

TUNE IN TO THE  
SOUND OF DEMOCRACY

## Justice Talking Radio Transcript

**An Update on Tobacco Legislation—Air Date: 11/13/06**

*Fifty years ago the first lawsuits against big tobacco were filed. While it's been nearly eight years since the landmark settlement between tobacco companies and the states, litigation continues in both federal and state courts about the hazards of smoking. This term the U.S. Supreme Court considers whether courts may impose a large damage award against Philip Morris in order to punish it for hiding the dangers of cigarettes. And state courts are deciding whether the marketing of "light" cigarettes violates state consumer protection laws. On this edition of Justice Talking we take a look at tobacco litigation and consider whether justice has been served by the lengthy legal wrangling over cigarettes.*

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. In our show today we'll look at how big tobacco companies are faring in courts around the country in a time where public smoking is outlawed in many U.S. cities and there's tighter regulation of tobacco. Courts are filled with lawsuits against tobacco companies, including a class-action suit out of New York and another tobacco case about how punitive damages are awarded that is now being considered by the U.S. Supreme Court. And it's been eight years since the Master Settlement Agreement forced the four biggest tobacco manufacturers in the country to pay millions of dollars to individual states. We'll get an update on which states are using the money to fight tobacco related diseases and which states are using it to do other things, like pave roads or put sprinklers on golf courses.

But first, I talked with John Eastman. He's a former radio and TV personality in Tampa Bay, Florida. He smoked Marlboro cigarettes for over 45 years. He was the first person to win an

individual lawsuit against Philip Morris, the world's largest cigarette maker. I asked him what made him think he had a case against the cigarette company.

JOHN EASTMAN: I didn't think I had a case. I thought I had an opportunity, perhaps, to learn something about what was going on in the area of this litigation. I thought I would lose but I would learn and maybe write about it.

MARGOT ADLER: Let's talk about smoking for a minute. When did you start smoking?

JOHN EASTMAN: Oh, when I was a boy. We'd swipe cigarette butts out of ashtrays. I graduated from high school in 1946 and I smoked then.

MARGOT ADLER: And how long did you smoke?

JOHN EASTMAN: Until the day I was hospitalized, in 1999.

MARGOT ADLER: And how many cigarettes did you smoke a day?

JOHN EASTMAN: Four packs.

MARGOT ADLER: Four packs a day?

JOHN EASTMAN: Yeah.

MARGOT ADLER: Wow!

JOHN EASTMAN: Yeah.

MARGOT ADLER: Did you have any idea at the time that smoking was harmful to your health?

JOHN EASTMAN: Oh yes. I knew that there was something not as good about it as other things you could do. But I had no idea that it was hurting me as it did. And if I knew it, I wouldn't allow myself to believe it. I was addicted, really, truly addicted.

MARGOT ADLER: Did you ever try to quit?

JOHN EASTMAN: Yes. You can't win unless you try to quit and can prove it. I was hired by SmokEnders. Do you know who they are?

MARGOT ADLER: Yes, I do. They are an organization that gets people to stop smoking, right?

JOHN EASTMAN: Right. They hired me to stop smoking on the air. And I took their money. And I did three shows smoking and getting rid of them by saying I can't do that. I can't be the hypocrite and take your money and say I'm quitting. I can't quit. So I had to give them the money back.

MARGOT ADLER: Now you're using oxygen 24 hours a day and you're in a wheelchair?

JOHN EASTMAN: Yes.

MARGOT ADLER: Can you walk?

JOHN EASTMAN: Yes, I can walk to and from the bathroom and other places where I have to but it's been three years of not walking so I'm not just a boy running around the house.

MARGOT ADLER: In your case what was the final settlement?

JOHN EASTMAN: \$3,600,000.

MARGOT ADLER: And what did the money allow you to do?

JOHN EASTMAN: Buy a house. Buy a car. Buy individual freedom. Compensate my son, my grandchildren.

MARGOT ADLER: Does it feel like the settlement has begun to make any amends for your health problems, or not?

JOHN EASTMAN: Oh, I'm not angry. I'm not angry at them. You know they had a mandate. Tobacco had a mandate going all the way back to Christopher Columbus. They recognized that it was a product, that people wanted it. Only the tobacco dealers themselves recognized that it was addictive. They knew what they were doing.

MARGOT ADLER: Thank you so much for speaking with us. John Eastman lives in Tampa Bay, Florida. He won a lawsuit against Philip Morris. The Court ruled that the company was partially responsible for his addiction to cigarettes.

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MARGOT ADLER: Howard Acosta was the lawyer who represented John Eastman and helped him win his case in 2003. He practices law in St. Petersburg, Florida and has filed more than 150 cases against tobacco companies. Welcome to Justice Talking, Howard.

