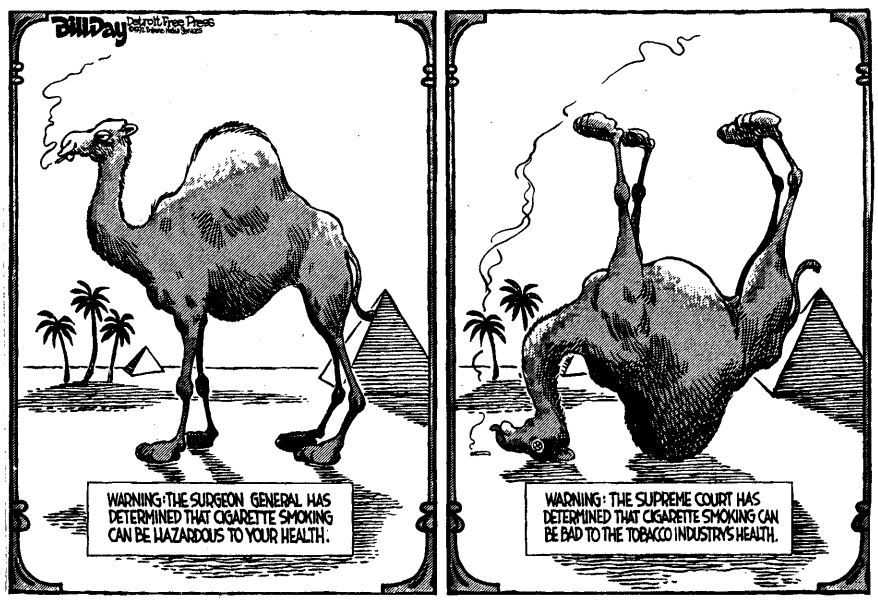
NEWS ANALYSIS

US Supreme Court opens new areas for litigation and regulation

On 24 June 1992 the United States Supreme Court favourably resolved the legal issue that for the past six years has stymied litigation in the United States against tobacco companies. In 1986 a federal appellate court ruled that the decision of Congress in 1965 to require warning labels on cigarette packages had the effect of barring ("pre-empting") many types of claim which might otherwise be made in product liability lawsuits against cigarette manufacturers. The lower court not only barred claims that the warning labels did not adequately apprise consumers of the nature and extent of the dangers of cigarette smoking, but went so far as to exclude claims that the cigarette manufacturers actively misrepresented the scientific evidence in order to sell more cigarettes.

Since 1986 five other federal appellate courts agreed that these claims are pre-empted, while three state appellate courts disagreed. After certifying the first federal decision, *Cipollone v Liggett Group, Inc*, for review in 1991, the Supreme Court heard aguments in the case twice, an unusual procedure which usually indicates that the justices are deeply divided about the outcome. The final decision therefore comes as a great relief, as well as vindication, for United States health and tobacco control groups which had joined in urging the court to let the litigation proceed without hindrance from "pre-emption."

The Supreme Court rules, seven to two, that none of the claims were pre-empted by the original, 1965, Federal Cigarette Labeling and Advertising Act. The same majority agreed that most types of claims against the cigarette companies are not pre-empted, regardless of when they arose. These include claims that (*a*) cigarettes are inherently defective, or inappropriately designed, or that their risks exceed their benefits, or that the manufacturers failed to test their safety, and (*b*) that cigarette manufacturers concealed knowledge they had or actively misrepresented the health effects of smoking.



By Bill Day of the Detroit Free Press. *Reprinted with permission of Tribune Media Services*

Six justices, however, concluded that two types of claims arising after the act was amended in 1969 were pre-empted: those based on the implicit misrepresentation contained in the healthy, energetic lifestyles portrayed in contemporary American cigarette advertising, and those based on the failure to include additional warnings in cigarette advertising and promotion. Despite contrary claims by the tobacco companies, these two remaining pre-empted areas are of little importance to tobacco litigation.

