

LITIGATION 101:

HOW THE COURT SYSTEM CAN IMPACT NEW YORK STATE COMMERCIAL TOBACCO CONTROL POLICY



PUBLIC HEALTH
LAW CENTER
at Mitchell Hamline School of Law

TODAY'S PRESENTERS

Professor Kevin Schroth, JD









Tom Pryor, Staff Attorney



THE PUBLIC HEALTH LAW CENTER



LEGAL TECHNICAL ASSISTANCE

-  Legal Research
-  Policy Development, Implementation, Defense
-  Publications
-  Trainings
-  Direct Representation
-  Lobby

EQUALITY:

Everyone gets the same – regardless if it's needed or right for them.



EQUITY:

Everyone gets what they need – understanding the barriers, circumstances, and conditions.



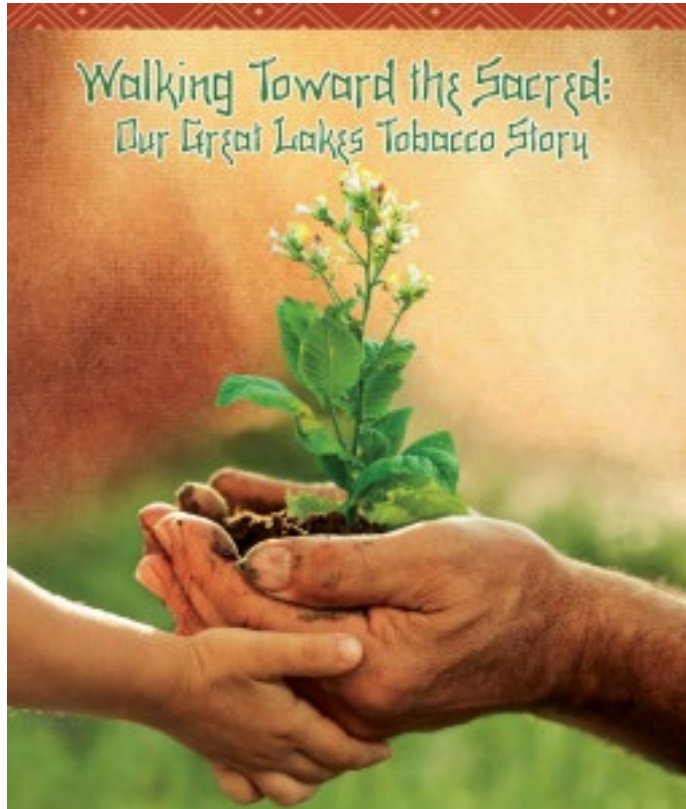
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based on work for First Nations Health Authority at Gathering Wisdom VI Drawing
CHANGE

Image credit: Sam Bradd <https://drawingchange.com/gathering-wisdom-visuals-for-a-healthy-future/>

COMMERCIAL TOBACCO IS NOT TRADITIONAL TOBACCO



[Available at this link](#)



Nicotiana rustica, Solanaceae, Mapacho, flower. Botanical Garden KIT, Karlsruhe, Germany. Wikimedia Commons.

LITIGATION 101

TODAY'S WEBINAR AGENDA

- Brief Overview of Government Branches
- The Court Systems and How They Work
- The Life Cycle of a Lawsuit
- How Litigation Can Impact Commercial Tobacco Control Policy
- Pivotal New York State Cases
- Q&A

WHO MAKES POLICY?

- Legislative Branch
- Executive Branch



WHO MAKES POLICY?

- Legislative Branch
 - Congress
 - State legislatures
 - Tribal councils
 - County boards
 - City councils
- Executive Branch



WHO MAKES POLICY?

- Legislative Branch
- Executive Branch
 - President
 - Governor
 - Tribal agencies
 - Mayor
 - State and federal agencies
 - Local health departments



WHO MAKES POLICY?

- Legislative Branch
- Executive Branch

...and the Courts



WHAT CAN COURTS DO?

- Force a party to do (or not to do) a certain thing
- Force a party to pay money
- Applies to private parties *and* all levels of the government



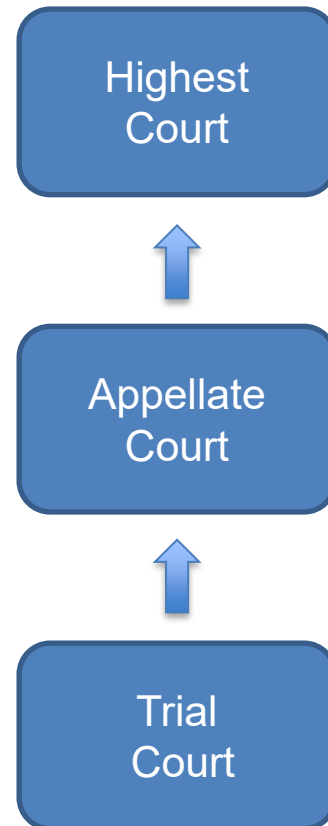
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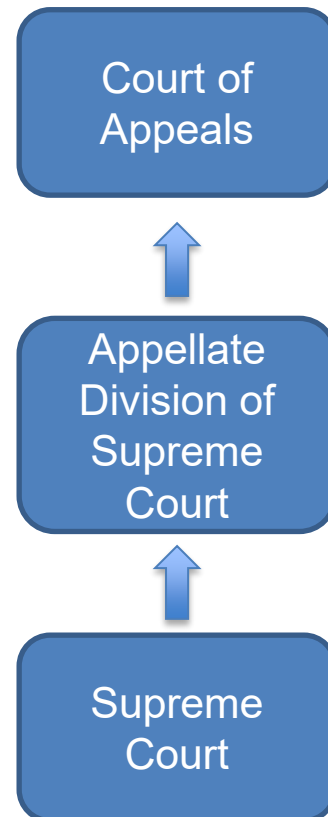


Cities, counties, Tribes, and states can pass policies, but courts have a say, too.

