

LITIGATION 101: TOBACCO POLICY

The Court System and Commercial Tobacco Control



Public policy is typically seen as the result of decisions made by democratically elected branches of government, but the courts also play a crucial role in shaping policy.

The judiciary is tasked with interpreting laws and can thus dictate whether and to what extent a policy is enforced. In addition, the courts possess considerable power to influence the actions of private entities, issuing rulings that carry implications as profound and far-reaching as the most aggressive public health measures.



This publication aims to demystify the litigation process and describe its impact on public health objectives — both in advancing and hindering them. Litigation is, after all, a double-edged sword: public-interest litigation has resulted in significant public health victories, while industry-led litigation continuously undermines public health policies. Therefore, this publication has three related objectives:

1. Providing insight into how litigation functions, including its costs and associated risks.
2. Demonstrating the proactive role litigation can play in pursuing public health goals.
3. Illuminating the tactics employed by the commercial tobacco industry through litigation and the threat of litigation, along with guidance for public health advocates on minimizing litigation risks.

What Can Courts Do?

Although originally described as “the least dangerous branch,”¹ the judiciary wields considerable influence over every level and aspect of policy in America. At its core, the courts possess the authority to “say what the law is.”² Consequently, they determine the constitutionality and enforceability of policies implemented by other branches of government. Moreover, courts hold significant power in regulating the conduct of private parties through various means, such as **injunctions**, **declaratory relief**, and the awarding of **damages**.

- **Injunctions:** Courts can issue injunctive relief, compelling a party to cease specific behavior or take particular actions. For example, a court can enjoin a city from enforcing an ordinance against a tobacco retailer. This remedy is reserved for situations where financial compensation alone would be inadequate to address the harm.
- **Declaratory relief:** Similar to injunctions, courts can declare the rights of one party concerning another. For example, a court could declare that a city ordinance violates a tobacco retailer’s First Amendment rights, leading to the cessation of enforcement against that retailer. Parties often seek declaratory relief when an impending lawsuit requires clarifying their rights in advance.
- **Damages:** In most civil cases, the primary form of relief is monetary damages. A court can order a defendant to financially compensate plaintiffs for the harm they have suffered. For instance, a tobacco retailer could seek lost-profit damages if a city ordinance unjustly interfered with its business operations. Additionally, courts can impose punitive damages as a deterrent against future misconduct.³

Importantly, a court decision can establish a **precedent** that binds other courts, resulting in an impact that reaches well beyond the immediate case. In the U.S. court system, lower courts are required to adhere to the decisions made by higher courts. For instance, if the U.S. Supreme Court interprets a federal law in a particular manner, all other courts are expected to adopt the same interpretation. As a result, the practical consequences of a case can extend far beyond the specific dispute, with both positive and negative implications.

Federal and State Courts

There is not just one court system in the United States that handles legal disputes. Rather, the nation has multiple overlapping systems, including hundreds of Tribal court systems. But most cases that are relevant to public health professionals are filed in either federal or state court. These two court systems run parallel to each other and share similar structures. However, both state and federal courts must have jurisdiction over the parties involved. For instance, a Texan court cannot compel a New Yorker to appear and defend herself in Texas if the individual has no ties to the state at all.⁴

