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Tobacco-Settlement: Liability [1]

Tob-re-liability

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July 21, 1998

Mr. Bruce Reed
White House
2nd Floor, West Wing
Washington, D.C. 20502

Via Fax

Dear Bruce,

Recently, an appellate court in New York handed down a decision which underscores the difficulties of prevailing in class actions against Tobacco based on addiction/dependency claims, for procedural reasons having nothing to do with the substantive merits of the case. *Small, et al. v. Lorillard Tobacco Co., Inc., et al.* (N.Y. Sup. Ct., App. Div., 1st Dept., 7/16/98). In *Small*, the appellate court reversed the lower court's certification of a class action based on Tobacco's fraudulent concealment of the addictive qualities of nicotine, despite the court's explicit finding that Congressional investigations since 1994 have "uncovered cigarette manufacturers' internal memoranda and studies, going back as far as the 1950s, which appear to show that the manufacturers extensively researched nicotine addiction with the express intention of designing products so addictive that people would be unable to stop buying them. Meanwhile, the manufacturers' public statements consistently denied that nicotine was addictive." (Op., p.6.)

The appellate court nevertheless denied class certification and dismissed the actions on the basis that class action law requires that common issues predominate over individual issues, and the fraud/deceptive practices claims asserted required individual

proof of (1) addiction and (2) reliance on the fraudulent misrepresentations by Tobacco. Therefore, although the court "share[d] plaintiffs' concern that unethical business dealings should not go unpunished simply because defendants harmed so many people that judicial resolution of their claims would be unmanageable" (Op., p.7), it nonetheless reversed the class certification.

I have attached the decision for your review. It could have potential serious impact on any future class actions against the tobacco industry.

Yours truly,

Stanley M. Chesley

SMC/svf
Encls.

Tob-sec-liability

Cynthia A. Rice 07/22/98 07:04:14 PM

Record Type: Record

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

cc: Julie A. Fernandes/OPD/EOP, Cynthia Dailard/OPD/EOP
Subject: Update on House Class Action Bill

Yesterday the House Judiciary Committee began marking up a revised version of Rep. Hyde's Class Action bill (markup is to continue July 28th according to the Congressional Record -- Sarah Rosen of the NEC is getting a full report). At a recent meeting, we agreed, as had Bruce urged, to oppose the bill based on our non-tobacco objections (no reason to transfer most class actions to federal court, concern about burdens on the federal court system, etc.). DOJ is going to draft a letter outlining their concerns (it will be an update of a June 18th letter -- the bill has been improved since then but not by enough). You should know that anti-tobacco advocates were emailing their contacts yesterday to urge them to call House members to oppose the bill (see excerpt below).

H.R. 3789 would allow tobacco companies, along with other defendants in class action lawsuits, to remove cases from state to federal courts -- giving federal courts jurisdiction over virtually every class action claim.

H.R. 3789 will lead to interminable delay for class action cases against the tobacco industry. The federal courts are already overburdened and are not equipped to handle the flood of cases that will be shifted from state courts to federal courts. In addition, federal courts are not expert in the state statutory and common law claims brought by most tobacco plaintiffs.

H.R. 3789 could effectively wipe out most class action litigation against the tobacco industry, limiting an important avenue of redress for consumers.

Class action lawsuits are one of the only ways that injured consumers can bring legal claims against tobacco companies. That is why Big Tobacco tried to wipe out class actions in the June 20, 1997 deal.

As Dick Daynard, Chairman of the Tobacco Products Liability Project at Northeastern University School of Law, has pointed out, H.R. 3789 could wipe out "the Engle case, the class on behalf of diseased Florida smokers presently in trial in a Miami state court, and would effectively discourage the filing of cases similar to Engle in the remaining 49 states. In addition, the Broin case, a class action on behalf of afflicted nonsmoking flight attendants

which was tried in a Florida state court and partially settled last year for $300,000,000, would probably have been dismissed in federal court or would, at best, still be in pro-trial skirmishes. H.R. 3789 would discourage other groups of afflicted nonsmokers from following suit."

SUMMARY OF DRAFT LIABILITY PROVISIONS OF THE PROPOSED MANAGERS' AMENDMENT (May 18, 1998)

ISSUE	Present Law	Managers' Amendment (S.1415)	Gregg-Leahy Amendment
Immunity for Tobacco Manufacturers	No Special Relief	Subject to Annual Cap on Liability of $8 billion	No Special Relief
Immunity for Parent Corporations	No Special Relief	Subject to Annual Cap	No Special Relief
Immunity for Corporate Affiliates	No Special Relief	Subject to Annual Cap	No Special Relief
Immunity for Lawyers, Agents, Executives	No Special Relief	No Special Relief	No Special Relief
Limitation on Punitive Damages for Future Acts of Tobacco Companies	No Special Relief	Not Subject to Cap if the Acts Are Not Covered by the Protocol and Consent Decrees	No Special Relief
Limitations on Punitive Damages for Past Acts	No Special Relief	Subject to Annual Cap	No Special Relief
Limitations on Compensatory (including Economic) Damages	No Special Relief	Subject to Annual Cap (Past and Future Acts)	No Special Relief
State Health Cost Recovery Cases for Past Acts	No Special Relief	Settled at State Option	Settled at State Option
State Health Cost Cases for Future Acts	No Special Relief	Completely Preempted	No Special Relief
Local and Tribal Health Cost Cases	No Special Relief	Completely Preempted for Both Past and Future Acts of Tobacco Co.s	No Special Relief
Federalization of Tobacco Claims	No Special Relief	Tobacco Claims Removable to Federal Court	No Special Relief
Immunity for Suppliers of Component Parts and Other Companies	No Special Relief	Complete Civil Immunity for Tobacco-Related Claims Against Certain Parties	No Special Relief
Civil Enforcement of State, Local and Tribal Tobacco and Health Laws	No Limitations	Significantly Preempted -- Except State Enforcement of Consent Decrees	No Limitations
Addiction and Dependence Claims	No Special Relief	Claims Seeking Cessation and Other Programs as Remedy are Preempted	No Special Relief

Prepared by the American Lung Association, Public Citizen, and Essential Action

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

ANALYSIS OF CURRENT DRAFT OF THE CIVIL LIABILITY PROVISIONS OF THE PROPOSED MANAGERS' AMENDMENT TO S. 1415

The basic structure of the civil liability provisions of the proposed Manager's Amendment would divide the liability provisions between two titles, Title VII and Title XIV. The provisions of Title VII would take effect whether or not the tobacco companies entered into consent decrees and the Master Settlement Agreement and Protocol. In contrast, Title XIV's liability provisions would take effect *only* if the tobacco manufacturers enter into consent decrees and the Master Settlement Agreement. Many of the liability provisions of Title VII in the April 1 Commerce Committee version of the bill have been moved to Title XIV, including the cap on the companies' civil liability and the limitation on governmental actions.

In obvious recognition of the many substantive flaws and technical errors that plagued the Commerce Committee bill because of last minute drafting, the Managers' Amendment is quite extensive. Unfortunately, this massive rewrite of the Committee bill is also being drafted at the last minute and behind closed doors. It is not surprising, therefore, that it, too, is riddled with loopholes, ambiguities and inconsistencies -- some are new, but many problems from the previous version of S. 1415 still remain in similar if not identical form.

TITLE VII.

Broad Applicability. Sec. 703 states that the provisions of Title VII apply to any civil action involving a tobacco claim. *Civil actions* are broadly defined in sec. 701(2) as any action or suit that is not a criminal action. This could include not only tort cases and governmental actions seeking reimbursement for health care costs, but also all governmental actions seeking injunctions or civil penalties for violations of State, Tribal or local law, and citizen suits to enforce State consumer fraud or other laws. A *tobacco claim* is also broadly defined in sec. 701(7) as encompassing all claims directly or indirectly related to the health-related effects of tobacco products, including claims related to any conduct, statement, or omission respecting the health-related effects of tobacco products. The definition of "tobacco claim" also seems to encompass civil suits to enforce advertising and marketing restrictions, ingredient disclosure requirements, second-hand smoke laws and like measures that are not included in or go beyond the consent decrees, and may include civil actions to enforce the decrees themselves. These definitions also cover civil claims for both past and future conduct.

Ralph Nader, Founder
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Federalization of Tobacco Claims and Preemption. The Managers' Amendment could result in all civil tobacco health-related claims being removed from state to federal courts. Sec. 702(a), entitled "Application; Preemption," states that "The provisions of this title govern any tobacco claim in any civil action" brought in a State Tribal or Federal Court. Although Sec. 702(b) states that the substantive law to be applied is the relevant State or Tribal law to the extent such law is not inconsistent with the federal Act, it seems that, under this section, tobacco claims could be considered federal statutory law claims and, therefore, could be removed to federal court by defendants without having to satisfy the requirements of diversity jurisdiction. (In addition, the elimination of retailers, wholesalers and other likely "local" defendants as "permissible defendants" in Secs. 1406 and 1411 will make it easier for tobacco manufacturers to meet diversity requirements, giving the companies added "insurance" that they can remove these claims to federal court if they choose.)

TITLE XIV.

These provisions of Title XIV, entitled "Consensual Exchange of Benefits," apply only if one or more of the manufacturers has entered into the national Protocol with the Secretary of HHS.

Broad Applicability. The new Title XIV, Sec. 1406, applies to any civil tobacco action brought pursuant to Title VII against a participating tobacco manufacturer and a host of other parties, including importers, wholesalers, retailers, suppliers of constituent parts of tobacco products, tobacco growers, and insurers of these parties. Lawsuits against other parties do not appear to be covered by this section.

Because it refers back to Title VII for several key definitions, Title XIV's scope is also extremely broad and may apply to any civil action involving a tobacco claim. Again, this could include all governmental actions seeking civil penalties for violations of State, Tribal or local law, and government and citizen suits to enforce State consumer fraud or other laws involving a tobacco claim.

Extensive Preemption of Governmental Claims. Sec. 1407 bars all civil actions involving a tobacco claim that are brought by States, municipal and county governments, other governmental entities, Indian Tribes, or other entities operating in *parens patriae*. There are two exceptions: claims "to enforce the terms of the Master Settlement Agreement or a consent decree," Sec. 1407(b), and claims by any state which elects within 30 days of the date of enactment to opt out of receiving its share of the payments under Title IV of the bill. Sec. 1407(c).

The full scope of this preemption are not entirely clear but appear to be extensive:

> 1) Limitations on State Lawsuits Against Tobacco Manufacturers. There are at least two substantial limitations on State lawsuits under Sec. 1407. First, a state that has not already filed a civil suit against a tobacco manufacturer at the time the Act is passed has

no "opt out" option. Sec. 1407(b). Second, and more importantly, a state that has filed a suit and "opts out" is only allowed to maintain that action already filed before enactment of the Act. Sec. 1407(c). The state is prevented from bringing any future civil action against a tobacco manufacturer or any of the other entities listed in Sec. 1406, no matter how badly the companies act in the future. The only civil actions it appears the state will be allowed to maintain in the future against the tobacco manufacturers are related to enforcement of the consent decrees.

2) Bar to State Enforcement of Anti-Fraud, Antitrust and other State Laws. States that do not "opt out" of Title XIV's scheme are permitted to "maintain a civil action involving a tobacco claim only to the extent necessary to permit continuing court jurisdiction over the settlement or consent decree." Sec. 1407(b). Thus, these states will be barred from filing any civil claims to enforce their anti-fraud, antitrust, environmental health or other consumer statutes that relate to tobacco and health -- including claims based on future conduct. Where fraudulent or conspiratorial acts are not covered by the consent decrees, the states will have their hands tied.

3) Complete Preemption of Local, Tribal and Other Governmental Actions. Local government claims against participating manufacturers are completely preempted, irrespective of whether the state in which the locality is located "opts in" or not. Sec. 1407. This provision would have blocked the City of San Francisco suit that led to the release of the R.J.Reynolds "Joe Camel" papers and historic concession by the industry, and may interfere with the ability of the city to enforce its victory in that case. Similarly, Tribal government actions are completely preempted, without any ability to "opt out." Local and Tribal claims are not only barred for past actions of the companies, but for all future conduct as well.

"Government entities" that are completely barred from bringing civil claims also could include foreign governments. Sec. 1407. This provision would legislatively preempt the recently filed claim in a U.S. court by Guatemala against the tobacco companies. Because the definition of "tobacco claims" is so broad, foreign governments may even be barred from collecting in U.S. courts judgments won in foreign courts. Thus, if Guatemala won a judgment against Philip Morris Guatemala in Guatemalan courts, but discovered the subsidiary could not satisfy the judgment and sought to enforce the judgment against the parent corporation based in the U.S., it may be prevented from doing so.

4) Extensive Regulatory Preemption. Based on the extremely broad scope of the definitions of "civil action" and "tobacco claim" Title XIV appears to bar not only governmental actions seeking reimbursement for health care costs, but also all governmental actions seeking civil penalties for violations of State, Tribal or local law. The definition of "tobacco claim" also seems to encompass civil suits to enforce advertising and marketing restrictions, ingredient disclosure requirements and like measures that are not included in or go beyond the consent decrees. If this interpretation

is correct, then regulation by states (except the "opt outs") that goes beyond the consent decrees is curtailed, and local and Tribal enforcement of such laws is completely eliminated. The inability to enforce will tend to freeze State, Tribal and local regulatory initiatives, because there will be little motivation to pass new laws that can only be enforced through criminal proceedings.[1]

5) Other Unintended Consequences? The broad sweep of the definition of "tobacco claim" coupled with the extensive preemption of State and local governments' ability to bring actions and the definition of "permissible defendants" in tobacco claims, Sec. 1411(a), may preempt cases not generally assumed to be covered by this bill. For example, Title XIV could be read to prohibit a local government from assessing civil penalties against a retailer or wholesaler who violates a local ordinance on youth access. The law is related to tobacco and health and is against a retailer, so it is covered by the Title. See Sec. 1406(a)(2). And in any case covered by the Title, the only permissible defendant is a manufacturer or successor; wholesalers and retailers are given immunity -- even from enforcement of local tobacco control laws. A bar that sells only tobacco products made by participating manufacturers, and is therefore a retailer under Sec. 1406(a)(2), that violates a local anti-smoking ordinance could be immune from civil prosecution, as could any of the entities listed in Sec. 1406(a)(2)-(5) who, as employers, violate local smokefree workplace laws.

Annual Cap on Participating Manufacturers' Civil Liability. Like the Commerce Committee version of the bill, the Managers' Amendment would cap the tobacco industry's total liability for all civil damages and penalties for all past and future wrongs, except punitive damages for future actions not covered by the Protocol and Consent Decrees. Sec. 1412. The amendment raises the cap from $6.5 billion to $8 billion per year, but this is still insignificant when compared to the costs caused by the industry. The U.S. Treasury Department estimates that the economic costs alone of tobacco related illness is $130 billion a year. An $8 billion cap limits the industry's liability to less than 10 cents on the dollar for direct economic costs.

The cap would cover all civil damages and penalties assessed against the participating companies in a given year, except punitive damages for future conduct as described above. Thus, limited by the cap are not only the health care costs recovered by States that do not opt out, but all tort damages, recoveries by health insurers, labor health funds, and employers, and any civil penalties for violating any tobacco and health laws that are not preempted by the Act. Any unsatisfied judgments carry from one year to the next. The bill does not require the tobacco defendants to pay interest to plaintiffs left waiting to recover.

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[1] Various anti-preemption provisions in other sections of S. 1415 may undercut the potential for this interpretation of the Act, but that is not clear. At the very least, even a mere possibility that the Act could interfere with the ability of state and local governments to enforce their health and safety laws underscores the need for this legislation to be scrutinized with the utmost care.

It is worth noting that the June 20 deal between tobacco manufacturers and certain state attorneys general also contained a liability cap; at that time, the cap was $5 billion per year. But under the deal, there was also a significant restriction on the types of civil claims that could be brought against the industry. There could be no class actions, no civil claims by health insurers, labor health funds, or private employers. The June deal would not have allowed punitive damages against the industry for past actions. And the deal had no state "opt out" provision. While we are pleased these unwarranted restrictions on legal remedies are no longer in the legislation, the effect of putting all of these cases under the cap could be substantial. Under the Amendment, civil claims of states that have "opted out", and of private insurers, labor health funds, and employers, as well as the claims by individual plaintiffs and class actions plaintiffs would all be subject to the cap. Although the cap has been raised from $5 billion to $8 billion, the impact of the cap on plaintiffs may be even greater than before, making any benefit of increasing the cap largely illusory.

There is no reason to believe that this cap exhausts the industry's ability to pay. Nor is there any reason why this industry, alone among all industries in the United States, should be protected with an annual cap from the ordinary legal consequences of its deliberate, fraudulent, outrageous and deadly conduct. Indeed, there is undoubtedly no industry *less* deserving of such special protections from liability.

Unworkable and Weak Non-Attainment Provision. Sec. 1409 of the Amendment contains a provision that purportedly would eliminate the liability cap if the look-back goals for youth smoking reduction are missed by more than 20 percentage points in a given year. However, the provision is unworkable, forcing the Secretary to make impossible factual findings, and subjecting the agency to an administrative nightmare. For example, rather than allowing the Secretary to find that the target is not met and subjecting that decision to judicial review on petition of the manufacturer, the proposal requires the Secretary to initiate a judicial proceeding in order to make a finding of substantial non-attainment. In addition, the industry can avoid the removal of the liability cap by demonstrating to the court that it complied with the law and acted in good faith. The Secretary has no administrative means of gathering evidence that would be needed to rebut the company's claim of "good faith.' Therefore, if a manufacturer was responsible for the goals being missed by 20 percent, it could still have the benefit of the liability cap. Therefore provision is hopelessly weak and ineffective in its current form would likely never result in the removal of the cap even if the look-back goals are missed by 20 percent or more.

Immunity for Suppliers of Component Parts of Tobacco Products and Others. Sec. 1406 of the bill states that Title XIV applies to all cases brought against parties listed in Sec. 1406(a)(1)-(5), including not only participating tobacco product manufacturers, but also their predecessors, and the wholesalers, retailers, insurers, and ingredient suppliers and others who do business with the participating tobacco product manufacturers (and not with the non-participating manufacturers.) Sec. 1411(a) states that the only permissible defendants in a civil tobacco claim covered by Sec. 1406 are participating tobacco product manufacturers and their successors. That means that all of the other parties listed in Sec. 1406 are given complete immunity from any civil liability

related to tobacco and health, whether brought by a State or local government, health insurer or other private party. While the Congress might not want to make retailers liable for manufacturing hazards, this provision could be interpreted to prevent local governments from civilly enforcing smokefree workplace rules in convenience stores. (See also "Unintended Consequences?" above.)

Also of significant concern is the effect of giving all these parties such sweeping immunity from all tobacco-related civil liability. For example, the companies that supply "component or constituent parts of tobacco products" get broad immunity. This could even include the company that supplied asbestos for Kent cigarettes' "Micronite" filters, and the companies that supply the various chemicals used to treat tobacco in the cigarette production process, no matter how knowing their conduct or deadly the results. This immunity from civil liability is broad, has few exceptions, and applies to both past and future conduct.

Addiction and Dependence Claims. The proposed Amendment would prohibit civil claims based on addiction or dependence. Sec. 1406. This prohibition would wipe out civil claims which are predicated upon addiction to, or dependence on, tobacco products and where plaintiffs are seeking relief in the form of cessation programs or other health programs. Sec. 1412. While the proposal attempts to preserve personal injury claims "based upon manifestation of tobacco-related diseases," national legislation should not preempt any claims by private parties against the tobacco industry, even those based "only" on addiction or dependence. Legislatively settling" these so-called "Castano" actions is not only a bad precedent for the Congress to set, but the Amendment would preempt all future addiction claims, even if the cessation programs or other programs that would be provided under the Act are deemed inadequate, are unavailable in a certain area, or are terminated at some point in the future.

