NLWJC - Kagan

DPC - Box 045 - Folder 003

Tobaco-Settlement: Federal Costs

06/01/98 MON 15:22 FAX

Tob-nat-federal 001
costs

Bruce / Cynthia / Cynthia —

It appears that Sen. Graham has asked DOT for its opinion of tort legislation making it easier for the federal gov't to sue tobacco companies. I can't see why we should release the analysis now — I'd rather just ignore this issue for the time being....

Cynthia - could you check w/ Tim & see what DOT has promised Graham and whether we can keep this in our back pocket?

Elena

OFFICE OF THE ATTORNEY GENERAL

FACSIMILE TRANSMITTAL COVER SHEET

DATE: 6 / 1 / 98

TO: Elena Kagan

FACSIMILE NO. 456-2878

TELEPHONE NO. 456-5584

FROM: Sam Ferrelli

FACSIMILE NO. 616-5117

TELEPHONE NO. 514-2267

NUMBER OF PAGES INCLUDING COVER SHEET 22

COMMENTS: Here is the Graham legislation & the Constitutional discussion

Sam

105th CONGRESS, 2D SESSION

S._____

_____

IN THE SENATE OF THE UNITED STATES

Mr. _____ introduced the following bill; which was read twice and referred to the Committee on _____

A BILL

To provide jurisdiction for the Attorney General of the United States to bring civil actions against tobacco companies for recovery of certain costs incurred by federal health programs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Section 1 Short Title

This Act may be cited as the "Tobacco Health Care Expenses Recovery Act."

Sec. 2 Findings

Congress makes the following findings:

(1) The sale, distribution, marketing, advertising, and use of tobacco products are activities in, and substantially affecting, interstate commerce and as such, have a substantial effect on the economy of the United States.

**** Draft 5/3/98 ****

(2) The sale, distribution, marketing, advertising, and use of tobacco products are activities in, and which substantially affect, interstate commerce by virtue of the health care-related and other costs that Federal and State governmental authorities have incurred because of the usage of tobacco products.

(3) There is a consensus within the scientific and medical communities that tobacco products are inherently dangerous and cause cancer, heart disease, and other serious adverse health effects.

(4) Illnesses and diseases that result from the use of tobacco products cost the Federal Government health care programs billions of dollars annually.

Sec. 3. Substantive Provisions

Title 28 is hereby amended by adding a new section following Section 1345 as follows:

"§ 1345a Tobacco Liability

(a) Definitions

For purposes of this section —

(1) CAUSED BY — The term "caused by" means that a tobacco product or products were a substantial factor in bringing about the harm suffered by an injured person.

(2) FEDERAL HEALTH PROGRAM — The term "Federal Health Program" means —

(A) the medicare program under title XVIII of the Social Security Act (42 U.S.C. § 1395 et seq.);

(B) the medicaid program under title XIX of the Social Security Act (42 U.S.C. § 1396 et seq.);

(C) any program administered by the Department of Veterans Affairs that provides, pays for, or provides reimbursement for health care items or services;

(D) any program under chapter 55 of title 10, United States Code;

(E) the Federal Employees Health Benefits Program, 5 U.S.C. § 8901-8913;

(F) any program administered by the Public Health Service to provide health services to American Indians and Alaska Native peoples, 25 U.S.C. § 1601, et

seq;

(G) any other Federal program under which the Federal Government provides, pays for, or provides reimbursement for health care items or services, as determined appropriate by the Attorney General, in consultation with the Secretary of Health and Human Services.

(3) HEALTH CARE EXPENSES — The term "health care expenses" means costs incurred, or for which the Federal Government provides reimbursement, for illnesses or conditions under any Federal Health Program that are caused by a tobacco product or products.

(4) INJURED PERSON — The term "injured person" means —

(A) an individual who has suffered an injury or disease caused by use of a tobacco product and his or her guardian, personal representative, estate, dependents, or survivors, whether or not such individual has commenced a legal proceeding against a tobacco company to recover for such injury or disease;

(B) a state, city, county, or territory of the United States, along with an Indian Tribe or Native American sovereign, that has brought a claim for its health care expenses caused by tobacco usage, whether or not such entity has commenced a legal proceeding against a tobacco company to recover for such costs;

(C) any third-party payor that has brought a claim for its health care expenses caused by tobacco usage, whether or not such entity has commenced a legal proceeding against a tobacco company to recover for such costs;

(D) any aggregate of those injured persons described in subsection (4)(a) or any private class of individuals who have brought a claim for injuries or disease caused by a tobacco product whether or not such individuals have commenced a legal proceeding against a tobacco company to recover for such injuries or diseases. If the United States brings a right of action on behalf of such an injured person, the United States may seek recovery based upon the payments or reimbursements made on behalf of the entire class of individuals.

(5) NICOTINE — The term "nicotine" means the chemical substance names 3 - (1-Methyl -2-pyrrolidinyl) pyridine or C10H14N2, including any salt or complex of nicotine.

(6) RIGHT OF ACTION — The term "right of action" means —

(A) a right to recovery by the United States against a tobacco company based on

health care expenses incurred by an injured person and caused by tobacco products;

(B) a right to recovery by the United States against a tobacco company which may be based on the share of the tobacco product market that is held by such company;

(C) a right to recovery by the United States for the health care costs incurred by usage of tobacco products in which the United States shall be permitted to establish causation and the amount of damages for which a defendant may be liable through the use of statistical analysis or epidemiological evidence or both;

(D) a right of recovery by the United States for health care expenses which shall not be defeated, reduced, or prorated based on:

(i) any contributory or comparative fault or negligence by the United States or an injured person or persons;
(ii) any claim for offset resulting from a shortened life expectancy of an injured person or persons.

(E) a right of recovery by the United States for health care expenses in which the following presumptions shall apply and can only be rebutted by clear and convincing evidence:

(i) nicotine is addictive;
(ii) the diseases identified as being caused by use of tobacco products in the Center for Disease Control and Prevention Reducing the Health Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General (United States Public Health Service 1989), The Health Consequences of Smoking: Involuntary Smoking, (USPHS 1986); and The Health Consequences of Using Smokeless Tobacco, (USPHS 1986), are caused in whole or in part by the use of tobacco products. A jury empaneled to hear an action brought under this Act shall be instructed as to the presumptions of this subsection.

(7) TOBACCO COMPANY — the term "tobacco company" means —

(A) a person who directly (not through a subsidiary company or affiliate) manufactures tobacco products for sale in the United States;

(B) a successor or assign of a person described in subparagraph (A);

(C) an entity established by a person described in subparagraph (A); or

(D) an entity to which a person described in subparagraph (A) directly or indirectly makes a fraudulent conveyance after the effective date of this Act or a transfer that would otherwise be voidable under chapter 7 of title 11, United States Code, but only to the extent of the interest or obligation transferred.

Such term shall not include a parent or affiliate of a person who manufactures tobacco products unless such parent or affiliate itself is a person described in any of the subparagraphs (A) through (D).

(8) TOBACCO PRODUCT — the term "tobacco product" means cigarettes, cigars, cigarillos, cigarette tobacco, pipe tobacco, roll-your-own tobacco, and smokeless tobacco, as such terms are defined for purposes of chapter 52 of the Internal Revenue Code of 1986.

(b) Civil Action for Recovery of Federal Health Care Costs

(1) IN GENERAL

In any case in which the United States pays for health care expenses to (or on behalf of) an injured person, the United States (independent of the rights of the injured person) shall have a right of action against, and the right to recover from, a tobacco company (or that company's insurer) for the health care expenses incurred, or to be incurred, by the injured person, under circumstances creating a liability upon a tobacco company to pay damages or creating a right in any injured person to receive monetary payment, including by legal or equitable remedy, from a tobacco company.