HOWARD ACOSTA: Thank you very much.

MARGOT ADLER: We just heard from one of your clients, John Eastman, who sued Philip Morris for health problems that resulted from smoking. Tell us the details of John's case.

HOWARD ACOSTA: Well, John had two very serious diseases. He had an abdominal aortic aneurysm, which the doctor said could burst anytime. It was a 50-50 chance every day. And he also has severe emphysema. After the trial, which we won, he had the money to go to Texas and have his aortic aneurysm fixed. So it was a very good deal for him.

MARGOT ADLER: There have been a lot of victories for the tobacco industry and until quite recently there were very few victories for your side. So what makes a successful case against a tobacco company? And was it different five, or even 10, years ago?

HOWARD ACOSTA: Well, it was different. There were a lot of things that were unknown five or ten years ago. But to be honest with you the big difference in my mind is that when the plaintiff, the injured smoker, is allowed to tell the jury that he accepts some responsibility for his injuries, that that changes the complexion of the case. And the other thing is that we've learned some information about cigarettes that we didn't know before. For example, for about the last 30 years the cigarette industry used tainted tobacco that was 33 times more carcinogenic than it needed to be.

MARGOT ADLER: The Supreme Court of Florida recently threw out a \$145 billion punitive damage verdict against Philip Morris in a class action suit, *Engle vs. Liggett*. Many commentators have said this was a big victory for big tobacco. First of all, was it? And what effect do you think the ruling will have on future tobacco cases?

HOWARD ACOSTA: Well, it wasn't a big victory for them. Or it won't be in the long run because the Supreme Court also said that up to 700,000 Florida smokers could now bring their claims against the cigarette industry and ask for punitive damages in each one of those cases. And that the juries in those cases would be instructed that as a matter of law the cigarette companies were negligent, that their products were defective and unreasonably dangerous, and that they'd conspired to deceive the public. So when that information is told by the judge to the jury, I think that the industry is going to be in big trouble.

MARGOT ADLER: Howard, have you ever smoked?

HOWARD ACOSTA: No. When I was about 12 years old some kids on the playground trapped me in a concrete pipe and put a Camel cigarette inside and told me I had to smoke it before I could get out. And that was enough for me.

MARGOT ADLER: So that made you a confirmed non-smoker for the rest of your life?

HOWARD ACOSTA: That's right.

MARGOT ADLER: And did you think that twenty years ago, or whenever you started, that this would end up being your main issue?

HOWARD ACOSTA: No, I really never dreamed that I'd be doing what I'm doing now. But when a cache of documents was found back in the early 1990s which revealed what the industry had really done and what it knew, and then what it did despite the knowledge it had, I was hooked.

MARGOT ADLER: Howard Acosta is a trial lawyer in St. Petersburg, Florida. Howard, thank you so much for talking with me.

HOWARD ACOSTA: Okay. You are very welcome.

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UNIDENTIFIED MALE: Now, a cigarette that's low in tar and nicotine, high in menthol flavor: new Montclair. Just enough in every puff makes every puff a pleasure. How much is just enough...

MARGOT ADLER: That was a 1950s ad for Montclair cigarettes. To learn about the history of smoking in America, I talked with Allan Brandt. He is a professor of the history of medicine at Harvard Medical School. He is the author of "The Cigarette Century," which will be published by Basic Books in March. Welcome to Justice Talking, Allan.

ALLAN BRANDT: Thanks very much.

MARGOT ADLER: Allan, the title of your book is "The Cigarette Century." Did smoking begin to get popular in the 20th century?

ALLAN BRANDT: Well, one of the really interesting things about cigarettes is that they really are a modern phenomena and for all intents and purposes almost no one smoked cigarettes before the 20th century. Obviously, there were other forms of tobacco use before then.

MARGOT ADLER: When did we first begin to see regulation of cigarettes in the United States?

ALLAN BRANDT: Well, let me go back just a minute because in the 1930's, for example, there would be ads that say "not a cough in a carload." And the way I read ads like that is there were concerns that cigarettes might be harmful to your health and the industry was taking efforts to reassure the American public. People were concerned about coughs. They were concerned about irritation. One of the principle theories of early cancer-causing agents is that they are irritants. Lucky Strike claimed that their cigarettes were toasted in the 1930s and thus free of irritants.

MARGOT ADLER: And that is already building in the 30s and the 20s?