For more information on Public Citizen's position on national tobacco legislation, visit our website at http://www.citizen.org/.

For additional information, call Joan Mulhern, Legislative Counsel at (202) 546-4996.

This analysis was prepared with substantial assistance from Essential Action.

Tob-acr-liability

20% exploration language

Elena:

The formulations below track the language in Section 203(c). Subsection (d) would need to be modified slightly (because, as currently drafted, it restates the "preponderance" standard) or could be combined with subsection (c).

Section 203(c)

In any action under this section, the court shall determine whether the tobacco product manufacturer has demonstrated, by clear and convincing evidence, that it engaged in best efforts to reduce minors' use of tobacco products to a degree at least equal to the required percentage reduction.

OR

In any action under this section, the court shall determine whether the tobacco product manufacturer has demonstrated that no reasonable observer would conclude that the manufacturer or distributor had failed to engage in best efforts to reduce minors' use of tobacco products to a degree at least equal to the required percentage reductions. [note: one could add a "clear and convincing" standard to this one, but it might be overkill]

Note that Section 203(g) would have to be changed in parallel because that section establishes the criteria for getting one's liability limitations back after they have been withdrawn.

1) burden on manufacturer

2) standard should be clear + convincing, not preponderance

3) and they should have to show best efforts - not just that they didn't do anything wrong.

Conv w/ Tom Perelli re 2070 expl[illegible]

Wyden amendment bad

(1) Panel has to make prediction judgment re clinic-y'all're doing a survey.

(2) puts all power in FDA conn

(3) recs to manuf. Prob: if manuf does this, not be a defense to 203 action even if no actual harm - other than in conjunc w/ 203.

203-1 even if doesn't rec -- why should manuf do it?

HHS always of views that [lit] They ever have to litigate, they'll lose.

data problems

can't litigated.

will be able to win Then cases if ind proved it on.

strengthen language -

~~203(f)~~

T. Ind not have to show by clr + conv ev that they failed to comply.

Ind. should have to prove it complied, but by clr + conv.

New burden is on HHS to show a "failure" by a preponderance of the evidence.

get away from strict compliance - supposed to do that...

ind need to show by clr + conv That They made best efforts to meet...

No tobacco product manufacturer shall receive the liability protections in Title XIV, including the annual liability cap under Section 1412, unless

1) the manufacturer makes its share of the upfront payment described in Section 402(a)(1); and

2) the manufacturer enters into a protocol with the Secretary of Health and Human Services under which the manufacturer agrees to:

a) comply with all relevant federal laws;

b) pay the annual payments required in Title IV;

c) pay the lookback assessments in Title II;

d) pay to set up a National Document Depository for all tobacco company documents;

e) comply with the terms of the FDA marketing and advertising regulation, even if that regulation is held to be inapplicable to others;

f) comply with additional marketing and advertising restrictions, such as

1) a prohibition on using human, animal, or cartoon images;

2) a prohibition on all outdoor advertising;

3) a prohibition on advertising on the Internet, if such advertising can be viewed by those under 18;

4) a requirement that only black and white text be used in advertisements, unless such advertisements appear in adult publications or adult-only stores;

5) a prohibition on making payments to place products in movies and other media that appeal to children under 18 years of age;

6) a prohibition on distributing merchandise containing tobacco product symbols or logos;

7) a prohibition on placing color advertisements on the back of magazines;

8) a prohibition on placing more than one advertisement of specified size at the point of sale; and

g) contract only with distributors and retailers who comply with advertising restrictions in the protocol

Even if the tobacco product manufacturer complies with all of the above requirements, the manufacturer will lose its liability protections under Title XIV if

a) The manufacturer or one of its officers is convicted of

1) violating the criminal misbranding provisions of the Food, Drug, and Cosmetic Act; or

2) violating the reporting requirements for the federal excise tax; or

3) engaging in smuggling of tobacco products;

4) violating federal mail fraud, wire fraud, and false statement laws.

b) The manufacturer fails to make any annual payment within one year of the date that it is owed.

c) The manufacturer misses a company-specific lookback target by 20 percentage points or more in a single year.

Tob-nr-liability

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AMENDMENT NO. ____ Calendar No. ____

Purpose: To modify provisions relating to civil liability for tobacco manufacturers.

IN THE SENATE OF THE UNITED STATES—105th Cong., 2d Sess.

S. 1415

To ref bacco
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AMENDMENT Nº 2433

By GREGG - LEAHY

Bill/Res. No to Modified Committee Substitute to S. 1415

9 Page(s)

GPO: 1998 35-821 (mac)

Referre ____

ordered to lie on the table and to be printed

AMENDMENT intended to be proposed by _____

Viz:

In title XIV, strike section 1406 and all that follows through section 1412 and insert the following:

SEC. 1406. RESOLUTION OF AND LIMITATIONS ON CIVIL ACTIONS.

(a) STATE ATTORNEY GENERAL ACTIONS.—

(1) PENDING CLAIMS.—With respect to a State, to be eligible to receive payments from the State Litigation Settlement Account, the attorney general for such State shall resolve any civil action seeking

recovery for expenditures attributable to the treatment of tobacco related illnesses and conditions that have been commenced by the State against a tobacco product manufacturer, distributor, or retailer that is pending on the date of enactment of this Act.

(2) FUTURE ACTIONS BASED ON PRIOR CONDUCT.—With respect to a State, to be eligible to receive payments from the State Litigation Settlement Account, the attorney general for such State shall agree that the State will not commence any new tobacco claim after the date of enactment of this Act (other than to enforce the terms of a previous judgment) that is based on the conduct of a participating tobacco product manufacturer, distributor, or retailer that occurred prior to the date of enactment of this Act, seeking recovery for expenditures attributable to the treatment of tobacco induced illnesses and conditions against such a participating tobacco product manufacturer, distributor, or retailer.

(3) APPLICATION TO LOCAL GOVERNMENTAL ENTITIES.—The requirements described in paragraphs (1) and (2) shall apply to civil actions commenced by or on behalf of local governmental entities for the recovery of costs attributable to tobacco-related illnesses if such localities are within a State

whose attorney general has elected to resolve claims under paragraph (1) and enter into the agreement described in paragraph (2). Such provisions shall not apply to those local governmental entities that are within a State whose attorney general has not resolved such claims or entered into such agreements.

(b) STATE AND LOCAL OPTION FOR ONE-TIME OPT OUT.—

(1) IN GENERAL.—The Secretary shall establish procedures under which the attorney general of a State may, not later than 1 year after the date of enactment of this Act, elect not to resolve an action described in subsection (a)(1) or not to enter into an agreement under subsection (a)(2). A State whose attorney general makes such an election shall not be eligible to receive payments from the State Litigation Settlement Account. Procedures under this paragraph shall permit such a State to make such an election on a one-time basis.

(2) EXTENSION.—In the case of a State that has secured a judgment against a participating tobacco product manufacturer, distributor, or retailer in an action described in subsection (a)(1) prior to or during the period described in paragraph (1), and such judgment has been appealed by such manufac-

turer, distributor, or retailer, such period shall be extended during the pendency of the appeal and for an additional period as determined appropriate by the Secretary.

(3) APPLICATION TO CERTAIN STATES.—A State that has resolved a tobacco claim described in subsection (a)(1) with a participating tobacco product manufacturer, distributor, or retailer prior to the date of enactment of this Act may not make an election described in paragraph (1) if, as part of the resolution of such claim, the State agreed that the enactment of any national tobacco settlement legislation would supersede the provisions of the resolution.

(4) LOCAL GOVERNMENTAL ENTITY OPTION FOR ONE-TIME OPT OUT.—

(A) IN GENERAL.—The Secretary shall establish procedures under which the attorney for a local governmental entity which commenced a civil action prior to June 20, 1997, against a participating tobacco product manufacturer, distributor, or retailer seeking recovery for expenditures attributable to the treatment of tobacco related illnesses and conditions, not later that 1 year after the date of enactment of this Act, may elect not to resolve any action de-

scribed in subsection (a)(3). A local governmental entity whose attorney makes such an election shall not be eligible to receive payments from the State Litigation Settlement Account. Procedures under this paragraph shall permit such a local governmental entity to make such an election on a one-time basis.

(B) EXTENSION.—In the case of a local governmental entity that has secured a judgment against a participating tobacco product manufacturer, distributor, or retailer in a claim described in subsection (a)(3) prior to or during the period described in subparagraph (A), and such judgment has been appealed by such manufacturer, distributor, or retailer, such period shall be extended during the pendency of the appeal and for an additional period as determined appropriate by the Secretary.

(C) APPLICATION TO CERTAIN LOCAL GOVERNMENTAL ENTITIES.—A local governmental entity that has resolved a claim described in subsection (a)(3) with a participating tobacco product manufacturer, distributor, or retailer prior to the date of enactment of this Act may not make an election described in subparagraph

(A) if, as part of the resolution of such claim, the local governmental entity agreed that the enactment of any national tobacco settlement legislation would supersede the provisions of the resolution.

(c) ADDICTION AND DEPENDENCY CLAIMS; CASTANO CIVIL ACTIONS.—

(1) ADDICTION AND DEPENDENCE CLAIMS BARRED.—In any civil action to which this title applies, no addiction claim or dependence claim may be filed or maintained against a participating tobacco product manufacturer.

(2) CASTANO CIVIL ACTIONS.—

(A) IN GENERAL.—The rights and benefits afforded in section 221 of this Act, and the various research activities envisioned by this Act, are provided in settlement of, and shall constitute a remedy for the purpose of determining civil liability as to those addiction or dependence claims asserted in the Castano Civil Actions. The Castano Civil Actions shall be dismissed to the extent that they seek relief in the nature of public programs to assist addicted smokers to overcome their addiction or other publicly available health programs with full res-

ervation of the rights of individual class members to pursue claims not based on addiction or dependency in civil actions in accordance with this Act.

(B) ARBITRATION.—For purposes of awarding attorneys fees and expenses for those actions subject to this subsection, the matter at issue shall be submitted to arbitration before one panel of arbitrators. In any such arbitration, the arbitration panel shall consist of 3 persons, one of whom shall be chosen by the attorneys of the Castano Plaintiffs' Litigation Committee who were signatories to the Memorandum of Understanding dated June 20, 1997, by and between tobacco product manufacturers, the Attorneys General, and private attorneys, one of whom shall be chosen by the participating tobacco product manufacturers, and one of whom shall be chosen jointly by those 2 arbitrators.

(C) PAYMENT OF AWARDS.—The participating tobacco product manufacturers shall pay the arbitration award.

(d) RULES OF CONSTRUCTION.—

(1) POST ENACTMENT CLAIMS.—Nothing in this title shall be construed to limit the ability of a government or person to commence an action against a participating tobacco product manufacturer, distributor, or retailer with respect to a claim that is based on the conduct of such manufacturer, distributor, or retailer that occurred after the date of enactment of this Act.

(2) NO LIMITATION ON PERSON.—Nothing in this title shall be construed to limit the right of a government (other than a State or local government as provided for under subsection (a) and (b)) or person to commence any civil claim for past, present, or future conduct by participating tobacco product manufacturers, distributors, or retailers.

(3) CRIMINAL LIABILITY.—Nothing in this title shall be construed to limit the criminal liability of a participating tobacco product manufacturer, distributor or retailer or its officers, directors, employees, successors, or assigns.

(e) DEFINITIONS.—In this section:

(1) PERSON.—The term "person" means an individual, partnership, corporation, parent corporation or any other business or legal entity or successor in interest of any such person.

(2) SECRETARY.—The term "Secretary" means the Secretary of Health and Human Services.

Tob-nr-liability

COALE, COOLEY, LIETZ, MCINERNY & BROADUS

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A third-party payor may assert claims, (but not an addiction claim or dependency claim), against a participating manufacturer to recover monies related directly or indirectly to tobacco-related illness or injury insofar and insofar only as to that portion of such monies which were not passed through to any other person whether in the form of charges, premiums, reduced benefits or other value to such third-party payor, or otherwise recovered by such third-party payor.

[redacted]-er-liability

A third-party payor may assert claims, [but not an addiction claim or dependency claim], against a participating manufacturer to recover payments related directly or indirectly to tobacco-related illness or injury only if the consideration paid to, or payment made by, such third-party payor was in no way adjusted, or based on, the use of or exposure to tobacco products at any time.

F:\DATA\L\03218001\ACT\4-28\INSERT.WPD

II

5/6 Bodham/Cole

Hatch - gaining momentum — HM - Just announcement, not bill

Ford, Hollings, Torricelli, Breaux, Feinstein

(looking at 456) bring down assessment; 2 — he's backed off FDA stuff

add UAs back in. — international

Cas burns sleuth - essentially protects agt CA. (although state suits)

Third-pty payer proposal - only if no adjustment (not Blues; some union suits still allowed)

2 I said should be off NT; they said OK.

Preemption - Kerry insisted. (supposedly for CA immunity - half a deal!)

(were in Rosenblatt settlement)

makes cases tremendously easier - invitation for Π's' lawyer

still have AyR defense, of course.

take out now or use as bargaining chip?

Tob-int-liability

Cynthia A. Rice 06/18/98 02:45:34 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP, Cynthia Dailard/OPD/EOP

cc:

Subject: POTUS Q&A in case you haven't seen

Q Mr. President, do you have any plans to resurrect tobacco, perhaps in the House? And how?

THE PRESIDENT: Well, yesterday many of the Republicans senators who I called -- and I talked to 10 of them yesterday -- said that they had been approached by Senator Lott about the prospect of putting some sort of special group together of four Republicans and four Democrats and maybe having them try just in a matter of a few days to come up with a bill they thought would actually not only pass the Senate, but could be written into law. And if that's a good-faith effort they're willing to make, that's certainly one option that I would consider.

But I don't intend to continue -- to stop fighting for this. I think it's obvious to everybody in the world what happened. This bill was voted out of the committee 19 to 1. Some of the people who voted for it in the Republican Caucus then did not vote for it on the floor, even though every major amendment which was adopted to the bill was sponsored by a Republican senator. And I think it's pretty clear what happened.

They may believe that the $40 million in advertising by the tobacco companies changed public opinion irrevocably and permanently, and, therefore, it's safe to walk away from the biggest public health obligation that this country has today. I don't believe that.

But even if the politics have changed, the merits haven't. One more day will pass today when 3,000 more children will start to smoke even though it's illegal to sell them cigarettes, and 1,000 of them will have their lives shortened because of it. And for us to sit here and do nothing in the face of evidence which has been mounting during this debate -- the Minnesota case, during this debate, gave the freshest and in some cases the most vivid documentary evidence of all from the tobacco companies themselves that they've known about the addictive qualities of nicotine for years, and that they have deliberately marketed cigarettes to children for years, even though they knew it was against the law to do it, because they needed what they call "replacement smokers."

Now, the bill is simple in its outline and clear in its

objectives. And in terms of the complications of it, many of those were added by the people who now are criticizing it.

So, on balance, I think the case is still so overwhelming that we ought to keep working on it, and I'm prepared -- you know, I've been working on this for years. When we started, most people didn't think we'd get as far as we have, and I don't think that we intend to stop until we prevail. And sooner or later we will, because it's the right thing to do.

Q Sir, how will you finance this child care initiative and other things that were contained in that bill without ruining the budget?

THE PRESIDENT: We can only finance -- we can finance that part of it which is within our own budget, and that part of it which was dedicated to -- which would had to have been financed by the states and which was within a menu of things that we supported that the states could spend it on won't be financed unless the states get the money some other way. And I think that's unfortunate, because I think that would be a good expenditure of some of the money.

Keep in mind, most of the federal money was designed to be spent on -- directly on health care --on medical research, on smoking cessation programs, on programs designed to deal with the consequences of the health problems that are directly related to smoking in this country. And that was, of course, a part of the Senate's decision in killing it.

I think it's important to point out also that there were -- that this bill is temporarily dead because of the unusual rule of the Senate that requires 60 percent, not 51 percent, of the Senate to pass on any bill other than the budget if somebody objects to it. So for all the $40 million in spending -- and as reported in the paper today, all the commitment to run the same ads all over again in November to protect the Republican members who voted with them -- they still could only muster 43 votes. And two of those votes were people who wanted a better provision for the tobacco farmers and essentially supported the bill.

So, essentially, what you've got is 41 people denying the American people and denying the huge majority of the United States Senate, including a number of Republicans, the right to pass a tobacco bill, and ask the House to do the same to protect our children. That's not a long way from success. And that means that each and every one of the members of the Republican Caucus who voted for that was in a way personally responsible for the death of the bill.

It's not all -- it's dead today. It may not be dead tomorrow. And it's not dead over the long run because the public health need is great. I've never quit on anything this important in my life, and I don't intend to stop now. There are too many futures

riding on it, and I think in the end we will prevail.

Tob - sr - liability

Bruce N. Reed
06/22/98 04:20:44 PM

Record Type: Record

To: Elena Kagan/OPD/EOP

cc:
Subject: Your hero

LA Times interview, Friday:

THE PRESIDENT: Let me tell you what we're doing now, is we're exploring every conceivable alternative for how we could come up with a bill that can actually pass the Congress that would do the job of reducing teen smoking. The only thing I have ruled out, which I did earlier today in my press conference, was just taking some slimmed-down bill that would make a mockery of the process so that Congress could say it did something.

I believe that the central reason the tobacco companies pulled out was not so much the money but was the uncertainty as to whether there would be some liability cap. And there was an unusual coalition of liberals and conservatives, for an unusual set of reasons, who voted against that; which is why, after consultation with Senator Lott, I came out and clearly said that I would be prepared to accept one and I thought they ought to vote for it. And I still believe that.

And the reason is clear. Whether your philosophically opposed to a liability cap or not as part of the settlement, under prevailing Supreme Court decisions I think it's clear that if we want the tobacco companies to limit their advertising and marketing, in order to do that they're going to have to understand to some extent what their financial exposure is in the future.

So for me, I have no problem with that, and I think if you talked to anybody who really wants a bill, they will tell you that in the end, if we're going to get a bill, it will have to have some kind of liability cap on it. So it ought not to be too generous to tobacco companies. It ought to be something they still feel, if they continue to do the wrong thing.

But if you look at -- there are three elements. All the studies show there are three elements which has led to a very high rate of teen smoking, even though it's illegal in every state to sell cigarettes to teenagers. One is the price. If the price were higher, kids wouldn't be as likely to buy them. Two is the advertising. And three is the access.

So we've got to try to deal with all three of those things. Then we need the bill to deal with the public health issues. And we need something for the tobacco farmers. And everything else, as far as I'm concerned, can be subject to negotiations.

So I'm looking at -- we've discussed three or four or five different ways that we can get this thing back on track. But the Senate knows what the parameters are. They could -- we could send them up a bill tomorrow that would pass the Senate if they decided they were going to do it.

Q Do you have a bill? I mean, a White House bill.

THE PRESIDENT: No, we don't, because we thought it was better -- in consultation with the Republicans, we thought it was better to let them have a committee bill. So they voted this bill out 19 to 1, and some of the people who voted for the bill voted against it on the floor yesterday -- the day before yesterday.

Q So you can't see a scenario giving them political cover of having a White House bill?

THE PRESIDENT: Oh, I don't mind giving them political cover. Don't misunderstand me. I don't mind -- to me, this is about the kids. If there is an agreement and there are members -- there are Democrats who are worried about being attacked because they gave a liability cap or Republicans who are worried about being attacked because they voted for a bill that would increase the price of cigarettes a buck a pack or however much it is in the bill, or they want to have some differences in the particulars as it's implemented, I don't mind doing that.

I think that this administration, I think because of the stand that I have taken and the stand the Vice President has taken, I think that our credibility on this is pretty strong. People know we really believe in this and we really believe it ought to be done. And I think everyone understands that any complicated piece of legislation has to represent a series of compromises.

So I'm more than happy to do all that, but I just -- I'm not prepared to adopt a bill that I don't think will do the job and that no reputable public health authority believes will do the job. That's my only bottom line.