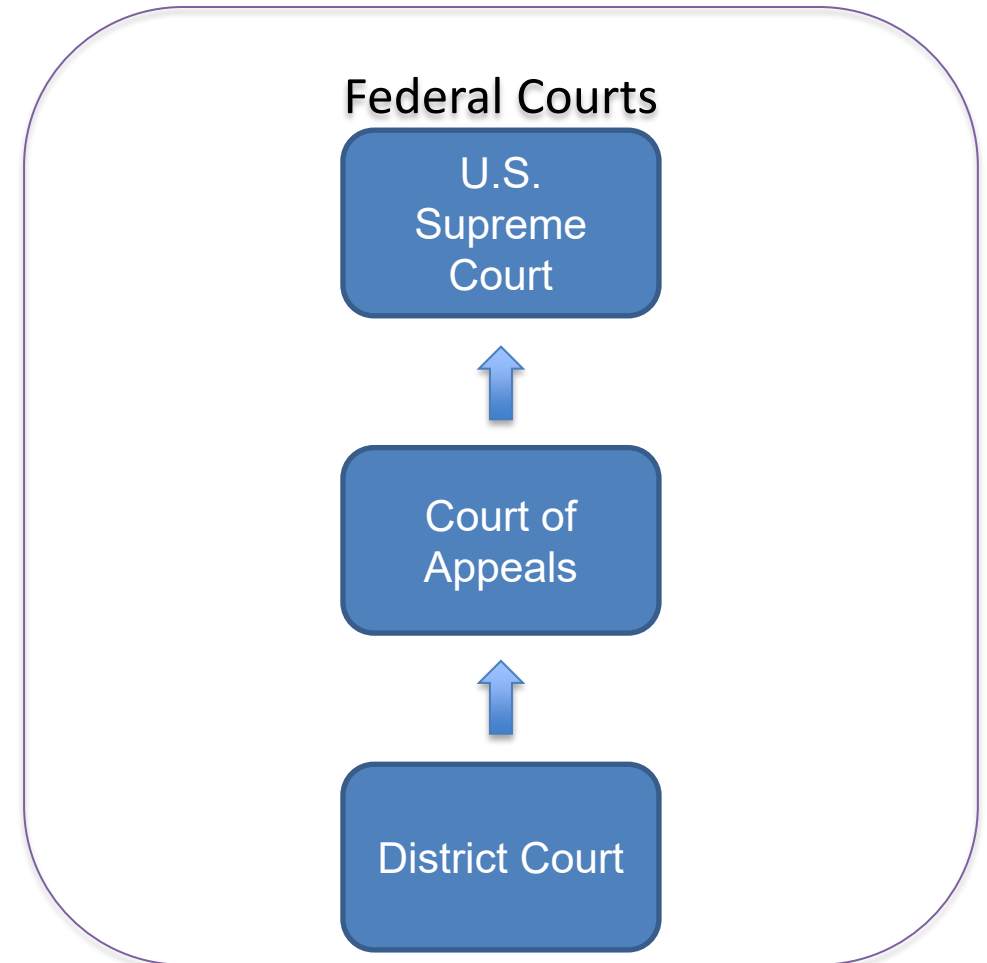
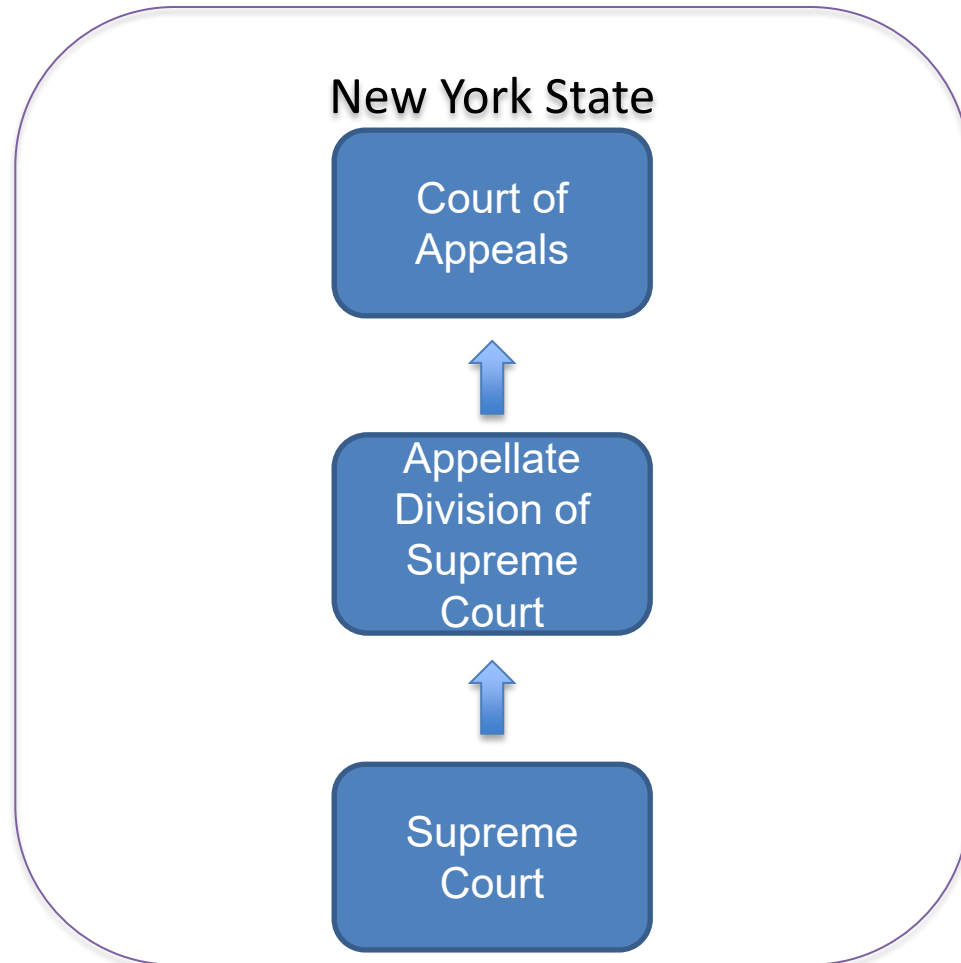
THE LIFE OF A CASE