While misleading lifestyle claims are a good reason for legislatures to ban cigarette advertising, they do not play well to United States jurors, who share the layman's scepticism that lifestyle advertising ever moves anyone to do anything. And, more subtly, the type of failure-to-warn claim which the Court pre-empted is simply not the type actually being made. Plaintiff's lawyers will still be free to prove that the cigarette companies failed to warn about all the dangers they knew about or should have discovered through reading the scientific literature or their own research, so long as the lawyers emphasise ways other than cigarette advertising and promotion that the manufacturers could have communicated the warnings. Such non-pre-empted channels include press releases, toll-free telephone hotlines, media appearances by industry spokespersons, and cigarette package inserts.

The *Cipollone* decision has already generated renewed interest in tobacco litigation, not only in the United States but in Australia and Britain (where over 60 potential plaintiffs attended a meeting in a Liverpool hotel in response to an advertisement by British lawyers). The most immediate benefit for the tobacco control movement may, however, be in the unexpected opportunities it opens for regulation by states and municipalities in the United States. The prevailing opinion in the case clearly held that whenever litigation is not pre-empted neither is state or local regulation. That means that states, counties, cities, and towns can now require cigarette manufacturers wishing to do business within their jurisdiction to inform government authorities of the results of their research on the health effects of smoking, and to inform the general public (through press releases, toll-free telephone hotlines, media appearances by

industry spokespersons, and cigarette package inserts) of *all* of the scientifically recognised hazards of cigarette smoking.

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On 6–8 November 1992 the Tobacco Products Liability Project will convene a national conference in Boston, Massachusetts, for public health regulators and plaintiffs' attorneys to discuss how best to take advantage of new opportunities following the Cipollone *decision* (*see p* 230). – ED

Iron Lady, Iron Curtain, iron lung

Transnational tobacco companies are unleashing powerful ammunition in their race to capitalise on new marketing opportunities in central Europe. The latest tactic at Philip Morris is to employ the services of Margaret Thatcher, former Prime Minister of the United Kingdom, as a geopolitical consultant. It is ironic that Thatcher herself launched Europe Against Cancer Year in 1989, while she was still in office, kicking off a $20 million campaign to deter children from smoking with a speech that has been called "the strongest anti-smoking speech ever made by a prime minister."

None the less, the former prime minister has been negotiating with Philip Morris executives to meet with them around the world "when their schedules coincide," for a fee rumoured to be $1 million per year for three years. She would reportedly advise the company on issues such as gaining access to newly opened markets in central and eastern Europe, product distribution in Russia, blocking the proposed European Community tobacco advertising ban, resisting cigarette taxes, and dealing with state run monopolies. Thatcher's staff confirms that an offer has been made but calls the million dollar fee "unutterable rubbish." Philip Morris had not planned to publicise Thatcher's appointment.

Health advocates and policymakers throughout the United Kingdom have expressed their alarm at the situation. Roger Sims, a Conservative Member of Parliament, commented, "I am quite astonished that of all the possibilities open to her she would have taken this one. She must know the facts of the deaths it causes. It is common knowledge that because of reducing consumption in Europe the

Western tobacco companies move into Moscow

tobacco companies are seeking to expand their markets in the Third World. It is quite extraordinary and verging on the irresponsible for a politician of her status even to be associated with this, let alone to be taking money for it."

Meanwhile, other transnational tobacco companies are wasting no time in their efforts to compete in central Europe. R J Reynolds Tobacco International has reached a partnership agreement with As-Petro, the first privately owned tobacco company in Russia. Reynolds bought 52% of the Uritski Tobacco factory in St Petersburg and plans to invest well over $10 million to expand and modernise the plant as it begins manufacturing cigarettes in Russia. This is the first major investment by a foreign company in a private cigarette enterprise in Russia. Reynolds also claims to be the first company to buy a majority share in a Russian company.

The revitalised plant is expected to double the output of the cigarette company, which is already the largest cigarette producer in the former Soviet Union. Annual production is expected to be 22 billion cigarettes. A shortage of 100 billion cigarettes annually was predicted recently by Russian officials, encouraging Reynolds to complete an agreement that had been under consideration for three years. The company will begin by producing local brands, but will introduce Camel cigarettes and other Reynolds' brands soon.