(A) ASSIGNMENT OF CLAIMS

The head of the department or agency of the United States paying such health care expenses may also require the injured person to assign his claim against the tobacco company to the extent that such claim seeks federal health care expenses. The United States may request an injured person to assert the Government's claim under this Act in his name "for the use and benefit of the United States."

(B) SUBROGATED RIGHTS

In addition to having an independent right of action, the United States shall, as to this right, be subrogated to any right or claim that the injured person has against a tobacco company to the extent of the health care expenses so incurred.

(2) INTERVENTION, ENFORCEMENT PROCEDURE

The United States may, to enforce a right under this section, (1) intervene or join in any action or proceeding brought by an injured person against a tobacco company who is liable for the health care expenses to the injured person or the insurance carrier or other entity responsible for the payment or reimbursement of the health care expenses; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment giving rise to health care expenses paid by the United States, institute and prosecute legal proceedings against the tobacco company who is liable for the injury or disease or the insurance carrier or other entity responsible for the payment or reimbursement of the health care expenses, in a State or Federal Court, either alone or in conjunction with the injured person.

(c) Regulations

(1) DETERMINATION AND ESTABLISHMENT OF MEDICAL EXPENSES

The Attorney General may prescribe any necessary regulations to carry out this chapter, including regulations with respect to the determination and establishment of the amount of health care expenses paid to (or on behalf of) an injured person.

(2) SETTLEMENT, RELEASE, AND WAIVER OF CLAIMS

To the extent prescribed by regulations under subsection (a) of this section, the head of the department or agency of the United States concerned may, with the approval of the Attorney General or her designate, (1) compromise, or settle and execute a release of, any claim which the United States has by virtue of the right established by section (b) of this title; or (2) waive any such claim, in whole or in part, for the convenience of the Government, or if that collection would result in undue hardship upon the injured person.

(3) EFFECT ON RIGHTS OF INJURED PERSON

No action taken by the United States in connection with the rights afforded under this legislation shall operate to deny to the injured person the recovery for that portion of damages not covered under this section.

(4) EFFECT ON OTHER STATUTORY PROVISIONS

This chapter does not limit or repeal any other provision of law providing for recovery by the United States of the cost of care and treatment described in section (b) of this title.

(d) Jurisdiction; Applicable law

The district courts of the United States shall have original jurisdiction of any civil action independently commenced by the Attorney General under this Act. Any civil action brought by the Attorney General under this Act shall be governed by the provisions of this Act, and to the extent consistent, the substantive law of the place governing the claim by the injured person.

(e) Statute of Limitations

The United States may bring a right of action pursuant to the Tobacco Health Care Expenses Recovery Act for any health care expenses incurred by an injured person for the ten years prior to the Act's effective date. Any claim based on health care expenses incurred after the effective date of the Act shall be governed by the provisions of Title 28, Section 1346."

Sec. 4 Funding

There is hereby authorized to be appropriated to the Attorney General such sums as may be necessary to carry out the provisions of Section 3.

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PRELIMINARY ANALYSIS OF POTENTIAL CONSTITUTIONAL CHALLENGES TO THE PROPOSED TOBACCO HEALTH CARE EXPENSES RECOVERY ACT

The proposed Tobacco Health Care Expenses Recovery Act would define a new federal right of recovery against tobacco companies for health care expenses that the United States pays to, or on behalf of, a wide range of "injured persons" -- including individuals with tobacco-related illnesses, state, local and tribal governments that have made claims for federal coverage of tobacco-related health care expenses, and third-party payors, such as insurance companies, that have made claims for such federal coverage. The United States' new right of recovery would enhance the federal government's present ability to recoup such costs.[1]

In expanding the federal government's right of recovery, the new cause of action would depart significantly from many of the traditional tort law principles that are incorporated into the current federal statutes governing recoupment. In particular, the proposed bill would allow the United States

(A) to obtain recovery from a tobacco company based on the company's market share rather than on proof that the company's products produced illness in particular users (Bill § 3, provision proposed for codification at 28 U.S.C. § 1335a(a)(6)(B));

(B) to establish causation on a population-wide basis, through the use of statistical analysis and epidemiological evidence (id. § 1335a(a)(6)(C));

(C) to recover without regard to defenses that consumers of tobacco products were contributorily negligent or that these consumers knowingly assumed the health risks at issue (id. § 1335a(a)(6)(D)(i));

(D) to establish causation with the benefit of statutory presumptions, rebuttable only by "clear and convincing" contrary evidence, that nicotine is addictive and that tobacco products cause a number of specified diseases (id. § 1335a(a)(6)(E));

(E) to recover the full amount of the costs that federal health care programs incur as a result of tobacco-related illnesses, notwithstanding arguments that the premature deaths of beneficiaries reduce outlays under other federal programs (id. § 1335a(a)(6)(D)(ii)).

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[1] Existing, more limited rights of recovery are contained in the Federal Medical Cost Recovery Act ("FMCRA"), 42 U.S.C. § 2651 (1994), and the Federal Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b)(2) (1994).

The new liability regime would apply to past as well as future conduct. As a result, the bill would implicate constitutional limits on retrospective economic legislation. In particular, the bill could be challenged as an infringement of the substantive component of the Fifth Amendment guarantee of due process and as an instrument of uncompensated takings in violation of the Takings Clause of the Fifth Amendment.[2]

Constitutional challenges based on the retrospective effect of the bill would be obviated if the bill were given strictly prospective application -- that is, if it were made applicable only to the recovery of federal health care expenses attributable to tobacco products sold after enactment of the measure. In the event that an important objective of the bill is to require tobacco companies to bear health care costs attributable to their past sales, however, we have set forth the primary constitutional issues that would be presented by retrospective application of the proposed liability scheme.

We emphasize that our analysis is preliminary in nature. The bill would burden tobacco companies with a novel form of tort liability, and thus we believe that careful consideration of litigation risks is warranted. To that end, the discussion that follows provides brief, separate assessments of the risks that are posed by the principal innovative features of the bill. In addition, because any constitutional challenge to the bill would likely include a complaint that the combined effect of the innovations was to upset tobacco companies' settled expectations in

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[2] The proposed Act might also be attacked as a bill of attainder or an ex post facto law. However, we believe that both of these challenges would fail. To qualify as a bill of attainder, a statute must single out a particular group for punishment without judicial trial. Even if legislation imposing liability for tobacco-related health care costs on the entire tobacco industry could be characterized as the singling out of a particular group -- but see United States v. Brown, 381 U.S. 437, 454 (1965) (legislation which applies to "any man" who happens to fall within a legislatively-defined category is not a bill of attainder) (emphasis in the original) -- it would not qualify as punishment under bill of attainder doctrine -- see Nixon v. Administrator of General Services, 433 U.S. 425, 468 (1977) ("Forbidden legislative punishment is not involved merely because the Act imposes burdensome consequences."). An argument based on the Ex Post Facto Clause would also be unfounded because that prohibition "applies only to criminal laws." Mahler v. Eby, 264 U.S. 32, 39 (1924); see also Harisiades v. Shaughnessy, 342 U.S. 580, 595 (1952) (explaining handful of early cases that applied the prohibition to civil cases as having "proceeded from the view that novel disabilities there imposed upon citizens were really criminal penalties for which civil form was a disguise").

such a severe manner as to transgress constitutional limits on retrospective economic legislation, we have also offered a concluding assessment of such a contention.

I. General Constitutional Principles

A. Potential Arguments that the Proposed Bill Would Violate the Substantive Component of the Fifth Amendment's Guarantee of Due Process -- The Supreme Court has accepted, as a general matter, that the requirements of due process leave legislatures with broad powers to upset settled economic expectations. The Court has stated "that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on the one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976) (upholding charges to current coal operators to finance black lung benefits for retired miners).[3] Due Process, as applied to statutes imposing or adjusting economic burdens, generally requires no more than "a legitimate legislative purpose furthered by a rational means." Pension Benefit Guarantee Corp., 467 U.S. at 729.

