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Tobacco: Selected Legal Issues

name redacted
Legislative Attorney

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Summary

Over the past couple of decades, the courts and Congress have been grappling with tobacco-related issues, among them, the Food and Drug Administration's (FDA's) authority to regulate certain tobacco products under the Federal Food, Drug, and Cosmetic Act (FFDCA); the Master Settlement Agreement (MSA) that resulted from lawsuits brought by states' attorneys general against tobacco companies; federal, private party, and foreign lawsuits against tobacco companies; limits on tobacco advertising; restrictions on selling and distributing tobacco to minors; and the Federal Trade Commission's rescission of its 1966 guidance document relating to tar and nicotine yields in cigarettes. This report addresses the above issues, with the exception of the FDA's authority to regulate tobacco products. For information on that topic see CRS Report R41304, *FDA Final Rule Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco*, by (name redacted) and (name redacted).

In the 1990s, states' attorneys general brought lawsuits for reimbursement of their states' tobacco-related medical expenses. They reached a settlement with tobacco companies in 1997, but the settlement did not garner the congressional approval needed for implementation. In 1998, 46 states, the District of Columbia, five U.S. territories, and the tobacco industry signed the MSA, worth $206 billion over 26 years.

In 1999, the Clinton Administration filed a lawsuit against major tobacco companies and industry trade groups to recoup federal tobacco-related medical costs. In 2006, a federal district court held that the tobacco companies violated two provisions under the Racketeer Influenced and Corrupt Organization Act (RICO) by, among other things, making false statements about the health effects of smoking. Among other remedies, the court ordered them to remove descriptors such as light, low-tar, natural, mild, and ultra light from their packaging. In 2012, the court ordered them to issue factual statements to counter the false statements that were part of the RICO verdict.

Since the U.S. Supreme Court's 1992 decision in *Cipollone v. Liggett Group Inc.*, individual and class action lawsuits have been brought against tobacco companies under theories such as fraudulent representation, conspiracy, breach of express warranty, and failure to warn. The private party suit section of this report discusses selected state class actions. Suits brought in federal courts by foreign governments for medical care costs resulting from tobacco-related illnesses have not been successful.

Tobacco advertising is restricted at the federal, state, and local levels. The Federal Cigarette Labeling and Advertising Act (FCLAA), the Family Smoking Prevention and Tobacco Control Act (FSPTCA), state laws, the MSA, and local ordinances limit tobacco advertising in ways such as prohibiting radio and television advertisements, compelling the use of health warning labels, limiting the use of terms that imply decreased health risks, banning the use of cartoons, and requiring individuals to have contact with a sales person before purchasing tobacco products. Additionally, federal law plays a role in enforcing laws that prohibit tobacco sales and marketing to minors.

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Introduction

Over the past couple of decades, the courts and Congress have been grappling with tobacco-related issues, among them, the Food and Drug Administration's (FDA's) authority to regulate tobacco under the Federal Food, Drug, and Cosmetic Act (FFDCA); the Master Settlement Agreement (MSA) that resulted from lawsuits by states' attorneys general against tobacco companies; federal, private party, and foreign lawsuits against tobacco companies; limits on tobacco advertising; and restrictions on selling and distributing tobacco to minors. This report concerns all of the above issues except the FDA's authority to regulate tobacco products, which is covered in a separate CRS report.[1]

State Suits and the Master Settlement Agreement

Beginning in 1994, 41 states and Puerto Rico began filing lawsuits against tobacco companies for reimbursement of tobacco-related medical expenses, particularly Medicaid expenditures. In November 1998, attorneys general from 46 states, the District of Columbia, and five U.S. territories signed the Master Settlement Agreement (MSA) with the major tobacco companies. Four states—Mississippi, Florida, Texas, and Minnesota—did not join the MSA, but instead settled individually with the tobacco companies. The MSA did not settle individual, union, private health care, or class action suits. Under the terms of the settlement, states will receive annual payments worth $206 billion over the next 26 years followed by unspecified subsequent payments to continue in perpetuity. Each state needed to and did obtain its trial court's approval to receive the MSA funds. The MSA also prohibited certain advertising, marketing, and promotion of tobacco products (see "Tobacco Advertising: Federal Regulations, MSA Restrictions, and Local Ordinances" below).

According to a March 2007 article by the American Bar Association Journal, of the $61 million paid to the states by tobacco companies, states had spent less than 8% on anti-smoking endeavors.[2] Government Accountability Office figures indicate that states have spent even less on tobacco control, which it defines as efforts to include prevention, education, enforcement, and cessation services.[3] States had allocated 30% of their MSA payments to health care, including Medicaid, health insurance, and hospitals; 22.9% towards budget shortfalls; 7.1% to general purposes; 6% towards infrastructure; 5.5% to education; 5.4% to debt service on securitized funds; 3.5% on tobacco control; and 7.8% to other projects.[4] The states had not allocated 11.9% of their MSA payments.[5]

[1] CRS Report R41304, *FDA Final Rule Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco*, by (name redacted) and (name redacted).

[2] Mark Curriden, *Up in Smoke*, A.B.A. Journal, March 2007, at 27.

[3] Lisa Shames, Acting Director, Natural Resources and Environment, GAO, Testimony Before the Committee on Health, Education, labor, and Pensions, U.S. Senate (February 27, 2007), *Tobacco Settlement: States' Allocations of Payments from Tobacco Companies for Fiscal Years 2000 through 2005*, at 14.

[4] Shames, *supra* note 33. Section 10908 of the Farm Security and Rural Investment Act of 2002 mandates that GAO report on "all programs and activities that States have carried out using funds received under all phases of the Master Settlement Agreement of 1997." P.L. 107-171.

[5] Shames, *supra* note 33.