ALLAN BRANDT: Yes, and largely on a clinical level. Advertisements would say "Ask your doctor about a light smoke." That would be an ad for Philip Morris, for example, around 1936, 1937. By the late 1930s, early 1940s, there's a recognized rise in numbers of lung cancer, a disease that was almost unknown as recently as 1900. So there's the beginning of speculation: Are the rising numbers of lung cancers associated with the remarkable rise in cigarette consumption that had preceded it by about 15 to 20 years? So by the middle 1940s, late 1940s, there are a number of investigators, and especially surgeons, who saw lung cancers and other cancers of the chest. There's a rising level of concern and investigation of the hypothesis that smoking is a cause of lung cancer. And then it becomes intensively studied right around 1950 to 1954. In my own judgment there was tremendous data by as early as 1953, 1954 implicating cigarette smoking as a cause of lung cancer and other diseases as well.

MARGOT ADLER: When were the first health warnings placed on cigarettes in America?

ALLAN BRANDT: The first health warnings didn't go on packages till around 1965, 1966.

MARGOT ADLER: Allan Brandt is a professor of the history of medicine at Harvard Medical School. His new book, "The Cigarette Century," will be published in March by Basic Books. Thank you so much for coming on Justice Talking, Allan.

ALLAN BRANDT: Thanks very much.

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MARGOT ADLER: Coming up: What will the Supreme Court say about punitive damages when suing tobacco companies?

UNIDENTIFIED MALE: This would have broad implications beyond tobacco. It would potentially impact the auto industry and any number of manufacturers that widely distribute other products into commerce.

UNIDENTIFIED MALE: And if Philip Morris ends up losing this case before the U.S. Supreme Court, I would say that it would not have much of any impact on the vast majority of businesses in society.

MARGOT ADLER: More on damage awards in big tobacco lawsuits—stay with us.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. On today's show we're taking a look at tobacco litigation in America. Tobacco-related lawsuits haven't slowed down. They continue to be heard in state and federal courts across the country. This term the U.S. Supreme Court will weigh in on a tobacco case involving corporate liability and punitive damages. In *Williams vs. Philip Morris*, the court will decide whether Philip Morris should pay up to \$80 million in damages for the smoking-related death of an Oregon man. In the past the Supreme Court has stated that excessive punitive damages could be unconstitutional, but is tobacco different from other products that have proven faulty? Anti-smoking activists argue that tobacco companies willingly deceived consumers for years and should, therefore, pay up, while others say this case could set a dangerous precedent when it comes to determining punitive damages. Disregarding standards already set by the Supreme Court could open the floodgates for years of product liability lawsuits to come.

Joining me to weigh in on the issue of punitive damages and tobacco are Sherman Joyce and Edward Sweda. Sherman Joyce is the president of the American Tort Reform Association, an organization that works to change the civil justice system. Edward Sweda is the senior attorney for the Tobacco Products Liability Project at Northeastern University, which uses litigation against the tobacco industry as a public health strategy. Welcome to both of you.

SHERMAN JOYCE: Thank you very much.

EDWARD SWEDA: Thank you.

MARGOT ADLER: We're going to be talking a lot today about punitive damages and compensatory damages. Sherman, give us a quick definition of both.

SHERMAN JOYCE: Well, compensatory damages, as the name suggests, are intended--as we all learned in law school, those of us who suffered through it--to make an individual whole. And they can take different forms. Probably the two major areas are, number one--and not to say that one is more important than the other--but number one: economic losses. They can include medical expenses, lost wages, anything that's quantifiable that an individual who has suffered a harm may have to have made up to him or her in the process of litigation. The second component is so-called non-economic damages, and these are meant, as the name suggests, to compensate an individual for a loss. But they are not economically quantifiable. And then finally, the other major category of losses or damages are punitive damages, which are really, at least, and I would just say from our perspective, in some way a different category. Because, unlike the overarching purpose, at least from the perspective of our civil justice system, they are not intended to compensate an individual. They are meant to deter and to punish the most egregious wrongdoing.

MARGOT ADLER: The Supreme Court recently heard a tobacco case, Williams vs. Philip Morris. Edward, you were there at the beginning of this case. Tell us a little about it.

EDWARD SWEDA: Mr. Jessie Williams did die back in 1997 after, I believe, over 40 years of smoking Marlboro cigarettes. He did testify that along the way, over the course of those years, even though he was urged by family members, and doctors, and others, to quit smoking, that he heard and read the statements from tobacco companies denying causation of smoking with various diseases in human beings, insisting that the link was basically statistical, hadn't been proven. And really Mr. Williams sort of clung on to that for many years basically concluding that if smoking were as bad as others were saying that the company would not be in the business. Unfortunately he, of course, was later diagnosed with lung cancer. At that point he realized that the companies had been lying to him and many millions of others. The jury in this case in Oregon was very careful here. And sometimes they are characterized as being run-away or irrational and that would be totally unfair. They, in fact, found him 50 percent responsible for the situation he faced with coming down with lung cancer. So even after factoring that in, the jury came back with a \$79.5 million punitive damage award. And it was because of what they learned that they were so outraged, and justifiably so, about what Philip Morris had done over the course of many decades directly affecting Mr. Williams.

