

Unless otherwise noted, the content of this course material is licensed under a Creative Commons Attribution - Non-Commercial - Share Alike 3.0 License.

Copyright 2008, Peter D. Jacobson

The following information is intended to inform and educate and is not a tool for self-diagnosis or a replacement for medical evaluation, advice, diagnosis or treatment by a healthcare professional. You should speak to your physician or make an appointment to be seen if you have questions or concerns about this information or your medical condition. You assume all responsibility for use and potential liability associated with any use of the material.

Material contains copyrighted content, used in accordance with U.S. law. Copyright holders of content included in this material should contact open.michigan@umich.edu with any questions, corrections, or clarifications regarding the use of content. The Regents of the University of Michigan do not license the use of third party content posted to this site unless such a license is specifically granted in connection with particular content objects. Users of content are responsible for their compliance with applicable law. Mention of specific products in this recording solely represents the opinion of the speaker and does not represent an endorsement by the University of Michigan.

Viewer discretion advised: Material may contain medical images that may be disturbing to some viewers.

THE ROLE OF LITIGATION IN FORMING PUBLIC HEALTH POLICY: TOBACCO

Peter D. Jacobson, JD, MPH



**Center for Law, Ethics, and Health
University of Michigan School of Public Health**

28 November 2007

PRESENTATION OUTLINE

- **Policy context**
- **Role of litigation**
- **Tobacco control policy and litigation**
- **Applicability to other public health issues**
- **Conclusion**

POLICY CONTEXT

The issues

- **Role of litigation**
 - **Relative to political process in forming public health policy**
 - **Relative to other available public health remedies**
- **Unprecedented scope and objectives of current tobacco and gun control litigation**

POLICY CONTEXT (cont.)

Policy context

- **Regulatory failure**
- **Role of local health agencies relative to state agencies**
 - **Tobacco litigation mostly initiated at state level**
 - **Gun control litigation mostly initiated at local level**
- **Litigation as political issue and as shaping public health policy**

THE LITIGATION ENVIRONMENT

Functions of litigation

- **Compensation**
- **Deterrence**
- **Accountability**
- **Equity**
- **Corrective functions vs. promoting social goals**

TOBACCO LITIGATION

Three Waves

- **First two waves based on negligence and strict liability**
 - **No damages paid**
 - **Individual responsibility defense**

TOBACCO LITIGATION (cont.)

- **Third wave more expansive**
 - **State Attorneys General Medicaid litigation**
 - **Public health policy goals more explicit**
 - 4 **Evolved from damages to public health**
 - 4 **State settlements somewhat erode public health focus**

FRAMEWORK FOR ANALYSIS

Rosenberg model

- **Dynamic view**
- **Constrained view**

Comparative institutional analysis

- **Political processes**
- **The market**
- **The courts**

Rule-shifting vs. culture-shifting effects

Tobacco Control Policies

Economic

- **Excise Taxes**
- **Damage awards from litigation**

Regulatory/Legislative

- **Youth access restrictions**
- **Restrictions on smoking**
- **Advertising restrictions**
- **Marketing curbs (i.e., on logos and sporting event scholarship)**
- **Enforcement activities**

Tobacco Control Policies (cont.)

Information/Education

- **Education about the harms from tobacco products**
- **Disclosure of tobacco industry documents**
- **Settlement negotiations with the tobacco industry**
- **Shifting the public health debate**
- **Smoking cessation programs**
- **Research in tobacco control policy or in tobacco-related diseases**
- **Counter advertising (i.e., anti-smoking ads)**

Role of Litigation in Changing Tobacco Policy

Exclusive domain

- **Damage awards**

Direct effects

- **Corrective measures shared with legislatures**

Role of Litigation in Changing Tobacco Policy (cont.)

Indirect effects

- **Disclosure of incriminating documents**
- **Educational function**
- **Stimulate other policymakers to act**
- **Influence changes in industry behavior**

ROLE OF POLITICAL INSTITUTIONS IN CHANGING TOBACCO POLICY

Direct

- **Every policy instrumentality except damages**

Indirect

- **Stimulate negotiations with the industry**

ARGUMENTS FAVORING JUDICIAL POLICYMAKING

Pragmatic

- **Legislative/regulatory failure**
- **Damage awards forcing large price increases**
- **Motivating public support through disclosing documents**
- **Forcing tobacco industry to negotiate**

ARGUMENTS FAVORING JUDICIAL POLICYMAKING (cont.)

Philosophical

- **Courts are inherently policymakers**
- **Blurring of the lines between the political and
judicial processes**

OBJECTIONS TO JUDICIAL POLICYMAKING

Philosophical

- **Separation of powers**
- **Legitimacy of courts as policymakers**
- **Procedural constraints limit ability of judges to evaluate policy alternatives**

OBJECTIONS TO JUDICIAL POLICYMAKING (cont.)

Pragmatic

- **Novel legal theories being tested**
- **Courts might not get it “right”**
- **Diverts resources from other policy efforts**
- **Reliance on litigation as a solution**

ROLE OF THE COURTS IN PUBLIC HEALTH POLICY

Institutional choice

- **Preconditions to litigation**
 - **Building the moral and political case**
 - **Not necessarily present in other public health battles**
- **Litigation as second-best solution**
 - **Distinct role in more comprehensive strategy**
 - **Concern about over-reliance on litigation**

ROLE OF THE COURTS IN PUBLIC HEALTH POLICY (cont.)

Individual choice and responsibility

- **Balance between industry culpability and individual freedom**
- **Tobacco as extreme case**
- **Applicability to other public health issues**

Applicability to Other Public Health Issues

- **Obesity**
- **Gun control**
- **Gambling addiction**
- **Differences?**
- **Similarities?**

CONCLUSION

- **Complex interactions between political theory and pragmatic policymaking realities.**
- **Blurring of the line between litigation and politics of public health**
 - **Opponents must confront legislative/regulatory failure**
 - **Proponents must recognize possibility that litigation will not change policy.**

QUESTIONS FOR DISCUSSION

(1) Which issues are amendable to litigation?

Tobacco? Alcohol? Guns? Obesity?

(2) What is achievable through litigation that cannot be obtained from other public health approaches?

(3) From your perspective, what are the costs and benefits from pursuing litigation as a policy strategy?