RESEARCH PAPER

Epidemiology of the third wave of tobacco litigation in the United States, 1994–2005

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Objective: To describe the epidemiology of litigation against the tobacco industry in the United States during the years 1994–2005 (described as the “third wave” of tobacco litigation). “Epidemiology” refers to the study of the distribution and determinants of disease in populations. We apply the term “epidemiology” to the litigation context for purposes of characterising qualitatively and, to the extent possible, quantitatively the variety of cases litigated against tobacco manufacturers and allied tobacco interests during the third wave and their impact on the tobacco industry.

Methods: The data for this paper come from legal cases identified in the Tobacco Deposition and Trial Testimony Archive (DATTA) collection (<http://tobaccodocuments.org/datta>), transcripts of testimony and related documents found in DATTA, government-mandated reports filed by tobacco manufacturers with the US Securities and Exchange Commission, investment company reports, reports and analyses published by the news media, a variety of informational documents produced by the Tobacco Control Resource Center at the Northeastern University School of Law, and legal settlement documents provided by the National Association of Attorneys General.

Results: The US tobacco industry faced a far greater number of lawsuits, and a greater variety of types of lawsuit, between 1994 and 2005 than it had in previous years. Plaintiffs won 31 (41%) of the 75 cases that were tried to verdict during the years 1995–2005. Seven plaintiffs have been paid awards totalling US\$115 million, including interest, following the exhaustion of appeals. Based on an evaluation of litigation brought against US industry leader Philip Morris, the total number of cases pending peaked in 2000, dropping off modestly since then. For example, 36 class actions were pending in 2000, while 33 were pending in 2005. In the same time period, individual actions fell from a total of 3385 to 2863. While the playing field has been levelled to some degree in the tobacco litigation arena with respect to the resources brought to bear by plaintiffs and defendants, tobacco industry defendants continue to employ far greater financial and human resources than their adversaries.

Conclusions: The third wave of tobacco litigation has represented a sea change in efforts to hold the tobacco industry in the United States accountable in American courtrooms. While tobacco manufacturers continue to do their utmost to make these cases difficult to pursue, many of the cases that have gone to trial have met with success in recent years, which suggests that plaintiffs’ lawyers are now better equipped to persuade juries of the defendants’ culpability.

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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 documents¹; denormalising 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 behaviour (for example, by admitting publicly that smoking causes cancer); and prompting substantial price increases, thus reducing consumption.² Given the centrality of the role of litigation as a policy tool, it is important to understand the characteristics of this litigation.

Legal cases against tobacco manufacturers and allied tobacco industry groups have been litigated in the United States since the 1950s. While there is some minor variation in the precise years identified for each particular phase of the litigation, it is generally recognised that tobacco litigation has taken place in three more-or-less distinct “waves”: 1954–1973, 1983–1992, and 1994 to the present.^{3–4} The first two waves—sandwiched around a decade that featured minimal litigation activity—were dominated by individuals suing tobacco companies for negligence. The first wave started in the aftermath of some of the first well-publicised revelations

that cigarette smoking causes lung cancer. The second wave commenced when the case of *Cipollone v. Liggett Group, Inc* was filed against several major cigarette manufacturers.⁵ The *Cipollone* case represented a departure from previous tobacco litigation because, among other factors, it was litigated by lawyers who were willing to bankroll the case at a much higher level than plaintiffs’ lawyers had previously. With greater resources at their disposal, the *Cipollone* lawyers used the tools of legal discovery to gain greater access to internal industry documents and the testimony of company officials than in any previous case.^{6–8} This landmark litigation eventually resulted in the only verdict in favour of a plaintiff during the first two waves of tobacco litigation, although the verdict was later reversed by an appellate court and subsequently dropped by the plaintiffs because their attorneys ultimately calculated that they could not afford to cover the costs of further appeals. Thus, neither of the first two waves of litigation resulted in any payments to plaintiffs.

The tobacco industry succeeded during the first and second waves by employing a powerful, two-fold strategy: first,

Abbreviations: DATTA, Tobacco Deposition and Trial Testimony Archive; FDA, US Food and Drug Administration; RICO, Racketeer Influenced and Corrupt Organizations

blame the plaintiff for “choosing” to smoke in spite of warnings on product packages and publicity regarding tobacco’s ill effects (while the defendants, paradoxically, denied that such warnings were accurate); and second, overwhelm the plaintiff by engaging in time-consuming and costly litigation tactics, such as taking numerous depositions and inundating the plaintiff’s attorneys with endless motions and other pre-trial demands.⁴ The industry’s litigation strategy was described most infamously in an internal memorandum sent to colleagues by J Michael Jordan, an attorney for the RJ Reynolds tobacco company⁵:

“The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiff’s lawyers. ...To paraphrase General Patton, the way we won these cases was not by spending all of our money, but by making that other son of a bitch spend all [of] his.”