As noted, the MSA grew out of lawsuits by the states seeking reimbursement for their medical expenses on behalf of tobacco users. If a third party, such as a tobacco company, causes an illness or injury to someone, and a state provides medical care for that illness or injury, as, for example, out of Medicaid funds, then the state may sue the third party for reimbursement of such funds. Because the federal government pays for at least 50% of each state's Medicaid costs, by law the federal government is entitled to its share of any reimbursements of Medicaid funds that a state receives from a third party that caused an illness or injury on which Medicaid funds were expended.[6] With respect to the MSA, however, Congress enacted P.L. 106-31 (2000), which authorizes the states to keep reimbursements they receive from third parties.[7]

The Federal Lawsuit

The federal lawsuit against major tobacco companies and industry trade groups began under the Clinton Administration in 1999 as a way for the U.S. government to recover tobacco-related medical costs paid by federal health care programs. The Department of Justice (DOJ) was seeking:

- (1) restitution for money paid by the federal government's health care programs for treatment and care of persons with tobacco-related diseases;
- (2) a disgorgement of the profits that the tobacco industry allegedly earned by violating the Racketeer Influenced and Corrupt Organizations Act (RICO); and
- (3) orders preventing fraud and future violations of the law, such as racketeering or making false, deceptive, or misleading statements about cigarettes; as well as orders that the defendants take certain actions, such as issuing corrective statements, disclosing research, and funding smoking cessation programs.[8]

Ultimately, the United States could not recover any funds from the defendants. In 2000, the U.S. District Court for the District of Columbia dismissed two claims by the government that would have provided for recovery under the Medical Care Recovery Act as well as under the Medicare Secondary Payer Act provisions of the Social Security Act.[9]

The suit then proceeded under two RICO claims, 18 U.S.C. Section 1962(c) and (d).[10] Section 1962(c) criminalizes the association of persons, including corporations, with enterprises that conduct their affairs through "a pattern of racketeering activity," which means that they commit two or more specified crimes within 10 years. Section 1962(d) outlaws conspiracies to violate Section 1962(c) or related provisions regarding racketeering activities. The government alleged that a pattern of racketeering activity existed because the defendants defrauded "individual smokers of their property (i.e., the money they spent on cigarettes)"[11] and sought disgorgement of certain profits.

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[6] 42 U.S.C. §1396b(d)(2)(B).

[7] FY1999 Emergency Supplemental Appropriations Act (P.L. 106-31), §3031.

[8] *United States v. Philip Morris Inc*., No. 99-2496, 1-2, 91-92 (D.D.C. filed February 2001) (DOJ First Amended Complaint).

[9] *U.S. v. Philip Morris*, 116 F. Supp. 2d 131 (D.D.C. Sept. 28, 2000).

[10] For additional information on RICO, see CRS Report 96-950, *RICO: A Brief Sketch*, by (name redacted).

[11] *U.S. v. Philip Morris*, 116 F. Supp. 2d 131, 153 (D.D.C. Sept. 28, 2000).

The defendants challenged the right of the government to seek disgorgement of profits. Although the district court ruled in favor of the United States, in 2004, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) reversed and ruled in favor of the defendants.[12] Thus, the court of appeals allowed only forward-looking injunctive relief. The United States could not recover the $280 billion disgorgement that had been sought for tobacco profits earned since 1971 for marketing to youth.[13] The court of appeals stated that injunctive relief under RICO[14] must focus on preventing future wrongdoing rather than on punishing past conduct. Noting that Congress explicitly crafted a set of remedial measures in the RICO statute and likely did not intend to provide other remedies, the court of appeals was "reluctant" to infer an additional remedy such as disgorgement.[15]

In August 2006, after a nine month trial, the U.S. District Court for the District of Columbia ruled that the defendants had violated RICO. The court found that the tobacco companies and trade industry organizations had conspired "to deceive the American public about the health effects of smoking and environmental tobacco smoke, the addictiveness of nicotine, the health benefits from low tar, 'light' cigarettes, and their manipulation of the design and composition of cigarettes in order to sustain nicotine addiction."[16] Although the court of appeals prevented the district court from imposing the remedy of disgorgement, the district court ordered the defendants to pay DOJ's legal costs, which totaled approximately $1.93 million.[17] The district court also enjoined the defendants from using descriptors such as low-tar, light, mild, and natural on their cigarette packaging and advertisements; ordered the defendants to place "onserts" or stickers with corrective statements on their packaging and to issue statements in newspapers and on television and retail displays;[18] and extended the length of time that tobacco companies must make documents produced in litigation available to the public, a requirement that originated in the MSA.

In March 2007, the U.S. District Court for the District of Columbia responded to a motion by certain defendants for clarification of the court's August 2006 order restricting the defendants' use of marketing descriptors such as natural and ultra light. Noting that RICO provisions have effect outside the United States if the illegal activity abroad "causes a 'substantial effect' within the United States," the court concluded that the defendants were prohibited from using such marketing descriptors and express or implied health messages internationally as well as in the United States.[19] The district court order did not take effect immediately because of the appellate court's stay and the pending appeal, discussed below.

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[12] *United States v. Philip Morris Inc*., 396 F.3d 1190 (D.C. Cir. 2004), *cert. denied* 546 U.S. 960 (2005).

[13] Anthony J. Sebok, *The Federal Government's RICO Suit Against Big Tobacco*, Findlaw.com, October 4, 2004, available at http://writ.lp.findlaw.com/sebok/20041004.html.

[14] 18 U.S.C. §1964(a).

[15] *Philip Morris*, 396 F.3d at 1200.

[16] *United States v. Philip Morris U.S.A., Inc.*, No. 99-2496, 1 (D.D.C. September 8, 2006) (amended memorandum opinion).

[17] *United States v. Philip Morris U.S.A.,* Inc., No. 99-2496 (D.D.C. filed October 2, 2006) (bill of costs).

[18] In 2012, the district court set forth the factual corrective statements that the cigarette companies must publish and include in onserts. *United States v. Philip Morris*, 2012 U.S. Dist. LEXIS 168107 (D.D.C. November 27, 2012).

[19] *United States v. Philip Morris U.S.A., Inc.*, No. 99-2496, 6, 8 (D.D.C. March 16, 2007) (memorandum opinion accompanying Order #1028). Several countries, including Australia, Brazil, and European Union members, currently prohibit marketing descriptors such as light and low-tar. *See* Judge Extends 'Light' Cigarette Ban Overseas, CNNMoney.com, March 16, 2007.