The incursion into Russia is merely the biggest of Reynolds moves in central Europe so far. In June of this year RJR Tobacco International announced that the company is acquiring a Hungarian cigarette factory for undisclosed terms. The Satoraljaujhely factory can produce 5.5 billion cigarettes a year and will manufacture Hungarian brands before an overhaul enables it to produce RJ Reynolds brands. Reynolds also has plans underway to build a factory in Warsaw, Poland.

Philip Morris purchased 30% of the Czechoslovakian cigarette manufacturer Tabak Kutna Hora for $104.4 million. The Czechoslovakian government owns 35% of the company and the public now owns 27%. Philip Morris intends to spend $140 million developing technology for the company. Tabak holds 70% of Czechoslovakia's cigarette market, and was coveted by the tobacco industry for its strategic position in central Europe.

Not to be left behind, British-American Tobacco Industries (BAT) negotiated a series of joint ventures with three cigarette factories in the Ukraine in February of this year. Under the joint ventures, locally grown tobacco would be used for the cigarettes. The joint ventures aim for more development of the Ukraine's tobacco plantations, increased modernisation of tobacco processing machines, and more development of United States style cigarettes in the Ukraine.

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US Environmental Protection Agency Science Advisory Board approves ETS risk assessment

On 22 July 1992 the Science Advisory Board of the United States Environmental Protection Agency (EPA) approved the final draft of the agency's risk assessment of the health effects of environmental tobacco smoke (ETS) (*Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, EPA/600/6-90/006B, May 1992). After some further technical revisions, the report will be submitted to EPA Administrator William Reilly for final approval as agency policy later this year.

This risk assessment, which was released in draft form two years ago, identifies ETS as a group A (known human) carcinogen that causes 3000

lung cancer deaths annually in the United States. Its conclusions clearly identify ETS as a major source of air pollution and toxic chemical exposure.

The risk assessment also presents the most detailed discussion of effects of ETS on children prepared to date, concluding that ETS causes increased respiratory symptoms and middle ear disease, and reduces lung capacity in children. In particular, it estimates that ETS contributes to 150000 to 300000 lower respiratory tract infections (which account for 7500 to 15000 admissions to hospitals) annually among children below 18 months of age. It also contributes to about 20% of all asthma attacks (about 1000000 attacks annually due to ETS) and causes 8000 to 26000 new cases of asthma annually. ETS exposure is also related to the sudden infant death syndrome (SIDS or cot death), but the relative importance of maternal smoking during pregnancy and exposure of infants to ETS could not be quantified.

Though the EPA has no direct regulatory authority over indoor air, this risk assessment will have major impact in stimulating local legislation and voluntary action to mandate smoke-free environments in workplaces, public places, restaurants, and, particularly, places that serve children, such as schools and child care centres. The findings will also impact litigation by non-smokers who are claiming damages from ETS exposure, as well as child custody cases in which one parent is a smoker and the other a non-smoker.

Aware of the tremendous implications of the EPA's entry into the field of passive smoking, the tobacco industry has been acting aggressively to delay or derail the agency's efforts in research on ETS. The tobacco industry (or its consultants) submitted over 50 "public comments" criticising the draft risk assessment, and organised several press conferences and other media campaigns designed to discredit the EPA. Given the tobacco industry's low public credibility, these activities simply served to draw public attention to the report and increase public interest and awareness of the dangers of ETS.

The tobacco industry also mounted an unsuccessful campaign to oust Dr David Burns of the University of California-San Diego, a well-known authority on the health effects of ETS who served as senior scientific editor for the 1986 Surgeon General's report, *The Health Effects of Involutionary Smoking*, from the Science Advisory Board on the grounds that he was "biased." The tobacco industry, however, saw no conflict of interest in the fact that another member of the board, James E Woods of Virginia Polytechnic Institute, had received a $1.2 million grant from Philip Morris to study the indoor ventilation system Philip Morris is promoting as the cure for indoor pollution due to ETS. Morton Lippman of the New York University Medical Center also serves as chair of the tobacco industry's Center for Indoor Air Research (an organisation modelled on the old Council for Tobacco Research), which funds research on indoor air pollution issues.