One year separated the second wave, which ended with the US Supreme Court’s ruling in *Cipollone*, and the launching of the third wave. While the third wave also has featured many cases brought on behalf of individuals—many more, in fact, than during the first two waves combined—it also has included two types of lawsuit not seen previously in the tobacco litigation arena: third-party health care cost recovery cases and class action cases. The single most important distinguishing characteristic of the third wave has been the availability to plaintiffs of substantial new evidence of industry wrongdoing. In addition, the first few years of the third wave were characterised by the first settlements of legal cases by the tobacco industry, particularly, though not exclusively, those involving large aggregated claims filed by state governments.

The third wave was triggered when evidence of the tobacco industry’s manipulation of nicotine gained public notice in February 1994. In that pivotal month the US Food and Drug Administration (FDA) and ABC News’ “Day One” investigative television programme disclosed that American cigarette manufacturers were controlling nicotine levels in their products with the intent to dose consumers with fine-tuned deliveries of the drug.^{10–14} Members of the American legal community responded by filing the first class action on behalf of injured smokers in March 1994.¹⁵ That was followed by the filing, in Mississippi, of the first state attorney general’s cost recovery lawsuit in May 1994.¹⁶ Those cases were soon followed by many similar legal actions, most notably one brought by the Minnesota state attorney general, also in 1994.¹⁷

The new wave of litigation rapidly mushroomed and created a synergy with the FDA investigation and a series of groundbreaking congressional hearings and inquiries in 1994. Numerous lawsuits filed by state attorneys general, classes of addicted and injured smokers, and individual plaintiffs led to the discovery of millions of previously confidential internal tobacco company documents.¹ The Minnesota case eventually led to a historic settlement whose terms ensured that approximately seven million documents, totalling 35 million pages, would be made public.¹⁸ Before that agreement was finalised, a key set of roughly 39 000 previously confidential documents obtained through the Minnesota litigation were released publicly by Congressman Thomas Bliley, chairman of the Commerce Committee of the US House of Representatives.^{19–20}

This paper describes the epidemiology of litigation against the US tobacco industry during the years 1994–2005. “Epidemiology” refers to the study of the distribution and

determinants of disease in populations. We apply the term “epidemiology” to the litigation context for purposes of characterising qualitatively and, to the extent possible, quantitatively the variety of cases litigated against tobacco manufacturers and allied tobacco interests during the third wave, and the impact of those cases on the conduct and fortunes of the tobacco industry.

METHODS

The data for this paper have been drawn from legal cases identified in the Tobacco Deposition and Trial Testimony Archive (DATTA) (<http://tobaccodocuments.org/datta>), transcripts of testimony and related documents found in DATTA, government-mandated reports filed by tobacco manufacturers with the US Securities and Exchange Commission, investment company reports, reports and analyses published by the news media, a variety of informational documents produced by the Tobacco Control Resource Center at the Northeastern University School of Law, and legal settlement documents provided by the National Association of Attorneys General. Information was also abstracted from DATTA transcripts of testimony in 171 cases regarding the number of lawyers formally recorded as appearing at depositions and at trial.

RESULTS

Legal claims filed in the United States during the third wave have alleged injuries—to health, as well as financial—within the following categories:

- smoking and health cases alleging personal injury brought on behalf of individual plaintiffs
- smoking and health cases alleging personal injury and brought on behalf of classes of individual plaintiffs
- class action cases alleging that tobacco company marketing of so-called “light” or “ultra-light” cigarettes constitutes deceptive and unfair trade practices
- health care cost recovery cases brought by governmental and non-governmental plaintiffs seeking either reimbursement for health care expenditures caused by cigarette smoking or disgorgement of tobacco company profits
- cases brought by former asbestos manufacturers seeking contribution or reimbursement for amounts expended in connection with defending against asbestos claims allegedly caused in whole or in part by cigarette smoking.²¹

The DATTA project has also identified, and the DATTA collection contains transcripts of testimony from, other litigation of interest such as libel actions brought by tobacco companies against members of the media for reporting on industry misconduct.²²