MARGOT ADLER: So if the Supreme Court had ruled in a previous case, in the State Farm case, that the ratio for determining punitive damages should generally be no more than nine times the amount of compensatory damages, and that anything higher could be unconstitutional, what's different about this case that justifies ratios that are so much bigger?

EDWARD SWEDA: What's different for the State Farm and some of the previous cases that the Supreme Court dealt with is those cases involved economic harm to a plaintiff—obviously a serious matter, but nothing nearly as serious as coming down with lung cancer, and then dying a premature death. The other key factor we're looking at is some of the criteria that—was the conduct by the defendant, did it show an indifference to, or reckless disregard of the health and safety of others? That certainly is the case here. The conduct had some financial vulnerability. This was basically one family going against a big corporation. The conduct involved repeated action rather than being an isolated incident. That's certainly the case. And that the harm was the result of intentional malice, trickery, or deceit, as opposed to mere accident. So all of those key criteria Philip Morris should be condemned.

MARGOT ADLER: Well, let's get Sherman in here. Is tobacco a different kind of a case? Is this particularly egregious? Should we look at this in a different way than the general State Farm sort of rules?

SHERMAN JOYCE: Well, we think that the rules that the Supreme Court has laid out, in State Farm and earlier cases, we think they should be broadly applicable. You know if you read—if you're over at the Supreme Court it says "equal justice under law." It doesn't have an asterisk. It doesn't say that we don't think that the court should have different rules or the litigation system should treat individuals, or organizations, or entities differently simply because one may happen to be a manufacturer. This would have broad implications beyond tobacco. It would potentially impact the auto industry, any number of manufacturers that widely distribute their products into commerce.

MARGOT ADLER: You're listening to Justice Talking. We're listening to Sherman Joyce, president of the American Tort Reform Association, and Edward Sweda, from the Tobacco Products Liability Project at Northeastern University. Edward, why do punitive damages need to be so high? Even if the damages in the tobacco case stay within the Supreme Court's ratio of nine to one, the punitive damages would still number well into the millions. Isn't that enough?

EDWARD SWEDA: The two key purposes of punitive damages are to punish wrongdoing and to deter similar wrongdoing in the future, both by the defendant in the particular case and any others who might decide to engage in similar misconduct. So in terms of the overall picture here Philip Morris needs substantial punitive damage awards to be assessed against them to deter them from ongoing misconduct. We just had in August a very lengthy, detailed ruling from federal judge Gladys Kessler in the government's racketeering lawsuit against the tobacco companies that, of course, included Philip Morris, and her conclusion in finding liability against the companies included that these companies are continuing on with racketeering behavior even up to the present, even well beyond 1998, when they entered into the Master Settlement Agreement with the various states' attorneys general in those cases.

MARGOT ADLER: Edward Sweda is the senior attorney for the Tobacco Products Liability Project. Sherman, if you take away the threat of punitive damages, what's to insure corporate accountability? Isn't the idea behind punitive damages that they are a way of keeping large corporations in line?

SHERMAN JOYCE: Well, I think first off you need to look at the fact that there are six states that don't even have punitive damages. There are plenty of scholars who would suggest that particularly if they aren't reigned in, if they take on a randomness, that it seems that Mr. Sweda and others have suggested, I think you can question what the deterrent value really is. Because if you could have situations, if you don't clearly delineate what type of conduct is appropriate for punitive damages and what the outer limit on punishment is, if you can't post a bond on one of these awards, you just have to say what's the real value? Compensatory damages, in and of themselves, if you're a good businessperson, you don't want to be injuring—you don't want to be responsible for injuring somebody or for causing some loss. That, in and of itself, I think has a deterrent effect. But you know again I come back to the underlying point, which is that we're about creating a system that's fair to everybody. This is not about compensating somebody; this is about punishment. And in no other aspect of our civil justice system do we allow--or even our legal system including the criminal justice system—do we allow the level of punishment to be subject to that amount of discretion.

MARGOT ADLER: There's another issue that comes up in the current Supreme Court case *Williams vs. Philip Morris*. When determining the punitive damages the jury in Oregon was asked to consider not only the harm to the plaintiff, Williams, but also the harm that Philip Morris caused to other Oregon smokers. Edward, is it legal to look beyond the plaintiff and include people who are not part of the case? What's the precedent here?