Given the general presumption in favor of the constitutionality of economic legislation (even when it is retrospective), and the federal government's significant interest in recovering its health care cost outlays, see Phillips v. Trame, 252 F. Supp. 948, 951 (E.D. Ill. 1966), there is no doubt that Congress may constitutionally enact legislation that would substantially augment its current capacity to recover from tobacco manufacturers some of the costs associated with smoking. Indeed, as applied prospectively to the health care costs attributable to the consumption of tobacco products sold after enactment of the proposed bill, the bill would not appear to pose serious constitutional problems. Applied retrospectively to the effects of

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[3] Accord, e.g., National Passenger R.R. Corp. v. Atchison, Topeka & Santa Fe. R.R. Co., 470 U.S. 4511, 477 (1985) (upholding requirement that railroads reimburse Amtrak for costs of railroad employee pass privileges); Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 730 (1984) (upholding retroactive application of penalties for withdrawal from pension plans).

The Supreme Court is expected to rule this term on the constitutionality of retrospective legislation that imposes even greater costs on past conduct than the legislation upheld in Turner Elkhorn. See Eastern Enterprises v. Chater, 110 F.3d 150 (1st Cir.), cert. granted sub nom. Eastern Enterprises v. Apfel, 118 S. Ct. 334 (1997). A decision in that case could delineate limits on retrospective economic legislation that would be relevant to the tobacco liability proposal.

tobacco sold prior to enactment, however, the proposed bill contains a number of novel features that warrant close attention.

We note in this regard that a number of states have passed similar legislation within the past several years, and that the Florida Supreme Court recently considered a due process and takings challenge to a state statute that provided Florida with a right of recovery for state health care costs that is similar to the proposed federal legislation. See Agency for Health Care Administration v. Associated Industries of Florida, Inc., 678 So.2d 1239, 1246, 1255-56 (Fla. 1996), (cert. denied, 117 S.Ct. 1245 (1997) (considering constitutionality of Fla. Stat. § 409.910 (1995)) (AHCA).[4] The Florida Supreme Court rejected the challenge in substantial part, but did hold two of the statute's provisions invalid under the due process guarantee of the Fourteenth Amendment. Id.[5] We address that decision and its relevance to the proposed legislation in the course of the discussion that follows of the specific provisions in the proposed bill that are susceptible of constitutional challenge.

We note also that opponents of proposals to hold tobacco companies liable for governmental health care costs attributable to tobacco use may argue that legislation of this sort should be analyzed with more suspicion than the type of legislation considered in Turner Elkhorn. The proposed legislation would not merely shift the benefits and benefits of economic life among private parties. Rather, it would provide a direct benefit to the government by altering the rules that were in place at the time of the conduct in question (sales of tobacco products to consumers who would eventually obtain federal health care benefits for the treatment of tobacco-related illnesses) to improve the United States' own prospects for recovery. The Florida Supreme Court did not address this argument in upholding most of the state law in question in AHCA. In addition, the proposed legislation does not contain any limit on its retrospective reach. It is unclear how long the period of retrospective liability for tobacco companies

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[4] For commentary considering the constitutionality of the Florida statute, see William W. Van Alstyne, Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida, 46 Fla. L. Rev. 563 (1994) (concluding that the Florida statute violates substantive due process and takes property without just compensation) and Jonathan S. Massey, The Florida Tobacco Liability Law: Fairy Tale Objections to a Reasonable Solution to Florida's Medicaid Crisis, 46 Fla. L. Rev. 591 (1994) (arguing the Florida statute comports with due process).

[5] The court also held a provision that abolished the statute of repose to be in violation of the Florida constitution insofar as it applied to claims that would have been barred by the prior statute of repose. Id. at

might be. A temporal limit on the retrospective application of the act could increase its likelihood of surviving constitutional challenge (and, depending on the outcome of the decision in the pending Eastern Enterprises litigation, might even prove to be mandatory). Thus, despite the generally lenient review that has been applied to seemingly analogous federal legislation, the novelty of the proposed legislation makes it difficult to assess the likelihood of a successful challenge.

B. Potential Arguments that the Proposed Bill Would Result in Uncompensated Takings of Tobacco Company Property -- The Supreme Court has repeatedly observed that "'[g]overnment hardly could go on'" if financial disadvantages caused by legitimate regulation of economic activity were routinely or even frequently deemed to be takings of private property requiring compensation. See Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 472 (1987), quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922); see id. at 422 (Brandeis, J., dissenting). "The Takings Clause, therefore, preserves governmental power to regulate, subject only to the dictates of justice and fairness." Keystone, 480 U.S. at 472 (internal quotation marks omitted). In evaluating takings claims that arise from economic regulation akin to the proposed bill, the Court has undertaken a three-factor analysis, examining (1) the character of the government action; (2) the economic impact of the regulation on the claimant; and (3) the extent to which the regulation interferes with reasonable investment-backed expectations. See, e.g., Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 645 (1993).

The outcome of this three-factor analysis, as applied to retroactive economic legislation such as the statute at issue here, is likely to track the outcome of an inquiry into whether the government's imposition of liability is "arbitrary and irrational" under substantive due process doctrine. In fact, the Supreme Court has stated that it would be "surprising indeed to discover" that retrospective economic legislation that does not violate due process nevertheless constitutes an uncompensated taking of petitioner's property in violation of the Fifth Amendment. See Concrete Pipe, 508 U.S. at 641. Accordingly, in the analysis that follows we focus primarily on substantive due process concerns, offering at the conclusion some observations as to the implications of this analysis for a potential takings challenge.

II. Specific Areas of Concern

A. Market Share Liability -- The bill provides for "a right to recovery by the United States against a tobacco company which may be based on the share of the tobacco product market that is held by such company. . . ." 28 U.S.C. § 1335a(a)(6)(B) (proposed). To the extent that this provision would render tobacco companies liable for past conduct based solely on their share of

the tobacco product market at the time of the conduct in question, we believe that it would be subject to reasonable constitutional challenge under the Due Process Clause.

The Supreme Court of California first adopted a market share liability rule nearly 20 years ago in Sindell v. Abbott Laboratories, 607 P.2d. 924 (Cal. 1980), in response to a lawsuit against a producer of DES. The market share liability theory permits a plaintiff who demonstrates injury from a product to surmount traditional rules regarding proof of causation by proceeding against a manufacturer on the basis of its share of the market for the product in question. In validating the market share liability theory, the Sindell Court rejected defendant's due process challenge to its imposition. Id. at 931 n.6. The court explained that "[i]n our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer." Id. at 936. The court therefore concluded that the imposition of liability based on market share was justified "[w]here, as here, all defendants produced a drug from an identical formula and the manufacturer of the DES which caused plaintiff's injuries cannot be identified through no fault of plaintiff[.]" Id.

Since that time, various state courts have considered whether to follow Sindell. Although many have declined to do so in the absence of legislative action, see, e.g., Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67, 76 (Iowa 1986) (the departure from traditional tort law and causation principles to hold a potentially innocent defendant liable lies "more appropriately within the legislative domain"); Zaaft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo. 1984) (en banc) (same), none has declared that such a liability rule would violate due process. Indeed, in AHCA, the Florida Supreme Court recently upheld against a due process challenge that portion of the statute that permitted the state to recover the costs associated with smoking from tobacco companies based on their market share. See AHCA, 678 So.2d at 1246, 1255-56 (upholding imposition of market share liability requirement in Fla. Stat. § 409.910(9)(b) (1995)).[6] At the same time, however, some courts have raised concerns that market share liability rules raise due process concerns. See, e.g., Tidler v. Eli Lilly & Co., 95 F.R.D. 332, 333 (D.D.C. 1982) ("market share theories provide "no statistical or mathematical assurance" that the plaintiff ingested

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[6] The court further concluded, however, that manufacturers could not, consistent with due process, be held joint and severally liable if liability were founded on a market share liability theory. AHCA, 678 So.2d at 1255-56. We do not understand the proposed bill to permit manufacturers to be held joint and severally liable in cases in which liability is premised on a market share liability theory.

any of the DES produced by the defendant, thus raising "constitutional difficulties of taking property without due process of law"), aff'd 851 F.2d 418 (D.C. Cir. 1988).