I don't -- I'm not interested in gaining any political benefit from this except insofar as it's necessary to induce people to ultimately pass the right kind of bill. That's my only objective here. I think this is a public health opportunity of a generation for the United States, and to squander it because there was $40 million in unanswered advertising by the tobacco companies, to which there are very good answers, is a great -- it would be a great pity. And I think in the end it's a misreading of the political opinions and character of the American people for the Republican majority to

think that they've gotten some big victory here. I just don't agree with that, and I hope we can work it out.

Tob - ser - liability

PARENT-SUBSIDIARY PROBLEM

The following proposed additions are designed to ensure that tobacco companies cannot move their assets to other entities to avoid the requirements of the Act. All obligations under the Act would be on the manufacturer itself, which would be assessed payments and would sue or be sued. If, however, the manufacturer was unable to satisfy its obligations, its affiliates would have to make the payments.

Add in the purposes section:

It is the intent of Congress that manipulation of the corporate form not be permitted to defeat the obligations of tobacco product manufacturers under this Act. Further, it is the intent of Congress that tobacco product manufacturers, as well as any parent companies, subsidiaries, or affiliated companies, who benefit directly or indirectly from the sale of tobacco products, shall be responsible for all assessments, fees, and penalties under this Act, as well as judgments won in suits involving tobacco claims under this Act.

Add a section (prior to Title I or in Title IX) to read as follows:

SECTION ____

(a) The obligations of tobacco product manufacturers under this Act, or for any civil liability for smoking related illnesses, shall not be defeated by corporate form.

(b) If a tobacco product manufacturer is unable to comply with satisfy any of the assessments, fees, or penalties under this Act or is unable to satisfy judgments or settlements against it for tobacco claims under this Act, all affiliated corporations or entities of said manufacturer shall be jointly and severally responsible for satisfying the obligations of said tobacco product manufacturer.

Add in the definitions section:

Affiliated corporation or entity -- The term "affiliate corporation or entity" shall mean any company or person, regardless of legal form,

1) that is a parent company of a tobacco product manufacturer;

2) that is a subsidiary of a tobacco product manufacturer;

3) that is owned by the same parent corporation, either directly or indirectly, as a tobacco product manufacturer;

4) that is a subsidiary owned directly or indirectly by a tobacco product manufacturer;

5) in which there is common ownership (direct or indirect) with the ownership of a tobacco product manufacturer of at least 5%; or

6) that is owned or operates in a fashion that provides a reasonable basis to hold the affiliated company or entity responsible for the obligations of the tobacco product manufacturer.

RESERVATION PROVISION

This provision is intended to avoid a Winstar problem. This language, which is taken from 42 U.S.C. § 1304 (1994) (reserved legislative power to modify social security programs), could be useful in defending against a variety of potential claims that the original Act created protected interests that later Congresses either could not infringe upon or could not infringe upon without paying just compensation. We recognize that the language may need refinement to provide some assurance of stability in the critical inducements to tobacco companies to obtain participating manufacturer status.

Add before Title I or in Title IX:

SECTION _____ -- RESERVATION OF THE RIGHT TO AMEND OR REPEAL

The right to alter, amend, or repeal any provision of this chapter is hereby reserved to the Congress.

ADDICTION/DEPENDENCE CLAIMS

Title VII of the Commerce Committee bill extinguishes all addiction and dependence claims, including the claims of the Castano plaintiffs. It is our understanding that the Committee intended only to extinguish suits which seek smoking cessation programs as a remedy. The most important question is whether these provisions should be eliminated (thus letting such suits go forward against all manufacturers) or placed in a consensual title (letting suits go forward against non-participating manufacturers only).

We have also been concerned about the vague definition of addiction/dependence claims. A hostile court could interpret the current Commerce Committee bill to prohibit use of addiction evidence to overcome assumption of risk. The following red-lined version of the bill provides our suggested rewrite:

In the definitions section of Title VII (or a consensual title):

(1) Addiction claim; dependence claim._ The term "addiction claim" or "dependence claim" refers only to any cause of action where the claim for relief ~~is predicated upon claims of addiction to, or dependence on, tobacco products, but neither term includes claims based upon manifestation of tobacco related diseases~~ seeks a cessation program or other means to reduce or eliminate the user's addiction to, or dependence on, tobacco products, and as used herein is brought by those who claim the need for nicotine reduction assistance. Neither addiction or dependence claims include claims based on manifestation of illness or tobacco-related diseases.

In a substantive section of Title VII (or a consensual title):

(c) Addiction and Dependence Claims Barred. In any civil action to which this title applies, no addiction claim or dependence claim seeking relief for an ongoing addiction or dependency by the provision of a tobacco cessation program or assistance may be filed or maintained.

BANKRUPTCY

There are two approaches to ensuring that tobacco manufacturers cannot avoid going into bankruptcy. The first is to make debts under the Act non-dischargeable. That is the simplest and can be done in the bill itself. The second is to amend the bankruptcy code to bar a tobacco company from filing for bankruptcy relief.:

Making debts non-dischargeable:

No participating tobacco product manufacturer shall cease operations without establishing a surviving entity against which a tobacco claim may be brought. Any obligation or interest of a participating, tobacco product manufacturer arising under such liability apportionment agreement shall be given priority and shall not be rejected, avoided, or discharged in a proceeding, under title 11, United States Code, or in any liquidation, reorganization, receivership, or other insolvency proceeding under State law.

Barring a tobacco company from availing itself of bankruptcy relief:

Section 109(b) of title 11, United States Code is amended--

1. in paragraph (3), by striking the period at the end and inserting "; or" and

2. by adding at the end the following:

(4) a tobacco product manufacturer, as defined in section 701(20) of the [Tobacco] Act.

Note

The above section defines who may be a debtor under chapter 7 of the Code. Thus, this language literally bars a tobacco company only from chapter 7. Subsection (d) of 109, however, disqualifies those who are barred from filing under chapter 7 from filing under chapter 11, excepting a stockbroker, a commodity broker or a railroad. Chapter 11 allows reorganization of a business enterprise and is the key chapter for current purposes. Hence, the above will achieve our purposes only if a tobacco company cannot qualify for one of the exceptions. Commodity broker, railroad, and stockbroker are terms defined in the Code. 11 U.S.C. § 101(6), (44), and (53(A). None seem to describe a tobacco company, but none require that a putative commodity broker, for example, have no other operations. To foreclose that risk, amend 109(d) as follows:

strike the period at the end and insert", but in no

event may a tobacco product manufacturer, as defined in section 701(20) of the [Tobacco] Act, be a debtor under chapter 11 of this title."

None of the above would preclude other forms of insolvency proceedings, such as an equity receivership. They are rarely used these days but would be the logical alternative here if tobacco companies are blocked from using federal bankruptcy. In the end, an equity receivership could wind up looking like a federal bankruptcy proceeding except for the discharge. One other option is to allow them to file only under chapter 7. Chapter 7 looks to liquidate an insolvent estate and does not discharge the indebtedness of a corporation. The trustee could operate the business as needed to maximize the sale price but continuing the business at least for a awhile is likely to happen under any scenario.

INTRODUCTIONS OF EVIDENCE CONCERNING THE DEVELOPMENT OF REDUCED-RISK TOBACCO PRODUCTS

Title VII of the Commerce Committee bill prohibits introduction of evidence concerning development of reduced risk tobacco products as follows:

> Future reduced-risk products . In any civil action to which this title applies, no allegation or evidence ~~relating to~~ reduced-risk tobacco products developed ~~after the date of~~ enactment of this Act shall be admissible or discoverable in any action on a tobacco claim arising out of, ~~based on~~, or related to any other tobacco product.

Ostensibly, this benefits the tobacco industry by prohibiting a plaintiff from showing, for example, that the company could have made its product safer had it wanted to (based on developments after the Act). Alternatively, it prohibits introduction evidence by tobacco companies that might be used to show that they are becoming good corporate citizens (may or may not be admissible to defeat or reduce a claim for punitive damages).

The question is whether they belong in or out of the Act.

INSURERS

The following provision has been proposed to make certain that insurance companies that have passed along costs to their insured do receive a windfall by suing tobacco companies for costs incurred in paying for tobacco-related injuries:

> A third-party payor may assert claims against a participating manufacturer to recover payments related directly or indirectly to tobacco-related illness or injury only if the consideration paid to, or payment made by, such third-party payor was in no way adjusted, or based on, the use of or exposure to tobacco products at any time.

I read this provision to bar <u>any</u> recovery by a company that adjusted its payments based on use of tobacco products. I am not sure that was the intent of the provision.

(From Lung Assn – largely wrong)

RESTRICTIONS ON TOBACCO INDUSTRY'S LEGAL LIABILITY: A COMPARATIVE ANALYSIS

ISSUE	PRESENT LAW	COMMERCE COMMITTEE BILL[1]	HARKIN/CHAFEE[2]	CONRAD[3]
Cap on Annual Liability	No special relief.	$6.5 billion; no rollover of unused cap.	$9.3 billion: Unused portion of cap up to $5.3 billion, rolled forward.	No special relief.
Preemption of Current Law: Special Limited Rules for all Tobacco Cases	No special relief.	Tobacco claims to be federal causes of action: state and local law effectively preempted.	No special relief.	No special relief.
Immunity for Corporate Parent	No special relief.	Complete immunity.	No special relief.	No special relief.
Immunity for Corporate Affiliates	No special relief.	Complete immunity.	No special relief.	No special relief.
Immunity for Assets of Industry Agents (PR Firms, Law Firms, etc.)	No special relief.	Complete immunity.	No special relief.	No special relief.
Limit on Punitive Damages for Past Actions	No special relief.	Subject to annual cap.	Subject to annual cap.	No special relief.
Limit on Punitive Damages for Future Actions	No special relief.	Subject to annual cap if related to manufacture, advertising, marketing or sale.	Subject to annual cap.	No special relief.
Limitation on Rules of Evidence	No special rule.	Potentially limits document discovery; bars evidence on reduced-risk products.	No special rule.	No special rule.
Special Rules for State Medicaid Cases	No special rule.	Settled at state option.	Settled at state option.	Settled at state option.
Special Rules for Certain Class Actions (Castano Cases)	No special rule.	Settled.	Settled.	Settled.

[1] Based on April 8, 1998 draft
[2] Based on March 31, 1998 draft.
[3] Based on February 12, 1998 draft.

Tob-est - Liability

Tob - rer - Liability

2.08 real

commit: 166 → 12.5

5/11 Liability meeting w/ Conrad

non-tobacco / or agent
parent, affiliate, attys (ad camp)

CosFano -

Reduced risk -

(cap applying to future misconduct) - KC objects all around.

Very concerned abt effects on dinan claims.

Somewhat less concerned about preempting CAs for addiction claims.

BVH: Not enuf - need to keep addiction claim.

But then: ok to preempt if public remedies

Conrad: need to be per pack
shouldn't neg pass-thru
(emphasize: make cos pay for harm they cause)

not discoverable - diff from FRE

DOJ: otherwise tracks ev. rules pretty well

BVH: shouldn't preempt state law -
states should be able to adopt
diff rules.

If it's s.q., ok

Tob-acr-Liability

TALKING POINTS ON WHAT'S NOT IN TITLE XIV

* **Title XIV Does Not Limit The Tobacco Companies' Liability**

  Participating manufacturers who comply with the rigorous restrictions in the protocol and the other requirements of Title XIV have their liability limited to $8 billion per year. If they owe more than $8 billion in a given year, they will simply have to pay the additional amount in the next year.

* **The Bill Does Not Prevent or Limit Anyone From Recovering**

  Every dollar that a person wins in a lawsuit against the tobacco industry will be paid. The bill does not limit the amounts that people can win. It only postpones payment until the next year if the tobacco companies owe more than $8 billion in a given year.

* **The Bill Does Not Limit A Person Who Claims that They Are Addicted From Recovering**

  The bill provides for extensive smoking cessation and other public health programs. The bill eliminates lawsuits against participating manufacturer only if those suits seek to create public health programs, such as smoking cessation programs. It does not limit any person from recovering any damages that they themselves have suffered.

* **The Bill Does Not Limit the Evidence that May Be Discovered or Introduced Against Tobacco Companies**

  The Manager's Amendment removed provisions that would prevent plaintiffs from discovering or introducing in court evidence of reduced-risk tobacco products

* **The Bill Does Not Limit Tobacco Companies' Obligation to Produce Documents in Litigation**

  The Manager's Amendment removed a provision that might have allowed the tobacco industry to avoid its obligation to produce documents in lawsuits. Under the Manager's Amendment, a person wishing to sue a tobacco company may review documents publicly disclosed under Title IX of the bill and may seek documents in discovery

* **The Bill Does Not Protect Attorneys, Advertising Agents, or Parent Companies**

  The Manager's Amendment expressly allows lawsuits against tobacco manufacturers and their parent companies. It does not change current law with respect to suits against attorneys and advertising agents, and thus does not preclude such suits.

* **The Bill Allows Class Actions and Third-party Claims to Go Forward**

* **The Bill Does Not Limit Recovery for Punitive Damages**

re Tob-mr-liability

ADDICTION/DEPENDENCE

Definition:

Addiction; dependence claim -- The term "addiction claim" or "dependence claim" refers only to a cause of action where the claim for relief seeks a smoking cessation program or other public health program that is to be available to members of the public and is designed to reduce or eliminate the user's addiction to, or dependence on, tobacco products. Neither addiction or dependence claims include claims based on manifestation of illness or related disease.

Note: This should do it, though in an excess of caution, one could re-state the langauge in the substantive provision that bars such claims.

related to an injury

Tob - mr-liabilth

NOTE TO ELENA:

Here's a red-lined version:

(1) Future reduced-risk products. -- In any civil action ~~to which this title applies~~ on a tobacco claim that is brought against a tobacco product manufacturer and arises out of, is based on, or is related to the health-related effects of a tobacco product, no allegation or evidence relating to reduced-risk tobacco products developed ~~by any tobacco product manufacturer~~ after the date of ~~enactment of this Act~~ sale of said product shall be admissible ~~or discoverable in any action on a tobacco claim arising out of, based on, or related to any other tobacco product.~~

The revised version is much closer to the normal rule of evidence; it will not give much comfort to the tobacco industry, but it does provide insurance against a rogue judge or unfavorable state law. Here are the significant changes; one could draft a compromise provision that did not incorporate all of these modifications:

1. The Commerce version prohibits introduction of evidence of reduced-risk products developed by any manufacturer;

   This version prohibits only evidence of products developed by the manufacturer who is being sued. This gives additional incentives for companies to develop their own reduced-risk products (assuming that at least some companies do not collude); if one develops a reduced-risk product, it can be used against the others.

2. The Commerce version prohibits discovery and admission of reduced-risk evidence

   This version permits discovery (which may lead to admissible evidence), but prohibits introduction

3. The Commerce version prohibits introduction of reduced-risk evidence developed after passage of the Act

   This version prohibits evidence of reduced-risk products developed after the date of sale of the tobacco product that is the subject of the claim. As a practical matter, this is incredibly difficult to apply because tobacco injury arises out of many purchases over time -- what is the relevant sale/date? It accords, however, with ordinary evidence rules, and is more palatable than the "date of the Act" provision in the Commerce bill. One could adopt a different date at random or use the date that the claim was filed as the cut-off (this might cause plaintiff's lawyers to hold suits until after one or more reduced-risk products are developed).

REDUCED RISK PRODUCTS

(1) Future reduced-risk products. -- In any civil action on a tobacco claim that is brought against a tobacco product manufacturer and arises out of, is based on, or is related to the health-related effects of a tobacco product, no allegation or evidence relating to reduced-risk tobacco products developed by said tobacco product manufacturer after the date of sale of said product shall be admissible.

2237 Rayburn

Tob-sec-liability

3/11/98 DOJ mtg re liability

1. Parent-subsidiary problem.

Bill tries to ensure all suits agt manu itself (not distrib, nor parent co.)

Virtues to This approach: we want inducement/benefit for other parties - down the distribution chain.

But what about up?

Why can't sue parent (if parent has done something wrong)?
" " " director (" director " " " ")?

Want to allow access to parent/sub's assets?

see proposal

n.b. McC doesn't change current law on This subject - gaining access to ~~other~~ parent/sub's resources?

goes current one better - don't do!

BZ: Just take out - how are They going to complain?

2. McC has provision to make debts non-dischargeable

This is better way to do - not to bar tob. co. from going into bankrupt.

Virtually identical w/ current McC language (can eliminate The 1st sentence)

Anything else nec? To prevent spin off of assets prior to going into bankruptcy.

3. Addiction claims

Not worth a lot of $

Decent arg. to terminate all/put $ into cessation

4. Reduced risk - could be benefit on either side!

But corrective action may be discoverable - why not here?

Anything in addition to existing law re corrective actions inadmissible?

[illegible] is identical - on corrective action rule

Tob-sur-liability

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION
WASHINGTON, DC 20510-6125

March 2, 1998

The Honorable William Clinton
The White House
Washington, DC 20500

Dear Mr. President:

I continue to believe strongly that Congress and the administration must work together in a cooperative and bi-partisan fashion if we are to craft a bill that will gain public support, Congressional approval and your signature.

As I stated to you in my previous letter, it will be particularly important for the Administration to exercise its executive responsibilities by providing Congress with detailed assessment of the provisions of pending tobacco legislation, and your specific policy and legislative recommendations.

With this letter I have enclosed the second series of questions to which we must have answers if we are to properly assess global tobacco settlement legislation, and move forward with the most effective and appropriate bill.

The Commerce Committee intends to begin mark-up of tobacco legislation on March 12. It would be most helpful if the administration could submit its answers as soon as possible in advance of the panel's Executive Session.

Thank you for your assistance in providing the Committee and Congress with the information requested. With regards,

Sincerely,

John McCain
Chairman

JM/jr

Questions Regarding the Civil Liability Section of the Tobacco Settlement

I. Title VI of S. 1415

1. Does the Administration support the civil liability provisions contained in S. 1415, as developed by the State Attorneys General? If so, why? If not, why not? What specific changes would the Administration recommend to the civil liability provisions?

What elements would be required in comprehensive tobacco legislation for the Administration to support the liability restrictions in S. 1415? Please be as specific as possible. If only some of the restrictions would be acceptable, please identify which and under what circumstances?

Section 601 of Senate Bill 1415 would provide General Immunity to the tobacco companies that are signatories to the settlement agreement ("tobacco companies") from current or future civil actions commenced by a State or local governmental entity. This termination of such suits is in return for the $368.5 billion in comprehensive payments the companies will make for public health, education, and research programs. The following questions pertain to specific provisions of S. 1415.

2. Does the Administration's support the termination of state and local government - sponsored suits, as recommended by the State Attorneys General? If so, why? If not, why not? If the Administration believes that **Section 601(a)** provisions regarding immunity from state and local governmental suits should be modified, what specific changes do you recommend?

3. **Section 601 (b)** would terminate class action claims arising from the use of tobacco products by the signatory companies, in the present and future. Does the Administration support this provision? Please discuss what changes, if any, you believe should be made to this provision.

4. **Section 601 (2) (A) and (B)** would terminate existing and future civil suits against tobacco companies based upon addiction and dependency claims. State Attorneys General contend that the primary objective of these claims has generally been to fund smoking cessation / prevention programs. The State Attorneys General advise that these important programs are already provided significant funds in the settlement. Does the Administration support this provision? If so, why? If not, why not? Please discuss what changes, if any, you would recommend to it.

5. Section 602 (b) would prohibit punitive damages from being awarded on the basis of past conduct of tobacco companies. The State Attorneys General have testified that the settlement proposal already provides $60 billion in punitive damage payments from the companies. Does the Administration support this provision? If so, why? If not, why not? Please provide what changes you would recommend. **See also question II (2), below.*

6. Section 602 (c) and (e) effectively provide that no suits other than individuals bringing personal injury claims, and third-party payors, can be brought against tobacco companies. Does the Administration support this provision? If so, why? If not, why not? If you believe the classes of permissible plaintiffs should be expanded, please specify what additional plaintiffs should be added.

