



DOES MASS PRODUCT TORT LITIGATION FACILITATE OR HINDER SOCIAL LEGISLATIVE REFORM? A COMPARATIVE STUDY OF TOBACCO REGULATION

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I. INTRODUCTION

Michael Moore, Mississippi State Attorney General, triumphantly proclaimed the settlement of the tobacco litigation as “the most historic public health agreement in history.”¹ Since that moment, numerous scholars and public health advocates have lined up to debate the effectiveness of litigation in accomplishing public health policy objectives.² No scholar

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¹ CARRICK MOLLENKAMP ET AL., *THE PEOPLE VS. BIG TOBACCO* 231 (1998) (quoting Moore’s speech announcing the GSA at a press conference on June 17, 1997 at the ANA Hotel).

² See, e.g., Peter D. Jacobson & Soheil Soliman, *Litigation as Public Health Policy: Theory or Reality?*, 30 J.L. MED. & ETHICS 224, 224 (2002) (“An ongoing debate among legal scholars and public health advocates is the role of litigation in shaping public policy.”); Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL. POL’Y & L. 769, 769 (1999) (“We see a distinct role

denies the fact that litigation can have an impact on social policy.³ Instead, the debate has tended to center around the appropriateness of intentionally using the judiciary as a tool for creating new social policy regimes in place of legislative action.⁴

The Master Settlement Agreement is one of the most substantial public health regimes ever created with the aid of litigation.⁵ For that reason, the regulation of tobacco has been widely examined by scholars to prove or rebut the assertion that litigation should be used to create social policy.⁶ The goal of this

for litigation as a complement to a broader, comprehensive approach to tobacco control policy making.”); Timothy D. Lytton, *Using Litigation to Make Public Health Policy: Theoretical and Empirical Challenges in Assessing Product Liability, Tobacco, and Gun Litigation*, 32 J.L. MED. & ETHICS 556, 556 (2004) [hereinafter Lytton, *Using Litigation to Make Public Health Policy*] (“In recent years, a number of prominent scholars have touted the use of litigation as an effective tool for making public health policy.”); Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 899 (1998) (“To assert—as I do here—that antimoking litigation and trial court decisions from 1994 to early 1998 significantly influenced national policymaking on tobacco is to enter an ongoing debate about the impact of courts on policy and social change.”).

³ See R. Shep Melnick, *Tobacco Litigation: Good for the Body but Not the Body Politic*, 24 J. HEALTH POL. POL’Y & L. 805, 805 (1999) (“That courts can bring about significant policy changes should be evident to everyone, even academics.”).

⁴ See *infra* Part III (analyzing the arguments in favor of and against the use of the judiciary to create social reform).

⁵ See MOLLENKAMP ET AL., *supra* note 1, at 231 (quoting Moore’s statement that the settlement is “the most historic public health agreement in history”); Jacobson & Soliman, *supra* note 2, at 230 (“Whatever its shortcomings, however, there is no question that these [public health] gains would not have been achieved absent the states’ Medicaid litigation.”); Rahul Rajkumar et al., *Is the Tobacco Settlement Constitutional?*, 34 J.L. MED. & ETHICS 748, 748 (2006) (stating that “the MSA was widely hailed as a victory for public health”).

⁶ See, e.g., Jacobson & Warner, *supra* note 2, at 771 (“In this article, we examine the relationship between litigation and public health policy formulation in the context of the debates over tobacco control policy.”); Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187, 188-89 (2000) (“[B]y its nature, private litigation does not adequately address public health concerns, and therefore will not create a comprehensive national tobacco policy.”); Lytton, *Using Litigation*

Article is to examine the scholarly debate by applying the real world experience of tobacco regulation in the United States and the United Kingdom to the theoretical arguments on both sides of the debate. The United States is a true mix of legislation and litigation that includes a mass product tort system far greater in scope and size than any place in the world.⁷ The United Kingdom is primarily a legislative state whose mass product tort litigation is nearly nonexistent.⁸ These dramatically differing approaches to the regulation of social policy create the ability to compare and contrast the effectiveness of using litigation to create social policy in the United States, while relying on legislation to create social policy in the United Kingdom. After examining the scholarly debate within the context of tobacco regulation in the United States and United Kingdom, this article finds that litigation ultimately hinders social legislative reform.

Part II of this Article examines the history of tobacco legislation and litigation in the United States and the United Kingdom. Part III analyzes the scholarly debate by applying the comparison of tobacco regulation in the United States and the United Kingdom. Part IV concludes by summarizing the findings of this Article.

to Make Public Health Policy, supra note 2, at 557 (stating that advocates and opponents have used the tobacco litigation as a case study in arguing for or against the use of the judiciary); Mather, supra note 2, at 900 (“I address several substantive and theoretical issues about the power of courts to effect change, using tobacco law and politics as a case study.”).

⁷ See Roger Magnusson, Book Review, 17 SYDNEY MED. L. REV. 477, 483 (2009) (Austl.) (reviewing LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT (2008)) (“The USA is the world’s great litigation laboratory”); Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 467 (2000) (“The description of the ‘American Way’ as seeking social change in the courts may not be an exaggeration.”).

⁸ See Andrei Sirabonian, Comment, *Why Tobacco Litigation Has Not Been Successful in the United Kingdom: A Comparative Analysis of Tobacco Litigation in the United States and the United Kingdom*, 25 NW. J. INT’L L. & BUS. 485, 506 (2005) (“The United Kingdom uses legislative means to dictate its public policy and thus is hesitant to punish private parties in order to send a message out to the public.”).

II. THE HISTORY OF TOBACCO REGULATION IN THE UNITED STATES AND THE UNITED KINGDOM

This Article undertakes a comparative analysis of the differing experiences of tobacco regulation within the United States and the United Kingdom. These two countries are sufficiently similar to draw comparisons, but at the same time contain two very different perspectives on how to solve social problems: the United States relies heavily on the tort system, while the United Kingdom relies heavily on legislation and social welfare programs.⁹ To provide the proper context to the scholarly debate, it is important to understand the regulation of tobacco through both legislation and litigation in the United States and the United Kingdom.

A. THE UNITED STATES

The United States is generally known for its prevalence of mass tort litigation;¹⁰ however, the United States has a long history of both legislation and litigation regarding the regulation of tobacco. This Article examines the history of tobacco regulation in the United States since the mid-1900s.

1. Legislation of Tobacco

For all intents and purposes, the history of tobacco legislation in the United States started on January 11, 1964, when United States Surgeon General Luther L. Terry released a report on smoking and health.¹¹ The Surgeon General found that “[c]igarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far

⁹ See *supra* notes 7-8 and accompanying text (explaining the different approaches to regulation taken in the United States and United Kingdom).

¹⁰ See *supra* note 7 and accompanying text (stating that the prevalence of litigation in the United States is far greater than anywhere else in the world).

¹¹ Justin D. Heminger, Comment, *Big Abortion: What the Antiabortion Movement Can Learn from Big Tobacco*, 54 CATH. U. L. REV. 1273, 1278 (2005). For the first time, this report linked smoking with several deadly diseases. Sirabonian, *supra* note 8, at 487.

outweighs all other factors.”¹² The Surgeon General stated that “[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action.”¹³

Spurred on by the findings of the Surgeon General’s Report, in June of 1964, the Federal Trade Commission (FTC) promulgated a rule requiring all cigarette ads and cigarette packages to include the following warning: “Caution: Cigarette smoking is dangerous to health and may cause death from cancer and other diseases.”¹⁴ Congress chose to preempt the FTC’s rule, however, when it passed the Federal Cigarette Labeling and Advertising Act (FCLLA).¹⁵ The FCLLA required all cigarette packaging to include the following warning, “Caution: Cigarette Smoking May be Hazardous to Your Health.”¹⁶ Congress used this language to draw a balance between informing the public about the negative effects of smoking, and implementing uniform requirements to protect commerce.¹⁷ In May of 1969, the FTC proposed a new rule that

¹² OFFICE OF THE SURGEON GENERAL, U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, *SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 37* (1964), available at http://profiles.nlm.nih.gov/NN/B/B/M/Q/_/nbbmq.pdf.

¹³ *Id.* at 33. See also Heminger, *supra* note 11, at 1278 (describing the Surgeon General’s report); Sirabionian, *supra* note 8, at 487 (same).

¹⁴ Christine P. Bump, Comment, *Close but No Cigar: The WHO Framework Convention on Tobacco Control’s Futile Ban on Tobacco Advertising*, 17 EMORY INT’L L. REV. 1251, 1275 (2003) (citations omitted). See also Graham E. Kelder, Jr. & Richard Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL’Y REV. 63, 67 (1997).

¹⁵ Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (codified as amended at 15 U.S.C. §§ 1331-41 (1994)); Kelder & Daynard, *supra* note 14, at 67. Congress wished to hold hearings on the issue of tobacco regulation in an attempt to avoid a “multiplicity of State and local regulations pertaining to labeling of cigarette packages[.]” Bump, *supra* note 14, at 1275 (citing H.R. REP. NO. 89-449, at 4 (1965)).

¹⁶ § 4, 79 Stat. 282; Kelder & Daynard, *supra* note 14, at 67; Sirabionian, *supra* note 8, at 487.

¹⁷ Sirabionian, *supra* note 8, at 488.

would require all cigarette advertising, in print and broadcast, to require the warning: "Cigarette smoking is dangerous to health and may cause death from cancer, coronary heart disease, chronic bronchitis, pulmonary emphysema, and other diseases."¹⁸ Congress once again chose to weigh in on the issue, and amended the FCLAA by passing the Public Health Cigarette Smoking Act (PHCSA).¹⁹ The PHCSA required all cigarette packages to contain the following warning: "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous to Your Health."²⁰ The PHCSA also prohibited cigarette advertising on all electronic media and included an express preemption clause.²¹

Congress amended the FCLAA for a second time in 1984 by passing the Comprehensive Smoking Education Act (CSEA).²² The CSEA required more stringent health warnings to be included on all cigarette packages and advertisements.²³ Four explicit warnings were required to be rotated on every package and advertisement in accordance with a plan submitted by the manufacturer and approved by the FTC.²⁴ The CSEA also

¹⁸ Kelder & Daynard, *supra* note 14, at 67 (quoting 34 Fed. Reg. 7917 (1969)).

¹⁹ Public Health Cigarette Smoking Act, Pub. L. No. 91-222, 84 Stat. 87 (1969) (codified as amended at 15 U.S.C. § 1334 (1970)); Bump, *supra* note 14, at 1276; Kelder & Daynard, *supra* note 14, at 67.

²⁰ § 4, 84 Stat. 87; Bump, *supra* note 14, at 1276; Kelder & Daynard, *supra* note 14, at 67, 72; Sirabonian, *supra* note 8, at 487.

²¹ §§ 5-6, 84 Stat. 87; Bump, *supra* note 14, at 1276-77; Kelder & Daynard, *supra* note 14, at 67. Congress made clear that no agency had authority to regulate tobacco as a consumer good under the Consumer Product Safety Act or the Federal Hazardous Substance Act. Kelder & Daynard, *supra* note 14, at 67-68.

²² Comprehensive Smoking Education Act, Pub. L. No. 98-474, 98 Stat. 2200 (1984) (codified as amended at 15 U.S.C. § 1333); Bump, *supra* note 14, at 1277.

²³ Bump, *supra* note 14, at 1277.

²⁴ § 4, 98 Stat. 2200; Bump, *supra* note 14, at 1277-78. The four warnings were:

created the Interagency Committee on Smoking and Health, which was designed to monitor the effects of smoking and to make recommendations to Congress.²⁵

In April of 1994, seven tobacco executives appeared in front of Congress and swore under oath that nicotine was not addictive.²⁶ Later that month, however, the “Cigarette Papers” were anonymously leaked by a former paralegal of the law firm representing Brown & Williamson Tobacco Co. to a University of California professor.²⁷ These documents clearly showed that tobacco executives knew for several decades that nicotine was addictive and that cigarettes caused cancer and other deadly diseases.²⁸ The documents also unveiled a massive conspiracy orchestrated by the tobacco companies to secure their respective market shares by intentionally increasing the levels of nicotine in their cigarettes to addict smokers.²⁹

SURGEON GENERAL'S WARNING: Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy

SURGEON GENERAL'S WARNING: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health

SURGEON GENERAL'S WARNING: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight

SURGEON GENERAL'S WARNING: Cigarette Smoke Contains Carbon Monoxide.

Id.

These new warnings were required to meet specific typeface and spacing requirements as well as required to be enclosed in a black border. Bump, *supra* note 14, at 1278.

²⁵ Sirabionian, *supra* note 8, at 488.

²⁶ Mather, *supra* note 2, at 906.

²⁷ *Id.*; Sirabionian, *supra* note 8, at 492-93.

²⁸ Sirabionian, *supra* note 8, at 493.

²⁹ *Id.*

Shortly following the revelation of the Cigarette Papers, the FDA undertook an extensive legal study of the agency's authority to regulate tobacco.³⁰ The FDA concluded that the nicotine present within cigarettes is in fact a drug, and cigarettes are in fact a drug delivery device.³¹ President Clinton adopted the FDA's interpretation, and in 1998, attempted to enact legislation that would have given the FDA the authority to regulate the content of cigarettes.³² This legislation failed in Congress.³³

There was no significant piece of federal tobacco legislation following the failure in 1998 until Congress passed the Family Smoking Prevention and Tobacco Control Act (FSPTCA) in 2009.³⁴ The FSPTCA is unquestionably the most stringent piece of federal legislation regulating the tobacco industry ever passed in the United States.³⁵ For the first time, the FSPTCA provided the FDA with the authority to regulate tobacco, including virtually every aspect of the design, manufacturing, advertising, distribution, and sale of tobacco products.³⁶ The FSPTCA

³⁰ Kelder & Daynard, *supra* note 14, at 68. The FDA has jurisdiction to regulate consumer products, which includes drugs and drug delivery devices. *Id.* The term "drug" is defined as "an article 'intended to affect the structure or any function of the body,' and [the term] 'device' [is defined] as an instrument or article intended to accomplish this goal." *Id.*

³¹ *Id.* The FDA claimed that it did not require any new legislation to regulate tobacco. The Supreme Court would ultimately disagree with this assessment. See Part II.A.2.iii.c (discussing the case in which the Supreme Court invalidated the FDA's attempt to regulate tobacco).

³² Kelder & Daynard, *supra* note 14, at 68; Turley, *supra* note 7, at 444.

³³ Turley, *supra* note 7, at 444. See *infra* notes 94-101 and accompanying text (describing the failure of the GSA and the McCain bill).

³⁴ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. §§ 387 (2010)).

³⁵ See Ricardo Carvajal et. al., *The Family Smoking Prevention and Tobacco Control Act: An Overview*, 64 FOOD & DRUG L.J. 717, 717 (2009) ("[T]here is little question that the law's enactment marks a dramatic shift in the relationship between the federal government and the tobacco industry.").

³⁶ *Id.*; Olga Yevtukhova, Note and Comment, *The Food and Drug Administration Kicks the Habit—The FDA's New Role in Regulation of Tobacco Products*, 35 AM. J.L. & MED. 700, 700 (2009).

specifically bans the use of flavored tobacco, although there is one exception for menthol.³⁷ Importantly, the FSPTCA actually gives the FDA authority to lower the amount of nicotine in cigarettes, even below the level which causes addiction.³⁸ However, the FDA cannot ban all tobacco products nor completely eliminate nicotine.³⁹

2. Litigation of Tobacco

Tobacco litigation in the United States has a long history. This Article does not claim to provide a full analysis of all litigation involving tobacco but instead provides an overview of the most important events of the litigation.⁴⁰ The history of tobacco litigation can be broken down into three main timeframes. This Article provides a general summary of each of the three waves of litigation and the important events that took place at each stage.

i. The First Wave of Litigation

The first wave of tobacco litigation in the United States lasted from 1954 to 1973.⁴¹ The first tobacco case, brought in 1954, was *Pritchard v. Liggett & Myers Tobacco Co.*⁴² Typical of all of the cases brought during the first wave of litigation,

³⁷ Yevtukhova, *supra* note 36, at 702. Menthol was excluded from the ban so that Congress could ensure the support of Philip Morris for the legislation. *Id.* This is regardless of the fact that menthol is clearly the most popular flavor of cigarettes and is actually more addictive than regular cigarettes. *Id.*

³⁸ *Id.* at 701.