EDWARD SWEDA: Well, what was at issue, and I attended the Supreme Court's oral argument back on October 31st, and just about the entire hour of the argument was devoted to this issue of the jury instructions in the particular case. What the distinction is, which was certainly a fine one, is that the jury could consider the conduct of Philip Morris as to other Oregonians in terms of putting them at risk as a measure and indication of the degree of reprehensibility. However, they would not be permitted to consider the actual harm, for example, or to have—to total up the number of Oregon smokers who die of cancer in a given year and then figure out Philip Morris' percentage of that and then to factor that or use that as some part of the formula to come up with a number. So what the justices discussed was Philip Morris' attempt, through their jury instructions that were not, that was not allowed in by the judge, to try to accomplish that, my sense is that the court recognized that the trial judge's rejection of those Philip Morris jury instructions was not unreasonable because of the particular way it was worded. But it is an area that I think will be the focus of the U.S. Supreme Court's ultimate decision in this case. And there is a possibility they may send it back to the Oregon Supreme Court for clarification. And if Philip Morris ends up losing this case before the U.S. Supreme Court I would say that it would not have much of any impact on the vast majority of businesses in society.

MARGOT ADLER: In the past, the Supreme Court ruled that the FDA does not have the authority to regulate tobacco and tobacco products. Some tobacco companies like Philip Morris want regulation. Others like R. J. Reynolds do not. Do you think that the FDA will eventually regulate cigarettes?

EDWARD SWEDA: Well, this one is quite interesting in that, as you said, Philip Morris, which is the industry leader in terms of number one in the market of cigarettes in this country, would like their version of FDA regulation to be enacted. And that would sort of firm them up for the

foreseeable future as number one in the country. And Reynolds being number two is resistant to that. And there's also been a split within the tobacco-controlled community for a number of years over the advisability of FDA regulation. As opposed to going on with what has been the case in recent years where we've had a lot of strong activity at both the state and local level, especially with great numbers of restrictions on where people can smoke in public, and that, along with increased taxes on cigarettes have helped to a large degree to help drive down smoking consumption rates in the country.

MARGOT ADLER: Edward, what kind of precedent do you think this current Supreme Court case would set for tobacco litigation depending on how it goes?

EDWARD SWEDA: Well, if Philip Morris would win and basically not have to pay anything more than single-digit ratio no matter what in any type of future case, I think unfortunately they would obviously benefit from that--continue on with business as usual and just mark up those costs as the price of doing business. On the other hand if they were to lose this case, I think that would be a message to people who have been harmed by smoking—and plaintiff attorneys who represent people injured by other consumer products—that they may wish to look again and maybe get into the arena of suing tobacco companies on behalf of people who have been harmed by the company's long history of fraud and reprehensible course of the past 50 years, which dates back to the early 1950s when the companies had the chance to do the right thing after getting some initial scientific reports that smoking caused diseases and instead engaged in decades of stonewalling and consumer fraud in order to maximize their profits.

MARGOT ADLER: And Sherman, what kind of precedent do you see that this case might set for punitive damage awards?

SHERMAN JOYCE: I think that the broader framework of an outer limit of the Constitution protecting against excessive punitive damages is certainly going to survive. Mr. Peck, the very fine lawyer representing Mrs. Williams, declined when specifically asked whether he was seeking an over-ruling of State Farm in the earlier cases. If there is a decision against Philip Morris I think you are going to see a couple of things. The first is the prospect, particularly since even though they're walking a very fine line and trying to be very careful, the fact that this court in Oregon and others are being permitted even on a limited basis to consider other conduct involving other individuals, you raise the specter of the potential for excessive punishment in subsequent cases. And I think that repetitive punitive damages for the same act or course of conduct is going to become, I think, both a constitutional and a legislative issue. But I think also if we see the Supreme Court in this case--because this is not just a smoking case, this is a manufacturing case. This is a case involving a widely distributed product that's legal. It's distributed in commerce, widely consumed. If we see the court back down I think you're going to see a greater--we've seen over twenty states enact legislation putting an outer limit, an explicit outer limit, on punitive damages. The fact that there's not been a lot of activity in recent years is due to the fact that the court's decisions have had a very strong disciplinary effect on punitive damages in recent years. But if this court comes down the way that Mr. Sweda is hoping that it will, I think you're going to see a lot of legislative activity.

MARGOT ADLER: Sherman Joyce is the president of the American Tort Reform Association. Edward Sweda is the senior attorney for the Tobacco Products Liability Project. Thank you both for talking with me on Justice Talking.

SHERMAN JOYCE: Thank you.

EDWARD SWEDA: Thank you.

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MARGOT ADLER: Coming up, one anti-smoking advocate says it's all about the money when it comes to keeping people from lighting up.

UNIDENTIFIED MALE: We're up against one of the most sophisticated marketing machines in the history of mass marketing. The Marlboro Man was named the greatest marketing icon of all time. And so if we have any hope or if we're to have any hope of countering these aggressive marketing efforts, we absolutely have to rededicate ourselves to securing these settlement dollars or increased tobacco taxes to fund programs that we know work.