II. EVALUATION OF THE RATIONALE AND RECOMMENDATIONS OF THE STATE ATTORNEY GENERALS.

1. Some State Attorneys General have stated that, on balance, the proposed settlement's $368.5 billion in funding for public health, research, education, and prevention programs greatly outweighs any recommended limits on liability provided to tobacco companies. One key factor relied on by the State Attorneys General is that unless certain liability claims were prohibited, companies in the industry would face bankruptcy or move overseas as a result of repetitive damage awards and settlements. This would scuttle the public programs mentioned above, and deny individual plaintiff's any chance of recovery. Testimony was presented by the State Attorneys General's negotiating team that the tobacco industry's profit margin is approximately $7 billion a year.

Please address this concern of the State Attorneys General. I would like to have the Administration's views on the question of whether bankruptcy is a realistic concern under the status quo, and whether the $368.5 billion payment from the companies could be jeopardized by eliminating (or significantly lessening) the proposed liability restrictions. What does the Administration believe would be the result if companies moved out of the U.S.? What figure on the tobacco companies' annual profitability does the Administration rely on, when making decisions regarding a possible annual payment from the companies in a proposed settlement?

2. A plaintiffs' attorney assisting the State Attorneys General in the settlement negotiations stated that the punitive damages payment of $60 billion contained in the settlement is a major public interest achievement, notwithstanding the settlement's cap on additional punitive damages. This was stated for two reasons:

first, the $60 billion payment greatly exceeds the *combined figure for all punitive damage awards in the U.S. from any type of litigation*. Secondly, the practical difficulties of plaintiffs winning punitive damage awards on tobacco claims due to their personal choice to use tobacco products, and the fact that some states prohibit punitive damages.

Please assess these comments and provide the Administration's response to them. What are the Administration's views regarding whether citizens and the public interest would be served by removing the punitive damages cap, and allowing citizens to seek such damages in suits against tobacco companies? Is the Administration aware of any punitive damage award that have actually been recovered by plaintiffs from litigation against tobacco companies? If so, please provide information on them.

3. If there is no global settlement, what is the future in terms of adverse liability judgements against the tobacco industry, especially from settlements of state-sponsored or class action suits? In other words, what can we expect under the status quo of having the industry aggressively contest broad-based suits and those from private individuals?

If there is no global settlement, what advertising practices do you believe can be expected from tobacco companies? Is there any reason to believe that companies would exercise their First Amendment rights and advertise as they see fit?

Does the Administration share the view that the current litigation situation, wherein states and class action suits are contested or settled on an individual basis by tobacco companies, presents a more favorable outlook for plaintiffs in terms of actually receiving *and* collecting monetary damages?

4. During our hearing with the CEO's of the major tobacco companies, there was discussion about the annual $5 billion global judgement cap and this idea that any judgement in excess of the cap would be "rolled over" and paid the next year. The suggestion is that every successful complainant would receive their award in due time.

Do you believe that is an equitable and practical policy? Would it be constitutionally valid between the fifty state jurisdictions?

5. Leading plaintiff attorneys testified before the Senate Commerce Committee about the difficulty of plaintiffs in actually *recovering* monetary damages -- as opposed to winning judgements -- for health injuries caused by asbestos and breast

cancer. Testimony stated that 70% of all asbestos companies went bankrupt, leaving tens of thousands of plaintiffs unable to recover any damages whatsoever. One plaintiff's attorney testified before the Senate Commerce Committee that some 300,000 women claiming serious injury from breast implants have not received any monetary compensation from the extensive litigation that has occurred.

Are these figures correct? Please provide what data the Administration has on the number of eligible plaintiffs in successful asbestos and breast cancer class actions, and the monetary damages that have actually been recovered by plaintiffs. Does the Administration agree with the State Attorneys General that there is an analogy between these cases, in that tobacco plaintiffs might face similar difficulties if there is no national settlement?

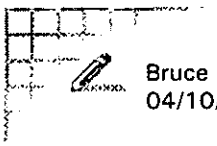
6. How do you respond to the belief of some Attorneys General that industry payments going to a general fund helps more people than a few high dollar, high profile class action judgements?

7. One of the leading plaintiff's trial attorneys that negotiated the settlement testified that any plaintiff with cancer is free to file suit under the proposed settlement. In addition, their attorneys will be assisted by the disclosure and central repository of industry documents that the settlement provides.

Does the Administration concur with these statements? If not, in what way are they inaccurate?

9. If the settlement is enacted, what does the Administration believe would be the resulting price increase in a pack of cigarettes?

Tob - acr - liability



Bruce N. Reed
04/10/98 11:52:18 AM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP

cc: Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP, Cynthia Dailard/OPD/EOP
Subject: Re: Question re: $6.5 liability and budget

Yes, you're right. In any event, it's a difficult scoring issue. We asked Jack about it last night. We should keep working with them to see how they would score it if it were part of the annual payment

tobacco - settlement - liability

[Concept Paper]

TITLE V - ELIGIBILITY CONDITIONS FOR RECEIPT OF LIABILITY PROTECTIONS UNDER TITLE VII

SECTION.501.PURPOSES

It is the purpose of this title to establish the conditions that a tobacco manufacturer or distributor must satisfy in order to be eligible for the liability protections enumerated in Title VII.

SECTION.502.CONDITIONS

The liability protections under title VII shall take effect on January 1, 2000 [or some other date if that is preferred]. To be eligible to receive liability protections under title VII, a tobacco manufacturer or distributor shall, on or before _____ [within 30 days of the enactment of this Act?], submit to the Secretary a Report agreeing:

(a) That such manufacturer or distributor will not engage in any conduct that was, either on the date of the signing of this Act, or at any time after the date of the signing of this Act: (i) prohibited by Titles _____, _____, etc. of this Act [this should include any of the FDA restrictions that are codified]; (ii) prohibited by any regulations promulgated by the FDA; (iii) prohibited by [the 1969 tv and radio prohibition]; or (iv) prohibited by [add other statutory and regulatory prohibitions, including those related to warnings, labeling, and packaging] [NOTE: The clause reading "either on the date of the signing of this Act" is included as a means of discouraging litigation challenges to the statutes and FDA regs, or, at the very least, ensuring that judicial invalidations are less than devastating: the idea is that even if a reg or statute is "struck down," a manufacturer will be required to continue to abide by it in order to receive liability protections. Perhaps a very carefully crafted severability provision could accomplish substantially the same result.];

(b) That such manufacturer or distributor has disclosed tobacco smoke constituents to [_____] [NOTE: This could also be imposed unconditionally but is included in the McCain protocol];

(c) That such manufacturer or distributor has disclosed nontobacco ingredients found in tobacco products to [_____] [NOTE: This could also be imposed unconditionally but is included in the McCain protocol];

(d) That such manufacturer or distributor has made the following payments: [_____] to [_____]

[NOTE: This could also be imposed unconditionally but is included in the McCain protocol];

(e) That such manufacturer or distributor will contract with only such distributors and retailers who have operated in compliance with the applicable provisions of Federal, State, or local law regarding the marketing and sale of tobacco products [NOTE: This is a variant of a McCain protocol provision which required a commitment not to "interact" with distributors and retailers who would not comply. This could be imposed unconditionally];

[NOTE: we have not included in this list the McCain bill's references to restrictions on lobbying and trade associations, and disclosure of documents relating to health, toxicity, and addiction. Nor have we included the restrictions on non-name-brand "glamorizing," which the McCain bill apparently would impose as an absolute, nonconditional prohibition.]

(f) That such manufacturer or distributor will engage in substantial efforts specifically designed, inter alia, to reduce minors' use of tobacco products to a material degree beyond the reduction that would be realized absent such efforts.

(g) The Secretary shall deem a Report committing the manufacturer or distributor to take the following steps, cumulatively, as efforts that satisfy the "substantial efforts" requirement:

> (i) Cessation of all outdoor advertising of tobacco products, and advertising of tobacco products in any arena or stadium where athletic, musical, artistic, or other social or cultural events or activities occur [assuming this latter restriction is not imposed unconditionally and across-the-board];
>
> (ii) Cessation of the use of all images, colors, music, and sound effects, in any tobacco-product advertising and labeling, including in newspapers, magazines, periodicals, on posters or placards; in nonpoint-of-sale promotional material (including direct mail); in point-of-sale promotional material; and in audio or video formats;
>
> (iii) Cessation of the use of all images and colors in any tobacco-product advertising in any video game, or other electronic amusement device that utilizes a computer, microprocessor, or similar electronic circuitry and its own cathode ray tube, or is

designed to be used with a television set or a monitor, that interacts with the user of the device [assuming this isn't already imposed unconditionally];

(iv) Absence of all tobacco-product advertising or labeling in any medium that the manufacturer or distributor had not [substantially?] used for such purposes as of [date of enactment], [Is "substantially" necessary in order to cover Internet?] and to which minors [could?] have access [are exposed? could be exposed?].

(h) The Secretary shall have the discretion to set forth in an advance an alternative set of steps (which may include some, though not necessarily all, of the steps enumerated above) that, if agreed to in a Report, shall constitute satisfaction of the "substantial efforts" requirement. The Secretary must determine that agreement to such an alternative set of steps would, to any reasonable observer, demonstrate a level of commitment to reducing underage use of tobacco products that is at least equivalent to the efforts specifically enumerated above.

(i) The specific steps enumerated above, or the alternative steps that the Secretary may set forth in her discretion pursuant to subsection (h), provide clear but nonmandatory guidance on how a manufacturer or distributor can guarantee compliance with this requirement. Manufacturers can also satisfy the "substantial efforts" requirement if they demonstrate in a Report to the Secretary that they will engage in other efforts demonstrating a level of commitment to reducing underage use of tobacco products that is at least equivalent to the efforts specifically enumerated herein.

(j) A manufacturer or distributor seeking to secure Secretarial approval through means other than those enumerated above, or set forth by the Secretary pursuant to subsection (h), must show that, to any reasonable observer, such efforts would demonstrate a level of commitment to reducing underage use of tobacco products that is at least equivalent to the efforts specifically enumerated above. As manufacturers and distributors present different fact patterns, the Secretary shall assess the weight to be given to particular kinds of efforts other than those herein specified, and shall evaluate such fact patterns in a consistent manner over time.

Section. 503. Enforcement.

[Neither the McCain Protocol, nor the June 20 Resolution, provides mechanisms for terminating the liability protection upon a determination that a manufacturer or distributor has failed to comply with the agreements that would entitle them to the protection in the first instance. We recommend that a system of

graduated civil penalties for non-compliance, followed by a termination of protection, be instituted. HHS should develop a standard for adjudging whether a material breach has occurred.

To ensure proper monitoring, the Secretary shall review Reports that have been deemed to satisfy the "substantial efforts" requirement by means other than compliance with the steps specifically enumerated in this title at least every ___ years to ensure that, to any reasonable observer, such efforts demonstrate a level of commitment to reducing underage use of tobacco products that is at least equivalent to the efforts specifically enumerated in this title. The Secretary, upon such review, may require a manufacturer or distributor to submit a new Report, and to have it approved, in order to retain the liability protections set forth in title VII. Manufacturers and distributors may also submit, in their discretion, new Reports to the Secretary in order to achieve compliance with the "substantial efforts" requirements by means other than those contained in their initially approved Report.

Section. 504. New Entrants.

(a) To be eligible to receive liability protections under Title VII of this Act, a tobacco manufacturer or distributor that begins marketing in the United States after the date of signing of this Act, shall, within 30 days of securing a the license required by section ___ of this Act, submit to the Secretary a report that satisfies the requirements of section 502 of this Title and, upon approval, be subject to the enforcement provisions set forth in section 503 of this Title.

(b) Any tobacco manufacturer or distributor that begins marketing in the United States after the date of signing of this Act and that fails to qualify for liability protection under Title VII of this Act shall annually deposit into an escrowed reserve fund an amount, to be determined by the Secretary under regulations that ensure ample coverage of expected liability based on the nature and scope of each covered business. Amounts contained in the reserve fund of a manufacturer or distributor who makes this election shall be used solely for liability payments for claims relating to the use of tobacco products. The manufacturer or distributor may reclaim any amounts remaining in the fund, with interest, at the end of the 35-year period beginning on the date on which such fund is established.

Tob-sct-Liability

PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

(202) 588-1000

March 25, 1998

FYI
JOHN

John Podesta
Deputy Chief of Staff
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Dear John:

Thanks for taking the time the other day to talk with Joan and me about tobacco. We appreciated your listening to what we had to say and, as always, your candid responses.

Enclosed is a copy of a brief we filed several years ago in a preemption case, Freightliner v. Myrick (please excuse the formatting -- we pulled this out of our computer.) The legal issue is of no significance, but the point of the brief was to explain why it is a bad idea to put all your eggs in the regulatory basket while eliminating the courts as avenues for creating deterrence against corporate malfeasance. Thus, aside from the important compensatory functions that the tort system plays, its role in deterring wrongful conduct and not pushing companies to maximize safety cannot be understated.

I have also contacted Professor Jon Hanson of Harvard Law School, who recently testified in the Senate making a similar point that the liability system is more likely to produce safer tobacco products and eliminate childhood smoking than is any form of command and control system that is likely to be enacted. I have asked him to send a copy of his testimony to you directly. I have spared you from his 300 page, 800 footnotes plus article which is coming out in the Yale Law Journal sometime soon.

If we have further thoughts, we will get back in touch with you, and I hope that if you have any concerns, you will call us. Thanks again for your time.

Sincerely,

Alan B. Morrison

ABM/ms
Enclosure

No. 94-286

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FREIGHTLINER CORPORATION, *ET AL.*,
Petitioners,

v.

BEN MYRICK, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit

BRIEF FOR PUBLIC CITIZEN, INC. AS *AMICUS CURIAE* URGING AFFIRMANCE

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In the

Supreme Court of the United States

October Term, 1994

No. 94-286

FREIGHTLINER CORPORATION, *ET AL.*,
Petitioners,

v.

BEN MYRICK, *ET AL.*,
Respondents.

BRIEF FOR PUBLIC CITIZEN, INC. AS *AMICUS CURIAE* URGING AFFIRMANCE

INTEREST OF *AMICUS CURIAE*

Public Citizen, Inc. is a nonprofit organization with approximately 100,000 members nationwide. Among its major areas of attention have been the prevention of injury to consumers from unreasonably dangerous products and assuring that accident victims can obtain adequate redress for their injuries in the courts. To realize these goals, Public Citizen has long recognized that there must be both strong regulations and an effective tort system, because each complements the other. Moreover, while both systems have a role in preventing unsafe products, it is only the tort system that provides compensation for injured victims.

Public Citizen's President, Joan B. Claybrook, is a former Administrator of the National Highway Traffic Safety Administration ("NHTSA"), which has regulatory jurisdiction over the air brakes involved in this case. Public Citizen's founder and former President is Ralph Nader, whose pioneering work is largely responsible for the passage of the National Highway Traffic Safety Act of 1966, 49 U.S.C. § 30101 *et seq.* (1994 Supp.)(the "Highway Safety Act"), which gave NHTSA its principal regulatory powers. As a result of the work of Ms. Claybrook, Mr. Nader and others who have effectively enforced the Highway Safety Act, there has been a vast improvement in safety of automotive vehicles in the United States, resulting in the savings of thousands of lives and the prevention of untold injuries. At the same time, there continue to be thousands of crash victims needlessly injured on our nation's highways—victims whose common law rights to seek compensation are expressly preserved by the Highway Safety Act. *Id.*, § 30103(e).

Public Citizen's expertise regarding regulatory issues extends beyond auto safety and includes matters subject to regulation by agencies such as the Food and Drug Administration, the Occupational Safety and Health Administration, the Nuclear Regulatory Commission, the Consumer Product Safety Commission and the Federal Aviation Administration. Each of those agencies issues important safety rules, and yet, as we explain below, none of them can do the job of protecting American lives on its own. Nor can NHTSA here. In this brief, which is filed with the consent of the parties, we explain why the regulatory system cannot reasonably be expected to be the sole protector of the safety of the products or services sold to American consumers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Although not so plainly stated, the position of petitioners and their *amici* is that, once a federal agency issues a safety

standard on a given subject, state laws which give rise to a claim for monetary damages for personal injuries involving the same subject-matter may not impose a duty of care greater than that imposed by the federal standard, because to do so would be "inconsistent" or create a "conflict" with the federal standard. This is true, petitioners and their *amici* argue, no matter how long ago the federal standard was issued, how inadequate it may be in light of more recent technology, or even how inexpensive it would be for the manufacturer to remedy a particular defect or problem.

The briefs for respondents and their other *amici* will demonstrate the legal fallacy of the assumption that Congress intended standards issued by NHTSA to preclude common law claims for damages on the theory that the Highway Safety Act operates as a minimum and a maximum, both as a regulatory matter and in the tort system. In this brief, we analyze the strengths and weaknesses of our regulatory system in order to demonstrate why Congress surely did not, nor would it have wanted to, put all its safety eggs in the basket of regulation, let alone to tie the right to compensation for death or personal injury to whatever standard the regulatory agency had issued. Before turning to that discussion, however, we offer this cautionary example to illustrate the hazards of using regulatory standards as the be-all and the end-all for defining an acceptable level of public safety.

The *Titanic* carried 2227 passengers and crew on its maiden (and final) voyage in April 1912; 1494 of them died after the ship hit an iceberg and sank. At the time of this tragedy, the *Titanic* carried 16 lifeboats with room for 980 people, thus satisfying maritime safety regulations set by the British Board of Trade. Indeed, the *Titanic* exceeded this standard by carrying four additional collapsible boats which could handle another 196 people.

The Board of Trade's lifeboat standard had been set in 1894, when the largest vessel afloat was approximately one-

quarter the size of the *Titanic* and other, new "super liners" such as the *Lusitania* and the *Mauretania*, which employed the most modern shipbuilding techniques and carried far more passengers than their predecessors. The Board of Trade was not oblivious to this development; in fact, an advisory committee met to discuss the lifeboat standard in early 1911, but the committee concluded that the 17-year-old regulation was adequate. A year later, nearly 1500 people were dead in a single accident. *See* John P. Easton and Charles A. Haas, TITANIC: DESTINATION DISASTER 113-14 (1987); John Dudman, THE SINKING OF THE TITANIC 13 (1988); Paul Eddy, Elaine Potter and Bruce Page, DESTINATION DISASTER 31 (1976).

Under petitioners' view of the law, which they ask this Court to embrace, a maritime safety rule of this sort would *—and should—*immunize a cruise line from liability, even in situations where two-thirds of its passengers are killed and such a loss of life could have been prevented. Merely to state the proposition advanced by petitioners and their *amici* is to expose its essential hollowness and to demonstrate why the arguments addressed here should be rejected.

ARGUMENT

CONGRESS WOULD NOT HAVE MADE VIOLATION OF REGULATORY STANDARDS THE *ONLY* BASIS FOR TORT RECOVERY.

A. Regulatory Agencies Cannot Reasonably Be Expected To Eliminate All Unreasonable Hazards in Products Under Their Jurisdiction.

Petitioners' unstated thesis is that Congress assumed that regulatory agencies would effectively eliminate all unreasonable risks in automobiles and trucks, with the result that there would be no need for the tort system to make those products

safe. As respondents argue, the Highway Safety Act's savings clause (49 U.S.C. § 30103(e)) and its legislative history make clear that Congress had no such intent in the area of motor vehicle safety; indeed, Congress specifically provided that the tort and regulatory systems would operate in tandem, as they have done for nearly 30 years. As we now show, it was not only sensible for Congress to have taken such a position, but the contrary position urged by petitioners—that Congress intended to place sole reliance on the regulatory approach to assure safe vehicles—would have been foolhardy.