Deserving of special mention, given its unique nature and unusual importance, is the case brought against the major US tobacco manufacturers by the US Department of Justice in 1999.²³ This civil lawsuit was filed following a four-year criminal investigation, which the Justice Department initiated in 1995 in response to a request from US Congressman Martin T Meehan. Mr Meehan delivered to the US attorney general a lengthy “prosecution memorandum” detailing a wide array of acts committed by tobacco companies and industry officials alleged to have constituted fraud, conspiracy, misrepresentation and other violations of law.^{24–25} The criminal investigation resulted in one misdemeanour conviction of DNA Plant Technology Corporation, a contractor to the Brown & Williamson Tobacco Corporation (which later merged with RJ Reynolds Tobacco Company to form Reynolds American Inc), whose scientists helped the cigarette manufacturer develop the genetically altered, high nicotine Y-1 tobacco,²⁶ but otherwise faltered due largely to

certain arcane legal complications. The Justice Department responded soon thereafter by filing its civil lawsuit, relying in large part on arguments presented to it by tobacco control legal experts and interested members of Congress.²⁷

The Justice Department case initially sought recovery of tobacco-related health care costs incurred under various government programmes, sought to restrain the tobacco industry from committing fraud and other unlawful conduct in the future, and asked the court to compel the defendants to disgorge the financial proceeds of their allegedly illegal conduct. The medical cost recovery claims were dismissed by the trial court in 2000, and appellate courts ruled in 2005 that disgorgement was not an available remedy under the civil Racketeer Influenced and Corrupt Organizations (RICO) Act. However, the trial court retained the ability to order a variety of significant, non-financial remedies.

In a Tolkien-length (1653 pages, or 1742 pages including the appendices) decision issued on 17 August 2006, federal Judge Gladys Kessler ruled that the defendants violated civil (that is, non-criminal) provisions of the RICO Act. She wrote that the case “is about an industry...that survives, and profits, from selling a highly addictive product which causes diseases that lead to a staggering number of deaths per year, an immeasurable amount of human suffering and economic loss, and a profound burden on our national healthcare system”. Based on the evidence presented during the nine-month trial, Judge Kessler concluded that the tobacco companies “lied, misrepresented, and deceived the American public...about the devastating health effects of smoking and environmental tobacco smoke”. Moreover, “they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted the truth about low-tar and light cigarettes so as to discourage smokers from quitting”. The judge further stated that the evidence presented “clearly establishes that Defendants have not ceased engaging in unlawful activity.... Their continuing conduct misleads consumers in order to maximize Defendants’ revenues by recruiting new smokers (the majority of whom are under the age of 18), preventing current smokers from quitting, and thereby sustaining the industry”.

On the basis of these extraordinary findings, the judge’s decision:

- prohibited the tobacco companies from committing acts of racketeering in the future or making false, misleading, or

deceptive statements concerning cigarettes and their health risks

- banned terms including “low tar”, “light”, “ultra light”, “mild”, and “natural” that have been used to mislead consumers about the health risks of smoking, and prohibited the tobacco companies from conveying any explicit or implicit health message for any cigarette brand
- ordered the tobacco companies to make corrective statements concerning the health risks of smoking and secondhand smoke exposure and their deceptive practices through newspaper and television advertising, their websites, and as part of cigarette packaging
- extended and expanded current requirements that the tobacco companies make public their internal documents produced in litigation
- ordered the tobacco companies to report disaggregated marketing data annually to the US government
- ordered the tobacco companies to make all litigation documents and key evidence available on their public websites through 2016.^{28–30}

Overall, the tobacco industry faced a far greater number of lawsuits, and a greater variety of types of lawsuit, between 1994 and 2005 than it had in previous years. Based on an evaluation of litigation against US industry leader Philip Morris (now a subsidiary of Altria Group, Inc), the total number of cases pending peaked in 2000, and has dropped off modestly since then (table 1). For example, 36 class actions were pending in 2000, while 33 were pending in 2005. In the same time period, individual actions fell from a total of 3385 to 2863.

Table 1 presents data concerning the number and types of legal cases brought against Philip Morris between 1994 and 2005. While many lawsuits have been filed against all of the major tobacco manufacturers, data relating to cases brought against Philip Morris, by far the largest maker of cigarettes in the United States, offer a useful overview of tobacco litigation trends during the third wave.