³⁹ *Id.*

⁴⁰ For a more detailed examination of the history of tobacco litigation, see Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331 (2001) (providing a detailed explanation of the history of tobacco litigation in the United States).

⁴¹ Heminger, *supra* note 11, at 1280; Kelder & Daynard, *supra* note 14, at 71.

⁴² 295 F.2d 292 (3d Cir. 1961); Sirabionian, *supra* note 8, at 486.

Pritchard involved an individual plaintiff who alleged that his lung cancer had been caused by smoking the defendant's cigarettes.⁴³ Cases during the first wave of litigation were generally brought under theories of deceit, breach of express and implied warranties, and negligence.⁴⁴ Tobacco companies continually defeated these cases by maintaining that cigarettes were not harmful, that smoking-related illnesses were unforeseeable, and that individual smokers assumed the risk of smoking.⁴⁵

ii. The Second Wave of Litigation

The second wave of tobacco litigation lasted from 1983 to 1992.⁴⁶ Again, this wave was characterized by individual plaintiffs bringing tort claims against large tobacco companies.⁴⁷ During the second wave, plaintiffs added claims of failure to warn and strict liability as theories of the tobacco companies' culpability.⁴⁸ Courts during the second wave continually rejected claims based on design and manufacturing defects and continued to dismiss lawsuits based on assumption of the risk and the unforeseeability of the disease.⁴⁹

⁴³ *Pritchard*, 295 F.2d at 294; Heminger, *supra* note 11, at 1279-80 (“[Tobacco] litigation began with individual plaintiffs bringing tort suits against the tobacco companies[.]”).

⁴⁴ Kelder & Daynard, *supra* note 14, at 71.

⁴⁵ *Id.*; Sirabionian, *supra* note 8, at 486-87. In 1965, the American Law Institute adopted Restatement (Second) of Torts § 402A, which provides for the strict liability of an individual who sells a product in a defective condition even if the seller may have exercised all reasonable care. RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1965). Section 402A would not prove to play a major role in tobacco litigation, however, because comment i specifically stated that normal tobacco was not unreasonably dangerous. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

⁴⁶ Heminger, *supra* note 11, at 1280.

⁴⁷ *Id.* at 1279-80 (“[Tobacco] litigation began with individual plaintiffs bringing tort suits against tobacco companies.”).

⁴⁸ Kelder & Daynard, *supra* note 14, at 71.

⁴⁹ *Id.*; Heminger, *supra* note 11, at 1280; Sirabionian, *supra* note 8, at 486-87.

Plaintiffs did receive some hope at the end of the second wave in *Cipollone v. Liggett Group, Inc.*⁵⁰ For the first time in the history of the tobacco litigation, the jury in *Cipollone* actually found for the plaintiff, and awarded a verdict of \$400,000.⁵¹ The jury found that the tobacco company had failed to warn about the health risks of cigarettes and breached an express warranty.⁵² The jury verdict was overturned on appeal by the Third Circuit, which held that the FCLAA preempted state law tort claims.⁵³ In 1992, the Supreme Court held that the FCLAA only preempted those claims based on failure to warn, but did not preempt those claims based on express warranty, fraud, misrepresentation, or conspiracy.⁵⁴ However, neither the family nor the law firm could afford to continue the litigation after the Supreme Court's ruling.⁵⁵

By the end of the second wave of litigation, over 700 lawsuits had been filed against tobacco companies alleging damage from smoking cigarettes; however, *Cipollone* was the only case to return a verdict for the plaintiff.⁵⁶ From 1954 to 1995, the tobacco companies did not pay one penny to a single plaintiff.⁵⁷

⁵⁰ 505 U.S. 504 (1992); Heminger, *supra* note 11, at 1280.

⁵¹ See Mather, *supra* note 2, at 904-05 & n. 10 (explaining that of all the cases filed between 1950 and 1995 only the *Cipollone* case returned a guilty verdict); Turley, *supra* note 7, at 446-47 (stating that the jury in *Cipollone* broke the near perfect record of the tobacco companies).

⁵² *Cipollone v. Liggett Grp., Inc.*, 693 F. Supp. 208, 210 (D. N.J. 1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 499 U.S. 935 (1991), *aff'd in part, rev'd in part*, 505 U.S. 504 (1992); Turley, *supra* note 7, at 446-47.

⁵³ Turley, *supra* note 7, at 447.

⁵⁴ *Cipollone*, 505 U.S. at 530-31; Kelder & Daynard, *supra* note 14, at 72.

⁵⁵ Mather, *supra* note 2, at 905.

⁵⁶ *Id.* at 904-05.

⁵⁷ *Id.* at 905.

iii. The Third Wave of Litigation

The third wave of litigation began in 1994 with the introduction of the class action as a tool used against the tobacco companies.⁵⁸ This wave of litigation changed drastically from the first two waves as the cases after 1994 focused almost exclusively on two new theories: (1) that tobacco companies had knowledge that nicotine was highly addictive and hid this knowledge, and (2) that tobacco companies intentionally doped their cigarettes with increased levels of nicotine to addict smokers.⁵⁹ The third wave of litigation saw three main types of litigation: private class actions, state *parens patriae* actions, and litigation over the authority of the FDA.

a. Private Class Actions

The era of class actions began in 1994 with the Florida appellate opinion in *Broin v. Philip Morris Cos.*⁶⁰ and the filing of *Castano v. American Tobacco Co.*⁶¹ *Broin* involved a class action of thirty non-smoking flight attendants, representing a proposed class of 60,000, alleging that they suffered from diseases caused by their exposure to secondhand smoke.⁶² The Florida appellate court reversed the trial court and held that the complaint did in fact meet the requirements of class action certification under FED. R. CIV. P. 23.⁶³ *Broin* ultimately settled for \$300 million to be placed in a fund for the establishment of a research center on tobacco-related diseases.⁶⁴ *Castano* involved

⁵⁸ Kelder & Daynard, *supra* note 14, at 72.

⁵⁹ *Id.*

⁶⁰ 641 So. 2d 888 (Fla. Dist. Ct. App. 1994).

⁶¹ 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

⁶² *Broin*, 641 So. 2d at 889.

⁶³ *Id.*

⁶⁴ Heminger, *supra* note 11, at 1282. Notably, none of the settlement money went to the individual plaintiffs. Geraint Howells, *Tobacco Litigation in the U.S.--Its Impact in the United Kingdom*, 22 S. ILL. U. L.J. 693, 694 (1998).

the overly optimistic attempt to certify a class action representing every nicotine-addicted individual in the United States.⁶⁵ The case was financed by the combined efforts of sixty private law firms, each contributing \$100,000 to the class action.⁶⁶ Initially, the trial judge conditionally certified the class in regards to particular liability issues.⁶⁷ The Fifth Circuit decertified the *Castano* class, stating that the central allegation of the complaint was a “novel and wholly untested theory[.]”⁶⁸ The court felt that it would be improper to commit the fate of the entire tobacco industry to one jury.⁶⁹

The failure of the *Castano* case caused the plaintiffs’ lawyers to change their strategy from nation-wide class actions to multiple state-wide lawsuits.⁷⁰ For example, a class action originally filed in Florida representing all United States citizens

⁶⁵ *Castano*, 160 F.R.D. at 549. The proposed class was defined as:

(a) All nicotine dependent persons in the United States, its territories and possessions and the Commonwealth of Puerto Rico who have purchased and smoked cigarettes manufactured by the Tobacco Companies;

(b) the estates, representatives, and administrators of these nicotine dependent cigarette smokers; and,

(c) the spouses, children, relatives and “significant others” of these nicotine dependent cigarette smokers as their heirs or survivors. *Id.*

⁶⁶ Heminger, *supra* note 11, at 1280-81; Mather, *supra* note 2, at 910.

⁶⁷ *Castano*, 160 F.R.D. at 560 (explaining that the class is limited to deciding the liability regarding “fraud, breach of warranty (express or implied), intentional tort, negligence, strict liability and consumer protection and punitive damages issues”).

⁶⁸ *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 737 (5th Cir. 1996).

⁶⁹ *Id.* at 752 (“The collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury.”).

⁷⁰ Kelder & Daynard, *supra* note 14, at 72.

was subsequently limited to include only Florida smokers.⁷¹ In that case, *Engle v. RJ Reynolds Tobacco*,⁷² the jury found for the plaintiff class, awarding \$12 million in compensatory damages and \$145 billion in punitive damages.⁷³ A Florida appellate court subsequently overturned the verdict and ordered the entire class to be decertified.⁷⁴ The court stated that the class failed “the requirements of predominance and superiority” while also destroying any “imagined savings of judicial resources.”⁷⁵ The Florida Supreme Court upheld some of the trial court’s findings, but ultimately agreed with the appellate court’s decision to decertify the class.⁷⁶ The Florida Supreme Court believed that the issues of causation and apportionment of fault among the defendants were too “highly individualized” to be properly resolved in a class action.⁷⁷

b. State Parens Patriae Lawsuits

The era of state *parens patriae* lawsuits against the tobacco companies began on May 23, 1994 when Mississippi’s Attorney General Michael Moore filed a lawsuit on behalf of the taxpayers of Mississippi to recover the state’s Medicaid expenditures spent on tobacco-related illnesses.⁷⁸ Moore decided to sue in equity

⁷¹ *Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 441 (Fla. Dist. Ct. App. 2003), *approved in part, quashed in part*, *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla. 2006) (citing *R.J. Reynolds Tobacco Co. v. Engle*, 672 So. 2d 39 (Fla. Dis. Ct. App. 1996)).

⁷² No. 94-08273 CA-22, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000).

⁷³ *Id.* at *8.

⁷⁴ *Liggett Grp., Inc.*, 853 So. 2d at 470.

⁷⁵ *Id.*

⁷⁶ *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1276-77 (Fla. 2006) (describing the findings of the trial court which were found to be appropriate and have *res judicata* effect on any subsequent litigation).

⁷⁷ *Id.* at 1254.

⁷⁸ Kelder & Daynard, *supra* note 14, at 73.

under theories of unjust enrichment and restitution.⁷⁹ Moore's claim was that the State of Mississippi had been directly injured by the tobacco companies in forcing the state's taxpayers to pay for the Medicaid costs associated with tobacco-related disease.⁸⁰ By September of 1996, fourteen other states had filed similar suits,⁸¹ and almost every state would shortly follow thereafter.⁸²

The pressure of these lawsuits subsequently caused Liggett & Myers Corporation to settle claims with twenty-two plaintiffs.⁸³ Liggett proceeded to publically admit that cigarettes cause deadly diseases, including cancer, and that cigarette companies were in fact targeting youth.⁸⁴ Liggett then turned over thousands of documents corroborating the Cigarette Papers and revealing an industry-wide cover-up.⁸⁵

The major tobacco companies were finally willing to talk about settlement with the mounting public outrage and states' *parens patriae* litigation.⁸⁶ On June 20, 1997, negotiations between representatives of the tobacco industry, state attorneys general, and the plaintiffs' bar produced the Global Settlement Agreement (GSA).⁸⁷ The proposed GSA required the tobacco companies to pay \$368.5 billion to the states, and to submit to three main categories of public health regulation.⁸⁸ First, the

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Turley, *supra* note 7, at 448.

⁸³ Sirabionian, *supra* note 8, at 493.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ DONALD G. GIFFORD, *SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES: GOVERNMENT LITIGATION AS PUBLIC HEALTH PRESCRIPTION* 131 (2010) [hereinafter GIFFORD, *SUING THE TOBACCO*].

⁸⁷ *Id.* at 132.

⁸⁸ Maria G. Bianchini, *The Tobacco Agreement that Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, 87 CAL. L. REV. 703, 708 (1999).

tobacco companies agreed that the FDA had authority to regulate tobacco and tobacco products.⁸⁹ This included the acknowledgement that the FDA had the ability to gradually reduce, but not eliminate, the level of nicotine.⁹⁰ Second, the GSA would have severely restricted advertising and promoting tobacco products, prohibited outdoor advertisements, banned “Joe Camel” and the “Marlboro Man,” and provided for more stringent rotating health warnings on cigarette packages.⁹¹ Third, tobacco companies were responsible for reducing underage smoking in the United States.⁹² The GSA contained specific “look-back” provisions that required the tobacco companies to make additional payments if they failed to meet specific target deadlines for reducing youth smoking.⁹³

The GSA was a privately negotiated settlement agreement, but it required congressional action to implement.⁹⁴ In November of 1997, Senator McCain introduced a duplicative copy of the agreement in the Senate that would implement the GSA.⁹⁵ Ironically, the largest critics of the GSA were the public

⁸⁹ *Id.*

⁹⁰ GIFFORD, SUING THE TOBACCO, *supra* note 86, at 174. Under the proposed GSA regulation, the FDA must first prove that lowering nicotine would decrease health risks, was feasible, and would not create contraband markets. *Id.*

⁹¹ *Id.* at 173. Smoking would also have been banned in the workplace and indoor public buildings and would have restricted the tobacco industry’s ability to lobby Congress. *Id.*

⁹² Bianchini, *supra* note 88, at 708.

⁹³ GIFFORD, SUING THE TOBACCO, *supra* note 86, at 174.

⁹⁴ *Id.* at 132. The GSA would have completely reduced or eliminated the legal rights of several groups not party to the agreement. *See id.* at 174-75. Specifically, the GSA would have banned all class actions, all individual claims based on addiction, any evidence of “reduced risk” products, all punitive damage awards, and capped the total liability that the companies would have to pay in any single year. Bianchini, *supra* note 88, at 708-09.

⁹⁵ Bianchini, *supra* note 88, at 713. Congress characterized the bill as a means of putting an end to youth smoking. *Id.* Whereas, the tobacco companies made clear that they only supported the negotiated GSA, and if the legislation contained no benefits for the industry, they would withdraw their support. *Id.* at 713-14.

health advocates, denouncing the agreement as a “sweetheart deal” for the tobacco industry.⁹⁶ With increasing pressure coming from the bill’s opponents in combination with the information revealed in the Cigarette Papers, politicians feared that they would quickly lose political support for the bill.⁹⁷ By March of 1998, the legislation implementing the GSA had been removed from the Senate.⁹⁸ In place of the original legislation, Senator McCain introduced a much tougher piece of legislation, which required \$516 billion in payments, additional advertising restrictions, and greater authority for the FDA to regulate.⁹⁹ The tobacco industry immediately withdrew their support and began an extensive lobbying campaign to defeat the bill.¹⁰⁰ The new bill died on the Senate floor on June 17, 1998.¹⁰¹

While Congress debated what to do about the GSA, the tobacco companies, the state attorneys general, and the plaintiffs’ bar began to discuss a new settlement that would not require congressional approval.¹⁰² These second negotiations quickly began to focus on money because of the parties’ inability to provide for a nationwide shield from liability.¹⁰³ On November 16, 1998, the parties agreed on the Master Settlement Agreement (MSA).¹⁰⁴ The MSA, agreed to by forty-six states and the five largest tobacco companies, settled all claims made

⁹⁶ GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 175 (“Following the announcement of the settlement agreement, many public health advocates blasted it as a sweetheart deal for the tobacco companies.”).

⁹⁷ Bianchini, *supra* note 88, at 714.

⁹⁸ *Id.*

⁹⁹ GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 175.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 175-76.

¹⁰³ *Id.* at 176.

¹⁰⁴ *Id.*

by the states for a payment of \$206 billion.¹⁰⁵ The primary purpose of the MSA was to prohibit the targeting of youth by the tobacco companies.¹⁰⁶ To this end, the MSA prohibited the use of cartoons, such as Joe Camel; sponsorship of concerts, sports, or events primarily attended by youth; advertising outdoors, such as the use of billboards; paid placements in movies; distribution of tobacco merchandise unless in adult-only locations; and gifts or free samples where available to youth.¹⁰⁷ The MSA also created the American Legacy Foundation, the primary goal of which is to educate youth about the health effects of tobacco.¹⁰⁸

The MSA lacked several key provisions previously included in the GSA. First, the MSA did not directly limit sales to youth as did the GSA. The MSA lacked any look-back provisions, and the MSA's restrictions on advertising and promotion were weaker than those originally included in the GSA.¹⁰⁹ Second, the MSA "tied anticipated state revenue to sales of tobacco, making the states even more dependent on continued smoking patterns and consumption."¹¹⁰ This arguably limited the extent to which state governments implemented regulations to prohibit smoking.¹¹¹ Third, and possibly the most important shortcoming of the MSA, the agreement did not grant the FDA authority to regulate tobacco and tobacco products.¹¹²

¹⁰⁵ Crystal H. Williamson, *Clearing the Smoke: Addressing Tobacco Issue as an International Body*, 20 PENN. ST. INT'L L. REV. 587, 600-01 (2002); GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 176.

