NLWJC - Kagan
DPC - Box 047 - Folder-008

Tobacco-Settlement: Medicare Suits

Tobacco - sr - medicare mtf

May 27, 1999

Dear Senator :

The undersigned members of the Coalition for Legal Reform urge you to oppose the Clinton Administration's plan to use the Department of Justice to utilize radical measures to pursue legal action against the tobacco industry to recover Medicare expenditures. We believe that this plan poses a serious threat to the entire business community and the rule of law. It would constitute an unprecedented use of the Department of Justice and tax dollars to sue legitimate businesses in pursuit of revenue for Federal programs. We oppose any such efforts at taxation through litigation.

In his 1999 State of the Union address, President Clinton announced "that the Justice Department is preparing a litigation plan to take the tobacco companies to court and, with the *funds* we recover, to strengthen Medicare." Attorney General Reno went one-step further by suggesting that the Department may enlist the services of trial lawyers who have already received billions of dollars in attorney's fees from the tobacco agreement with 46 states. To accomplish this goal, the President requested $20 million for the Department of Justice to fund this effort in his FY 2000 budget request.

Government litigation is not new. Environmental, civil rights and even antitrust litigation have long been a technique government has used to implement policies enacted by legislatures. To our knowledge, however, never before has the President of the United States announced that the purpose of the Federal litigation was to raise revenue.

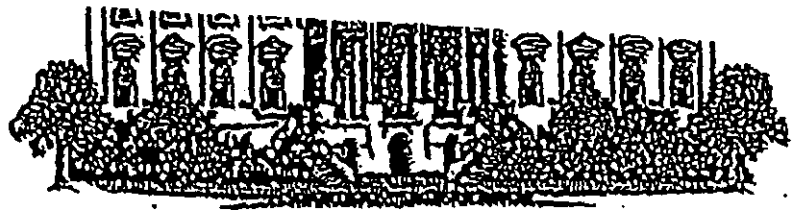
The most alarming aspect of such revenue-raising litigation is the government's new willingness to ensure its victory by stripping businesses of their substantive legal rights and defenses. This may occur through what are inaccurately called "clarifying amendments" to existing law, forum shopping, or through attempts to twist and change existing precedents. Suffice it to say that we believe that the radical legal theories that the Department of Justice is likely to use against tobacco could be used against virtually any industry.

Our concern is so great that we are forming a growing Coalition for Legal Reform. We believe that the Department of Justice should be blocked from suing a particular industry to raise revenue—in this case the tobacco industry. We expect this will be used as a test case for future litigation against other legitimate industries.

We urge you to oppose the Administration's plan to use the Department of Justice to strong-arm legitimate businesses and to reject any legislation or appropriation that may facilitate or encourage this dangerous precedent.

Sincerely,

American Insurance Association
Americans for Tax Reform
American Tort Reform Association
American Wholesale Marketers Association
Business Civil Liberties, Inc.
Cato Institute
Citizens for a Sound Economy
Citizens for Civil Justice Reform
Coalition for Uniform Product Liability Law
Food Distributors International
Food Marketing Institute
National Association of Beverage Retailers
National Association of Convenient Stores
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Grocers Association
National Restaurant Association
National Roofing Contractors Association
National Taxpayers Union
Petroleum Marketers Association of America
Small Business Survival Committee
U.S. Chamber of Commerce



Tobacco - not human -
Medicare mtr

THE WHITE HOUSE

Domestic Policy Council

DATE: _____

FACSIMILE FOR: Bruce + Elena

FAX:
PHONE: 6287

FACSIMILE FROM: Cynthia Rice, Special Assistant to the President for Domestic Policy

FAX: 202-456-7431
PHONE: 202-456-2846

NUMBER OF PAGES (INCLUDING COVER): 3

COMMENTS:

(1) Our Q+A

(2) DOJ fact sheet

Tobacco Q&A
April 6, 1999

Q: Is the Justice Department hiring private attorneys to assist them in their lawsuit against tobacco companies?

A: The Justice Department entered into an agreement with a law firm from Minnesota on a consulting basis to provide advice and assistance to the Justice Department's tobacco litigation team. This firm represented the State of Minnesota and the Blue Cross-Blue Shield in their lawsuit against the tobacco industry, and will bring enormous experience and expertise to the federal litigation. We are pleased that the Justice Department is moving ahead on litigation to recover smoking-related federal health care costs. All other questions about the agreement should be directed to the Justice Department.

Q: When will the Justice Department bring suit against the tobacco companies?

A: This a matter for the Justice Department's task force to determine. Litigation will be brought when the Justice Department is fully prepared to do so.

Background: The firm, Robins, Kaplan, Miller & Ciresi, is a Minneapolis law firm. They represented the state of Minnesota and Blue Cross-Blue Shield in their lawsuit against the tobacco industry.

Department of Justice

FOR IMMEDIATE RELEASE
TUESDAY, APRIL 6, 1999
WWW.USDOJ.GOV

CIV
(202) 514-2007
TDD (202) 514-1888

DEPARTMENT OF JUSTICE STATEMENT

The Department of Justice has entered into an agreement with the Minneapolis law firm Robins, Kaplan, Miller & Ciresi L.L.P., to retain the firm's services as consultants on tobacco litigation. According to the agreement, Robins, Kaplan, Miller & Ciresi will provide advice and assistance to the Justice Department's tobacco litigation team on a reduced-rate hourly billing basis through June 30, 1999.

Robins, Kaplan, Miller & Ciresi represented the state of Minnesota and Blue Cross-Blue Shield of Minnesota in their lawsuit, *State of Minnesota and Blue Cross and Blue Shield v. Philip Morris, Inc.* As a result of the lawsuit, and in the middle of trial, the tobacco industry agreed on May 8, 1998, to pay $6.6 billion to reimburse Minnesota for health damage to its citizens and submit to cigarette marketing and advertising curbs.

"Robins, Kaplan, Miller & Ciresi is widely recognized for its success in the Minnesota litigation against the tobacco industry and for its expertise in this area of litigation," said David W. Ogden, Acting Assistant Attorney General for the Civil Division. "They have devoted thousands of hours to uncovering and learning the facts relating to tobacco litigation. Their extraordinary experience in this area will be very valuable to the Department's tobacco litigation team as we prepare a plan to recover federal health care expenditures from the tobacco industry."

According to the contract, the Department of Justice will pay the firm $75 per hour and will reimburse the firm for travel costs and expenses. This represents a substantial reduction in the firm's customary billing rate. The total contract, which runs through June 30, 1999, is for a maximum of $81,670, although the contract could be extended with the agreement of both the government and the firm.

The Department made clear that the contract did not contemplate payment to the firm of any "contingency fee" related to potential recoveries. It also made clear that only a consulting role was contemplated at this time. "At least for the foreseeable future, the litigation team itself will consist exclusively of Justice Department attorneys," Ogden said.

Tobacco - settlement - Medicare suit

U.S. Department of Justice
Civil Division

Washington, D.C. 20530

FACSIMILE TRANSMITTAL COVER SHEET

DATE: 4-6-99

TO: Bruce Lead + Elena Kagan

FACSIMILE NO.: 456-5542 456 2878

TELEPHONE NO.: _____

FROM: David Ogden

FACSIMILE NO.: (202) 514-8071

TELEPHONE NO.: (202) 514 3301

NO. OF PAGES: _____ + cover sheet

COMMENTS:

Department of Justice

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will consist exclusively of Justice Department attorneys," Ogden said.

Tobacco Litigation Team / Consulting Announcement
Tuesday, April 6, 1999
Q&A

Q: What happens after June 30, 1999?
A: Although the contract expires on June 30, we have the option to renew it and continue to seek the firm's consulting services after that time.

Q: Will the firm represent the government in a lawsuit?
A: Under this agreement, the firm is only authorized to provide advice and assistance to the Department's tobacco litigation team.

Follow-up:
Q: Is it a possibility that the firm will eventually represent the government?
A: There are not plans for that. This agreement is for the firm to act in a consulting role to the Justice Department's litigation team.

Q: Are you considering a contingency fee arrangement in the future with the firm?
A: No. The contract does not contemplate payment to the firm of any "contingency fee" related to potential recoveries. We do not intend to enter into any contingency fee arrangement in connection with this litigation.

Q: Would you ever consider such an agreement?
A: I can't imagine that we would. This has not been discussed as an option.

Q: Isn't it a conflict of interest for the firm to represent Minnesota and the United States?
A: No. This agreement has been thoroughly examined by our ethics experts and there is not a conflict of interest.

Q: Did you compete this contract with other firms?
A: No. It was clear that Robins, Kaplan, Miller & Ciresi is extraordinarily qualified in this area of litigation.

Q: Do you think this decision creates the appearance that you don't have full confidence in the lawyers in the Department of Justice?
A: No. Clearly this firm has exceptional experience that the Justice Department lawyers can use in their case against the tobacco industry. Attorneys at the firm have spent thousands of hours reviewing millions of documents produced in Minnesota's tobacco case. They will be able to make an invaluable contribution to the efforts of the outstanding team that has been assembled already at the Department. We have complete confidence in the team of experienced government litigators we have assembled.

Q: **How many lawyers are on the tobacco litigation team from the Department?**
A: Currently the team consists of about 10 full-time attorneys. There are about 10 additional attorneys from various divisions of the Department working with the full-time team.

Q: **What divisions are represented on the team?**
A: The attorneys on the full-time team are from the Civil Division, but there are also attorneys from the Office of Legal Counsel, Antitrust Division, the Criminal Division and the Environment and Natural Resources Division working with them.

Q: **How does the fact that the criminal investigation may be coming to a close affect the tobacco litigation team?**
A: I have no information about the criminal investigation, but there is no connection.

Q: **How far along is the litigation plan?**
A: The litigation team continues to review and assess the various legal theories and is developing those theories and determining the most effective approach to recover federal health care expenditures from the tobacco industry.

Q: **Do you have a timeline for when litigation will be brought against the industry.**
A: No.

Tobacco - nr - Medicare suit

Cynthia A. Rice 04/29/99 01:05:51 PM

Record Type: Record

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

cc: J. Eric Gould/OPD/EOP@EOP

Subject: Need your advice on one DOJ Q&A on tobacco lawsuit

As you recall Sen McConnell and others submitted written questions to the AG on the tobacco lawsuit. Since the AG is testifying next Wednesday, we'd like to get these to the Hill tomorrow. There's one tricky one I'd like your help with. Can you think of a better way to answer this question?

Current Version of Q&A

Q: The Administration directly connects its proposed 55-cent increase in the cigarette excise tax to health care expenditures in various Federal programs. See FY 2000 Budget of the United States Government, Table S-8 (listing Veterans, Federal Employees Health Benefits Program, Department of Defense, and Indian Health Service). Doesn't this suggest that the amount of previously collected Federal tobacco excise tax revenues should offset any claims for past Federal health care expenditures?

A: No. The Department believes that liability for Federal tobacco-related health care costs properly may be assessed against the parties responsible for these costs. The Department does not agree that excise taxes paid by smokers relieve or reduce the accountability of the tobacco companies for these costs.

Background

Table S-8 of our budget simply lists 1) the year-by-year revenue raised by the 55 cent excise and the accelerated 15 cent tax, 2) the year by year tobacco related health costs in Veterans, Federal Employees Health Benefits Program, Department of Defense, and Indian Health Service, and 3) the amount assumed from recoupment.

The text of our budget (p. 88), however, says in the section disucssing the price increase: "The funds that result from this policy will offset tobaco-related Federal health care costs. Each year, the Federal Government spends billions of dollars treated tobacco-related diseases for our Armed Forces, veterans, and Federal employees. It is fitting that the tobacco industry reimburse U.S. taxpayers for these costs, just as it has already agreed to do for the States."

In the later section mentioning the lawsuit, the budget says "In addition to these Medicaid costs, tobacco-related health problems have cost Medicare and other Federal programs billions of dollars each year. To recover these losses, the Department of Justice intends to bring suit against the tobacco industry, and the budget contains $20 million to pay for necessary legal costs. The Administration will propose that recoveries will be used to enhance the security of Medicare for future generations."

T&L - set - medicare suit

CHARLES S. ROBB
VIRGINIA

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Washington, DC 20510
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United States Senate

WASHINGTON, DC 20510-4603

COMMITTEES:
ARMED SERVICES
FINANCE
INTELLIGENCE
JOINT ECONOMIC COMMITTEE
Democratic Policy Committee

February 4, 1999

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am concerned about the proposal to bring a federal lawsuit against the nation's tobacco manufacturers. When you first announced this approach during the State of the Union, I thought such a suit might provide a way to bring all of the parties to the negotiating table to resolve the uncertainties which still surround tobacco production in the United States. As you know, many Virginians rely on tobacco for their livelihood, from manufacturing workers to growers to dock workers. Beginning with the comprehensive settlement announced on June 20, 1997 and continuing until today, these workers, growers and their families have suffered enormous upheaval and uncertainty.

I'd like to find a way to help alleviate this upheaval and give these families some certainty, and I've concluded it is likely that the lawsuit would create further instability. For this reason, I'd like to urge you not to initiate such a federal legal action.

The states successfully sued the tobacco companies under various theories of recovery, including Medicaid reimbursement, consumer fraud and antitrust violations. The federal government, apart from asserting some claim under the state's Medicaid recovery, does not appear to have a similar obvious basis for a suit. In the past, the position of the Justice Department has been that the federal government does not have the authority to sue manufacturers of a legal product such as tobacco. This position, I understand, was based on a lengthy internal memorandum produced several years ago. I understand further from an article in the *New York Times* on January 21, 1999, that another memorandum was prepared by outside counsel that reaches the opposite conclusion and asserts that the federal government does have a right to sue. Having a copy of these two documents would assist me in understanding exactly what caused the Justice Department to reverse its original position.

In the hope of avoiding this federal litigation, I would like to request copies of these two documents as soon as possible.

Sincerely,

Chuck Robb

Charles S. Robb

State Office:
The Innsbrook, Suite 310
2011 East Main Street
Richmond, VA 23219
(804) 771-2221

Regional Offices:
Dominion Tower, Suite 107
999 Waterside Drive
Norfolk, VA 23510
(757) 441-3754

First Union Bank Building
Main Street
Clintwood, VA 24228
(540) 926-4184

First Citizens Bank Building
530 Main Street
Danville, VA 24541
(804) 791-0230

B. B. & T. Bank Building
310 First Street, SW, Suite 107
Roanoke, VA 24011
(540) 985-0202

Tob - nr - medicare suit

Cynthia A. Rice 01/15/99 12:34:08 PM

Record Type: Record

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

cc: J. Eric Gould/OPD/EOP

Subject: Medicare tobacco related costs

Bruce you asked yesterday if we have an estimate of Medicare tobacco-related costs.

If we need to use a number we and OMB (Mendelson) are comfortable using "tens of billions of dollars a year."

Here's why:

(1) The best estimate we have is that tobacco-related health problems cost Medicare $10 billion in 1993. This estimate was published in CDC's Morbidity and Mortality Weekly Report in 1994, and was cited by CBO in its April 1998 report on the proposed tobacco settlement.

(2) CDC and OMB both think this estimate is conservative. Besides, we don't want to pre-judge what a suit may ask for once estimates are updated. Thus, we'd propose to be general. Mendelson particularly made the point that OMB wouldn't sign off on using a particular number but would be ok with "tens of billions of dollars." Currently our budget Medicare paragraph says "billions of dollars each year."

Estimates of total tobacco-related health costs (federal, state, private) range from $45 to $75 billion a year.

Tob - sct - medicare suit

DOD
VA
OPM

"Litigation"
pref - not //
underinclusive -
also Leg's

D. Ogden / T. Perelli

- Pass at some Q+A
- Leg outreach
↓

Legislative: DOJ Apps + ~~Auths~~ Murtha
Rogers / Gregg / Hollings
Hyde / Conyers; Hatch / Leahy

Graham
Kennedy
Conrad
Durbin
Waxman

Everyone else for us.

After 3:00

- Chuck Brain
- Pam Smith
514-2078
(from OLA)

Press contact - for DOJ

Legal talking heads:
↓
Academics
Tribe / [redacted]
David Vladeck - Pub Citizen

AGs -
Moore / Humphrey /
Gregoire

Trial Lawyers

TP: DOJ's idea

Why POTUS announcing?
How to characterize what doing?
- already decided?
- theories rely on?

Don Remes - Dep Asst AG
for Torts Section
(Shows - Not politically driven)

Press folks [redacted]
draft one-pager
not sure to use.

NOT task force to go
after states - make
clear NAAG - ??
NGA - Ray Sheppach

Pub health
advocates -
champion dash?
Kessler

Backgrounder on Wednesday.
??? DOJ reporters

Tob-nr-Medicare suit

Cynthia A. Rice 01/26/99 10:21:16 PM

Record Type: Record

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

cc:

Subject: Bruce you asked for the budget language on the Medicare lawsuit $$

The budget says:

"In addition to these Medicaid costs, tobacco-related health problems have cost the Medicare program billions of dollars each year. To recover these losses, the U.S. Department of Justice intends to bring suit against the tobacco industry, and the 2000 budget contains $20 million to pay for necessary legal costs. The Administration will propose that all recoveries will be used to preserve and protect Medicare for future generations."

Tob-rr-Medicare mit

DEPARTMENT OF JUSTICE FACT SHEET
Developing a Plan to Take the Tobacco Industry to Court...

What is the Justice Department Doing...

- The Justice Department ~~has created a~~ is creating task force to develop a plan to bring the tobacco industry to court to recover federal expenditures caused by tobacco use.

- The task force is assessing the various legal theories to determine which would be most effective to recover federal funds paid out as a result of tobacco-related illnesses.

- Theories under which the United States has the authority to pursue recovery for those who injure recipients of the federal health care benefits include, but are not limited to:

  Medical Care Recovery Act, 42 U.S.C. 2651-53, which permits recovery from those who commit a tort that causes the federal government to pay out health care benefits, and

  Medicare Secondary Payer Act, 42 U.S.C. 1395y(b), which permits the United States to recover from those responsible to pay, under appropriate circumstances, for injury done to recipients of Medicare.