Plaintiffs won 31 of the 75 cases (41%) that were tried to verdict during the years 1995–2005 (tables 2–4). Juries handed down verdicts for plaintiffs in 11 different states, representing virtually every region of the country. In all, seven plaintiffs have been paid awards totalling \$115 million, including interest, following the exhaustion of appeals. (Note: All dollar figures cited in this paper refer to US currency.) Paid awards have ranged from \$165 000 to \$82

Table 1 Smoking and health-related lawsuits pending against Philip Morris/Altria, 1994–2005

Type of case	1994	1997	2000	2003	2005
Individual actions	40	375	3385*	3149†	2863‡
Class actions§ ¶	2	50	36	33	33
Health care cost recovery actions**	3	105††	53	14	5
Total	45	530	3474	3196	2901

*Includes 3085 cases brought by flight attendants seeking compensatory damages for personal injuries allegedly caused by exposure to secondhand tobacco smoke.

†Includes 2726 cases brought by flight attendants seeking compensatory damages for personal injuries allegedly caused by exposure to secondhand tobacco smoke (pending as of 13 February 2004).

‡Includes 2640 cases brought by flight attendants seeking compensatory damages for personal injuries allegedly caused by exposure to secondhand tobacco smoke.

§For the years 2000, 2003 and 2005, includes claims filed by approximately 983 individuals in a single proceeding in West Virginia.

¶For 2003 and 2005, includes smoking and health class actions and lights/ultra lights consumer deception class actions.

**For 2000, 2003 and 2005, includes US government lawsuit seeking recovery of tobacco-related health care costs and other legal relief.

††Includes actions brought by state attorneys general.

Sources: 8K and 10K filings by Altria Group and Philip Morris Companies with US Securities and Exchange Commission, 10 March 1995 to 7 February 2006.

Table 2 Jury verdicts (by case) in favour of plaintiffs during the third wave of tobacco litigation

Case	State	Year of verdict	Compensatory damages assessed by jury	Punitive damages assessed by jury	Total amount of award assessed by jury	Current status of case	Type of case*
Horowitz	CA	1995	\$1.3 million	\$700000	\$2 million	Upheld on appeal; plaintiff was paid \$3 million, including interest	I
Carter	FL	1996	\$750000	\$0	\$750000	Upheld on appeal; plaintiff was paid \$1.09 million, including interest	I
Widdick	FL	1998	\$552000	\$450000	\$1.002 million	Reversed; dismissed on appeal	I
Henley	CA	1999	\$1.5 million	\$50 million	\$51.5 million	Reduced to \$10.5 million; upheld on appeal; plaintiff was paid \$16.7 million (including interest)	I
Williams-Branch	OR	1999	\$800000	\$79.5 million	\$80.3 million	On appeal	I
Connor	MD	1999	\$225000	\$2 million	\$2.225 million	Second trial ordered to determine non-liability issue related to when plaintiff's mesothelioma developed	I
Engle	FL	1999	N/A	\$145 billion	\$145 billion	Reversed; on appeal	C
Whiteley	CA	2000	\$1.72 million	\$20 million	\$21.72 million	Reversed; set for retrial	I
Traverso	CA	2000	\$48,000	\$1 million	\$1.048 million	Settled (terms confidential)	I
Farnan (Engle class member)	FL	2000	\$2.9 million	\$0	\$2.9 million	On appeal	I
Amodeo (Engle class member)	FL	2000	\$5.8 million	\$0	\$5.8 million	On appeal	I
Della Vecchia (Engle class member)	FL	2000	\$4 million	\$0	\$4 million	On appeal	I
Jones	FL	2000	\$200000	\$0	\$200000	Verdict vacated by trial court	I
Blue Cross and Blue Shield of New Jersey	NY	2001	\$17.8 million	\$0	\$17.8 million	Reversed	H
Boeken	CA	2001	\$5.54 million	\$3 billion	\$3+ billion	Reduced to \$55.54 million; upheld on appeal; plaintiff was paid \$82 million (including interest)	I
Kenyon	FL	2001	\$165000	\$0	\$165000	Upheld on appeal; plaintiff was paid \$195000 (including interest)	I
Burton	KS	2002	\$198000	\$15 million	\$15.198 million	Punitive damage award eliminated; plaintiff was paid \$198000	I
Schwarz	OR	2002	\$170000	\$150 million	\$150.17 million	Reduced to \$100.17 million; on appeal, remanded back to trial court for new trial to re-determine amount of punitive damages	I
French	FL	2002	\$5.5 million	\$0	\$5.5 million	Reduced to \$500000; on appeal	I
Luckacs (Engle)	FL	2002	\$500000	\$37 million	\$37.5 million	Reduced to \$25.1 million; on appeal	I
Bullock	CA	2002	\$850000	\$28 billion	\$28+ billion	Reduced to \$28.1 million; upheld by mid-level appeals court; on appeal	I
Vargas	PR	2002	\$1 million	\$0	\$1 million	Reversed	I
Miles/Price	IL	2003	\$5 billion	\$3 billion	\$10.1 billion (including \$2.1 billion interest)	Reversed; on appeal	C
Eastman	FL	2003	\$3.25 million	\$3.25 million	\$6.5 million	Reduced to \$3.25 million; plaintiff was paid	I
Boerner	AR	2003	\$4.025 million	\$15 million	\$19.025 million	Punitive damage award reduced to \$5 million by appeals court; plaintiff was paid \$9 million	I
Thompson	MO	2003	\$1.05 million	\$250000	\$1.3 million	On appeal	I
Frankson	NY	2003	\$175000	\$20 million	\$20.175 million	Punitive damage award reduced to \$5.5 million; on appeal	I
Scott	LA	2004	\$592 million	\$0	\$592 million	On appeal	C
Arnitz	FL	2004	\$240000	\$0	\$240000	Upheld by mid-level appeals court; on appeal	I
Smith	MO	2005	\$500000	\$20 million	\$20.5 million	On appeal	I
Rose	NY	2005	\$3.42 million	\$17.1 million	\$20.52 million	On appeal	I