The United States Supreme Court has not addressed the constitutionality of the imposition of a market share liability rule, and it has repeatedly declined petitions to review market share liability cases. As has been noted, the Court has generally applied a lenient standard in reviewing federal legislation that retroactively imposes substantial costs on the past conduct of regulated entities. See, e.g., Usery v. Turner Elkhorn Mining Company, 428 U.S. 1, 15 (1976). More specifically, the Court has explained that presumptions in civil cases concerning economic regulation, such as the presumption of causation that underlies the market share liability rule in the proposed legislation, satisfy due process so long as "the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate." Id. at 28 (quoting Mobile, J & K.C. R. Co. v. Turnipseed, 219 U.S. 35, 43 (1910)). The Court has added that, in determining whether a presumption is an arbitrary mandate, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it." Id. (quoting United States v. Gainey, 380 U.S. 63 (1965)).

In light of the rationale for market share liability that has been set forth by the California Supreme Court in Sindell, and the Florida Supreme Court's recent acceptance of that rationale in Agency for Health Care Administration, a provision permitting recovery on a market share liability theory would be likely to withstand constitutional challenge under the standard of review applied in Turner Elkhorn. We note, however, that Sindell emphasized both the common formula from which DES was made and the difficulty of identifying the particular manufacturer of the product in question in upholding the imposition of market share liability. In the tobacco context, there is arguably a stronger case to be made that (1) the injured person would have known the brand of the product in question and (2) different brands of tobacco products vary in the virulence of their adverse effects on consumer health. For these reasons, the imposition of market share liability in this context would be more likely to survive constitutional review if (as the present bill would appear to allow) defendants were permitted to argue that damages should be apportioned not only on the basis of their market share but also on the basis of the variations in the disease-causing properties of different brands. The bill could make even clearer that such an argument regarding damages would be open to manufacturers.

B. Statistical and epidemiological proof of causation -- Section 1335a(a)(6)(C) of the proposed bill would allow the United States "to establish causation and the amount of damages for which a defendant may be liable through the use of statistical analysis or epidemiological evidence or both." This provision would not be

subject to reasonable constitutional challenge as a facial violation of the right to substantive due process. The provision would not prevent tobacco manufacturers from rebutting or refuting the statistical or epidemiological studies that the United States might proffer pursuant to this provision. Moreover, in actions brought in federal court, where the Federal Rules of Evidence would apply, such evidence presumably could be admitted only in accord with the principles governing the use of expert testimony that the Supreme Court has established. See Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 79 (1993) (setting forth standards for the admission of expert testimony under the Federal Rules of Evidence in a case concerning the admissibility of epidemiological studies). Because, under Daubert, statistical and epidemiological evidence may already be admitted to prove causation under certain conditions, the provision would not even appear to mark a departure from current rules regarding permissible forms of evidence.

We note that we would not construe this general provision, which concerns the forms of evidence that the government may use in proving the federal medical program costs attributable to tobacco-related injuries, to permit the United States to claim a right to recover without regard to a defense that some payments of federal medical program funds were made erroneously. Indeed, if the provision permitting statistical proof were construed to permit the government to proceed against manufacturers without identifying the individuals for whose costs it sought reimbursement, we believe that the provision would be subject to substantial constitutional challenge. While the provision regarding market share liability (discussed above) would merely allocate the costs of a known injury among the known class of manufacturers who could have caused it, a provision that permitted the federal government to hold companies liable for federal health care expenditures on unidentified patients, without regard to whether payments were made erroneously to some portion of those patients, would arguably permit the government to recover in the absence of proof that the manufacturers had caused the injury that resulted in the payment.

In AHCA the Florida Supreme Court considered a state statutory provision that allowed the State, if the number of recipients of state benefits for tobacco-related illness proved "'so large as to cause it to be impractical to join or identify each claim,'" to recover without identifying individual recipients, proceeding instead on the basis of proof of "'payments made on behalf of an entire class of recipients.'" AHCA, 678 So.2d at 1254 (quoting Fla. Stat. § 409.910(9)(a) (1995)). The Florida Supreme Court invalidated this portion of the Florida statute, ruling that it operated as a conclusive presumption of tobacco company liability, which companies would be barred from rebutting, by showing, for example, that particular state Medicaid expenditures had gone to

the payment of fraudulent claims.[7]

C. Abrogation of traditional defenses to tort liability -- The proposed bill would eliminate certain defenses that tobacco companies have traditionally been able to mount to tort liability. In particular, proposed section 1335a(a)(6)(D)(i) would allow the United States to recover federal health care expenses without regard to tobacco companies' arguments that beneficiaries of federal health care programs were contributorily negligent or that these beneficiaries knowingly assumed the health risks of consuming tobacco products.

We do not believe that abrogation of these defenses would violate the substantive due process rights of tobacco companies. In Arizona Copper Co. v. Hammer, 250 U.S. 400 (1919), the Supreme Court considered a due process challenge to a state employee compensation statute that eliminated employers' existing common law assumption of risk defense. The Court stated that the common law rules for allocating risks of injury between employer and employee were "not placed, by the Fourteenth Amendment, beyond the reach of the state's power to alter," provided that the state did not interfere arbitrarily and unreasonably, and in defiance of natural justice...." Id. at 421-22. Finding that the decision to place the risk of injury on the employer could be defended as a rational means of advancing the public welfare, the Court rejected the due process challenge. Id. at 426.

In AHCA v. Associated Industries, the Florida Supreme Court upheld the state legislature's abrogation of common law defenses in actions by the State of Florida to recover state expenditures on tobacco-related medical services. Citing Arizona Copper and its prior decisions upholding other statutory limitations on common law tort defenses, the court rejected tobacco companies' claims that the state's tobacco legislation was arbitrary and irrational on its face. 678 So.2d at 1251-53.

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[7] On the other hand, the Florida Supreme Court did not consider two arguments for defending the rationality of a provision that would permit the government to recover without affording defendants an opportunity to prove that at least some of the payments were a consequence of either fraud or abuse on the part of program recipients or of administrative error. The first is that in a program of the scope of the federal programs at issue here, payment of at least some erroneous or fraudulent/abusive claims is part of the cost of administration, reasonably charged to those responsible for the underlying illnesses. The second, and more important, is that tobacco companies could still be free to present evidence that lax administration led to excessive outlays and that the statute would not preclude reduction of federal recovery on this basis.

Others have pointed out that there is a long tradition in tort law of holding certain kinds of enterprises absolutely liable for harms engendered by their "ultrahazardous activities," such as blasting.[8] It is difficult to imagine a convincing argument that legislative extension of this well-established cost-allocation doctrine to suits involving government recovery of health care costs from tobacco companies is so arbitrary and irrational as to violate substantive due process.

D. Rebuttable presumptions concerning the addictiveness of nicotine and the causal connection between tobacco use and specified diseases -- Section 1335a(a)(6)(E) of the proposed bill would allow the United States, in an action for recovery of federal health care expenses, to invoke statutory presumptions, rebuttable only by "clear and convincing" contrary evidence, that nicotine is addictive and that the use of tobacco products causes a number of diseases, as described in three specified reports by the United States Public Health Service.