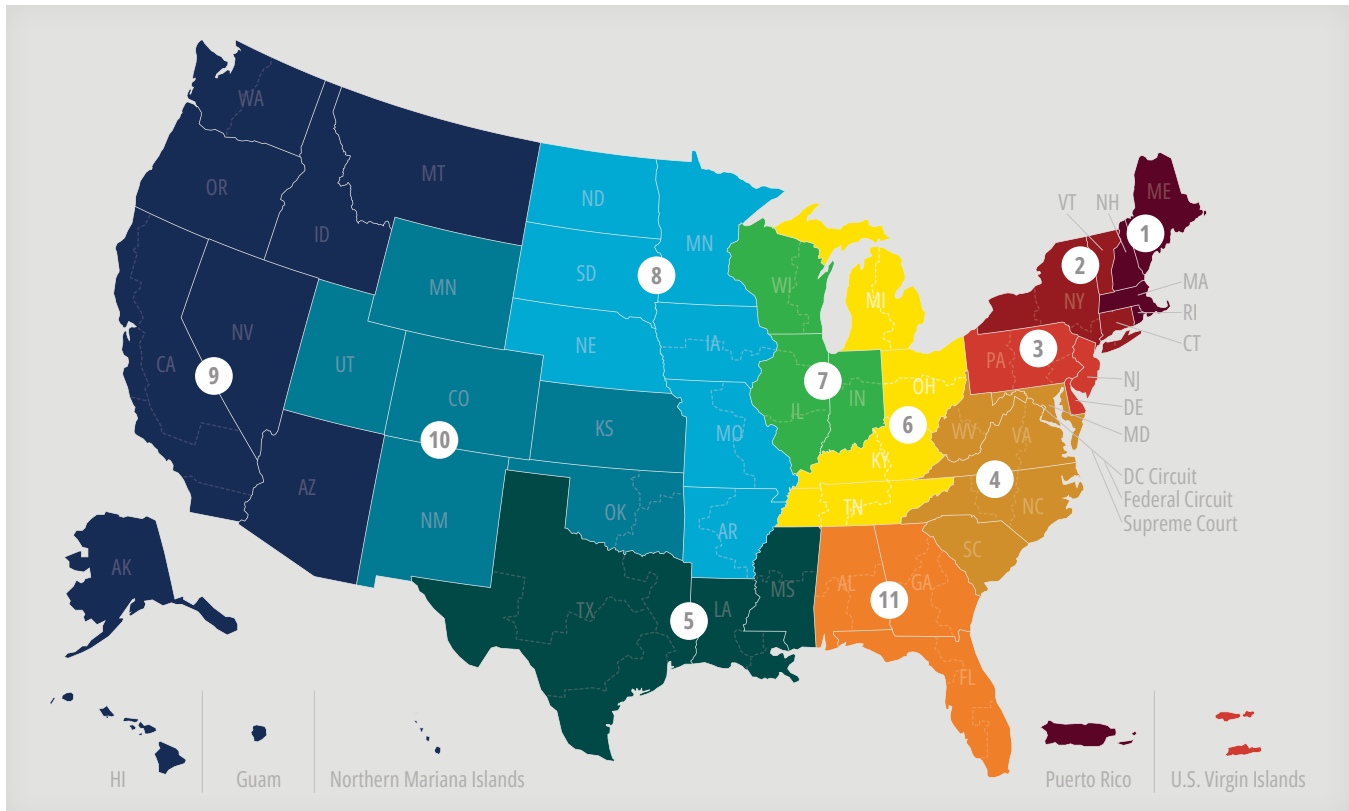
The primary distinction between state and federal courts lies in their jurisdiction. State courts have plenary jurisdiction, enabling them to hear cases on virtually any type of matter. On the other hand, federal courts operate under limited jurisdiction and can only hear cases involving federal questions — lawsuits related to federal statutes or the federal Constitution. Additionally, federal courts can take up a case if there is complete diversity of citizenship between the parties, and the value of the controversy exceeds \$75,000.⁵ Finally, it is important to note that if a lawsuit is initially filed in a state court, defendants can sometimes “remove” the case to federal court if it meets the federal jurisdictional requirements.

The Federal Court System

The federal court system consists of 94 district courts, with each state having at least one. These district courts serve as the starting point for most cases — they are where **complaints** are filed, facts are gathered through **discovery**, legal arguments are developed via **motions to dismiss** and **motions for summary judgment**, and **trials** take place.⁶

After a district court decision, the losing party has the right to appeal that decision. Appellate courts, in general, act as error-correcting bodies. Parties are not allowed to introduce new evidence or raise new issues during the appeal. Instead, their focus is on identifying legal errors made at the district court level. Courts of appeal possess broad authority, capable of affirming, reversing, or remanding the case back to the district court for further proceedings.

Geographic Boundaries of United States Court of Appeals and United States District Courts



In the federal court system, appeals initially go to the United States Court of Appeals. There are 13 federal appellate courts, or “circuits,” with 12 covering different regions across the United States and the Federal Circuit Court having national jurisdiction over specific case types. Each Circuit has multiple judges, ranging from 6 (in the First Circuit) to 29 (in the Ninth Circuit).⁷ Typically, a panel of three judges reviews each appeal, but in rare cases, the circuit may consider a case “en banc,” with every circuit judge reviewing and then ruling on the matter.