What is the relationship to state settlements...

- The Justice Department's efforts do not include seeking funds collected by the states through settlements with the industry. The states recovered money expended under the Medicaid program. The Justice Department is developing plans to recover funds expended under other federal programs, where the federal government pays directly.

- The amount of money paid out by the federal government under various programs is even larger than that paid out by the states through the Medicaid program. As has long been recognized with respect to the success lawsuits brought by the states, the tobacco industry's potential liability for government provided health care is unprecedented.

- The United States provides health care benefits through a wide varitety of programs, including Medicare, Veterans' benefits, benefits to members of the armed services, CHAMPUS, the Federal Employee Health Benefits program, and the Indian Health Services. The task force will look at all of these programs.

Who will serve on the task force...

- The task force will be led by the Civil Division with Deputy Assistant Attorneys General Philip Bartz and Donald Remy supervising. The Department has already begun to pull the task force together drawing up on the resources of the civil division, as well as other

Justice components.

TLS-ext-Medicare mit

As everyone knows, our children are targets of a massive media campaign to hook them on cigarettes. I ask this Congress to resist the tobacco lobby. Together, let's reaffirm the FDA's authority to protect children from tobacco, hold the tobacco companies accountable, and protect tobacco farmers.

Smoking has cost taxpayers hundreds of billions of dollars under Medicare and other programs. The states are right: taxpayers shouldn't pay for the costs of lung cancer, emphysema and other smoking-related illnesses -- the tobacco companies should. Tonight, I am announcing that Justice Department is preparing a litigation plan to take the tobacco companies to court. And with the funds we recover, we should strengthen Medicare. If we act in these areas -- minimum wage, family leave, child care, health care and the safety of our children -- we will begin to meet our generation's historic responsibility to strengthen our families for the 21st Century.

A 21st CENTURY ECONOMY

Today, America is the most dynamic, competitive, job creating economy in history.

But we can do even better -- in building a 21st Century economy for all Americans.

Today's income gap is largely a skills gap. Last year, Congress passed a law enabling workers to get a skills grant to choose the training they need. This year, I recommend a five year commitment in this new system so that we can provide that training for all Americans who lose their jobs, and rapid response teams to help towns where factories have closed. And I ask for a dramatic increase in federal support for adult literacy, so we can mount a national campaign aimed at millions of working people who read at less than a fifth grade level.

In the past six years, we have cut the welfare rolls nearly in half. Two years ago, from this podium, I asked five companies to lead a national effort to hire people off welfare. Tonight, our Welfare to Work Partnership includes 10,000 companies who have hired hundreds of thousands of people. Our balanced budget will help another 200,000 people move to the dignity and pride of work.

We must bring the spark of private enterprise to every community in America -- to inner cities and remote rural areas -- with more support for community development banks, empowerment zones and 100,000 vouchers for affordable housing.

And I ask Congress to support our bold plan to help businesses raise up to $15 billion of private sector capital to bring jobs and oportunity to our inner cities and rural areas -- with tax credits and loan guarantees, including new American Private Investment Companies modeled on our Overseas Private Investment Corporation. Our greatest untapped markets are not overseas -- they are right here at home.

Tob-rer-Medicare suit

A surprise, embargoed until the President says it.
On background, admin official -- you can't use it till the President says it, and you can't call anyone for reaction until BC says it around 9:40

Tonight, the President will announce that the Justice Dept is preparing a litigation plan to take the tobacco companies to court.

He'll say that smoking has cost taxpayers hundreds of billions of dollars under Medicare and other programs, and that taxpayers shouldn't have to pay for the costs of lung cancer, emphasyma, and other smoking-related illnesses -- the tobacco companies should. He'll also say that we should strengthen Medicare with funds we recover.

The Administration has been reviewing this matter since the collapse of the tobacco bill. The tobacco industry's potential liability for government-provided health care is unprecedented, and the Dept has now determined that the federal govt has viable grounds for recovery.

The Dept is launching a task force to develop a lawsuit.
The Dept will be committing significant resources to this effort.

I'm not going to discuss the Dept's litigation strategy. (what claims, what theories, what courts)

damages

It's an imp issue
and it deserves
attention.

Tob-nT-Medicare mit →BUDGET OVERLAP

Tobacco Q & A

What exactly did the President announce in the State of the Union address?

The President announced that the Department is developing a plan to bring the tobacco industry to court to recover federal expenditures caused by tobacco use. Tobacco-related illnesses cost the taxpayers over $ ___ billion per year. This is an unprecedented potential liability and the Department believes that there are viable grounds on which to seek recovery.

What does the President's announcement actually mean?

After reviewing the relevant facts and law, the Department has determined that there are a number of appropriate bases on which to recover from the tobacco industry for federal health care expenditures. We are now committing additional resources and increasing our efforts to prepare a plan to bring law suits, where appropriate.

Hasn't the Department been looking at this for a while?

The Department has looked at these issues at different times in the past and has been actively reviewing the factual and legal issues since the failure of comprehensive tobacco legislation in the last Congress.

What has changed now?

The Department is forming a task force to prepare to litigate to recover these costs. This task force will make decisions on the scope and types of cases that we will pursue.

Has the Department definitely decided to sue?

Yes. Final decisions about when and where to file the lawsuit or suits will be made after the task force completes its assessment, but at this time the Department believes that there are viable grounds for recovery under federal law.

Could the task force ultimately decide not to file litigation?

I don't want to tie the task force's hands, but we believe that there are viable grounds for recovery under current law.

On what theories will the United States base its recovery?

The task force will, of course, make decisions about appropriate theories to pursue. There is no question, however, that the United States has the authority to pursue recovery for those who injure recipients of federal health care benefits under the Medical Care Recovery Act, 42 U.S.C. §§ 2651-53, which permits recovery from

those who commit a tort that causes the federal government to pay out health care benefits, and the Medicare Secondary Payer Act, 42 U.S.C. § 1395y(b), which permits the United States to recover from those responsible to pay, under appropriate circumstances, for injury done to recipients of Medicare. [We will not comment further on potential theories at this time.]

Will the United States take the same approach as the States?

We have extensively reviewed the theories pursued by the States and may pursue some of the same theories, but federal law provides other avenues for recovery as well. The task force will assess all available theories and develop the most effective litigation plan.

It has been suggested that the federal government could only pursue recovery one smoker at a time. Does the Department agree with this assessment? Wouldn't this make a recovery burdensome and inefficient?

As I indicated, the task force will review and decide such questions prior to filing any suit.

When/Where will these lawsuits be filed?

These decisions will be made by the task force, but they will be working to bring appropriate suits as soon as possible.

Who will serve on the task force?

The task force will be run out of the Department's Civil Division, but will draw on other Department components as well.

Who will head the task force?

The Civil Division will head the task force with DAAGs Phil Bartz and Donald Remy supervising. We have already begun to pull the task force together.] ?

Will the task force be located in the same place?

Yes. We have located office space and are working out the details.

Will you hire outside attorneys, like David Boies in the Microsoft case?

It is a possibility. There are a number of attorneys with significant experience litigating against the tobacco industry who could be a valuable part of this team.

Will the Department pay outside attorneys on a contingent fee basis?

No.

The litigation will be a major undertaking. Does the Department currently have the resources that it needs to pursue this litigation?

The Department will be working with existing resources this year, but will seek additional resources in FY2000 [Can we say this?].

Will the Department build on evidence compiled by the states in bringing their litigation – for example, the evidence uncovered by Minnesota demonstrating that the tobacco companies worked together for years to hide the dangers associated with tobacco use?

Yes. As a result of the State lawsuits, there are millions of pages of documents that have been made public. These documents demonstrate that the tobacco companies have targeted children and hidden the addictive and dangerous nature of their product. The task force thus will build on this effort in developing its suits.

What programs will the Department seek recovery for?

The United States provides health care benefits through a wide variety of programs, including Medicare, Veterans' benefits, benefits to members of the armed services, CHAMPUS, the Federal Employee Health Benefits program, and the Indian Health Service. The task force will look at all of these programs.

Hasn't the tobacco industry paid enough? $200 billion to the states?

The states were recovering money expended under the Medicaid program. The President's announcement relates to a plan to recover funds expended under other federal programs, where the federal government pays directly for directly. The amount of money paid out by the federal government under various programs is even larger than that paid out by the states through the Medicaid programs.

Will the Department sue the states to recover its share of Medicaid dollars?

The President's announcement had nothing to do with the state settlement and the task force will not be involved in recovery of Medicaid dollars. Those decisions are to be made in the first instance by HHS.

Why did the President and not the Attorney General announce this initiative?

This is an unprecedented liability that we believe is owed to the United State treasury and is a enormous commitment of resources. It is thus a matter significant enough to warrant a Presidential announcement.

Isn't this a violation of Department of Justice policy?

No. We are announcing the formation of a task force to review these issues. The fact that the President chose to announce this simply underscores the importance of our effort and the massive potential liability that is owed to the federal government.

Isn't it odd to announce a plan to bring lawsuits before actually bringing them? Isn't this unfair to the tobacco companies?

It may be unusual, but, as has long been recognized with respect to the lawsuits brought by the states, the tobacco industry's potential liability for government provided health care is unprecedented. Any effort to recover this money is similarly unprecedented. [In addition to its significance, we needed to announce our intention because we will be seeking additional funding from Congress for FY2000 as the task force continues its efforts].

Aren't you concerned that this task force will be viewed as a political move?

Politics has nothing to do with the formation of the task force. The Department believes that there are viable theories on which to recover a massive amount of money owed to the federal treasury. The states have already settled their claims with the tobacco industry for approximately $200 billion dollars. The federal government has paid out many times that amount over the last 40 years in medical care arising out of tobacco use.

Isn't this just extortion? Isn't the administration just trying to force the tobacco industry back to the bargaining table in Congress?

No. We are basing the formation of the task force on our review of the facts and law, not on anything else. The Department believes that there are viable theories on which to recover a massive amount of money owed to the federal treasury. That the tobacco industry has already settled similar claims against the states for approximately $200 billion dollars should demonstrate the appropriateness of this course of action.

Tob-rr-talking points
(and)
Tob-rr-Medicare suit

Tobacco Q&A
January 20, 1999

Q: What did the President announce last night?

A: The President announced that the Justice Department is preparing a litigation plan to take the tobacco companies to court for smoking-related federal health care costs. The Justice Department, after studying this matter for several months, has determined that the tobacco companies' potential liability is massive and that there are appropriate bases for recovery, and the Justice Department is putting together a task force to make decisions on the best way to bring litigation.

Q: What claims will the suit assert? What damages will it seek? Will there be more than one suit?

A: These are matters for the Justice Department's task force to determine. The Justice Department has noted two possible theories on which to proceed: the Medical Care Recovery Act and the Medicare Secondary Payer Act. And possible costs to be recovered include those under Medicare, the Federal Employee Health Benefits program, military and veterans benefits, and the Indian Health Service. But these are all matters that will be evaluated and decided on by the Task Force, and in general we will not be discussing our litigation strategy in public.

Q: When will the suit be brought?

A: This is a matter for the Justice Department's task force to determine. Litigation will be brought when the Justice Department is fully prepared to do so.

Q: Hasn't the Justice Department been looking at this for a long time? Why did it suddenly reach this decision?

A: The Justice Department has been reviewing this matter since the collapse of tobacco legislation last summer. After careful consideration, the Justice Department concluded that there were viable grounds to recover tobacco-related health care costs from the companies.

Q: Did the President direct the Attorney General to bring this suit?

A: No. The Justice Department made this decision, based on its analysis of the relevant legal questions. The President of course supports the Attorney General's determination.

Q: Did the White House talk to the Justice Department about bringing the suit?

A: The Justice Department did keep the White House apprised of its analysis, and White House lawyers asked questions and offered views as appropriate. It was always clear that any decision to proceed with tobacco litigation would be made by the Attorney General.

Q: But did the White House lawyers try to persuade the Justice Department to bring the suit?

A: All the lawyers -- both from the Justice Department and from the White House -- were trying to understand and analyze the issues involved as completely as possible. The White House lawyers always understood that this would be the Attorney General's decision.

Q: Who will be handling this litigation in the Justice Department?

A: The litigation will be run out of the civil division, although other units of the Justice Department may also play a role in particular aspects of the litigation.

Q: How does this litigation relate to the federal government's claim for recoupment of a portion of the states' settlement money?

A: There is no connection at all between the two things. The task force will be evaluating claims against the tobacco companies, not the states. Issues concerning recoupment of the state settlements are entirely separate and distinct.

Q: Why is the President suing the tobacco companies and asking for a tax increase to reimburse the federal government for the costs of tobacco-related disease. Isn't this double-dipping?

A: First, the tax increase will reimburse the government only for the non-Medicare costs of tobacco-related disease in the future. It would not reimburse the government for Medicare costs or for any past costs. Second and more important, these are different and independent actions. The Justice Department made a legal decision to proceed against the tobacco companies on the basis of its analysis of the companies' potential liability. By contrast, the decision to seek a tax increase was a public health decision made by the White House.

1-9-98 Mtg w/ Hunger etc.:
Tobacco lawsuit

Hunger — No gameplan for specific action for specific dates
Do have some plans — Sec Recov Act
subrogation suits
? as to how many could be brought
perhaps counts for punitive damages
(but some reservations among career people)
Plea: get proper legis through
[Surgeon Results we have probs w/ approp]

Bartz — Put together task force — 20 attys: civil/crim/antitrust
Work cases up / decide on legal theories / getting files for indivs.
5-10 states
how many people in each state?
have people (TT's) there?? - 5 or 50 or 500
Not poss to do simple aggregation suit.
Want to bring biggest case w/ biggest $ potential.
Need someone to head it up. Outside or inside - haven't decided yet. (like Boies)
To extent you can get p. who know what's in docs - helpful - so Minn AG people
(CHHH didn't do much work on case himself)
Reas. time parameters

Ogden — MCRA or MSPA - person by person - suits of case.
But hope: can bring as many good cases as poss

keep looking at pun damages.

Hunger: Hope there will be efforts to ~~create~~ give us tools we need – i.e., legislation.

Bartz: Not a lot of $ bear value in indiv suits. (i.e. in con we're talking about)

Older: Ms. g. I suits now – move to cause.

Perelli: Already getting docs in usable form.
Need to get that done – organize material.

Pun damns
Equitable remedies } may: things outside the box –
have to keep evaluating these

Bartz –
Mass, Md, Minn, Pa.
Depends on what claims are.

Could vary; take by state complaint

Hunger – able PTs atty, involved in litig.
now assist us – ask them to help us.

Down the road.

Tab - RT - Medicare Suits

DRAFT

Honorable Frank W. Hunger
Assistant Attorney General
Civil Division
U. S. Department of Justice
Washington, D.C. 20530

Dear Mr. Hunger:

The Federal Employees Health Benefits (FEHB) Program is the largest employer sponsored health benefits system in the country. The Program provides health insurance to active Federal employees and their dependents as well as Federal annuitants and their survivors. The U.S. Office of Personnel Management (OPM) manages the FEHB Program, through contracts with over 350 health benefits plans. OPM also administers the Employees Health Benefits Trust Fund (Fund), under 5 U.S.C. §8909 which is used to make payments to approved health benefits plans and to pay for administrative expenses to administer the FEHB Program.

OPM is mandated to administer the FEHB program in an efficient and economical manner. In times of rapidly increasing medical costs to employers, OPM takes very seriously its obligation to offer the Federal workforce comprehensive medical coverage at the lowest possible costs. As Federal employees and the Government share in the costs of the health insurance provided by the FEHB Program, cost containment is a primary component of OPM's management responsibilities.

In that regard, we have noted with great interest the number of lawsuits recently brought by state governments as well as health plans themselves, against the tobacco industry, in an attempt to recoup the dollars expended for tobacco-related illnesses. As the nation's largest employer and provider of employee health benefits, we seek the advice of the Department of Justice as to whether the FEHB Program might similarly seek to recover the dollars that have been expended in the FEHB Program for tobacco-related illness.

We have been advised by at least one large health plan that it will attempt to seek such recovery for its lines of business involving private sector employers. Although we have been advised that specific plan will not seek recovery on behalf of the FEHB Program, we would be greatly concerned about the FEHB Program becoming involved in such litigation by other plans or other litigants. This is because not all of the many plans that contract with OPM in the FEHB Program are apparently planning such litigation, and we would not want any ultimate recovery to benefit only some of the FEHB plans. Further, we do not believe it is in the best interests of the FEHB Program to have the issue of recovery dependent on litigation brought in various courts,

on behalf of various plans, with potentially inconsistent theories of recovery. Therefore, we bring to your attention the question of whether the Federal Government, through the Department of Justice, should consider its own litigation on behalf of the FEHB Program.

We would appreciate the opportunity to discuss with the Department of Justice such litigation. Our health benefits experts in OPM's Retirement and Insurance Service can fully explain the process of payments of benefits in the Program, and OPM and the Department of Justice could then discuss the various theories that might be applicable to recovering such costs. For example, we understand some health plans have pursued litigation in their private sector business under general theories of tort liability. In those situations, the relief sought included recovery of medical costs paid by the carrier for tobacco-related illness. In the FEHB context, for example, the medical costs paid by the FEHB health plan for the treatment of an enrollee's cancer, where the illness can be shown to be proximately caused by use of tobacco, would be recovered by OPM on behalf of the Program. The FEHB recovery would be in the nature of a typical subrogation recovery, the proceeds of which would be returned to the Fund. While in the usual subrogation context, the enrollee would bring an action to which the health plan would subrogate, we believe that an action on behalf of the entire FEHB program could be more effective and efficient.