A federal safety standard, such as the one at issue here, is a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(4), *i.e.*, "an agency statement of general or particular applicability and future effect . . .." As such, agency rules generally can apply only on a future or prospective basis. *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). Standards of this sort cannot help past accident victims or their families, for example, by directing the payment of monetary damages to those victims. Nor, obviously, can they undo the death or injury that took place. What safety standards can do, however, is try to prevent similar deaths or serious injuries from happening in the future.[1]

By contrast, the tort system operates on a retrospective basis. Each case requires an examination of the particular facts regarding a particular accident victim and a particular manufacturer. The goal is to provide relief, often in the form

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[1] In the case of rules affecting product design, such as standards for automobiles and trucks, standards must not only be prospective, but issued sufficiently far in advance to permit the new safety standard to be incorporated into the design and manufacture of the vehicle. The necessary lead-time can be years. But where a product has been shown to be defective in practice, the tort system provides a powerful incentive to the manufacturer to rectify the problem as soon as it arises, rather than waiting for a federal standard to take effect.

of monetary damages, to accident victims who can satisfy basic state law tort standards for recovery. The goal is not to legislate a broad rule of general applicability, although individual judgments may force a manufacturer to alter its conduct to avoid future liability.

There is, of course, significant cross-fertilization between the two fields. Information obtained in individual tort suits often informs the judgment of federal regulators about whether existing standards are adequate, or whether new protections should be proposed. Similarly, the standards set by federal agencies are useful benchmarks for the finders of fact in particular tort cases, although compliance with federal standards are generally only evidence of due care, not an absolute defense. *See generally* RESTATEMENT (SECOND) OF TORTS § 288(C)(1964). That is as it should be, for the regulatory system and the tort system complement each other, helping to anticipate problems before they occur and providing relief when accidents do happen.

Petitioners' argument might have some appeal if we lived in a world where perfect regulation was the norm, *i.e.*, where agencies always have access to data enabling them to pinpoint precisely what problems should be solved and in what order, so as to advance public safety to the greatest extent possible; where agencies never lack the personnel, technical data, and other resources needed to deal with potential safety hazards; where regulations are immediately issued once the agency identifies a problem requiring a solution; where rules are swiftly updated to reflect design changes (as in the automobile industry), technological advances, or scientific knowledge in the field; where regulatory decisions are made by politically insulated agencies, free from untoward pressure from congressional committees and powerful industry lobbying groups; and where rules operate perfectly without unintended consequences or trade-offs.

There are a number of reasons why the regulatory system does not always work that way and why the Court should reject the implicit notion that Congress viewed the tort system as somehow at war with federal regulations in those areas where the regulators have taken some action to deal with a safety problem. As a way of understanding why this is so, let us start with the fact that the process of setting federal safety standards can be time-consuming. At the outset, the agency must obtain enough information to make a preliminary judgment that there is a problem of sufficient magnitude to warrant a rulemaking proceeding. In making this judgment, as well as any subsequent judgments about whether and how to proceed, there is often an information gap between the agency and the regulated industry that can affect the pace and ultimate disposition of any regulatory effort. The regulated industry almost invariably has greater information and technical expertise than its regulators, who face a constant challenge in trying to extract information with which to make their own informed judgment. Nor does industry have any incentive to furnish objective, unbiased information to regulators.

The "information gap" problem is complicated by the fact that various agencies cannot generally compel the production of information, except in the context of an enforcement proceeding. Even for agencies which can compel the production of documents, they must operate in a way that is mindful of the strictures of the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*, which complicates the data-collection activities of agencies and is often invoked by the regulated industry as a way to prevent agencies from obtaining data needed to initiate a rulemaking proceeding.[2]

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[2] One example illustrates our point. Although silicone-gel breast implants had been on the market for decades, the FDA had not (continued...)

Moreover, in most instances, a regulated industry will have little incentive to volunteer the data that an agency needs, and experience suggests that the industry devotes most of its energy to persuading the agency *not* to regulate, indeed, not even to open a rulemaking proceeding. It is very rare to see an industry initially respond to potential rulemaking initiatives by saying "We don't think there is a need to regulate, but here are all the data you need, and if you decide to regulate, here are several approaches you could try."[3]

Apart from these practical limitations on obtaining adequate information with which to regulate, the rulemaking process suffers from delays as a result of various requirements imposed on agencies under the Administrative Procedure Act or the agency's organic statute, which are designed to incorporate certain "due process" guarantees into the process. In addition, exogenous statutes such as the Paperwork Reduction Act, the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.*, and the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, impose additional requirements that the agency must factor into its calculus about whether and how to regulate. Also, since at least 1981, agencies have had to

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[2](...continued)
conducted a review of their safety—even after the passage of the Medical Device Amendments of 1976, 21 U.S.C. §§ 360c *et seq.*, clearly gave the agency authority. The FDA's inquiry into the safety of the implants was largely sparked by data casting doubt on the safety of the implants obtained by lawyers handling product liability cases, who in turn submitted it to the FDA. *See* DeBenedictis, *FDA Action Spurs Implant Suits*, 78 A.B.A.J. 20 (March 1992).

[3] To be sure, if it subsequently becomes clear that an agency firmly intends to issue a standard, the affected industry may grudgingly provide information indicating what (from its view) would be the most cost-effective or least intrusive way to proceed, but such data rarely appears as the industry's initial response after a regulation is proposed.

follow the dictates of Executive Orders that add additional procedural requirements agencies must follow as a precondition for issuing a rule.[4]

Thus, it can and does take years to draft and adopt major safety standards. *See, e.g., Public Citizen Health Research Group v. Auchter*, 702 F.2d 1509 (D.C. Cir. 1983); 796 F.2d 1479 (1986); 823 F.2d 626 (1987)(describing OSHA's halting, multi-year efforts to impose a standard for ethylene oxide). This factor is relevant here for several reasons. First, agencies have finite resources, and there is only a limited number of safety standards that an agency can issue in a given year. Second, even if an agency adopts a rule requiring use of today's state-of-the-art technology, subsequent changes in technology or scientific knowledge may render that rule an anachronism in terms of the level of safety that should be required. Third, as a practical matter, the agency's limited resources may preclude it from revisiting existing rules which have become outmoded because of technological or scientific advances.[5]

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[4] Indeed, out of concern that the rulemaking process has become "ossified" or overly "encrusted," the prestigious Administrative Conference of the United States has urged Congress to refrain from enacting any new procedural requirements that further encumber the rulemaking process. Administrative Conference of the United States, Conference Recommendation 93-4, *Improving the Environment for Agency Rulemaking* (1993).

[5] OSHA's rulemaking experience is instructive in this regard. Since its creation in 1971, OSHA has issued barely two dozen regulations governing the permissible level of worker exposure to toxic substances. The slow pace of OSHA's rulemaking is directly attributable to the factors canvassed above. *See* Thomas O. McGarity and Sidney A. Shapiro, WORKERS AT RISK: THE FAILED PROMISE OF THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION (Praeger, 1993).

(continued...)

Equally problematic is the fact that agency rules are often issued with a clear understanding that they do not fully protect the public from unreasonable risks. For instance, the vast majority of OSHA's health standards are based on industry consensus standards adopted by the agency on a wholesale basis in the early 1970s under 29 U.S.C. § 655(a). *See AFL-CIO v. OSHA*, 965 F.2d 962 (11th Cir. 1992)(invalidating OSHA's effort to update these standards without full-scale rulemaking). These standards were recognized as inadequate when they were adopted over 20 years ago, and, by now, they are even more woefully out of date.[6] Nonetheless, under petitioners' theory, workers injured by exposure to high levels of these substances should be stripped of their state law remedies, merely because OSHA has some "standard" covering them.

Thus, a rule of law under which federal safety standards set a ceiling on the protection available pursuant to state tort laws would create perverse results that Congress could not have intended when it enacted the Highway Safety Act in 1966. According to the reading advanced by petitioners and their *amici*, accident victims are able to recover fully for their injuries under state tort law so long as NHTSA fails to adopt a rule on a given topic. However, once a rule on that topic is enacted, accident victims would lose their right to hold a manufacturer who complied with the federal standard liable

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[5](...continued)

[6] Indeed, the Senate Report on this section of the Occupational Safety and Health Act recognized the interim nature of these standards: "a large proportion of the voluntary standards are seriously out-of-date. Many represent merely the lowest common denominator of acceptance by interested private groups." S. Rep. No. 91-1282, 91st Cong., 2d Sess. 6 (1970), *reprinted in* [1970] U.S. Code Cong. & Admin. News 5177, 5182.

for their injuries, even in cases where the manufacturer knew that the injury could have been prevented by using an inexpensive, off-the-shelf technology. It is difficult to believe that Congress's decision to empower NHTSA to adopt safety standards designed to prevent injury was also a license to deprive accident victims of recovery when readily available measures would have prevented the injury.

There is a separate reason for rejecting the notion that a federal safety standard should preempt a manufacturer's liability in a tort case. Let us take the type of situation that petitioners might regard as their strongest case, *e.g.*, FDA pre-clearance of medical devices before those devices are licensed for use by the public, or the FAA's process for certifying that a new aircraft type meets federal airworthiness standards and should be available for use by the flying public. Suppose that design defects, latent flaws, or other problems turn up or are not addressed in an agency's pre-clearance review process. According to petitioners, if the manufacturer knew of the problem, but nonetheless took no action to correct it, a tort victim would still go remediless.

Let us take real-life examples. For instance, suppose the FDA approved the design of a heart valve for use on humans, yet, when used, the valve failed at an unacceptably high rate because of manufacturing defects. Or suppose that a manufacturer of heart catheters fraudulently obtained the FDA's marketing approval by failing to provide the agency with data showing that the catheter had a propensity to malfunction in a way that could cause serious harm or deaths to patients. There have been a number of decisions by federal courts of appeals on the question of whether the Medical Device Amendments to the Food, Drug and Cosmetic Act, 21 U.S.C. § 360c *et seq.*, in precisely these circumstances preempt state law tort law remedies for products that have been approved for use by the Food and Drug Administration, but, in practice, have proven to pose unreasonable risks to patients. Although the circuit courts are split on this issue, *compare*,

e.g., Mendes v. Medtronic, Inc., 18 F.3d 13 (1st Cir. 1994), *with National Bank of Commerce of El Dorado v. Kimberly-Clark Corp.*, __F.3d___, 1994 WL 580798 (8th Cir., Oct. 25, 1994), the FDA has now taken the position—apparently with the approval of the Solicitor General—that there is no broad preemption. *See* Brief for the United States as *Amicus Curiae* in *Linda Talbot et al. v. C.R. Bard et al.*, No. 94-1951 (1st Cir.). The core reason cited by the government is the same we argue here—namely, that federal regulatory requirements do nothing to compensate injured victims, and that courts should be particularly hesitant to conclude that Congress intended to deprive tort victims of their state law remedies unless there has been a clear and definitive statement by Congress to that effect.

Similarly, the Federal Aviation Administration requires aircraft manufacturers to satisfy airworthiness standards before a new aircraft type can be certified for use in commercial aviation. Under one FAA rule, 14 C.F.R. § 25.803(c) and Part 25, App. J (1994), a manufacturer must run a test demonstrating that a planeload of passengers can be evacuated within 90 seconds with half the exit doors blocked. Inevitably, the test will not replicate the actual cabin environment after a crash. In the first place, participants know in advance they are taking part in a test, so there is not the panic or disorientation which can occur in real accidents. Moreover, the rule requires only "minor obstructions" (such as blankets and pillows) in the aisles or near the exists. 14 C.F.R. Pt. 25, App. J(k). In a real test, passengers may have to climb over seats which are dislodged by the crash and block the aisles; passengers may also have to deal with smoke and toxic fumes, which often fill the cabin in survivable accidents where fire is present. Finally, the rule does not limit a manufacturer to one test only, so it is possible to keep running this test as many times as is needed until everyone gets out within 90 seconds.

Under petitioners' theory, the fact that a manufacturer can meet this test once, even after many failures, would bar any state tort claim which has the effect of challenging the FAA rule as inadequate, even if the FAA test bears little relation to what happens in an actual crash. The irony of this argument is illustrated when one also considers how in October 1991, during a test designed to prove that McDonnell Douglas's MD-11 aircraft should be approved as safe for public use, 44 people were injured and one person paralyzed during a controlled evacuation of the sort described above. *See* Ralph Nader and Wesley Smith, COLLISION COURSE: THE TRUTH ABOUT AIRLINE SAFETY 188-89 (1994).

Accordingly, even if an agency has adopted detailed safety standards on every known hazard within its jurisdiction, and even if an agency has elaborate pre-clearance review processes that a manufacturer must pass before its products are used by consumers, those efforts may still be inadequate to protect public safety. And, because automobile manufacturers subject to the Highway Safety Act do not have to obtain premarket clearance of their vehicles, even though they regularly make significant changes affecting a vehicle's safety performance, there is surely no basis to conclude that Congress intended to transform NHTSA's regulatory floor into a ceiling on tort standards.

B. Regulatory Preemption May Be Found, If At All, Only In Situations Far Removed From the One Here.

In this section of the brief, we address the question of whether, and under what circumstances, an agency's decision to regulate may be treated both as a ceiling as well as a floor on a state's ability to impose tort liability. Although that is petitioners' core contention, we do not believe that question is presented in this case for a single yet critical reason: Unlike many other statutes, the Highway Safety Act contains an express "savings clause," 49 U.S.C. § 30103, which states

emphatically that "Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."

However, Public Citizen does not take the position that there are no situations in which an agency's decision to regulate should not be treated as a ceiling as well as a floor —just that those situations are few and far between. The current case, involving NHTSA's regulation of air brakes, provides a useful point of reference. In 1978, the Ninth Circuit struck down an earlier version of NHTSA's rule (FMVSS 121) requiring antilock brakes on all trucks and trailers, citing evidence indicating that antilock brakes were potentially more hazardous than standard brakes and remanding the rule to NHTSA for further consideration. *Paccar, Inc. v. NHTSA*, 573 F.2d 632 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). On remand, the agency conceivably could have issued a rule forbidding the use of antilock brakes on trucks. In that event, conflict preemption principles might bar a tort claim based on the failure to have air brakes on a truck, although such a defense would have to surmount the hurdle of the Act's savings clause. But NHTSA did not issue such a rule, as petitioners concede, and thus all of petitioners' discussion of "conflict" preemption is irrelevant to this case.[7]

Regulatory preemption in a given situation might thus occur in another way as well. Suppose that in the course of a rulemaking proceeding, the FDA decided that only synthetic materials can be used for heart valves; the use of natural valves, from pigs and other animals would not be approved, because, on balance, synthetic valves were deemed superior.

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[7] The airbags illustration used by petitioners and their *amici* is similarly inapt. At no point did NHTSA *forbid* the installation of airbags, and hence it was always physically possible for automobile manufacturers to comply simultaneously with NHTSA requirements and state tort law.

In that situation, if FDA made a clear-cut choice about the material to be used to manufacture heart valves, it might plausibly conclude that it would be unreasonable to allow juries to second-guess that choice by saying that synthetic valves were unsafe because another material had not been chosen. The agency might feel particularly confident in pre-empting state law if its analysis of the choices pointed clearly in one direction. In that situation, the FDA might reasonably determine that it was necessary not simply to make a choice, but to preclude the tort system from making a contrary one.

Assuming that such a decision was within FDA's statutory authority, and further assuming that the FDA wished to implement that policy choice, the agency should be required to do so explicitly in the regulation itself, with an explanation of its rationale for preempting tort laws as part of its statement of its reasons for the rule, as well as a definitive statement regarding the scope of preemption. This would not be a new requirement. In fact, in *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707 (1985), this Court indicated that it would be desirable for agencies to articulate the intended preemptive effect of their regulations, noting that, as a practical matter, it is easier for agencies to address such questions when drafting rules than it is for Congress to address these detail issues when drafting a statute. *Id.* at 721.

If agencies were to consider regulatory preemption issues as part of individual rulemaking proceedings, manufacturers and the public alike would have an opportunity to discuss preemption matters at the time a standard is issued, rather than having the issue arise through the back door many years later, as the Department of Transportation has sought to do on occasion regarding passive restraints. Thus, in cases of actual impossibility of compliance with both a state-developed tort standard and a federal regulatory standard, preemption may be justified, but only in rare circumstances, and then only if the agency both has been empowered to preempt by

Congress and has explicitly made such a choice when promulgating the federal standard.

* * *

In assessing petitioners' theory, it is important to understand that there is one vital fact petitioners conveniently overlook. No matter how perfect the regulatory system may be, it does not and cannot provide compensation for the injuries that regulations do not succeed in preventing. That is the function of the tort system. While standard-setting disciplines the market prospectively, the tort system reviews the reasonableness of a defendant's conduct and asks whether that conduct, if it fails the test of reasonableness, caused the injuries to the plaintiff. One consideration that a trier of fact will certainly take into account is whether the defendant complied with applicable safety standards. Thus, a ruling in favor of respondents will not strip petitioners of the defense that their conduct was reasonable because it was consistent with applicable safety standards. But, as we have shown, compliance with existing safety standards is not a guarantee that the product does not pose an unreasonable risk. Accordingly, in a real sense, the two systems are complementary, in that they both provide powerful incentives for manufacturers to make their products more safe.

Finally, it bears emphasis that the opportunities for discovery and cross-examination in civil litigation allow for a more fine-tuned process of information gathering that the regulatory process. In a tort action, especially where the victim is seriously injured, there is every incentive to take extensive discovery and ferret out the truth. As we noted, agencies have a number of handicaps in gathering information from industry; limited resources, patchwork statutory authorization, and little, if any, opportunity to examine industry experts. In sharp contrast, in litigation, the plaintiff has full authorization to discover all relevant information, through subpoenas, depositions and document requests. In short,

combining the incentive to gather evidence with the power of the court to compel discovery makes the tort system a extraordinarily powerful engine of determining whether products are unreasonably unsafe.

The history of regulation is clear that, but for many civil tort cases, inadequate regulation of specific products would have continued. It is this final aspect of the tort system that underscores how it goes hand in hand with the work of regulatory agencies and why Congress was so eminently reasonable in concluding that there should be no preemption of civil claims for damages based on an existing NHTSA regulation.

CONCLUSION

For the reasons given above and in the brief of respondents, the judgment below should be affirmed.

Tol-sr-liability

Prepared Statement Before the Committee on Labor & Human Resources, United States Senate

Jon D. Hanson & Kyle D. Logue

430 Dirksen Senate Office Building, Washington, D.C.
February 24, 1998

Introduction

Mr. Chairman and Members of the Committee, we thank you for inviting us to appear today. For the past several years, we have been researching and writing on the question of how best to regulate the market for cigarettes. We have a pair of forthcoming publications in which many of our comments today are, or will be, much more fully developed.

In an article that will appear in the March issue of the *Yale Law Journal*, we make three general arguments regarding the cigarette market.[1] First, we argue that the market for cigarettes is characterized by severe market failures and hence is in need of extensive government regulation. Given that the current debate in Washington assumes the need for some type of government action in the cigarette area, we will not restate those market failures here. Instead, we will say only this: In light of evidence that smokers typically begin habits at a very early age, they tend to underestimate the long-term health risks to themselves of smoking, they often underestimate the addictiveness of cigarettes, and they do not bear many costs associated with their own smoking, we agree that the market for cigarettes should not be left unregulated.

The second general point that we make in the Yale article is that, from a deterrence (or public health) perspective, the most promising type of regulation in the cigarette context is some form of "ex post incentive-based regulation"—regulation that imposes the costs of smoking on cigarette manufacturers as those costs arise, *giving manufacturers incentives to make safer cigarettes and forcing cigarette prices to reflect the full social costs of smoking.*

Finally, in that article we describe how the Proposed Tobacco Resolution takes just the wrong approach, completely rejecting ex post incentive-based regulation and instead expanding the use of other regulatory approaches (mainly command-and-control provisions) that have proven to be—and are widely regarded by regulatory experts as being—inferior to incentive-based regulatory approaches.