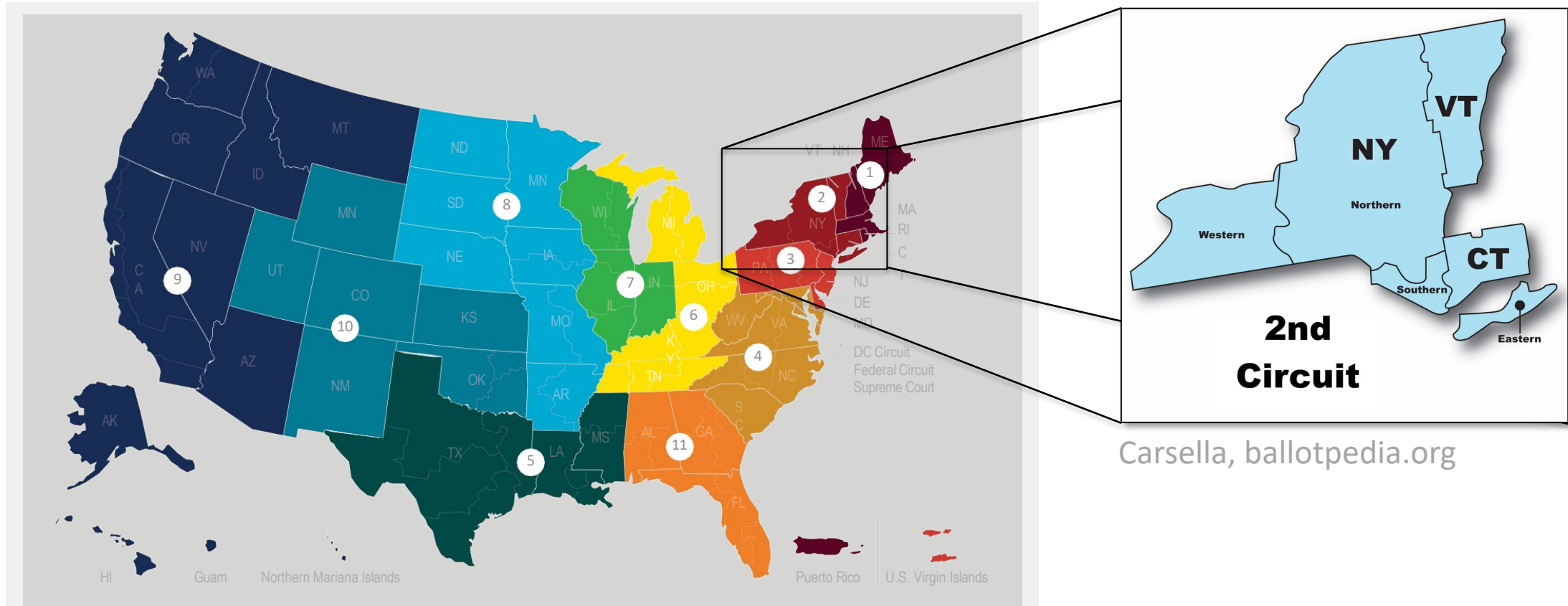
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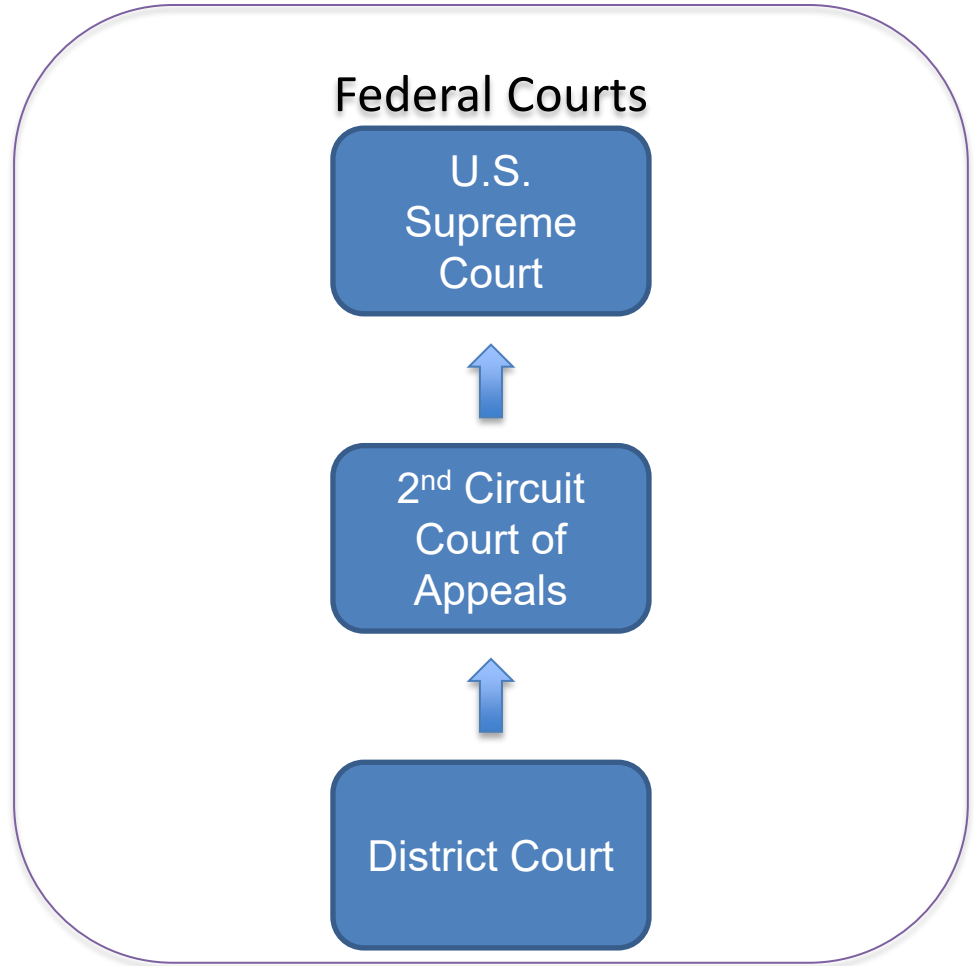
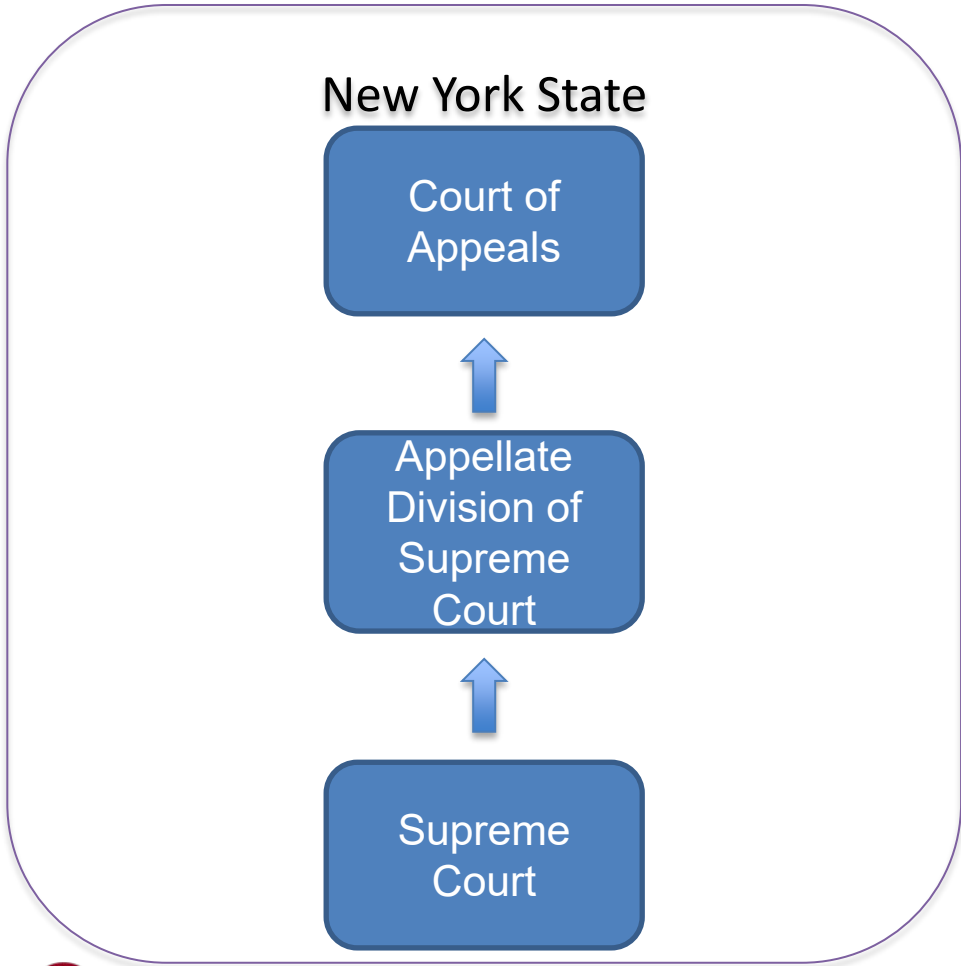


