Appendix 14.3
Tobacco Litigation Case Summaries

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Case Against Legacy Foundation

In 2001, the Lorillard Tobacco Company (Lorillard) launched a series of attacks claiming that the truth® campaign had violated the provisions of the Master Settlement Agreement (MSA), which prohibited the American Legacy Foundation (Legacy) from engaging in "vilification" or "personal attacks." After receiving notice of Lorillard's intent to sue under the MSA, Legacy moved first, seeking a declaratory judgment in the Delaware courts that it could not be sued under the MSA since it was not a party to the agreement and, in the alternative, that its ads violated no legal requirements. Lorillard quickly filed a second suit against Legacy and also filed suit against the National Association of Attorneys General and the attorney general of Delaware, contending that they were responsible for Legacy's actions. After 5 years of litigation activities, the Delaware Supreme Court unanimously rejected an effort by Lorillard to shut down Legacy or, at least, the truth® campaign, its edgy and effective youth public education campaign (*Lorillard Tobacco Co. v. American Legacy Foundation*, 903 A.2d 728 [Del. Supr. 2006]).

Light Cigarette Cases

"Light" or "low-tar" cigarettes have been successfully marketed as less risky than smoking conventional cigarette brands (Kozlowski and Pillitteri 2001). However, such cigarettes have not been found to be safer than higher-yield cigarettes and they are just as addictive (Thun and Burns 2001). Tragically, because of this all too common misconception, millions and millions of smokers switched to light cigarettes instead of quitting (Shiffman et al. 2001).

The National Cancer Institute (2001) published internal industry documents that suggest that the cigarette industry knew the truth about light cigarettes, but kept this information secret and continued to market light cigarettes. Believing that they were misled, light cigarette smokers filed class action lawsuits under their states' unfair and deceptive business practices statutes. The intent of these statutes is to give consumers broad-based protection against abusive business practices (Sweda et al. 2007). The principal allegation in the light cigarette lawsuits was that the cigarette manufacturers misled consumers by marketing light cigarettes as having less tar and nicotine than other cigarette brands, even though actual exposure levels are the same. Those who smoked (and continue to smoke) light cigarettes reasonably believed that they were being exposed to less tar and nicotine and are entitled to refunds. Furthermore, under state unfair and deceptive business statutes, consumers often are entitled to monetary relief in the amount of three times the amount they spent.

Courts across the country have split on whether these cases may proceed as class actions. In *Estate of Michelle Schwarz v. Philip Morris, Inc.,* 348 OR. 442, 235 P.3d 668 (2010), where a woman switched to light cigarettes rather than quitting and subsequently died of lung cancer, the jury returned a verdict of $168,000 in compensatory damages and $150 million in punitive damages. These damages were reduced to $25 million in a retrial necessitated for technical reasons, and was appealed and retried in 2010 by the Oregon Supreme Court.

Canadian Class Actions

Although class actions are not available in most countries, they are possible under provincial law in the Canadian civil justice system (Watson 2001). Two major class actions against tobacco manufacturers went to trial in 2012, where they are being tried together in a Montreal courtroom. Each involves class members from the province of Quebec. Together, the cases seek over $27 billion (Can.) from the three major cigarette manufacturers operating in Canada (Chung 2012).

In the "Letourneau" case, the plaintiffs are seeking a payment of $10,000 (Can.) for each of the estimated 1.8 million addicted smokers in the province (*Cécilia Létourneau v. JTI-Macdonald Corp, Imperial Tobacco Canada Ltd., and Rothmans, Benson & Hedges Inc.,* District of Montreal, PQ No. 500-06-000070-983 [2012]). In the other case, known as "Blais," the plaintiffs are seeking $105,000 (Can.) for each of the estimated 90,000 members of the class suffering from lung cancer, larynx cancer, throat cancer, or emphysema due to smoking (*Conseil québècois sur le tabac et la santé and Jean-Yves Blais v. JTI-Macdonald Corp, Imperial Tobacco Canada, and Rothmans, Benson & Hedges Inc.,* District of Montreal, PQ No. 500-06-000076-980 [2012]). Like the trials

in the United States, many of the internal documents from the manufacturers are being made publicly available (Chung 2012).

Individual Cases

Along with the state-brought suits and class actions, several individual plaintiffs have successfully brought claims against the tobacco industry in the third wave of tobacco litigation. Most of these plaintiffs raised claims similar to the product liability claims individual plaintiffs brought in the second wave. In addition to compensatory damages, juries have punished the tobacco industry's conduct by awarding punitive damages in many of these cases. Individuals injured from cigarettes and industry misconduct continue to bring claims against the tobacco industry.