A variation of this theory could be for the recovery of the difference in the amount of FEHB premiums that were paid to the health plans and the amount of premiums that would have been owed had the health plans not expended the monies needed to pay for tobacco related medical treatment. Pursuant to statute, the rates charged by FEHB health plans must reflect the cost of benefits provided. 5 U.S.C. § 8902(I). These increased health benefits liabilities have had a direct impact on the Fund, through which premium dollars are used to pay FEHB costs. There is a real cost to the Government as the majority of the premium dollars are contributed by the Government, with the remainder contributed by the individual Federal employee enrollee.

As the managers of the FEHB Program and the Fund, OPM believes that it has a duty to seek out and attempt to recover funds that would reduce the cost of medical insurance for the Federal workforce. We recognize that litigation of this type is a major undertaking, with certainly no guarantee of success. However, we believe it would be productive to further explore the Department of Justice's views on whether such litigation is possible and whether it might comport with similar litigation on behalf of other Federal providers of medical treatment or insurance.

DRAFT

We would appreciate the opportunity to further discuss this matter. I would look forward to meeting with you or members of your staff to more fully review this issue. I can be reached at 202 606-1700.

Very truly yours,

Lorraine Lewis
General Counsel

Every morning - mass only
Mon/Thurs eve/mass only
school speech

Tob - set - medicare suits

8-27 Ogden/Perelli – Tobacco suits

but Theory – dm's have to show reliance
but: common knowledge defense
many states – express tob carve-out

indirect claims: standing in shoes? { neg fraud / product defect / priv. nuisance

1. CL Std Oil – means what says
straight CL very, very difficult
espec given enactment of MCRA
even Dkemps has backed off
also: can't prohib in CL a/c 3Ps suing for econ loss (remoteness problem). Recharacterize as direct claim??
Calro gets you around Std Oil a bit)

breach of vol. assumed duty – shifts "we're going to research"
but This is not the kind of duty gen. recognized in this tort – also could get this into some other area.
Further: preemption problem: Labeling Act

(what's the duty? This is subj to motion to dismiss)
essentially becomes a fraud claim
but we had own knowledge/ own position – how can we say defrauded? reliance, etc.
(maybe bad – but should w/stand motion to dismiss)

public nuisance
prob – can motion to dismiss
a) really abt use of land – most have been thrown out – have to find "pub rt" – really none here
b) remedy? basically injunctive. some cases also give $ as abatement, but hard here.

restitution
indemnity
unjust enrichment
could claim there were Us claims (indep) – not restorative type.
all equitable remedies.
need legal duty – fraud or quasi-fraud. where is it here?
Scruggs says: just has to say "done wrong" helps you more w/ damages. Then w/ proving the breach of duty
nebulous – makes Std Oil seem all the more relevant.

2. MCRA a) OK to ^ get Medicare recovery? (OK to)
Medicare statute ^ says No. (Up's history)

96 – amend: add "pay for" – what allows Medicare, but no mention – clearly not in Cong's mind – but still have plain lang arg

so still have decent arg

FEHBP/CHAMPUS

Can ^to VA/DOD/IHS/ ^med servs regardless of above - no problem there.

(b) cives creating a tort liab.

"indep rt of action" - but what does this mean?

longstanding interp - then new stat lang.

one theory (me ct) - not subj to defenses (reducing liab), but subj to defenses eliminating liab.

But AgR falls on wrong side of line, no? not free and clear of all defs. → plain reading of cases

btr reading: proced v. subst defenses.

tort agt indiv ore OK to show tort agt US?

1st is probably btr, but 2nd is OK.

2) now: no problem w/ Std Oil remoteness

basically a fraud type claim

show you misconduct

not show reliance or damages or AgR

do statistical case - (very hard- likely to lose)

(me - gd arg to ship dams - but reliance??) → no real cases.

but we just don't have a tort, agt US (see above)

Proof of rel. in aggregate sense - reas person would have relied and/or stmts intending to rely

~~Also AgR~~!

Could discount for non-reliance - try to do that statistically as well } not nec to show reas pers would have relied

And then let them come back w/ stat proof on AgR. (or indiv by indiv)

3. MSP

a) threshold Q: is there a cog action? dramatically diff views
   ppnt can sue ∧ it req'd a response to pay under
   primary plan (incl. liab ins. plan)
   we've never brought 3P tort action.
   but have sent letters to insurers demanding payment -
   sure suppose we can sue!
   ~~arg~~ ppt: can only join or intervene in someone else's suit;
   if you can, can only do after judgment
   some say: 50-20 some: 50-50
   regs don't say much - just reiterate statute

b) once you're in door, really same as in MCRA?
   Arg: "req'd a response to pay" bc then MCRA -
   doesn't have "tort" language
   (individuated)

   perhaps in this context, can get away a little more
   w/ that ev.
   debtors, etc. don't matter - if they're "responsible" at
   all, they're on hook - us ppnt is pay as less recent.
   If you have contrib claim ppt indiv smoker,
   go bring it.

   Can you tunnel AT laws thru MSP
   (w MCRA): then you get good substance
   from AT (but no AT standing problem);
   and get good standing from MSP/
   MCRA (which we above we haven't
   been able to attach to a cog a)

c) Some SOL problems here - 6 yrs real. prospect
   maybe limited to 3 yrs damages - unless can show concealment

4. Antitrust

AT had inves - collusion to prevent ~~[illegible]~~ fire-safe cigarettes.

developed case quite a bit.

decided not worth bringing - standing + damages bars

They did This notw/standing AT/FTC MOU: basically a neg'ot.

a) Can 3P bring suit? Elhauge 5-part test.

he has pulled policy rationales, but This is not a "test"

all states that have tried this, have lost on this ground

(~~Illinois~~ Brick - compet or consumer) } also ins cases lost in dist cts.

just out; couple of cases after (EE) give you some wiggle room.

EE says: — direct claim / indirect claim — prob: not so direct. collusive conduct: tobacco mkt; injury in health care mkt so not so direct after all.

} here, you have to use policy rationales; not a flat rule, etc.

2: why should you let a 3P sue if 2P can't?

only cases you can use that are out there: RICO cases.

Arguments you can make, but probably lose.

70/30 about

b). AT injury

States generally have lost on This, but not always.

fed cts ruled agr

"injury to bus or prop" - competitive harm. Very tied to above - can you have comp harm through personal harm

Juris: would take a long time to do.

Money-shifting — crim issues?

EE says if you get over above problem, your chances of succeeding here much ↑d:
As long as anti-comp affects the whole, Then all OK.
If you win The 1st, you're more likely than not to win 2nd??

Amicus brief?

c) ~~Others~~ Damages
Stat. ev. in AT claims - totally commonplace.
~~But~~ Not likely to get The big recovery.
Have to have collusion & dams.
Real factual q: how much $ attributable to this - how safe is safer cig?
who would have smoked it?

Also: offsets —
- taxes collected
- people die earlier

} they Think - AT model should approp. consider those — bec. the q is: what is the impact on the public fisc — if we made $, how can we argue —

earlier to overcome: equally addictive safe cigarette would have made same amt of taxes.
Poss: ~~get~~ adds to dams claims, but more p. would have started.

* Hard to avoid they Think —
~~of~~ guess: obliterates our case.
one answer: If you go for all costs — not just health care -- e.g. in lost productivity — Then it flips again
another answer: oh yuck. (MIND) Bout in AT cases, this would be fairly std fare.

Could sue for Parens patriae injunction // crim fines what all problems above
↳ what are they? how much?

could you get kickbacks?? get restitution to indivs??

often not much a det. in context of crim case

5. RICO -

predicates - mail/wire frauds - must trace through to damages (tough causation prob).

a) initial problem - only CTs that have ruled - US cannot bring RICO claim for damages. we have good plain language; but 1st cases predating on Clayton Act cut agt us probably lost, but this is a better fact pattern than usual - actual proprietary damage to Pl. (any diff's w/ in Clayton Act context).

b) pure mail/wire fraud?
loss of conduct alleged wouldn't fit.
narrower range of conduct to work with.

c) Trace conduct thru to injury
heightened prox. cause std.

essentially factual, but see below

have to show reliance as part of this. reliance by govt; or could we show people's?? or (them, could by stat?)

d) "injury to bus or prop"
Do our injuries fit w/in this def.
Just like in AT - but here there are some cases seeming to cut our way. Still hard, though.

Rico guys say: no way.

see CT said: 3Ps don't fall w/in realm of prox. cause.

better agt - very strong in RICO - that you could do in aggregate - intent/mean person would have relied.

From Hunger

Tob - ltr - medicare suit

BRIEFING REGARDING A POTENTIAL FEDERAL LAWSUIT TO RECOVER SMOKING-RELATED HEALTHCARE COSTS

- **Desirability of Bringing Suit.** The desirable goal of recovering federal healthcare costs associated with tobacco must be grounded on a plausibly winning legal theory of recovery. The Department has examined possible legal theories in this regard extensively over the past three years. During this period, we also have successfully defended FDA's authority to regulate tobacco products. In addition, it has been publicly disclosed that we are conducting a criminal investigation involving the tobacco industry. We are also willing to challenge the tobacco companies to recover healthcare costs if we have a credible basis to do so.

- **State Attorney Generals' Approaches are not Workable for the United States.** Private plaintiff attorneys who have represented some of the states and other ATLA lawyers have recently suggested that the United States could sue to recover its healthcare costs based on equitable common-law theories or, alternatively, the Medical Care Recovery Act ("MCRA"). Their suggestions, while well-intended, cannot overcome the legal hurdles faced by the federal government in bringing a Medicare recovery suit. Indeed, the alternative approaches vividly highlight the weaknesses in each alternative.

  - Unlike the states, the United States cannot sue to recover its healthcare damages absent statutory authority. *United States v. Standard Oil Co.*, 332 U.S. 301 (1947). Bound by Supreme Court precedent, the United States does not have the necessary statutory authority to sue for damages to the federal fisc.

  - In general, the success of the states' lawsuits has not stemmed from their common law claims. Several state courts and two federal courts have recently dismissed common law claims because the types of healthcare damages sought are too remote from the industry's wrongful conduct to have been caused by the manufacturers' conduct.

  - MCRA, the one federal statute that explicitly authorizes a right of recovery for federal healthcare costs, is designed for the United States to sue for health care furnished to a single individual; it does not authorize aggregation of claims.

  - Regarding the Medicaid program, the United States' only remedy is to collect from the states which have pursued claims against the tobacco manufacturers.

- **Preemption Issues.** Any action alleging — whether implicitly or explicitly — that the tobacco companies failed to warn consumers as to the safety and health affects of tobacco products would likely be preempted by the Federal Cigarette Labeling and Advertising Act and the Smokeless Tobacco Act.

- **Feasibility Challenges.** Unless the United States can aggregate potential claims,

bringing individual claims for the tens of millions of beneficiaries is an insurmountable obstacle. The trend in federal law disfavors aggregation of claims in mass tort actions, particularly tobacco actions. *See e. g., Castano, et al. v. American Tobacco Co.*, 84 F.3d 734 (5th Cir.1996). Even with an aggregation approach, it will still be necessary for us to assemble this evidence and the Department of Health and Human Services has estimated that the undertaking would, in the best of circumstances, take well over 12 months.

- **Legislative Authorization is Needed and Should be Pursued.** Aware of these legal hurdles, we drafted a bill for Senator Graham that would give us authority to sue the tobacco manufacturers. To date, no effort has been made to enact this bill. This bill also would lessen the proof problems by permitting use of statistical data, creating a presumption on causation, eliminating certain affirmative defenses, and requiring a jury instruction that nicotine is addictive. Because the precise amount of the costs incurred by the federal government for smoking-related illnesses is difficult to ascertain, proving damages still would be very challenging even with this bill.

- **An Unsuccessful Federal Lawsuit Would Seriously Undermine the Public Health Strategy Against Tobacco Use.** Civil litigation brought by the United States to recover healthcare costs would be a serious mistake — for the government and for the public health. With no real chance of success, we would be committing ourselves to the largest, most complex affirmative lawsuit ever filed by the United States. The tobacco lawyers know the weaknesses in our legal theories and evidence. The tobacco companies would be fighting for their very existence and would have every incentive to defend these suits vigorously. Settlements short of trial — as have occurred in the some state cases — would be very unlikely.

    - If the industry successfully defeated a federal lawsuit, the overall campaign against the use of tobacco would suffer a devastating setback. Litigation success against the United States would appear to absolve the tobacco companies of their prior bad conduct. An unsuccessful litigation effort to recover healthcare costs would also be utilized to defeat our legislative efforts.

- **Conclusion:** The consequences of an ill-fated federal lawsuit are all negative. The loss of that federal law suit could adversely affect the efforts to reduce youth tobacco use and any chance of a comprehensive legislative solution. Lacking a viable legal theory, the United States should not initiate litigation against the tobacco industry to recover healthcare costs stemming from tobacco use. Our efforts should be directed toward enactment of the Graham legislation.

Tob - not - medicare suit

Proposed
42 USCA 2651
42 U.S.C.A. s 2651

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 32--THIRD PARTY LIABILITY FOR HOSPITAL AND MEDICAL CARE

s 2651. Recovery by United States

(a) Conditions; exceptions; persons liable; amount of recovery; subrogation; assignment

In any case in which the United States is authorized or required by law to furnish or pay for hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability, or other liability for restitution, upon some third person (other than or in addition to the United States and except employers of seamen treated under the provisions of section 249 of this title) to pay damages therefor, the United States shall have a direct right to recover at law or in equity (independent of the rights of the injured or diseased person) from said third person, or that person's insurer, the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for and shall, in addition to this direct right also be subrogated to any right or claim that the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors has against such third person to the extent of the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for. The head of the department or agency of the United States furnishing such care or treatment may also require the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, as appropriate, to assign his claim or cause of action against the third person to the extent of that right or claim.

not enough - not main prob - don't think much / suit exists

doesn't address concern - admit additional suit, but doesn't solve problems

(b) Pay and allowances

If a member of the uniformed services is injured, or contracts a disease, under circumstances creating a tort liability, or other liability for restitution, upon a third person (other than or in addition to the United States and except employers of seamen referred to in subsection (a) of this section) for damages for such injury or disease and the member is unable to perform the member's regular military duties as a result of the injury or disease, the United States shall have a direct right (independent of the rights of the member) to recover from the third person or an insurer of the third person, or both, the amount equal to the total amount of the pay that accrues and is to accrue to the member for the period for which the member is unable to perform such duties as a result of the injury or disease and is not assigned to perform other military duties.

see above

see above

Essential problem - aggregation - not solved

(c) Third-party beneficiary status of United States

(1) If, pursuant to the laws of a State that are applicable in a case of a member of the uniformed services who is injured or contracts a disease as a result of tortious or other **accountable** conduct of a third person, there is in effect for such a case (as a substitute or alternative for compensation for damages through tort or **other accountable** liability) a system of compensation or reimbursement for expenses of hospital, medical, surgical, or dental care and treatment or for lost pay pursuant to a policy of insurance, contract, medical or hospital service agreement, or similar arrangement, the United States shall be deemed to be a third-party beneficiary of such a policy, contract, agreement, or arrangement.

(2) For the purposes of paragraph (1)—

(A) the expenses incurred or to be incurred by the United States for care and treatment for an injured or diseased member as described in subsection (a) of this section shall be deemed to have been incurred by the member;

(B) the cost to the United States of the pay of the member as described in subsection (b) of this section shall be deemed to have been pay lost by the member as a result of the injury or disease; and

(C) the United States **also** shall be subrogated to any right or claim that the injured or diseased member or the member's guardian, personal representative, estate, dependents, or survivors have under a policy, contract, agreement, or arrangement referred to in paragraph (1) to the extent of the reasonable value of the care and treatment and the total amount of the pay deemed lost under subparagraph (B).

(d) Enforcement procedure; intervention; joinder of parties; State or Federal court proceedings

The United States may, to enforce a right under subsections (a), (b), and (c) of this section (1) intervene or join in any action or proceeding brought by the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors, against the third person who is liable or **accountable** for the injury or disease or the insurance carrier or other entity responsible for the payment or reimbursement of medical expenses or lost pay; or (2) if such action or proceeding is not commenced within six months after the first day in which care and treatment is furnished or paid for by the United States in connection with the injury or disease involved, institute and prosecute legal proceedings against the third person who is liable or **accountable** for the injury or disease or the insurance carrier or other entity responsible for the payment or reimbursement of medical expenses or lost pay, in a State or Federal court, either alone (in its own name or in the name of the injured person, his guardian, personal representative, estate, dependents, or survivors) or in conjunction with the injured or diseased person, his guardian, personal representative, estate, dependents, or survivors.

(e) Veterans' exception

The provisions of this section shall not apply with respect to hospital, medical, surgical, or dental care and treatment (including prostheses and medical appliances) furnished by the

Department of Veterans Affairs to an eligible veteran for a service-connected disability under the provisions of chapter 17 of Title 38.

(f) Credits to appropriations; regulations

(1) Any amount recovered under this section for medical care and related services furnished by a military medical treatment facility or similar military activity shall be credited to the appropriation or appropriations supporting the operation of that facility or activity, as determined under regulations prescribed by the Secretary of Defense.

(2) Any amount recovered under this section for the cost to the United States of pay of an injured or diseased member of the uniformed services shall be credited to the appropriation that supports the operation of the command, activity, or other unit to which the member was assigned at the time of the injury or illness, as determined under regulations prescribed by the Secretary concerned.

(g) Definitions

For the purposes of this section:

(1) The term "uniformed services" has the meaning given such term in section 101 of Title 10.

(2) The term "tortious or other accountable conduct" includes any tortious omission or conduct requiring restitution to be made to prevent an unjust enrichment.. makes it wrong - they don't believe this exists

(3) The term "pay", with respect to a member of the uniformed services, means basic pay, special pay, and incentive pay that the member is authorized to receive under Title 37, or any other law providing pay for service in the uniformed services.

(4) The term "Secretary concerned" means--

(A) the Secretary of Defense, with respect to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard (when it is operating as a service in the Navy);

(B) the Secretary of Transportation, with respect to the Coast Guard when it is not operating as a service in the Navy;

(C) the Secretary of Health and Human Services, with respect to the commissioned corps of the Public Health Service; and

(D) the Secretary of Commerce, with respect to the commissioned corps of the National Oceanic and Atmospheric Administration.