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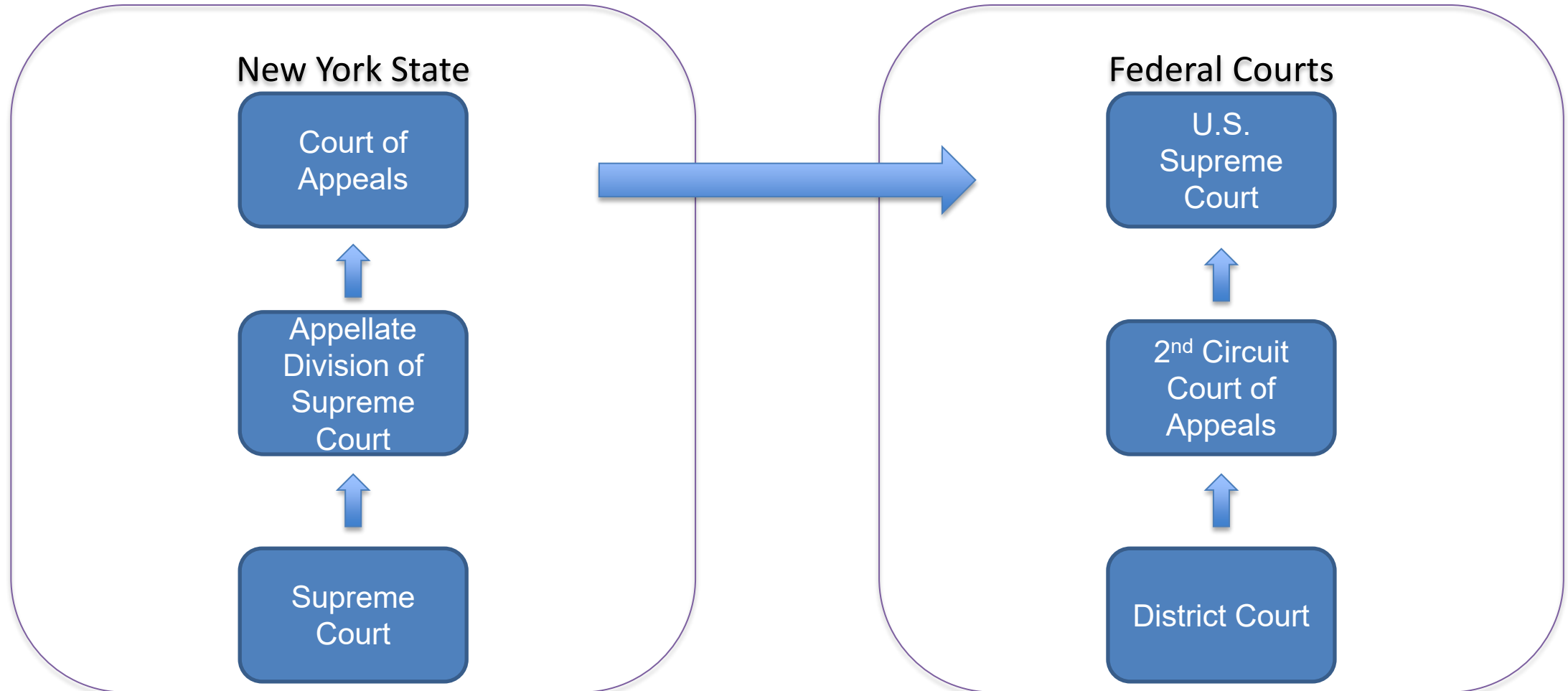