If the losing party disagrees with the Court of Appeals’ decision, they can appeal to the U.S. Supreme Court.⁸ However, the Supreme Court operates on a discretionary docket, meaning it can choose whether to accept or reject appeals — parties do not have an automatic right to be heard by the Supreme Court. The Supreme Court typically only accepts appeals that involve issues of national importance, conflicts among the Circuit courts, or cases that could establish significant precedents. If the Supreme Court rejects a petition, the decision of the Court of Appeals stands. All nine justices typically vote on each case, and if a majority agree on a particular outcome, it becomes the final opinion on the matter.⁹

State Court System

State court systems often mirror the structure of the federal court system, typically comprising district courts, intermediate appellate courts, and a state supreme court. Similar to federal courts, a case progresses through the state courts, eventually reaching the state supreme court. However, a key distinction is that if a case involves a federal question, the losing party at the state supreme court can appeal to the U.S. Supreme Court (subject to acceptance or rejection, as previously discussed).

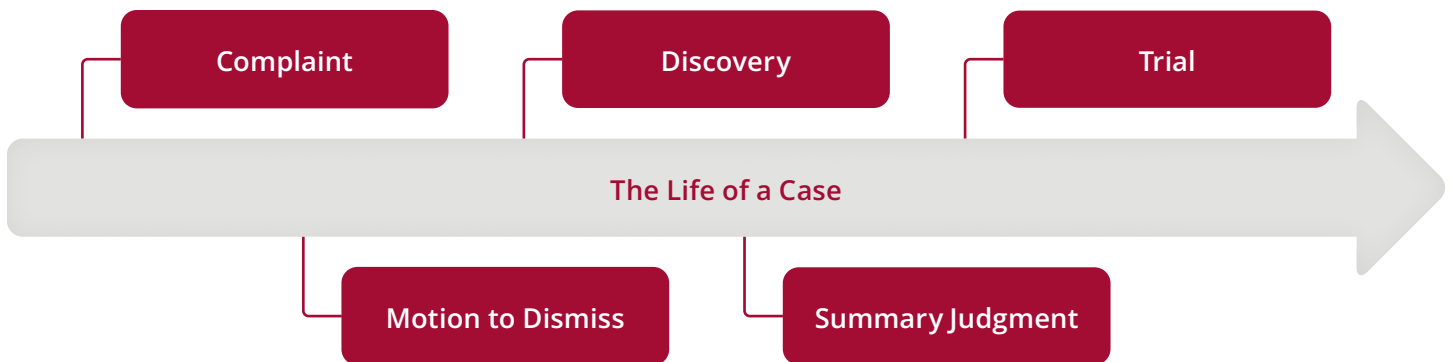
Despite similarities, there is some variety in how states structure their court systems. For example, certain states, like Vermont, lack intermediate courts of appeal, directing appeals straight to the state Supreme Court. In contrast, other states, like Pennsylvania, boast multiple intermediate courts of appeal, each handling specific types of appeals. Moreover, many states feature specialized courts or tribunals that coexist with, or operate beneath, more conventional district courts — for example, probate courts or family courts.

The Life of a Case

The federal court system generally follows a uniform process: whether a case is heard in the Eastern District of New York or the Western District of Washington, the proceedings would be similar. However, state courts exhibit significant diversity in their governing rules. The following offers a high-level overview of how cases typically progress in both state and federal courts, while acknowledging that substantial variations may exist among the states.

Public health professionals need to be aware that most cases in which tobacco companies sue government entities are often resolved early in the process. These lawsuits usually revolve around specific legal questions, such as whether an ordinance is preempted, or whether a law infringes upon commercial free speech, and do not typically involve disputed facts requiring extensive discovery and lengthy trials. Consequently, parties can often stipulate to relevant facts and resolve the case through legal briefs to the court. However, cases initiated by public health professionals proactively suing tobacco companies can be considerably more prolonged, as the claims are usually fact-intensive and require a more extensive process.