Both the tobacco companies and the DOJ filed notices of appeal with the D.C. Circuit.[20] On May 22, 2009, the court of appeals issued its decision largely upholding the district court's finding of liability against the nine cigarette manufacturers.[21] The appeals court also upheld the district court's remedial order that had imposed the numerous affirmative and negative duties on the defendants while denying the government's proposed remedy of a counter-marketing campaign, smoking cessation program, youth smoking reduction program, and monitoring scheme.[22] Furthermore, the appeals court rejected the government's request to seize billions of dollars in corporate profit from companies that include Altria Group, R.J. Reynolds, and Brown & Williamson. The court of appeals also partly vacated the district court's remedial order and remanded for further proceedings on four discrete issues. These included vacating the remedial order with respect to the prohibition on health messages or descriptors and ordering the district court "to reformulate [its] injunction so as to exempt foreign activities that have no substantial, direct, and foreseeable domestic effects."[23] It remains to be seen how this order will affect the district court's earlier March 2007 decision that the provisions in the remedial order that prohibit defendants from using express or implied health messages apply to the defendants' actions taken outside the United States.

Selected Private Party Suits

Prior to 1992, tobacco lawsuits were typically individual product liability and negligence suits brought by smokers or their relatives seeking damages for smoking-related illnesses. The tobacco industry generally prevailed in these cases by arguing that the Federal Cigarette Labeling and Advertising Act (FCLAA),[24] which requires warning labels, preempted plaintiffs' claims that the tobacco companies had a duty to warn consumers.[25] In some cases, however, tobacco manufacturers prevailed by arguing that smokers assumed the risks of smoking.[26] Then, in 1992, in *Cipollone v. Liggett Group, Inc.*,[27] the U.S. Supreme Court made it more feasible for smokers to recover. Although the Court held that federal laws requiring warning labels[28] precluded states from imposing additional requirements or prohibitions on cigarette advertising and labeling, and therefore precluded lawsuits alleging that the federally required warning labels were inadequate, the Court stated that federal law did not preclude "state-law damages actions." Examples of state-law damages actions include failure-to-warn lawsuits based on tobacco companies' "testing or

[20] *United States v. Philip Morris U.S.A., Inc.*, No. 99-2496 (D.D.C. September 11, 2006) (Philip Morris U.S.A. Inc., Altria Group, Inc., British American Tobacco Ltd., R.J. Reynolds Tobacco Co., Brown & Williamson Corp., and Lorillard Tobacco Co. Notices of Appeal); *United States v. Philip Morris U.S.A., Inc.*, No. 99-2496 (D.D.C. October 16, 2006) (DOJ Notice of Appeal).

[21] The appeals court dismissed the two trade associations that were defendants in the case. See *D.C. Circuit Upholds Landmark RICO Case Against Big Tobacco*, National Law Journal, May 26, 2009.

[22] *United States v. Philip Morris U.S.A., Inc.*, 566 F.3d 1095 (D.C. Cir. May 22, 2009), cert. denied, 130 S. Ct. 3501 (2010).

[23] *Id*. at 1150.

[24] 15 U.S.C. §1331-41.

[25] *See, e.g.*, *Pennington v. Vistron Corp.*, 876 F.2d 414 (5th Cir. 1989); *Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 660 (Minn. 1989).

[26] *See* Brief for Petitioner at 13-14, n.3, *Philip Morris U.S.A., Inc. v. Williams*, 549 U.S. 346 (2007)(and cases cited therein).

[27] 505 U.S. 504 (1992).

[28] 15 U.S.C. §§1331-41, 4402.

research practices or other actions unrelated to advertising or promotion," or claims of breach of express warranty, fraudulent representation, and conspiracy.[29]

This section now examines selected suits brought by private parties after *Cipollone*. In addition to the class action and individual suits discussed below, tobacco companies have been sued by their own shareholders for decreased stock prices due to deceptive practices, and by insurance companies for medical expenses resulting from fraud, conspiracy, racketeering, misrepresentation, and antitrust violations. Cigarette manufacturers have also been sued under legal theories that include negligence, strict liability, defective design, public nuisance, antitrust laws, and unfair trade practices.

Caronia v. Philip Morris

Long-term cigarette smokers filed a class action suit, *Caronia v. Philip Morris U.S.A., Inc.*, seeking to have the manufacturer provide low dose computed tomography (CT) scans for lung cancer on an annual basis or more frequently if the scan shows signs of cancer.[30] The plaintiffs alleged that Philip Morris's "wrongful design, manufacturing, and marketing" placed them at a higher risk for lung cancer.[31] Essentially, the plaintiffs were trying to hold Philip Morris liable for not producing a safer cigarette.

The federal district court dismissed the plaintiffs' defective design claims.[32] In a separate order after additional briefing, the court granted Philip Morris's motion to dismiss. Even though the court held that New York would likely recognize a cause of action for medical monitoring, the plaintiffs had not alleged that absent Philip Morris's failure to produce a safer cigarette they would not face an increased need for medical screening[33]—even if Philip Morris had made a safer cigarette, the plaintiffs would still face an increased risk for lung cancer and an increased need for medical screening due to smoking. The court granted Philip Morris's motion for summary judgment on the implied warranty claim, finding that there was no breach of the warranty that the cigarettes were suitable for their foreseeable use.[34]

Schwab v. Philip Morris

In the federal class action lawsuit *Schwab v. Philip Morris U.S.A., Inc.*, lead plaintiff Barbara Schwab sued six tobacco companies in the U.S. District Court for the Eastern District of New York, alleging that the tobacco industry committed fraud and misled customers by marketing light cigarettes as less dangerous than regular cigarettes.[35] The *Schwab* case became the first light cigarettes, or "lights," case to receive class certification from any federal court. The district court

[29] *Cipollone,* 505 U.S. at 524-25, 530-31.

[30] *Caronia v. Philip Morris U.S.A., Inc.,* No. 06-224 (E.D.N.Y. January 19, 2006).