Carsella, ballotpedia.org

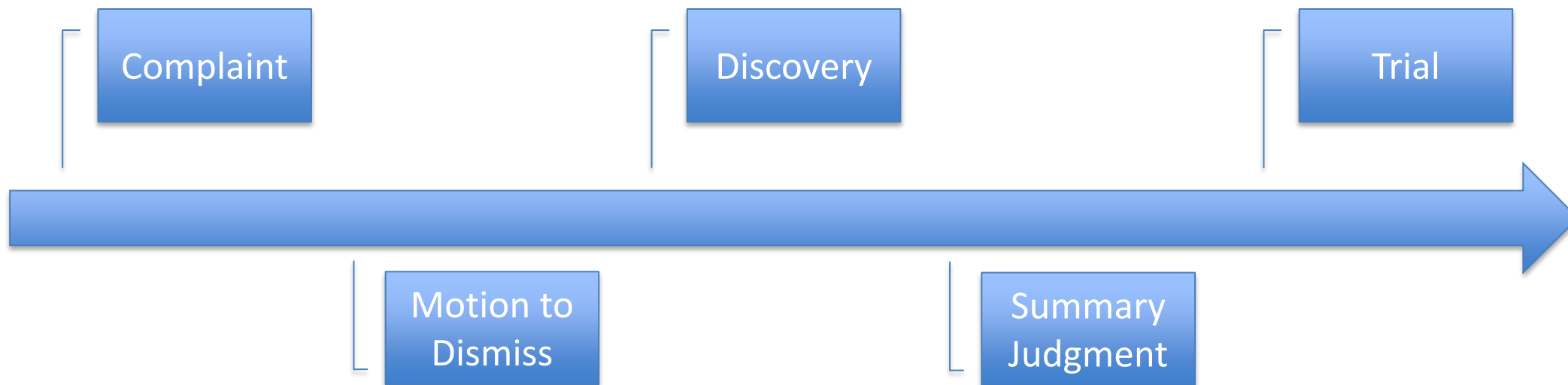
THE LIFE OF A CASE



THE LIFE OF A CASE



DISTRICT COURT



THE LIFE OF A CASE: DISTRICT COURT

- Complaint
 - Short statement of facts
 - Describes claims
 - Requests relief
- Motion to Dismiss
- Discovery
- Summary Judgment
- Trial



THE LIFE OF A CASE: DISTRICT COURT

- Complaint
- Motion to Dismiss
 - Asking court to dismiss because claims are deficient
- Discovery
- Summary Judgment
- Trial



THE LIFE OF A CASE: DISTRICT COURT

- Complaint
- Motion to Dismiss
- **Discovery**
- Summary Judgment
- Trial



THE LIFE OF A CASE: DISTRICT COURT

SCOPE OF PARTY DISCOVERY

- Available to both sides
- Scope:
 - All nonprivileged relevant information
 - Includes electronic (email, saved files, texts, etc.) and physical documents
 - Balance against burden and expense
- Types:
 - Written discovery
 - Requests for documents
 - Depositions



THE LIFE OF A CASE: DISTRICT COURT

- Complaint
- Motion to Dismiss
- **Discovery**
 - Expensive
 - Time consuming
 - Potential PR impacts
- Summary Judgment
- Trial



THE LIFE OF A CASE: DISTRICT COURT

- Complaint
- Motion to Dismiss
- Discovery
- Summary Judgment
 - Asking court to dismiss because there's not enough factual evidence to support legal claims
- Trial



Photo Credit: Wesley Tingey

THE LIFE OF A CASE: DISTRICT COURT

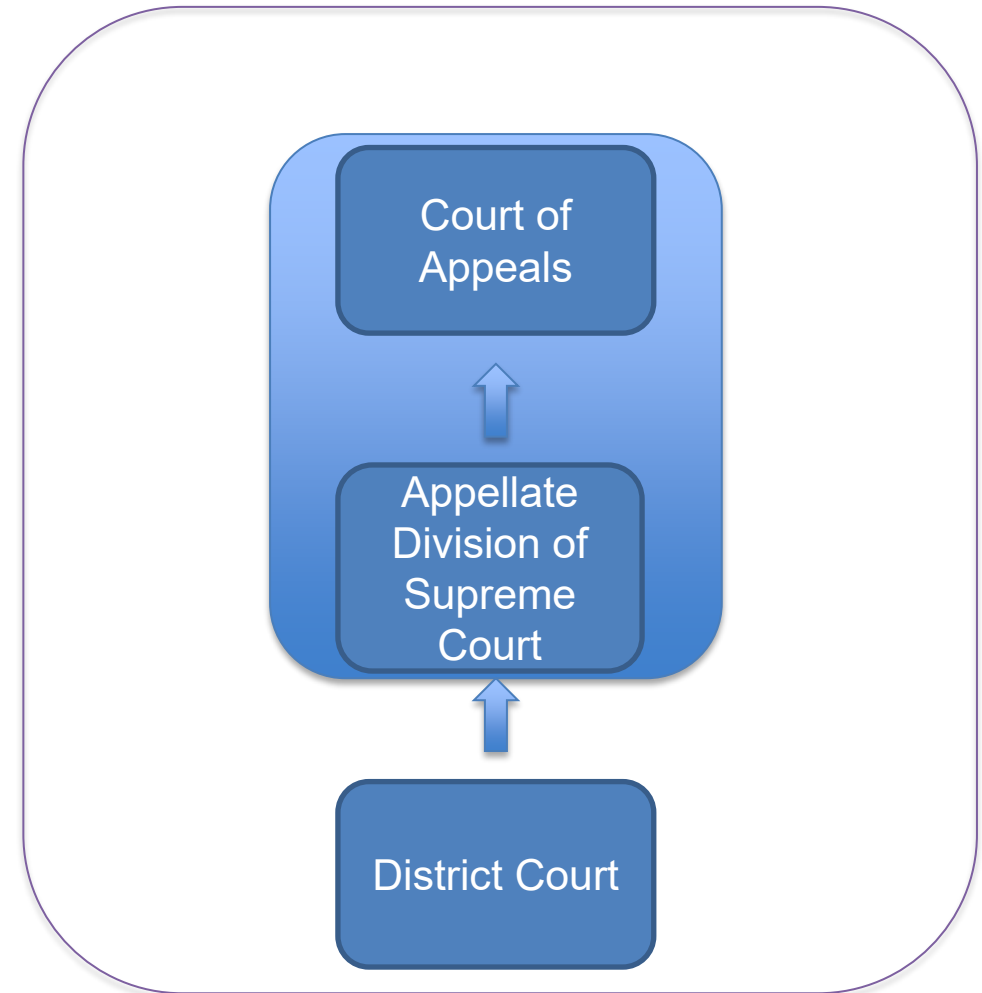
- Complaint
- Motion to Dismiss
- Discovery
- Summary Judgment
- Trial
 - Judge or jury
 - Expensive to prep.