In 1991, Grady Carter brought the first tobacco case to produce a verdict that the defendant actually paid. Carter, a lifetime smoker of Lucky Strike cigarettes, sued Brown & Williamson Tobacco Corporation under theories of negligence and strict liability after being diagnosed with lung cancer (*Tobacco Products Litigation Reporter* 1996, p. 1.114). In 1996, the jury found that the defendant's cigarettes were "unreasonably dangerous and defective" and awarded Carter $750,000. After exhausting all of its appeals, the defendant paid Carter in 2001 (Van Voris 2001).

In a more recent lawsuit, Mayola Williams sued Philip Morris on behalf of her deceased husband, who smoked about three packs of the defendant's cigarettes per day from the early 1950s until his death from lung cancer in 1997 (*Williams v. Philip Morris, Inc.*, 92 P.3d 126 [Or. Ct. App. 2004]; Guardino and Daynard 2005). After trial, an Oregon jury awarded Williams $821,485.80 in compensatory damages and $79.5 million in punitive damages. The trial judge reduced the damages to $500,000 and $32 million, respectively (Miura et al. 2006). The Oregon Court of Appeals reinstated the $79.5 million award for punitive damages. On the third appeal to the U.S. Supreme Court, the Court dismissed the writ of certiorari (the decision by the Supreme Court to hear an appeal from a lower court) as "improvidently granted," exhausting all of the defendant's appeals and finalizing the $79.5 million award (*Philip Morris Inc., v. Williams*, 556 U.S. 178, 129 S. Ct. 1436, 173 L. Ed. 2d 346, 2009 U.S. LEXIS 2493, 77 U.S.L.W. 3557, 21 Fla. L.Weekly Fed. S. 731 [2009]).

Four individuals have separately sued Philip Morris successfully in California for injuries they sustained from smoking cigarettes. The first California suit, *Henley v. Philip Morris Inc.*, 113 Cal.Rptr.2d 494, 93 Cal. App.4th 824 (2001); 114 Cal. App. 4th 1429, 9 Cal.Rptr.3d 29 (2004), resulted in a jury verdict of $1.5 million in compensatory damages and $50 million (later reduced to $9 million) in punitive damages (Table 14.3.1) (Guardino and Daynard 2005). In *Whiteley v. R.J. Reynolds Tobacco Co.*, WL 3299595 (Cal. App. 1 Dist. Oct. 14, 2009), the jury initially awarded the plaintiff $1.7 million in compensatory damages and $20 million in punitive damages for her products liability claim. After a retrial, the jury awarded the plaintiff $2.4 million in compensatory damages, but no punitive damages.

The other two California cases involved extraordinarily large awards of punitive damages that the courts later reduced. In *Boeken v. Philip Morris USA, Inc.*, 48 Cal. 4th 788, 230 P.3d 342, 108 Cal. Rptr. 3d 806 (2010), the jury awarded the plaintiff, who was diagnosed with lung cancer after 10 years of smoking, $5.54 million in compensatory damages and $3 billion in punitive damages (Miura et al. 2006). A California appellate court reduced the punitive damages to $50 million, and the U.S. Supreme Court declined review, cutting off the defendant's final avenue of appeal (Miura et al. 2006). The jury in *Bullock v. Philip Morris, Inc.*, 159 Cal. App. 4th 655 (2008) also found in favor of the plaintiff and awarded compensatory damages of $850,000 and $28 billion in punitive damages. The trial court reduced the punitive damages amount to $28 million, and a California appellate court remanded the case for a new jury trial solely to recalculate punitive damages. On August 24, 2009, the second jury awarded the plaintiff $13.8 million in punitive damages, and on August 17, 2011, a California appellate court upheld the jury's award (*Bullock v. Philip Morris, Inc.*, 198 Cal. App. 4th 543 [2011]). California's highest court denied review of the $13.8 million punitive damages award.