*I, individual case; C, class action case; H, health care cost recovery case.

AR, Arkansas; CA, California; FL, Florida; IL, Illinois; KS, Kansas; LA, Louisiana; MD, Maryland; MO, Missouri; NY, New York; OR, Oregon; PR, Puerto Rico. Sources: Court filings; news media reports; Tobacco Control Resource Center, Northeastern University School of Law; Morgan Stanley Equity Research North America; Prudential Equity Group, LLC.

million, including interest. Seven of the 31 verdicts in favour of plaintiffs were later reversed or vacated; of those seven, three either remain on appeal or are set to be retried. Plaintiffs won 16 of the 43 cases (37%) that went to trial against Philip Morris. Thus far the company has paid plaintiffs a total of approximately \$102 million, including interest, in three of them.

Verdicts won by plaintiffs in cases against members of the tobacco industry since 1995 have ranged from a low of \$165 000 to a high of \$145 billion. We also have identified 61 settlements of cases against the tobacco industry, all but six of which were brought by state attorneys general in the mid-1990s (table 5).

The unprecedented \$145 billion verdict came in the class action case of *Engle v. Liggett Group, Inc.* That verdict was overturned by a Florida appellate court, then partly reinstated by the Florida Supreme Court. The latter court rejected the punitive damage verdict, but upheld the jury's findings that the tobacco companies had engaged in a broad range of wrongful acts. The court ruled that hundreds of thousands of individuals in Florida may now pursue streamlined, less-costly cases against the tobacco industry for compensatory and punitive damages. These class members will be entitled to rely on the court's findings that cigarette manufacturers were negligent and their products defective, unreasonably dangerous, addictive, and the cause of 16 major diseases. These individuals will

Table 3 Jury verdicts won (by party) during the third wave of tobacco litigation

Party	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Plaintiffs	1	1	0	1	4	6	3	6	5	2	2
Defendants	0	1	2	1	8	2	8	4	12	2	4

Sources: Court filings; news media reports; Tobacco Control Resource Center, Northeastern University School of Law; Morgan Stanley Equity Research North America; Prudential Equity Group, LLC.

Table 4 Jury verdicts (by type of case) in favour of plaintiffs during the third wave of tobacco litigation

Type of case	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Individual actions	1	1	0	1	3	6	2	6	4	1	2
Class actions	0	0	0	0	1	0	0	0	1	1	0
Health care cost recovery actions	0	0	0	0	0	0	1	0	0	0	0

Sources: Court filings; news media reports; Tobacco Control Resource Center, Northeastern University School of Law; Morgan Stanley Equity Research North America; Prudential Equity Group, LLC.

only be required to prove personal medical causation and reliance on any acts of fraud that they allege.³¹

The first two cases to result in payments to plaintiffs after all appeals had been exhausted were *Horowitz v. Lorillard, Inc.*, which received a jury verdict in 1995, and *Carter v. Brown & Williamson Tobacco Corporation*, whose verdict was handed down in 1996. In those cases, the defendants paid \$2 million and \$750 000, respectively, in compensatory and punitive damages, plus interest. The *Carter* case was the first conventional cigarette-caused lung cancer case to be upheld on final appeal, and was the first successful case to employ the newly available evidence that had triggered the third wave of tobacco litigation. The *Horowitz* case concerned an individual who contracted a rare and fatal case of mesothelioma—an asbestos-caused lung cancer—after smoking Kent cigarettes with “Micronite filters” containing crocidolite asbestos. In that case, liability was shared equally between a cigarette manufacturer and the supplier of the asbestos-containing filters.

