

# STRATEGIC LITIGATION

## Using Private Law to Achieve Public Goals

Summer 2010

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### Required Text:

Packet at NU Bookstore

### Course Requirements:

1) Class participation.

2) Final Assignment: Describe how you would apply what you have learned this quarter to address a specific problem through private litigation. Specifically describe the social problem being addressed, who would be sued, what defenses may be used, and what procedural obstacles either side may encounter. How would the litigation be financed? What effect would the method of financing, identity of plaintiff or counsel, choice of legal theories and forum, etc. have on the ability of this litigation to achieve its social goals? Explain what you think can be achieved by using litigation strategies. **Please discuss your choice of topic with me before June 25, 2010.** Please limit your analysis to no more than 20 pages. The papers are due in student services by noon of the last day of finals.

3) Present PowerPoint based on your paper during the final classes.

## I. Introduction

### June 1 - Why Private Litigation?

#### Page

- 1 1) Adam Smith, excerpt from *An Inquiry into the Nature and Causes of the Wealth of Nations*, and Archimedes, as quoted in *Book of Histories (Chaliades)*, translated by Francis R. Walton.
- 3 2) Deborah R. Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*. 26. Rev. Litig. 883 (2007).

### **June 3 - Could and Should Private Litigation be Used to Achieve Public Goals**

#### Page

- 16 1) Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality*, pp.132-135.
- 21 2) 1989 Surgeon General's Report, *Reducing the Health Consequences of Smoking*, pp. 20-22.
- 25 3) Richard A. Daynard, *Tobacco Liability Litigation as a Cancer Control Strategy*, 80 JNCI 9 (1988).
- 29 4) W.E. Parmet and R.A. Daynard, *The New Public Health Litigation*, Annual Review of Public Health, 2000.

### **June 8 - Preview of Strict Liability/Mass Torts**

#### Page

- 45 1) Steven P. Croley and Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 Mich. L. Rev. 683 (1993).
- 59 2) *Borel v. Fibreboard Paper Products*, 493 F.2d 1076 (5th Cir. 1973).
- 77 3) Deborah R. Hensler, et al., *Asbestos in the Courts: The Challenge of Mass Toxic Torts*, pp. 110-124 (Rand: The Institute for Civil Justice 1985).

## **II. The Plaintiff's Case**

### **June 10 - Epidemiology in Establishing Causation**

#### Page

- 93 1) 1964 Surgeon General's Report
- 106 2) Kenneth J. Rothman and Sander Greenland, *Causation and Causal Inference in Epidemiology*, American Journal of Public Health Supplement 1, 2005.
- 113 3) Bert Black and David E. Lilienfeld, *Epidemiologic Proof in Toxic Tort Litigation*, 52 Fordham L. Rev. 732 (1984).
- 129 4) Richard S. Cornfeld and Michael B. Minton, *How to Defend Against an Adverse Epidemiological Study*, 3 TXLR (BNA) 1092 (Feb. 8, 1989).

### **June 15 - Scientific Evidence**

#### Page

- 135 1) *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).
- 145 2) *Daubert v. Merrell Dow Pharmaceuticals*, 43 F.3d 1311 (9th Cir. 1995).
- 155 3) *General Electric v. Joiner*, 522 U.S. 136 (1997).
- 157 4) *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
- 159 5) *Weisgram v. Marley*, 528 U.S. 440 (2000).
- 161 6) Joe S. Cecil, *Ten Years of Judicial Gatekeeping Under Daubert*, American Journal of Public Health Supplement 1, 2005.
- 168 7) Lissy C. Friedman, Richard A. Daynard, and Christopher N. Banthin, *Learning from the Tobacco Industry about Science and Regulation*, American Journal of

- Public Health Supplement 1, 2005.
- 173 8) Neil Vidmar, *Expert Evidence, the Adversary System, and the Jury*, American Journal of Public Health Supplement 1, 2005.