Rebuttable presumptions are routinely established by common law and statute. In Turner Elkhorn, the Supreme Court rejected mining companies' due process challenges to a series of statutory presumptions concerning black lung disease. These included rebuttable presumptions that black lung disease in miners with ten or more years of underground mining experience were employment related, and that deaths from respiratory disease among such miners were employment related. See Turner Elkhorn, 428 U.S. at 11-12, 27-28, citing Turnipseed, 219 U.S. at 43 (1910).

E. Abrogation of potential limitations on damages -- Section 1335a(a)(6)(D)(ii) of the proposed bill would disallow tobacco company claims that federal recoveries of tobacco-related health care expenses should be offset by savings attributable to reduced lifespans of health care beneficiaries. The bill would prevent tobacco companies from arguing that federal savings attributable to tobacco-related deaths -- such as reduced payments to retirees under Social Security and other federal retirement programs -- must be accepted as offsets to health care cost increases.

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[8] See, e.g., Spano v. Perini Corp., 25 N.Y.2d 11, 15, 250 N.E.2d 31, 33 (1969) (New York law conforms to the "widely (indeed, almost universally) approved doctrine that a blaster is absolutely liable for any damages he causes, with or without trespass"). See generally Frank J. Vandall, Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigaratte Manufacturers, 52 Ohio St. L.J. 405, 414-18 (1991) (arguing that the imposition of absolute liability on tobacco companies would, among other benefits, improve the allocation of the health care costs of smoking and improve economic efficiency by placing liability on the least cost avoider).

We do not believe that due process precludes this limitation on potential offsets by tobacco companies. A full accounting of how premature tobacco-related deaths affect the federal budget would be extraordinarily difficult to perform. Computation of potential pension savings, by itself, would entail extremely complex calculations that would account, for example, for the tendency of tobacco-related illness to induce early retirements. Moreover, an offset calculation that only accounted for possible pension savings would be highly misleading. The second-order and third-order fiscal effects of tobacco related illness, including shortened worklives and reduced productivity among tobacco users and increased demands for government services among survivors of users who die prematurely, would also have a place in any reasonably complete accounting. Concerns about the administrative impracticality of any rigorous offset rule, as well as equitable objections to this type of credit for shortened lives, ought to sustain an argument that the offset limitation provision of the proposed legislation is neither arbitrary nor irrational under current substantive due process doctrine.

III. Preliminary Observations Concerning the Management of Litigation Risk

As we have discussed, the Florida Supreme Court invalidated a portion of a similar Florida state law that permitted the state to recover tobacco-related health care costs incurred by the state government without identifying individual patients on whose behalf the state incurred these costs. It also held the provision invalid insofar as it abrogated a statute of repose and joined market share liability with joint and several liability. In all other respects, however, the Florida Supreme Court upheld the law -- including its market share liability provision -- against facial due process and takings challenges, while noting that certain provisions might be successfully challenged in application. Unfortunately, the Florida Supreme Court decision does not provide a particularly thorough analysis of the relevant due process and takings precedents. Accordingly, it is difficult to draw many conclusions from that decision as to the likelihood that the proposed federal legislation would withstand constitutional attack.

In assessing the prospects of a constitutional challenges to the cumulative effect of the proposed legislation's various provisions that expand tobacco company liability for tobacco-related illness, we have considered the lower federal courts' treatment of challenges to an existing piece of controversial federal legislation that dramatically expanded liability for past acts. The Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601 et seq., established a new liability scheme for apportioning the costs of cleaning up releases and threatened releases of hazardous substances. The Act defined a new class of federally defined costs

-- the costs of cleaning up hazardous substances in accordance with CERCLA's substantive cleanup standards -- and a novel regime for apportioning these costs among a wide range of responsible parties, including hazardous substance generators and transporters and the owners and operators of disposal sites.

The liability that CERCLA imposes on these responsible parties is strict: the statute allows very little scope for arguments that a responsible party should escape liability because it took reasonable precautions to prevent damage to the environment. CERCLA liability is also joint and several: except in unusual cases where harms are clearly divisible, responsible parties that are financially healthy and identifiable can be held liable for the entire cost of cleaning up disposal sites, even if the majority of wastes were contributed by other insolvent or unidentifiable parties.

CERCLA unquestionably upset the expectations of entities that generated, transported and disposed of hazardous substances before the statute was enacted. Actions undertaken prior to CERCLA, which did not subject the actor to liability under contemporaneous legal standards, became a source of enormous liability by virtue of CERCLA's enactment. However, the federal courts have uniformly rejected due process challenges to this new liability scheme, ruling that CERCLA provides a rational means of achieving a legitimate governmental objective -- assigning the costs of waste site cleanup to those who have benefited in the past from inexpensive but unsafe means of disposal. See, e.g., United States v. Gurley, 43 F.3d 1188, 1194 (8th Cir.), cert. denied, 516 U.S. 817 (1995); United States v. Monsanto Co., 858 F.2d 160, 174 & n.31 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); United States v. Northeastern Pharmaceutical & Chem. Co., 810 F.2d 726, 732-34 (8th Cir. 1987), cert. denied, 484 U.S. 848 (1987).

Any reliance on the CERCLA case law must be tempered by an awareness of some significant distinctions between CERCLA and the proposed tobacco legislation. CERCLA does not allow market share liability. In addition, CERCLA liability does not operate solely as a means of promoting recovery by the federal government. While some CERCLA recoveries redound directly to the federal government, private parties can also conduct cleanups and recover part of the costs from private parties. By contrast, the proposed legislation provides a right of action that the federal government alone would possess -- and thus the legislation serves to make it easier for the federal government to recoup costs that it would otherwise have to pay than it would be for any arguably similarly situated third party.[9] For that reason, there is an argument that the

[9] CERCLA also requires the federal government (or any other party who seeks to recover response costs from responsible parties) to document the reasonableness of those response costs. Thus

legislation should not be understood as an attempt by the federal government to shift the "burdens and benefits" of economic life among private parties in a neutral fashion, but rather as an attempt by the federal government to use its legislative power to take private funds that would be insulated from governmental power under traditional common law tort principles.[10]

The foregoing assessment of the liability provisions of the proposed legislation, separately and in combination, has implications for the courts likely handling of any takings claim. The Supreme Court, as we noted earlier, has suggested that economic legislation that comports with the demands of substantive due process can be expected, as a general matter, not to be found to effect an uncompensated taking. See Concrete Pipe, 508 U.S. at 641. In deciding a taking challenge, courts would be likely to examine the same features of the proposed legislation under a somewhat different analytic framework. Instead of determining whether expansion of the federal government's ability to recover health care expenses from tobacco changes represented an "arbitrary and irrational" imposition on the companies, could evaluate the character of the government action, the economic impact on the tobacco companies, and the extent to which the new liability interfered with companies' reasonable investment-backed expectations, see id. at 645, in order to determine whether the bill forced the tobacco companies to bear "public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 48 (1960). In the final analysis, we would expect these two inquiries to reach identical results.

CERCLA has no analogue to the provisions of the Florida statute that the Florida Supreme Court struck down in AHCA v. Associated Industries -- the authorization to recover health care expenditures without identifying specific patients whose tobacco-related illnesses led to state health care expenditures.

[10] But compare Yankee Atomic Elec. Co. v. United States, 112 F.2d 1569, 1576 & n.6 (Fed. Cir. 1997) (general principle that "large, unrecognized societal problems are frequently spread among those who benefited from the source of the problem" relevant even when government would otherwise bear those costs), pet. for cert. filed 66 U.S.L.W. 3364 (Nov. 12, 1997) (No. 97-801).

Sen. Feinstein Makes Appeal to Stop Assault Weapons Export to U.S. By Jeff Brazil and Steve Berry (c) 1997, Los Angeles Times

Escalating her campaign against the importation of assault weapons, U.S. Sen. Dianne Feinstein Thursday appealed to the leaders of Russia, Greece and Bulgaria to prevent the export of thousands of the rapid-fire guns to the United States.