In *Carter* and *Horowitz*, the damage awards were upheld without modification. It is not unusual, however, for damage awards imposed by juries to be reduced upon review by the trial court or appeals court judges. For example, the \$3 billion award assessed in *Boeken v. Philip Morris, Inc.* in 2001 ultimately was reduced to \$55.5 million.

In the 2003 case of *State Farm Mutual Auto Insurance Company v. Campbell*, which concerned insurance company wrongdoing in settling claims, the US Supreme Court ruled that the award of punitive damages is limited by considerations of due process. The court held that the ratio of punitive damages to compensatory damages should rarely exceed a single digit ratio (that is, 9:1 or less).³² An appellate court reduced the award in the *Boeken* case in order to satisfy the Supreme Court’s general guidepost. The decision to reduce the award so dramatically may not have been justified, however. In the *State Farm* decision, the court made clear that the ratio of punitive damages to compensatory damages should be determined in light of five questions:

- Was the harm personal or economic in nature?
- Did the defendant act with indifference or reckless disregard?
- Was the plaintiff financially vulnerable?
- Was this repeated or one-time conduct?
- Was the conduct intentional or accidental?

The *State Farm* case concerned the bad faith actions of an insurance company, and no bodily injury was involved. In contrast with that ordinary case involving misconduct in a

commercial transaction, tobacco litigation usually includes allegations of grievous bodily harm, and sometimes death, caused by the defendants’ intentional, reckless and repeated conduct.

The tobacco litigation playing field has been levelled to some degree with respect to the resources brought to bear by plaintiffs and defendants, particularly in terms of the information available to each side, since plaintiffs now have access to large volumes of internal tobacco industry documents that were unavailable before the mid-1990s. The state attorney general cases also, uniquely, featured the involvement of a large number of well-financed plaintiffs’ lawyers who combined forces to litigate against the tobacco industry. The cumulative threat posed by those cases prompted the tobacco industry to settle them in 1997 and 1998.²⁵

Since settling the attorney general litigation, the tobacco industry has continued to employ far greater financial and human resources than its adversaries. Altria reported that, for the years 2000–2004, it spent \$1.713 billion defending tobacco-related product liability cases.^{21–33} During the same time period, RJR Tobacco’s expenditures on tobacco-related litigation totalled \$779 million.^{34–35} Over the five-year period, total litigation expenditures for just the two companies was a half-billion dollars per year.

In its annual report for 2004, Altria shed light on what prompted those considerable expenditures:

“Litigation defense costs are influenced by a number of factors. ...Principal among these factors are the number and types of cases filed, the number of cases tried annually, the results of trials and appeals, the development of the law controlling relevant legal issues, and litigation strategy and tactics. ...The factors that have influenced past product liability defense costs are expected to continue to influence future costs. While PM USA does not expect that product liability defense costs will increase significantly in the future, it is possible that adverse developments among the factors discussed above could have a material adverse effect on PM USA’s operating companies [sic] income.”²¹

Lawyers’ fees as high as \$1000 per hour undoubtedly contributed to the high cost of defending these cases.³⁶ At any rate, Altria’s annual report confirmed that tobacco-related litigation has had a meaningful impact on its bottom line, and it foresaw that such costs would continue.

Comparable data are not available for the plaintiffs’ side, but it is clear that plaintiffs’ expenditures are dwarfed by

Table 5 Settlements reached during the third wave of tobacco litigation

Type of case	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005
Health care cost recovery actions	5*	2† ‡	48§ ¶	0	0	0	0	0	0	0
Class actions	1**	1††	0	0	0	0	0	0	0	0
Individual actions	0	0	0	0	1‡‡	0	0	1§§	1¶¶	1***

*The states of Mississippi, West Virginia, Florida, Massachusetts and Louisiana settled cases with Brooke Group Ltd and Liggett Group Inc (<http://stic.neu.edu/settlement/AGsettlement96.htm>), preliminary to the states' ultimate settlements with all of the major tobacco companies in the years 1997–1998.