[31] Sean Wajert, *Medical Monitoring Claim Pursued in New York State*, Washington Legal Foundation Legal Opinion Letter, Vol. 16, No. 15 (June 2, 2006).

[32] *Caronia v. Philip Morris U.S.A., Inc*., 2010 Dist. LEXIS 12168, 26 (E.D.N.Y. Feb. 10, 2010).

[33] *Caronia v. Philip Morris*, 2011 U.S. Dist. LEXIS 12610 (E.D.N.Y. January 13, 2011).

[34] *Id.*

[35] *Schwab v. Philip Morris U.S.A., Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y. Sept. 25, 2006). The defendant tobacco companies in the *Schwab* case are R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., British American Tobacco Ltd., Lorillard Tobacco Co., Liggett Group Inc., and Philip Morris U.S.A., Inc.

found that the MSA did not preclude the suit because, in the MSA, the states, not individual smokers, were compensated. On appeal, the U.S. Court of Appeals for the Second Circuit decertified the class action lawsuit, finding that the "class action suffers from an insurmountable deficit of collective legal or factual questions" and therefore did not meet a requirement under Rule 23 of the Federal Rules of Civil Procedure that "questions of law or fact common to class members predominate over any questions affecting only individual members."[36]

Engle v. Liggett Group, Inc.

In most states, courts reportedly have denied class action status to plaintiffs for private lawsuits against tobacco companies.[37] However, in Florida, the Circuit Court of Miami-Dade County granted class action status in *Engle v. Liggett Group*.[38] In *Engle*, a jury awarded $145 billion in punitive damages against tobacco companies and industry trade groups. After the jury verdict, however, Florida's Third District Court of Appeal decertified the class of up to 700,000 Florida smokers.[39] On December 21, 2006, the Florida Supreme Court upheld the decision to decertify the class.[40] The court stated that causation and the proportion of the defendants' fault were too individualized to be litigated as a class action suit.[41] Such issues included whether cigarettes, or some other factor, caused the plaintiffs' illnesses, and the percentage of fault that should be attributed to each defendant tobacco company if a plaintiff smoked multiple brands. The court did uphold smaller individual damage awards of $2,850,000 and $4,023,000 for two Florida cancer patients. The U.S. Supreme Court denied certiorari in the *Engle* case.[42]

The Florida Supreme Court decision did not prevent individual smokers (or families of deceased smokers) from filing individual lawsuits instead of a class action. The court's opinion upheld most of the jury's findings that cigarettes are addictive, defective, and unreasonably dangerous products that cause diseases.[43] This aspect of the court's decision will give plaintiffs a significant advantage in any individual lawsuits against the same defendants because, under the doctrine of collateral estoppel, the individuals will not have to prove these findings again—that cigarettes are addictive, defective, and unreasonably dangerous.[44] According to one tobacco company's filing with the Securities and Exchange Commission, "[a]s of April 11, 2008, RJR Tobacco had been served in 1,931 *Engle* Progeny Cases in both state and federal courts in Florida. These cases include approximately 8,178 plaintiffs."[45] The company also stated that "[t]he number of cases will increase due to a delay in the processing of cases in the Florida court system."[46] Other

[36] *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 219, 222 (2d Cir. 2008).

[37] Anthony Sebok, *The Federal Government's RICO Suit Against Big Tobacco*, Findlaw.com, October 4, 2004, available at http://writ.lp.findlaw.com/sebok/20041004.html.

[38] *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 440 (Fla. Dist. Ct. App. 2003).

[39] *Id*.

[40] *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

[41] *Engle*, 945 So. 2d at 1265.

[42] *R.J. Reynolds Tobacco Co. v. Engle*, 128 S. Ct. 96 (2007).

[43] *Engle*, 2006 Fla. LEXIS 1480, at *7-*8.

[44] See, Brown v. R.J. Reynolds Tobacco Co., 611 F.3d 1324 (11th Cir. 2010).

[45] Reynolds American, Inc., Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the quarterly period ended March 31, 2008, at 18 http://reynoldsamerican-inc.com/common/ViewPDFDisclaimer.aspx?postID=1275&disclaimer=10q.

[46] *Id.*

sources have reported that as of 2010 "4000 related cases have been filed and are awaiting trial in Florida."[47]

Post-*Engle*, there have been mixed results in the individual suits. In one of the first suits, a Fort Lauderdale jury awarded a widow $8 million in damages against Altria, the parent company of Philip Morris. Additionally, a Fort Lauderdale jury awarded a plaintiff nearly $300 million in damages in a September 2008 case.[48] Subsequently, however, a state jury in St. Petersburg, FL, delivered a verdict in favor of R.J. Reynolds, where the plaintiff was also a widow of a smoker who died of lung cancer.[49] Although juries had returned verdicts favorable to plaintiffs initially in post-*Engle* cases, tobacco defendants received a string of victories later.[50]

Price v. Philip Morris

On December 15, 2005, the Supreme Court of Illinois overturned a verdict of $7.1 billion in compensatory damages and $3 billion in punitive damages in the consumer-fraud and deceptive trade practices class action of *Price v. Philip Morris U.S.A., Inc.*[51] An Illinois circuit court had certified a class that consisted of 1.14 million plaintiffs who bought Cambridge Lights cigarettes and Marlboro Lights cigarettes in Illinois from the time that the cigarettes were first placed on the market until February 2001. The plaintiffs alleged that tobacco companies committed fraud by advertising light cigarettes as having lower tar and nicotine levels and leading consumers to think that such cigarettes were safer to smoke than full flavor cigarettes.[52] The Illinois Supreme Court ruled against the plaintiffs and held that the Federal Trade Commission (FTC) had authorized light and low tar labeling and therefore that Philip Morris U.S.A., Inc. could not be held liable as long as the company complied with FTC requirements, even if the terms were false or misleading. The U.S. Supreme Court denied certiorari on November 27, 2006.[53]

Since this decision, the Supreme Court decided *Altria Group, Inc. v. Good*.[54] In this case, the Court addressed whether the Federal Cigarette Labeling and Advertising Act (FCLAA) preempted a state law claim that Philip Morris USA (PMUSA) and its parent company Altria Group violated the Maine Unfair Trade Practices Act (MUTPA) by using "light" and "low tar"

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[47] *Legal Update*, Tobacco Control Legal Consortium (Fall 2010).