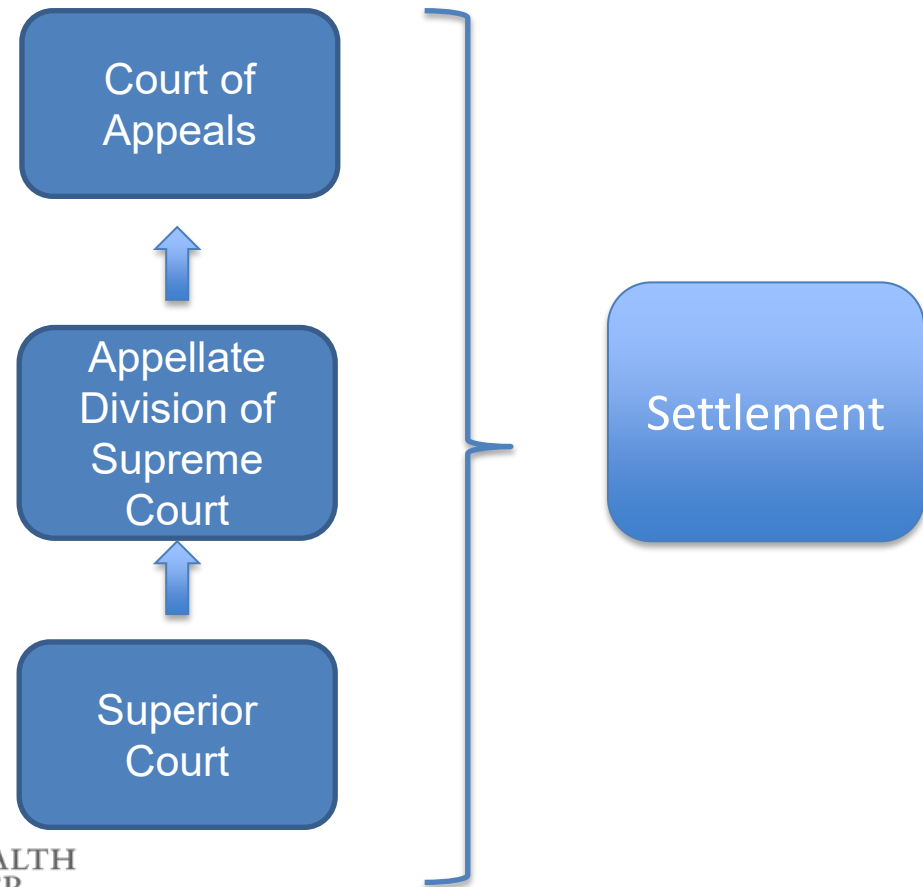
Photo Credit: Robert Linder

THE LIFE OF A CASE: APPELLATE COURT

- Guaranteed one appeal
- Mostly discretionary review by Court of Appeals; almost completely discretionary at the U.S. Supreme Court
- Limited to legal questions
- Lengthy



THE LIFE OF A CASE



COMMON TYPES OF LAWSUITS

- Individual and class action litigation
- Public-interest litigation
- Industry-led litigation



LITIGATION TRACKER

Litigation is an important tool to defend and advance public health policy. This tracker provides information and official court documents from select lawsuits within the focus areas of the Public Health Law Center, including commercial tobacco control and healthy eating. Some cases are relevant to cross-cutting issues that affect public health, such as preemption and First Amendment considerations. The Public Health Law Center has supported public health goals as an amicus curiae, or friend-of-the-court, by filing briefs (included here) with relevant information that the court may choose to consider. You can read more about the [Function and Role of Amicus Briefs in Public Health Litigation](#).

Search

Public Health Topics + Legal Issues + State ↓ SEARCH

Status ↓ CLEAR

Displaying 1-10 of 83

STATE OF MINNESOTA V. JUUL LABS, INC. (2019)

December 4, 2019, Minnesota Attorney General Keith Ellison filed a lawsuit suing e-cigarette manufacturer JUUL Labs, Inc. The lawsuit, filed in Hennepin County District Court, allege that JUUL violated multiple state consumer-protection laws, breached its duty of reasonable care, and created a public nuisance.

State **Minnesota** Most Recent Activity **2023** Status **Closed**

R.J. REYNOLDS V. CITY OF EDINA (2020)

Industry challenges a local flavored tobacco product ordinance adopted by the City of Edina, Minnesota, arguing that the ordinance is preempted by the Tobacco Control Act.

State **Minnesota** Most Recent Activity **2023** Status **Open**

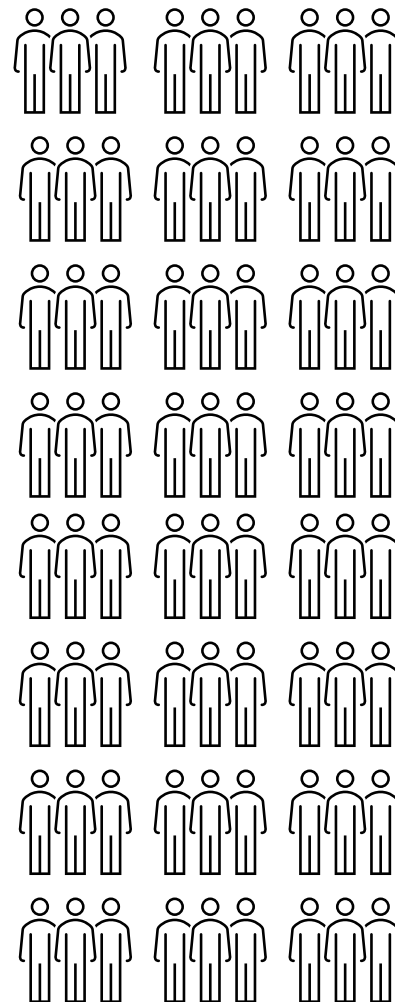
COMMON TYPES OF LAWSUITS

- Individual and class action litigation
- Public-interest litigation
- Industry-led litigation

INDIVIDUAL AND CLASS ACTION LITIGATION



Vs.



Vs.



INDIVIDUAL AND CLASS ACTION LITIGATION

Example:

- In Re: Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation (2019)



COMMON TYPES OF LAWSUITS

- Individual and class action litigation
- **Public-interest litigation**
- Industry-led litigation

PUBLIC INTEREST LITIGATION

Example

- Baltimore v. Philip Morris (2022)



COMMON TYPES OF LAWSUITS

- Individual and class action litigation
- Public-interest litigation
- **Industry-led litigation**

INDUSTRY-LED LITIGATION

- Litigation can derail legislation
- And litigation is expensive and unpredictable
- So litigation risk can stop a policy before it starts



Photo Credit: Alexandr Sadkov

7/25/2023

KEY TAKEAWAYS

THE INTERSECTION OF POLICY & LITIGATION

- Involve attorneys in decision-making process
- Evaluate and minimize litigation risk
- Factor risk tolerance into decision making



Photo Credit: Christin Hume

The background of the slide features a large, faint watermark of the Rutgers University seal. The seal is circular and contains the text "RUTGERS UNIVERSITY" around the perimeter and "1823" at the bottom. The seal is centered and overlaps the main title text.