#### **June 17 – Climate Change (Matt Pawa, Guest Speaker)**

Page

- 179 1) *Courts as Battlefields in Climate Fights*, New York Times (2010)
- 183 2) *Connecticut v. American Electric Power Co.*, 582 F.3d 309 (2d Cir. 2009)
- 241 3) *Native Village of Kivalina v. ExxonMobil* (U.S.D. Ct. N.D. CA 2009)

#### **June 22 - Consumer Protection**

Page

- 253 1) Mass. Gen. Laws Ann. ch. 93A, §§2, 9 (2009).
- 257 2) *Charles of the Ritz Distributors Corporation v. Federal Trade Commission*.  
143 F.2d 676 (U.S. App. 1944)
- 269 3) *In re First Alliance Mortgage Co.*, 280 B.R. 246 (C.D. Cal. 2002).
- 271 4) *In re First Alliance Mortgage Co.*, 471 F.3d 977 (9th Cir. 2006).
- 275 5) Complaint, *Newell v. Polar Beverages, Inc.*
- 285 6) Kansas Opinion, *Newell v. Polar Beverages, Inc.*
- 287 7) Settlement Agreement, *Newell v. Polar Beverages, Inc.*
- 293 8) Baby Einstein saga

#### **June 24 - Obesity**

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- 311 1) Richard A. Daynard, *Obesity Litigation: Who's to Blame?*
- 313 2) Jess Alderman, Jason A. Smith, Ellen J. Fried, and Richard A. Daynard,  
*Application of Law to the Childhood Obesity Epidemic*, 35 J.L. Med. & Ethics  
90 (2007).
- 326 3) *Pelman v. McDonald's*, 237 F. Supp. 2d 512 (S.D.N.Y. 2003).
- 347 4) *Pelman v. McDonald's*, 396 F.3d. 508 (2d Cir. 2005).

#### **June 29 - Liability Standard**

##### **A. Strict Liability**

Page

- 351 Restatement of Torts Third: Products Liability - Sections 1 (Liability of Commercial Seller or Distributor for Harm Caused by Defective Products) and 2 (Categories of Product Defect).
- 1) Consumer Expectation**
- 366 *Lamke v. Futorian Co.*, 709 P.2d 684 (Okla. 1985).
- 2) Risk-Benefit**
- 372 a) *Cipollone v. Liggett*, 644 F. Supp. 283 (D.N.J. 1986).
- 378 b) N.J. Stat. Ann. § 2A:58C-3 (2009).

379 c) *Haglund v. Philip Morris*, 446 Mass. 741 (2006).

**B. Duty to Warn**

387 1) Cigarette Warning Labels, 6.1B T.P.L.R. 3.200.

388 2) Canadian Cigarette Warning Labels.

**July 1 - Liability Standard Continued/Plaintiff's Damages**

**C. Misrepresentation, Fraud, Conspiracy**

Page

390 1) *Crocker v. Winthrop*, 514 S.W.2d 429 (Tex. 1974).

394 2) *Cipollone v. Liggett*, 683 F. Supp. 1487 (D.N.J. 1988).

406 3) *Nicolet v. Nutt*, 525 A.2d 146 (Del. 1987).

410 3) *Williams v. Philip Morris*, 127 P.3d 1165 (Or. 2006).

**D. Economic Injury: RICO**

414 1) *Florida Court Approves Civil RICO Action for Marketing, Litigation Abuses by DuPont*, 13 TXLR (BNA) 1016 (January 20, 1999).

417 2) Law synopsis by the Tobacco Control Resource Center, *USA v. Philip Morris*.

**July 6 - Punitive Damages**

Page

430 1) *Williams v. Philip Morris*, 127 P.3d 1165 (Or. 2006).

441 2) *Williams v. Philip Morris*, 549 U.S. 346 (2007).

447 3) *Williams v. Philip Morris*, 176 P.3d 1255 (Or. 2008), questions presented by Philip Morris's petition for certiorari, *Williams v. Philip Morris*, 128 S. Ct. 2904 (2008), *Williams v. Philip Morris*, 2009 U.S. LEXIS 2493.

449 4) Sara D. Guardino and Richard A. Daynard, *Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages*, 67 U. Pitt. L. Rev. 1 (2005).

**July 8 - When to Sue: Fear of Cancer/Medical Monitoring/Statute of Limitations**

Page

473 1) *Waage v. Cutter*, 926 P.2d 1145 (Alaska 1996).

479 2) *Eagle-Picher v. Cox*, 481 So. 2d 517 (Fla. Dist. Ct. App. 1985).