"These are exactly the kind of weapons many Americans are trying to keep off our streets," the California Democrat wrote in letters sent to Russian President Boris Yeltsin, Greek Prime Minister Konstandinos Simitis and Bulgarian Prime Minister Ivan Kostov.

The weapons in question are modified versions of the AK 47 and Heckler & Koch 91, which were first restricted by federal law in 1989 and again in 1994. The weapons have been cosmetically changed to comply with those legislative restrictions. But, according to Feinstein, these high-capacity, semiautomatic assault weapons still "are not suitable or readily adaptable to sporting purposes," thus are in violation of the 1968 Gun Control Act, and should be barred from import.

Feinstein is asking the leaders to intervene because, in each case, the companies exporting the weapons to the United States are at least partially owned by the governments in those countries.

"What is becoming more evident is the fact that other countries are beginning to export various mutations, cosmetic mutations, of assault weapons, but the military, assault capability and capacity of the weapons are the same," Feinstein, a member of the Senate foreign relations committee, said Thursday.

The importation of the weapons at issue was approved by the U.S. Bureau of Alcohol, Tobacco and Firearms, which has said that it had no choice but to grant an import request if a weapon has been changed enough to comply with the 1994 federal assault weapons law. Feinstein, however, believes the agency is misinterpreting the 1968 Gun Control Act, which bars the import of even reconfigured assault weapons if they are not found to have legitimate "sporting purposes."

"We're looking into the issues that the senator is presenting," Brian Burns, an ATF spokesperson, said.

Thursday's action comes a month after Feinstein asked Israeli Prime Minister Benjamin Netanyahu to block the proposed export to a U.S. gun manufacturer of tens of thousands of modified Uzi and Galil assault weapons a request the Israeli government is still considering.

The request also comes three weeks after Feinstein, joined by 29 other U.S. senators, urged President Clinton to suspend the importation of semi-automatic military-style assault weapons until it can be determined that the weapons are in compliance with U.S. law. Clinton has met with Feinstein, and his staff is said to be considering what action, if any, to take.

"The president ought to shut it down," Feinstein said Thursday.

Sentencing of Rep. Kim Is Postponed (Los Angeles) (c) 1997, Los Angeles Times

LOS ANGELES A federal judge has postponed until Jan. 14 the sentencing of U.S. Rep. Jay C. Kim, R-Calif., and his wife, June, who pleaded guilty in August to misdemeanor charges of knowingly accepting and concealing more than $230,000 in illegal campaign contributions from corporate and foreign donors.

The Kims were to have been sentenced Oct. 23, but Judge Richard A. Paez granted a delay at the request of the federal probation office, which is preparing a pre-sentencing report on the couple for the court.

Under terms of a plea agreement with the Kims, the U.S. Attorney's office agreed to seek no more than six months jail time for them.

Tobacco-settlement - federal costs

Tobacco Industry Slapped with Pair Massive New Lawsuits By Henry Wein. (c) 1997, Los Angeles Times

The tobacco industry encountered new legal problems two massive lawsuits seeking the recovery of billions of d treating sick smokers by federal Medicaid, Medicare and vet programs were filed in federal court in Wichita, Kan.

The suits were filed by individuals, acting on behalf of federal taxpayers.

The cases are analogous to those filed by 41 state attorneys general seeking recompense for expenditures the states made treating sick smokers. The suits allege that the cigarette companies have engaged in a conspiracy spanning more than four decades to deceive the public about the dangers of their products, hook teen-agers on an addictive product and keep them addicted by manipulating nicotine levels.

Consequently, the suits allege the U.S. government has incurred more than $100 billion in expenses treating smokers under various federal benefit programs.

Under terms of the proposed national tobacco settlement that would resolve the state cases and 17 major class actions, only state governments were to receive a portion of the $368.5 settlement fund, even though about half of the money spent on smoking-related illnesses by the states was provided to them by the federal government, said Mark D. Hutton, a Wichita attorney who represents the plaintiffs in the cases filed Thursday.

Since federal officials have not carried out "their obligations to the taxpayers" to seek recovery of money to compensate the federal government for expenses incurred treating smoking-related diseases, "our clients are doing it for them," said Hutton's co-counsel Gary L. Richardson of Tulsa, who was the U.S. attorney in Oklahoma in the early 1980s.

Because the tobacco settlement must be approved by Congress, there has been no determination of how the funds would be allocated if the deal is enacted into law. In theory, the federal government would be entitled to a healthy chunk in some cases up to 80 percent of any recovery a state got, depending on how much of a state's Medicaid money came from the U.S. treasury.

However, the attorneys general have been attempting to persuade lawmakers in Washington that they be permitted to keep all of the money so long as they allocate it for health care for uninsured children or a similar purpose.

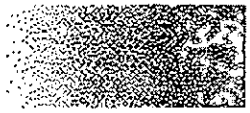
Since the national settlement was announced on June 20, several lawmakers, led by Sen. Edward M. Kennedy, D-Mass., have said that there has to be reimbursement to federal taxpayers for any settlement to pass muster.

Just two days ago, the Department of Defense announced that the agency felt it was entitled to a substantial recovery if the settlement becomes law because the department spends $584 million a year to treat service personnel with illnesses caused by smoking.

Mississippi Attorney General Mike Moore, who filed the first of the state cases against the $50 billion-a-year tobacco industry, told senators this summer that some time ago he had formally asked the Justice Department to sue the cigarette companies, utilizing the same legal theories that the states had used. He said Justice Department officials never responded.

Justice officials had no immediate response Thursday to the new suits. Spokespersons for Philip Morris, Inc. and R.J. Reynolds Tobacco Corp., the nation's two largest cigarette makers, said they had not been served with the suits and thus could not comment.

Tobacco - settlement - federal costs



Jerold R. Mande

10/10/97 01:14:11 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP

cc:

Subject: Reno letter to Harkin on recovering federal costs due to tobacco

Here is a draft letter from Reno to Harkin that George shared with us. I think the pressure is going to continue to mount for various 3d parties to recover tobacco related costs. Today's Broin settlement will add to the pressure. I am concerned that the letter stakes out more of a position than we have thoughtfully reached. Your thoughts?

The Honorable Tom Harkin
United States Senate
Washington, D.C. 20510

Dear Senator Harkin:

Thank you for your letter of September 18, 1997, requesting an answer to the question of whether the federal government will be bringing a suit against the tobacco companies for smoking-related health care costs. As explained in my previous letter, the Department of Justice along with the involved agencies have considered such suits and to date have not elected to try to recover smoking related costs incurred by the federal government through direct litigation against the tobacco companies.

This Administration believes that our efforts should be directed at reducing teen smoking, as the President has said, "Reducing teen smoking has always been America's bottom line." That is why the President on September 17th of this year called for comprehensive tobacco legislation with the goal of reducing teen smoking by 50 percent within seven years. The President announced five key elements which must be the heart of any national tobacco legislation:

1. A comprehensive plan to reduce teen smoking, including tough penalties if targets are not met;

2. Full authority for the FDA to regulate tobacco products;

3. Changes in the way the tobacco industry does business;

4. Progress toward other public health goals; and

5. Protection for tobacco farmers and their communities.

As Congress and the Administration work together to draft this comprehensive tobacco legislation, it will be entirely appropriate to consider the impact of smoking related diseases on federal programs. It is also important to remember that the most meaningful action we could take would be to reduce teen smoking because this is what is going to impact the lives and the health of our children. If we can craft a legislative package that actually reduces teen smoking, then we will save not only the lives and health of our children, but we will also take the most important action possible to reduce what the states and the federal government have to spend in the future for health care costs caused by tobacco related diseases.

