence O. Gostin, *World Health Law: Toward a New Conception of Global Health Governance for the 21st Century*, 5 YALE J. HEALTH POL'Y L. & ETHICS 413, 419 (2005) (discussing whether there is advocating a movement towards a "tobacco" vertical governance through centralized regulation, thereby enabling [tobacco] regulatory standards to be harmonized).

civil and criminal liability consistent with this Convention.

4. The Convention shall in no way affect or limit any rights of access of the parties to each other's courts where such rights exist.

5. The Conference of the Parties may consider, if possible, at an early stage, taking account of the work being done in relevant international fora, issues related to liability including appropriate international approaches to these issues and appropriate means to support, upon request, the Parties in their legislative and other activities in accordance with this Article.

The Convention manifests a broad societal concern, together with a firm intent on the part of governments, to control tobacco, using all appropriate legal means at a country's disposal. Interestingly, the industry participated in the elaboration of the Convention, exercising its option regarding notice and comment. At the time its contributions were viewed with skepticism due to the atmosphere of abiding mistrust arising from decades of adversarial relations. The approach to these issues can be either dictatorial or consensual, with the adoption of the latter relying on a paradigm shift between the industry and its regulators.

Given the evolution of the litigation environment in the United States, including the evolving consensus concerning the industry's right to exist within certain confines and prevailing views of corporate responsibility, the approach to tobacco control on the international level should focus on finding the appropriate space in which to reach an accommodation, provided that both sides have sufficient economic incentives to do so.

This will require the industry to find an adequate interlocutor and the parties to agree on certain basic principles regarding the role of the product in society, including its immediate externalities, the underlying demand for the product, and the impossibility of immediately reallocating productive capacity to other uses while maintaining employment and

budgetary flexibility.

At the international level, there will be questions as to whether “one size fits all” with regard to the appropriate scope and content of a given accommodation. The Framework Convention on Tobacco Control, the move toward harmonization regarding both product liability and product safety issues, and the notoriety of the tobacco control issue may render some type of concerted action possible. The European approach, which tends to favor regulation and administration over litigation and case-specific outcomes, may further provide an impetus toward a negotiated solution, whether it takes the form of an international or EU-wide settlement or a set of national settlements concluded pursuant to certain broad international guidelines.

We believe governments will move assertively to contain the negative effects of smoking by adopting forceful public health strategies. Our analysis, however, suggests that such steps should be informed on the international level by the litigation experience in the United States. In an era of heightened, highly public standards of corporate responsibility, when consensus can be promoted by commercial compromise, judicial moderation, and transparent regulatory action adapted to prevailing institutional conditions, such an approach provides an opportunity to move expeditiously to a realistic equilibrium at lower cost.

#### **F. CONCLUSION**

Tobacco litigation took root in the fertile ground of the U.S. legal system, with individual claims against the companies being used as an ad hoc tool for elaborating social policy. The social norms and public health concerns at the time were, however, permissive regarding smoking. Evidence about health and the health cost impact of smoking has only been gathered over time due to increasing societal awareness and parallel strides in scientific and medical knowledge.

The repeated success of the tobacco companies in individual cases lead to a new legal approach focusing on class actions. As before, the focus was on the alleged misconduct of the

tobacco companies, as buttressed by the production of documentation through the use of the aforementioned “discovery” procedure. Tobacco litigation then began to spread internationally, with individual cases appearing in several countries. Thus, with a lag of almost thirty years, other countries followed the United States, albeit on a much smaller and restrained scale, with again a substantial advantage for the tobacco companies in terms of litigation success rates. The standard of proof required to demonstrate the misconduct of the tobacco companies is hard to meet, as it must distinguish between the individual decisions of consumers regarding smoking, given the associated and increasingly well-known health risks, and those perhaps unfairly induced or “promoted” by the companies due to industry misconduct.

As has been seen, a third wave began in the U.S. in the 1990s, based on four distinctive features: (i) reliance on politically powerful third party payors in the form of the states or state-supported health care entities to bring the cases (ii) increased knowledge of smoking and its health implications and related industry (mis)conduct acquired through the enhanced access to documentation during the second wave, (iii) increasing medical costs on a system-wide basis, and (iv) an alleged causal relationship between smoking and health care costs. The evidence produced matched an interest on the part of the U.S. states to recoup medical treatment costs associated with tobacco consumption.

The move to focus on aspects more amenable to measurement (e.g., the health implications and quantified costs of smoking), the sheer size of the claims involved, and the political power of the plaintiffs changed the risks of litigation for the companies, despite their previous record of courtroom success. This modified litigation landscape and changed risk calculus prompted the search for an agreement that essentially had the nature of an “insurance contract” – against a stream of payments effected over a period of 25 years, no more legal cases of a similar nature would be brought by the states. Basically, the cost of prior

litigation and the possibility of even more costly future litigation lead the parties to establish a sort of regulatory compact for the tobacco industry derived directly from the litigation process.

For the international scene, one may wonder whether the same route and a similar endpoint will be reached. In our view, the development of a formal and increasingly strict regulatory equilibrium will emerge, without recourse to the intensive litigation that characterized the U.S. process.