CREDIT(S)

1995 Main Volume

(Pub.L. 87-693, s 1, Sept. 25, 1962, 76 Stat. 593; Pub.L. 102-54, s 13(q)(8), June 13, 1991, 105 Stat. 281.)

1998 Electronic Update (As amended Pub.L. 104-201, Div. A, Title X, s 1075(a), (b), Sept. 23, 1996, 110 Stat. 2661.)

Tob-or-medicare suit
(and)
Tob-or- Senate proposal

Ron Klain @ OVP
10/01/98 02:09:28 PM

Record Type: Record

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

cc:
Subject: Tobacco Memo

A few things:

1. I think we should make clear that our terms will be as tough as they were on McCain. We are going to have a very high bar.

2. Also, we should provide for inclusion/consultation of the anti-tobacco forces, esp. Koop/Kessler. The last thing we need right now is these folks saying we are selling out on this issue. If they blast us, we lose. We need to get them on board.

Tob- scr- medicare suit

and

Tob- scr- scruff proposal

Bruce N. Reed
10/01/98 03:15:38 PM

Record Type: Record

To: Ron Klain/OVP @ OVP

cc: Elena Kagan/OPD/EOP
Subject: Re: Tobacco Memo

I called you to say we weren't going to send the memo into the President for the next few weeks, just to make sure nobody thinks we're rushing into discussions with the tobacco companies.

When the time comes, of course we should hold out for a good deal. But the McCain bill is an unfair standard for discussions over the Medicare claim. It doesn't do anybody any good to assume that we can get $516 billion for settling a suit the Justice Dept. refuses to bring.

We'll reach out to Waxman, Conrad, and the public health community as we try to figure out a legislative and budget strategy for next year.

Tob - set - medicare
secti
and
Tob - set - negotiati-

Legal problems

1. Sep of powers problem - exec br. can't arrange for use of fed recoveries
   - St AGs think coming from fed ⇓
   - ↙ If states, then tremendous practical/political prob.
     Also: could be legal prob. in some states - where ⇓ has to be linked by st. leg. (analogue to fed prob).

2. Ind doesn't have bi regard to validity of fed medicare actions -
   - Why give credence in any way to this?

3. Trust gap - really unfortunate

FDA jurisdiction -
not drug/device -
too broad
how do you bind everyone
to what's really a new
"leg" scheme?
SCt ready to slap them down.

Evolve?
Probably yes - trust
But -- "don't worry
I know they'll do
it."

Tob - nT - Medicare suits

PERELLI - Q

Meyer Kaplow

John Ede - suggesting strongly -
it isn't stop / head off on another course -
preemptively flex muscles on HCFA.

MK - let CG know about it.

Reactic from PM - expected to nT.
NOT in a diff place than on Friday.
Pour everyone understands - more pieces that have to be worked on.

Personally optimistic that will be able to address unanswered pieces later. Have to go down same course

Pres. decree doesn't work.
Want to put heads together - nT from AtoB - espec. given head difficulty of approving through Cong.

Bunch of issues that need resolution -
industry voices about addressing all of issues,
incl. reg. of product thru FDA.
Money piece w/r/t fed govt.
Pub. health end - some won't get done then.
Should deal - partly to lean over for feds.

Tob-set-medicare suits

and

Tob-set-negotiations

Legal problems

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ToS - rep - medicare rules

and

ToS - rep - negotiation

Approach — Substance

~~Step~~

Wyden Mt.

Doesn't work

Long way toward goal - doesn't ⇐⇒ want to be put off track

Punish - much more positive has people researching

- 2-step?

HCFA → cessation → put fund.

→ w/ punitive effect??

Have any right to come into state Medicaid negotiations?? Under Medicaid laws??

THE WHITE HOUSE

WASHINGTON

September 30, 1998

MEMORANDUM FOR THE PRESIDENT AND VICE PRESIDENT

FROM: Bruce Reed
Elena Kagan

SUBJECT: Federal Tobacco Claims

Over the last few months, we and Bruce Lindsey have had many conversations with Department of Justice attorneys regarding the feasibility of bringing suit against the tobacco companies for Medicare and other losses stemming from the use of tobacco products. We also have asked DOJ lawyers to consult with a number of law professors and trial attorneys who have considered the viability of a lawsuit.

The Department now has concluded that it should not bring suit against the companies. Almost everyone at DOJ agrees that such a suit could be brought consistent with Rule 11 (i.e., with minimum professional standards). Most DOJ lawyers also acknowledge that given the size of the claim and other factors, the companies might well choose to settle the suit (as they are settling state claims) for a substantial sum of money plus public health concessions. DOJ attorneys believe, however, that they should not bring suit unless they would stand a reasonable prospect of actually winning the suit at trial and on appeal (i.e., putting aside all settlement possibilities). The attorneys have concluded that under existing law governing Medicare and other potential federal claims, they cannot meet this standard. The lawyers principally argue that current law precludes the federal government from aggregating (i.e., bringing in a single suit) claims for each Medicare beneficiary's tobacco-related health care costs.

At the same time, most DOJ attorneys appear amenable to settling federal claims against the tobacco companies without bringing a prior lawsuit. (The lawyers reason that although they cannot bring suit against the companies for want of an effective aggregation device, they do in fact have millions of individual claims against the companies, which they could settle all at once.) Under this approach, the government would enter into negotiations with the tobacco companies to resolve potential federal claims; if an agreement were reached, the parties would file in court a settlement agreement and proposed consent decree, which would release federal claims against the tobacco companies in exchange for some combination of monetary damages and injunctive relief. No legislation would be necessary.

We have some reason to believe that the companies -- at least Philip Morris and Lorillard -- would have an interest in entering into this kind of negotiation in the wake of a settlement with the states (which, as you know, is rumored to be in the offing). The principal outside counsel for Philip Morris (Meyer Koplow) recently suggested to Elena that his client wants to resolve all

government claims against it, including potential claims by the federal government. He implied that a potential settlement agreement could include money, FDA jurisdiction, and marketing restrictions.

The prospects of actually reaching a good agreement with the companies are uncertain. We know that the companies want to rid themselves of potential government litigation, primarily so they can spin off non-tobacco assets. But without an actual suit against the companies, we would have relatively little leverage in negotiations. Moreover, we could encounter serious legal difficulties in trying to achieve some of our objectives -- particularly, an assurance of FDA jurisdiction -- through a non-legislated settlement.

We believe the Administration should attempt to engage the companies in such a negotiation, but we wanted your approval first. There is always some risk that Democrats will fret that we are letting the companies off too easily. However, they will be reassured somewhat by the Justice Department's involvement in these negotiations -- and the only relief the companies can get out of these talks is from a suit we have not brought. The advantage of entering into negotiation is that we might be able to get something done on tobacco without Congress -- and if not, we could lay the groundwork for legislative action next year.

Approve: _____ Disapprove: _____ Let's Discuss: _____

Tob- sct - Medicare suits

Cartano reply

THE ARGUMENT FOR A FEDERAL LAWSUIT TO RECOVER TOBACCO-RELATED HEALTH CARE COSTS

Introduction

Various arguments have been made that the federal government is powerless, absent new legislation, to seek judicial redress for tortious exploitations of its health care programs. The chief arguments advanced, are that the United States Supreme Court, in its 1947 decision in United States vs. Standard Oil, infra, forbad such a suit at common law by the federal government, and that the current congressional authorization under the Federal Medical Care Recovery Act is deficient because it does not plainly create such a right of action.

This memorandum addresses these and other arguments:

Standard Oil: What did the Court really hold?

The federal government's initial effort to recover medical expenditures from third parties who tortiously injured its charges was rebuffed by the Supreme Court in United States vs. Standard Oil, 332 U.S. 301 (1947). Standard Oil involved a car wreck in which a serviceman was injured, and the government sued the other driver for the costs of the serviceman's medical care. The government's claim was described by the Supreme Court as one for "tortious interference by a third person with the relation between the Government and the soldier." In declining to sanction the suit, the Court held that the executive branch could not create "a new liability in the nature of a tort" as a tool of federal fiscal policy. Any new liability, held the Court, must be created instead by Congress. However, in declining to impose liability for a "new" tort, the Court noted that congressional action was unnecessary to create a judicial remedy for traditional tortious acts committed

against the government. 332 U.S. at 316 Fn. 22.

The proposed federal claims against Tobacco for increased governmental health costs of medical care are similar enough to the government's claims in Standard Oil that many courts might feel bound by that decision. The questions thus arise: (I) has Congress created a relevent right of action since Standard Oil, and/or (ii), are the facts that would give rise to Tobacco's liability here sufficiently different from those of Standard Oil so as to fall under its exception allowing traditional tort remedies?

Congress created the necessary right of action in the Federal Medical Care Recovery ct ("FMCRA"). FMCRA was enacted in 1962, and has been amended twice. The operative language from the FMCRA is:

> In any case in which the United States is authorized or required by law to furnish or pay for hospital, medical, surgical, or dental care and treatment...to a person who is injured or suffers a disease, after the effective date of this Act, under circumstances creating a tort liability upon some third person...to pay damages therefore, the United States shall have a right to recover (independent of the rights of the injured or diseased person) from said third person, or that person's insurer, the reasonable value of the care and treatment so furnished, to be furnished, paid for, or to be paid for and shall, as to this right be subrogated to any right or claim that the injured or diseased person...has against such third person...(Parenthesis in original.)

doesn't say to whom

The parenthetical phrase that the government's claims are "independent of the rights of the injured or diseased person" was added by amendment in 1996, but no case to date has interpreted its import. This amendment was literally "stuck in" among technical amendments in an armed services appropriation measure, such that there is no meaningful legislative history. Pub. L. 104-201. Previous amendments have been construed, however, to give the government a direct claim and not merely one as a subrogee of the victim. United States v. Merrigan, 389 F.2d 21 (3d. Cir. 1968), is perhaps the best case

for imposing liability on Tobacco under the FMCRA:

> Subsection (a) of the Medical Care Recovery Act unmistakably confers on the government what the congressional reports describe as an "independent right of recovery" from the tortfeasor of the reasonable value of the care and treatment it furnishes to the injured person. What is involved here is the construction of the Act's remedial or procedural provisions. These are not be construed strictly against the government, but rather in aid of the substantive right which the statute has created. Congress did not intend to limit the primary right of recovery in specifying the right of subrogation in aid of it. (Footnotes omitted; citation omitted.)

389 F.2d at 23-24.

The Merrigan decision is particularly compelling in light of the fact that the government's action there was not commenced until after the victim's own suit had gone to final judgment. Thus, even substantive defenses against the victim, like res judica, were held not to bar an independent federal suit. See also United States vs. Theriague, 674 F. Supp. 395, 400 (D. Ma. 1987) ("The government's right of action under the MCRA in this case is independent of Theriague's claim. The Court concludes that the defendants may not raise the defense of comparative negligence in this case.")

Despite Merrigan and similar holdings by federal district courts, no case has emerged clearly dealing with whether the FMCRA will permit the government to assert the type of common law claims that were once prohibited in Standard Oil.

The best arguments for an affirmative answer are as follows:

First, Congress has enacted the FMCRA expressly in response to Standard Oil. And while the FMCRA was initially only a subrogation statute, it has consistently been amended, so that it now gives the government a direct, non-derivative cause of action and it has been further amended to permit the federal government to circumvent state no-fault laws and other impediments to federal recovery. Thus, Congress has indicated a strong

desire to have the government made whole when third parties impair its health care programs by tortiously creating added expenditures. The cases unanimously dictate a "liberal" construction of the FMCRA in favor of governmental recovery.

Second, where Congress has clearly indicated a desired policy but has legislated in a less than clear or comprehensive manner, the federal courts are free to fashion remedies consistent with congressional intent. In Bush v. Lucas, 462 U.S. 367 (1987), a case in which common law recovery was denied to a government employee because of what was held to be a "comprehensive" legislative remedy for First Amendment violations, the Supreme Court stated:

> If we were writing on a clear slate, we might answer the question whether to supplement the statutory scheme in either of two quite simple ways. We might adopt the common-law approach to the judicial recognition of new causes of action and hold that it is the province of the judiciary to fashion an adequate remedy for every wrong that can be proved in a case over which a court has jurisdiction. Or we might start from the premise that federal courts are courts of limited jurisdiction where remedial powers do not extend beyond the grant of relief expressly authorized by Congress.
>
> ...
>
> Our prior cases, although sometimes emphasizing one approach and sometimes the other, have unequivocally rejected both extremes. They establish our power to grant relief that is not expressly authorized by statute, but they remind us that such power is to be exercised in the light of relevant policy determination made by Congress. (Emphasis added.)
>
> In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counseling hesitation before authorizing a new kind of federal legislation. (Footnotes and citations omitted.)

462 U.S. at 373, 378.

Although Congress has legislatively manifested its intent to protect the federal fisc

by creating both direct and derivative remedies through the FMCRA, the Act is less than comprehensive or clear in addressing a potential liability of this enormity and with such a profound impact on federal programs. Thus, it may be argued, under Bush and other precedent, the courts are free either to fashion new, or to entertain traditional remedies at common law to effectuate the congressional policy of making the government whole in instances such as here. See United States vs. Haynes, 445 F.2d 907, 908 (5th Cir. 1971) ("Reduced to fundamentals, the basic purpose of the Medical Care Expense Recovery Act [sic] is to allow the federal government to recover from third party wrongdoers the value of medical care which is provided to injured persons.")

Third, the facts at issue here are different from those in Standard Oil in at least one fundamental way: in Standard Oil, the injury for which the government sought recompense was caused by the negligence of a driver who injured a serviceman who was treated at government expense. Here, the injury for which the government seeks damages was caused intentionally by the promotion and sale of a knowingly injurious product to consumers, according to documents obtained in discovery in the state cases, the effect of this risky business upon governmental health delivery programs was recognized by Tobacco no later than 1978.

Tobacco has perpetuated the modern market for tobacco products by marketing to underaged consumers and reinforcing their continued consumption into adulthood by controlling nicotine. In essence, Tobacco has maintained its business by acting as an enabler; by preying on the immature; by addicting its customers; and by disingenuously creating doubt about the health effects of its products.

According to public health authorities, tobacco use has had a profound adverse

affect on the health of Americans. Such use shortens life by eight years on average; causes or contributes to approximately 40 discrete diseases; and results in generalized ill health. More than 400,000 Americans die prematurely every year from tobacco use. Approximately 3,000 underage U.S. teenagers start regular smoking every day. Treatment of tobacco related diseases costs Americans billions of dollars annually. Approximately $20 billion is to the Medicare system alone.

Do these facts, if true, create a common law right of action in favor of the United States? In United States vs. Silliman, 167 F.2d 607 (3d Cir. 1948), the Third Circuit restated the following general rule:

> The United States can sue those who commit tortious acts which result in pecuniary loss to the United States. Thus action may be brought for a trespass on Government owned land or an injury to chattels owned by the United States. We think this line of authorities clearly demonstrates the standing of the United States as plaintiff to recover pecuniary loss sustained by a tort recognized at the common law. (Footnotes omitted.)

See also In re Debs, 158 U.S. 564 (1895).

Respected secondary authorities state the rule even more strongly, as the following quotation from CJS demonstrates:

> The United States has power to sue. The government's right to maintain an action is inherent in its sovereignty and it is not restricted to maintaining actions through the instrumentality of an agent authorized to act for it. Its right to resort to the courts is not restricted to any particular form of action and, in addition to its right to bring law actions, it may sue in equity....It may bring a suit for injunction...(Footnotes omitted.)

91 C.J.S. Section 175

From all of the authorities examined, we find no case denying a right of action in the United States for established common law tort claims unless Congress has expressly pre-empted the field. Here, is where Standard Oil is most readily distinguished. Standard Oil

did not hold, as some have suggested, that the government cannot maintain common law claims. Instead, it held that the federal courts could not judicially create a new common law liability. See 332 U.S. 301, at 313 (1947)(Federal courts "more modest than State courts, particularly in the freedom to create new common law liabilities.")

Assuming a right of action in the United States, what is the most appropriate legal theory? After considering and rejecting the usual tort remedies, we settled on traditional claims in equity jurisprudence. Equitable claims more neatly fit the circumstances where the conduct of a "legal" but dangerous enterprise unreasonably externalizes its costs to the public. Equitable claims also have the advantage, if properly brought, of being capable of non-jury decision.

We strongly recommend that the equitable claims of (I) abatement of public nuisance; (ii) indemnity; and (iii) restitution be used as the principal vehicle for federal recovery. We also recommend seeking injunctive relief to stop marketing to teenagers, as the industry was compelled to do in the four settling states.

Remember, the Supreme Court acknowledged in Standard Oil that "it has not been necessary for Congress to pass statutes imposing civil liability in those situations where it has been understood since the days of the common law that the soverign is protected from tortious interference." 332 U.S. at 316 FN.22. It is more than arguable that the instant facts create something more akin to the type of traditional common law liability that the Standard Oil Court said was actionable even without a congressional blessing.

AGGREGATION OF CLAIMS AND FEASIBILITY OF PROOF

An argument has been made that bringing individual claims for millions of Medicare

recipients is an insurmountable task, and that recent court decisions disfavor an "aggregation" approach. The response is that bringing millions of individual claims is insurmountable, but that aggregations through modern econometric methods have been sustained in Medicaid actions in Mississippi, Florida, Texas, and Minnesota, only one of which state had a special statute permitting statistical proof. The other three states relied upon ordinary rules of evidence. It is only in class actions, where individual defenses are available, that aggregations have been discouraged. The use of statistical modeling based upon published population surveys has been judicially sanctioned in other contexts as well. See Federal Manual on Scientific Evidence. Federal Judicial Center (1994).

Our experts have already done some preliminary work on Medicare, and have come up with very supportable damages computations.