¹⁰⁶ Williamson, *supra* note 105, at 601.

¹⁰⁷ *Id.*; GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 176.

¹⁰⁸ Williamson, *supra* note 105, at 602. The American Legacy Foundation is the group responsible for "thetruth.com" anti-smoking ads currently available in print or on television. *Id.*

¹⁰⁹ GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 176.

¹¹⁰ Turley, *supra* note 7, at 448.

¹¹¹ Williamson, *supra* note 105, at 603.

¹¹² GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 176.

c. The FDA's Attempt to Regulate Tobacco

Occurring simultaneously with the states' *parens patriae* actions was the FDA's renewed attempt to regulate tobacco.¹¹³ After having previously denied any authority to regulate tobacco, the FDA promulgated regulations aimed at reducing tobacco consumption among youth.¹¹⁴ The FDA's authority to create such regulations was then challenged in court.¹¹⁵ In *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court held that the FDA lacked authority to regulate tobacco and tobacco products.¹¹⁶ The Court stated that Congress expressed a clear intent to preclude the FDA from exerting the exact authority the agency claimed to have in that case.¹¹⁷ To allow the FDA to have authority to regulate tobacco would be wholly inconsistent with the FDCA's regulatory scheme and the tobacco-specific legislation passed after the FDCA.¹¹⁸ In light of this clear congressional intent, the FDA lacked the required authority to regulate tobacco.¹¹⁹

B. THE UNITED KINGDOM

The United Kingdom is often thought of as a highly regulated culture with generous social welfare programs as compared to

¹¹³ See *supra* notes 30-31 and accompanying text (describing the FDA's finding that tobacco is a drug and cigarettes are a drug delivery device).

¹¹⁴ *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (citing Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44615-11618 (Aug. 28, 1996) (codified at 21 C.F.R. pts. 801, 803-04, 807, 820, 897)).

¹¹⁵ *Coyne Beahm, Inc. v. U.S. FDA*, 966 F. Supp. 1374, 1379 (M.D.N.C. 1997), *rev'd sub nom. FDA v. Brown & Williamson Tobacco Corp.*, 153 F.3d 155 (4th Cir 1998), *aff'd*, 529 U.S. 120 (2000).

¹¹⁶ 529 U.S. at 126.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* In 2009, the FDA received congressional authority to regulate tobacco for the first time. Yevtukhova, *supra* note 36, at 700.

the United States.¹²⁰ The United Kingdom has had almost no experience with tobacco litigation until very recently and even that has been extremely sparse. This Article examines the history of tobacco regulation in the United Kingdom since the mid-1900s.

1. Legislation of Tobacco

Legislation of tobacco within the United Kingdom began in 1964, prior to legislation in the United States, with a voluntary agreement between the legislature and the tobacco industry that banned the advertising of cigarettes on television and radio.¹²¹ A subsequent, voluntary agreement, made in the 1970s, placed additional restrictions on the amount of money spent on advertising, the content of the advertising, and the placement of the advertising.¹²² In 1986, the Voluntary Agreement on Advertising, Promotion and Health Warnings Act prohibited all advertisements in cinemas, restricted the amount of poster advertising, prohibited posters near schools, and prohibited advertisements in any magazine whose readers consisted of at least one-third young women.¹²³ The 1986 agreement also created a system of six rotating health warnings that were required on all cigarette packages and in all advertisements.¹²⁴

¹²⁰ See *supra* note 8 and accompanying text (explaining that the United Kingdom relies on legislation to regulate public policy and not litigation).

¹²¹ AM. CANCER SOC'Y INC., TOBACCO CONTROL COUNTRY PROFILES 502 app. B (Marlo A. Corrao et al. eds., 2000), available at http://who.int/tobacco/statistics/country_profiles/en/TCCP2001.pdf; Bump, *supra* note 14, at 1292. The advertising of tobacco in other venues was not regulated until 1971. Williamson, *supra* note 105, at 599.

¹²² Williamson, *supra* note 105, at 599.

¹²³ AM. CANCER SOC'Y INC., *supra* note 121, at 503 app. B; Bump, *supra* note 14, at 1293. The 1986 agreement created the independent Committee for Monitoring Agreements on Tobacco Advertising and Sponsorship. AM. CANCER SOC'Y INC., *supra* note 121, at 503 app. B.

¹²⁴ AM. CANCER SOC'Y INC., *supra* note 121, at 503 app. B; Bump, *supra* note 14, at 1293 & n.257. The six warnings were:

Smoking can cause fatal diseases[;] Smoking can cause heart disease[;] Smoking when pregnant can injure your baby and cause

These warnings were very similar to the warnings required in the United States in 1984.¹²⁵

In 1987, the United Kingdom entered into the Voluntary Agreement on Tobacco Sponsorship.¹²⁶ This agreement prohibited tobacco companies from sponsoring activities in which the majority of participants were under the age of eighteen.¹²⁷ The 1987 agreement placed further restrictions on expenditures by tobacco companies and imposed additional health warnings.¹²⁸

In addition to legislation specifically passed by the United Kingdom, the European Community also passed legislation through the European Union (EU).¹²⁹ The EU has the authority to pass Directives which affect legislation in the individual member states.¹³⁰ Directives establish EU policy while allowing each member state to adopt its own national legislation within the Directive's requirements.¹³¹ The EU began to implement tobacco control measures in 1989.¹³²

premature birth[;] Stopping smoking reduces the risk of serious diseases[;] Smoking can cause lung cancer, bronchitis and other chest diseases[;] and More than 30,000 people die each year in the UK from lung cancer. BBC NEWS ONLINE, *Timeline: Smoking and Disease*, BBC NEWS, <http://news.bbc.co.uk/2/hi/health/4377928.stm> (last updated June 30, 2007).

¹²⁵ Compare *supra* note 124 (listing the 1986 health warnings in the United Kingdom)), with *supra* note 24 (listing the 1984 health warnings in the United States).

¹²⁶ AM. CANCER SOC'Y INC., *supra* note 121, at 503 app. B.

¹²⁷ *Id.* This contributed to limiting the sponsorship of sports teams and stadiums. Williamson, *supra* note 105, at 599.

¹²⁸ AM. CANCER SOC'Y INC., *supra* note 121, at 503 app. B.

¹²⁹ Bump, *supra* note 14, at 1294.

¹³⁰ *Id.*

¹³¹ *Id.* at 1294-95 ("Thus, directives are binding as to the end result achieved within each of the EU member states, but allow the states to design the means to reach those ends.").

¹³² *Id.* at 1294.

In that year, the EU passed Directive 89/552/EEC, which prohibited all forms of television advertising for cigarettes and any tobacco products.¹³³ The United Kingdom implemented the EU directive by passing The Broadcasting Act,¹³⁴ although this was previously governed by the 1964 voluntary agreement.¹³⁵ Also in 1989, the EU passed directive 89/662/EEC, which required all cigarette packages to contain health warnings covering at least 4% of the package.¹³⁶ The United Kingdom passed the Tobacco Products Labeling (Safety) Regulations¹³⁷ of 1991, which required 6% of the package surface to contain the required health warnings.¹³⁸ The United Kingdom also passed the Children and Young Persons (Protection from Tobacco) Act¹³⁹ in 1991, which made it illegal to sell cigarettes to any person under the age of sixteen and increased the penalties for anyone selling to minors.¹⁴⁰ In 1992, the United Kingdom amended its 1986 agreement to prohibit advertising in magazines whose readers consisted of at least one-fourth young women and began to phase out permanent external advertisements by 50% over the next five years.¹⁴¹

¹³³ Council Directive 89/552, art. 13, 1989 O.J. (L 298) 23; Bump, *supra* note 14, at 1295.

¹³⁴ Broadcasting Act, 1990, c. 42.

¹³⁵ AM. CANCER SOC'Y INC., *supra* note 121, at 503 app. B.

¹³⁶ Council Directive 89/662, art. 3(3) 1989 O.J. (L 359) 1.

¹³⁷ Tobacco Products Labeling (Safety) Regulations, 1991, S.I. 1991/1530.

¹³⁸ *Id.* § 5(1)(d); Williamson, *supra* note 105, at 599.

¹³⁹ Children and Young Persons (Protection from Tobacco) Act, 1991, c. 23.

¹⁴⁰ *Id.*; AM. CANCER SOC'Y INC., *supra* note 121, at 503 app. B. The 1991 Act also made it illegal to sell unpackaged, individual cigarettes, or packs with less than ten cigarettes, and required all retailers to post warning signs of the legal age. *Id.*

¹⁴¹ AM. CANCER SOC'Y INC., *supra* note 121, at 503 app. B; Bump, *supra* note 14, at 1293.

The United Kingdom strengthened its tobacco regulations, in response to EU directive 90/239/EEC, when it implemented The Cigarettes (Maximum Tar Yield) (Safety) Regulations of 1992.¹⁴² These regulations, for the first time, set limits on the amount of tar legally allowed in cigarettes.¹⁴³ Cigarettes could contain no more than 15mg of tar sold before 1998 and no more than 12mg of tar sold after 1998.¹⁴⁴ The United Kingdom then took two important steps in strengthening the regulation of tobacco. First, the United Kingdom required that any manufacturer seeking to introduce a new additive into a tobacco product get approval from the Department of Health.¹⁴⁵ Second, the United Kingdom began to regulate the amount of nicotine in cigarettes, requiring that no cigarette sold after 1992 contain more than 1.5mg of nicotine, and no cigarette sold after 1997 contain more than and 1.2mg of nicotine.¹⁴⁶

The United Kingdom's regulation of tar and nicotine was followed by the EU in 2001. The EU Directive on Tobacco Products¹⁴⁷ placed maximum limits on the amount of tar, nicotine, and carbon monoxide permissible in a cigarette.¹⁴⁸ The 2001 Directive required that no cigarette contain more than 10mg of tar, 1mg of nicotine, and 10mg of carbon monoxide sold after January 1, 2004.¹⁴⁹

The United Kingdom subsequently passed The Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations of 2002¹⁵⁰ to carry out the 2001 EU Directive and

¹⁴² Cigarette (Maximum Tar Yield) (Safety) Regulations, 1992, S.I. 1992/2783.

¹⁴³ *Id.*

¹⁴⁴ *Id.* § 2(1)(a)-(b).

¹⁴⁵ AM. CANCER SOC'Y INC., *supra* note 121, at 503 app. B.

¹⁴⁶ *Id.*

¹⁴⁷ Council Directive, 2001/37, 2001 O.J. (L 194) 26.

¹⁴⁸ *Id.* art. 3, ¶ 1.

¹⁴⁹ *Id.*; Williamson, *supra* note 105, at 607-08.

¹⁵⁰ Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations, 2002, S.I. 2002/3041.

setup the required maximum ceilings.¹⁵¹ The 2002 regulations further required that each package contain a statement of the levels of tar, nicotine, and carbon monoxide present in the cigarettes,¹⁵² and that at least 30% of the surface of all cigarette packages display the required health warnings.¹⁵³ Tobacco companies were required to disclose all ingredients, the reason for including those ingredients, and the toxicological data concerning those ingredients on a yearly basis to the Secretary of State.¹⁵⁴ This type of stringent regulation requiring disclosure of cigarette ingredients has yet to be accomplished in the United States.¹⁵⁵

The Tobacco Advertising and Promotion Act of 2002¹⁵⁶ increased the United Kingdom's regulation of tobacco advertising. The 2002 Act prohibits any person in the course of a business from publishing or causing to be published a tobacco advertisement in the United Kingdom.¹⁵⁷ This includes the distribution of tobacco advertising in electronic format.¹⁵⁸ Later regulations made clear that it is not a violation of the 2002 Act to publish advertisements at the direct location of the point-of-sale.¹⁵⁹ The Health Act of 2006¹⁶⁰ required that all places open

¹⁵¹ *Id.* § 3(2).

¹⁵² *Id.* § 4.

¹⁵³ *Id.* § 8(1)(a)-(b).

¹⁵⁴ *Id.* § 12.

¹⁵⁵ *See supra* notes 34-39 and accompanying text (explaining that, for the first time, the FDA was given authority to regulate the ingredients of cigarettes in 2009).

¹⁵⁶ Tobacco Advertising and Promotion Act, 2002, c. 36 (U.K.).

¹⁵⁷ *Id.* § 2(1).

¹⁵⁸ *Id.* § 2(3). It is not a violation of the 2002 Act if the person does not carry on business in the United Kingdom. *Id.* § 2(4).

¹⁵⁹ The Tobacco Advertising and Promotion (Point of Sale) Regulations, 2004, S.I. 2004/765 § 4.

¹⁶⁰ Health Act 2006, 2006, c. 28.

to the public or used as a place of work be smoke free.¹⁶¹ The Health Act of 2009¹⁶² eliminated all tobacco vending machines and provided for the phased out elimination of tobacco displays, including price lists, in stores between 2011 and 2013.¹⁶³ The 2009 Act provided that retailers selling tobacco must do so in a segregated part of the store, out of the view of the rest of the public.¹⁶⁴

2. Litigation of Tobacco

Tobacco litigation in the United Kingdom has been extremely unsuccessful and nearly nonexistent. A typical example of tobacco litigation in the United Kingdom is *Hodgson v. Imperial Tobacco Ltd.*, the first tobacco class action filed in the country.¹⁶⁵ The case began in 1992 under the plaintiffs' claim that Gallaher and Imperial Tobacco had been negligent in not reducing the level of tar in their cigarettes.¹⁶⁶ After six years of lengthy pretrial proceedings, forty-six of the fifty-two plaintiffs admitted that they were willing to give up on the lawsuit.¹⁶⁷ The case officially ended on February 26, 1999, when the trial judge ruled that thirty-six of the plaintiffs were barred

¹⁶¹ *Id.* pt. 1, ch. 1 § 2(1)-(2).

¹⁶² Heath Act 2009, 2009, c. 21.

¹⁶³ *Tobacco - Health Act of 2009*, DEPARTMENT OF HEALTH (March 26, 2010), http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_093278.

¹⁶⁴ *Id.*

¹⁶⁵ Martyn Day, *Tobacco Litigation*, 2006 J. PERS. INJ. L. 1, 4 (U.K.); Sirabionian, *supra* note 8, at 498 (noting that the case has been commonly referred to as *The Leigh Day Case*, after the law firm who represented the plaintiffs).

¹⁶⁶ Sirabionian, *supra* note 8, at 499.

¹⁶⁷ *Id.* at 498.

by the three-year statute of limitations.¹⁶⁸ The trial judge described the plaintiffs' negligence claims as "speculative."¹⁶⁹

By October 2003, not a single case against the tobacco companies in the United Kingdom had made it past pretrial proceedings.¹⁷⁰ That was until *McTear v. Imperial Tobacco Ltd.*¹⁷¹ This case was advanced by a widow on behalf of her husband, who, since 1964 at the age of twenty, had smoked two packs of cigarettes a day.¹⁷² Her husband had been diagnosed with lung cancer in 1992 and promptly filed suit against Imperial Tobacco.¹⁷³ Legal Aid twice rejected the case.¹⁷⁴ Much about the *McTear* case resembles the early American litigation of the 50s, 60s, and 70s.¹⁷⁵ Fearful that one case would spur an avalanche of lawsuits as in the United States, Imperial Tobacco refused to accept any connection between smoking and cancer.¹⁷⁶ Imperial Tobacco argued that epidemiology is not an adequate branch of science to prove causation, that the tobacco companies had no knowledge of the dangers of their product,

¹⁶⁸ *Id.* at 499 (explaining that thirty-six of the plaintiffs had been diagnosed with lung cancer more than three years before filing the lawsuit). Under § 33 of The Limitations Act (1980), the judge was allowed to use his discretion in deciding to allow the case to go forward regardless of the statute of limitations if it would be in the "interest of justice." *Id.*

¹⁶⁹ *Id.* at 498.

¹⁷⁰ *Id.*

¹⁷¹ [2005] CSOH 69; (2005) S.C. 1 (Scot.), available at <http://www.scotcourts.gov.uk/opinions/2005CSOH69.html>.