[48] Naugle v. Philip Morris U.S.A., Inc., NO. 07-036736 (Fla. Cir. Ct., Sept. 2, 2008).

[49] Alison Frankel, *Third Time's a Charm for Defense in Florida Smoker Suits*, American Lawyer.com, March 27, 2009.

[50] *Legal Update*, Tobacco Control Legal Consortium (Fall 2010).

[51] 2005 Ill. LEXIS 2071 (Ill. 2005). The Illinois Supreme Court denied the class's motion for rehearing on May 5, 2006.

[52] Melanie Warner, *Big Award on Tobacco is Rejected by Court*, N.Y. Times, July 7, 2006, at C1.

[53] The United States submitted an amicus brief in a separate U.S. Supreme Court case, *Watson v. Philip Morris U.S.A., Inc.*, which argued that "the FTC has never adopted any official regulatory definitions of the terms 'light,' or 'low tar'; and ... the FTC has neither requested nor required tobacco companies to describe or advertise their cigarettes using those or any other descriptors." Brief for the United States as Amicus Curiae, *Watson v. Philip Morris Companies, Inc.*, 551 U.S. 142 (2007) (No. 05-1284), 2005 U.S. Briefs 1284, at *21. After this submission was made, an Illinois circuit court judge questioned whether he would have jurisdiction to hear a post-judgment motion seeking to "vacate or withhold final judgment" in the *Price* case due to the federal government's position in its *Watson* amicus brief. The Illinois Supreme Court instructed the judge "to enter an order dismissing plaintiffs' motion." *Philip Morris USA, Inc. v. Bryon*, 876 N.E.2d 645 (Ill. 2007).

[54] 555 U.S. 70 (2008). For an examination of this case, see CRS Report R40639, *The Federal Cigarette Labeling and Advertising Act and Preemption Revisited: An Analysis of the Supreme Court Case Altria Group, Inc. v. Good and Current Legislation*, by (name redacted).

descriptors on cigarettes, thereby delivering the message that light cigarettes deliver less tar and nicotine to consumers than regular brands, while knowing such message to be untrue. The Court held that the plaintiffs' claims were not expressly preempted by the FCLAA because their claims under the MUTPA are predicated on the general duty not to deceive. The Court further rejected PMUSA's argument that the state law claims were impliedly preempted because of its contention that the FTC has for decades promoted the development and consumption of low-tar cigarettes, encouraged consumers to rely on representations of tar and nicotine content in choosing among cigarette brands, and authorized the use of such descriptors. In holding that the FCLAA neither expressly nor impliedly preempted the plaintiffs' claims, the Court's decision appears to allow other state law claims of fraud based on the use of descriptors such as "light" and "low tar" to go forward.[55]

California Cases

In August 2002, the California Supreme Court enabled individuals to sue tobacco companies by holding that a statute[56] granting tobacco manufacturers immunity from products liability suits applied only from the date of the statute's enactment on January 1, 1988, until the statute's repeal effective January 1, 1998. The court found that general tort principles applied to conduct before and after the 10-year immunity period.[57] In a separate case decided on the same day, the court also found that the immunity statute did not prohibit lawsuits alleging that tobacco additives create an unreasonably dangerous product "that exposed smokers to dangers beyond those commonly known to be associated with cigarette smoking."[58]

In a subsequent ruling, *Grisham v. Philip Morris*, the California Supreme Court held that the state's two year statute of limitations for filing a physical injury claim starts to run after a "smoker is diagnosed with a disease caused by the cigarettes."[59] The ruling did not address whether the statute of limitations would have run if an individual was diagnosed with more than one illness, "[f]or example, if a smoker were diagnosed with emphysema five years ago and then lung cancer last month—but only files suit after the lung cancer diagnosis—the statute of limitations may have run."[60] Defendant tobacco companies had argued that the statute of limitations should begin when smokers discover they are addicted to cigarettes.[61]

Foreign Suits in U.S. Federal Courts

The governments of Guatemala, Nicaragua, and Ukraine sued major American tobacco companies in the U.S. District Court for the District of Columbia for money they had spent on medical care for their citizens' tobacco-related illnesses. The government of Guatemala, for

[55] *See, e.g.*, *Holmes v. Philip Morris USA*, 2009 Del. Super. LEXIS 467 (December 4, 2009); *Aspinall v. Phillip Morris USA*, 453 Mass. 431 (2009).

[56] Cal. Civ. Code §1714.45, *repealed by* 1997 Cal. Stat. ch. 570, §1.

[57] *Myers v. Philip Morris Cos., Inc.*, 28 Cal. 4th 828 (Cal. 2002).

[58] *Naegele v. R.J. Reynolds Tobacco Co.*, 28 Cal. 4th 856 (Cal. 2002).

[59] Millie Lapidario, *Tobacco Claims Will Start Smoking Again, Thanks to Calif. Ruling*, The Recorder, February 20, 2007.

[60] *Id.*

[61] *Id.*

example, alleged that the tobacco companies misrepresented the dangers of cigarette smoking, and as a result, the Guatemalan government waited before making efforts to shrink its smoking population.[62] Reasoning that "the injury that [the nations] purportedly suffered occurred only as a consequence of the harm to individual smokers," the district court dismissed the lawsuit.[63]

The U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal, noting that it concurred with seven circuits "that the alleged injuries of the third-party payors are too remote to have been proximately caused by the defendants' alleged conduct."[64] The court also held that the foreign governments did not have standing "unless there is a clear indication by the Supreme Court or one of the two coordinate branches of government to grant such standing" to foreign nations to sue in the United States on behalf of their foreign citizens.[65] The foreign governments had argued that they were suing on behalf of their people and were "seeking to protect their governments' treasuries."[66] On October 29, 2001, the U.S. Supreme Court denied certiorari.