Crafting the comprehensive tobacco legislation called for by the President so that it will successfully reduce teen smoking, is an enormous challenge that will take commitment and concerted action by both the Administration and Congress. Forging such legislation will balance the competing interests of many different goals and policies. We believe the decision on whether and how to recoup the monies spent by federal programs to treat tobacco related diseases should be considered as part of this overall legislation and we do not believe it would be productive for the Administration to unilaterally address this mater through litigation at this juncture.

Again, we believe that the impact of tobacco related diseases should be considered as a part of the debate in forging the comprehensive tobacco legislation called for by the President. Litigation, however, is not necessarily the best method for recouping these costs. As the congressional debate and investigation into the global tobacco resolution progresses, I will, of course, remain willing to reassess the desirability of trying to recoup the federal monies which have been expended through litigation.

Sincerely,

Janet Reno

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

Federal
Tobacco - ~~suit~~ suits

22 SEP 1997

Ms. Elena Kagan
Deputy Assistant to the President for Domestic Policy
White House, Second Floor West Wing
Washington, DC 20502

Dear Ms. Kagan:

I am writing to reiterate the Department of Defense's interest in potential recovery of expenditures for health care costs attributable to the use of tobacco products. Our interest arises in the context of the on-going negotiations with the tobacco industry representatives and various state Attorneys General.

I understand that the White House Domestic Policy Council is participating in these settlement discussions with a view towards negotiating an appropriate settlement document that will, among other things, address the recovery of federal agency health care expenditures which stem from tobacco-induced death, illness or disease. The Department of Defense has estimated its expenditures in this area to be approximately $584 million annually (out of a total annual DoD health care budget of $15 billion). This is not only a substantial expenditure, it attests to a significant impact upon precious health care resources.

I offer whatever assistance the Department can provide you in your efforts. Please do not hesitate to contact Commander Doug Newman, my point of contact for this matter, at (703) 697-9343.

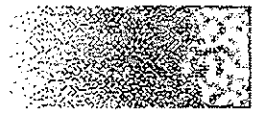
Sincerely,

Judith Miller

Judith A. Miller

cc:
Honorable Frank Hunger, Assistant Attorney General, Civil Division, Department of Justice
Honorable Rudy de Leon, Under Secretary of Defense (Personnel and Readiness)
Honorable Fred Pang, Assistant Secretary of Defense (Force Management Policy)
Dr. Edward Martin, M.D., Acting Assistant Secretary of Defense (Health Affairs)

tobacco - settlement - federal courts



Jerold R. Mande

10/14/97 05:38:32 PM

Record Type: Record

To: Elena Kagan/OPD/EOP, Bruce N. Reed/OPD/EOP, Christopher C. Jennings/OPD/EOP

cc: Thomas L. Freedman/OPD/EOP, Jeanne Lambrew/OPD/EOP, Fred DuVal/WHO/EOP

Subject: Decoded copy of Reno letter to 5 Senators on Tobacco and Medicaid

Elena and Bruce --

Here is a decoded copy of the draft letter in case the version George sent came over encoded, which it did on my computer.

The Honorable Tom Harkin
United States Senate
Washington, D.C. 20510

Dear Senator Harkin:

Thank you for your letter of September 18, 1997, requesting an answer to the question of whether the federal government will be bringing a lawsuit against the tobacco companies for health care costs caused by tobacco related diseases. As explained in my previous letter, the Department of Justice along with the involved agencies have considered such suits and, to date, have not elected to attempt to recover these costs through direct litigation.

This Administration believes that our efforts should be directed at reducing teen smoking through comprehensive tobacco legislation. As the President said, "Reducing teen smoking has always been America's bottom line." That is why the President on September 17th called for comprehensive tobacco legislation with the goal of reducing teen smoking by 50 percent within seven years.

The President announced five key elements that must be the heart of any national tobacco legislation:

1. A comprehensive plan to reduce teen smoking, including tough penalties if targets are not met;

2. Full authority for the FDA to regulate tobacco products;

3. Changes in the way the tobacco industry does business;

4. Progress toward other public health goals; and

5. Protection for tobacco farmers and their communities.

Reducing teen smoking is most important because it will save the lives and health of our children. Financially, reducing teen smoking would be the most significant step that the Administration and Congress could take to save future health care costs.

Crafting the comprehensive tobacco legislation that will successfully reduce teenage tobacco use, is an enormous challenge. Forging such legislation will necessarily balance the competing interests of many different goals and policies. We believe the consideration of the costs incurred by federal programs in treating tobacco related diseases should be addressed through the comprehensive tobacco legislation.

Until that process is concluded, however, it would be inadvisable for the Department to explain why it has not attempted to recover such costs through direct litigation because events and facts may develop which would call for a different course in the future. Pronouncements at this time could impede the Department's ability to change course at that time.

Sincerely,

Janet Reno

Tobacco - settlement - federal costs

Bruce/Tom - FYI Elena

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

22 SEP 1997

Ms. Elena Kagan
Deputy Assistant to the President for Domestic Policy
White House, Second Floor West Wing
Washington, DC 20502

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I understand that the White House Domestic Policy Council is participating in these settlement discussions with a view towards negotiating an appropriate settlement document that will, among other things, address the recovery of federal agency health care expenditures which stem from tobacco-induced death, illness or disease. The Department of Defense has estimated its expenditures in this area to be approximately $584 million annually (out of a total annual DoD health care budget of $15 billion). This is not only a substantial expenditure, it attests to a significant impact upon precious health care resources.

I offer whatever assistance the Department can provide you in your efforts. Please do not hesitate to contact Commander Doug Newman, my point of contact for this matter, at (703) 697-9343.

Sincerely,

Judith Miller

Judith A. Miller

cc:
Honorable Frank Hunger, Assistant Attorney General, Civil Division, Department of Justice
Honorable Rudy de Leon, Under Secretary of Defense (Personnel and Readiness)
Honorable Fred Pang, Assistant Secretary of Defense (Force Management Policy)
Dr. Edward Martin, M.D., Acting Assistant Secretary of Defense (Health Affairs)

Tobacco - federal costs

DRAFT

The Honorable Tom Harkin
United States Senate
Washington, D.C. 20510

Dear Senator Harkin:

Thank you for your letter of September 18, 1997, requesting an answer to the question of whether the federal government will be bringing a lawsuit against the tobacco companies for health care costs caused by tobacco related diseases. As explained in my previous letter, the Department of Justice along with the involved agencies have considered such suits and, to date, have not elected to attempt to recover these costs through direct litigation.

This Administration believes that our efforts should be directed at reducing teen smoking through comprehensive tobacco legislation. As the President said, "Reducing teen smoking has always been America's bottom line." That is why the President on September 17th called for comprehensive tobacco legislation with the goal of reducing teen smoking by 50 percent within seven years.

The President announced five key elements that must be the heart of any national tobacco legislation:

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4. Progress toward other public health goals; and

5. Protection for tobacco farmers and their communities.

Reducing teen smoking is most important because it will save the lives and health of our children. Financially, reducing teen smoking would be the most significant step that the Administration and Congress could take to save future health care costs.

Crafting the comprehensive tobacco legislation that will successfully reduce teenage tobacco use, is an enormous challenge. Forging such legislation will necessarily balance the competing interests of many different goals and policies. We believe the

consideration of the costs incurred by federal programs in treating tobacco related diseases should be addressed through the comprehensive tobacco legislation.

Until that process is concluded, however, it would be inadvisable for the Department to explain why it has not attempted to recover such costs through direct litigation because events and facts may develop which would call for a different course in the future. Pronouncements at this time could impede the Department's ability to change course at that time.

Sincerely,

Janet Reno

U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General Washington, DC 20530

July 16, 1997

The Honorable Tom Harkin
United States Senate
Washington, DC 20510

Dear Senator Harkin:

Thank you for your letter suggesting that the Department of Justice file a legal action to recover certain tobacco-related health care costs. I apologize for the delay in responding.