¹⁷² Sirabionian, *supra* note 8, at 500.

¹⁷³ *Id.* Mr. McTear died just three months after his diagnosis. *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ See Kristen G. Rogers, "Mad Plaintiff Disease?" *Tobacco Litigation and the British Debate Over Adoption of U.S.-Style Litigation Methods*, Note, 27 GA. J. INT'L & COMP. L. 199, 230 (1998) ("British lawyers are running into many of the obstacles that stood in the way of American suits in the 1950s and 1960s.").

¹⁷⁶ Sirabionian, *supra* note 8, at 500.

and that the plaintiff had sufficient knowledge about the health risks of smoking to make an informed decision.¹⁷⁷

On May 31, 2005, the Scottish trial judge ruled that Imperial Tobacco was not liable for the death of the plaintiff.¹⁷⁸ The judge found that, in 1964, the general public was well aware of the health risks of smoking, including that smoking can cause cancer.¹⁷⁹ The judge also found no evidence that Imperial Tobacco had ever accepted the causal connection between smoking and cancer.¹⁸⁰ The judge stated that epidemiology was not a sufficient branch of science because the plaintiff's expert witnesses lacked credibility.¹⁸¹ Specifically, the judge thought that the expert witnesses, in combination with the advocacy group Action on Smoking and Health, were using the case to push forward their own policy objectives through biased testimony.¹⁸² As a result, the judge ruled that the plaintiff had failed to prove individual causation.¹⁸³

III. THE IMPACT OF TORT LITIGATION ON LEGISLATIVE SOCIAL REFORM

Numerous scholars have weighed in on the question of whether litigation should be used as a tool for creating social policy. The abundance of literature floating between numerous law reviews has created an academic debate between those who answer the present question in the affirmative and those who

¹⁷⁷ L. Friedman & R. Daynard, *Scottish Court Dismisses a Historic Smoker's Suit*, 16 TOBACCO CONTROL 1, 2-3 (2007) (electronic pages).

¹⁷⁸ *McTear*, [2005] CSOH at [9.15]; (2005) S.C. at 568.

¹⁷⁹ *Id.* at [9.4], 567-68.

¹⁸⁰ *Id.* at [9.6], 568.

¹⁸¹ *Id.* at [9.9-9.10], 568-69. The judge reasoned that because the plaintiff's expert witnesses were not being paid, they lacked credibility. Friedman & Daynard, *supra* note 177, at 2.

¹⁸² Friedman & Daynard, *supra* note 177, at 2.

¹⁸³ *McTear*, [2005] CSOH at [¶ 9.10]; (2005) S.C. at 568-69; Friedman & Daynard, *supra* note 177, at 2.

answer it in the negative. Advocates and opponents have made various arguments for and against the use of litigation as each side attempts to constantly counter one another. These arguments tend to fall into one of three broader thematic categories: (1) the structure of democracy and the ability of the legislature to function properly,¹⁸⁴ (2) the cooperation between the legislature and judiciary in possibly creating reform together,¹⁸⁵ and (3) the general deterrent effects of tort law in creating compliance with social policy objectives.¹⁸⁶ Each argument will in turn be explained and subsequently evaluated using a comparison of the contrasting styles of regulation used in the United States and United Kingdom. After applying the experiences of tobacco regulation in the litigation-focused United States and the legislatively driven United Kingdom to the current scholarly debate, this Article concludes that the use of the mass product tort system hinders the legislature from creating social reform.

A. THE STRUCTURE OF DEMOCRACY AND THE ABILITY OF THE LEGISLATURE TO FUNCTION PROPERLY

The first broad thematic category in which scholars debate the use of the judiciary to create social reform deals with the structure of democracy and the ability of the legislature to function properly. Public health advocates argue that the legislative systems are controlled by special interests and have failed to function properly. The judiciary can be used to circumvent these failed legislative bodies because the courts are able to impose substantial damage awards and equitable relief. Opponents of using the judiciary argue that the courts face procedural constraints which inhibit their ability to create

¹⁸⁴ See *infra* Part III.A (describing the arguments of advocates and opponents which fall into the broad category of democracy and legislative failure).

¹⁸⁵ See *infra* Part III.B (describing the arguments of advocates and opponents which fall into the broad category of legislative and judicial cooperation).

¹⁸⁶ See *infra* Part III.C (describing the arguments of advocates and opponents which fall into the broad category of the deterrent effects of tort law).

adequate reform. Attempting to circumvent the legislature through the judiciary will violate the structure of a democracy and create undemocratic results.

1. The Legislative and Regulatory Systems

The most often cited justification for judicially-created social reform is that the legislative and regulatory systems have failed to function properly.¹⁸⁷ Legal scholars and public choice economists argue that special interest groups, backed by “Big Business,” dominate and control the legislative and regulatory branches of government.¹⁸⁸ Special interests are able to “capture” the lawmaking body through their superior resources and greater access to the lawmaking process.¹⁸⁹ Public health advocates argue that the large tobacco companies were able to exert extremely powerful economic and political influence over the legislature.¹⁹⁰ Health advocates argue that the legislative bodies continually declined to adopt tobacco reform in the face of clear and widely held public support for stricter regulation.¹⁹¹

This claim leads to the conclusion that the legislative and regulatory systems must have failed since both bodies refused to adopt reform that was widely supported by the public.¹⁹² Public health advocates support this conclusion by pointing to several specific examples from the American experience. In 1965 and

¹⁸⁷ Jacobson & Warner, *supra* note 2, at 793 (“The principle pragmatic argument in favor of using litigation to seek tobacco control policy objectives emerges from proponent’s perceptions that the legislative and regulatory systems have failed.”).

¹⁸⁸ RENA STEINZOR & SIDNEY SHAPIRO, *THE PEOPLE’S AGENTS AND THE BATTLE TO PROTECT THE AMERICAN PUBLIC: SPECIAL INTERESTS, GOVERNMENT, AND THREATS TO HEALTH, SAFETY, AND THE ENVIRONMENT* 45 (2010).

¹⁸⁹ *Id.* at 45-46.

¹⁹⁰ Jacobson & Warner, *supra* note 2, at 793.

¹⁹¹ *Id.*

¹⁹² *Id.*; Jacobson & Soliman, *supra* note 2, at 225. See also Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 558 (explaining that legislatures and agencies may fail to properly regulate and industry after becoming captured by special interest).

1969, Congress explicitly preempted agency action by implementing legislation which was much weaker than the proposed agency regulations.¹⁹³ In 1998, after the release of the incriminating Cigarette Papers, Congress rejected legislation that would have given the FDA authority to regulate tobacco.¹⁹⁴ Public health advocates look to these examples as evidence demonstrating the tobacco companies' control over, and the failure of, the legislative system.¹⁹⁵

The argument of legislative failure needs to be taken with a grain of salt and critically evaluated because almost every group who loses a debate in Congress will claim that they in fact have the support of the public and the legislative process must have failed.¹⁹⁶ It is easy to now look back in time and argue that there was a clear need for stricter regulation of tobacco, but the realization now that regulation was needed does not by itself justify the claim that the system must have been broken at that earlier time.¹⁹⁷ It is important to remember that tobacco was the source of a livelihood for a large segment of the population.¹⁹⁸ Regulation would have affected far more people than just the big tobacco companies.

¹⁹³ See *supra* notes 14-21 and accompanying text (describing how Congress twice preempted FTC action by passing the FCLLA and the PHCSA).

¹⁹⁴ See *supra* notes 94-101 and accompanying text (explaining Congress' failure to pass the GSA and the more stringent McCain bill).

¹⁹⁵ See, e.g., Kelder & Daynard, *supra* note 14, at 66-67 (describing the legislative system's failure, and specifically, Congress' preemption of more stringent agency action).

¹⁹⁶ Melnick, *supra* note 3, at 807.

¹⁹⁷ See Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond - A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1383 (2001) ("[W]hen democratically elected representatives choose not to implement regulations, it is not because they are 'captured' by powerful lobbyist groups, but because they are simply better informed or have a greater awareness of the larger political context.").

¹⁹⁸ See THOMAS CAPEHART, U.S. DEP'T OF AGRIC., TRENDS IN U.S. TOBACCO FARMING 1-5 (2004), available at <http://www.ers.usda.gov/publications/tbs/nov04/tbs25702/tbs25702.pdf> (explaining that in 1954, there were 512,000 farms on 1,547,000 acres used for growing tobacco).

There is no doubt that tobacco companies contributed large sums of money to political campaigns.¹⁹⁹ In contrast to the claims of public health advocates, however, these large sums of money may not have had such a large effect on congressional voting. John Wright, a political scientist specializing in special interest groups, undertook the most comprehensive study on this subject by analyzing every tobacco-related roll call vote in both the House and Senate between 1980 and 2000.²⁰⁰ Wright found that contributions to political campaigns provided no advantage to the tobacco companies.²⁰¹ Instead, the legislative success of the tobacco companies was more the result “of legislators’ regulatory and pro-business ideologies than of campaign money or a geographic voting bloc.”²⁰²

Wright’s conclusion that legislative voting was the result of the legislator’s personal ideology appears to be supported by an analysis of the tobacco regulation within the United Kingdom. Similar to the United States, the United Kingdom consistently passed legislation regulating the advertising and promotion of cigarettes between the 1960s and the 1990s. Beginning in 1998, the United Kingdom strengthened its legislation to begin regulating the amount of tar and nicotine within cigarettes at the same time that the American Congress rejected legislation that would have given the FDA similar authority.²⁰³ The possible explanation for this divergence between the countries is

¹⁹⁹ See, e.g., Kelder & Daynard, *supra* note 14, at 68 (stating that the tobacco industry contributed \$2.3 million in “soft money” in 1995).

²⁰⁰ John Wright, *Campaign Contributions and Congressional Voting on Tobacco Policy, 1980-2000*, 6 BUS. & POL. 1, 2 (2004). 1980 is the earliest possible year in which data on campaign contributions can be paired with the voting record. *Id.*

²⁰¹ *Id.* at 3 (“On most bills that directly affect tobacco, the effect of campaign contributions on voting is statistically indistinguishable from no effect.”).

²⁰² *Id.* at 2-3.

²⁰³ Compare *supra* notes 144-57 and accompanying text (explaining regulation in the United Kingdom which instituted maximum ceilings on the level of tar and nicotine), with *supra* notes 94-101 and accompanying text (explaining the failure of Congress to pass legislation in 1998 that would have given the FDA authority to regulate nicotine).

the political ideology of the United Kingdom's legislators.²⁰⁴ The United Kingdom is widely viewed as being a pro-regulatory state with greater emphasis on social welfare programs as compared to their American counterparts.²⁰⁵ The United Kingdom, for example, considers health care to be a public good and therefore provides universal care through social welfare programs.²⁰⁶ As such, the culture of the United Kingdom and political ideology of its legislators are more likely to be pro-regulation than pro-business. It is not surprising then that the United Kingdom would be more likely to pass legislation in favor of public health, whereas the United States would be more likely to pass legislation in favor of business. This explains why the United Kingdom was successful in adopting legislation limiting the level of nicotine in cigarettes without the aid of litigation, and why the United States failed to adopt similar legislation with the aid of litigation. The United Kingdom was successful in passing legislative tobacco regulation because of the political ideology of its legislators, not because the tobacco companies in the United Kingdom were somehow weaker than the tobacco companies in the United States.

Comparing the regulation of tobacco between the United States and United Kingdom, it appears clear that neither of the countries' legislative systems failed. Instead, what was truly frustrating public health advocates was that the legislative systems did not pass stringent enough regulation.²⁰⁷ The history of tobacco legislation in the United States and the United

²⁰⁴ Cf. Wright, *supra* note 200, at 10 (stating that the legislative success of tobacco companies in the United States was the result of the legislators' political ideologies).

²⁰⁵ See *supra* notes 7-8 and accompanying text (explaining that the United Kingdom relies on legislation to pass policy reform while the United States is much more reliant on litigation).

²⁰⁶ See Howells, *supra* note 64, at 702 ("Tort Law in the United States performs a more political function than it does in the United Kingdom. This is because compensation in the U.S. covers certain items which are considered public goods in the United Kingdom (such as health costs)[.]").

²⁰⁷ Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 923 (2008) [hereinafter Gifford, *Impersonating the Legislature*].

Kingdom is more likely the result of the particular political ideology held by the countries' legislators.

2. Judicial Remedies and Procedural Constraints

Public health advocates argue that, in place of the failed legislative system, the judiciary should be used to create social reform because courts have the ability to impose remedies which will create or facilitate their policy objectives. First, advocates argue that courts possess the ability to impose substantial damages upon an industry.²⁰⁸ Public health advocates view damage awards in litigation as the substitute for excise taxes.²⁰⁹ Advocates argue that these taxes should be imposed on the industry and, absent the capture of the legislative bodies by special interest, that these taxes would have been imposed by Congress.²¹⁰ Courts also possess the ability to impose damages far beyond the mere equivalent of a tax as juries may find it appropriate to impose punitive damages upon industries.²¹¹ Second, advocates argue that courts possess the ability to impose equitable relief.²¹² Acting in a legislative or regulatory function, courts can impose injunctions or restraints on the activities of the tobacco companies.²¹³ Acting in this capacity,

²⁰⁸ Jacobson & Soliman, *supra* note 2, at 225; Jacobson & Warner, *supra* note 2, at 794.

²⁰⁹ Jacobson & Soliman, *supra* note 2, at 225; Jacobson & Warner, *supra* note 2, at 794; Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 558.

²¹⁰ Jacobson & Soliman, *supra* note 2, at 225-26; Jacobson & Warner, *supra* note 2, at 794.

²¹¹ Jacobson & Soliman, *supra* note 2, at 225; Jacobson & Warner, *supra* note 2, at 794; Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 558.

²¹² Jacobson & Soliman, *supra* note 2, at 226; Jacobson & Warner, *supra* note 2, at 773, 794.

²¹³ Jacobson & Soliman, *supra* note 2, at 225; Jacobson & Warner, *supra* note 2, at 773, 794.

courts are able to correct market failures that have not been addressed through legislative means.²¹⁴

Advocates of litigation view the MSA as the prime example of how litigation, or even a settlement, can create both damages and equitable relief to further a social policy objective.²¹⁵ However, a careful examination of the MSA and other examples of tobacco litigation shows that courts face serious procedural constraints in changing social policy.

i. Examining the Master Settlement Agreement

Contrary to the belief of public health advocates, the MSA failed to result in the imposition of substantial damages or equitable relief on the tobacco industry. First, the damages contained within the MSA have not been effective. Although \$206 billion may at first glance appear to be a significant figure, several anticompetitive provisions of the MSA greatly reduced its effectiveness.²¹⁶ The MSA created high barriers to entry, guaranteed current market shares, eliminated price competition, and permitted price-fixing.²¹⁷ Many scholars have commented that the MSA effectively allows tobacco companies to meet in private and agree on whatever price of cigarettes they wish to set — a practice commonly known as collusion.²¹⁸ In fact, the price of cigarettes increased by forty-five cents the very day the settlement was signed and by seventy-six cents within

²¹⁴ Jacobson & Soliman, *supra* note 2, at 226.

²¹⁵ See *id.* at 230 (“[I]t seems fair to say as an initial assessment that the agreement has achieved some positive public health policy goals, . . . there is no question that these gains would not have been achieved absent the states’ Medicaid litigation.”).

²¹⁶ Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Government’s Tobacco Litigation*, 33 CONN. L. REV. 1143, 1173-76 (2001); Craig P. Raysor, *From the Sword to the Pen: A History and Current Analysis of U.S. Tobacco Marketing Regulations*, 13 DRAKE J. AGRIC. L. 497, 527 (2008).

²¹⁷ Little, *supra* note 216, at 1173-74.