RUTGERS

Institute for Nicotine
and Tobacco Studies

Major New York Tobacco Litigation

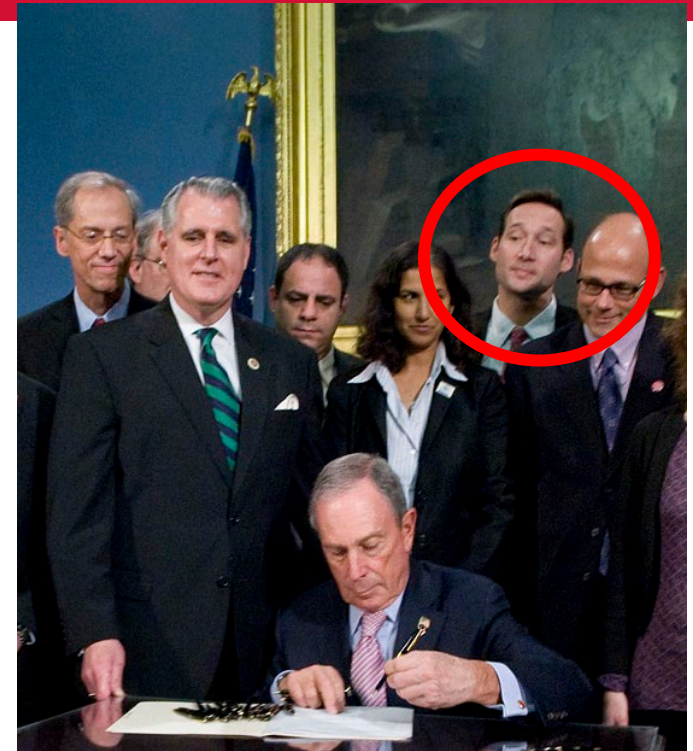
Kevin R.J. Schroth, JD

Rutgers Institute of Nicotine & Tobacco Studies

Rutgers School of Public Health

Outline

- NYC Flavor Law – 2009
 - *U.S. Smokeless v. NYC*, 708 F.3d 428 (2d Cir. 2013)
- Point of sale warning signs
 - *23-34 94th Street Grocery v. NYC DOHMH*, 685 F.3d 174 (2d Cir 2013)
- Discount bans
 - *NATO v. NYC*, 27 F. Supp.3d 415 (SDNY 2014)
- Haverstraw product display ban
 - Adopted, April 2012; rescinded July 2012

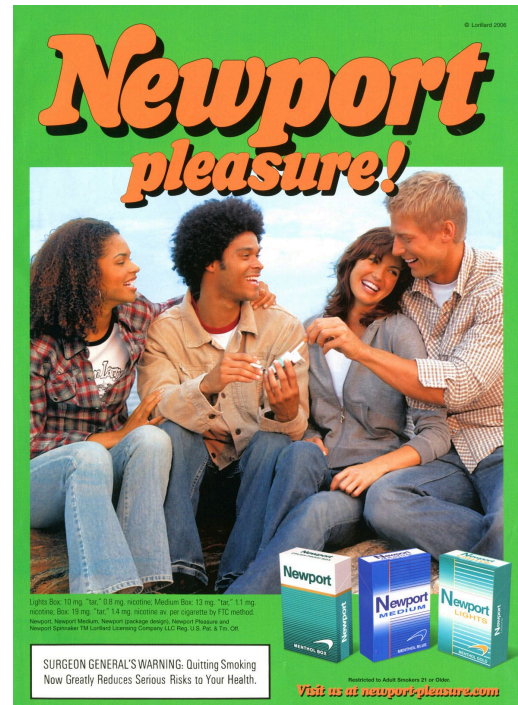


NYC Flavor Ban

- 1st flavor ban of its kind in the U.S.
- Advocacy started in 2005
- Law passed in October 2009
 - Months after the FSPTCA passed (in June 2009)
- Tobacco industry filed lawsuit in late 2009
- Implementation began in Oct 2010



Menthol Exempted



- Tobacco Control Act (TCA) passed in June 2009
 - Banned all flavored cigarettes, except menthol
 - NYC bill amended to exempt cigarettes
- NYC followed TCA's menthol exemption
 - TCA called for TPSAC study
 - NYC's risk of litigation would be greater if it banned menthol

NYC Flavor Ban

What the law did

- Banned the sale of flavored tobacco products
 - With exceptions
 - Not a complete ban – but the exception is very small
- The law was drafted to avoid regulating the manufacturing process
 - Does not prohibit flavoring ingredients
 - Does not affect manufacturing methods
 - Only affects final product

What the law did NOT cover

- Did not apply to any cigarettes, including menthol
 - TCA banned other flavored cigarettes
- Exempted “tobacco bars”
 - Only 8 tobacco bars in NYC at time
 - No more allowed – relic of SFAA
 - 7 were high-end cigar bars that didn’t sell flavored cigars
 - 1 was a hookah bar
 - ❖ Rule for exemptions: *If you have to make an exemption, make sure it doesn’t hurt your law*

U.S. Smokeless v. NYC

- **Altria (through two subsidiaries) sued on Dec. 28, 2009**
 - Preemption
 - Vagueness (claim dropped, in part, to avoid discovery)
- **Claim based on preservation/preemption clause**
- **3 clauses can be summarized in 5 words**
 - **Preservation clause**— *gives*
 - **Preemption clause** — *takes away*
 - **Saving clause** — *gives back*

“SEC. 916. PRESERVATION OF STATE AND LOCAL AUTHORITY.

“(a) **IN GENERAL.**—

“(1) **PRESERVATION.**—Except as provided in paragraph (2)(A), nothing in this chapter, or rules promulgated under this chapter, shall be construed to limit the authority of a Federal agency (including the Armed Forces), a State or political subdivision of a State, or the government of an Indian tribe to enact, adopt, promulgate, and enforce any law, rule, regulation, or other measure with respect to tobacco products that is in addition to, or more stringent than, requirements established under this chapter, including a law, rule, regulation, or other measure relating to or prohibiting the sale, distribution, possession, exposure to, access to, advertising and promotion of, or use of tobacco products by individuals of any age, information reporting to the State, or measures relating to fire safety standards for tobacco products. No provision of this chapter shall limit or otherwise affect any State, tribal, or local taxation of tobacco products.