The tobacco industry had also mounted an extensive programme of political pressure, primarily through the offices of Congressman Thomas Bliley, who represents the district (Richmond, Virginia) containing Philip Morris' largest domestic cigarette manufacturing facility. Bliley's campaign included letters and meetings with high level officials of the EPA, pressure through congressional hearings, and "star chamber" proceedings in which agency staff were interrogated by Bliley's staff. Press reports also indicate that Vice President Dan Quayle's Council on Competitiveness was working to head off all government action related to indoor air quality.

In the end the industry pressure probably did slow down release of the final report by diverting EPA resources in to answering the stream of charges and, perhaps, reduced the resources that the EPA devoted to this work. In the end, however, the industry's pressure led to a much stronger scientific document. By considering every possible criticism – however weak – the EPA's scientific staff was able to produce a fine piece of scientific work that provides a seamless defence of its conclusions. The EPA risk assessment will serve as a major resource for tobacco control professionals at all levels worldwide.

The appropriate next step would be for the EPA to extend its work to a risk assessment on ETS and heart disease, which accounts for 10 times as many deaths as lung cancer. Many authorities, including the American Heart Association, have called on the agency to take this step.

STANTON A GLANTZ
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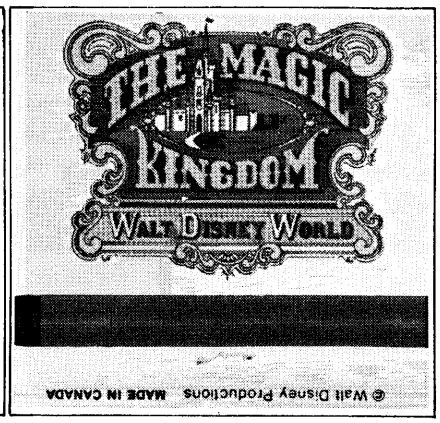
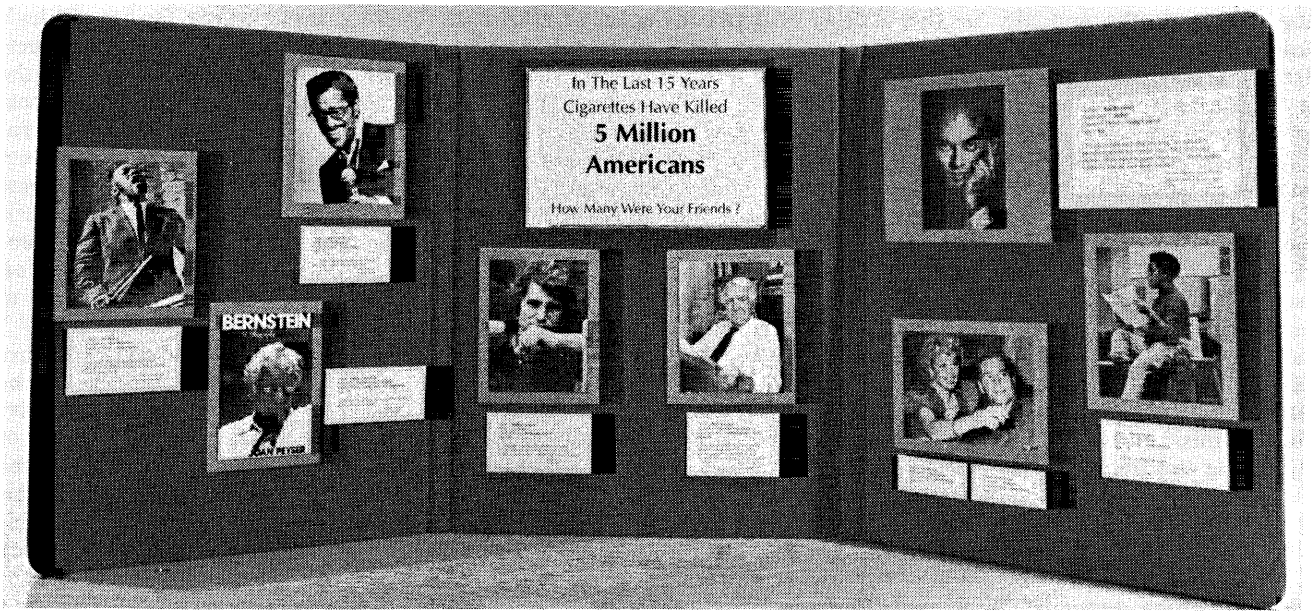
The draft risk assessment, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* (EPA/600/6-90/0068), is available from the Environmental Protection Agency, Indoor Air Division, 401 M Street SW, Washington, DC 20460, USA.