†The two settled cases were In Re: Mike Moore, ex rel., State of Mississippi Tobacco Litigation, Chancery Court, Jackson, Mississippi, No. 94–1429 (<http://stic.neu.edu/MS/mssettle.htm>); and State of Florida v. American Tobacco Co, Inc, Circuit Court, 15th Judicial District, Palm Beach County, Florida, No. CL 95–1466 (<http://stic.neu.edu/FL/flsettle.htm>).

‡A number of states separately settled the state attorney general cases with Brooke Group Ltd and Liggett Group Inc (<http://stic.neu.edu/liggettsettle.htm>), preliminary to the states' ultimate settlements with all of the major tobacco companies in the years 1997–1998. See note § for information regarding the Master Settlement Agreement (MSA).

§The Master Settlement Agreement was reached between 46 states and the major US tobacco companies (http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf). For a complete listing of the individual state cases settled, see the MSA (exhibit D).

¶The two other settled cases in 1998 were State of Minnesota v. Philip Morris Inc, District Court, 2nd Judicial District, Ramsey County, Minnesota, No. C1–94–8565 (<http://stic.neu.edu/MN/settlement.htm> and <http://stic.neu.edu/MN/consent.htm>); and State of Texas v. American Tobacco Co, US District Court, Eastern District of Texas, No. 5:96-CV-0091 (<http://stic.neu.edu/Tx/Texas-settlement.htm>).

**Castano v. American Tobacco Co Inc, US District Court for the Eastern District of Louisiana, No. 94–1044, was settled with Brooke Group Ltd and Liggett Group Inc.

††Broin v. Philip Morris Companies, Inc, Circuit Court, 11th Judicial Circuit, Dade County, Florida, No. 91–49738 CA 22, was settled with all defendants.

‡‡Traverso v. Lorillard Tobacco Co, Superior Court, San Francisco County, California, was settled following a verdict holding the defendant liable for \$1.048 million, but before the jury could assess supplementary damages in a second phase of the trial.

§§Shipman v. Philip Morris Companies, Inc, District Court, 18th Judicial District, Johnson County, Texas, No. 26294.

¶¶McMullin v. US Smokeless Tobacco Co, Circuit Court, 4th Judicial Circuit, Duval County, Florida, No. 00-02790-CA.

***Mattern v. Liggett Group, Inc, Circuit Court, 22nd Judicial District, City of St Louis, Missouri, No. 032-09705.

Sources: Court filings; news media reports; Tobacco Control Resource Center, Northeastern University School of Law; Morgan Stanley Equity Research North America, Prudential Equity Group, LLC.

those of the industry. A study of transcripts from 171 cases included in the DATTA collection showed that tobacco industry lawyers have consistently outnumbered plaintiffs' lawyers at depositions and at trial. According to information recorded in DATTA transcripts, defendants averaged 2.4 times as many lawyers at depositions and 1.6 times as many lawyers at trial, compared to plaintiffs (Emily L Goldman, University of Michigan School of Public Health, unpublished paper, April 2004).

DISCUSSION

The third wave of tobacco litigation has represented a sea change in efforts to hold the tobacco industry accountable in American courtrooms. While tobacco manufacturers continue to do their utmost to make these cases difficult to pursue, the successful outcomes of many cases in recent years—in marked contrast with the abysmal record of tobacco litigation during the first two waves—highlight the fact that plaintiffs' lawyers are now better equipped to persuade juries of the defendants' culpability. Reasons for the relatively greater success of plaintiffs in the third wave include their use of previously confidential tobacco company documents as evidence and testimony by former company officials serving as whistleblowers.²⁵ Nevertheless, the defendants still win more cases at trial than the plaintiffs, which probably is attributable, at least in part, to the continued disparity of resources between the tobacco industry and the plaintiffs.