MARGOT ADLER: More on what's being done to prevent smoking around the country—stay with us.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Over the years tobacco companies have faced a huge number of lawsuits. We've talked about a few. But to get a better sense of the range of lawsuits and some of the most important decisions that have been made, I talked with Robert Rabin. He's a law professor at Stanford University and he's the editor of the book "Regulating Tobacco." Welcome to Justice Talking.

ROBERT RABIN: Thank you. It's good to be here.

MARGOT ADLER: Let's talk about some of the landmark court decisions in tobacco litigation. Looking back over the past 30 years, could you tell us about a few of the most important cases?

ROBERT RABIN: Well, the first 40 years of tobacco litigation, beginning in the early 1950s, actually went under the radar screen principally because the two waves of tobacco litigation--one from the mid 50s to the mid 60s and the other from the mid 80s to the early 90s--resulted in absolutely no victories for the plaintiffs. So there certainly weren't any key cases in that period. The plaintiffs were individual litigators who were just overwhelmed by the defense that tobacco company presented and the cost of proceeding. So all of those cases really vanished without a trace. I would say that the first major landmark case was the Chipalone case, which was very hard fought. Eventually it went up to the U.S. Supreme Court. This is in the early 90s, in 1992 or 1993, on the question of whether the Cigarette Labeling Act which Congress had passed some 30 years earlier, whether it preempted failure to warn claims by tobacco victims.

MARGOT ADLER: And this Chipalone case, was this by an individual?

ROBERT RABIN: Yes. That was an individual case. And all of the cases in those first two waves of tobacco litigation up to the early 1990s—the first 40 years—they were all individual cases. The first landmark class action case was filed very shortly after that in the early 90s. Once the evidence of deception and internal memos suppressing information about health risks came to light, the first class action claim was filed in the federal courts, the Costano case. And that case was brought by a consortium of plaintiffs' lawyers, who were much more visible, savvy plaintiffs' lawyers, who had been successful in the asbestos litigation, much more successful than the single practitioners who had brought the earlier cases. Nonetheless, Costano was a landmark, again mostly for the defendants, because after initial success at the trial court level in getting the class certified when the case was appealed up to the Federal Court of Appeals, the Federal Court of Appeals said there were too many individual issues and they decertified the class.

MARGOT ADLER: Now, there was a huge case where states sued big tobacco companies and won. Can you briefly tell us how that came about?

ROBERT RABIN: The state cases were claims for reimbursement of funds that the states expended on behalf of smokers who were injured by tobacco and didn't have the money to pay themselves. So they were in hospitals and had Medicaid reimbursement from the state. The first state to file one was Mississippi, and essentially what they claimed was that the industry was unjustly enriched to the damage of the state by having the state expend these public monies on reimbursement of the health costs of the injured smokers. After Mississippi filed other states began to file and it became a landslide. Virtually all of the states eventually filed. And in 1998 the industry entered into the multi-state settlement agreement in which it agreed to pay \$206 billion to have all of the state cases settled and to buy peace and predictability in that particular channel of litigation.

MARGOT ADLER: Now you talked about how class-action lawsuits did not work in the beginning, but we're beginning to see class-action lawsuits again and there's an upcoming case out of Brooklyn involving light cigarettes. Tell us about that case and what's at stake.

ROBERT RABIN: The light cigarette cases are based on a claim of fraud and deceit that is particularly targeted at the claims by the industry that light cigarettes were healthier, didn't pose the same health risks as other cigarettes. Research has indicated that individual smokers tend to smoke the light cigarettes really right down to the filter and as a consequence they end up being exposed to as much, if not more, carcinogens than the smokers of regular cigarettes.

MARGOT ADLER: Robert, thank you so much for talking with me on Justice Talking.

ROBERT RABIN: You are very welcome.

MARGOT ADLER: Robert Rabin is a law professor at Stanford University. He's the editor of the book "Regulating Tobacco."

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MARGOT ADLER: The state of Vermont is building a case against R.J. Reynolds over a cigarette product that's advertised as a healthier cigarette alternative. Reporter Kerry Seed has the story.

KERRY SEED: The Marlboro Man is dead. Joe Camel was run out of town by the state attorney general. And according to the Federal Trade Commission, U.S. cigarette sales have fallen by more than 21 percent since 1998. In August in Washington, U.S. District Judge Gladys Kessler issued a 1,653-page opinion ordering cigarette makers to stop describing their products as low-tar, light, ultra-light, or mild, because she ruled those names imply that Marlboro Lights are somehow better for you than Marlboro Reds. Tobacco makers are appealing the ruling. At the same time R.J. Reynolds, Philip Morris, and others are spending big money to develop a new kind of cigarette, what they call "PREP" cigarettes or potentially reduced exposure products. Mike Burn covers the tobacco beat for Brandweek magazine, a weekly journal of marketing.