490 3) *Khan v. Shiley*, 217 Cal. App. 3d 848 (1990).

496 4) *Potter v. Firestone*, 863 P.2d 795 (Cal. 1993).

504 5) *Metro-North Commuter RR v. Buckley*, 521 U.S. 424 (1997).

### **III. Defenses**

#### **July 13 - Preemption**

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- 528 1) *Altria v. Good*, 129 S. Ct. 538 (2008).  
546 2) *Riegel v. Medtronic*, 128 S. Ct. 999 (2008).  
561 3) *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).  
591 4) Richard A. Daynard, *How "Implied Express Preemption" Happened*, Annual Rev. Amer. Law (in press)

#### **July 15 - Plaintiff's Fault/Conduct or Knowledge/Assumption of the Risk/Proximate Cause**

Page

- 598 1) Note, *Plaintiff's Conduct as a Defense to Claims Against Cigarette Manufacturers*, 99 Harv. L. R. 809 (1986).  
604 2) *Tompkins v. American Brands*, 219 F.3d 566 (6th Cir. 2000).

##### **A. Worker's Compensation**

- 615 1) *Sarocco v. General Electric*, 879 F. Supp. 156 (D. Mass 1995).

##### **B. Conflicts of Law/Forum Non Conveniens**

- 622 1) *In re Union Carbide*, 634 F. Supp. 842 (S.D.N.Y. 1986).

### **IV. Can Courts Deliver Justice?**

#### **July 20 - Cost of Litigation and Discovery Abuse**

Page

- 630 1) Fed. R. Civ. P. 1, 11, 26 (2009).  
637 2) Sara D. Guardino and Richard A. Daynard, *Punishing Tobacco Industry Misconduct: The Case for Exceeding a Single Digit Ratio Between Punitive and Compensatory Damages*, 67 U. Pitt. L. Rev. 1 (2005). ????  
673 3) Fla. Stat. Ann. § 69.081 (2009).  
674 4) *AC and S v. Askew*, 597 So. 2d 895 (Fla. Dist. Ct. App. 1992).  
677 5) *Haines v. Liggett*, 814 F. Supp. 414 (D.N.J. 1993).  
686 6) Richard A. Daynard, *Lawyer Management of Systems of Evil: The Case of the Tobacco Industry*, 5 Roger Williams U. L. Rev. 117 (1999).

#### **July 22 - Class Actions**

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- 689 1) Fed. R. Civ. P. 23 (2009).  
692 2) *McLaughlin v. Philip Morris*, 522 F.3d 215 (2d Cir. 2008).  
703 3) *Aspinall v. Phillip Morris*, 453 Mass. 431 (2009).  
706 4) *Broin v. Phillip Morris*, 641 So. 2d 888 (Fla. Dist. Ct. App. 1994).

- 710 5) *Engle v. Liggett*, 945 So. 2d 1246 (Fl. 2006).  
 718 6) *Neisen-Stone v. R.J. Reynolds* (Dade Cty 2010)  
 724 7) *Brown v. R.J. Reynolds* (M.D. FL 2008)

### July 27 - Class Actions Continued

#### Page

- 739 1) *Aspinall v. Philip Morris*, 442 Mass. 381 (2004).  
 753 2) *Class Action Fairness Act of 200 (CAFA): Text for the Class Action Defense Lawyer*.  
 765 3) *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).  
 783 4) *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999).

### July 29 – Other Approaches

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#### **A. Multi-District Litigation**

- 803 1) Multi-District Litigation Statute, 28 U.S.C. Ann. § 1407 (2009).  
 805 2) *In re Asbestos Products Liab. Litig.*, 771 F. Supp. 415 (J.P.M.L. 1991).

#### **B. Other Ways of Resolving Mass Torts**

- 813 1) Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U.L. Rev. 659 (1989).  
 836 2) *Findley v. Blinken*, 982 F.2d 721 (2d Cir. 1992).  
 841 3) *United States v. Bestfoods*, 524 U.S. 51 (1998).

### Aug. 3 - Presentation of Papers

Aug. 5 - “ “ “

Aug. 9 - “ “ “

Aug. 12 - “ “ “