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

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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
• 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
<table>
<thead>
<tr>
<th><strong>FRAMEWORK FOR ANALYSIS</strong></th>
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<tr>
<td><strong>Rosenberg model</strong></td>
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<tr>
<td>• Dynamic view</td>
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<td>• Constrained view</td>
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<tr>
<td><strong>Comparative institutional analysis</strong></td>
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<tr>
<td>• Political processes</td>
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<td>• The market</td>
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<td>• The courts</td>
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<td><strong>Rule-shifting vs. culture-shifting effects</strong></td>
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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
<table>
<thead>
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<th>Role of Litigation in Changing Tobacco Policy (cont.)</th>
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<tr>
<td><strong>Indirect effects</strong></td>
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<tr>
<td>• Disclosure of incriminating documents</td>
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<td>• Educational function</td>
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<td>• Stimulate other policymakers to act</td>
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<td>• Influence changes in industry behavior</td>
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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.
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<th>QUESTIONS FOR DISCUSSION</th>
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<tr>
<td>(1) Which issues are amendable to litigation? Tobacco? Alcohol? Guns? Obesity?</td>
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<td>(2) What is achievable through litigation that cannot be obtained from other public health approaches?</td>
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<td>(3) From your perspective, what are the costs and benefits from pursuing litigation as a policy strategy?</td>
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