Complaint: The complaint is a short document that initiates a lawsuit. It outlines the plaintiff's grievance, including relevant facts, legal claims or theories supporting the need for relief, and the specific remedies or relief sought. The complaint need not be overly detailed or technical; its purpose is to inform the defendant of the alleged actions that led to the lawsuit.



Motion to Dismiss: After receiving the complaint, defendants must respond by admitting or denying its contents. However, if the complaint contains a critical flaw, the defendant can file a motion to dismiss the lawsuit. This motion asks the court to rule against the plaintiff, asserting that even if everything in the complaint is true, the plaintiff is not entitled to relief.

Prevailing on a motion to dismiss requires meeting a high threshold. This is intended to ensure that potentially valid cases are not prematurely dismissed before plaintiffs can develop their arguments fully. The motion will succeed only if there is a fundamental legal flaw in the complaint. For example, if a consumer sues a manufacturer for selling a defective product, but waits too long to file the lawsuit, the manufacturer might succeed in dismissing the case on the grounds that the statute of limitations¹⁰ for that sort of claim has expired.

Discovery: If a case survives the motion to dismiss phase, it proceeds to discovery. In many cases, especially those involving complex factual issues, discovery is the longest, most expensive, and most pivotal phase. This process allows litigants to gather information from each other to support their claims or defenses.

Typically, a litigant can access all relevant, **non-privileged** information from the opposing party, provided it is not overly burdensome or costly. Where the parties cannot agree on the reasonableness of a discovery request, the judge may have to resolve objections, which might require written motions and hearings.

However, just because information is discoverable does not automatically make it public or usable in the case. Various evidentiary rules govern whether and how information obtained through discovery can be used as evidence, along with rules (often agreed upon by the parties) concerning the use of confidential information.

Public health advocates should be aware of three types of discovery requests:

- **Written Requests:** Parties can use “interrogatories” to pose questions to the opposing side that must be answered truthfully and comprehensively. For instance, a plaintiff tobacco retailer may inquire about all enforcement actions taken by a city concerning a particular ordinance.
- **Requests for Documents:** Parties can ask the other side to provide physical or electronic documents relevant to the case. These requests cover a wide range of materials, and may include reports, emails, texts, social media posts, draft documents, handwritten notes, voice messages, metadata, and more. The producing party is responsible for locating the requested documents, ensuring their relevance, and redacting or withholding any attorney-client privileged content before handing them over.
- **Depositions:** Depositions involve an oral examination of an individual regarding the facts of a case. Conducted under oath, a court reporter records a transcript, much like a cross examination during a trial. However, no judge is present, and depositions often occur in conference rooms or virtually. In cases involving organizations like corporations or cities, anyone from the organization can be deposed.

The discovery phase of a case often determines its outcome, as it provides access to crucial facts supporting the parties’ claims or defenses. Consequently, parties invest substantial resources in pursuing discovery or objecting to the opposing side’s requests. Apart from the evident time and expense involved, the discovery process can be emotionally taxing — members of an organization may be required to hand over emails and documents for review and production to the other side, and endure hours-long depositions.

Summary Judgment: After the close of discovery, parties often move for summary judgment. This motion is similar to a motion to dismiss, but with a crucial distinction: while a motion to dismiss must accept all facts in the complaint as true, a motion for summary judgment can be based on evidence gathered during discovery. The moving party essentially requests the court to dismiss the case (or parts of it) due to the absence of material facts in dispute, making it impossible for a reasonable jury to rule in favor of the other side. Like motions to dismiss, prevailing on a summary judgment motion is challenging due to the high threshold required.

There are compelling reasons for this rigorous standard: when judges grant summary judgment, they effectively deprive the other side of the opportunity to present their case to a jury. Consequently, this should only occur in rare situations where the case is so one-sided that proceeding further would truly be pointless.

Trial: If the case survives summary judgment and parties do not reach a settlement, it proceeds to trial. Parties can choose to present their case before a judge or jury, offering their evidence and arguments. Trials can be quite costly, even for short durations. Preparing for a one-day trial can take up to a week or more, with lawyers devising strategies, collecting exhibits, preparing witnesses, and crafting opening and closing statements.