Tobacco Advertising: Federal Regulations, MSA Restrictions, and Local Ordinances[67]

The Federal Cigarette Labeling and Advertising Act (FCLAA) limits advertising of tobacco products.[68] The act prevents advertising of cigarettes, little cigars, and smokeless tobacco[69] via electronic communications under the jurisdiction of the Federal Communication Commission, such as radio and wire communications, as well as broadcast, satellite, and cable television. In combination with other federal statutes, the act requires health warning labels on cigarette and smokeless tobacco packaging, as well as on all cigarette and most smokeless tobacco advertisements.[70] The health warnings must be rotated several times per year according to a manufacturer-submitted plan approved by the Federal Trade Commission.[71] Because of the FCLAA's preemption provision, states cannot impose their own health warning labels on cigarettes.[72]

The FCLAA's preemption provisions do not apply to the MSA because the states and tobacco manufacturers voluntarily agreed to waive "any and all claims that the provisions of this

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[62] Saundra Torry, *Cigarette Firms Sued by Foreign Governments*, Wash. Post, January 17, 1999, at A12.

[63] *Guatemala v. Tobacco Inst., Inc.,* 83 F. Supp. 2d 125, 129 (D.D.C. 1999).

[64] *Guatemala v. Tobacco Inst., Inc.,* 249 F. 3d 1068, 1069 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 994 (2001).

[65] *Id.* at 1073.

[66] *See id.* at 1072.

[67] For information on federal advertising laws related to alcohol, tobacco, mail (including junk mail), telephone, commercial email (spam), and the Federal Trade Commission Act, see CRS Report RL32177, *Federal Advertising Law: An Overview*. For a discussion of the First Amendment issues concerning cigarette advertising and the FSPCTA see CRS Report R41304, *FDA Final Rule Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco*, by (name redacted) and (name redacted).

[68] 15 U.S.C. §1331-41.

[69] Cigars are not subjected to similar advertising and warning restrictions.

[70] 15 U.S.C. §§1331-41, 4402. Federal law does not require warning labels on outdoor billboards that advertise smokeless tobacco. 15 U.S.C. §4402(a)(2).

[71] 15 U.S.C. §§1333(c)(1), 4402(c); 16 C.F.R. Part 307.

[72] 15 U.S.C. §1334(b); Cipollone v. Liggett Group Inc., 505 U.S. 504 (1992).

Agreement violate the state or federal constitutions."[73] The MSA restricted tobacco advertising in several ways, although it did not restrict certain forms of advertising, such as print and online advertisements or marketing inside retail locations. The MSA banned cartoons; tobacco advertising on public transportation; sponsorship of certain team and league sports; stadium naming rights; gifts to minors of non-tobacco merchandise in exchange for proofs of purchase of tobacco products; free samples of tobacco products in places other than adult-only facilities; signs outside stores larger than 14 square feet; and billboards in arenas, stadiums, malls, and arcades. However, the MSA allows advertisements that are located within and not visible outside of adult-only facilities.[74] Within MSA limitations, tobacco companies may still sponsor certain musical, sporting, and cultural events. The MSA also bans the sale and distribution of merchandise with tobacco product brand names, except for at brand-name sponsored events. The MSA prohibits payments to the media for the promotion, mention, or use of tobacco products, except for adult-only media. Moreover, the MSA prohibits tobacco companies from targeting or promoting tobacco to minors.[75]

Though states' attorneys general signed, and trial courts ratified the MSA, several states and cities created additional restrictions on tobacco advertising. For example, Baltimore passed ordinances prohibiting tobacco and alcohol advertisements on billboards, except for commercial and industrial zones of the city. The U.S. Court of Appeals for the Fourth Circuit upheld Baltimore's ordinances in two cases,[76] finding that they do not violate the First Amendment.[77]

In 1999, the Massachusetts Attorney General promulgated advertising restrictions—on cigarettes, smokeless tobacco, little cigars, and cigars—that he intended to fill the gaps left by the MSA. The regulations prohibited all sizes of outdoor tobacco advertisements within 1,000 feet of playgrounds, schools, and parks, including advertisements located within a store that were visible from the outside of that store. The rules also imposed a similar 1,000-foot state ban on point-of-sale retail displays if the displays were less than five feet tall and located in stores accessible to youth.[78] Additionally, the attorney general restricted tobacco promotions, samples, and cigar labels; banned self-service displays; and required customers to have contact with a sales person before handling or purchasing tobacco products.[79] In 2001, however, the U.S. Supreme Court held in *Lorillard Tobacco Co. v. Reilly* that the FCLAA preempted Massachusetts's outdoor advertising and point-of-sale restrictions for cigarettes, because the FCLAA preempts state regulations of cigarette advertising and promotion.[80] Therefore, the Court struck down that portion of the regulations. The Court noted, however, that the FCLAA preemption provisions do not apply to smokeless tobacco or cigars, or restrictions on cigarette sales.[81]

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[73] Master Settlement Agreement, at 99, available at http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf.

[74] Master Settlement Agreement, p. 18.

[75] *Id.* at 14-21.

[76] *Penn Advertising of Baltimore, Inc. v. Schmoke*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997); *Anheuser-Busch v. Schmoke*, 101 F.3d 325 (4th Cir. 1996), *cert. denied*, 520 U.S. 1204 (1997).

[77] For further information on First Amendment issues raised by advertising laws, see CRS Report 95-815, *Freedom of Speech and Press: Exceptions to the First Amendment*, by (name redacted).

[78] Mass. Regs. Code tit. 940, §§21.04, 22.06.

[79] *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 534-36 (2001).

[80] *Id.* at 551-52.

[81] *Id.* at 553.