²¹⁸ GIFFORD, SUING THE TOBACCO, *supra* note 86, at 182; Little, *supra* note 216, at 1174 (citations omitted).

the next few years.²¹⁹ This price increase is in extreme excess of the mere nineteen cent increase estimated to be necessary to cover the payments under the MSA.²²⁰ New entrants into the market were encouraged to sign onto the MSA by enjoying these price increases but not becoming liable for any payments under the MSA unless their future revenues exceed 125% of their current levels.²²¹ If any of the four major tobacco companies lost market share to these new entrants, then their payments under the MSA would be decreased and possibly eliminated.²²² The MSA also tied the expected payments of the states directly to the sale of cigarettes.²²³

By allowing the tobacco companies to greatly increase the price of cigarettes and protect their market share, the MSA was, in actuality, creating a tax on the individual smokers instead of creating substantial damages to be levied on the industry.²²⁴ Increasing the price of cigarettes through collusion allowed the tobacco companies to pass along the entire cost of the settlement onto their consumers: the individual smokers.²²⁵

²¹⁹ THOMAS C. CAPEHART, JR., U.S. DEP'T. OF AGRIC., TRENDS IN CIGARETTE INDUSTRY AFTER THE MASTER SETTLEMENT AGREEMENT 4 (2001), available at <http://www.ers.usda.gov/publications/tbs/oct01/tbs250-01/tbs250-01.pdf>; GIFFORD, SUING THE TOBACCO, *supra* note 86, at 180. See also Rajkumar et al., *supra* note 5, at 751 (“Between April 1998 and April 2002 . . . the average wholesale price of standard cigarettes increased by 108%.”).

²²⁰ GIFFORD, SUING THE TOBACCO, *supra* note 86, at 180.

²²¹ *Id.*

²²² *Id.* at 181.

²²³ Turley, *supra* note 7, at 448. “This raises the fact that the states themselves face a financial conflict of interest . . . That is, in order for the states to maximize their revenue from the MSA, they must ensure that the tobacco industry remains solvent.” Rajkumar et al., *supra* note 5, at 750.

²²⁴ See Raysor, *supra* note 216, at 529 (stating that “the true brunt of the MSA payments were going to be passed down the supply line as the cigarette companies would charge more for cigarettes and recoup the money from the consumers”).

²²⁵ See Rajkumar et al., *supra* note 5, at 751 (explaining that “little of the actual cost of the settlement has been absorbed by the cigarette manufacturers themselves”); Raysor, *supra* note 216, at 529.

What is worse is that this new tax acts in a regressive fashion.²²⁶ On the whole, poorer people smoke more than people of higher incomes.²²⁷ This causes the poor to disproportionately pay more of the \$206 billion settlement, both in terms of percentage of income and absolute dollars.²²⁸ Not only did the MSA fail to create damages that could be imposed on the tobacco industry, the MSA actually created damages that were imposed on the very people the state attorneys general were claiming to protect.

Second, the supposed equitable relief within the MSA has also been an overall disappointment.²²⁹ The MSA was designed to prevent the targeting of youth and restrict the overall advertisement of tobacco.²³⁰ However, the MSA allowed tobacco companies to “take actions ‘that have as their *secondary purpose* the initiation, maintenance or increase of youth smoking.’”²³¹ While Joe Camel was banned by the settlement, R.J. Reynolds was still permitted to use camels on their packaging and cultural icons such as the “Marlboro Man” and “Newport Lovers” were unaffected.²³² There were also no restrictions placed upon media creators to use tobacco products without compensation.²³³ The MSA failed to adequately define the phrase “a significant percent of youth” in determining event

²²⁶ GIFFORD, SUING THE TOBACCO, *supra* note 86, at 183.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See Rajkumar et al., *supra* note 5, at 750 (“The impact of the MSA on the tobacco industry’s marketing practices has been similarly disappointing.”).

²³⁰ See *supra* notes 106-108 and accompanying text (describing the purpose of the MSA).

²³¹ Shital A. Patel, *The Tobacco Litigation Merry-Go-Round: Did the MSA Make it Stop?*, 8 DEPAUL J. HEALTH CARE L. 615, 628 (2005) (emphasis added) (quoting Robert L. Kline, *Tobacco Advertising After the Settlement: Where We Are and What Remains To Be Done*, 9 KAN. J.L. & PUB. POL’Y 621, 624 (2000)).

²³² *Id.* at 629.

²³³ *Id.*

sponsorship.²³⁴ Likewise, the MSA permitted tobacco companies to advertise outdoors when sponsoring an event, and tobacco retailers were permitted to advertise outdoors at any of their store locations.²³⁵ The MSA attempted to restrict the activities of tobacco companies, but the agreement contained many loopholes that permitted the tobacco companies to continue with business as usual.²³⁶

Public health advocates often claim that the MSA was a historic and successful public health agreement. Examining the MSA closely reveals that the agreement ultimately was unable to create damages or adequate equitable relief which could then be imposed on the tobacco industry. The failure of the MSA has caused some commentators to say that the only people to lose under the settlement were in fact the sick smokers.²³⁷

ii. Examples of Other Procedural Constraints

Beyond the failures of the MSA, the litigation of tobacco in the United States and United Kingdom reveals much more about the constraints that courts face. Throughout the history of tobacco litigation, courts have struggled with aggregating individual cases and the decisions of whether to certify a class.²³⁸ Individual suits within the United States and United Kingdom have faced numerous challenges—specifically, dealing with individual causation and affirmative defenses.²³⁹ The

²³⁴ *Id.* at 630.

²³⁵ *Id.* at 627-28.

²³⁶ See Jensen, *supra* note 197, at 1380 (“Thus, it would appear that the industry essentially bought a license to continue business as usual[.]”).

²³⁷ See Little, *supra* note 216, at 1172 n. 139 (citing Thomas C. O’Brien, *Constitutional and Antitrust Violations of the Multistate Tobacco Settlement*, 371 CATO POL’Y ANALYSIS 1, 1-2 (2000)).

²³⁸ See, e.g., Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) (decertifying a nationwide class action); Engle v. Liggett Grp., Inc. 945 So. 2d 1246, 1276-77 (Fla. 2006) (decertifying a statewide Florida class action); Sirabonian, *supra* note 8, at 498 (explaining the decertification of *Hodgson v. Imperial Tobacco Ltd.*).

²³⁹ See, e.g., McTear v. Imperial Tobacco Ltd., [2005] CSOH 69 [¶ 9.10]; (2005) S.C. 1, 568-69 (Scot.) (ruling that the plaintiff had failed to prove

inability of the courts to certify class actions extremely limits the judiciary's ability to have any substantial impact on social policy.²⁴⁰ The ruling in an individual claimant's case simply does not have the same effect on the social policy of an entire nation as would a class action of potentially hundreds of thousands of people.²⁴¹

Even assuming that a court is able to produce a ruling that has the potential to change social policy, courts still face the challenge of how the social change will be implemented. The failure of the GSA is a great example of this challenge.²⁴² In the late 1990s, the GSA represented the most stringent regulation of the tobacco industry in the history of the United States at a time when there was immense support for tobacco regulation.²⁴³ All that was required was congressional approval to sign the settlement into law.²⁴⁴ One would have thought that public health advocates would have been the first group to support such stringent legislation regulating tobacco and punishing the tobacco companies. However, the public health advocates were actually among the most adamantly opposed to the GSA and were the leading force behind its failure.²⁴⁵ The failure of the

individual causation); *see also supra* note 57 and accompanying text (explaining that not a single plaintiff in the United States defeated the tobacco companies in litigation between 1954 and 1995).

²⁴⁰ *See* Micah L. Berman, *Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law*, 75 *BROOK. L. REV.* 1, 58 (2009) ("The legal developments catalyzed by tobacco decisions-- . . . limits on class certification . . . --have severely weakened the ability of personal injury litigation to effectively deter corporate misconduct and protect public health.").

²⁴¹ *See id.* at 42-43 (explaining that class action litigation is "a powerful tool that could address serious public health threats," while individual litigation "remained extraordinarily expensive and risky, due to the industry's aggressive litigation tactics").

²⁴² *See supra* notes 94-101 and accompanying text (describing the failure of the GSA).

²⁴³ *See supra* notes 87-93 and accompanying text (describing the GSA).

²⁴⁴ *See supra* note 94 and accompanying text (explaining that the privately negotiated GSA would become law if Congress signed it into law).

²⁴⁵ *See supra* notes 94-101 and accompanying text (describing the failure of the GSA).

GSA illustrates how courts have no way of knowing if the social policy regimes they create will receive political support or whether there will be a political backlash against the new social policy.²⁴⁶

Courts can impose damages and equitable relief, but they also face severe procedural constraints when imposing such damages and equitable relief for the purpose of creating new social policy. The failures of the MSA, the class actions in the United States and United Kingdom, and the failure of the GSA illustrate the difficulty that courts face in overcoming the procedural constraints of the judiciary in attempting to create or facilitate social reform.

3. The Conceptual Structure of Democracy

Opponents to the use of the judiciary most often respond to the claims of public health advocates by relying on “the conceptual structure of governance in our democracy[.]”²⁴⁷ Opponents argue that the government was setup with an intentional separation of powers in which policy decisions were vested in a popularly elected legislature.²⁴⁸ Within this framework, the role of the courts is to guarantee that the procedural requirements of the Constitution are adhered to, not to create social policy.²⁴⁹ Courts are unable “to define policy objectives, interpret empirical data, [and] select the ‘right’ parties to the litigation or the ‘right’ cases for policy judgments.”²⁵⁰ Courts do not have the necessary information to resolve conflicting policy choices, lack the ability to understand the implications of a policy decision, and lack the ability to assess the economic impact of such a decision.²⁵¹ Opponents argue that courts are a public device for resolving disputes, not

²⁴⁶ Jacobson & Warner, *supra* note 2, at 796.

²⁴⁷ *Id.* at 795.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 796

²⁵⁰ *Id.*

²⁵¹ *Id.*; Jacobson & Soliman, *supra* note 2, at 226.

“a lobbying tool for advancing an otherwise unsuccessful legislative agenda or a means of circumventing the legislative process altogether.”²⁵² Litigation, as a tool for implementing social policy, is undemocratic.²⁵³ Whether public health advocates like it or not, opponents argue that creating social policy was deliberately left to the legislature.²⁵⁴

A study of tobacco regulation does indeed raise concerns about the undemocratic nature of judicially created reform. The negotiations leading up to the GSA and MSA were characterized by two and a half years of private closed-door meetings.²⁵⁵ Although countless lawyers attempted to negotiate part of the settlement for themselves,²⁵⁶ the real bargaining occurred between a small number of state attorneys general, several powerful plaintiffs’ lawyers, and tobacco’s general counsel.²⁵⁷ At particular points in the negotiations, the states would be represented by a single plaintiff’s attorney with no attorneys general present.²⁵⁸ There were even moments of heated tension between the state attorneys general, seeking Medicaid reimbursement, and the private plaintiffs’ lawyers, seeking large fees.²⁵⁹ As soon as the GSA was announced, public health advocates immediately began criticizing the settlement as a “sweetheart deal for the tobacco companies.”²⁶⁰ Some advocates tellingly remarked, “[w]ho gave you the right to make health

²⁵² Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 559.

²⁵³ Jacobson & Soliman, *supra* note 2, at 226.

²⁵⁴ *Id.* at 226-27.

²⁵⁵ GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 177; LaFrance, *supra* note 6, at 195 (stating that the MSA was created through secret negotiations).

²⁵⁶ MOLLENKAMP ET AL., *supra* note 1, at 171-72.

²⁵⁷ GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 177.

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 177; MOLLENKAMP ET AL., *supra* note 1, at 76, 171-72.

²⁶⁰ GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 175.

policy for the country?”²⁶¹ These criticisms were largely the result of the undemocratic nature in which the GSA and MSA were created. The negotiations occurred in private meetings in which the public health advocates were excluded, and only a select few individuals were represented.²⁶²

These same concerns over the democratic nature of tobacco regulation have not been evident in the United Kingdom. This is because all of the United Kingdom’s tobacco regulations have been the result of the legislature and not the judiciary.²⁶³ Tobacco litigation in the United Kingdom has been extremely sparse and unsuccessful.²⁶⁴ Instead, the United Kingdom has addressed the public health problem of tobacco completely through legislative measures.²⁶⁵ Addressing a public health problem through legislation avoids concerns of undemocratic reform.²⁶⁶ Legislation is debated in a public and open arena where all people are represented.²⁶⁷ National legislative policy is not decided by a select few in private closed-door meetings or randomly selected juries.²⁶⁸

²⁶¹ *Id.* (citations omitted). Opposition also came from tobacco farmers and other private plaintiffs’ lawyers—all parties who were left out of the negotiations. *Id.*

²⁶² *Id.* at 177.

²⁶³ Compare *supra* Part II.B.1 (describing the legislation of tobacco in the United Kingdom), with *supra* Part II.B.2 (describing the litigation of tobacco in the United Kingdom).

²⁶⁴ See *supra* Part II.B.2 (explaining the unsuccessful litigation of tobacco in the United Kingdom).

²⁶⁵ See *supra* Part II.B.1 (explaining the United Kingdom’s efforts to regulate tobacco through legislation).

²⁶⁶ See Dimitrios Kyritsis, *Representation and Waldron’s Objection to Judicial Review* (U.K.), 26 OXFORD J. LEGAL STUD. 733, 738-39 (2006) (explaining that the citizens of democracies elect their legislators through a system of majority vote).

²⁶⁷ See *id.* at 739 (explaining that the representatives of a nation’s citizens debate legislation to exchange arguments, reveal issues, and reach a better decision).

²⁶⁸ Turley, *supra* note 7, at 434 (“[T]hose who want social change must face the representatives of the public, not a randomly selected jury of six.”).

A comparison of tobacco regulation in the United States and United Kingdom shows that judicially created social reform can raise serious implications for the conceptual structure of a democracy. In the United States, public health advocates wanted to move the social policy debate out of Congress because of the perceived control by the tobacco companies.²⁶⁹ But in the end, the debate was shifted to closed-door private meetings where tobacco companies had even more power and absolutely no accountability for the deals that ultimately were cut by the parties.²⁷⁰ In contrast, the United Kingdom reform has consistently been subject to public debate in the open arena of the legislature. The private negotiations that took place in the United States are clearly not the picture of the democratic process envisioned in a democracy of checks and balances and separation of powers.²⁷¹

4. First Thematic Conclusion

Comparing tobacco regulation within the United States and United Kingdom reveals that opponents are correct in arguing that courts face procedural constraints. The comparison also raises serious concerns about the conceptual structure of democracy. The evidence shows that the legislative systems did not fail and courts do face procedural constraints that can severely limit the effectiveness of any damage awards or equitable relief. Attempting to use the judiciary as a means of creating social reform creates an undemocratic forum in which only select individuals are represented. Analysis of the arguments within the first broad thematic category supports the assertion that using the mass product tort system ultimately hinders social legislative reform.

²⁶⁹ GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 177-78.

²⁷⁰ *Id.* at 177. For a more detailed description of the entire negotiations, see MOLLENKAMP ET AL., *supra* note 1, at ch. 4-11.

²⁷¹ GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 177.

B. THE COOPERATION OF THE LEGISLATURE AND JUDICIARY TO CREATE REFORM TOGETHER

The second broad thematic category in which scholars debate the use of the judiciary to create social reform focuses on the cooperation of the legislature and judiciary in creating reform together. Public health advocates argue that litigation provides a means for reframing and redefining a policy problem. Redefining a policy problem through litigation can bring added media coverage, which can place an issue on legislators' agendas, mobilize political support, and create new alliances. These positive benefits of media coverage can then change the legislative bargaining power of public health advocates. Advocates also see the judiciary as a means of revealing relevant policy information and filling gaps left in legislation. Opponents argue that litigation can hinder legislative reform by creating a feeling amongst the public that the problem has been solved, and that using the judiciary as a second version of the legislature will erode the public's respect for the courts. Creating social policy through the courts will be hindered by the lure of financial concessions and is an inefficient method of creating social policy because litigation is long, drawn out, expensive, and offers no guarantee of success.

1. Reframing and Redefining the Policy Problem

Public health advocates argue that the judiciary can help the legislature pass reform because the filing of a lawsuit offers an "unusually rich potential for framing an issue and defining a policy problem."²⁷² Switching the venue of a debate may provide new methods of approaching and responding to a public health problem.²⁷³ Litigation presents the lawyers and litigants with the opportunity to articulate a narrative and tell their story in a way that affixes blame to their opponent.²⁷⁴ This method of

²⁷² Mather, *supra* note 2, at 918.

²⁷³ Timothy D. Lytton, *Using Tort Litigation to Enhance Regulatory Policy Making: Evaluating Climate-Change Litigation in Light of Lessons from Gun-Industry and Clergy-Sexual-Abuse Lawsuits*, 86 TEX. L. REV. 1837, 1841 (2008) [hereinafter Lytton, *Enhance Regulatory Policy*].