Theory - here it is govt's claim - no indiv defenses are available - it is an aggregate claim - not a collection of indiv claims.

POLICY CONCERNS

Arguments have been advanced that with no real chance of success, a federal lawsuit against Tobacco would adversely affect efforts to reduce youth smoking and chances for comprehensive legislation. This would be true if one concluded that there is little chance of success. But such is not the case.

Such a suit would have no affect on the youth smoking initiatives under the new FDA rule. A suit could, however, give the government even more remedial powers than the Federal Food Drug and Cosmetic Act permits, because common law remedies would enable youth-directed marketing practices to be enjoined through the suit as a public nuisance, regardless of the FDA rule.

Given the present state of affairs post-McCain Bill, what chance is there for comprehensive legislation without the leverage this suit would create? We know from the

successes in the above states that when the industry has to face a trial that puts its existence at risk, it has no choice but to compromise.

CONCLUSION

A federal suit to recover tobacco-related expenses has more than a reasonable chance of success, with or without the FMCRA. The "black letter law" of the Act itself, as amended, plainly expresses a Congressional desire to protect the federal fisc and its programs from tortious exploitation. The cases have all interpreted the Act liberally in furtherance of this congressional purpose. The act clearly satisfies the Standard Oil requirement for a congressional policy to give the government redress.

Even aside from FMCRA, the intentional acts of Tobacco give rise to traditional common law causes of action that are within the traditional tort exception to the Standard Oil proscription against "new" torts or common law liabilities.

The evidentiary issues concerning aggregation have been overcome in most of the state tobacco suits, and the technology to estimate scientifically the damages to federal programs has been demonstrated.

Is this suit a "lay down"? No. But properly pled and filed in an appropriate forum with experienced lawyers it has a better than even chance. It is a chance that Tobacco has shown that it will not take. Moreover, it affords perhaps the only opportunity to reverse the losses of the past congressional session.

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STATE CAUSE OF ACTION/ THEORY	**OUTCOME**
Texas	
Direct Claim	Survives under Texas law, which allows "quasi-sovereign" suits; FN expressly distinguishes authority of the United States due to Standard Oil
Civil RICO (federal)	Survives with court expressing doubt about the strength of the state's case
Federal Antitrust	Dismissed; court held that there was no antitrust standing or antitrust injury
State Antitrust	Dismissed; court held that there was no antitrust standing or antitrust injury, and that the state could not sue because it was not a participant in the market
State Consumer Protection	Dismissed due to lack of nexus between the state's alleged injury and the violation and to the fact that the state was not a consumer
Restitution	Dismissed because no benefit was conferred on defendants
Unjust Enrichment	Dismissed because no benefit was conferred on defendants
Public Nuisance	Dismissed because there was no claim that there was a misuse of real property
Negligent Performance of a Voluntary Undertaken	Dismissed because corporate statements and advertising do not create a special duty
Fraud/Misrepresentation	Survives; court holds that there may be a set of facts that would constitute a material misrepresentation
Maryland	
Direct Claim	Dismissed; court held that subrogation only was permitted
Restitution	Dismissed because there is an adequate remedy at law (through subrogation) and the state has not conferred a benefit on defendant
State Consumer Protection	Survives; the state statute does not require that plaintiff be a consumer

State Antitrust	Survives; the state statute permits suits by third parties that are indirectly injured
Fraud and Deceit	Dismissed with leave to amend as a subrogation claim; no ruling on the merits
Breach of Voluntarily Assumed Duty	Dismissed with leave to amend as a subrogation claim; no ruling on the merits
Negligent Misrepresentation	Dismissed with leave to amend as a subrogation claim; no ruling on the merits
Breach of Express Warranty	Dismissed with leave to amend as a subrogation claim; no ruling on the merits
Breach of Implied Warranty	Dismissed with leave to amend as a subrogation claim; no ruling on the merits
Negligence	Dismissed with leave to amend as a subrogation claim; no ruling on the merits
Strict Liability	Dismissed with leave to amend as a subrogation claim; no ruling on the merits
Conspiracy	Dismissed with leave to amend as a subrogation claim; no ruling on the merits
Iowa	
Fraud	Dismissed; court found no proximate cause and cause of action otherwise barred by statute
Breach of Voluntarily Assumed Duty	Dismissed; court found no proximate cause and no physical harm and held that strictly economic damages were barred by the economic loss doctrine
Consumer Fraud Statute	Survives on theories based on unfair trade practices and fraudulent public statements; statute allowed relief including disgorgement, an injunction, and civil penalties
Unjust Enrichment	Dismissed; court found that there was an adequate remedy at law and that there was no benefit bestowed on defendants
Nuisance Statute	Survives; no analysis
Civil Conspiracy	Survives; no analysis
Aider and Abetter	Survives; no analysis
Washington	

State Consumer Protection Statute	Survives; court permits this antitrust-style claim after analyzing state law and determining that the state may bring suit even if it has not suffered "antitrust damages" and that the direct purchaser rule does not apply..
State Antitrust	Survives; no analysis
State Unfair Competition Statute	Dismissed to the extent that the state seeks damages or restitution for its own losses
Breach of Special Duty	Dismissed; court found that there was no allegation of physical harm to the state, no proximate cause, and no allegations of reliance by the state
Unjust Enrichment	Dismissed because the state did not confer a benefit on defendants and defendants had no duty to the state (as distinguished from individuals)
California Cities	
Civil Rico	Dismissed; court held that there was no proximate cause and no injury to business or property
Fraud (statutory)	Dismissed with leave to amend if the cities allege that they themselves relied on the misrepresentations of defendants and that that reliance led to damage; the court also held that the cities would have to prove that each of the individual smoker's injuries were actually caused by tobacco
Breach of Special Duty	Dismissed with leave to amend to identify a duty undertaken, establish a direct link to between the claimed breach and damages, and to prove that each individual smoker's injuries were actually caused by tobacco
Breach of Warranty	Dismissed because the cities are not consumers
Restitution	Dismissed because the cities did not confer a benefit on the defendants and no duty was established
Conspiracy	Dismissed with leave to amend, but the court held that this claim was wholly derivative on underlying tort claims
Indiana	
Breach of Special Duty	Dismissed
Conspiracy	Dismissed
Negligence	Dismissed

State Antitrust	Dismissed
State Consumer Protection	Dismissed
Minnesota	
Breach of Special Duty	Dismissed; injury to plaintiffs too remote to bring tort claims
State Antitrust	Survives; the court held that Minnesota has broad antitrust standing and has eliminated the Illinois Brick rule
Deceptive and Unfair Trade Practices	Survives because, under state law, plaintiffs need not be consumers
Restitution	Survives; no analysis of the merits

Tob-sct-medicare suits

facsimile
TRANSMITTAL

to: Elena Kagan
fax #: 202-456-2878
re: U.S. Antitrust Claims Against Cigarette Makers
date: August 14, 1998
pages: 18, including this cover sheet.

Following is my memo on the legal viability of U.S. Antitrust Claims Against Cigarette Makers.

From the desk of...

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August 13, 1998

Joel Klein
Assistant Attorney General for Antitrust

Doug Melamed
Deputy Assistant Attorney General for Antitrust

Dan Rubinfeld
Deputy Assistant Attorney General for Economics

VIA FAX 202-616-7320, 202-514-0306

I understand the Department of Justice may currently be considering whether to bring suit against the cigarette manufacturers. I believe an antitrust suit against the cigarette makers for conspiring not to compete on product safety would be viable, and wanted to share my analysis of why I believe this. I also wanted to alert you that the Antitrust Division's ability to bring a suit under Clayton Act §4A is likely to be affected by an appeals now pending before the Third Circuit and Second Circuits. If the Division wants to preserve its ability to bring antitrust claims for the full damages to the United States from the cigarette makers' conspiracy to restrain trade (including the medical expenses it paid), I believe it would be in the Division's interests to file amicus briefs supporting the antitrust claims in these cases.

I have been analyzing the relevant antitrust issues because I am counsel to plaintiff health funds in these appeals and in other cases nationwide bringing similar antitrust claims. I thus understand the obstacles to such a suit, which are essentially the same since Clayton Act §§4 & 4A have the same wording. The cigarette makers can be expected to raise three objections under the rubric of antitrust standing, that any injury from paying medical expenses for smokers is: (1) indirect; (2) not antitrust injury; and (3) not an injury to "business or property."

Although these three objections gain some superficial appeal from language in *Illinois Brick*, *Associated General Contractors*, and *Reiter*, I have concluded that a more thoughtful analysis of these and other Supreme Court precedents actually forecloses each of the three objections. To understand this analysis, we first need to understand more precisely the antitrust claims.

I. The Nature of the Antitrust Claims

Various suits brought by other health care payors (including the States, health insurers like Blue Cross, and union health funds like the ones in my cases) allege a horizontal conspiracy among tobacco manufacturers not to compete on product safety. The alleged conspiracy consisted of both a conspiracy to withhold safer tobacco/nicotine products, and a conspiracy to withhold product safety information.
Obviously, these two parts of the conspiracy are linked: if a firm cannot advertise the relative safety of its cigarette, there is not much point in it investing money to make safer cigarettes. Antitrust law covers both conspiracies to fix product quality, *Allied Tube*, 486 U.S. at 501; *Professional Eng'rs*. 435 U.S. at 695, and to withhold product information, *Indiana Dentists*, 476 U.S. at 461 (condemning "concerted...effort to withhold ...information desired by consumers," there x-rays from insurers). Indeed, since there is no plausible procompetitive purpose for this conspiracy, such a conspiracy would be condemned summarily under the rule of reason. *Id.* at 459.

The alleged conspiracy would prevent any cigarette maker from seeking to increase its individual market share by making safer cigarettes or other nicotine products or by advertising the greater harm of its rivals' cigarettes. Indeed, the complaints recount several concrete cases where cigarette makers did develop safer cigarettes and safety information but held them off the market because of the antitrust conspiracy. If this is true, it helps explain why the cigarette industry is only significant industry to show no improvement in product safety for the last four decades. Other industries that produce dangerous products, like automobiles, have seen vigorous competition and improvements in product safety. As part of this competition, auto manufacturers constantly advertise the relative safety of their cars over others.

There is nothing comparable in the cigarette industry. True, cigarette makers have marketed cigarettes that are filtered, low tar and low nicotine. But they have never advertised these cigarettes as less carcinogenic or less addictive. Such advertising would have been directly banned by the alleged conspiracy not to advertise relative

product safety. It would also have been made impossible by the alleged conspiracy not to actually market safer cigarettes. Indeed, the complaints allege that clever product design in fact made filtered, low-tar and low-nicotine cigarettes more dangerous and addictive than regular cigarettes. This would mean their introduction was not genuine competition on product safety at all.

Such short-circuiting of the competitive process is precisely what antitrust law is meant to redress. It clearly states an antitrust cause of action. Indeed, if proven, I think it would be no exaggeration to say that this was the most socially destructive antitrust conspiracy of the century.

One big advantage of an antitrust claim over deception claims is that the antitrust claims are invulnerable to the objection that everyone already knew cigarettes were dangerous. This is an objection of particular relevance to the United States since its own Surgeon General issued the warnings about how unsafe cigarettes are. But the objection is entirely irrelevant to the antitrust claims for two reasons.

First, general knowledge about cigarette safety is not the same as knowledge about the *relative* safety of different cigarettes, and that is the key competitive product safety information for antitrust purposes. We all know driving cars is dangerous to some degree. But this would not mean automakers could engage in a conspiracy not to advertise differences in the relative safety of different car brands. Even the Surgeon General could have benefitted from withheld information about which cigarettes were less carcinogenic than others, and what made them that way, since that would have helped treat government-covered patients and reduce the United States' medical bills. And certainly the smokers would have benefitted from product safety information helping them choose which cigarette brand to buy.

Second, even if everyone had full knowledge, that would be no bar to the antitrust claims for withholding safer products. This is because what antitrust entitles us to is not just the right to make price-quality trade-offs when buying but the right to have the ideal price-quality trade-offs available to us through competition. Just as it would be no defense to a price-fixing conspiracy that buyers know they are paying too much, so too it is no defense to a quality-fixing conspiracy that buyers know the quality is too low. After all, if automakers conspired to make no car safer than a Yugo, they could not defend themselves by saying that buyers know that cars in general (or Yugos in particular) are unsafe and must regard such risks as outweighed by the benefits of

driving. For the conspiracy would be taking away from us the right to choose the safer cars that competition would produce. Likewise, the alleged conspiracy to withhold safer cigarette and nicotine products from smokers and the United States takes away options a free market could have produced.

II. Antitrust Standing Analysis

The United States of course has automatic standing to bring a suit to seek civil and criminal penalties and injunctive relief for violations of federal antitrust law. But the big damages are obviously in recoupment of medical expenses paid out, and those would have to be sought under Clayton Act §4A. Still, if the government (mistakenly) concludes a suit under §4A is not viable, the social destructiveness of the alleged conspiracy would seem to more than warrant a suit on other terms. Indeed, the case would be particularly compelling because the interpretation of §4A that would preclude suit by the United States would also (under the parallel language in §4) preclude a federal antitrust suit by *any* affected private party. Health funds, insurers, and States would be subject to precisely the same objections, and suit by the smokers would be precluded because one cannot sue under antitrust for personal injury. Thus, an adverse interpretation of §§ 4&4A would mean that the most socially destructive antitrust conspiracy of the century could go completely unremedied by federal antitrust law, unless the United States intervened to seek civil or criminal sanctions.

But I hope to show that under a correct analysis of §§ 4 & 4A both the United States and other health care payors do have antitrust standing to recover the medical expenses caused by the alleged cigarette makers' conspiracy. In explaining why, we must be careful to distinguish between two different causal chains, which I depict on Chart 1. One is that the cigarette makers' conspiracy directly withheld product information and treatment products from the health payor (here, the United States) that the health payor could have used to reduce its medical bills. The health payor could have recommended or required that covered smokers use safer cigarettes, treatment products like nicorette might have been available sooner, or the health payor could have adjusted deductibles or coverage or take more active steps to discourage smoking. Here any physical injury suffered by smokers occurs flows indirectly from the direct effect on the health care payor of the misconduct. This is depicted in Chart 1a.

The second causal chain is that cigarette makers directly withheld product information and safer cigarettes from the smokers, causing smokers to develop more medical

illness, for which the health care payor directly paid the medical bills. This is probably where the biggest damages are. This second causal chain is indirect in the sense that the health care payor would not be paying but for the fact that smokers were injured, but is direct in the sense that the health care payors directly pay all medical bills (payment does not flow through smokers) and that the need to make such payments flows naturally and foreseeably from the conspiracy. This is depicted in Chart 1b.

One can expect a categorization war on the second causal chain, but one should note two general things. (1) Whether an injury is called "direct" (or "proximate") versus "remote" is itself a policy judgment. *Holmes*, 503 U.S. at 273 n.20; *Associated General Contractors*, 459 U.S. at 537 n.34; PROSSER & KEETON, TORTS §42, at 274 (5th ed. 1984). (2) Even if one calls this injury "indirect," many antitrust cases hold that indirectly injured parties can sue. Indeed, each of the big three antitrust standing cases (*Illinois Brick*, *McCready*, and *Associated General Contractors*) identifies an indirect party who can nonetheless sue, as I will explain.

A. Indirectness

Indirectness is not even plausibly a reason to reject the claim in chart 1a. But it might be deemed on superficial analysis a reason to reject the bigger-damage claim in chart 1b. On closer examination, though, it does not bar even the 1.b. claim.

1. No Black-Letter Ban on Suits by Indirect Parties. The cigarette makers can be expected to make the blanket statement, citing cases like *Illinois Brick*, that parties indirectly affected by an antitrust conspiracy can never sue under antitrust. But in fact in *Associated General Contractors*, the Supreme Court generally rejected any such "black-letter rule," *AGC*, 459 U.S. at 536, and specifically rejected the "directness of the injury" test, *id.* at 536 n.33, stating that instead courts should apply five policy factors.

1. Whether any indirect injury was intended or foreseeable.
2. Whether indirectness made the causal inquiry more difficult.
3. Whether allowing suit by the indirect party would require a complicated apportioning of damages to avoid duplicative damages.
4. Whether a more directly injured party could sue to vindicate the interest in enforcement.
5. Whether the indirectly injured party could trace its injury to the anticompetitive aspects of the defendant's conduct.

Id. at 537-45. The first four are remoteness/proximate cause factors generally applicable to federal statutes, *Holmes*, 503 U.S. at 269, while the fifth factor is the antitrust injury requirement that I will discuss in the next section.

Indeed, none of the main three antitrust standing cases decided by the Supreme Court (including *Illinois Brick*) is consistent with the claim that indirect parties never have standing. *See* Chart 2. For while *Illinois Brick* held that generally indirect purchasers do not have antitrust standing, it also recognized that indirect purchasers may have standing if they bought under pre-existing cost-plus contracts. 431 U.S. at 736. *See also* II Areeda & Hovenkamp, Antitrust Law ¶371e (collecting cases). Why? Because none of the policy factors indicate that their claim should be barred. (1) Their harm is foreseeable; (2) causation is not speculative; (3) there is no difficulty apportioning to avoid duplicative damages; and (4) the more direct party has no incentive to sue because it suffered no injury. Indirectness is thus no absolute bar to antitrust standing if these factors do not counsel against standing.