In another individual plaintiff case, Willie Evans sued Lorillard in 2004 on behalf of his deceased mother, Marie Evans, alleging that the defendant negligently marketed Newport cigarettes (a menthol-flavored cigarette targeted at new, young, and African-American smokers) and negligently failed to warn consumers of the dangers associated with smoking Newports (*Evans v. Lorillard Tobacco Co.*, 465 Mass. 411 [2013]). Marie Evans began smoking when she was 13 years of age, several years after Lorillard began distributing free cigarettes to her and other residents of her housing project; she continued to smoke, despite many attempts to quit, until shortly before her death from lung cancer at 54 years of age. After trial, in December 2010, the jury found for the plaintiff and awarded a total of $71 million in compensatory damages (which the trial judge later reduced to $35 million) and $81 million in punitive damages (Valencia 2010). The $81 million punitive damages award, was reversed by the

Table 14.3.1 Punitive damages in tobacco litigation

Case Name	State	Verdict year	Initial punitive damages award	Final status of punitive damages award
Henley v. Philip Morris	CA	1999	$50 million	$9 million
Williams-Branch v. Philip Morris	OR	1999	$79.5 million	$79.5 million
Whiteley v R.J. Reynolds, Philip Morris	CA	2000	$20 million	$0
Engle v. R.J. Reynolds, et al.	FL	2000	$144.8 billion	$0
Boeken v. Philip Morris	CA	2001	$3 billion	$50 million
Burton v. Philip Morris	KS	2002	$15 million	$0
Schwarz v. Philip Morris	OR	2002	$150 million	$25 million (on appeal as of Dec. 2012)
Bullock v. Philip Morris	CA	2002	$28 billion	$13.8 million
Boerner v. Brown and Williamson Corp.	AR	2003	$15 million	$15 million
Price v. Philip Morris	IL	2003	$3 billion	$0
Frankson v. Brown and Williamson Corp.	NY	2004	$20 million	$5 million
Smith v. Brown and Williamson Corp.	MO	2005	$20 million	$1.5 million
Evans v. Lorillard	MA	2010	$81 million	$0

Supreme Judicial Court for technical reasons; the settlement of the case prevents this from being retried.

In addition to product liability suits, some individuals have brought consumer protection lawsuits against the tobacco industry, which also are referred to as private attorney general cases because the individual is acting in the interest of the public. In the early 1990s, a California individual sued R.J. Reynolds Tobacco Company (RJR) claiming that its Joe Camel advertising unfairly targeted minors (*Mangini v. R.J. Reynolds Tobacco Co.,* 7 Cal. 4th 1057 [1994]). Although the California Supreme Court later found that the *Federal Cigarette Labeling and Advertising Act* preempted this claim in *In re Tobacco Cases II*, 41 Cal. 4th 1257 (2007), Mangini and RJR settled this claim in 1997 (Mangini Settlement Agreement). RJR agreed to discontinue the Joe Camel advertising and paid $10 million, some of which was earmarked for educational programs to discourage minors from smoking, as part of the settlement agreement (Mangini Settlement Agreement 1997).

Secondhand Smoke Cases

It has been nearly four decades since the first reported case involving a nonsmoker's involuntary exposure to secondhand tobacco smoke (*Shimp v. New Jersey Bell Telephone Co.,* 368 A.2d 408, 145 N.J. Super. Dec. 20, 1976). Donna Shimp, an office worker for the New Jersey Bell Telephone Company was granted an injunction to ensure a smokefree area in her workplace. The company had already adopted a smokefree policy to protect its sensitive office equipment. The court held that the "evidence is clear and overwhelming. Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to perform properly the duties of their jobs."

The evidence of the hazards of exposure to secondhand smoke has only become stronger over the subsequent years (U.S. Department of Health and Human Services 2006). Whether in office settings, business establishments that are open to the public, prisons, multi-unit buildings, or in residences where child custody disputes are occurring, hundreds of lawsuits seeking to protect nonsmokers from the unnecessary hazards of exposure to secondhand smoke have proliferated throughout the United States.

In *Staron v. McDonald's Corp.*, 872 F. Supp. 1092 (D. Conn. 1993), 51 F.3d 353 (2nd Cir. 1995), the plaintiffs

brought an action under the *Americans with Disabilities Act* (1990); they argued that the presence of tobacco smoke in the defendant's restaurants prevents the plaintiffs from having the opportunity to benefit from the defendant's goods and services. Suffering from adverse physical reactions when in the presence of smoke, the plaintiffs also alleged that the defendant's restaurants are in fact places of public accommodation under 42 *U.S.C.* 12181. They were seeking an injunction against smoking in the defendant's restaurants, "thereby giving the plaintiffs equal access to said restaurants."

The U.S. Court of Appeals for the Second Circuit held "that plaintiffs' complaints do on their face state a cognizable claim against the defendants under the *Americans with Disabilities Act,*" noting that "the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the disability in question and the cost to the organization that would implement it . . . . We see no reason why, under the appropriate circumstances, a ban on smoking would not be a reasonable modification."