After determining that the restrictions on smokeless tobacco and cigars were not preempted by the FCLAA, the Court had to reach the issue of whether Massachusetts's outdoor and point-of-sale advertising regulations violated the First Amendment, which guarantees freedom of speech.[82] Though Massachusetts had a compelling interest in protecting youth from tobacco products, the Court found that the restrictions on outdoor advertising of cigars and smokeless tobacco were overbroad in that they prohibited advertising "in a substantial portion of the major metropolitan areas of Massachusetts," included oral communications, and imposed burdens on retailers with limited advertising budgets.[83] The Court also upheld challenges by smokeless tobacco and cigar companies to the outdoor advertising restrictions on the grounds that adults have a right to information and the tobacco industry has a right to communicate truthful speech on legal products.[84] The Justices then struck down the similar 1,000-foot state ban on point-of-sale retail displays for cigars and smokeless tobacco under five feet tall in stores accessible to youth. They noted that the prohibition did not advance the goal of preventing minors from using tobacco products because some children are taller than five feet and others can look up at their surroundings.[85] According to one source, at least 20 state and local laws have been repealed as a result of *Lorillard*.[86]

Finally, as to the question of Massachusetts's regulation of cigarette, smokeless tobacco, and cigar sales, the petitioners did not argue that the FCLAA preempted Massachusetts law.[87] As a result, the Court evaluated arguments from cigarette, smokeless tobacco, and cigar petitioners that certain sales restrictions violated the First Amendment. The Court upheld restrictions banning self-service displays and requiring customers to have contact with a sales person before handling or purchasing tobacco products.[88] According to the Justices, the state had a substantial interest in preventing minors from accessing tobacco products, and the regulation was narrowly tailored so as not to significantly affect adult access to tobacco products.[89]

Restrictions on Selling and Distributing to Minors

All 50 states ban tobacco sales to individuals under age 18, and federal law plays a role in this restriction.[90] The Public Health Service Act authorizes the Secretary of Health and Human Services (HHS) to "make an allotment each fiscal year for each state" to be used for "activities to

[82] The First Amendment applies to advertising, but the U.S. Supreme Court has held that it "affords a lesser protection to commercial speech than to other constitutionally guaranteed expression" and analyzes commercial speech differently from other forms of expression. United States v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993); *see* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (four-part test for commercial speech analysis).

[83] *Lorillard*, 533 U.S. at 562, 564-65.

[84] *Id.* at 564. Additionally, the Court reasoned that the attorney general's restriction on in-store advertising that can be viewed from the outside "presents problems in establishments like convenience stores, which have unique security concerns." *Id.* at 565.

[85] *Id.* at 566.

[86] David L. Hudson Jr., *Tobacco Ads*, First Amendment Center. Available at http://www.firstamendmentcenter.org/speech/advertising/topic.aspx?topic=tobacco_alcohol.

[87] *Lorillard*, 533 U.S. at 566.

[88] *Id.* at 567.

[89] *Id.* at 569.

[90] Barnaby J. Feder, *U.S. Imposes Rules on Tobacco Sales to Minors*, NY Times, January 19, 1996.

prevent and treat substance abuse."[91] Under a 1992 amendment to this statute, sponsored by Representative Michael Synar and known as the "Synar Amendment," the Secretary may make such grants "only if the State has in effect a law providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute such product to any individual under the age of 18."[92]

Under the Synar Amendment, states must enforce their bans through annual random, unannounced inspections.[93] If a state fails to comply with the federal enforcement provisions and reporting requirements on its enforcement activities, the federal government may reduce that state's federal funding for substance abuse treatment.[94] According to the HHS regulations, the goal of the Synar Amendment's random inspections requirement is to achieve 80% or higher compliance with laws prohibiting tobacco sales and the distribution of tobacco products to individuals under 18.[95]

In 2008, the Supreme Court decided *Rowe v. New Hampshire Motor Transport Association*, where it held that two Maine laws aimed at restricting minors' access to cigarettes through the internet were preempted by the Federal Aviation Administration Authorization Act of 1994 (FAAA).[96] The FAAA prohibited states from "enact[ing] or enforc[ing] a law ... related to a price, route, or service of any motor carrier ... with respect to the transportation of property." In 2003, Maine passed two laws that instituted requirements for shipping and delivery sales of tobacco products that attempted to end sales to minors. Violators of either provision could receive civil penalties.[97]

The first provision required tobacco retailers to use delivery services that verify that, if the purchaser of the tobacco products was under 27 years old, the purchaser had a valid government photo identification that indicated the purchaser was of legal age to buy tobacco products.[98] That provision also required the purchaser to be the addressee and to sign for the products. The second provision provided that a person was "deemed to know" that a shipment contained tobacco products if the package was marked on the outside by a tobacco retailer (1) "to indicate that the contents are tobacco products" and (2) with the retailer's name and Maine tobacco license number.[99] A person, such as a delivery service, was also "deemed to know" that the package contained tobacco if it came "from a person listed as an unlicensed tobacco retailer."[100] In other words, as the Supreme Court stated, the second provision "imposes civil liability upon the carrier, not simply for its knowing transport of (unlicensed) tobacco, but for the carrier's *failure*

[91] 42 U.S.C. §300x-21.

[92] 42 U.S.C. §300x-26(a)(1). The Synar Amendment was enacted as §1926 of the Alcohol, Drug Abuse, and Mental Health Administration Reorganization Act, P.L. 102-321 (1992).

[93] 42 U.S.C. §300x-26(b)(2)(A).

[94] *Id.* at §300x-26(c).

[95] 45 C.F.R. §96-130(g).

[96] 552 U.S. 364, 128 S. Ct. 989 (2008). For additional information on this case, see CRS Report RS22938, *Rowe v. New Hampshire Motor Transport Association: Federal Preemption of State Tobacco Shipment Laws*.

[97] *Rowe*, 128 S. Ct. at 994.

[98] Me. Rev. Stat. Ann. tit. 22, §§1555-C(3)(C).

[99] Me. Rev. Stat. Ann. tit. 22, §1555-C(3)(B); Me. Rev. Stat. Ann. tit. 22, §1555-D.

[100] Me. Rev. Stat. Ann. tit. 22, §1555-D.

sufficiently to examine every package."[101] The state argued that such laws helped the state to stop minors from gaining access to cigarettes.