Appeal: A party dissatisfied with an unfavorable ruling has the right to appeal. As previously mentioned, appeals are limited to correcting legal errors and cannot introduce new facts or arguments. Appellate courts are not there to reevaluate the evidence. Despite being based on discrete legal questions, appeals are not quickly resolved. For instance, in the 2nd Circuit Court of Appeals, the median time from filing a notice of appeal to terminating the appeal was over 13 months.¹¹ During this period, the parties draft and submit briefs, prepare for and conduct oral arguments, and await the judges' written opinion explaining their ruling.



Settlements

At any stage of the litigation process, the parties have the option to settle. A settlement is essentially a contract where plaintiffs agree to dismiss their case in return for something from the defendant, typically money or a commitment to take specific actions or refrain from certain actions. Settlements, like contracts, are legally binding agreements, and parties can seek court enforcement if necessary.

Litigation and Public Policy

Litigation can be a powerful tool to either advance or hinder public health policy. When driven by public-minded individuals and organizations against the tobacco industry, litigation can achieve objectives that are often challenging to attain through conventional policy-making processes. On the other hand, when employed by the tobacco industry, litigation can obstruct local, state, and national efforts to advance important public health policy.

Proactive Use of Litigation by the Public Health Community

The public health community has frequently turned to litigation as an alternative means to promote public health goals. The current landscape of modern commercial tobacco control policy owes much to litigation, including the influential Master Settlement Agreement (MSA) and Judge Kessler's decision in *United States v. Philip Morris*.¹² Additionally, individuals filing lawsuits independently or through **class actions** have played a role in advancing public health goals through litigation.

Proactive litigation against tobacco companies can further public health goals in several ways:

- Lawsuits can secure court orders or settlements compelling the tobacco industry to modify its practices. For example, the MSA imposes significant restrictions on commercial tobacco marketing, especially marketing aimed at children.
- Lawsuits can result in substantial damage awards and financial settlements that threaten the financial viability of commercial tobacco companies. For instance, state attorney general litigation against Juul resulted in settlements requiring Juul to pay over \$1 billion to 46 states, the District of Columbia, and Puerto Rico.¹³
- Litigation can spotlight the harmful practices of the commercial tobacco industry and raise awareness of the negative health impacts of commercial tobacco. For example, the MSA led to the release of millions of pages of internal tobacco industry documents, exposing the industry's strategies for promoting its addictive and dangerous product.¹⁴



Class Actions

Class actions are a product of civil procedure rules, allowing the aggregation of claims from a group of people who have suffered identical or similar harms. Instead of pursuing numerous separate lawsuits, class actions consolidate the claims into one lawsuit, with damages, if awarded, distributed among the class members. However, to proceed as a class, plaintiffs must first establish “class certification,” showing that common issues of fact and law exist among the class members.¹⁵ If liability requires individual determinations, for example, the court will not certify the class, and the litigation will proceed on an individual basis.

Class action lawsuits allow plaintiffs to aggregate their claims that would otherwise be too cost-prohibitive to bring individually, as well as protect against inconsistent judgments involving the same claims. Moreover, they can be a powerful tool for public health, as the combined damages of a class can reach millions or even hundreds of millions of dollars. Companies, including the tobacco industry, often modify their policies and practices to avoid potential exposure from class action lawsuits.

Multidistrict Litigation and Toxic Torts

Similar in concept to class actions, multidistrict litigation (MDL) occurs when numerous cases with the same or similar claims are pending throughout the country. To streamline proceedings, these cases can be consolidated into one district court. A judge will then handle joint motions or oversee bellwether trials. The outcomes of these proceedings will apply to the individual cases, which will continue as separate litigation. Notably, MDL can encompass both individual cases *and* class actions, allowing multiple separate class action lawsuits to be included within one MDL case.