In a second forthcoming article, to be published in the *Southern Illinois University Law Journal*, we elaborate on one type of ex post incentive-based regulation that was briefly outlined in the Yale article.[2] It is a regime that we call *smokers' compensation.* The principal goals of the regime would be: (a) to force cigarette manufacturers, and hence cigarette consumers through the price of cigarettes, to take into account something closer to the full social costs of cigarettes than is currently the case; (b) to create incentives for cigarette companies to make safer cigarettes, indeed to compete with respect to cigarette safety just as they have always competed with respect to taste; (c) to establish a separate insurance pool for smoking-related harms that is financed by smokers through the price of cigarettes, thereby removing those costs from existing public and private health-insurance pools (which means, of course, lower premiums or taxes for nonsmokers); and (d) to do all three of those things without producing administrative costs that outweigh the benefits of the regime.

In our testimony, we will provide a sample of the types of arguments contained in those two articles.

I. The Case for Ex Post Incentive Based Cigarette Regulation

A. *Three Categories of Regulation*

When comparing and contrasting various regulatory regimes, scholars often divide the world of regulation into three general categories: *command-and-control* regulation; *performance-based* regulation; and *incentive-based* regulation. The distinctions among these three categories are not perfect. Thus, some examples of

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[1] Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 108 YALE L.J. 1163 (forthcoming March 1998).

[2] Jon D. Hanson, Kyle D. Logue & Michael Zamore, *Smokers Compensation: Toward a Blueprint for Federal Regulation of Cigarette Manufacturers*, 22 S.ILL U. L.J. ___ (forthcoming Spring 1998).

command-and-control regulation begin to shade into performance-based regulation. And some examples of performance-based regulation begin to look like incentive-based regulation. In fact, it is probably most accurate to understand the three categories as three points along a continuum, with command-and-control regulation at one end, incentive-based regulation at the other end, and performance-based regulation somewhere in the middle. Nevertheless, it is useful to maintain the conceptual distinctions among the three types of regulation to enable us to identify the costs and benefits of moving in one direction or the other along the continuum.

Under *command-and-control* regulation, sometimes called "input regulation," the regulator imposes specific requirements on the firm. The regulator in effect tells the regulated firm how specifically to run some aspect of its business. In regulating pollution, for example, the command-and-control regulator might prescribe specific steps that manufacturers must take, or specific technologies that they must use, to reduce the level of pollution that is emitted by their manufacturing processes.[3]

Under *performance-based* regulation, by contrast, the regulator presents manufacturers with a target of some sort, which the manufacturers are given incentives to meet. That target is sometimes called a "performance standard." The manufacturers are then left to decide how best to achieve the target. One performance standard, for example, might be a maximum quantity of pollution that a firm is allowed to emit over a given period of time, such as that allowed by tradable pollution permits. Failure to achieve the relevant target, however, would result in a fine or additional regulation.[4] Performance-based regulation, when compared to command-and-control regulation, reflects a greater degree of humility and skepticism with regard to how much the regulator can be expected to know about the cutting-edge technology in a given industry

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[3] There are many examples of command-and-control regulation in the Proposed Resolution. For example, the warning requirements and the advertising restrictions that the Proposed Resolution would impose on manufacturers are best characterized as command-and-control regulations. Similarly, if the FDA exercised its limited authority under the Proposed Resolution to mandate particular "technically feasible," "less hazardous tobacco products," it would do so in the form of command-and-control regulations.

[4] The Proposed Resolution contains a couple of performance-based standards. The best known example is the so-called "look-back" provision, which would set target levels of underage smoking that the industry would pay a fine for failing to meet.

and a greater degree of reliance on the industry (or the market) to have and act on that information. Nevertheless, both types of regulation make substantial informational demands on the regulator.

Although there is something to be said for performance-based regulation over command-and-control regulation,[5] both impose roughly the same informational demands on the regulator. To see why this is so, consider the following question: How is the performance-based regulator to choose the appropriate target level of performance or the appropriate fine for failing to meet that target? For example, how does Congress or EPA determine the aggregate level of air or water pollution to permit? To answer such questions the regulator must have information about not only the level of harm caused by different levels of pollution but also the total social costs and benefits of the activities that give rise to the pollution.

Incentive-based regulation is superior to command-and-control and performance-based approaches because it requires less information of the regulator, and because it relies more on the market to generate the desired regulatory outcomes, than the other two approaches do. Under incentive-based regulation, the regulator simply forces the manufacturers to pay the total costs of their manufacturing activities. The manufacturers are then left to decide what to do about those costs, if anything. Thus, incentive-based regulation does not, in any way, tell manufacturers how to run their business (as command-and-control regulation does). Nor does it require the regulator to choose the ideal regulatory target (as performance-based regulation does). It simply makes the industry pay its costs, and lets the market sort things out. The general superiority of incentive-based regulation over command-and-control regulation in most settings is fairly widely accepted among efficiency-oriented scholars and is increasingly recognized by policy makers. Indeed, most of the important recent debates in environmental regulation

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[5] If there is a performance standard or target that is *assumed* to be desirable, performance-based regulation can be superior to command-and-control regulation as a means of achieving that standard, for the reason already described — manufacturers have better information. In addition, if we know what the target standard is, then enforcement of such a standard is relatively easy (because of the ease of monitoring compliance) compared to enforcement of command-and-control regulation, where the regulator must constantly defer to the informational advantage of the manufacturer.

seem to be about, not whether to use market forces, but how best to use market forces as a means of reducing pollution.

B. *Ex Post vs. Ex Ante Incentive-Based Regulation*

Consider one additional definitional distinction: the distinction between "ex ante" and "ex post" incentive-based regulation. Under ex post incentive-based regulation, as we define the term, the regulator waits until after the harm occurs and then imposes the costs of that harm on the particular manufacturer responsible for it. Thus the manufacturer, in making its initial production decisions, will anticipate the possibility of such ex post liability and will take into account the expected value of those liability costs in deciding how much to invest in improving the safety of its cigarettes and in deciding how much to charge consumers for its brand of cigarettes. Under current law, we have a form of ex post incentive-based regulation: tort law or products liability law.

Ex ante incentive-based regulation, on the other hand, tries to impose those same expected accident costs on manufacturers before the harms actually occur. The typical example of this type of regulation would be an excise tax imposed on cigarettes. What is interesting is that the excise tax seems to be the preferred form of regulation among most economists. Indeed, among the economists writing about cigarettes, it seems to be the only regulatory tool that is given serious consideration. Why do economists have this preference for excise taxes? It is because a tax supposedly requires less information on the part of the regulator than command-and-control or performance-based regulation does: Again, the idea is that the regulator can just measure harm and impose it on the manufacturer.

There are two general reasons why ex ante incentive-based regulation is inferior to the ex post version, especially in the cigarette context. First, choosing the appropriate rate of tax requires the regulator (as in the case of command-and-control and performance-based regulation) to have an enormous amount of information up front (at the time the tax rate is set) about the costs and benefits of cigarettes, including the costs and benefits of alternative cigarette designs. In contrast, under an ex post regime, costs would be imposed on cigarette manufacturers only as the external harms caused by cigarettes actually became manifest. Thus, although the regulator would be responsible for sorting out after the fact what harms had been caused by cigarettes and should be

charged to manufacturers, it would be the cigarette manufacturers who would decide up front how to make and market cigarettes to minimize those costs.

Second, an excise tax, in contrast with an ex post approach, does not create incentives for cigarette manufacturers to compete over safety. This is a very basic point, but it is central to the argument for an ex post regime and to our critique of the proposed national tobacco settlement. At best, an excise tax of the sort now being considered would impose on each manufacturer the average per pack external costs for the whole industry. Such a tax, however, provides no incentive for manufacturers to make investments in developing and manufacturing safer cigarette designs (such as nicotine-free cigarettes or low-carcinogen cigarettes) or in identifying relatively low-risk smokers (people who are least likely to suffer harmful effects from smoking). Any such innovations would cost a manufacturer money — the research and development costs among others — but would provide essentially zero benefit to that manufacturer given that the taxes are fixed (or, if variable, are assessed on a market share basis).[6] This phenomenon is a special case of what policy scholars call the "common pool" or "free rider" problem. We sometimes refer to it as the "unraveling problem," because, under such a scenario, the market for safety improvements may unravel, as each manufacturer realizes that making investments in safety enhancements is not in their financial best interest. Indeed, assuming that relatively safe cigarettes are more costly to produce or market, each manufacturer's incentive will be to make its cigarettes less safe.

We should emphasize that our position is *not* that command-and-control, performance-based regulation, and excise taxes should never be used. In some non-cigarette situations (for example, in dealing with the problems of air pollution created by automobile emissions), command-and-control or performance-based regulation, or perhaps an excise tax, may be the only available options. This would be true if ex post incentive-based regulation were considered impractical, perhaps, for example, because the harms associated with the injury-causing substance are too widely dispersed to give

[6] If the taxes are fixed, then, of course, nothing that a manufacturer does can lower them. Even if the taxes vary to reflect the changes in the average costs imposed by cigarettes, however, manufacturers will not invest to lower those costs, because the benefit of such investments would be shared with the whole industry in the form of a reduced industry-wide excise tax. Again, each manufacturer would have a strong incentive to make no such safety-enhancing investments.

rise to ex post damage claims brought by individual victims. It should be emphasized, however, that the cigarette market presents a setting in which ex post incentive-based regulation *is* available as a regulatory option. Therefore, those types of regulation in the cigarette context are not viable *substitutes* for ex post incentive-based regulation, for the reasons already discussed. Still, even in the cigarette context, command-and-control and performance-based regulation might be useful complements to an ex post incentive-based regime, for example, as additional means of reducing underage smoking.

C. *The Problem with the Proposed Resolution*

Given the arguments in favor of incentive-based (and against command-and-control) regulation, one would hope that any proposal to regulate cigarettes would rely most heavily on incentive-based approaches, with little emphasis on command-and-control and performance-based regulation. In fact, the Proposed Resolution takes just the opposite approach. It is dominated by a renewed and strengthened emphasis on command-and-control regulation, including everything from new warning requirements to new FDA control over the level of nicotine and other ingredients in tobacco products.

In addition, the settlement contains the occasional performance-based approach — such as the "look back" provision designed to achieve specific targets of underage smoking by various points in time — but those provisions, by virtually all accounts, entail penalties that are too weak. Moreover, as we argued above, the way in which the penalties would be apportioned among tobacco companies (essentially on a market-share basis) would undermine each company's incentives to reduce underage smoking.[7]

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[7] To get a clearer picture of the limits of the command-and-control and performance-based regulations outlined in the proposed resolution, consider the following questions. What gives us any confidence that the proposed cigarette warnings and advertising restrictions would be any more effective than they have been in the past in this country or in other countries? Why would cigarette manufacturers, in response to requirements that they must turn over to the FDA all research regarding potential alternative, potentially safer, cigarette designs, stop conducting such research? What if the FDA did identify a cigarette design that appeared likely to be safer than conventional designs? Should the FDA mandate it? What if smokers increased their overall consumption of cigarettes because of the new design? What if the safer cigarette were unpopular because of, say, unpleasant taste attributes? Should the FDA require that all cigarettes adopt the new design? If not, would the FDA require that cigarette manufacturers market cigarettes with the safer design as aggressively as they market their conventional brands? Why is the target reduction level of the look-back provision set at 60%? What if the look-back provision were successful in encouraging the industry to reduce underage smoking to target levels, can we be

Finally, the Proposed Resolution is especially remarkable for its rejection of ex post incentive-based regulatory approaches. In fact, by sharply curtailing products liability law as a means of regulating manufacturer behavior, the Proposed Resolution would eliminate the only existing incentive-based system with any potential for internalizing the external costs of smoking. The Proposed Resolution arguably includes an incentive-based component, insofar as the costs imposed on manufacturers are required to be passed through to consumers in the form of a price hike. That mandated price hike would, like an excise tax, force manufacturers to bear at least some of the costs of their products. Viewing the Proposed Regulation in that light, some scholars have complained that the price hike is too small.[8] And some senators and the Clinton administration have recently suggested the possibility of increasing the price hike to some amount closer to $1.50 per pack.[9] In fact, there appears to be an emerging consensus among commentators and policy makers that the regulatory effect of the de facto excise tax needs to be enhanced and will have a greater regulatory effect than that of other aspects of the Proposed Resolution.

But again, because of the common-pool problem, even an excise tax of $1.50 per pack would not create incentives for manufacturers to make safer cigarettes.

III. An Introduction to Smokers' Compensation

A. *Introduction*

As we have already mentioned, one type of ex post incentive-based regulation of cigarettes is currently in effect—that is, products liability law. And compared with the Proposed Resolution, we would prefer the status quo, which may be imperfect but at least has the potential for producing the sorts of deterrence incentives and pricing effects that we see as important. In this Part, however, we explore one alternative to products

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sure that many of the children who would otherwise have started smoking as children would not just pick up the habit at age 18?

[8] According to Jeffrey Harris, for instance, the proposed agreement would, if adopted, have the effect of a $0.62 per pack excise tax on cigarettes.

[9] *See* Jeffrey Taylor, *More Senators Seem to Back Increasing Cigarette Prices Beyond Level in Accord*, WALL ST. J. A4, Sept. 17, 1997.

liability law, an administrative system of compensation and cost-internalization that we call *smokers' compensation.*

The following issues distinguish a smokers' compensation regime from other conceivable ex post incentive-based approaches, including a products liability regime: (a) who the decision-maker would be, (b) who would be entitled to bring claims, (c) what costs would be recoverable by the claimant, (d) what evidentiary showing the claimant would have to make to receive compensation, and (e) how the claimant's damages would be allocated among cigarette companies. As we describe in greater detail below, one plausible version of a smokers' compensation regime would (a) be decided by some type of administrative tribunal, (b) be open only to smokers themselves or to those who bring claims on behalf of smokers (e.g., the smoker's estate or a subrogated insurer), (c) allow recovery only for those costs that tend to be covered under standard insurance and existing administrative compensation regimes, (d) require some showing of a causal connection between the claimant's harm and her smoking, and (e) would allocate damages among cigarette companies, as much as is feasible, according to each company's causal contribution to each claimant's harms. Under such a regime, the administrative fact-finders would bring expertise to the adjudication of smoking-injury claims.[10] Perhaps supported by a standing science panel,[11] the fact-finder would bring to bear the most current evidence, epidemiological and otherwise, regarding the effects of cigarette smoking. Research could be not only borrowed from private researchers, but also funded or conducted by the tribunal itself.

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[10] Administrative alternatives are frequently proposed in situations that involve complex scientific or medical determinations, long latency periods, and large numbers of potential plaintiffs. *See, e.g.*, Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951, 952 (1993). This description is usually applied to mass toxic exposures, but fits tobacco equally well.

[11] One model for a "Tobacco Disease Panel" is Ontario's Industrial Disease Standards Panel, which assists the provincial Workers' Compensation Board. Its mandate is to investigate potential diseases, to make findings about causal connections, to specify criteria for evaluation of claims, and to advise the Board concerning appropriate eligibility rules. The Board refers specific questions to the panel, but the panel may also investigate issues on its own accord. The panel may appoint specialist scientific subpanels on particular subjects. The full panel integrates the scientific findings with policy considerations to make recommendations to the Board. *See* 2 AMERICAN LAW INST. ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 227 (1991), at 335-37.

Causation-based administrative alternatives to tort law are not strangers to the legal landscape. Workers' compensation is the exclusive remedy for employees injured on the job in every state.[12] And alternative compensation systems have been used at the federal level on several occasions, including the Black Lung Benefit Program for miners suffering from lung disease,[13] the National Vaccine Injury Compensation Program for victims of illnesses contracted from immunizations,[14] and the Price-Anderson Act governing liability in the event of a nuclear accident.[15] Indeed, the notion of an alternative compensation system specifically for smoking-related injuries is itself not new. Over twenty years ago, Donald Garner proposed a system in which welfare agencies could exercise no-fault claims against cigarette manufacturers to recover direct medical costs and related transfer payments, such as social security disability payments.[16]

Garner's proposed system would involve a special tribunal with expert fact-finders to manage any complicated scientific questions of causation. Claimants could invoke a rebuttable presumption of causation based on how long the victim smoked, and liability would be apportioned according to the approximate number of each manufacturer's cigarettes that were smoked by the victim. A presumption that all cigarettes are equally dangerous would be rebuttable by a manufacturer's showing that its brand is safer than others'.

Since Garner's article, legal scholars have continued to discuss the notion of an alternative compensation scheme for tobacco. Richard Ausness, for example, recently proposed creating an administrative board with rulemaking and adjudicative authority to process tobacco-injury claims.[17] As under Garner's system, Ausness's board would set presumptions of causation, perhaps even irrebuttable for certain diseases, and damages would be limited to economic losses. Most recently, Paul LeBel advocated an

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[12] *See* U.S. CHAMBER OF COMMERCE, 1994 ANALYSIS OF WORKERS' COMPENSATION LAWS at vii (1994).

[13] *See* 30 U.S.C. §§ 901-945 (1994); *see also* PETER S. BARTH, THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE (1987).

[14] *See* 42 U.S.C. §§ 300aa-10 to 300aa-34 (1994).

[15] *See* 42 U.S.C. § 2210.

[16] *See* Donald W. Garner, *Cigarettes and Welfare Reform*, 26 Emory L.J. 269 (1977).

administrative system involving broad, categorical determinations of causation and damages to minimize costs.[18] The program would be available only to individuals with particular diseases and smoking patterns, and those claimants would be allowed to collect only out-of-pocket medical expenses. LeBel would also allow a modest benefit to families of smokers who die from smoking-related diseases, primarily for the symbolic value. Both Ausness and LeBel would finance the payment of damages through an excise tax.

Those earlier proposals were not designed to address all of the deterrence and cost-internalization goals that, in our view, should be central. The Ausness-LeBel excise tax, for instance, would impose costs on all manufacturers, irrespective of their causal connection. As we emphasized above, however, the goal of optimal deterrence requires that *each manufacturer bear that portion of the overall cigarette-caused harm that is attributable to that manufacturer's brand.* Only then will market forces lead manufacturers to design, produce, and market safer cigarettes. And only then will each brand of cigarette fully reflect its expected costs.

None of the actual or proposed causation-based compensation systems provides a perfect model for a smokers' compensation system. They do, however, highlight some of the major considerations and tradeoffs in designing an ideal smokers' compensation system. In the Southern Illinois article, we provide a more fully formed, but still incomplete, model of the smokers' compensation idea. In this testimony, we suggest only a few of the major substantive issues that must be confronted in crafting such a system.

In an ideal smokers' compensation world, three conditions would hold. First, all smoking-related injuries would be "signature diseases." They would, in other words, be caused exclusively, or nearly so, by smoking. Second, smokers would be steadfastly brand loyal, sticking to their preferred cigarette as long as they smoke. Third, all smoking-caused damages would be tangible and easily measured. In this cheap-deterrence world, the analysis would be greatly simplified. If a claimant had one of the

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[17] *See* Richard C. Ausness, *Compensation for Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 36 WAYNE L. REV. 1085 (1990).

[18] *See* Paul A. LeBel, *Beginning the Endgame: The Search for an Injury Compensation System Alternative to Tort Liability for Tobacco-Related Harms*, 24 N. KY. L. REV. 457, 474 (1997).

signature diseases, the system could easily place liability on the manufacturer that caused the harm for an appropriate amount, and the costs of smoking would be appropriately internalized.

The good news is that the ideal world is not as far from the real world as most readers might assume. Certain diseases, most notably lung cancer and chronic lung disease, are significantly more common among smokers than they are among non-smokers and smoking is very likely to be the central cause of those diseases among smokers.[19] There is also evidence that smokers are extremely brand loyal.[20] Moreover, a substantial portion of smoking costs is economic and may be easily and accurately measured.