McCready is even closer on pont. *See* Chart 3. *McCready* found antitrust standing for a plaintiff denied insurance reimbursement for psychologist services even though the plaintiff was neither a direct purchaser from the defendants nor their intended target since the pyschologists were the target. Nonetheless, she was given standing. Why? Because she met the four policy factors. (1) It was enough that her harm was "foreseeable" even if not intended. 457 U.S. at 478-79. (2) Causation was not too speculative even though mediated through an intervening employer who could have changed insurers. *Id.* at 475 n.11 & 480 n.17. (3) There was no difficulty apportioning to avoid duplicative damages since harm to the patient was distinct from harm to the psychologists and employers. *Id.* at 475, 483. (4) No more direct party could sue for these damages since only the patient paid the medical bills. *Id.*

Associated General Contractors denied standing to the highly indirect plaintiffs, *see* Chart 4, but stated that the unionized subcontractors in that case would have standing even though they were indirectly injured. 459 U.S. at 541-42. Why? Because the causal connection to their injury was not speculative but rather clearly foreseeable and intended. While not necessary to have standing, existence of intent to cause harm to the plaintiff "should 'ordinarily be dispositive' in creating standing." *Id.* at 537 n.35. Thus, the unionized subcontractors could sue even though factors 3 & 4 not met.

Finally, the cigarette makers can be expected to stress *Holmes*, 503 U.S. 258, which

adjudicated RICO standing using antitrust standards. But while *Holmes* did use the language of "directness," it also rejected any "black-letter rule," stating that "our use of the term 'direct' should merely be understood as a reference to the proximate-cause enquiry that is informed by the concerns set out in the text," *Holmes*, 503 U.S. at 273 n.20, which is to say by the same policy factors applied by *AGC* other than antitrust injury, *id.* at 269 & n.15. Moreover, if one examines the *Holmes* case closely (see Chart 5) one can see that, while the indirect plaintiff-claims at issue were deemed to lack standing, the Court recognized that two other indirect-plaintiff claims could have standing. That is, the *Holmes* Court itself recognized that its analysis only barred one of three indirect claims.

2. Applying the Four Policy Factors to Claims of Health Care Payors.

a. Intended or Foreseeable. The complaints generally allege that the cigarette makers intended to harm health care payors and could clearly foresee it. Intent "should 'ordinarily be dispositive' in creating standing." *AGC*, 459 U.S. at 537 n.35. So should foreseeability: "the scope of liability should ordinarily extend to but not beyond all "direct" (or "directly traceable') consequences *and those indirect consequences that are foreseeable.*" PROSSER & KEETON, TORTS §42, at 273 (5th ed. 1984) (emphasis added).

b. Indirectness not does not make the causal connection more speculative. Unless you disbelieve the wealth of medical studies about the harmfulness of cigarettes, the causal connection is clear. The Cigarette makers can be expected to argue that causation is unduly speculative because the smokers might have been injured by independent health conditions. But this is not a ground for denying standing based on indirectness because that causal complication would also apply even if the party they deem directly injured (the smoker) were suing for this injury. That is, this is not a causal complication exacerbated by another link in a causal chain. The causal chain leading to the medical bills is precisely the same whether the suit is brought by the smokers or the health care payors.

While the causal chain is no longer, the causal complications are actually far *lower* for the health care payors because they can prove their injury by statistical proof rather than individuated proof. Individuated proof would be extremely cumbersome and unwieldy for any court, and an inefficient use of judicial time, and so expensive as to preclude pursuit of the claims. More important, statistical proof of increased medical bills over many smokers can be established with far *more* accuracy that individuated

proof of harm to individual smokers. What is individually quite uncertain can, through aggregation, become extremely predictable. An insurer of one million homes can predict fire damage far more accurately than an insurer of one home. It is hard to determine whether a specific smoker would have contracted an illness with less harmful cigarettes. But it can be determined with far more certainty that, over millions of individuals, medical bills are statistically increased by more harmful cigarettes.

Associated General Contractors was a very different case. There causal connection was lengthy and dubious, and plaintiffs did not allege that any unionized firm was unable to do business, lost market share, or terminated a collective bargaining agreement, that union membership declined, or that the unions lost any dues. *Id.* at 528, 541 n.46, 542.

c. Allowing Suit by Indirect Party Does Not Require Complicated Apportionment to Avoid Duplicative Damages. Under the complaints I have seen, and the one I would recommend the United States bring, the health care payor is only suing for the medical bills it paid directly. Since the smokers didn't pay the medical bills in question, only the health care payor could sue for them. *Blue Cross v. Marshfield Clinic*, 65 F.3d 1406, 1414 (7th Cir. 1995) (Posner, J.) (antitrust violation increasing medical bills; Blue Cross, not insured, has standing); *Steele v. Hospital Corp.*, 36 F.3d 69, 70 (9th Cir. 1994) (same under RICO). The smokers could not sue because they did not suffer any injury to their "business or property," Clayton Act §4, a term interpreted to exclude physical injury. *Reiter*, 442 U.S. at 339. Thus, there is no possibility the antitrust claims of health care payors would duplicate damages from smoker antitrust claims. And since there is no pass-on of the damages in question, there is no need to apportion passed-on damages.

As the *McCready* court put it: "[W]hatever the adverse effect of Blue Shield's actions on McCready's employer, who purchased the plan, it is not the employer as purchaser, but its employees as subscribers, who are out of pocket as a consequence of the plan's failure to pay benefits." 457 U.S. at 475. Likewise, here whatever the adverse effect of cigarette makers' actions on smokers, who buy their cigarettes, it is not the smokers as purchasers, but the health care payors, who are out of pocket as a consequence of the cigarette makers' conspiracy. That is, like McCready, they paid the medical bills.

Note that the issue here is whether one plaintiff's antitrust damages might duplicate another plaintiff's antitrust damages, not whether they might duplicate RICO/tort damages. *See Illinois Brick*, 431 U.S. at 731 (objecting to "duplicative recoveries under §4"). Different claims require different proof and all might not

succeed. The single-satisfaction rule is what prevents plaintiffs from using multiple claims to recover more than their actual damages, or in antitrust more than treble their damages. *Zenith*, 401 U.S. at 348.

d. No more direct party who could bring the suit. If health care payors cannot sue, there is not only no antitrust remedy for these particular damages, but *no antitrust damages to deter such conspiracies at all* since the smokers clearly cannot sue in antitrust. Antitrust standing law was not intended to create a safe harbor for antitrust violations. To the contrary, the general purpose of standing doctrine is to *promote* vigorous enforcement by choosing the best plaintiff and concentrating all antitrust claims in that plaintiff. *Illinois Brick*, 431 U.S. at 735 ("antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers"). Remote plaintiffs are generally denied standing not because of some arbitrary distaste for remote litigants but because of concern that otherwise more difficult causal proof and damage apportionment would "discourage vigorous enforcement of the antitrust laws by" the directly injured parties. *McCready*, 457 U.S. at 475 n.11; *Illinois Brick*, 431 U.S. at 745-46; *AGC*, 459 U.S. at 541-42. It would be perverse to use this doctrine to preclude all damage claims.

B. Antitrust Injury

Antitrust injury is the fifth *AGC* factor, and a necessary one that must be met in every case. The cigarette makers can be expected to argue that no health care payor can recover because they are not consumers or competitors of cigarette makers, nor otherwise direct participants in the restrained market, and thus do not suffer antitrust injury. But the health care payors *are* consumers and direct participants in the claim identified in Chart 1a. They are not for the claim identified in Chart 1b. But there is in fact no Supreme Court case that states an antitrust plaintiff must be a consumer or competitor of defendants, or otherwise a direct participant in the restrained market. To the contrary, the Supreme Court has expressly rejected the proposition. *Associated General Contractors* rejected any requirement that plaintiff must be in the "area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *AGC*, 459 U.S. at 536 n.33. *McCready* was even more explicit, stating that the antitrust "'statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated.'" *McCready*, 457 U.S. at 472.

In fact, the only antitrust injury requirement is that the plaintiff's injury be attributable to the anticompetitive effect of the conspiracy. Here any health care payor's injury is clearly attributable to the anticompetitive withholding of products and information. Such a concerted refusal involves precisely the kind of anticompetitive injury that antitrust was designed to prevent.

This fits with the main purpose of antitrust injury doctrine, which is to screen out those who would suffer injury only if the challenged conduct had *pro*competitive effects. For example, the Supreme Court has used antitrust injury doctrine to exclude a rival challenging a horizontal merger that would hurt the rival only if the merger *decreased* market prices to more competitive levels. *Brunswick*, 429 U.S. 477; *Cargill*, 479 U.S. 104; *Atlantic Richfield*, 495 U.S. 328 (same for rival challenging nonpredatory vertical maximum price-fixing). Likewise, the *Assoc Gen Contractors* language about the plaintiff not being a "consumer or competitor" referred merely to uncertainty over whether -- on the particular facts of that case -- the union plaintiffs there would be harmed or benefitted from lower competition in the relevant market. 459 U.S. at 539. Used this way, antitrust injury doctrine helpfully weeds out plaintiffs with anticompetitive motives. But that concern is not applicable to any health care payor.

Again, the proposed requirement that a plaintiff be a consumer, competitor, or direct market participant is rejected not only by the language of the Supreme Court cases but by their application to concrete instances. *Illinois Brick* recognized that an indirect purchaser under a pre-existing cost-plus contract *could* have antitrust standing even though it would not be a consumer or competitor, nor a direct participant in the market in which prices were fixed. *See* Chart 2. *McCready* recognized that the plaintiff there would have standing even though she was not a competitor nor consumer of defendants (she did not buy insurance and did not want to buy psychiatry services), and not a direct participant in the restrained market. *See* Chart 3. And *AGC* recognized that the unionized subcontractors would have standing even though they were not competitors or consumers of the defendants, nor direct participants in the restrained market. *See* Chart 4. In all cases, the identified parties would nonetheless have antitrust standing and allege antitrust injury because their injury clearly flows from the anticompetitive aspect of the defendants' conduct.

I summarize the above 5 factor analysis in Chart 6. Since the cigarette makers can be expected to cite numerous non-antitrust cases where insurers have no direct claiim against tortfeasors who harm their insureds, I also include Chart 7, which explains why

the factors do not apply to such typical insurer claims.

C. "Business or Property"

Under Clayton Act §§ 4 or 4A, the plaintiff must show that the antitrust violation caused injury to its "business or property." This excludes physical injury, but does not exclude any monetary damage. *Reiter*, 442 U.S. at 339; II AREEDA & HOVENKAMP, ANTITRUST LAW at 208-09 (rev. ed. 1995) (including costs of defending against litigation or loss of labor union's ability to recruit members).

The cigarette makers can be expected to argue that this excludes monetary damage that flows from physical injury to *another* individual, but to date have cited no case in support of this proposition. They do cite various RICO cases applying the same "business or property" requirement where the courts denied the physically injured party recovery for monetary expenses flowing from its *own* physical injury. *See Bast*, 59 F.3d 492, 495 (4th Cir. 1995); *Doe*, 958 F.2d 763, 767 (7th Cir. 1992). But the Supreme Court itself has held that a firm can recover for damage to its "business or property" when it suffers monetary damages flowing from physical injury to *other* persons. *NOW v. Scheidler*, 510 U.S. 249, 253-56 (1994) (plaintiff could sue under RICO for economic injury to clinic that resulted from physical violence against its employees and patients). Likewise, it has been held that a plaintiff could sue under RICO for economic injury that resulted from mob hit on its president even though the president's estate could not sue for his own physical injury. *Kubecka v. Avellino*, 898 F. Supp. 963, 969 (E.D.N.Y. 1995).

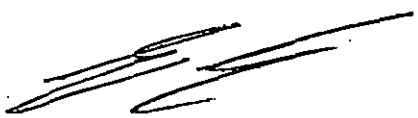
Thus, the paying of medical bills under the claim identified in Chart 1.b is clearly a monetary damage that, since it does not flow from a physical injury the health care payors themselves suffered, they can recover for under the "business or property" test. Also, the monetary damages the health care payors suffer from the conspiracy to withhold information and treatment products does not flow from a physical injury at all. So the claim identified in Chart 1.a. even more clearly satisfies the "business or property" test.

Indeed, the "business or property" requirement *strengthens* the case that health care payors have standing because it clearly excludes all antitrust claims that could possibly be brought by the smokers. There is thus no possibility of duplicative damages or antitrust suit by more directly affected smokers.

Conclusion

I thus conclude that indirectness, antitrust injury, and the "business or property" requirement are not bars to suits by the United States under Clayton Act §4A seeking treble damages for all medical expenses it paid as a result of any cigarette makers conspiracy not to compete on product safety. And, of course, even if the United States could not (or was not willing to) sue to recover its own damages, it could sue to vindicate the public interest in competitive markets by seeking civil or criminal sanctions and injunctive relief.

Sincerely,



Einer Elhauge

CHART 1

Figure 1a.

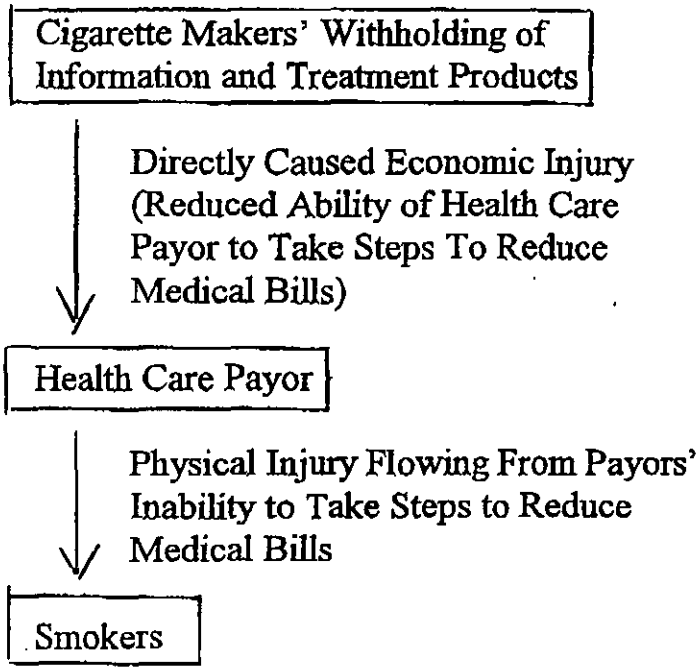
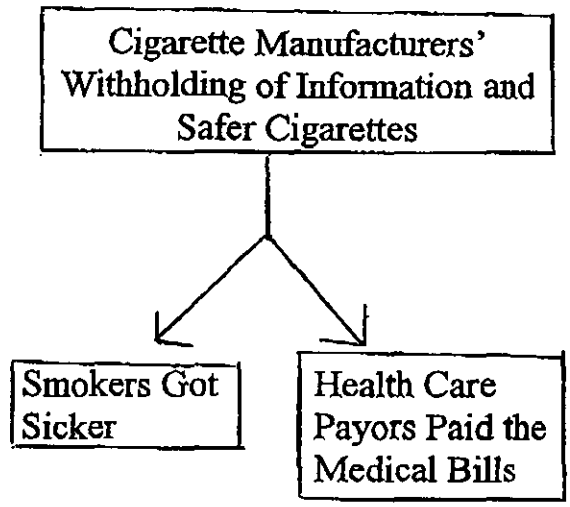


Figure 1b.

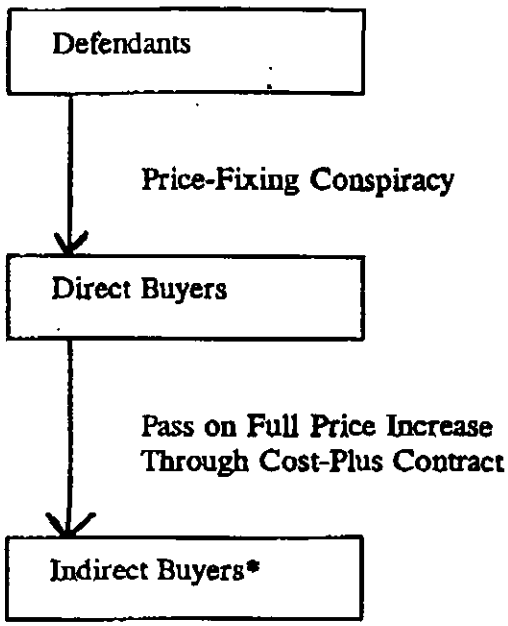


Not Even Plausibly Indirect -- Physical Injury to Smokers is Rather Indirect Effect Flowing From Direct Effect on Health Care Payors

Funds directly pay all medical bills (do not flow through smokers) but paying them because smokers directly injured by defendants' misconduct. Whether injury called "direct" is itself a policy judgment. *Holmes*, 503 U.S. at 273 n.20; Prosser & Keeton, Torts §42, at 274 Even if deem "indirect," many cases hold that similarly indirectly injured parties meet proximate cause requirements.

CHART 2

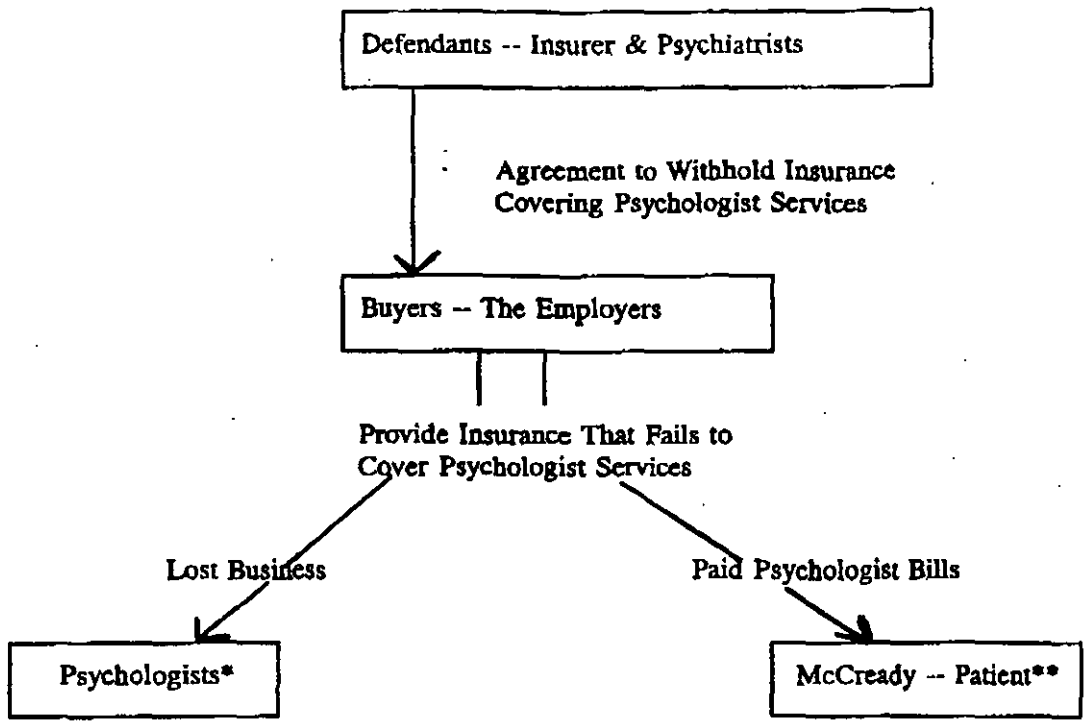
COST-PLUS INDIRECT BUYERS UNDER *ILLINOIS BRICK*, 431 U.S. 720 (1977)



* Can have standing, 431 U.S. at 736, even though (1) their injury is indirect; and (2) they are not competitors or consumers of defendants, nor direct participants in the restrained market. Why? They meet all the *AGC* factors: (1) harm foreseeable; (2) causation not speculative; (3) no difficulty apportioning to avoid duplicative damages; (4) more direct party has no incentive to sue; (5) harm flows from anticompetitive aspect of defendants' conduct.