Hall of Shame

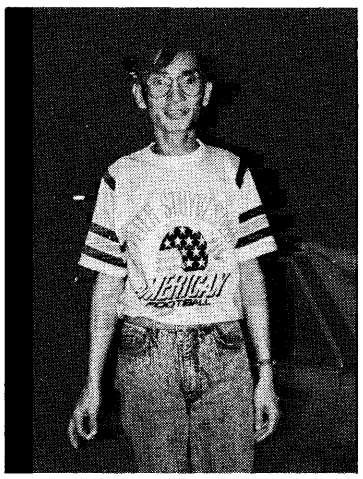
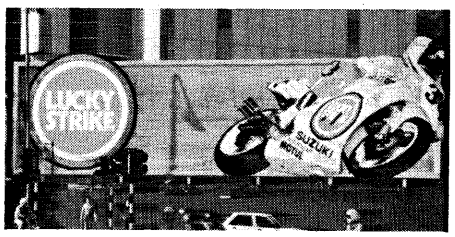
In a corridor of Roswell Park Cancer Institute in Buffalo, New York, there is an exhibit known as the Tobacco Hall of Shame, consisting of black bordered photographs of US cinema and television stars who have died from smoking-related diseases. More's the pity that this sobering display is not located where it could have a major impact, such as at Disneyworld or Universal Studios in Florida. At these amusement park meccas for millions of children and parents smoking is hardly discouraged in the endless queues. Indeed, the first sign one sees on Disneyworld's Main Street is for a tobacco shop (see matchbook covers below). Incidentally, Walt Disney died of lung cancer. – AB





Kuala Lumpur 1991

Signs at Kuala Lumpur's international airport warn foreigners of the death penalty for bringing in drugs; throughout the airport billboard advertisements for Rothmans, Marlboro, and other cigarette brands also beckon new arrivals. Such hypocrisy is readily appreciated in Malaysia. Although tobacco advertising was banned on television in the late 1980s in this devoutly religious country, the tobacco companies RJ Reynolds, British-American Tobacco (BAT), Rothmans, and Philip Morris – with a wink from the government – continue to create television advertisements for cigarette brand named clothing, sports events, and a host of other gimmicks. In just five days in Kuala Lumpur last September Dr John Slade and I observed a Salem Power Station tape and record shop; Salem rock concerts; television advertisements for the Benson and Hedges Golden Gallery (for jewellery); Camel adventure clothing stores and displays of the Camel clothing collection in major department stores; Salem country music night at the Stargazer discotheque; Dunhill news stands and lottery agents; a Peter Stuyvesant bowling alley; billboard and television advertisements for Peter Stuyvesant Travel; a Kent Holidays shopping centre kiosk; a Lucky Strike darts tournament; Lucky Strike/Malaysian motorcycle grand prix billboard and television advertisements in Malay; the Dunhill soccer team; children and teenagers in Dunhill, Salem, Kent, and Peter Stuyvesant t-shirts; street vendors selling boxer shorts with Marlboro, Camel, Salem, and other cigarette logos; television, newspaper, and billboard advertisements for the Marlboro World of Sports; television, newspaper, and billboard advertisements for Rothmans motorcycle racing; a television advertisement for the Benson and Hedges Golden Moments in Golf show; street giveaways and "tastings" of Marlboro; (counterfeit) Camel Trophy watches sold by street vendors everywhere; and television and newspaper advertisements for Salem grand slam tennis, which was really the non-tobacco-sponsored US Open broadcast by satellite.

We did not observe a single anti-smoking advertisement in the mass media during the entire five days.

Final note: In late summer 1992 a Malaysian ministerial committee claimed that all forms of cigarette advertising in Malaysia would be banned by the end of the year. Also, Marina Emmanuel of the International Organization of Consumers Unions (based in Penang, Malaysia) reports that anti-smoking advertisements are now being aired on Malaysian television, courtesy of the Ministry of Health. – AB