In finding that the FAAA preempted Maine's mail-order tobacco product delivery laws, the Court noted that Maine's laws had a "significant impact" on carrier rates, routes, or services. The Court reasoned that Maine's laws had the effect of substituting "government commands for 'competitive market forces' in determining ... the services that motor carriers will provide."[102] The Court also found that Maine's laws would be preempted regardless of whether, as Maine alleged, the overturning of Maine's laws would hurt its efforts to stop underage smoking.[103] Justice Ginsburg's concurrence stated that a "large regulatory gap [was] left by an application of the FAAA['s] preemption provision, which affected state enforcement strategies to prevent tobacco sales to minors."[104]

The 2009 FSPTCA, however, ensures that the FDA will become much more involved in stopping minors from obtaining tobacco products. Under the act, the FDA has reissued its 1996 regulation which, among other restrictions, prohibits the sale of cigarettes or smokeless tobacco to persons under 18, requires that retailers check photo ID to verify the age of purchasers under the age of 27, and prohibits tobacco-product vending machines except in adult-only facilities.[105]

Modified Risk and Artificial or Natural Flavor Cigarettes

The cigarette industry has historically used a test methodology initially set forth by the Federal Trade Commission (FTC) in 1967 to determine tar and nicotine ratings of cigarettes.[106] This method, which relies on the use of a machine "to produce uniform, standardized data about the tar and nicotine yields of mainstream cigarette smoke," is known as the FTC Test Method or the Cambridge Filter Method.[107] In 1966, the FTC issued a guidance document that informed major cigarette manufacturers that factual statements of tar and nicotine content would be permitted if they were based on the FTC Method.[108] In litigation regarding light and low-tar cigarettes, tobacco manufacturers often reference this guidance document as well as other actions of the FTC as evidence that the FTC authorized the use of descriptors such as "light" or "lower tar and

[101] *Rowe*, 128 S. Ct. at 996.

[102] *Id.* at 995.

[103] *Id.* at 996-98.

[104] *Id*. at 998 (Ginsburg, J. concurring).

[105] 21 U.S.C. §387a-1; 21 C.F.R. Part 1140.

[106] Press Release, Federal Trade Commission, *FTC to Begin Cigarette Testing*, August 1, 1967, available at http://www.philipmorrisusa.com/en/cms/Products/Cigarettes/Tar_Nicotine/ftc_1967_press_release.aspx. Prior to the use of the FTC Method, cigarette manufacturers used different testing methods to determine tar and nicotine yields, "making cross-brand comparison unreliable." *Price v. Philip Morris, Inc.*, 848 N.E.2d 1 (Ill. 2005); 2005 Ill. LEXIS 2071, at *4. In 1955 the FTC allowed industry manufacturers to make such claims "only if they could substantiate their claims by 'competent scientific proof.'" *Id*. at *3.

[107] *Accuracy of the FTC Tar and Nicotine Cigarette Rating System Before the Senate Comm. on Commerce, Science, and Transportation*, 110th Cong. (November 13, 2007) (statement of William E. Kovacic, FTC Commissioner).

[108] FTC Rescinds Guidance from 1966 on Statements Concerning Tar and Nicotine Yields, Press Release, November 26, 2008, available at http://www.ftc.gov/opa/2008/11/cigarettetesting.shtm.

nicotine," and that because of this, they cannot be held liable for any misleading or deceptive practices.[109]

On December 8, 2008, the FTC published a notice that it had rescinded the 1966 guidance document. It stated that the scientific consensus is that "machine-based measurements of tar and nicotine yields using the Cambridge Filter Method 'do not offer smokers meaningful information on the amount of tar and nicotine they will receive from a cigarette, or on the relative amounts of tar and nicotine exposure they are likely to receive from smoking different brands of cigarettes.'"[110] In its notice of rescission, the FTC declared that although cigarette manufacturers have adopted descriptive terms such as "light" and "ultra low," the Commission "has neither defined those terms, nor provided guidance or authorization as to use of the descriptors."[111] The Commission declined to initiate a proceeding to ban all use of descriptors because the district court had entered an order requiring tobacco manufacturers to do so in the government's RICO lawsuit against tobacco companies (*United States v. Philip Morris*). Furthermore, the Commission indicated that any continued use of descriptors or reference to the testing method would be subject to the FTC Act's prohibition against deceptive acts or practices.

The FDA, however, has issued new regulations for the testing, reporting, and public disclosure of tobacco product ingredients and smoke constituents, including tar and nicotine levels, to replace the FTC method.[112] The FSPTCA specifically prohibits manufacturers from marketing "modified risk tobacco products" (MRTP) without prior FDA approval. MRTP's are defined as any product whose labeling or advertising explicitly or implicitly suggests that the product is less risky than other tobacco products, whose manufacturer has taken any action that "would be reasonably expected to result in consumers believing" that the product reduces risk, or whose labeling or advertising uses descriptors such as "light," "mild," or "low" to characterize the level of a substance in the product.[113] The FSPTCA also specifies that all manufacturers must cease using terms such as "light" and "low-tar" to describe their low-yield brands.[114] As mentioned previously, the MRTP provisions of the act were upheld by a federal district court in *Commonwealth Brands v. U.S.*

The FSPTCA also prohibits the use of any additive, with the exception of menthol, that acts as a "characterizing flavor" of the cigarette or its smoke.[115] This provision acts as a prohibition on all artificial and natural flavors in cigarettes with an exception for menthol flavorings.[116]

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[109] *See, e.g., Watson v. Philip Morris U.S.A., Inc.*, 551 U.S. 142 (2007); *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008).

[110] 73 Fed. Reg. 74501 (December 8, 2008).

[111] *Id*. at 74504.

[112] 21 U.S.C. §387d; 21 C.F.R. Part 1140.

[113] 21 U.S.C. §387k(b)(2)(A).

[114] *Id*.

[115] 21 U.S.C. §387g(a)(1)(A).

[116] *Id*. ("Beginning 3 months after June 22, 2009, a cigarette or any of its component parts (including the tobacco, filter, or paper) shall not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco or menthol) or an herb or spice … that is a characterizing flavor of the tobacco product or tobacco smoke.)

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

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(name redacted), former Legislative Attorney, was the initial author of this report, and (name redacted), Legislative Attorney, authored a previous update.

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