CHART 3

BLUE SHIELD v. McCREADY, 457 U.S. 465 (1982)



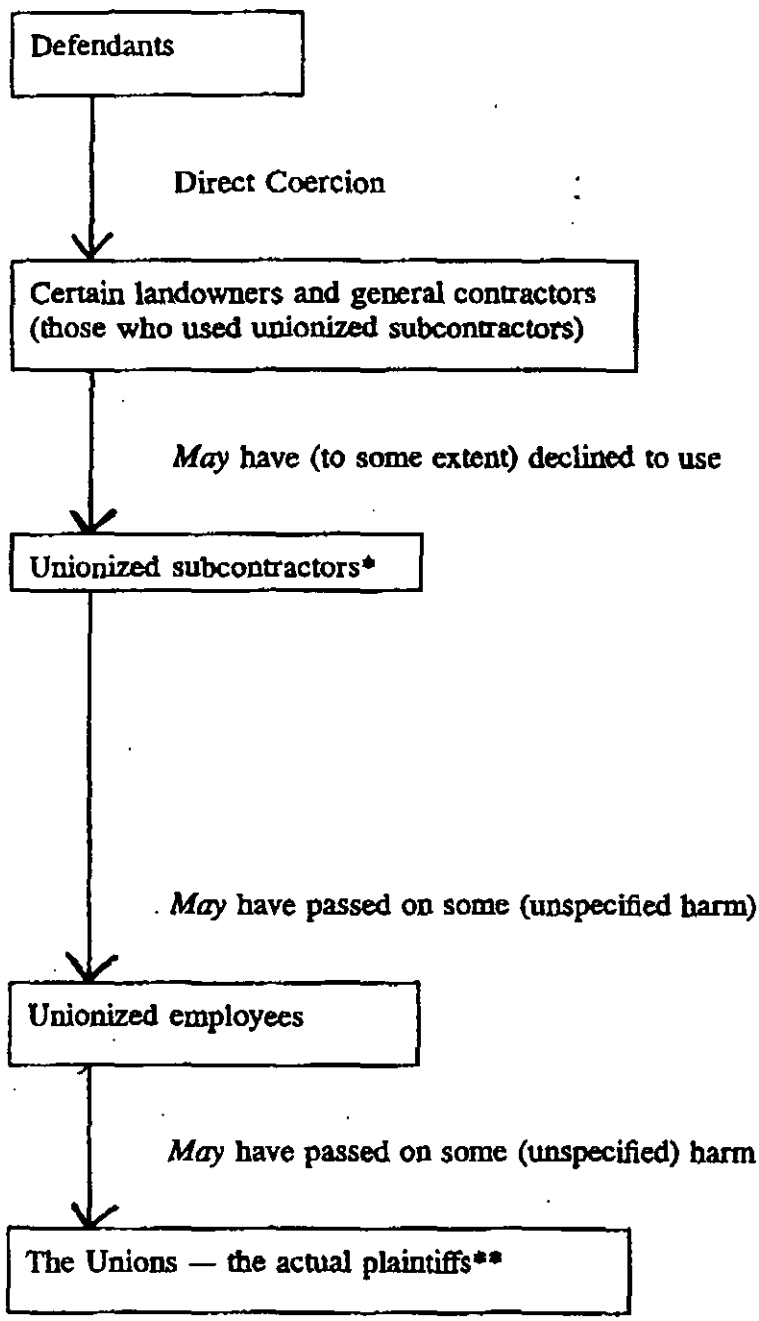
* Psychologist can sue for lost business, 457 U.S. at 483, but has no standing to sue for "injury arising to himself from his treatment of McCready" because "he has been fully paid." *Id.* at 475, 483. Likewise, here the smokers cannot sue because they did not pay medical bills.

** Patient has standing even though (a) not a direct purchaser, (b) not a competitor or consumer of defendants, (c) not a direct participant in the restrained insurance market, and (d) not intended target of the conspiracy. Like health funds here, patient is the one "out of pocket" for the medical bills, not her employer or the psychologist. *Id.*

Patient met all five factors: (1) Enough that harm "foreseeable" even if not intended, *id.* at 478-79, (2) causation not too speculative even though intervening employer could have changed insurers, *id.* at 475 n.11 & 480 n.17, (3) no difficulty apportioning to avoid duplicative damages since harm to patient distinct from harm to psychologists and employers, *id.* at 475, 483, (4) no more direct party cannot sue for these damages since only patient paid bills, *id.*, (5) harm flows from anticompetitive aspect of defendants' conduct and is "inextricably intertwined" with the injury the conspirators sought to inflict in the psychotherapy market. *Id.* at 483-84.

CHART 4

ASSOCIATED GENERAL CONTRACTORS, 459 U.S. 519 (1983)

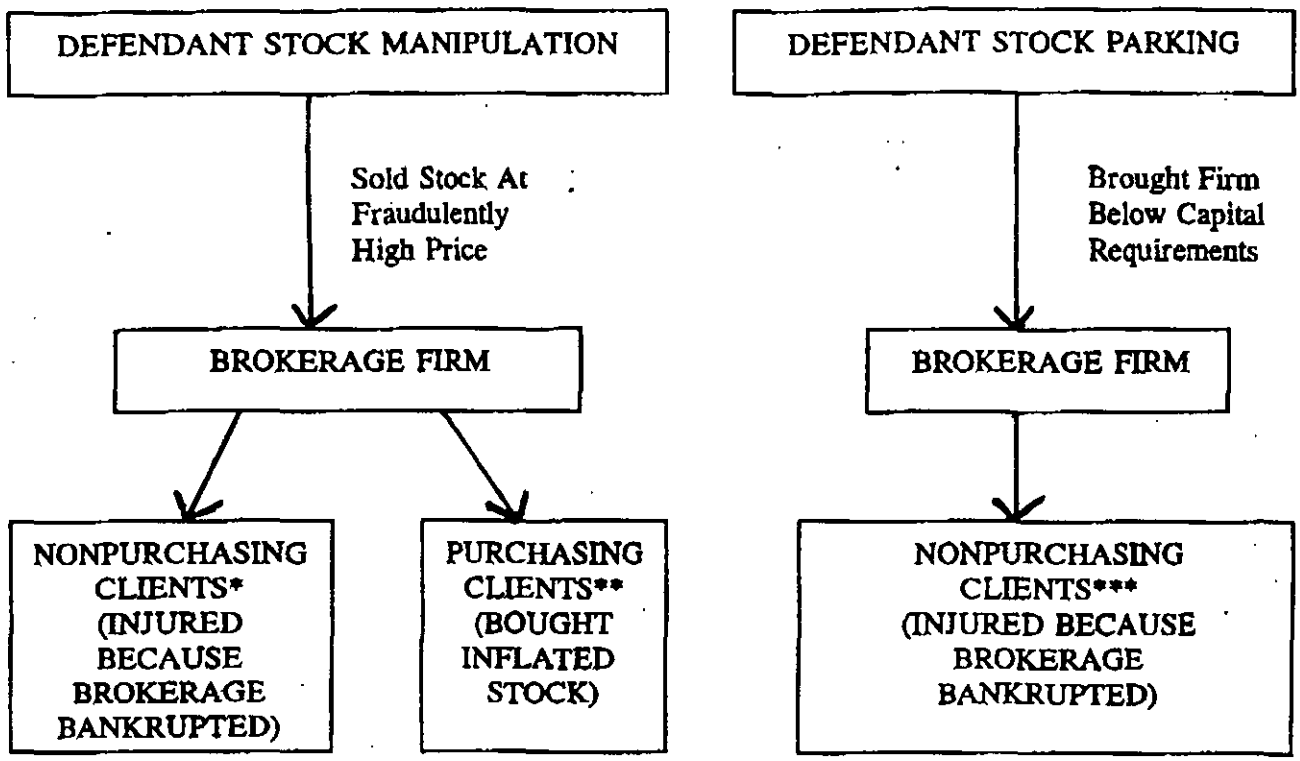


* *Would* have standing, 459 U.S. at 541-42, even though (1) their injury is indirect; and (2) they are not competitors or consumers of defendants, nor direct participants in the restrained market. Why? Harm foreseeable and intended, causation not speculative, and harm flows from anticompetitive aspect of defendants' conduct. Can thus sue even though factors 3 & 4 would not be met.

** Far more indirect and speculative a causal chain than in our case, rife with possibilities for duplicative damages, hard to apportion damages, and more direct plaintiffs.

CHART ● 5

HOLMES V. SIPC, 503 U.S. 258 (1992)



(Court assumed plaintiff SIPC stood in the shoes of all the brokerage clients. 503 U.S. at 271).

* No proximate cause or standing. Based on application of 3 *Holmes* policy factors, not formalistic definition of "directness." *Holmes*, 503 U.S. at 272 n.20.

** Can show proximate cause and standing. *Holmes*, 503 U.S. at 272 n.19 (first paragraph) (citing *Ashland*, 875 F.2d at 1280; *Bankers Trust*, 859 F.2d at 1100-1101). Although the cigarette makers' logic would call their injury "indirect," their injury is clearly foreseeable and 3 *Holmes* factors are met.

*** Can show proximate cause and standing. *Holmes*, 503 U.S. at 272 n.19 (second paragraph) (citing *Taffet*, 930 F.2d at 856-57; *County of Suffolk*, 907 F.2d at 1311-12). Although the cigarette makers' logic would call their injury "indirect," their injury is clearly foreseeable from the evasion of capital requirements, and the 3 *Holmes* factors are met.

The cigarette makers' logic would indicate all three plaintiffs' claims were indirect and thus lack standing. But, in fact, *2 out of 3 "indirect" plaintiffs do have standing.*

CHART 6

FACTORS AS APPLIED TO CLAIMS DEEMED "INDIRECT" IN OUR CASE

(Claims Deemed "Direct" *Automatically* Satisfy Proximate Cause Without Looking at Factors. *See Nunan v. Bennett*, 184 Ky. 591, 212 S.W. 570 (1919))

FACTOR	HOW MET HERE
1. Harm Intended Or Foreseeable. (Only element required at common law.)	Clearly alleged. This "should" 'ordinarily be dispositive' in creating standing" in antitrust. *ACG*, 459 U.S. at 537 n.35.
2. Indirectness Does Not Make the Casual Inquiry Unduly Difficult and Speculative. (Inapplicable to injunctive claims. *Cargill*, 479 U.S. at 111 n.6.)	(1) Complications defendants cite equally applicable to suits brought by smokers. (2) Causal proof actually *less* complicated and *less* speculative here because statistical proof of cigarette effects more manageable and more accurate than individuated proof.
3. Allowing Suit by Indirect Party Does Not Require Complicated Apportionment to Avoid Duplicative Damages. (Inapplicable to injunctive claims. *Cargill*, 479 U.S. at 111 n.6.)	(1) Medical bills paid directly by funds, not smokers, thus only funds can sue. *Blue Cross*, 65 F.3d at 1414; *Steele*, 36 F.3d at 70; *McCready*, 457 U.S. at 475. (2) Under RICO and antitrust, (a) smokers could never sue for medical bills because individuals cannot sue for monetary damages flowing from their *own* physical injury, but (b) funds can sue because entities can recover for monetary damages flowing from physical injury to *other* persons. *Scheidler*, 510 U.S. at 253-56; *Kubecka*, 898 F. Supp. at 969.
4. No More Direct Party Could Bring Suit. (Inapplicable to injunctive claims. *Cargill*, 479 U.S. at 111 n.6.)	No one else could sue for these medical bills. Indeed, defendants' remoteness logic would also bar any suit brought by governments or insurers who paid medical bills, thus giving defendants a complete safe harbor for their deception and conspiracy.
5. Antitrust Injury Exists. (Inapplicable to non-antitrust claims. *Holmes*, 503 U.S. at 269 n.15.)	Met because can trace funds' injury to anticompetitive aspects of conspiracy. Plaintiff need not be a direct market participant if injury is "inextricably intertwined" with those who are. *Bodie-Rickett*, 957 F.2d at 291; *Fallis*, 866 F.2d at 211; *Province*, 787 F.2d at 1052; *Southaven*, 715 F.2d at 1086. (All 6th Cir. cases relying on *McCready*). Injury is "inextricably intertwined" if plaintiff pays the medical bills resulting from a conspiracy. *McCready*, 457 U.S. at 483-84.

CHART 7.
HOW FACTORS DIFFER BETWEEN OUR CASE AND ORDINARY CASE WHERE INSURERS MIGHT TRY TO DIRECTLY SUE TORTFEASOR

FACTOR	HOW NOT MET IN ORDINARY INSURER CASE
1. Harm Intended Or Foreseeable?	Generally tortfeasors intend to harm their victims and are not thinking about insurers. Thus, do not intend or foresee harm to insurers. Here cigarette makers engaged in calculated and deliberate plot to shift costs.
2. Indirectness Makes the Casual Inquiry Unduly Difficult and Speculative?	Generally tortfeasors cause individual harm that the insurer cannot claim to be able to prove more easily and accurately than the individual. Here statistical proof of cigarette effects more manageable and more accurate than individuated proof.
3. Allowing Suit by Indirect Party Requires Complicated Apportionment to Avoid Duplicative Damages?	Generally there would be apportionment or duplication because the tortfeasor can be sued directly by the insured. But here smokers cannot sue directly because did not pay medical bills and because suits for personal injury are precluded under RICO and antitrust.
4. Could More Direct Party Bring Suit?	Generally the tortfeasor can be sued directly by the insured. But here smokers cannot sue directly because did not pay medical bills and because suits for personal injury are precluded under RICO and antitrust.
5. Antitrust Injury?	Generally does not come up because it is extremely rare for firms to conspire to fix product quality at unsafe levels. Here the cigarette makers have done precisely that.

Tob - set - medicare suit

cc: Bruce

TOBACCO

Why The Feds Won't Rain On The Industry's Victory Parade. Outperforms MO, RN, UST

Gary Black (212) 756-4197
Jon Rooney (212) 756-4504

August 26, 1998

TOBACCO

Stock	Rating	Price	Earnings									
S&P 500		1,091	13	45.35	48.00	50.75	24.1	22.7	100	100	7%	–	1.5%

HIGHLIGHTS

1. We remain skeptical that the federal government will bring a federal action to recover money spent on tobacco-related injuries (Medicare recovery statute is ambiguous; claim would have to be filed in federal court; long paper trail showing government's awareness of tobacco's dangers). More likely, a federal claim is being pitched by plaintiff counsel as a potential settlement vehicle by which the industry would get additional legal protections, but have to concede FDA jurisdiction, marketing restrictions, and additional money to keep the feds from going after the states' settlement winnings — all to facilitate approval of the AG deal.
2. Settlement negotiations between the industry and the attorneys general will resume today in New York, after a 3-week hiatus. We expect a new settlement in the $180 - $200 billion range for the remaining 46 states to be announced before the Washington state trial begins (September 21). We believe at least 40 of the remaining 46 states will embrace the new agreement. We believe the AGs will increasingly view this deal as the first step in a two-step process — state settlement now; federal settlement next year.
3. We believe the industry has reached some agreement amongst themselves on the renegade issue, and will accept a provision that aligns the states' interests with the industry's on pricing (states' payments drop if renegade share goes above certain level; AGs will go after retailers who carry non-signatory product). Despite a widening price gap, private label share has plummeted -- 4.25% in June, vs. 4.81% a year ago, and vs. 7.0% three years ago. Non-"Big 4" share of the discount category is just 4.8% -- unchanged vs. three years ago. The disappearance of private label reflects trade programs put in place after Marlboro-Friday.
4. We expect the industry to give little ground on marketing restrictions, rejecting demands by the AGs that the industry concede human images in their ads. On the other hand, we see the industry agreeing to eliminate cartoons in ads as well as brand sponsorships — both which would represent high-profile political victories for the AGs. To date, the industry has conceded what it gave in Minnesota -- billboards, branded merchandise, and movie product placements. The industry likely wants to hold back many June 20 marketing provisions (in-store ads, continuity programs, magazine ads) for a possible national accord next year.
5. The Engle Phase I trial is now unlikely to begin before October 1, and will last through year-end. Jury selection continues at a snail's pace: Some 70 jurors have now been picked for the 120-person jury pool, from which 6 jurors and 10 alternates will be selected. Problems in picking jurors: Many don't speak English; _ are members of the potential class (currently addicted or have

injuries caused by smoking). By the time Phase I is completed, we should have two more favorable rulings on class actions out of the Maryland and Louisiana highest courts. We expect the Florida Supreme Court to decertify the Engle class next Spring.