MIKE BURN: These are basically cigarettes that maybe have less toxins, less harmful substances in them than regular cigarettes.

KERRY SEED: Vermont's assistant attorney general, Julie Brill, specializes in consumer protection in tobacco matters.

JULIE BRILL: I do think that tobacco companies are working on this because they recognize that the vast majority of Americans, including smokers, would prefer to not have products consumed that when used as intended will kill you.

KERRY SEED: Vermont sued R.J. Reynolds in 2005, seeking an injunction to stop the company from advertising its PREP cigarette, Eclipse, as a safer alternative to regular cigarettes, and it's seeking penalties under Vermont's consumer fraud act. Vermont charges that R.J. Reynolds made unsubstantiated health claims about Eclipse. The company posted a website saying that Eclipse has 40 percent less tar and 60 percent less nicotine than other brands, as well as 15 percent more carbon monoxide. Print ads for Eclipse cigarettes went a step further, saying Eclipse is "a cigarette that may present less risk of cancer, chronic bronchitis, and possibly emphysema." Vermont assistant attorney general Julie Brill disputes those claims.

JULIE BRILL: R.J.R. has not studied any regular smokers on a long-term basis. The studies are very short-term studies of smokers on the order of four weeks or so. All they show is a reduction in the level of inflammation when a very heavy smoker switches on a short-term basis to Eclipse.

KERRY SEED: The State of Vermont is working with a coalition of attorneys from six states and the District of Columbia to sue R.J. Reynolds over these claims under Vermont consumer protection law. The trial is still probably a year away. And the state and R.J. Reynolds are in the discovery phase, gathering evidence in preparation for their day in court. Mike Burn of Brandweek says the stakes in this case are high.

MIKE BURN: J.P. Morgan had a report which estimates that PREPs could be a one billion dollar market for tobacco manufacturers by 2009. It could balloon up to \$20 billion by 2015. Right

now, cigarette sales is a \$36 billion category, so that's a big opportunity for tobacco manufacturers.

KERRY SEED: So far, though, PREP cigarettes haven't been big sellers. R.J. Reynolds' Eclipse cigarette has been available in some markets since the mid 90s, but I searched for it all over Portland, Maine, where I live, with no luck. [ringing telephone]

UNIDENTIFIED MALE: Good morning. May I help you?

KERRY SEED: Hi, I'm calling to see if you have a brand of cigarettes called Eclipse.

UNIDENTIFIED MALE: No, we don't.

UNIDENTIFIED MALE: Do I have what?

KERRY SEED: Do you sell Eclipse cigarettes?

UNIDENTIFIED MALE: No.

KERRY SEED: Hi. Do you sell Eclipse cigarettes?

UNIDENTIFIED MALE: No.

KERRY SEED: Do you know where I might be able to find those?

UNIDENTIFIED MALE: No, sorry.

KERRY SEED: Have you heard of them?

UNIDENTIFIED MALE: Yeah.

KERRY SEED: Finally, I called R.J. Reynolds. Company spokesman Mark Smith didn't want to talk on the record. But he did send me a couple of packs so that I could see how Eclipse cigarettes work. The box says "the future of smoking," and when you open it the first thing you see is a card with instructions on enjoying Eclipse. Yes, this is a cigarette that requires instructions, because while it's a white stick that looks like most of their cigarettes, the similarities end there.

UNIDENTIFIED MALE: Instructions on enjoying Eclipse: Eclipse is unique because it primarily heats rather than burns tobacco.

KERRY SEED: You heard that right. The only part of the cigarette that burns is a star-shaped coal in one end of the cigarette. Once you light that, heat is drawn over a metallic insulated pocket of tobacco and the tobacco releases vapors into your mouth and lungs. Tom Flynn is a 38-year-old smoker who lives in Portland, Maine, and he was willing to try an Eclipse for this story.

TOM FLYNN: Let's give this a whirl. [lighter click] Hmm, it's definitely different. It's nothing like a normal cigarette. There's less flavor. You feel more like you're just puffing air and then there's a hint of the tobacco essence, I guess.

KERRY SEED: When he exhales it smells more like wet paper than smoke. Based on Eclipse cigarette's under-whelming sales figures and on this smoker's trial of Eclipse, the future of smoking in the U.S. may face even bigger trouble outside the courts.

KERRY SEED: If this is the future of smoking, what would you say about the future of smoking?

TOM FLYNN: I'm not impressed at all. I think, you know, ideally the future of smoking is that there will be no smoking.

KERRY SEED: Perhaps, but with billions of dollars at stake, the tobacco companies may have other plans. For Justice Talking, this is Kerry Seed.