As noted above, Goldman found that defendants averaged 2.4 times as many lawyers at depositions and 1.6 times as many lawyers at trial, compared to plaintiffs. These disparities are probably conservative, because the tobacco companies do not make all of the lawyers who represent them in a given case available at depositions and trials. For example, during a trial, a few of the defendants' lawyers will make officially recorded appearances in the courtroom, while others—sometimes many others—remain unidentified in the courtroom gallery or work off-site in offices and hotel rooms. Tobacco company defendants may limit the visibility of their attorneys within the courtroom in order to soften their image as wealthy corporate giants. Some tobacco plaintiffs' attorneys may work outside of court proceedings

and depositions, but it is our observation that this is much less common than for defence attorneys. In another indication that tobacco companies strategically control the use of lawyers in the courtroom, Philip Morris is now reportedly hiring more minority and women lawyers, whom the company believes will hold greater appeal for juries.³⁷

The industry has sought to dissuade potential new plaintiffs from filing suit by making it appear that plaintiffs face insurmountable hurdles and probably will lose on appeal. In fact, less than 20% of the verdicts for plaintiffs have thus far been reversed on appeal, and cases large and small continue to be filed. In August 2005, for example, the United Seniors Association, a conservative Republican advocacy group, sued six cigarette manufacturers on behalf of the organisation's members. The case seeks payment of \$60 billion to the US government to cover Medicare expenditures for smoking-related health care, as well as another \$60 billion for the plaintiffs themselves.³⁶ That case was dismissed but is currently being appealed based upon the findings of fact establishing tobacco companies' liability in the US Department of Justice lawsuit.³⁸

On another front, the industry has worked to reduce its liability through the passage of legislation. Tort reform adopted at the state level has, at times, given protection from liability to tobacco manufacturers.³⁹ In addition, at least 33 states, with encouragement from the tobacco industry, have passed laws to limit the size of appeal bonds.⁴⁰ These laws reduce the size of the bond that a losing defendant must post in order to stay an adverse judgment during an appeal. In 11 states, the caps on appeal bonds affect only cigarette manufacturers.⁴¹

In February 2005, the US Congress approved, and President George W Bush signed into law, the "Class Action Fairness Bill of 2005". The law is designed to shift most class actions from state courts to the federal court system, which is generally more hostile to class actions than are the state courts.⁴² In a press release,⁴³ US Senate Democratic leader Harry Reid said:

"Yet another real world effect of this bill is to help the tobacco industry avoid accountability. This bill's requirements virtually guarantee that tobacco-related cases will

What this paper adds

A limited amount of peer-reviewed analysis has been conducted previously regarding the "third wave" of tobacco litigation. Earlier studies, now outdated, documented the number of legal cases filed against major cigarette manufacturers and discussed the characteristics of the third wave.

This study constitutes the most up-to-date qualitative and quantitative analysis of the legal cases brought against the major US tobacco manufacturers during the third wave of tobacco litigation. It reviews recent changes in federal and state law and their effect on efforts to hold the tobacco industry accountable in courts of law. The study presents and analyses data drawn from the Tobacco Deposition and Trial Testimony Archive. The study also analyses updated information regarding the financial and human resources employed by major tobacco companies to defend themselves in court.

end up in federal court since the major tobacco companies are all headquartered in only one or two states while tobacco victims are nationwide."

One of the most recent and important legal decisions against a tobacco company was announced by the Oregon State Supreme Court on 2 February 2006. The unanimous court affirmed a 1999 verdict of \$80.3 million against Philip Morris in the case of Williams-Branch v. Philip Morris, Inc.⁴⁴ "Philip Morris's conduct was extraordinarily reprehensible," the court wrote in its decision, ruling that the high punitive damage award was justified. The US Supreme Court announced that it will review that ruling, with the final decision anticipated in mid-2007.⁴⁵ In another case, the Supreme Court announced on 20 March 2006 that it would not review the 2001 verdict in Boeken v. Philip Morris, Inc. Consequently Philip Morris was ordered to pay \$82 million, including interest, to the widow of a longtime smoker of Marlboro cigarettes.⁴⁶

In the future, as the large, aggregated claims that have characterised the third wave run their course, it is possible that a fourth wave of tobacco litigation will emerge, fuelled by the ever-growing availability of internal industry documents and public anti-smoking sentiment. Such a new wave might feature an increase in types of litigation that, until now, have been seen to only a limited degree, including legal actions relating to secondhand smoke exposure and deaths due to cigarette-caused fires, which often involve victims who did not themselves smoke cigarettes.

ADDENDUM

On 25 September 2006, after this paper was accepted for publication, Judge Jack Weinstein of the US District Court for the Eastern District of New York issued a ruling allowing a massive class action to be litigated by American consumers of "light" cigarette brands, with the case scheduled to go to trial as early as January 2007.⁴⁷ If appellate courts permit the case, called Schwab v. Philip Morris USA Inc, to proceed to trial, the outcome could potentially result in compensation being paid to tens of millions of individuals in the United States while costing cigarette manufacturers hundreds of billions of dollars in damages.

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