²⁷⁴ Mather, *supra* note 2, at 918-19.

reframing the issue can change the way the public views the public health problem by making some policy choices appear more attractive than others.²⁷⁵ This provides public health advocates the chance to “excite public interest and engender pressure for policy reform.”²⁷⁶

Public health advocates argue that the tobacco litigation presented the opportunity to reframe the issue as one of institutional failure and the need for judicially created reform.²⁷⁷ The story was no longer about individuals who assumed the risk of smoking while tobacco companies were innocent parties producing a legal product.²⁷⁸ As Attorney General Michael Moore famously said: “The state of Mississippi never smoked a cigarette.”²⁷⁹ The tobacco companies faced a “truly sympathetic plaintiff: a state trying to recover its expenses for taking care of its sick citizens and trying to protect its children from becoming future victims.”²⁸⁰ The Medicaid litigation allowed public health advocates, plaintiffs’ lawyers, and attorneys general to successfully paint a picture of industry-induced addiction.²⁸¹ Tobacco companies became the “cynical capitalist who would stoop to anything [to make a buck or] contest the charges against them.”²⁸² The state attorneys were seen as the white knights fighting for public health.²⁸³

²⁷⁵ Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 558.

²⁷⁶ Lytton, *Enhance Regulatory Policy*, *supra* note 273, at 1841.

²⁷⁷ *Id.* at 1842.

²⁷⁸ WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW* 238 (2004).

²⁷⁹ Mike Moore, *The States Are Just Trying to Take Care of Sick Citizens and Protect Children*, 83 A.B.A. J. 53, 53 (1997).

²⁸⁰ *Id.*

²⁸¹ HALTOM & MCCANN, *supra* note 278, at 237, 239; Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 558.

²⁸² Mather, *supra* note 2, at 922.

²⁸³ *See id.* at 920.

While this is all true, it is also true that public sentiment regarding tobacco had begun to change prior to the state Medicaid lawsuits. The release of the Cigarette Papers, the perjury of tobacco executives, the FDA's decision to regulate tobacco, increasing media coverage, and increasing state regulation all contributed to changing the public's perception of the tobacco companies.²⁸⁴ It is arguable that the states' Medicaid litigation was filed because of the public's changing perceptions, not that the Medicaid litigation changed the perception.

This theory appears to be supported by an examination of tobacco litigation in the United Kingdom. Tobacco litigation within the United Kingdom has been completely unsuccessful in redefining the policy problem.²⁸⁵ In *McTear*, the most recent case, the tobacco companies defeated liability on the same traditional arguments of assumption of the risk and causation.²⁸⁶ Similarly, in *Hodgson*, the trial judge described the plaintiffs' negligence claims as wholly "speculative."²⁸⁷ Litigation in the United Kingdom has been unable to change the story from one of assumption of the risk to one of cynical capitalists. Instead, the culture of the United Kingdom has continued to place "more importance on the idea of 'personal responsibility' for one's actions."²⁸⁸ The United Kingdom has nevertheless passed increasingly strict tobacco regulations including the regulation of the levels of nicotine and tar present in a cigarette.²⁸⁹ The tobacco litigation in the United Kingdom failed to redefine the policy problem, but public sentiment

²⁸⁴ GIFFORD, SUING THE TOBACCO, *supra* note 86, at 190.

²⁸⁵ See *supra* Part II.B.2 (describing the failure of tobacco litigation in the United Kingdom).

²⁸⁶ See *supra* notes 178-183 and accompanying text (describing the Scottish court's reasoning in *McTear v. Imperial Tobacco Ltd.*).

²⁸⁷ Sirabonian, *supra* note 8, at 498-99.

²⁸⁸ *Id.* at 506.

²⁸⁹ See *supra* notes 144-57 and accompanying text (explaining tobacco legislation in the United Kingdom which limits the amount of tar and nicotine legally allowed in cigarettes).

continued to shift against the tobacco companies resulting in stricter legislation.²⁹⁰

Coinciding with the states' Medicaid litigation, there was a transformation in how the American people viewed the public health problem of tobacco. It is unclear that this redefining of tobacco regulation was caused by the litigation. The American perception of tobacco regulation had begun to change well before the first Medicaid lawsuit was filed. The United Kingdom tobacco litigation has been an obvious failure in redefining the policy issue. It may never be conclusively known if the states' Medicaid litigation was the driving force that led to the reframing of tobacco regulation in the United States. Applying the experience of the United Kingdom and the building momentum against tobacco that had begun well before the Medicaid lawsuits, it is reasonable to argue that the change in the public's perception of tobacco regulation would have happened regardless of the litigation.

2. Agenda Setting, Mobilization of Political Support, Alliance Creation, and the Public's Perception that the Problem is "Solved"

Public health advocates believe that redefining the policy problem through litigation will be effective in accomplishing their policy goals because litigation can bring increased media coverage to a particular public health issue.²⁹¹ They argue that the increased media coverage of litigation is capable of placing an issue on legislators' agendas, mobilizing political support, and creating new alliances.²⁹²

First, advocates argue that increasing media coverage can place a specific issue on the agenda of legislators, agency

²⁹⁰ See Rogers, *supra* note 175, at 201 (describing the public's outrage against the tobacco companies for intentionally hiding knowledge about the harmful effects of cigarettes and purposefully addicting smokers to their products).

²⁹¹ Mather, *supra* note 2, at 913.

²⁹² *Id.* at 916; Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 558.

officials, and the public.²⁹³ Studies have shown that media coverage of tobacco in the 1990s increased proportionately with the pace of litigation.²⁹⁴ The media coverage tended to spike directly following a trial court's decision.²⁹⁵ This increased coverage led to increased negative publicity which in turn contributed to keeping tobacco regulation on the public agenda.²⁹⁶ Second, advocates argue that increasing media coverage of litigation can mobilize political support by "encouraging more lawsuits, energizing otherwise diffuse and unorganized constituencies, and serving as a basis for fundraising."²⁹⁷ Studies of public opinion show that attitudes were gradually becoming more negative over several decades.²⁹⁸ This was accelerated in the 1990s as public attitudes greatly shifted to an unfavorable opinion of the tobacco industry.²⁹⁹ This negative attention led to a shift in Congress, as even Republican politicians began to support tobacco regulation.³⁰⁰ Third, advocates argue that increasing media coverage of litigation can create new alliances by highlighting common ground among different groups of people.³⁰¹ As the political support for an issue increases, groups of individuals begin to form new alliances in an effort to promote or oppose an issue.³⁰²

²⁹³ Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 558.

²⁹⁴ Mather, *supra* note 2, at 913.

²⁹⁵ *Id.* at 916.

²⁹⁶ *Id.* at 916, 918.

²⁹⁷ Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 558.

²⁹⁸ Mather, *supra* note 2, at 923.

²⁹⁹ *Id.* at 923-24.

³⁰⁰ *Id.* at 918; GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 175, 177.

³⁰¹ See Mather, *supra* note 2, at 916 (explaining that litigation allows for the possibility of creating common interests and new identities).

³⁰² *Id.*

During the 1990s, doctors and the medical community finally became more vocal about the terrible effects of smoking, state attorneys general became involved in public health, and the plaintiffs' bar began to unify.³⁰³

It is clear that there was agenda setting, mobilization of political support, and alliance creation centered on the issue of tobacco regulation at the same time as the states' Medicaid lawsuits. However, it is not clear that these benefits were the result of the litigation. The states' lawsuits did not occur until after the FDA decided to regulate tobacco, the release of the infamous Cigarette Papers, and the obvious perjury of the tobacco executives lying in front of Congress.³⁰⁴ There was also increasing public awareness of the negative health risks of smoking, of the negative attitudes towards the tobacco companies, and a movement of state and local regulations against smoking.³⁰⁵ These important events happened so close in time with the litigation that it may never conclusively be known that litigation caused the agenda setting, mobilization of political support, and alliance creation.³⁰⁶

Examining tobacco regulation in the United Kingdom may give reason to think that these positive benefits would have occurred regardless of the litigation. Tobacco litigation in the United Kingdom was so overwhelmingly unsuccessful that no possible claim can be made that the litigation contributed to agenda setting, mobilization of political support, or alliance creation.³⁰⁷ Nevertheless, in the late 1990s and early 2000s, the

³⁰³ HALTOM & MCCANN, *supra* note 278, at 228 (describing the alliance created between attorneys general and private plaintiffs' lawyers); Heminger, *supra* note 11, at 1281-82; Mather, *supra* note 2, at 925. Interestingly, the 1990s also saw the cigarette manufacturers creating alliances, such as with the governor of Mississippi, in an attempt to stop the filing of the Medicaid lawsuit. Mather, *supra* note 2, at 921.

³⁰⁴ GIFFORD, SUING THE TOBACCO, *supra* note 86, at 190.

³⁰⁵ Patel, *supra* note 231, at 625 ("Essentially, attitudes towards smoking had been changing for many years before the MSA was negotiated[.]).

³⁰⁶ GIFFORD, SUING THE TOBACCO, *supra* note 86, at 190.

³⁰⁷ See *supra* Part II.B.2 (describing the unsuccessful tobacco litigation in the United Kingdom).

United Kingdom successfully passed legislation that placed limits on the levels of tar and nicotine in cigarettes.³⁰⁸ The authority to regulate the ingredients of cigarettes was not accomplished in the United States until 2009.³⁰⁹ The ability of the United Kingdom's legislature to pass such strict tobacco reform without the aid of litigation may provide evidence that the agenda setting, political support, and alliance creation experienced in the United States was not the result of the Medicaid litigation.

Even if one were to assume that litigation did at least contribute to the agenda setting, political support, and alliance creation, the regulation of tobacco still raises questions about the long-term effectiveness of these benefits. With all of the negative media coverage, negative public attitudes, political support, and alliance creation, there was no national legislative tobacco reform in the United States.³¹⁰ In fact, both the GSA and the harsher McCain bill failed in Congress.³¹¹ This unexplainable lack of legislative reform is possibly the result of the public's perception that the problem had been solved.³¹² The evidence shows that in 1994, with the release of the Cigarette Papers and the filing of the Mississippi Medicaid lawsuit, media coverage of tobacco spiked.³¹³ The very next year, in 1995, the media coverage of tobacco returned to the same level as in 1993.³¹⁴ There is also evidence to show that the media coverage

³⁰⁸ See *supra* notes 144-57 and accompanying text (describing legislation in the United Kingdom that regulated the amount of tar and nicotine legally permissible in a cigarette).

³⁰⁹ See *supra* notes 34-39 and accompanying text (stating that the FDA first received authority to regulate nicotine in cigarettes in 2009 when Congress passed the FSPTCA).

³¹⁰ See *supra* text accompanying note 34 (describing the lack of tobacco legislation in the United States from 1998 to 2009).

³¹¹ See *supra* notes 94-101 (explaining the failure of the GSA and the McCain bill).

³¹² Jacobson & Soliman, *supra* note 2, at 227; Jacobson & Warner, *supra* note 2, at 797.

³¹³ Mather, *supra* note 2, at 913.

³¹⁴ *Id.* at 913-14.

is highest directly following a trial court's decision, but that the momentum does not follow the subsequent appellate proceedings.³¹⁵ The evidence found by William Haltom and Michael McCann supports the conclusion that the negative media coverage of the tobacco companies was limited in both effect and duration.³¹⁶ One problem found by Haltom and McCann is that the media coverage of the litigation did not create any real winner.³¹⁷ The tobacco companies clearly became villains, but so too did the plaintiffs' attorneys who stood to make millions while the actual victims received next to nothing.³¹⁸ From 1997 to 2001, fifty-five to sixty-four percent of the public still blamed individual smokers for their diseases.³¹⁹

These findings may help to explain the obvious lack of national legislative tobacco reform. The public is well aware and informed about important trials regarding tobacco and the multi-million/billion dollar verdicts being levied against the large tobacco companies.³²⁰ However, the public may not follow up with any subsequent proceedings.³²¹ The public may not be aware that a class was later decertified, a jury verdict was overturned, or the MSA has so many loopholes as to be ineffective.³²² Without knowing the end of the story, the public may reasonably believe that the tobacco companies have been

³¹⁵ *Id.* at 916.

³¹⁶ HALTOM & MCCANN, *supra* note 278, at 228-29.

³¹⁷ *Id.* at 241.

³¹⁸ *Id.*

³¹⁹ *Id.* at 255.

³²⁰ Mather, *supra* note 2, at 916 (stating that media coverage of litigation appears to peak following the trial judge's decision).

³²¹ See HALTOM & MCCANN, *supra* note 278, at 261 ("It is noteworthy that this momentous reversal received only minimal news coverage."); Mather, *supra* note 2, at 916 ("[T]he sharpest increase in news coverage [was] following the trial judge's decision, in contrast to the periods following the appellate actions.").

³²² See HALTOM & MCCANN, *supra* note 278, at 260-61 (explaining how monumental reversals on appeal received only minimum media coverage).

adequately punished and the social problem of tobacco has been “solved.”³²³ This causes the media coverage and public pressure to disappear, taking with it all of the momentum and political support that had been built up for legislative reform.

During the state Medicaid litigation, tobacco was on legislators’ agendas, political support was mobilized in favor of regulation, and new alliances opposing tobacco were formed. It is extremely difficult, however, to untangle the interplay of media coverage, legislative proceedings, and litigation. It may never conclusively be known whether tobacco litigation created or even contributed to these benefits. Evidence from legislation in the United Kingdom may show that these benefits were not the result of litigation. Even if one were to assume that litigation did have some impact, there is still evidence to show that the long-term impact of agenda setting, political support, and alliance creation is diluted by the public’s perception that the problem has been solved.

3. Legislative Bargaining Power

Public health advocates view the benefits of increased media coverage generated by litigation as instrumental to achieving their policy goals because litigation will help strengthen their bargaining power within legislative and regulatory bodies.³²⁴ A positive litigation outcome, the threat of potential liability, or just the extreme cost to defend a mass product lawsuit increases public health advocates’ ability to force their political opponents, agency officials, or the industry itself into a compromise.³²⁵ The tobacco industry may voluntarily agree to change their policy simply to avoid potentially negative outcomes in litigation and possible huge damage awards that may accompany those outcomes.³²⁶

³²³ See Mather, *supra* note 2, at 898 (“Cigarette makers . . . may have succeeded in pushing tobacco issues to the back burner, to less visible political arenas in which tobacco interests historically have dominated.”).

³²⁴ Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 558.

³²⁵ *Id.*

³²⁶ Jacobson & Warner, *supra* note 2, at 795; Jacobson & Soliman, *supra* note 2, at 226.

Public health advocates claim that the MSA is a great example of how litigation can change a party's respective bargaining power. It is true that the states' Medicaid litigation successfully forced the tobacco industry to compromise at a point in time when the industry had never once paid a single plaintiff in any case.³²⁷ However, the MSA was not, in reality, a compromise by the tobacco industry even though it may at first glance appear to be.³²⁸ The MSA guaranteed the tobacco companies their respective market shares while allowing the industry to engage in legal collusion.³²⁹ The MSA also failed to have an impact on the tobacco industry's promotion and advertising.³³⁰ Although the tobacco companies agreed to give up some forms of advertising, the MSA simply diverted the tobacco industry's resources into other avenues.³³¹ What appears to be a severe compromise by the tobacco industry is really just a document that takes away the negative political and media coverage of tobacco but allows the industry to continue with business as usual.³³²

³²⁷ See *supra* notes 56-77 and accompanying text (showing that no individual plaintiff had ever received a payment from the tobacco industry prior to the industry's decision to settle).

³²⁸ Raysor, *supra* note 216, at 528-29. "At first blush, this may seem like a major blow to the profits of the tobacco companies. However, the true brunt of the MSA payments were going to be passed down the supply line as the cigarette companies would charge more for the cigarettes and recoup the money from the consumers." *Id.*

³²⁹ See *supra* notes 216-223 and accompanying text (explaining how several anticompetitive provisions of the MSA allowed the tobacco companies to agree on a set price for cigarettes).

³³⁰ See *supra* notes 229-236 and accompanying text (describing how the MSA's restrictions on advertising contained so many loopholes as to make the regulations meaningless).