Nevertheless, the cheap-deterrence-world conditions are not always met, at least not entirely. For instance, although smoking is known to increase the risk of heart disease, there are a number of other potential causes of heart disease as well. Similarly, some smokers do occasionally switch brands. Insofar as the real world diverges from the cheap-deterrence world, it becomes necessary to weigh the value of increased accuracy in attaching injury costs to manufacturers against the administrative costs of achieving that accuracy. A similar trade-off exists with respect to calculating real-world damages.

In what follows, we suggest some of the ways in which a smokers' compensation system could be implemented in the real world. For the purposes of this discussion, we assume that the smokers' compensation claims will be brought by either smokers themselves, their families, or by their subrogated insurers (private or public). Therefore, the two remaining issues, to which we now turn, are these: What causal showing must

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[19] For example, *66%* of all cases of esophagus cancer are due to smoking (even though only approximately 30% of the population are smokers). To put the point differently, a smoker is *7.6 times* more likely to die of esophagus cancer than a non-smoker. For chronic lung diseases, such as emphysema, the numbers are 72% and 9.6 times. For laryngeal cancer, the numbers are, 74% and 10.5 times. For lung cancer (for which there are 123,000 annual deaths), the numbers are 87% and 22.4 times. And for mouth cancer, the numbers are 89% and 27.5 times. See Patrick Remington, Assessing the Health Effects of the Proposed Tobacco Settlement (Working Paper: Proceedings of the Conference on the So-Called Global Tobacco Settlement: Its Implications for Public Health and Public Policy) at 8, tbl.1.

[20] *See* Joe B. Tye et al., *Tobacco Advertising and Consumption: Evidence of a Causal Relationship*, 8 J. PUB. HEALTH POL'Y 492, 493 (1987) ("Cigarettes enjoy one of the most tenacious brand loyalties of any consumer product."); *see also* Philip H. Dougherty, *A.M.A.'s*

the smokers' compensation claimant make in order to recover? And, assuming causation is demonstrated, what damages would the claimant be entitled to recover?

B. *Causation*

1. *General Causation*

The first inquiry of a smokers' compensation board would be to determine whether cigarette smoking could have caused the injury claimed. To lower administrative costs, the system could be open only to certain claims. A threshold definition of a compensable injury under smokers' compensation might turn, for example, on the quantity of cigarettes smoked (and/or the length of time during which the victim was a smoker) and the type of disease for which a claim is being made. Claims for certain diseases with known, constant latency periods might be barred until a given period of time has passed. Finally, a determination that smoking *could* have caused any compensable injury would not necessarily imply that, in the given case, smoking *did* cause the injury.

One option for addressing difficult questions of causation, often proposed for mass toxic torts, would be probabilistic recovery.[21] In such a system, damage awards would be discounted by the likelihood that smoking did not cause the smokers' injury. If, say, smoking has a 90% probability factor of causing lung cancer in smokers,[22] one out of every ten smokers with lung cancer would have developed lung cancer even without smoking. In theory, those individuals should not be compensated, since smoking did not cause their injuries. The nature of epidemiological evidence, however, makes it extremely difficult, if not impossible, to identify which ten claims should be denied. Probabilistic recovery would address this problem by allowing *all* claimants with lung cancer to collect damages—at 90% of their total. The industry would thus pay the full costs of the injuries caused by its product, albeit not to the exact victims.

Assault on Tobacco, N.Y. TIMES, Dec. 12, 1985, at D29 ("Unlike most products you could name, cigarettes engender considerable brand loyalty.").

[21] For an extended early discussion of an ex post incentive-based regime along the lines described here, see David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 851 (1984).

[22] Our hypothetical estimate may be reasonably accurate, as 87% of all lung cancer deaths in 1985 were caused by smoking. Presumably, the percentage of *smokers* whose lung cancer

A smokers' compensation system could adopt another commonly recommended tool for simplifying the causal determinations as well: evidentiary presumptions.[23] Garner, Ausness, and LeBel all propose presumptions of causation for certain diseases depending on the claimant's smoking history. Moreover, presumptions of causation figure prominently in many of the administrative schemes set up by the current federal law, including the Black Lung Benefits Program and the National Vaccine Injury Compensation Program. The use of presumptions would reduce the costly obstacles facing claimants. It would also expedite the claims process by avoiding redundant litigation of scientific evidence. Although these administrative-cost savings would come at the expense of additional deterrence, such a tradeoff may be desirable.

2. *Specific Causation*

If a claimant smoked only one brand of cigarette, establishing general causation would be sufficient. When the smoking-related injuries must be divided among multiple brands, however, a smokers' compensation system would need to allocate liability. Ausness and LeBel do not address this question; under each of their proposals, damages would be financed by excise taxes. Liability, therefore, would effectively be determined by market share. The Black Lung Benefits Program and the National Vaccine Injury Compensation Program are similarly funded by taxes, with liability allocated according to market share rather than causal share. In this subsection, we identify five possible methods of allocating liability among cigarette manufacturers other than market-share liability. We begin with the least accurate and (probably) least expensive and move toward the most accurate and most expensive. In presenting these methods, we remain agnostic as to the proper tradeoff between accuracy and administrative costs; our goal is simply to highlight a few of the possible options.

First, responsibility could be divided *equally* among the manufacturers that produced cigarettes smoked by the claimant. This method would be the easiest to administer, as it would require only the knowledge of which brands were smoked and

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deaths were due to smoking would be well over 90% given that the rate of lung cancer among smokers is approximately 20 times that of nonsmokers.

[23] Depending on the system, such presumptions could be rebuttable or irrebuttable. Failure to satisfy the conditions of the presumption could bar compensable claims from being brought, or it could simply shift the burden of proving causation to the claimant.

some basic arithmetic. Moreover, it is at least one step better than an allocation based solely on market share in that only those companies that manufactured the particular smoker's cigarettes would pay for that smokers' harms. If consumers are reasonably brand loyal or if those who are not brand loyal switch brands somewhat randomly,[24] then manufacturers of relatively safe cigarettes should thrive and competition for safety should emerge. Nevertheless, the nexus between causation and payment of damages would be somewhat attenuated, reducing the beneficial incentive effects of the system.

Second, rather than dividing liability equally, a smokers' compensation system could prorate liability according to the length of time a smoker consumed each manufacturer's brand of cigarette. This method would require the fact-finder to make additional findings of fact, and would thus add to the administrative costs of the process. Pro rata liability, however, could represent an improvement over the equal allocation method inasmuch as it would allocate damages in a way that more closely approximated the harm done by the respective manufacturers. This approach, too, may have problems. For example, insofar as smokers systematically smoke disproportionately dangerous cigarettes for disproportionately short durations, this equal-allocation-by-time method would not create optimal ideal deterrence. To help address any such problem, this allocation system could be combined with a rebuttable presumption that all cigarettes are equally dangerous. Manufacturers of demonstrably safer cigarettes would be permitted to rebut that presumption, thereby reducing their shares of liability.[25]

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[24] If brand switching were independent of the risks posed by the different brands and if smokers typically did not smoke all brands of cigarettes, then makers of more dangerous cigarettes would bear more of the liability costs. To be sure, in some cases, a manufacturer might be charged, say, only half of the damages, when its product caused more than half. However, that manufacturer will more often be charged half than will manufacturers of the other brands charged in that case because, by hypothesis, that manufacturer's cigarettes are more dangerous.

[25] Although the administrative board may lack information to judge adequately the relative riskiness of cigarettes, manufacturers probably do not. By placing the burden on manufacturers, therefore, the presumption forces the well-informed manufacturer to inform the poorly informed regulator. Furthermore, it does so in a way that pits manufacturers against manufacturers in contrast to the current regime in which manufacturers have common incentives to maintain one simple story—that there is no proof that any brand of cigarettes causes cancer and that smoking cigarettes is not addictive. A code of silence in response to a presumption that all cigarettes are equally dangerous, however, is certainly not unimaginable given the industry's history, and would partially undermine the primary motivational impact of ex post incentive-based regulation by sharply reducing care level considerations from manufacturing decisions. While this behavior would not be in individual companies' best interests, oligopolistic decision-

A third allocation system would involve estimating the number of cigarettes smoked of each brand. Doing so would further refine the allocation process, but at much greater cost. It may be that a smoker smokes a half-pack of Brand *X* every day for ten years. If that person moves on to Brand *Y* for another ten years, while also increasing consumption to a pack per day, she has smoked twice as many Brand *Y* cigarettes, though the time frame for each brand was the same. Recognizing this problem, Garner suggests the per number means of allocating liability, coupled with a rebuttable presumption that cigarettes are equally dangerous.

Fourth, it may be desirable to allocate the damages in some way other than purely on a pro rata basis. The allocation could, for example, be structured on a "winner-take-all" basis. Such a system could assume any number of forms. For instance, the manufacturer who produced the most cigarettes smoked by the claimant could bear all liability. Such a method would reduce the administrative costs associated with inter-manufacturer disputes. Or the company producing the first brand smoked could bear a disproportionate share of the liability. This "first-brand penalty" might be justified on the grounds that first brands create the addiction and that their toxins linger in a smoker's body for the greatest number of years.

C. *Damages*

Assuming a claimant can prove the causal link between her illness and her smoking habit, how much should that person receive under a smokers' compensation program? There are two general sorts of losses that might be compensated, economic losses and noneconomic (or intangible) losses. Taking deterrence as our only goal, an ideal smokers' compensation scheme would, at least in an abstract world resembling an economist's model, award full compensation for both economic and noneconomic harms caused by cigarettes. In the real world, however, the picture is clouded by a number of complicating political and administrative considerations. In the Southern Illinois article, we will lay out some of those factors and their implications for the types of injuries that should be compensable. We argue in that article that, in light of the various practical and

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making might prompt such action, particularly if the industry felt that the smokers' compensation system could be dismantled if it failed to produce results. Even were it the case that manufacturers could not manage to cooperate in that way, however, administrative regulators

political constraints, a smokers' compensation system should, like most of the extant no-fault programs and public and private insurance arrangements, be limited to economic loss only. More specifically, the smokers' compensation should provide complete medical benefits, partial but substantial disability benefits, and death benefits. Compensation for noneconomic losses, if any, should be scheduled and modest.

IV. Possible Objections

There are two possible objections to an ex post incentive-based system, such as a smokers' compensation system, as compared to an ex ante incentive-based system of regulation, such as an excise tax.

A. *Strategic Avoidance of Regulatory Incentives*

First, an excise tax might be presumed superior because it would be charged as the cigarette is sold rather than when the injury occurs. Because, under a smokers' compensation system, manufacturers would be liable for the harms of cigarettes sold many years earlier, a smokers' compensation system would arguably create opportunities for cigarette manufacturers to evade the regulator's incentive-creating sanctions. For example, after profiting for twenty years or so, a new entrant to the cigarette market might simply distribute its assets to its shareholders, rendering itself largely immune to the threat of smokers' compensation claims. To be sure, the manufacturer would then be bankrupted by the smokers' compensation claims, but only after many years of profiting substantially and distributing those profits to shareholders. Legal scholars sometimes describe this as a Judgment-proofing or "hit and run" strategy.

There are several reasons why such judgment-proofing strategies are unlikely to be adopted by manufacturers. For example, sophisticated long-term creditors would – and, in other industries, do – include covenants prohibiting (or, more generally, increasing the costliness of) such strategies. Also, opportunities for strategic avoidance of regulatory incentives exist for virtually *all* forms of regulation. For instance, manufacturers could avoid the effect of an excise tax by directly or indirectly selling their brands on black markets, as may be common in other countries that have substantial

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might not be sufficiently competent to sort out any informational disputes and competing claims among manufacturers.

cigarette tariffs. That evasion strategy would be less effective under a smokers' compensation system because manufacturers would have to pay for the harms caused by all of their cigarettes, even those purchased on black markets. Indeed, for that reason, manufacturers would have a strong incentive to discourage the emergence of black markets in their own cigarettes.

Finally, there are regulatory policies that could be adopted that would prevent manufacturers from evading the threat of future liability. For instance, as is provided for under the proposed resolution, manufacturers might be required to put up a substantial bond, to ensure that some assets are available in the future. Similarly, as is the case for virtually all European corporations, manufacturers might be required to meet minimum capitalization requirements, which would serve the same purpose as a bond. In addition, as is true of automobile drivers in most of the states in this country, cigarette manufacturers could be required to purchase a minimum amount of liability insurance which would cover the costs of future potential liability.

B. *The Personal Responsibility Question*

Others might object to a smokers' compensation system (or to any other type of victim-initiated ex post incentive-based system) on the ground that it compensates smokers for the harms caused by cigarettes and thus removes from them any responsibility for their own decisions. If the goal is to make all parties "own up" to their decisions, however, several arguments can be made that the appropriate policy response would be to adopt some form of ex post incentive-based regulatory system.

First, the argument cuts two ways. A strong argument can be made that, without products liability or some other type of ex post incentive-based regulation of cigarettes, tobacco *manufacturers* would be allowed to avoid responsibility for *their* actions. Indeed, some analysts have calculated that the proposed settlement would, if enacted, increase the industry's net profits.[26]

Second, even if we are worried primarily about individual rather than corporate responsibility, the only way to be sure that smokers take full responsibility for their

[26] *See* John M. Broder, *Industry Windfall Seen in Tobacco Deal*, GREENSBORO NEWS & REC. (N.C.), Sept. 23, 1997, at A1 (describing an FTC study finding that "the tobacco companies could reap as much as $123 billion in additional profits in the next 25 years if the settlement plan is adopted as drafted").

actions would be through the implementation of an ex post incentive-based regime of regulation and its effects on the price of cigarettes. Otherwise, smokers would continue to externalize substantial costs in the form of higher insurance premiums and tax rates.

Under a smokers' compensation program, there is no doubt that smokers would be responsible for their decisions. For starters, they would have to pay when purchasing each pack of cigarettes, in the form of higher product prices, for their right to make a claim when they come down with a smoking-caused illness. The arrangement is virtually identical to the arrangement that exists between individuals and their first-party health insurance companies. Thus, just as one is not getting medical care from one's insurer for nothing, smokers under a smokers' compensation program would not be getting something for nothing—and thus would not be evading responsibility.

Moreover, even to the extent smokers or their families receive compensation for their harms, it is difficult to say that the dead or seriously ill smoker would ever fully evade the ultimate responsibility for her smoking decisions. And that is especially true compensation is limited under the system to economic losses and public and private insurers enjoy subrogation and indemnity rights.

IV. Is it Really Now or Never; This or Nothing?

Those who are interested in the cigarette problem might ask questions such as: "Doesn't the proposed resolution represent a step in the right direction?"; and "In light of the fact that the apparent momentum in Washington to enact a comprehensive federal regulatory response to the cigarette problem might die, shouldn't we embrace the proposed resolution or something substantially similar to it while we have the chance, rather than be returned to the status quo?"

In our view, the answer to both questions is "no." Taking public health as the overriding goal, we would, if forced to choose, pick the status quo. To understand why, it is necessary first to understand that critics and supporters of the proposed settlement share two flawed premises, which nevertheless seem to be dictating the terms of the policy debate. First, both sides assume that the primary purpose of products liability law in this context is not to serve public health goals, but simply to compensate those injured by smoking. Second, both sides seem to agree that civil liability laws have, to date, failed

to serve that or any other worthwhile goal. Consequently, most participants in the debate have indicated in one way or another that the elimination of products liability law would be no big loss, even for smoking plaintiffs. The proponents of the proposed settlement, for instance, point out that, even if $368.5 billion does not cover all the harms caused by cigarettes, it is a lot more than nothing, which is what manufacturers are often said to have paid in tort damages to individual plaintiffs to date. Critics are typically less explicit. They make their views known either by not mentioning the effect of the settlement on tort law or by indicating that they would not challenge that effect if only the settlement could be adjusted to serve public health goals better.

Arguably, however, the principal goal of products liability law is, broadly speaking, *public health*, not compensation. In the cigarette context in particular, the question then becomes whether the public health goal is better achieved through products liability law or through the types of regulation envisaged in the proposed settlement. Those who would sacrifice products liability law to accept the settlement implicitly assume that the public health benefits of the latter would outpace the public health benefits of the former. But, perhaps because of the general anti-tort sentiment in this country, that presumption has been largely unexamined and is, for several reasons that we have already noted, highly questionable.

Products liability law comes far closer, at least in theory, to providing an ex post incentive-based type of regulation than any alternative form of regulation now being considered (other than the smokers' compensation regime we are proposing). Moreover, products liability law could have more than just a theoretical impact. It is true that no substantial tort judgments have been won against the tobacco industry. Nevertheless, products liability law is currently in a state of flux or disequilibrium. In our view, the growing inevitability of many large civil judgments against the industry helped push the manufacturers to the negotiating table and thus made the $368.5 billion settlement offer possible. In other words, to say that the settlement agreement would produce $368.5 billion while tort law has produced nothing is to misunderstand what motivated the agreement in the first place.

It would be more accurate to claim that command-and-control regulation, not products liability law, has failed those who have been harmed by cigarette smoking. The

FDA has long declined to exercise its authority in this area, presumably because of the political power of the cigarette industry and because of the FDA's lack of expertise regarding how best to regulate. Furthermore, it has been administrative regulation that has effectively derailed otherwise viable tort claims against cigarette manufacturers. For example, the FTC-promulgated warning labels have given rise to the preemption defense and greatly strengthened the assumption-of-risk defense in tort law. Those defenses have until very recently proved an insurmountable barrier to tort recovery. Thus, in light of this past experience with administrative regulation, it is not clear that we should have much confidence in the expanded role for administrative regulation contemplated in the settlement proposal.

Conclusion

That brings us to our final observation. The history of tobacco regulation makes clear one very disturbing fact. The cigarette industry has, using a variety of strategies, successfully managed to protect itself throughout this century against any form of meaningful regulation. By far, its most successful strategy has been to meet the threat of tough regulations with weak command-and-control regulations that are preemptive of individual tort claims. A case in point is the experience with FTC warning-label requirements. And there are many other such examples. Within the last several years, that practice has been especially evident at the local level, where the industry has supported some state tobacco control legislation in an effort to preempt the authority of city, town, and county governments to control the sale and use of tobacco. With that historical backdrop in place, it is illuminating to look briefly again at the promises and the likely effects of the proposed resolution. As will become clear, the proposed resolution appears to be just one more example – this time on a grander scale – of a very successful long-term tobacco-industry strategy.

The proposed resolution states that "[a] key element in achieving the Act's goals will be forcing a fundamental change in the way the tobacco industry does business." With that assessment we completely agree. The proposed resolution also claims that it would "provide for means to ensure that the industry will not only comply with the letter of the law but will also have powerful incentives to prevent underage usage of tobacco

products and to strive to develop and market less hazardous tobacco products." As our analysis has indicated, however, that claim is unfounded.

Indeed, as already emphasized, the mix of regulatory regimes chosen by the proposed resolution—mostly command-and-control; some qualified performance-based; and virtually zero ex post incentive-based regulation—is precisely the reverse of what most policy-oriented scholarship would recommend. Moreover, it is, from the tobacco industry's perspective, ideal. In light of the industry's track record, therefore, the choice of that mix of regulatory regimes was probably no accident.

As we have already noted, command-and-control is the least effective form of regulation in this type of setting. It requires the regulator to have an enormous amount of information about the product, information that the regulator often must rely on the industry to provide. Insofar as the industry is the source of the regulator's information, it becomes relatively easy for the industry to manipulate the process and avoid really having to bear the costs of its actions. Furthermore, the regulations themselves are severely limited by the inability of the regulator to anticipate every counter-move that the industry might make in its attempt to thwart the regulator—or, more accurately, to save the money that would otherwise have to be spent in complying with the spirit of the regulation.

As we have argued, those criticisms certainly apply to the settlement's numerous command-and-control regulations. To be sure, the agreement also contains some elements of performance-based regulations, which, in theory, might pose somewhat of a regulatory threat to the cigarette industry. As other critics have noted and our research shows, however, the performance-based aspects of the settlement are rendered quite anemic by the substantial ex ante and ex post loopholes and the relatively minor surcharges for failing to meet performance targets.