A child's exposure to secondhand smoke has been the core issue in a number of cases involving disputes about child custody when a couple is divorcing. In the case of *In Re Julie Anne, A Minor Child*, 121 Ohio Misc. 2d 20, 2002 Ohio 4489, 780 N.E.2d 635, 2002 Ohio Misc *LEXIS* 46 (2002), the court issued a restraining order against smokers to protect a child under the court's jurisdiction from the dangers of exposure to secondhand tobacco smoke. The Court took judicial notice of the harmful nature of secondhand smoke on the health of children, citing numerous studies that characterized secondhand smoke as a carcinogen and a hazard to those exposed to it. The Court concluded: "The overwhelming authoritative scientific evidence leads to the inescapable conclusion that a family court that fails to issue court orders restraining people from smoking in the presence of children under its jurisdiction is failing the children whom the law has entrusted to its care." The Court granted a restraining order with provisions that "the mother and father are hereby restrained under penalty of contempt from allowing any person, including themselves, to smoke tobacco in the presence of the minor child Julie Anne. If smoking is allowed in the house in which the child lives or visits on a regular basis, it shall be confined to a room well ventilated to the outside that is most distant from where the child spends most of her time when there."

In *Helling v. McKinney* 113 S. Ct. 2475, 509 U.S. 25 (1993), an inmate who was housed in a cell with a heavy smoker brought a civil rights action against prison officials alleging violation of the Eighth Amendment's cruel and unusual punishment provision due to his exposure to secondary cigarette smoke. In 1993 the U.S. Supreme Court affirmed a lower court "that McKinney states a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of exposure to secondary cigarette smoke that pose an unreasonable risk of serious damage to his future health."

In *Harwood Capital Corp. v. Carey*, No. 05-SP-00187 Boston Housing Court (2005), a landlord sought to evict two tenants after receiving complaints from abutting residents about the strong smell of smoke emanating from their apartment. The tenants' lease did not mention smoking. The tenants worked out of the unit; they combined to smoke about 40–60 cigarettes per day. After a 3-day trial, a jury returned a verdict that Carey had breached his lease under a clause in the standard Greater Boston Real Estate Board lease prohibiting tenants from creating a nuisance or engaging in activity that substantially interfered in the rights of other building occupants. The jury also ruled that, therefore, the landlord was entitled to possession of the unit.

Litigation over exposure to secondhand smoke is not limited to the United States. In the 1980s and 1990s, a substantial number of individuals brought legal claims against employers and hospitality venue operators in Australia after suffering harm from exposure to secondhand tobacco smoke (Scollo and Winstanley 2008). During the same period, many employers began to voluntarily impose smoking bans in workplaces. Across Australia, states and territories have enacted laws that ban smoking in most enclosed workplaces as well as some unenclosed public places.

Cigarette-Fire Cases

Several fire-related product liability suits against Philip Morris have been dismissed (Halbert 1999). However, in 2003 Philip Morris paid $2 million to settle a Texas lawsuit based on an incident in 1992 when a 21-month-old girl, Shannon Moore, was severely burned while asleep in a car seat when her mother's parked car burst into flames (Levin 2003). The lawsuit alleged that the girl's mother had inadvertently let her lit cigarette fall onto the car seat, where it smoldered before igniting the car seat. As the *Los Angeles Times* reported, "[o]ver the course of the litigation, lawyers took dozens of depositions and Philip Morris produced more than 100,000 pages of internal documents concerning its research and lobbying activities on fire-safe cigarettes" (Levin 2003).

Smokeless Tobacco Cases

In June 1986, an Oklahoma City, Oklahoma, jury returned a verdict for a defendant smokeless tobacco company (*Marsee v. U.S. Tobacco Co.*, 639 F.Supp. 466 [1986]; 866 F.2d 319 [10th Cir. 1989]). Sean Marsee had died at 19 years of age from tongue cancer after using Copenhagen snuff and chewing tobacco for at least 6 years. His family was unsuccessful in its attempt to have the defense verdict overturned on appeal.

However, in 2010, the family of a 42-year-old North Carolina man, Bobby Hill, who died of mouth cancer after three decades of using U.S. Smokeless Tobacco Company's Skoal and Copenhagen brands of smokeless tobacco, reached a $5 million settlement of a wrongful death lawsuit (Helliker 2010).

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