³³¹ Bump, *supra* note 14, at 1304 ("When banned from one particular medium, the tobacco industry merely transfers its marketing expenditures to another medium."). A study of the MSA's prohibition on billboard advertising concluded that the tobacco industry simply shifted its expenditures to point-of-sale advertising. *Id.*

³³² Jensen, *supra* note 197, at 1380 ("Thus, it would appear that the industry essentially bought a license to continue business as usual[.]").

Examining the additional tobacco litigation in both the United States and United Kingdom makes clear that the litigation failed to change any legislative bargaining power. In the United States, the tobacco litigation initially resulted in the GSA.³³³ However, this document failed to become law because Congress could not gather the required political support.³³⁴ Public health advocates claimed that the tobacco industry's control over the legislative bodies had stopped Congress from passing tobacco reform.³³⁵ The GSA, however, is an example of an instance where the entire tobacco industry supported tobacco reform, yet Congress still could not pass the reform into law.³³⁶ It is hard to see how the litigation could have changed the legislative bargaining power of public health advocates if tobacco reform could not be passed, even when such reform was not being opposed by the industry. Similarly, after the tobacco litigation settled, it took another eleven years for Congress to finally pass legislative tobacco reform.³³⁷ It is difficult to argue that the tobacco litigation changed the legislative bargaining power of the parties when it took public health advocates more than an entire decade after the settlement to finally pass legislative reform.

Advocates may attempt to counter the failure of the GSA by pointing out the fact that the make-up of Congress had changed.³³⁸ The late 1990s saw the Republicans sweep into

³³³ See *supra* notes 87-93 and accompanying text (describing the creation of the GSA).

³³⁴ See *supra* notes 94-101 and accompanying text (describing the failure of the GSA).

³³⁵ See *supra* notes 187-195 and accompanying text (explaining the argument of public health advocates that the legislative systems had failed).

³³⁶ See *supra* notes 94-101 and accompanying text (explaining the failure of the GSA even though it was supported by the tobacco industry).

³³⁷ See *supra* text accompanying note 34 (describing the failure of Congress to pass tobacco legislation following the failure of the GSA until the FSPTCA in 2009).

³³⁸ GIFFORD, SUING THE TOBACCO, *supra* note 86, at 190 (“[T]his failure can be laid at the feet of a Republican administration and a Republican Congress that were pervasively anti-regulatory in economic matters.”).

power and take control of the Congress.³³⁹ However, this claim appears to directly confirm the findings of Wright and directly refute the claim of public health advocates. If the claim by advocates is that litigation can change legislative bargaining power, then why did the Medicaid lawsuits not change the position of Republicans? This is especially perplexing when one considers the fact that the tobacco industry supported the proposed reform.³⁴⁰ The support of the tobacco industry removes from the equation the claim of public health advocates that the tobacco industry prevented reform by controlling Congress. Instead, the fact that the GSA failed in a Republican Congress, even with the support of the tobacco industry, appears to support the conclusion of Wright that the history of tobacco legislation is a story of the legislators' political ideologies.³⁴¹ The GSA most likely failed because of the prevalent political ideology of the Congress. Some legislators who opposed the bill wanted no regulation, while other legislators who opposed the bill wanted more stringent regulation.³⁴² The Medicaid lawsuits did not change the legislative bargaining power of the members of Congress because legislators continued to vote according to political ideology.

The same can be said of the tobacco litigation in the United Kingdom. The tobacco companies in the United Kingdom have never been forced to pay a plaintiff, and only once have they actually been required to go to trial.³⁴³ This clear failure could not possibly cause supporters of the tobacco industry to begin making concessions to public health advocates. Nonetheless, the United Kingdom has consistently passed tobacco reform. This cannot reasonably be claimed to be the result of the massively unsuccessful litigation. Instead, this is most likely the

³³⁹ *See id.*

³⁴⁰ *See supra* note 95 (describing the tobacco industry's support for the GSA).

³⁴¹ Wright, *supra* note 200, at 2-3.

³⁴² *See id.* at 2; GIFFORD, SUING THE TOBACCO, *supra* note 86, at 175.

³⁴³ *See supra* Part II.B.2 (describing the failure of tobacco litigation in the United Kingdom).

product of the legislators' political ideology, not some legislative advantage gained through litigation.

Public health advocates argue that the MSA is a great example of how litigation can change the respective bargaining power of the parties. A careful examination, however, reveals that the MSA was not a compromise by the tobacco industry. Further study of the tobacco litigation in the United States and United Kingdom makes clear that the litigation did not change the legislative bargaining power of the respective parties. The legislators in both countries continued to vote consistently with their political ideologies.

4. Revealing Relevant Information but Eroding Respect for the Judiciary

Public health advocates argue that litigation can facilitate reform by the legislature because courts are able to reveal policy-relevant information.³⁴⁴ Public health advocates argue that legislators and regulators do not always have a comparative advantage as against the regulated industry in obtaining vital information relevant to public health regulation.³⁴⁵ In these cases, the courts may be the only institution capable of lowering the information costs which currently preclude the legislative bodies from obtaining this information.³⁴⁶ Advocates view the courts as “the best institution for penetrating social problems characterized by badly asymmetrical information and a high level of complexity.”³⁴⁷

Opponents of litigation argue that using the judiciary as a “second front in legislative battles” may ultimately erode the public's respect for the judiciary and the rule of law.³⁴⁸ The

³⁴⁴ Lytton, *Enhance Regulatory Policy*, *supra* note 273, at 1842.

³⁴⁵ Wendy Wagner, *When All Else Fails: Regulating Risky Products Through Tort Litigation*, 95 GEO. L.J. 693, 732 (2007) [hereinafter Wagner, *When All Else Fails*].

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 559.

discovery process can be extremely costly.³⁴⁹ This process is a justified use of public and private resources when it is designed to uncover the information necessary to resolve a dispute between parties that are currently before the court.³⁵⁰ However, the judiciary loses integrity and threatens their legitimacy as impartial arbitrators when expensive discovery requests are used to advance a particular plaintiff's policy agenda without regard to the merits or outcome of the lawsuit.³⁵¹

Public health advocates cite to the Cigarette Papers as proof of how litigation can produce relevant policy information.³⁵² However, the Cigarette Papers were not revealed through litigation.³⁵³ Instead, they were stolen and leaked by a former paralegal who worked at Brown & Williamson.³⁵⁴ There is also no guarantee that these papers would have been turned over during discovery. The Cigarette Papers showed that tobacco executives had "specified scores of documents that were to be shipped out of the country, presumably to escape the reach of the legal process."³⁵⁵ Tobacco companies were also "channel[ing] their scientific research through their lawyers, for example, by labeling scientific reports 'attorney work product' to shield them through attorney-client privilege or by directing their lawyers to screen and suppress industry research[.]"³⁵⁶ These same practices were being used in the United Kingdom as

³⁴⁹ *Id.*

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Cf.* Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935, 948 (1999) [hereinafter Wagner, *Rough Justice*] ("[T]he attorney general litigation has begun to reverse the manufacturers' long-enjoyed immunity regarding the undisclosed and preventable hazards of cigarettes.").

³⁵³ *See supra* note 27 and accompanying text (describing how the Cigarette Papers were leaked).

³⁵⁴ *Id.*

³⁵⁵ GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 108.

³⁵⁶ Mather, *supra* note 2, at 903.

well.³⁵⁷ Counsel of a prominent English law firm actually wrote to the chief scientist of British American Tobacco, stating, “[b]ecause correspondence on the subject of Buerger’s disease might not be privileged, it is important that contact between the scientists should be routed through the lawyers.”³⁵⁸ If tobacco companies in the United States and United Kingdom were willing to dope their cigarettes with nicotine and abuse the professional privilege of their lawyers, it may not be safe to assume that a simple discovery request would have forced the tobacco companies to willingly turn over incriminating evidence.

The litigation process, through the use of discovery, is capable of revealing documents that may contain information relevant to regulation. In many circumstances, however, regulatory agencies and legislative bodies are just as capable of finding the same information. It was not the case that the legislative bodies were unable to discover information about the negative health effects of tobacco without the use of litigation.³⁵⁹ Congress did not possess the information because it willingly chose not to research tobacco or create an agency to monitor tobacco.³⁶⁰ There is no evidence to show that the tobacco industry held a serious comparative advantage over the legislative bodies that would justify the use of litigation instead of requiring an agency to undertake their own scientific studies. In fact, as early as 1964, the United States Office of the Surgeon General had already undertaken its own study, in which they found a connection between smoking and lung cancer.³⁶¹ This

³⁵⁷ Andrew Higgins, *Corporate Abuse of Legal Professional Privilege*, 27 CIV. JUST. Q. 377, 388 (2008) (U.K.).

³⁵⁸ *Id.*

³⁵⁹ See, e.g., *supra* notes 11-13 and accompanying text (explaining the 1964 report of the United States Surgeon General).

³⁶⁰ See *supra* Part III.A.1 (describing the history of tobacco legislation in the United States); see also Wagner, *Rough Justice*, *supra* note 352 at 950 (describing “Congress’ consistent failure to hold the tobacco industry accountable for the hazards of cigarettes[.]”).

³⁶¹ See *supra* notes 11-13 and accompanying text (describing the findings of the 1964 Surgeon General’s report).

demonstrates that if Congress so desired, the government could have undertaken its own studies or provided funds for private organizations to research the health effects of tobacco. Using litigation as a means of forcing parties to undergo expensive discovery when the desired information could just as easily be obtained through other means is an abuse of the discovery process which threatens to erode respect for the judiciary.³⁶²

5. Filling Gaps in Legislation

Public health advocates argue that the judiciary can help the legislature in creating reform because litigation can fill the gaps left in legislation and regulation.³⁶³ Lawmakers will never be capable of anticipating all the ways in which an industry will be able to legally evade regulation.³⁶⁴ This necessarily implies that all legislation and regulation will unavoidably contain gaps and loopholes for industries to exploit.³⁶⁵ Public health advocates see litigation, or even the threat of litigation, as a means of forcing the industry into voluntary compliance with the advocates' ultimate public health objectives.³⁶⁶

It is absolutely true that no single piece of legislation will ever be completely comprehensive and contain the answer for every possible factual scenario that occurs in the real world. It is also true that the judiciary properly fills any gaps in the legislation by interpreting the intent of the legislators.³⁶⁷ However, the judiciary must interpret the laws that are actually

³⁶² See Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 559 (stating that the judiciary appears to lack integrity when discovery requests are enforced for the purposes of advancing a plaintiff's policy goals).

³⁶³ *Id.* at 558; Lytton, *Enhance Regulatory Policy*, *supra* note 273, at 1842.

³⁶⁴ Lytton, *Using Litigation to Make Public Health Policy*, *supra* note 2, at 558.

³⁶⁵ *See id.*

³⁶⁶ *Id.*

³⁶⁷ *See* 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:5 (7th ed. 2011) ("For the interpretation of statutes, 'intent of the legislature' is the criterion that is most often recited.").

passed in accordance with the actual legislative intent of that law.³⁶⁸

The tobacco litigation shows that the judiciary will not interpret a law to achieve a public health advocate's policy goals that have been rejected by Congress or are inapposite to the statutory scheme. In the late 1990s, the FDA attempted to claim the legal authority to regulate tobacco as a drug.³⁶⁹ However, the Supreme Court held that Congress had expressly intended to preclude the FDA from exercising such authority and refused to interpret the law so as to achieve the goals of the public health advocates.³⁷⁰ The same has been true in the United Kingdom where public health advocates have been even less successful in using litigation. Only one case against the tobacco companies has even made it to trial, and in that case, the judge held that the tobacco company possessed no liability for the death of the plaintiff.³⁷¹

The judiciary plays a proper role when it interprets the law in front of it along with the actual legislative intent of that law. But as the tobacco litigation reveals, courts are not willing to interpret laws for the sole purpose of achieving public health policy goals. The judiciary will not act to implement policy that is inapposite to the statutory scheme or the legislative intent.

6. Attraction of Financial Rewards

Opponents to the use of the judiciary argue that litigation will hinder legislative reform because litigation's focus on providing damages in terms of monetary awards will distort any

³⁶⁸ See *id.* ("None of these methods can be criticized if they in fact reflect the intent of the legislature, but none can be supported when they result in a finding of legislative intent which did not in fact exist within the legislature.").

³⁶⁹ See *supra* notes 30-31 (explaining the FDA's attempt to regulate tobacco).

³⁷⁰ Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 126 (2000).

³⁷¹ See *supra* notes 171-183 and accompanying text (describing the *McTear* case).

attempt at creating social policy.³⁷² Litigation is traditionally an arena in which individuals can redress their injuries.³⁷³ This causes the judicial process to focus largely on money.³⁷⁴ Contingency fees, for example, are a great mechanism for enabling people to bring cases that otherwise would not be initiated.³⁷⁵ Contingency fees, however, also create powerful incentives based solely on money.³⁷⁶ Whether based on greed or not,³⁷⁷ it is extremely realistic and likely that litigation will focus on financial recovery instead of public health objectives.³⁷⁸

An examination of the tobacco litigation in the United States, and specifically the MSA, appears to support this argument. As the negotiations leading up to the MSA progressed, the focus became more and more centered around money.³⁷⁹ The state attorneys general were most interested in recovering taxpayer dollars that had been spent on treating victims of tobacco-related illnesses.³⁸⁰ The private plaintiffs' attorneys focused on recovering their large fees.³⁸¹ As one negotiator of the MSA stated, "The money in the tobacco settlement is as addictive to

³⁷² Jacobson & Soliman, *supra* note 2, at 227; Jacobson & Warner, *supra* note 2, at 797.

³⁷³ Jensen, *supra* note 197, at 1379.

³⁷⁴ Jacobson & Warner, *supra* note 2, at 797; Jacobson & Soliman, *supra* note 2, at 228; Jensen, *supra* note 197, at 1379.

³⁷⁵ LaFrance, *supra* note 6, at 202.

³⁷⁶ *Id.* "Large attorneys' fees give class counsel a financial interest to settle that is independent of the class claimants' interest." Bianchini, *supra* note 88, at 723.

³⁷⁷ LaFrance, *supra* note 6, at 202.

³⁷⁸ Jacobson & Warner, *supra* note 2, at 797; Jacobson & Soliman, *supra* note 2, at 228; Jensen, *supra* note 197, at 1379.

³⁷⁹ GIFFORD, SUING THE TOBACCO, *supra* note 86, at 176.

³⁸⁰ MOLLENKAMP ET AL., *supra* note 1, at 171.

³⁸¹ *Id.* at 172.

states as the nicotine in cigarettes is to smokers.”³⁸² With this added attention to money, the MSA contained several public policy flaws, omitting provisions that had initially been included in earlier negotiations.³⁸³ Specifically, the MSA failed to contain look-back provisions, tied state revenues to tobacco sales, and did not give the FDA authority to regulate tobacco.³⁸⁴ The MSA also created high barriers to entry, guaranteed current market shares, eliminated price competition, and permitted price fixing.³⁸⁵

In comparison, tobacco regulation in the United Kingdom has not fallen victim to the allure of wealth. One reason for this is the lack of a contingent fee system equivalent to the one used in the United States.³⁸⁶ Conditional fees in the United Kingdom permit lawyers to enter into “no win, no fee” arrangements with clients.³⁸⁷ However, attorneys in the United Kingdom “may not contract for a percentage of damage awards as compensation for their work.”³⁸⁸ Prohibiting this type of fee arrangement eliminates the potential incentives based on financial rewards because the attorney’s fee is not determined by the damage award of the case.³⁸⁹ An attorney may still attempt to negotiate

³⁸² GIFFORD, *SUING THE TOBACCO*, *supra* note 86, at 179 (quoting Rick Hampson, *States Squander Chance to Fight Smoking*, USA TODAY, Mar. 11, 2003, at 1B (quoting Christine Gregoire)).

³⁸³ *See supra* notes 108-112 and accompanying text (explaining the several flaws of the MSA).

³⁸⁴ *Id.*

³⁸⁵ *See supra* Part III.A.2.i (examining the MSA).

³⁸⁶ *See Rogers*, *supra* note 175, at 227 (“The British version of contingency fees, however, is not identical to the American version.”).