Considering the big picture, therefore, we have no trouble rejecting the suggestion that the proposed settlement would somehow substantially alter the culture or incentives of the tobacco industry. To the contrary, the basic incentives of manufacturers would remain. They would still seek to find and to create loopholes in the regulations. They would still seek to misrepresent the risks to consumers and regulators.

Our very strong sense at the end of the day is that the proposed resolution would accomplish precisely what previous efforts to regulate the cigarette industry have accomplished. Specifically, the proposal would create the illusion of regulation (at least initially) while simultaneously protecting the industry and smokers from having to bear the costs of cigarettes. In the words of C. Everett Koop: "The tobacco industry has always been able to get around or hurdle over measures we set up to try to stop them . . . to make victories of steps we thought would set them back. . . . We don't want that to happen again here."

Tob-act - liability
and
Tob-act - lookback penalties

Definition of Participating Manufacturer

This amends the definition of "participating manufacturer" in Title VII so that a tobacco product manufacturer ceases to receive any of the liability protections in Title VII if 1) the look-back penalties in Title II are invalidated, 2) the industry falls short of the required percentage reduction in youth smoking by 20 percentage points, or 3) the individual manufacturer falls short of the required percentage reduction in youth smoking by 20 percentage points.

Section 702(16)

Insert new subsection (A) (iii)

(iii) is subject to the manufacturer-specific and industry-wide surcharge provisions of Title II and

(a) the relevant industry-wide target for reduction in underage use specified in section ___ has never exceeded the percentage reduction in underage use of a type of tobacco product, assessed on an industry-wide basis in accordance with section ___, by more than 20 percentage points (provided that an increase in underage use shall be treated, for purposes of this provision, as a negative reduction); and

(b) the relevant manufacturer-specific target for reduction in underage use specified in section ___ has never exceeded the percentage reduction in underage use of a type of tobacco product, assessed on a manufacturer-specific basis in accordance with section ___, by more than 20 percentage points (provided that an increase in underage use shall be treated, for purposes of this provision, as a negative reduction).

Credits for Judgments and Settlements

Section 707(e) allows a participating tobacco manufacturer to take an credit against the fund of 80% of all judgments and settlements in a given year. This amendment to Section 707(e) creates a sliding scale by which the percent credit that a manufacturer receives from the Settlement Fund decreases if the manufacturer or the industry fails to meet youth smoking targets by specified amounts. Under this provision, manufacturers would still receive other benefits of Title VII, but the cap would, in effect, increase.

Section 707(e) Except as provided in subsections (3) and (4) ,

[Insert current version of Section 707(e)]

(3) If the tobacco industry fails to achieve the percentage reductions in youth use of a tobacco product in a given year specified in section ___, a participating tobacco manufacturer shall receive credit for judgments and settlements paid pursuant to this section during that year, as provided under the section Credits for Tobacco Company Liability in the Master Settlement Agreement, according to the following schedule:

Difference between the required percentage reduction for underage use and the actual percentage reduction, as determined pursuant to Title II	Credit
0-5%	60%
5-10%	45%
10-15%	30%
15-20%	15%
>20%	0%

(4) If a participating tobacco manufacturer fails to achieve the percentage reductions in youth use of a tobacco product in a given year specified in section ___, the participating tobacco manufacturer shall receive credit for judgments and settlements paid pursuant to this section during that year, as provided under the section Credits for Tobacco Company Liability in the Master Settlement Agreement, according to the following schedule:

Difference between the required percentage reduction for underage use and the actual percentage reduction, as determined pursuant to Title II	Credit
0-5%	60%
5-10%	45%
10-15%	30%
15-20%	15%
>20%	0%

Judicial Review

Place at the end of Title II (or in some relevant part of Title II):

The amount of surcharge is committed to the sound discretion of the Secretary and shall be subject to judicial review by the United States Court of Appeals for the District of Columbia Circuit, based on the arbitrary and capricious standard of the Administrative Procedures Act, 5 U.S.C. § 706(2)(1). Notwithstanding any other provision of law, no court shall have authority to stay the payment of any surcharge payments due the Secretary under this Act pending judicial review.

Tob-rt-liability

OPTIONS

1) Failure to meet an absolute standard prevalence level (outcome based)

2) Missing established reduction or prevalence target

a) by a specific percentage

b) by a period of time (miss in each of 3 years running)

3) Any finding of criminal wrongdoing

can be broadly defined or include:

(a) knowing participation in the black market

(b) withholding disclosure information

(c) any criminal activity related to the sale or marketing of tobacco to underage youth

4) Any Felony behavior

5) Any changes in products deemed damaging or more attractive to the underage population

Tob-mr-liability

"BEST EFFORTS" DEFENSE AND JUDICIAL REVIEW

Waiver of Surcharge

The Secretary may waive [reduce?] any surcharge imposed on a manufacturer or distributor pursuant to section ___ if [said manufacturer or distributor demonstrates, by clear and convincing evidence, that it has engaged in best efforts to reduce minors' use of tobacco products to a degree at least equal to the required percentage reduction] [no reasonable observer would conclude that the manufacturer or distributor had failed to engage in best efforts to reduce minors' use of tobacco products to a degree at least equal to the required precentage reductions]. The amount of reduction of a surcharge shall be committed to the sound discretion of the Secretary.

Judicial Review

Imposition of a surcharge shall be subject to judicial review by the United States Court of Appeals for the District of Columbia Circuit, based on the arbitrary and capricious standard of the Administrative Procedures Act, 5 U.S.C. § 706(2)(1). Notwithstanding any other provision of law, no court shall have authority to stay the payment of any surcharge payments due the Secretary under this Act pending judicial review.

DEFINITION OF PARTICIPATING MANUFACTURER

Section 702(16)

Insert new subsection (A) (iii)

(iii) is subject to the manufacturer-specific and industry-wide surcharge provisions of Title II.

(if it throws out lookback penalties, you don't get liability protection)

KICKOUT PROVISION

Section 703(b) EXCEPTIONS

(7) against a participating tobacco product manufacturer if, with respect to said manufacturer, the relevant manufacturer-specific target for reduction in underage use specified in section ___ has at any time exceeded the percentage reduction in underage use of a type of tobacco product, assessed on a manufacturer-specific basis in accordance with section ___, by more than 20 percentage points (provided that an increase in underage use shall be treated, for purposes of this provision, as a negative reduction).

Tob-ser-liability

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EXCEPTION FOR MANUFACTURER ENGAGING IN CRIMINAL CONDUCT

Section 703(b) EXCEPTIONS: add new subsections 703(b)(7)

(8) against a participating tobacco product manufacturer if that manufacturer, or any of its principal officers (acting in that official's corporate capacity), is convicted of

(A) manufacturing or distributing misbranded tobacco products in violation of the criminal prohibitions on such misbranding established under the Food Drug and Cosmetic Act, 21 U.S.C. §§ 331, 333;

(B) violating reporting requirements established under the federal excise tax scheme, 26 U.S.C. § 5762(a)(4);

(C) violating, or aiding and abetting the violation of, the Trafficking in Contraband Cigarettes Act, 18 U.S.C. chapter 114; or

(D) violating federal prohibitions on mail fraud, wire fraud and false statements to federal law enforcers in the course of making reports or discloses required by this Act, [cites].

John: This is meant to include all youth marketing and access restrictions in your bill, which (at least in the last draft you gave us) are included under the heading "misbranding." If you've changed the way your bill is structured, then this should be changed too.

3-20 Liability Mtg

DO - cap is not
pun dams outside the cap. - future conduct
pun for past - next to show up.
class actions
joinder - last

} is there some way, even, make it difficult for P. to say that you've made it impossible to recover.

~~[redacted]~~

hold the $ paid for a certain period of time?
(to prevent danger of $ disappearing when it will be needed).
Set priorities among claimants?

Bill Felkel - if someone brings lawsuit in future
started smoking after 1998
got addicted before age of 18.

maybe too hard to show addicted?

so hi-flier - even by creating fed cause of action - no Any R or strict liability

Link to youth smoking targets?
hard to have ~~a~~ on ~~a~~ and off spirit.
create havoc.
how affect s of C?

although has to be solved if any link at all?

- Could also ↑ caps (OR) make copayment scheme different - e.g., have to pay 30%

Problem - we'll never even be able to collect these penalties - in litigation constantly.

tob - sct - liability

Los Angeles Times

WASHINGTON BUREAU

FAX TRANSMITTAL

PLEASE DELIVER TO: Elena Kagan

LOCATION: White House OPC

FAX NUMBER: 456 - 2878

WE ARE SENDING 8 PAGES, INCLUDING THIS COVER.

SENDER: Alissa J. Rubin

PHONE: (202) - 861 - 9297

COMMENTS: Hi Elena: Hope these are of interest. Only the first page really ~~~~ seemed like a new emphasis to me.

INTERNATIONAL SQUARE / 1875 EYE STREET, N.W. / WASHINGTON, D.C. 20006 / TELEPHONE (202) 293-4650

REFORMS AVAILABLE ONLY THROUGH VOLUNTARY AGREEMENT BY THE INDUSTRY

- Waiver of Constitutional claims to prevent the tobacco industry from challenging the Act.
- Assessment of huge "look back" surcharges on the industry if targets for reducing youth tobacco use are not met, even if the industry is not at fault.
- Prohibition on all outdoor tobacco advertising
- Prohibition on advertising in enclosed stadia and of advertising directed outward from retail establishments.
- Prohibition on use of human images and cartoon characters in tobacco ads.
- Requirement for text-only, black and white ads, except in adult publications and facilities
- A ban on all non-tobacco merchandise (e.g., caps, jackets and bags) bearing the name of a tobacco brand.
- A ban on tobacco sponsorships of cultural, athletic and other events in the name of a tobacco brand.
- Significant limits on the size and location of point-of-purchase ads.
- Prohibition of tobacco ads on the Internet where accessible in the U.S.
- A ban on payments to media (e.g., movies, television, music, video games) to use or refer to tobacco products.
- Requirement that the industry dissolve current industry trade associations, and placing restrictions on the formation and operation of new associations.
- Requirement that the industry issue corporate "principles" and conducting "Scarlet Letter" advertising publicly announcing any violation of law.
- Requirement that the industry establish and fund a publicly open depository containing many of its documents.
- Guarantee that current market participants fund any judgments obtained by individual plaintiffs against other tobacco companies.
- Requirement that the industry to pay revenue designated for "counter-marketing" advertising campaigned designed to discourage tobacco use.
- Requirement that the industry settle lawsuits or make liability payments to the Federal government or the States, or fund smoking-cessation programs for individuals.

EXERPT OF REMARKS BY ELENA KAGAN
OF THE WHITE HOUSE DOMESTIC POLICY COUNCIL
REGARDING THE NEED FOR COMPREHENSIVE TOBACCO LEGISLATION
FEBRUARY 13, 1998

"We have to pass legislation that...significantly raises the price of a pack of cigarettes and imposes restrictions on access and advertising and, in the event that that still doesn't work to meet our youth smoking goals, imposes tough penalties on manufacturers. **All of those are necessary. They all reinforce each other. [emphasis added]** The President does not want Congress to pass piecemeal legislation that does only one of those things, that, you know, for example, imposes only access and marketing restrictions and fails to raise the price of a pack of cigarettes substantially."

SUMMARY OF TESTIMONY

COLORADO ATTORNEY GENERAL GALE NORTON

FEBRUARY 5, 1998

The civil liability component of the June 20, 1997 national tobacco settlement agreement is an integral part of a comprehensive plan to resolve pending litigation and establish a mechanism for claims by individuals to be compensated for injuries caused by the companies, both past and present. The civil liability portion of the settlement has been widely misunderstood. Although often characterized as providing "immunity" to the tobacco companies, it does not provide any immunity from liability, either civil or criminal.

The settlement calls for extraordinary payments to be made by the industry in perpetuity to the states, the federal government, and to be set aside for payment of tort claim settlements or judgments. $60 billion is designated as punitive damages for past misconduct of the companies. These punitive damages will be shared by the public as a whole, not by a small group of plaintiffs and lawyers, in lieu of punitive damages being awarded case by case. Punitive damages for future misconduct are not limited in any fashion.

Class actions would be eliminated as a mechanism for trying individual claims, although consolidation of cases for preliminary discovery and motions is permitted. While this may be viewed as limiting plaintiffs' opportunities for cost sharing, in fact, class actions are not likely to be certified by many cases involving individual claims under current court procedures. Moreover, as experience has shown, the class action procedure can also be misused to force all claimants into one action. As has been demonstrated by the recent flight attendant class action, settlement of class actions does not always result in payments being made to class participants, though their claims are settled. Moreover, because the companies will be placing millions of documents into a public depository for use in individual cases, the cost of preparing for an individual trial, especially conducting discovery, should be reduced.

Most importantly, the civil liability provisions of the settlement prevent a "race to the courthouse" atmosphere for litigating or settling pending and future cases. The settlement provides for an orderly, and financially sound, mechanism to assure payment by the industry of damages to the states and for federal programs which will deter youth smoking. The industry can withstand the huge financial liability contemplated by the settlement if it structured over a long period of years, but not if a number of cases go to trial and result in judgments becoming immediately payable. If left to the tort system, a handful of large judgments could force the companies, or some of them, into bankruptcy, leaving the remainder of the plaintiffs empty-handed, or spending years standing in line with other creditors hoping to be paid. Thus, the civil liability provisions as a whole, rather than benefiting only the tobacco companies, are also of great benefit to the states and individual claimants as well.

Summary Highlights of the Civil Liability Provisions of the June 20, 1997 Proposed Tobacco Resolution

- The tobacco industry does not get immunity.
- Individual claimants who believe that they have a tobacco-related disease may still sue the industry for full compensation with assurance that any final judgment will be satisfied.
- The industry is subject to punitive damages for any future wrongful conduct.
- The industry receives absolutely no protection from criminal liability now or in the future.
- The Proposed Resolution settles pending, and prohibits future, Attorney General actions (and similar actions brought by non-federal governmental entities) and class actions or other aggregated claims.
- Third party claims (such as contribution claims and claims by health insurance providers) are prohibited, except where based on subrogation to a single individual claim.
- The civil liability provisions afford predictability in return for industry payments and other concessions while preserving individual rights.
- The industry pays in excess of $60 billion for the public benefits to settle punitive damages claims for past conduct. Since in over 40 years of tobacco and health litigation punitive damages have never been awarded against the industry, this is an extraordinary result.
- The prohibition on class actions simply confirms existing federal case law that tobacco and health cases cannot be maintained on a class basis. Individual actions, however, may be aggregated for purposes of discovery and other pre-trial proceedings, to allow plaintiffs to share the expenses of such proceedings.
- To reduce the expense of litigation against the industry, the industry is required to place all of its health-related original laboratory research documents in a depository which is open to the public and a streamlined, expedited procedure for contesting industry claims of privilege is created.
- The annual $5 billion cap on liability payments simply ensures a regular pay-out mechanism if tort liability were to rise so high the industry's ability to pay immediately might be jeopardized . In that event, excess liability payments simply roll over to the next year until they are satisfied.
- Claims based solely on allegations of addiction--that is, claims seeking money solely because the plaintiff is allegedly addicted to tobacco, and not because the plaintiff has some alleged tobacco-related disease--are settled in return for the industry's funding of tobacco-use cessation programs for persons wishing to quit.

The Civil Liability Provisions of the June 20, 1997 Proposed Tobacco Resolution

What they do:

- The industry pays more than $60 billion to settle punitive damage claims for past conduct.
- Settles pending and prohibits future Attorneys General actions (and similar actions brought by non-federal governmental entities) and class actions or other aggregated claims.
- Settles all addiction claims in return for industry funded cessation programs.
- Third-party claims (such as contribution claims and claims by health insurance providers) are prohibited, expect where based on subrogation to a single individual claim.
- Annual payment cap (up to $5 billion per year) will ensure predictability and stability so that all final judgments are paid in full and annual industry payments can be made.
- Manufacturers will establish a national document depository, at the industry's expense, that is open to the public and is located in the Washington, D.C. area which should dramatically reduce the costs of litigation for plaintiffs and expedite the pre-trial stage of litigation.
- A three judge panel will determine the legitimacy of all claims of privilege related to documents.
- The industry will deposit all original laboratory research relating to the health and safety of tobacco products, except legitimate trade secrets.

And what they don't do:

- Individual plaintiffs who believe that they have tobacco-related diseases may still sue the industry for full compensation and will receive every dollar of any final award. No limit is placed on the amount of compensation.
- The industry remains fully subject to punitive damages for any future wrongful conduct.
- The industry receives <u>absolutely no protection</u> from criminal liability now or in the future.

Why the Civil Liability Provisions Should Be Enacted As An Essential Part Of A Comprehensive Tobacco Resolution:

- The civil liability provisions are necessary to address the unique issues presented by tobacco products: products that are legal, that millions of fully informed adults choose to use, but that are recognized to be risk factors for serious diseases. There cannot be an overall resolution that, on the one hand, reaffirms the legality of the products, but on the other hand, subjects the tobacco industry to ruinous liability for manufacturing it.

- The ability of the companies to make the annual payments to benefit the public as contemplated by the Proposed Resolution, and to pay future plaintiffs, will be jeopardized if the companies are exposed to potentially ruinous tort liability. In such case, a relatively few plaintiffs who get to the court early could receive huge financial recoveries.

- The civil liability provisions are also necessary to avoid jeopardizing the health benefits to the public of the Proposed Resolution. Under the Proposed Resolution, tobacco products would continue to be legally produced in this country by strictly regulated companies paying billions of dollars per year to benefit the public health and subject to rigid marketing restrictions. This cannot be done if the companies making these payments and subject to these restrictions are also exposed to ruinous liability at the same time.

- Under the Proposed Resolution, the tobacco industry would make hundreds of billions of dollars of payments to benefit taxpayers and to further the public health, and would consent to many additional measures (such as strict advertising restrictions) that could not be constitutionally imposed on the industry without its consent. The only way the industry can undertake such commitments is in the context of an overall resolution that affords it some predictability and certainty in its continuing operations.

The Civil Liability Provisions Afford Predictability for the Manufacturers in Return for Industry Payments and Other Concessions While Preserving Individuals' Right to Sue.

- Class and aggregated actions would be prohibited in tobacco litigation. (The prohibition on class actions confirms existing federal caselaw that tobacco and health cases cannot be maintained on a class basis.) Individual actions, however, may be aggregated for purposes of discovery and other pre-trial proceedings, to allow plaintiffs to share the expenses of such proceedings.

- The industry pays in excess of $60 billion for the public benefit to settle punitive damages claims for past conduct. Since in over 40 years of tobacco and health litigation punitive damages have never been awarded against the industry, this is an extraordinary result. The industry, moreover, remains fully exposed to punitive damages for any future misconduct.

- Claims based solely on allegations of addiction -- that is, claims seeking money solely because the plaintiff is allegedly addicted to tobacco products, and not because the plaintiff has some allegedly tobacco-related disease -- are settled in return for the industry's funding of tobacco-use cessation programs for persons wishing to quit. At the same time, plaintiffs alleging that they suffer from tobacco-related diseases may still claim that the diseases were caused by addiction to tobacco products.

- The annual cap on liability payments simply ensures a regular pay-out mechanism if tort liability were to rise so high that the industry's ability to pay immediately might be jeopardized. In that event, excess liability payments simply roll over to the next year. The cap is extremely high -- up to $5 billion per year, as increased for inflation -- to ensure that delays occur only when necessary.

- To reduce the expense of litigation against the industry, the industry is required to place all of its health-related original laboratory research documents in a depository open to the public and a streamlined, expedited procedure for contesting industry claims of privilege is created.

- There is ample precedent establishing Congress' power to limit an industry's tort liability. As the United States Supreme Court stated in upholding the federal Price-Anderson Act, which limits the liability of the nuclear power industry, "statutes limiting liability are relatively commonplace and have been consistently enforced by the courts." Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 88 n.32 (1978).