Recent Public Health Litigation

- *Baltimore v. Phillip Morris (2022)*: Cigarettes, the most common form of litter globally, are not biodegradable, despite popular belief. Tobacco companies intentionally designed non-biodegradable filters, knowing they would contribute to littering. The City of Baltimore filed a lawsuit against Philip Morris International and other major tobacco manufacturers, seeking to hold them accountable for cigarette litter. The claims include public nuisance, trespass, and violations of state and municipal laws. The city aims to recover damages, including past, present, and future cleanup costs for cigarette litter, along with punitive damages.
- *In Re: Juul Labs, Inc., Marketing, Sales Practices, and Products Liability Litigation (2019)*: Juul Labs, Inc. (Juul), the manufacturer of popular electronic smoking devices, faced thousands of civil lawsuits primarily alleging that it targeted its products to youth and inaccurately labeled nicotine content. In October 2019, the Judicial Panel on **Multidistrict Litigation** consolidated and transferred these cases against Juul to the U.S. District Court in the Northern District of California, encompassing suits from cities, counties, school districts, individuals, tribes, and consumer purchaser class actions. In December 2022, Juul entered into four settlements to resolve the personal injury, consumer class action, government entity, and tribal cases. These settlements aim to address youth use of e-cigarettes, with settlement amounts likely exceeding \$1 billion.¹⁶

Defending Against Litigation from the Tobacco Industry

Just as public health advocates use litigation to advance public health goals, the tobacco industry employs it to impede or halt public health initiatives. The commercial tobacco industry frequently initiates lawsuits against federal, state, and local policies, typically raising issues such as preemption, commercial free speech, and regulatory takings.¹⁷ For instance, the tobacco industry unsuccessfully challenged the County of Los Angeles' flavored tobacco product sales restriction in 2020, arguing that the ordinance was preempted by federal law, and holding up enforcement of the law for several years.¹⁸

However, that the industry sues does not automatically mean the industry is justified in its claims. Many laws challenged by the commercial tobacco industry are eventually upheld in court.¹⁹ Despite this, it is still best to avoid litigation if possible for several reasons:

- **Cost and Time**: Litigation is expensive and time-consuming, often taking months or even years to resolve and incurring millions in attorneys' fees and discovery expenses. In addition, it can result in public relations costs if embarrassing documents come to light.



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- **Precedent:** A loss in court can lead to undesirable precedents, especially if a higher court issues an opinion that hinders public health goals.
- **Unpredictability:** Even the best lawyers cannot accurately predict litigation outcomes. Litigation involves not only considering the facts and legal principles at issue, but also understanding the disposition of a judge or jury.

Importantly, the industry is aware of these challenges and uses the threat of litigation to dissuade jurisdictions from pursuing vital public health laws. The commercial tobacco industry often sends threatening letters if a city is considering a policy that may impact its profits. These threats are often enough to sway jurisdictions, as they understandably want to avoid lengthy litigation against a well-funded adversary and the associated risks.

Managing Litigation Risk

Public health advocates must carefully assess whether a particular policy is worth the risk of litigation. To help manage these risks, you can take several steps:

- **Form a relationship with your attorneys:** Identify and engage with in-house attorneys or regularly contracted attorneys early in the policymaking process. Establishing a good working relationship will enable you to seek legal advice and guidance throughout the development of the policy.
- **Protect privilege:** Understand that *non-privileged* materials are potentially discoverable in litigation. Keep documents and communications with your attorney confidential, protected by the attorney-client privilege. This privilege covers confidential communications

made for the purpose of giving or seeking legal advice. Be cautious about sharing such communications with external parties, as it may waive the privilege.

- **Work through legal issues in advance:** Conduct a legal assessment of the policy with your attorney early on. Even if your attorneys are not public health law specialists, they can identify potential legal problems. By involving your attorneys from the beginning, you can modify the policy to achieve its goals while minimizing legal risks. Organizations like the Public Health Law Center can also provide background material and information on common legal hazards and claims. For summaries of significant commercial tobacco lawsuits over the last few decades, check out the Public Health Law Center's online [Litigation Tracker](#).
- **Assess your risk tolerance:** Carefully evaluate the risk of potential lawsuits, the likelihood of losing, and the associated costs of litigation. Consider whether pursuing the policy is still worthwhile despite these risks. Often, the policy's significance and public health benefits will outweigh the potential legal challenges. Making these decisions in advance will help avoid last-minute scrambling if a lawsuit is filed.

The commercial tobacco industry leverages litigation and the fear of lawsuits to obstruct critical public health initiatives from even taking off. However, by proactively managing and minimizing risks, public health professionals can conserve resources, thwart the industry's litigious tactics, and continue to advance essential public health policies.