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Cf. Bianchini*, *supra* note 88, at 724 (“[B]ecause mass tort cases are litigated on a contingency fee basis, attorneys have significant incentives to settle.”). “Moreover, with their own financial interest at stake, class counsel may be less aggressive in challenging settlement terms favored by the defendants. Clients’ interests in maximizing recovery . . . thus diverge from the interests of their attorneys in collecting fees through settlement.” *Id.*

a settlement for their client, but this attempt is not motivated by the attorney's interest in personal wealth. A second reason why tobacco regulation in the United Kingdom has not fallen victim to the allure of wealth is the fact that the United Kingdom has addressed the public health problem of tobacco completely through legislation.³⁹⁰ Legislators do not face the same monetary incentives as plaintiffs and their lawyers.³⁹¹ This allows legislators to focus on the desired social policy. Legislators are not put in a position where they could potentially compromise certain policy provisions in exchange for direct monetary awards as were the negotiators in the MSA.

A comparison of tobacco regulation in the United States and United Kingdom reveals that litigation does have a tendency to focus on large monetary awards. The negotiators of the MSA compromised on some of the original public health provisions in exchange for money. In contrast, legislators do not face the same dilemma of competing interests between money and public health. Unlike plaintiffs and their attorneys, legislators can focus the debate exclusively on the merits of the public health issue.

7. Long, Drawn Out, Expensive, and No Guarantee of Success

Opponents next argue that the judiciary will hinder legislative reform because litigation promises to be "long, drawn out, and expensive."³⁹² Litigation offers no guarantee of success in achieving the desired policy objectives.³⁹³ Opponents argue

³⁹⁰ See *supra* Part II.B.1 (describing the tobacco legislation in the United Kingdom).

³⁹¹ Compare Kyritsis, *supra* note 266, at 738-39 ("Legislators, we tend to think, have a special duty to heed the interests and convictions of the people who elect them . . . They are also under institutional pressure to do so, since, if they fail to heed their interests and convictions, they are likely not to get re-elected."), with Bianchini, *supra* note 88, at 723 ("Large attorneys' fees give class counsel a financial interest to settle that is independent of the class claimants' interests. When the attorneys' interests diverge from those of the class, the resulting settlement agreement may enrich class counsel . . . but provide little, if any, recovery for the class members.").

³⁹² Jacobson & Warner, *supra* note 2, at 796.

³⁹³ *Id.*

that attempting to change social policy may often include novel and untested legal theories, that some policy goals of public health advocates may be unattainable or unaffected by litigation, and using litigation could potentially divert precious government resources away from programs which are actually working towards implementing the desired social policies.³⁹⁴

Comparing the tobacco regulation in the United States and United Kingdom shows that litigation can certainly be extremely expensive, time consuming, and often not likely to succeed. Tobacco litigation in the United States is full of examples of cases which were long, drawn out, expensive, and have failed not only to achieve the desired social policy goals, but also on the merits.³⁹⁵ The same has been shown by the little amount of tobacco litigation that has occurred in the United Kingdom.³⁹⁶ Both countries have demonstrated that litigation is by no means an efficient method of creating social policy. Tobacco litigation in both the United States and United Kingdom has in fact proven to be a waste of time, money, and resources in terms of advancing social policy goals.

8. Second Thematic Conclusion

Comparing the tobacco regulation within the United States and United Kingdom reveals that opponents are correct in arguing that using the judiciary will hinder efforts to create legislative reform. It is not clear that litigation is capable of redefining the policy problem. Efforts to place the issue on

³⁹⁴ *Id.* at 796-97; Jacobson & Soliman, *supra* note 2, at 227.

³⁹⁵ See, e.g., *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504 (1992) (a case originally filed in 1983, returned a jury verdict for the plaintiff in 1988, overturned by the Third Circuit in 1990, and reversed by the Supreme Court in 1992; however, the plaintiff and law firm could not afford to proceed after 1992); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (a case originally filed in 1993, financed by sixty different law firms, each contributing \$100,000, but was decertified by the Fifth Circuit in 1996).

³⁹⁶ See, e.g., *McTear v. Imperial Tobacco Ltd.*, [2005] CSOH 69; (2005) S.C. 1 (OH) (a case originally filed in 1992, finally made it to trial in 2003, and returned a verdict for the tobacco company in 2005). See also *supra* notes 165-169 and accompanying text (explaining the failure of *Hodgson v. Imperial Tobacco Ltd.*—an attempted class action filed in 1992 which ended in 1999 because of problems with the statute of limitations).

legislators' agendas, mobilize support, and create new alliances may be hindered by the public's perception that the problem has been solved. Litigation has not proven to change legislative bargaining power. Using the discovery process solely for social policy goals may erode the public's respect for the courts. The courts can only fill gaps in legislation that are consistent with the legislative intent. The evidence shows that policy goals can be distorted by the lure of money. And, litigation has proven to be long, drawn out, expensive, and unsuccessful. Analysis of the arguments within the second broad thematic category supports the assertion that using the mass product tort system hinders social legislative reform.

C. THE DETERRENT EFFECTS OF TORT LAW

The third broad thematic category in which scholars debate the use of the judiciary to create social reform centers around the general deterrent effects of tort law. Public health advocates argue that the potential of tort liability will cause product manufacturers to act in a less injurious way, which will further their public health objectives. Manufacturers are in the best position to minimize the loss and are able to distribute the loss across all of society. Opponents argue that the deterrent effects of tort law are overstated, and the concepts of loss minimization and distribution are not applicable in the context of latent diseases.

1. Loss Minimization and Loss Distribution

Public health advocates argue that litigation is useful in creating social reform because of the general deterrent effects of tort law and the allocation of loss, referred to generally by tort scholars as "loss minimization" and "loss distribution."³⁹⁷ The deterrent theory of tort law is rather simple: tort law threatens people with having to pay for the injuries they produce;

³⁹⁷ See, e.g., Donald G. Gifford, *The Peculiar Challenges Posed by Latent Diseases Resulting from Mass Products*, 64 MD. L. REV. 613, 629 (2005) [hereinafter Gifford, *The Peculiar Challenges*]; Jacobson & Soliman, *supra* note 2, at 234-35 ("[T]ort litigation can be effective in monitoring overall product quality and in punishing manufacturers for producing goods that harm individuals and damage the public health.").

therefore, people will alter their behavior by taking into account the interests of others in a socially desirable and less injury-producing way.³⁹⁸ Loss minimization captures the idea that the manufacturer of a product is in the best position to minimize the loss.³⁹⁹ The manufacturer is able to make its products safer or reduce production.⁴⁰⁰ Loss distribution reflects the idea that the manufacturer is in the best position to spread the loss across all of society.⁴⁰¹ Instead of requiring one individual plaintiff to bear the burden of the entire loss, the manufacturer has the ability to increase price and distribute the loss across a large group of consumers.⁴⁰² The theories of loss minimization and loss distribution are not unique to public health advocates wishing to use litigation to further specific public policy objectives.⁴⁰³ The theories are viewed, however, by advocates of litigation as a means of forcing companies to make their products safer and reduce production.⁴⁰⁴

Recently, some scholars have begun to question the effectiveness of loss minimization and loss distribution. Donald Gifford argues that three factors may limit the effectiveness of loss minimization and distribution within the specific context of

³⁹⁸ Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 560 (1985).

³⁹⁹ See Gifford, *The Peculiar Challenges*, supra note 397, at 629 (explaining Calabresi's goal of "primary accident cost avoidance" as minimizing accident producing behavior).

⁴⁰⁰ Lytton, *Using Litigation to Make Public Health Policy*, supra note 2, at 558.

⁴⁰¹ See Gifford, *The Peculiar Challenges*, supra note 397, at 629 (explaining Calabresi's goal of "secondary accident cost avoidance" as distributing the losses which have already occurred across all of society).

⁴⁰² *Id.*

⁴⁰³ Indeed, the ideas were first advanced by the instrumentalists, Judge Calabresi and Judge Posner. *Id.* at 627 & n.80.

⁴⁰⁴ Lytton, *Using Litigation to Make Public Health Policy*, supra note 2, at 558.

mass product tort litigation of latent diseases.⁴⁰⁵ First, there tends to be an extended period of time between the manufacture of the product and the imposition of liability.⁴⁰⁶ Second, the litigation of latent diseases is generally unable to assign liability to the specific activity that caused the harm.⁴⁰⁷ Third, actions taken by parties other than the product manufacturer are generally contributing causes to the victim's ultimate illness.⁴⁰⁸ As Gifford argues, the interplay of these three factors makes the analysis of determining which party is in fact the cheapest cost avoider within the context of tobacco-related illness much more complicated.⁴⁰⁹ Arguments can be made that the tobacco manufacturers, the individual smokers, the state and federal governments, or a combination of all three could possibly be the cheapest cost avoider.⁴¹⁰ This determination could turn on when a smoker began smoking, if and when a smoker quit smoking, and a consideration of the government's subsidies for tobacco and their acquiescence in failing to regulate cigarettes.⁴¹¹

The theories of loss minimization and loss distribution have also been criticized outside of the specific context of latent disease. Stephen Sugarman claims that the deterrent effects of tort law exaggerate the dangerous behavior of individuals and the ability of potential tort liability to reduce such behavior.⁴¹²

⁴⁰⁵ Gifford, *The Peculiar Challenges*, *supra* note 397, at 613 (explaining that (1) the existence of an extended period of time between the distribution of the product and the imposition of liability, (2) the inability to attribute liability to the specific activity which caused the harm, and (3) the contributing causes of third parties all frustrate the deterrent effects of tort law in the context of latent diseases).

⁴⁰⁶ *Id.* at 635-36.

⁴⁰⁷ *Id.* at 654.

⁴⁰⁸ *Id.* at 662.

⁴⁰⁹ *Id.* at 662-63.

⁴¹⁰ *Id.* at 667-68.

⁴¹¹ *Id.* at 668-72.

⁴¹² Sugarman, *supra* note 398, at 561 & n.12.

The general reason for why this deterrent effect is ineffective is because the “law and economics” rationale, on which the theory is based, depends on the assumption of perfect information.⁴¹³ In the real world, individuals lack perfect information.⁴¹⁴ Even if individuals possess the required information, they lack the knowledge to properly apply it, improperly discount the threat, feel the need to satisfy immediate needs, believe the benefits of such behavior outweigh the relatively small tort penalty, or purchase liability insurance.⁴¹⁵ All of these factors greatly reduce the deterrent effects of tort law.⁴¹⁶

Examining the history of tobacco in the United States and United Kingdom, there does appear to be evidence to support the idea that the deterrent effects of the tort system are overstated. In the United States, tobacco companies have paid hundreds of billions of dollars in tort penalties.⁴¹⁷ In the context of the MSA, the tobacco companies were able to pass the entire tort liability onto consumers by raising prices.⁴¹⁸ However, in the context of the individual smokers and their lawsuits, tort liability has been unable to distribute the loss.⁴¹⁹ The failure of class actions and individual suits means that the smokers are

⁴¹³ *Id.* at 564-65.

⁴¹⁴ Paul Horwitz, *Free Speech as Risk Analysis: Heuristics, Biases, and Institutions in the First Amendment*, 76 TEMP. L. REV. 1, 12 (“Individuals regularly lack perfect information in making decisions, and would not be infinitely skilled at weighing that information even if they had it.”).

⁴¹⁵ Sugarman, *supra* note 398, at 565-74.

⁴¹⁶ *Id.*

⁴¹⁷ *See, e.g., supra* note 105 and accompanying text (stating that the tobacco companies had to pay \$206 billion to forty-six states under the MSA).

⁴¹⁸ *See supra* notes 217-223 and accompanying text (describing the ability of the tobacco companies to raise the price of cigarettes immediately following the MSA).

⁴¹⁹ *See supra* Part II.A.2 (describing the failure of most tobacco litigation in the United States).

stuck bearing the entire cost of their injuries.⁴²⁰ Tobacco companies have not reduced production or attempted to make cigarettes any safer by reducing the level of nicotine.⁴²¹ Individuals have also not stopped smoking,⁴²² and it took the United States government eleven years to finally pass legislation that allows the FDA to regulate levels of nicotine.⁴²³ It does not appear that tobacco companies have felt any deterrent effects from the imposition of liability or tort law generally. In fact, it appears that the tobacco companies, the federal government, and the individual smokers are all proceeding with business as usual.⁴²⁴

Tobacco litigation in the United Kingdom similarly brings into question the effectiveness of the deterrent effects of tort law. Tort law in the United Kingdom has been completely unable to hold the tobacco companies liable.⁴²⁵ Tobacco companies face no deterrent incentives if they know that they are free from liability.⁴²⁶ Smokers have also failed to change their behavior as they continue to create a huge demand for

⁴²⁰ See *supra* note 395 (explaining the failure of two prominent tobacco cases in the United States).

⁴²¹ LaFrance, *supra* note 6, at 197 (“[T]he chief activity by which the tobacco companies have inflicted harm will continue, namely, the development and marketing of cigarettes.”).

⁴²² Wendy E. Parmet, *Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 HOUS. L. REV. 1663, 1712 (1999) (“The state tobacco reimbursement cases have been settled, but children still smoke and smokers still die.”).

⁴²³ See *supra* note 34 and accompanying text (explaining that Congress did not pass national tobacco legislation following 1998 until the FSPTCA in 2009).

⁴²⁴ Jensen, *supra* note 197, at 1380.

⁴²⁵ See *supra* Part II.B.2 (explaining the failure of tobacco litigation in the United Kingdom).

⁴²⁶ See Sugarman, *supra* note 398, at 560 (“It is first assumed that, absent tort law, people would selfishly pursue their own interests, putting their personal desires ahead of the safety of others.”).

tobacco products.⁴²⁷ Tort law has failed to minimize any of the losses and to distribute those losses. The individual smokers are stuck with the entire cost as they are the ones paying the large cigarette taxes that fund the country's social welfare programs.⁴²⁸

The deterrent effects of tort law and the positive benefits of loss minimization and loss distribution were once thought of as given. However, the experience of the tobacco litigation appears to support the recent scholarship that has brought these well-accepted concepts into question. Tobacco companies have not been deterred from producing cigarettes, individuals have not stopped smoking, cigarettes have not been made safer, and the majority of losses have not been distributed beyond the individual smokers.

2. Third Thematic Conclusion

Comparing tobacco regulation within the United States and United Kingdom reveals that opponents are correct in arguing that litigation of latent diseases is ineffective in deterring injury-producing conduct. Litigation has not forced tobacco companies to minimize their losses or distribute them across all of society. Tort liability has been ineffective in forcing the tobacco companies to change their behavior away from injury-producing conduct and towards the objectives of public health advocates. Analysis of the arguments within the third broad thematic category supports the claim that the mass product tort system hinders social legislative reform.

IV. CONCLUSION

This Article has undertaken to answer the question of whether mass product tort litigation facilitates or hinders social

⁴²⁷ See Parmet, *supra* note 422, at 1712 (explaining that people continue to smoke and die from tobacco related illnesses).

⁴²⁸ See DR. JUDITH MACKAY & DR. MICHAEL ERKSEN, WORLD HEALTH ORGANIZATION, THE TOBACCO ATLAS 108-09 tbl. B (2002), available at <http://www.who.int/tobacco/en/atlas41.pdf> (explaining that 78% of the cost of a package of cigarettes in the United Kingdom is taxes, and that cigarette taxes account for 3.23% of all United Kingdom tax revenue).

legislative reform. The United States is viewed as heavily reliant on litigation while the United Kingdom is viewed as a social welfare state which regulates exclusively through legislation.⁴²⁹ In all three of the broad thematic categories, the arguments of public health advocates failed to show how using the judiciary can facilitate social reform. The legislatures did not fail. The use of the judiciary created undemocratic results in which only a select few were able to participate.⁴³⁰ Efforts of the judiciary to work with the legislature to pass reform measures only hindered such reform efforts.⁴³¹ The deterrent effects of tort law were ineffective as tobacco companies failed to change their injury-producing behavior and were not made to distribute the losses across society.⁴³² After examining the arguments on both sides of the debate and comparing the real world experience of tobacco regulation in the United States and United Kingdom, this Article has found that litigation hinders social legislative reform.

⁴²⁹ See *supra* notes 7-8 and accompanying text (explaining that the United Kingdom relies on legislation to regulate public policy while the United States is more likely to rely on litigation).

⁴³⁰ See *supra* Part III.A (explaining that the legislative systems did not fail and using the judiciary to create social reform is undemocratic).

⁴³¹ See *supra* Part III.B (explaining that the judiciary will hinder reform efforts if it attempts to work in cooperation with the legislature).

⁴³² See *supra* Part III.C (explaining that the deterrent effects of tort law appear overstated in the context of the tobacco litigation).