This is due to two main reasons: (1) Tobacco companies are globalized and their resulting openness to a transparent, consensual regulatory *modus vivendi* is therefore likely to develop in overseas jurisdictions faster than was the case in the United States. Indeed, the public smoking bans implemented across Europe without the intensive lobbying efforts to counter such measures that had characterized industry strategy and conduct in the past are an indication of the new ethos; and (2) The legal traditions and systemic frameworks of many jurisdictions outside the U.S. are not heavily reliant on case-specific decisions for effecting social change but rather on the elaboration and implementation of regulatory, administrative, and legislative norms. Moreover, the difficulties in proving in an adjudicative forum the alleged misconduct of the tobacco companies and the effect thereof on consumer behavior discourage the use of the courts. Such difficulties are further compounded by the general lack, or at least limited availability in non-US jurisdictions, of procedural devices, such as the aforementioned “discovery” technique for gaining access to and assembling company information. Lower damages amounts in most non-U.S. jurisdictions provide a further disincentive for resorting to full-blown, “scorched- earth” litigation.

For all of the above reasons, stemming from the history of the extensive litigation in the U.S. and the related legal and economic lessons learned, to the globalized nature of the product and resulting societal perceptions, to the regulatory emphasis in most jurisdictions outside the U.S., and the common interest of government regulators and companies in managing the product in a

socially efficient and potentially “Pareto-optimal” manner, it appears that the U.S. litigation experience is unlikely to be replicated abroad. Moreover, it is likely that the consensual, somewhat less confrontational, approach is likely to be a harbinger of the future on both sides of the Atlantic, particularly where issues of broad social policy are at stake, whether in the tobacco sector or in other industries of social concern.

To conclude, it is worth returning to our initial questions: How can the U.S. experience in tobacco litigation serve as a guide at the international level? And has it served the broader public interest?

In the United States, litigation was deemed to be an important supplement to an already highly regulated tobacco sector, regardless of the attendant costs. The tradition of private attorneys general, whereby individuals are expected, if not encouraged, to vindicate their rights through litigation, provided a favorable backdrop for the proliferation of court cases in the U.S. context.

European countries start from a different point, with a highly developed regulatory culture, different legal traditions, and less overall reliance on litigation to address issues of broad social policy. It is therefore difficult to see how the same road can be followed, and in light of what appears to be the endpoint, whether, indeed, it should be.

In the United States, the final balance has now been broadly defined at both the state and federal level with the conclusion of the MSA, and the recently decided federal racketeering (RICO) case, with individual litigation being relegated to a smaller and declining role. The rough equilibrium to which the United States has gravitated over the years appears to be already well advanced in Europe through the direct regulatory path. Rapidly industrializing and developing economies in Asia and elsewhere also appear to be moving expeditiously to plug regulatory gaps through the passage of tobacco control legislation inspired by both the European model and international instruments,



such as the WHO Framework Convention on Tobacco Control, even as sporadic litigation activity has manifested itself.

Thus, the final outcome reached in the United States is likely to be also reached internationally, most likely by a heavy reliance on direct, transparent regulation, thereby saving the time and costs of the litigation path.

On the second question regarding the public interest, it is clear that the tobacco cases raised the awareness of citizens in the U.S. concerning the health risks though the extent of the 'market failure' concerning (a) the ability of consumers to assess accurately the relevant risk and (b) the related efficiency of using litigation to remedy this alleged information gap, particularly in terms of cost and transparency are suspect. Ultimately, firms changed their behavior in order to find a new 'business space' adapted to prevailing social perceptions and circumstances that would allow them to function as legitimate commercial actors without having to engage in constant, high cost litigation. Government responded to secure enhanced enforcement and control over the product together with a predictable revenue stream derived therefrom. Globalization and enhanced communication will no doubt promote similar cooperation strategies on the part of the industry and governments elsewhere. Having experienced a somewhat coerced change from old business ways to the ones available under (and compatible with) the MSA in the United States, firms are likely to move rapidly in a conciliatory direction.

From the European and perhaps the broader international perspective, it would therefore appear that moving to a sustainable commercial and societal equilibrium through transparent regulation and openly negotiated compromises, as opposed to litigation, might offer the lowest cost and most efficient alternative for both safeguarding the public interest, as defined at the outset of this article, and managing what most agree is a controversial, but well-ensconced, product sector.

For many, the tobacco industry is anachronistic, at best, and wholly unacceptable, at worst. Oscillating between these two poles, the tobacco industry may actually become a template for

other industries in the development of consensual rulemaking practices designed to enhance government control, enforcement, and revenues while providing the commercial stakeholders room to carry out their business. Given the growing complexity of the world economy and the development of new industries and companies of ever increasing global reach, it appears likely that some form of direct regulatory approach, balancing the interests of the concerned stakeholders, will become common place to secure the efficiencies that are lost in piecemeal litigation. Microsoft's attempt to accommodate the European Union in the antitrust sphere, albeit after a protracted legal battle, is, in some respects, a variation on the tobacco theme outlined in this paper. It is easy to imagine that such an approach predicated on direct discussions aimed at accommodating the interests of the concerned stakeholders will become the norm as the implications of certain forms of commercial activity for areas of broad, yet pressing, social concern, such as the environment or privacy, become evident. The matrix of government, individual, and commercial interests at issue will require a more global, synthetic, and collaborative approach to regulation in order to ensure both reasonable and appropriate control for government and sufficient commercial freedom and initiative for industry to promote movement toward an appropriate and sustainable societal equilibrium.