I certainly agree that smoking is a major public health issue whose impact, in terms of lives lost, illnesses caused, and costs to our health care system, has been devastating. In addressing this issue, the Department of Justice has strongly defended the regulations issued by the Food and Drug Administration ("FDA") to keep tobacco products, and the advertising of these products, away from children. The recent district court decision upholding the FDA's authority to regulate tobacco was an important victory in this ongoing battle.

Your letter emphasizes that the Federal government has incurred health care costs related to tobacco use under Medicaid, Medicare and several other Federal health programs. As you know, pursuant to the Medicaid law, there are now 40 states that have sued tobacco companies to recoup health care costs incurred for tobacco-related diseases. The Department of Justice, along with the Department of Health and Human Services ("HHS"), which oversees the Medicaid program, has closely monitored this litigation. Under the Medicaid statute, the states are authorized to pursue recovery of health care expenses from third parties who are legally liable for these costs. We have been in contact with many of the State Attorneys General who have brought suits and have kept them updated about the status of our defense of the FDA regulations. We have also responded to their inquiries and requests for assistance.

Since the Medicaid program was designed to be primarily administered by the states, the Medicaid law does not include a provision which would allow the Federal government to pursue such recoveries directly. However, because the Federal government does pay a significant portion of the cost of the Medicaid program, Congress protected the Federal government's interest in

any third party suits the states bring by requiring the states to reimburse the Federal Government its portion of any recovery.

On June 20, 1997, the states announced that they had reached a proposed settlement of their pending Medicaid claims against tobacco companies. The terms of that proposed settlement would require Federal legislation to implement the compromise. The Administration is currently reviewing the proposed settlement. As part of that review, the impact of the proposed settlement on the Federal interests associated with the Medicaid program is being considered.

As referenced in your letter, the Federal government also incurs costs related to tobacco use under Medicare and through medical services provided directly by the federal government. Federal interests under these programs may be implicated by the recent proposed settlement of the states' Medicaid suits. You may be assured that the issues raised by your letter will be considered during the Administration's review of the proposed settlement.

As always, thank you for sharing your views about these important issues. We will certainly keep them in mind during the Administration's review of the options presented by the proposed settlement.

Sincerely,

Ann M. Harkins

Ann M. Harkins
Deputy Assistant Attorney General

United States Senate

WASHINGTON, D.C. 20510

September 18, 1997

The Honorable Janet Reno
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Attorney General Reno:

Once again, we are writing to urge you to bring suit against the tobacco industry to recover the approximately $20 billion in tobacco-related health care costs borne by federal taxpayers each year.

As you know, we sent a similar letter to you in April of this year. We received a reply from your staff on July 15, but it did not answer an important question: Will the Federal government bring suit against the tobacco industry to recover tobacco-related Federal health costs? And if not, why not?

Since our initial letter was written in April, we would respectfully request a swift and timely response.

Sincerely,

United States Senator

United States Senator

United States Senator

United States Senator

United States Senator

United States Senator

LATEST DRAFT OF TOBACCO Tobacco - federal costs
Letter

DATE:

FROM: Director
Center for Medicaid and State Operations

SUBJECT: Cost Sharing in Tobacco Company Recoveries and Expenses--ACTION

TO: Associate Regional Administrator
Division of Medicaid
Regions I-X

In June of last year we provided guidance to you regarding a March 15, 1996 settlement by the Liggett Group tobacco company with five States (Massachusetts, West Virginia, Mississippi, Florida and Louisiana). On March 20, 1997 the Liggett Group agreed to settle claims with an additional seventeen States (Arizona, Connecticut, Hawaii, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Minnesota, Nevada, New Jersey, New York, Oklahoma, Texas, Utah, Washington and Wisconsin). During this past summer, Mississippi and Florida settled suits with a number of tobacco companies and have received monies as a result of those settlements. The payments are pursuant to an agreement settling suits the States filed in whole or in part to recoup Medicaid costs associated with tobacco-related illnesses. I am writing to outline HCFA's policy with regard to sharing in these recoupments and in the State costs incurred in pursuing them. I ask that you send the attached model letter to each of the twenty-two States referenced above. Please send me a copy of the signed and dated letters for our records.

As with any other Medicaid-related revenue or recovery, the Federal share of appropriate amounts the twenty-two States receive from the tobacco companies should be reported on the Form HCFA-64 Medicaid expenditure report for the quarter in which they are received by the State, at the current Federal Medical Assistance Percentage (FMAP). The State agency must credit HCFA with our share of these payments even if the settlement payment checks are not addressed to the Medicaid agency or credited to the State's Medicaid account. Crediting the Medicaid program appropriately is required because the States' complaints in the lawsuits were based wholly or in part on tobacco industry liability for health problems of Medicaid recipients and others and consequent Medicaid expenditures by the States for which we provided the Federal share.

To the extent that some States indicate that non-Medicaid claims were also included in their underlying lawsuits, HCFA would accept a reasonable allocation of the recovery as recompense of the federal Medicaid share. HCFA central office is available to enter into discussions with States regarding allocation prior to completion of the HCFA-64, if a State so desires.

State administrative costs incurred in pursuit of Medicaid recoveries from tobacco companies are matchable at the standard 50 percent administrative matching rate.

This is a first step in a communication process to remind States of the legal requirements for Medicaid recoveries. Central office will provide further communication as needed.

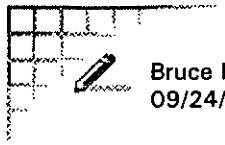
If you have any questions on this matter, please contact Joe Corteal, Division of Financial Management, who may be reached at (410) 786-3380. Thank you for your cooperation.

Sally K. Richardson

Attachment

cc: Regional Administrators

Tobacco – title –
federal costs

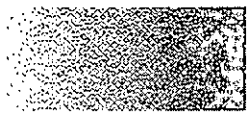


Bruce N. Reed
09/24/97 06:09:26 PM

Record Type: Record

To: Jerold R. Mande/OSTP/EOP
cc: Elena Kagan/OPD/EOP
bcc:
Subject: Re: Tobacco language for upcoming Justice hearing

I don't like the first sentence or the last sentence. I would drop the first sentence, and replace the last sentence with something mushier like, the administration will work with Congress to examine this issue as Congress considers comprehensive tobacco legislation.
Jerold R. Mande



Jerold R. Mande

09/24/97 03:48:39 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP

cc: Elena Kagan/OPD/EOP
Subject: Tobacco language for upcoming Justice hearing

Here is language George has shared with us that Justice would like to include in the AGs testimony for an upcoming hearing (I have inquired about the particulars of the hearing). My thoughts: it should be determined by Congress *and* the President; there probably should be mention of expenditures by local gov'ts; remimbursing federal programs for smoking related costs raises a 6th element that the President hasn't mentioned that I see as related to how we work out the liability issue. Your thoughts?

The distribution of funds flowing from the comprehensive tobacco legislation will be determined by Congress. In addition to reimbursing the states for Medicaid expenditures, federal agencies and programs have
spent monies for smoking related diseases (Medicare, Indian Health
Service, CHAMPUS (military), Department of Veterans Administration,
and the Federal Employees Health Benefit Program). Thus far, the Department and the other federal agencies have not believed it was advisable to attempt to recoup these costs through direct litigation. The costs to these federal programs and agencies should be considered by Congress as a part of the comprehensive tobacco legislation.

tobacco - suits -
federal courts

George.Phillips @ justice.usdoj.gov
09/22/97 03:12:00 PM

Record Type: Record

To: elena kagan

cc:
Subject: Talking Points for the AG on the "Tobacco Settlement" for Overs

Andy and Elena:

I would be interested in knowing whether you have any comments on the attached, especially on how we propose the AG to respond if she gets a question about whether the federal govt. should be brining suits to recover the monies federal programs have paid out for smoking related diseases.

(Elena: I will also fax this to you.)

--George

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