Conclusion

Proactive litigation against the commercial tobacco industry can lead to important public health victories just as industry-led litigation can derail hard-won public health policies. Regardless, litigation is an inescapable part of the modern world, and public health advocates must stay informed about the litigation landscape and its impact on public health policy.

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Endnotes

- 1 Alexander Hamilton, The Federalist Papers: No. 78.
- 2 Marbury v. Madison, 5 U.S. 137, 177 (1803).

- 3 Note that parties typically bear the costs of their own litigation, meaning that both the winning and losing parties cover their attorneys' fees. As a result, any damages awarded to a party are reduced by their attorneys' fees. However, in certain situations, a party may demand that the other side cover their attorneys' fees. This is more common when there is a fee-shifting statute, as in Section 1983 civil rights suits, but can also occur if the party is entitled to punitive damages as well. See 42 U.S.C.A. § 1988(b).
- 4 See, e.g., *Walden v. Fiore*, 571 U.S. 277 (2014).
- 5 See 28 U.S.C. § 1332.
- 6 It is worth noting that not all cases begin in district court. Some lawsuits commence in agency proceedings and then may transfer to the federal court system.
- 7 See 28 U.S.C. § 44. These numbers do not include Senior Circuit Judges. Circuit judges are permitted to take "senior status" wherein they retire but from full time service but retain a reduced caseload. They can thus be active participants in the Circuit, but they do not count against the Circuit's cap on judges. See *id.* § 294; *id.* § 371(d).
- 8 This is referred to as petitioning for a writ of certiorari, which roughly translates to an order instructing the lower court to submit all relevant documents from a case, enabling the Supreme Court to be "more fully informed." When the Supreme Court decides to review a case, court watchers may say that the Court has "granted cert."
- 9 In certain situations, a justice may abstain from voting on a case, either due to non-participation in oral argument or recusal. In such instances, a tie vote is possible, and if there is no majority opinion, the lower court ruling stands.
- 10 A "statute of limitations" sets out the period of time in which a person can bring a legal action. For example, if someone is injured by a product on September 1, 2023, and the statute of limitations for a product liability claim is two years, that individual would have to file a lawsuit about the injury by September 1, 2025. If the person files afterwards, the case is likely to be dismissed regardless of defendant's liability.
- 11 See *U.S. Court of Appeals–Judicial Caseload Profile*, https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0331.2023.pdf.
- 12 For more on the MSA and Judge Kessler's opinion, see A COMPLEX ACHIEVEMENT: THE TOBACCO MASTER SETTLEMENT AGREEMENT, IN LOOKING BACK TO MOVE FORWARD: RESOLVING HEALTH & ENVIRONMENTAL CRISES (2020), <https://www.publichealthlawcenter.org/sites/default/files/resources/A-Complex-Achievement-The-Tobacco-Master-Settlement-Agreement-Chapter-3.pdf>; *The Verdict Is In: Findings from United States v. Philip Morris*, Tobacco Control Legal Consortium (2006), <https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-verdict-is-in.pdf>.
- 13 See Public Health Law Center, *The Universe of Juul Litigation: What State Attorney General Action and Multidistrict Litigation Settlements Mean for Public Health* (April 27, 2023).
- 14 These documents can be accessed at <https://www.industrydocuments.ucsf.edu/tobacco/collections/msa>.
- 15 See generally Fed. R. Civ. P. 23.
- 16 See Public Health Law Center, *Juul Litigation and Settlements: Frequently Asked Questions* (2023), <https://www.publichealthlawcenter.org/sites/default/files/resources/Juul-Litigation-FAQ.pdf>.
- 17 The Public Health Law Center has created resources covering these subjects and more, available here: <https://www.publichealthlawcenter.org>.
- 18 See, e.g., *R. J. Reynolds Tobacco Co. v. County of Los Angeles*, No. 20-55930 (9th Cir. 2022), <https://www.publichealthlawcenter.org/litigation-tracker/rj-reynolds-v-county-los-angeles-2020>.
- 19 Public health professionals should also bear in mind the corollary proposition: that the commercial tobacco industry has not yet sued over a policy does not imply that it cannot or will not prevail if it chooses to do so in the future.