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UNIDENTIFIED FEMALE: Tobacco companies make a product that kills about 440,000 Americans a year. That's more than illegal narcotics, AIDS, suicide, gun violence, fires, automobile accidents, hurricanes, earthquakes, knife fights, judo chops, ax murderers, chainsaw murderers or any other kind of murder, shark attacks, bear attacks, and Bigfoot. So just to recap, tobacco companies are allowed to make and sell a product that kills more Americans each year than all those things combined.

MARGOT ADLER: That was an ad from the Legacy Foundation, an anti-smoking group funded with money from the 1998 Master Settlement Agreement, a landmark decision against American tobacco companies. In the settlement, the four largest tobacco companies in the country agreed to pay \$206 billion to individual states as compensation for their smoking-related medical costs. To get a sense of how that money is being spent I spoke with Daniel McGoldrick. He's the vice president of research for the Campaign for Tobacco-Free Kids. Welcome to Justice Talking.

DANIEL MCGOLDRICK: Thanks. It's great to be here.

MARGOT ADLER: Can you tell us how the Master Settlement Agreement came about?

DANIEL MCGOLDRICK: The agreement was the result of lawsuits by all of the states that attempted to recover the medical costs that the states had spent treating tobacco-related diseases. We know today tobacco causes about \$97 billion in healthcare costs, many of those paid for with public dollars. So this was an effort for the most part by those states to recover those damages from the tobacco companies whose fraudulent behavior had caused those damages in the first place. So that's what led to the lawsuit.

MARGOT ADLER: Now some states are using the settlement money for things, I gather, that are not really related to health. So give us some of the more egregious examples.

DANIEL MCGOLDRICK: Well, a lot of the states have securitized their payments, or several of them have.

MARGOT ADLER: What does that mean?

DANIEL MCGOLDRICK: Essentially they have sold their future payments for up-front lump-sums that are worth much less than they would have gotten in the long run in order to solve state budget problems. And so unfortunately many of these dollars have gone simply to balancing state budgets, when in fact it's tobacco use that's causing a lot of those budget problems in the first place because of the healthcare dollars spent treating tobacco-related disease. Some of the money is going into other health programs. There are egregious uses. We've heard those stories of sidewalks in L.A., golf course sprinklers in upstate New York. There was a proposal to fund a morgue in North Dakota, which was sadly ironic in terms of the use of these dollars. Some of the money goes for economic development in tobacco-growing regions. And no one thinks that we shouldn't help the tobacco growers transition as hopefully fewer and fewer people use tobacco, but in some states there's five times as much money going for that as there is for tobacco prevention.

MARGOT ADLER: Now your organization, Campaign for Tobacco-Free Kids, publishes a yearly report tracking how states use the money from the tobacco settlement. Which states have been particularly good using the money for its intended purpose?

DANIEL MCGOLDRICK: Unfortunately, it's a very small number of them. There are three states currently, Margot, that are funding at even the minimum level recommended by the Centers for Disease Control and Prevention. Those states are Colorado, Delaware, and Maine. And in Colorado, it took a voter initiative. The voters had to pass a tobacco tax to fund the tobacco prevention program because their settlement dollars had been squandered. Ironically, Mississippi, which is typically not ranked at the top of most lists when it comes to help, was one of the leaders in this country in funding tobacco prevention with its settlement dollars. They were one of those states where a court order as part of the settlement actually mandated that they spend at the level recommended by the CDC.

MARGOT ADLER: The money from the Master Settlement was supposed to fund anti-smoking measures. How does the amount that's being used stack up against what tobacco companies spend on their advertising or marketing campaigns?

DANIEL MCGOLDRICK: Well, that's a great question. The latest data from the Federal Trade Commission indicates that the tobacco companies spend over \$15 billion a year on marketing and promoting their products. That dwarfs what we're spending by a ratio of about 30 to one. So, yeah, we're up against one of the most sophisticated marketing machines in the history of mass marketing. You know the Marlboro Man was named the greatest marketing icon of all time. And so if we have any hope or if we're to have any hope of countering these aggressive marketing efforts we absolutely have to rededicate ourselves to securing these settlement dollars

or increased tobacco taxes to fund programs that we know work. The science tells us they work. The research tells us they work. If we follow the guidelines from the CDC, we can counter that \$15 billion in spending by the tobacco companies.

MARGOT ADLER: Thank you so much for talking with us.

DANIEL MCGOLDRICK: I appreciate the opportunity.

MARGOT ADLER: Daniel McGoldrick is the vice president of research for the Campaign for Tobacco-Free Kids.

Let us know what you have to say about tobacco litigation and smoking. Give us your thoughts on our website, [justicetalking.org](http://justicetalking.org). Sign up for our e-newsletter there and check out our podcasts of previous shows. Thanks for joining me. I hope you'll tune in next week. I'm Margot Adler.

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