“(2) **PREEMPTION OF CERTAIN STATE AND LOCAL REQUIREMENTS.**—

“(A) **IN GENERAL.**—No State or political subdivision of a State may establish or continue in effect with respect to a tobacco product any requirement which is different

U.S. Smokeless v. NYC

- **PRESERVATION CLAUSE (GIVES)**

Allows state/local government to pass laws “with respect to tobacco products... *more stringent*” than the TCA

- **PREEMPTION CLAUSE—TAKES AWAY—**exception to preservation clause

A locality cannot pass a “requirement...*different from, or in addition to...* [a FDA] *tobacco product standards...*”

- **SAVING CLAUSE—GIVES BACK LESS—**exception to the exception

Preemption clause “does *not* apply to *requirements* relating to the *sale...*of...tobacco products...”

Not Preempted → Good Precedent for Other Localities

- NYC's law was not a ***requirement*** relating to a ***tobacco product standard***
 - Law related to the sale of a finished product
 - Did not address process of achieving the finished product
- Even if it were a product standard, it would have been "***saved***" as a ***requirement*** relating to the ***sale*** of tobacco products
- *US Smokeless* precedent
 - Protects local authority to issue sales restrictions
 - Paved the way for similar laws

Visualizing Preemption

FDA Role

- Constituents
- Flavors (including ingredients)
- Nicotine yields (not 0)
- Harmful or potentially harmful constituents (HPHC)
- Must be APPH

State/Local Role

- Sales restrictions (classes of products)
- Flavors restrictions
- Restrictions on time/place/manner (but not content)
- Cannot be “*different from*” or “*in addition to*” a product standard

23-34 94th Street Grocery

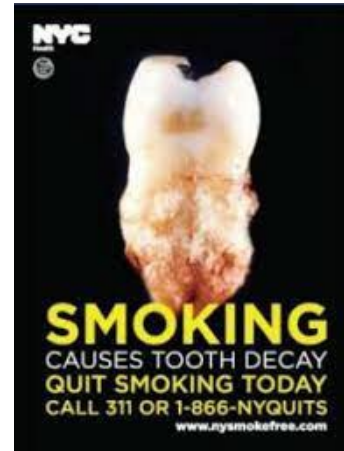
- NYC's Board of Health passed a rule requiring warning signs:
 - Small sign at cash register or
 - Large sign where products are displayed



23-34 94th Street Grocery

US law prohibits state/local gov't from “imposing a *requirement* or *prohibition* based on smoking and health...*with respect to the advertising or promotion of...cigarettes*”

- Rule imposed a “requirement”
- Was it “with respect to the advertising or promotion of cigarettes”?
- Court: *Yes*



Location requirement was key to court's decision

NATO v. NYC, 27 F. Supp.3d 415 (SDNY 2014)

2013 law aimed at increasing tobacco prices in multiple ways:

1. **Discount ban**
2. Countering illicit trade
3. Price floors for cigarettes & little cigars
4. Cigar 4-pack requirement



Rising cigarette prices spark increase in 'buttlegging'

By Gregory Inoué July 24, 2018 | 9:22am | Updated



Buttleggers love New York.
That's because it is fertile ground for their illegal activities, since it is now more expensive than ever to buy smokes in the Big Apple. New York has "the worst smuggling problem in America," said Scott Drenkard, with the Tax Foundation.

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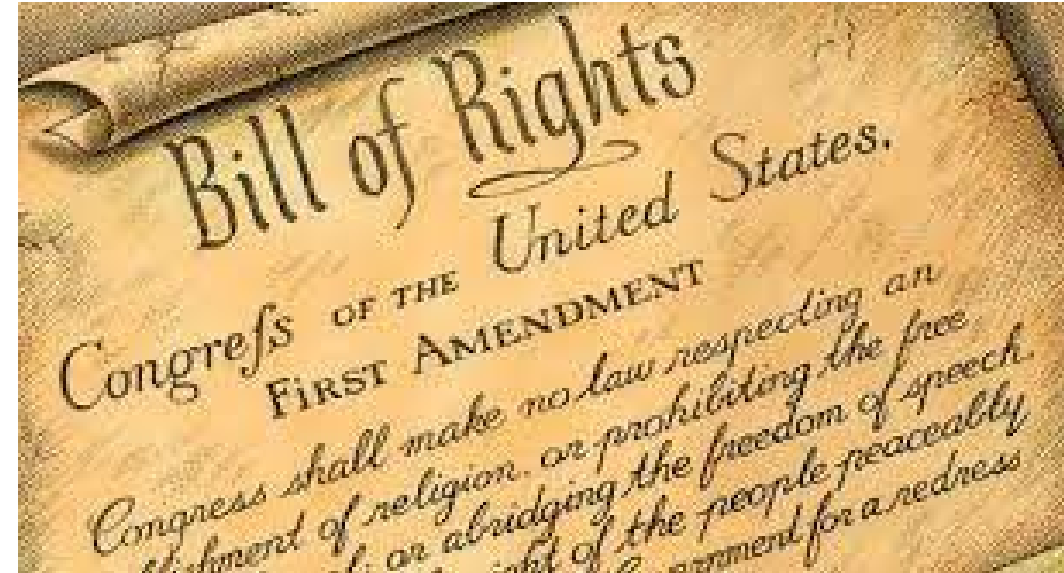
Product Display Ban

- Visibility of tobacco products...
 - Spurs purchases
 - Increases youth susceptibility
- Haverstraw adopted a product display ban in April 2012
- Tobacco industry sued
- Haverstraw rescinded ordinance in July 2012
- Why?



Product Display Ban

- PDB is a restriction on commercial speech
- The government can restrict speech, but it needs a good reason
- Supreme Court established a test:
 - ✓ 1. Is speech legal (*no protection for ad to sell crystal blue meth*)
 - ✓ 2. Significant government interest (*e.g., saving lives*)
 - ? 3. Advances government interest (*Is there evidence it works?*)
 - ? 4. Restricts no more speech than necessary



Product Display Ban – The Devil’s Advocate

Advances
government
interest
(Does it
work?)

- Evidence from Canada is inconclusive at best because other measures were introduced at same time
- Canadian law bans advertising too
- Haverstraw law may ban product display, but it won’t be effective if product display is replaced by tobacco ads?

Restricts
more speech
than
necessary

- Other laws can reduce smoking without restricting speech
- Enforce existing laws banning youth access
- Legal adults consumers want to see where to buy tobacco products



Questions?

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