Tobacco Control Legal Consortium

Fact Sheet 6
Litigation
Proposed Regulation of Tobacco Products by the U.S. Food and Drug Administration
S. 625/H.R. 1108

Tobacco litigation has contributed to the cause of tobacco control by uncovering key information about tobacco industry misconduct, in part through the discovery and publication of millions of previously confidential internal tobacco company documents; denormalizing the tobacco industry in the eyes of the public, policy-makers and the media; compelling the industry to start to engage in a certain degree of responsible behavior (e.g., publicly admitting that smoking causes cancer); and prompting substantial price increases, thus reducing consumption.

Legal cases against tobacco manufacturers and allied tobacco industry groups have been litigated in the United States since the 1950s. The most recent phase of tobacco litigation, which got under way in 1994, has featured many more cases than in earlier years. The single most important distinguishing characteristic of these cases has been the availability to plaintiffs of substantial new evidence of the industry's internal knowledge of the health effects of tobacco use, its manipulation of nicotine to cause addiction, and its cover-up of such information.

The FDA legislation explicitly preserves all pending legal actions and many future legal actions:

- Section 4(a) states that, "Nothing in this Act (or an amendment made by this Act) shall be construed to . . . affect any action pending in Federal, State or Tribal court, or any agreement, consent decree, or contract of any kind."
- Section 917(b) states that, "No provision of this chapter [i.e., the 'Family Smoking Prevention and Tobacco Control Act'] relating to a tobacco product shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State." It is unclear how the legislation would affect future legal claims based on areas of state law other than product liability (e.g. fraud, consumer protection or contract law.)

The legislation makes clear, however, that the preemptive effect of Section 5(b) of the Federal Cigarette Labeling and Advertising Act, as amended, still applies. Under that provision, plaintiffs in tobacco products liability cases cannot claim that cigarette companies failed to warn them of the health effects of smoking after 1969, when the preemptive language went into effect, nor can plaintiffs assert claims based in theories of negligence or misrepresentation by omission.

Other potential ramifications of the legislation's effect on tobacco-related litigation do not appear in the explicit text of the legislation but must be inferred. For example, nothing in the language of the legislation creates a shield against liability under state law based on a theory that the tobacco industry's actions have been reviewed or approved by the federal government; however, tobacco companies will likely make such an argument with unpredictable results. It also cannot be predicted whether state legal claims based on theories other than product liability law might be found to be preempted by implication. Moreover, some legal claims under specific state statutes might not be possible, because some state laws bar claims related to federally-regulated activities.