6. The biggest risk to the stocks is not that there won't be a deal, but that any deal struck may not be embraced by the requisite 40 or so states necessary for the industry to opt into the deal. We believe that prospects for a new federal Medicare lawsuit can be used to persuade holdout AGs to take the current AG deal with its limited marketing and regulatory provisions, and wait for the federal action next year to secure the much stronger marketing and regulatory provisions that would be attached to a federal deal.
7. We see almost no chance that the plaintiff counsels who represent various Blue Cross/Blue Shield organizations will succeed in their efforts to block BAT's separation of tobacco and insurance as a fraudulent conveyance. For one, tort claims against BAT (the parent of B&W) have routinely been dismissed; two, there is no evidence that B&W (the sub) will have any trouble paying its current and unmatured obligations, given only one loss at trial, and B&W's ability to raise prices to pay off new judgments.
8. We reiterate outperform ratings on Philip Morris, RJR, and UST.

ADDITIONAL DETAILS

1. **Will Feds rain on industry's victory parade?** We spent some time talking with people on the plaintiffs' side familiar with Richard Scruggs' attempts to get the U.S. government to file a federal Medicare recovery action for what could total $500 billion over 25 years. Many on the plaintiffs' side view a federal suit as a settlement vehicle through which to secure the marketing, regulatory, and public health provisions in the June 20 accord that are not possible with a state-only settlement -- without needing Congress' approval. The industry, of course, would have to agree to such a settlement. Under this plan, the industry would get protections against potential federal claims, and against judgments from class actions, consolidations, and punitive damages in personal injury cases, which could be structured as offsets against the federal payments. Prospects for a new federal settlement might presumably persuade holdout AGs to sign a new state-only settlement that many view as not tough enough — as a sort of first step in a two-step settlement process where FDA jurisdiction, tougher marketing restrictions, and a steeper price increase (an additional $.35 - $.40/pack, on top of the $.35 - $.40/pack increase needed to fund a state-only settlement) would come in at the federal level. A new federal settlement would also allay fears that the federal government will move to recover its share of the states' settlement proceeds under the Health Care Financing Act (HCFA). Under HCFA, the federal government is required to take from the states its share of Medicaid money recouped by the state. On average, the federal government's take is 60%.

   According to plaintiff sources, the potential federal action, which would have to be filed in federal court and most likely in the DC circuit, could be settled for the same $170 billion or so that the feds were to get under the June 20 accord. The settlement would be structured as a consent decree with the Department of Justice (DOJ): DOJ acts as the lawyer for all agencies within the executive branch of government (i.e., the Administration), and which includes the FDA. The federal settlement could be structured as an add-on to the state-only settlement, or as a vehicle that encompasses the state-only settlement. As part of the federal settlement, the manufacturers who agree to sign the deal would drop their lawsuits against the FDA (now on appeal to the 4th Circuit) and sign consent decrees agreeing to the remaining marketing restrictions found in the FDA agreement or in the June 20 accord. In return, the federal settlement would specify that payments to the federal government would be offset by payments for judgments paid by the industry for class actions and consolidations, as well as for punitive damages awarded in individual suits. There could also be a renegade provision whereby signatories to the deal, by virtue of their consents to the terms of the FDA provisions, would be deemed in compliance with the FDA regulations, whereas any manufacturer that did not consent to the deal (i.e., did not agree to the FDA provisions), or who tried to enter the market after the consent decree was signed, would have to prove to the FDA that their products were safe and effective — which would be difficult under the FDA Rule promulgated in August 1996. Plaintiff counsel Scruggs has said publicly that he

would try to assemble a super tag team of plaintiff lawyers to bring a federal action, which might alleviate another concern we have had — that the Castano counsel, having bet on the wrong horse in pursuing class actions rather than Medicaid suits, would get paid off and presumably go away. Frankly, however, we cannot see why the U.S. Attorney General's office would hire outside counsel if it were thought there would be a quick settlement.

A new federal settlement, in combination with the state-only settlement, would effectively give the industry -- on paper at least — the legal protections from the June 20 accord, without requiring a single vote by Congress.. If the agreement could be structured in such a way to withstand legal challenges by the smaller players — once the "Big 4" withdraw their FDA suits, the renegades would presumably bring their own claims to block the FDA from asserting jurisdiction over tobacco — the signatories would no longer face potentially bankrupting events, since state actions (which would allow an offset for local government judgments), and potential federal actions (with offsets for class actions, consolidations, and punitive damages for individual claims) would be included. One risk would lie in the federal offset provision, since class action judgments, in theory, could exceed federal payments. We believe that DOJ cannot, unless it has congressional approval, pay off these claims that exceed the federal payments. Because the courts, by and large, have consistently denied class action treatment in all personal injury cases, including tobacco class actions, the odds of judgments exceeding payments to the federal government is very low.

For this year at least, we believe there is little chance that the federal government will bring a federal Medicare action — and even less chance that the industry would cut a deal with the federal government to settle a federal Medicare action. Our sources within the Administration say that there is limited interest in bringing a Medicare recovery claim against the tobacco industry now, on the heels of high-profile tobacco losses in the EPA and FDA cases. Our discussions with the industry suggest there is deep-seated mistrust for anything that involves this Administration, given the double-cross on the June 20 accord. Moreover, there is no interest by the industry in paying $170 billion to the federal government, when class action protection has already been effectively granted by the federal courts, and with the state courts more or less in line. We believe that renegade provisions that deem signatories to a deal as being in compliance with FDA regulations, and those who don't sign as being not in compliance, would fail in court. One obvious remedy by which to get the small players to comply with a federal agreement is to structure the settlement payments as excise taxes, but this would require an act of Congress — a road the industry certainly has no interest in traveling. So while we see some merits in a federal lawsuit as a settlement vehicle — particularly one that could persuade hard-core AGs to embrace the AG settlement now pending -- we cannot, obviously, endorse the concept of a federal lawsuit that could derail the industry's efforts to separate tobacco from non-tobacco interests. Ultimately, we doubt this Administration would bring an action for recovery of federal moneys associated with tobacco unless there were clear indications that the industry would embrace such an action as a settlement vehicle — which we just don't see happening at this time.

****
Go To: Tobacco BBS HomePage / Resources Page / Health Page / Documents Page / Culture Page / Activism Page
****

END OF DOCUMENT

8/28 Cole/Scruggs mtg

Tob-medicare suits
ST

what cos. said consent decree won't give them:

- renegade provision
- civil liability
- fed/state division

FDA -
even if others bring suit, so what?
they've agreed!
of course, renegade cos. wouldn't
be regulated in this way —
This exacerbates the renegade problem.

nothing flies unless this bill passes

statute: post bond - exceeds amt of annual payment
all cig manuf must
exception: for those operating
under cons. decree

John Cole - wrap in national class action settlement.
Scruggs - makes it too complicated.

Tob - state settlements
and
Tob - medicare suits

Bruce N. Reed
08/11/98 10:58:34 AM

Record Type: Record

To: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP

cc:
Subject: blablabla

"Say goodbye to tobacco.... It's gone." Rep. John Linder, National Republican Congressional Committee Chairman, before House adjourned Friday

HIGHLIGHTS

1. We believe the current tobacco environment is similar to 1986-87, when sentiment turned dramatically as the 2nd tobacco litigation wave collapsed. From 12/85 to 9/87, Philip Morris' relative multiple soared from 55% to 90%, as a wave of favorable appellate rulings convinced investors that bankruptcy risks were way overdiscounted, and Philip Morris' stock price tripled (S&P +70%).

2. Our discussion with senior executives suggests that the subpar investment performance of the group over the past 18 months is likely to compel all company boards to take more aggressive stances in accelerating earnings growth and unlocking values through buybacks, dividend hikes, and asset distributions. This is what happened between 1985-1990 (MO tripled earnings and dividends). After an 18-month absence, Loews (LTR) has now resumed its buyback program, despite the Tischs' bearishness on the market.
3. On Friday, the House joined the Senate in recess until Labor Day, and Republican leaders conceded officially there would be no tobacco legislation passed this year. With a $.10/pack excise tax increase passed last September now scheduled to go into effect in 2000, and another $.05/pack hike due to begin 2002, we believe it will be at least a few years before Congress attempts to tackle tobacco again, given the tortured and exhaustive process the McCain bill was put through before it was finally killed this summer.
4. We expect a new settlement between the industry and the 46 attorneys general who have not settled by Labor Day. We expect the industry, having taken off a week to assess the renegade provisions (what to do about manufacturers who don't join the deal) will have concluded that the renegade provisions on the table -- states vow to bring claims against manufacturers and retailers who don't comply; states' payments, already volume adjusted, fall further if renegade share increases -- are sufficient. We perceive that Philip Morris and most large wholesalers believe the renegade problem is better dealt with by beefing up trade programs.
5. Expected decertifications of state class actions by the highest courts in Maryland (any day) and Louisiana (this Fall) are the likely catalysts that will convince investors that the Engle class action, which begins after Labor Day in West Palm Beach, FL and will last three months, will also be decertified by the Florida Supreme Court, in early-1999. In the history of mass tort personal injury actions, we find no record of any multi-phase trial ever reaching the individual stage (defendants settled or class was decertified).
6. We expect the Florida trial court that heard Widdick, or the same 1st Circuit appellate court that overturned Carter, to throw out the Widdick (aka Maddox) verdict under the same reasoning (preemption, 1963 B&W evidence not appropriate, documents should have been protected under attorney-client privilege). This would erase the one remaining loss on the

industry's unblemished record at trial, and further dissuade potential plaintiff attorneys from pursuing individual claims.

7. Risk #1: If there is no state-only settlement, we see 5% downside. The Washington Medicaid trial begins October 14. The judge has dismissed all but three claims -- conspiracy, anti-trust, and violation of Washington's Consumer Protection Act (CPA). While the latter permits only injunctive relief, anti-trust violations and conspiracy combined with CPA would permit money damages. The judge has ruled that the industry can introduce evidence that the state collected more in excise taxes than it claims in damages.
8. Risk #2: If the Administration files its own Medicare/Medicaid recovery action to get the industry to cough up money for the federal government and accept FDA jurisdiction, we could see 5% downside as investors worry that this new action might trigger fraudulent conveyance claims. Any federal claim, however, would have to be filed in federal court (have dismissed 5 of 5 labor union / health care claims). The federal government, unlike the states, shows a clear paper trail of knowledge of tobacco's risks.
9. We reiterate our outperform ratings on Philip Morris (price target $60), RJR Nabisco ($40), and UST ($40).

Tob-re-medicare suits

Bruce—
FYI.
Elena

As it happened, John Spenkelink never got a new trial and was executed in 1978.

While Kendall's current client does not face the death penalty, the lawyer's challenge in preparing Clinton for his historic grand jury testimony Monday is to spare the president from potential political demise.

Two sources have told the Los Angeles Times that Kendall, along with Robert S. Bennett, the president's lawyer in the Paula Corbin Jones' sexual harassment lawsuit, has advised Clinton that repeating his flat denial of a relationship with Monica S. Lewinsky could be fraught with peril.

Their fear, according to these sources, is that Clinton's testimony could give independent counsel Kenneth W. Starr evidence of grand jury perjury, which would be stronger legal grounds for impeachment than lying in a civil lawsuit.

Kendall and Bennett have told associates that, while they are uncertain of the truth of the matter, they would give the same warning against answering specific questions under oath to any other client who is the target of a federal prosecutor on grounds that the prosecutor may try to trip them up. Both declined to comment on their positions or advice.

No outsiders are privy to Clinton's briefing sessions, which are mainly handled by Kendall and an associate, Nicole K. Seligman. Mickey Kantor, the private attorney, former Commerce secretary and ex-campaign official who continues to advise the president, and first lady Hillary Rodham Clinton, also attends most of the sessions and contribute ideas.

``It's very much a work in process," one source said of the briefings and the president's testimony plan. In addition, the fact that Hollywood producer Harry Thomason, a longtime Clinton friend, has remained in Washington following his own grand jury appearance Tuesday could indicate that Clinton may be considering making a public statement.

After several hours with his lawyers Saturday, Clinton, in shorts and sneakers, stretched his legs with a jog on the South Lawn and tossed a ball for his dog, Buddy.

``Prepping your client is extremely important if he's a critical player in an investigation, as President Clinton is," remarked Randall J. Turk, who has represented many political figures.

But Turk and others said that political figures often can be difficult clients to manage, preferring to walk into the teeth of a grand jury session out of fear that refusing to testify could harm their public careers.

Kendall presumably is reviewing with the president all of his previous statements as well as what Kendall has learned about the previous grand jury testimony of Secret Service witnesses; Betty Currie, his personal secretary; and longtime friend Vernon E. Jordan, according to other lawyers.

Currie and Lewinsky are said to have testified that Lewinsky made about three dozen visits to the White House after she was transferred to a Pentagon job in April 1996, and that she returned gifts she had received from the president to Currie after learning that Jones' lawyers planned to subpoena them.

``In briefing the president, you would ask him, `How do you intend to explain those visits as well as Lewinsky's return of the gifts?' " one former Justice Department official speculated.

``Then, Kendall might say, `Well, that's an explanation. But you might want to phrase it a little differently while keeping the same thought.' You would always insist that your client tell the truth and not get hung up on a perjury charge," the ex-official added.

Turk noted that ``to avoid your client being surprised by prosecutors, you want to collect all the documents and facts that you can, show them to your witness and ask probing questions in anticipation of the kinds of tough questions the prosecutors are going to ask."

Myles H. Malman, a former Miami federal prosecutor who helped convict Panamanian dictator Manuel A. Noriega of racketeering, drug trafficking and money laundering, recommends ``going over everything the president has said publicly" or in the Jones case, including his finger-wagging statement that he ``did not have sexual relations with that woman, Ms. Lewinsky" and ``never told anyone to lie."

In addition to having access to a transcript of the president's deposition in the Jones case, which has been dismissed, Kendall has sought and obtained permission from a federal judge to view a videotape of that Jan. 17 session.

Government May Attack Tobacco Companies Via Medicare (Washn) By Alissa J. Rubin and Myron Levin (c) 1998, Los Angeles Times

WASHINGTON The White House, frustrated by the collapse of anti-smoking legislation, is giving increasingly serious consideration to a strategy aimed at extracting massive monetary damages from cigarette makers by filing a lawsuit on behalf of the government's Medicare program.

Top White House officials are said to be eager to go forward with a Medicare lawsuit if they can overcome concerns among some administration attorneys, primarily within the Justice Department, about its chances for success, according to lawyers close to the discussions.

The suit would attempt to recover from the nation's five major tobacco companies the accumulated cost borne by taxpayers to treat people with smoking-related diseases under Medicare, which covers the medical expenses of more than 35 million Americans aged 65 and older.

Sources close to the discussions said the suit could seek damages of nearly $1 trillion.

The lawsuit would represent a major shift in strategy in the battle over tobacco industry liability. It would be designed to increase pressure on cigarette companies to come back to the bargaining table and work out a settlement with the administration and Congress.

The Medicare suit would dwarf pending lawsuits filed by 40 states to recover costs under Medicaid, the joint state-federal health insurance program for the poor and disabled.

For the time being, administration officials are being circumspect about the discussions, noting that a final decision is not expected for several weeks. ``Justice and Health and Human Services are still reviewing it," said one White House official. ``It requires full legal analysis. They haven't reached closure yet."

A tobacco industry spokesman said Saturday he had not been aware of the discussions within the administration, but predicted ``the government would have great difficulty in mounting such a case." He cited, among other things, the large amount of excise taxes Washington has collected over the years from cigarette sales.

The spokesman, who requested anonymity, said the discussion of a Medicare lawsuit sounds like an effort by the administration ``to find a way to cover their own failures of leadership in this matter by trying to come up with a political and public relations gesture."

The lawsuit is being promoted, among others, by Mississippi Attorney General Mike Moore and plaintiffs' attorney Richard Scruggs. Moore and Scruggs were the first lawyers to test the idea of suing cigarette makers to recover medical costs to states.

Scruggs went on to represent a number of state attorneys general in similar suits and it was the collective impact of those suits that brought the tobacco industry to the bargaining table last year.

Scruggs and Moore want to assemble a team of top attorneys to handle the Medicare case for the federal government. The Mississippi lawyers argue that the threat of having to defend potentially ruinous lawsuits is the only way to get cigarette makers to accept a comprehensive package of marketing restrictions and other measures to reduce underage smoking.

Their argument received a potential boost on Friday, when a federal appeals court ruled that the Food and Drug Administration has no authority to regulate nicotine nor restrict marketing targeted at youths.

Another supporter of such a lawsuit is constitutional law scholar Laurence Tribe, who has looked closely at the legal issues involved at the request of officials in Washington.

The idea of filing a Medicare recovery lawsuit was considered more than a year ago by the Justice Department. The idea eventually was rejected, in part because Justice attorneys were concerned that the government lacked the legal standing to bring such a suit.

Ever since the collapse of congressional efforts to regulate tobacco, however, the White House has been searching for other ways to push its anti-tobacco agenda. About a month ago, White House officials asked several agencies to take another look at the viability of filing a lawsuit against the tobacco industry.

``They are looking for a way to do it," said one attorney. ``But they've got some nervous nellies in the Justice Department that don't think the Medical Recovery Act permits this kind of lawsuit."

White House officials recently began passing along to the Justice Department legal arguments prepared by private attorneys who dispute the department's analysis of the suit's legal prospects.

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Einer Elhauge

Foul Smoke

The conventional wisdom is that those who favor free markets should disfavor the current multi-billion dollar tobacco litigation. The conventional wisdom is wrong. For lost in the welter of news articles is the fact that plaintiffs in many of the tobacco cases allege an antitrust conspiracy that, if proven, means the current state of the cigarette market resulted not from a free market, but from a fundamental and devious interference with the free market.

There are two product features sellers can conspire about: price and quality. Most antitrust conspiracies are about price. But conspiracies about quality are also covered by antitrust law. This is because we are entitled to both the product price and quality that would be produced by markets unhampered by anticompetitive seller conspiracies.

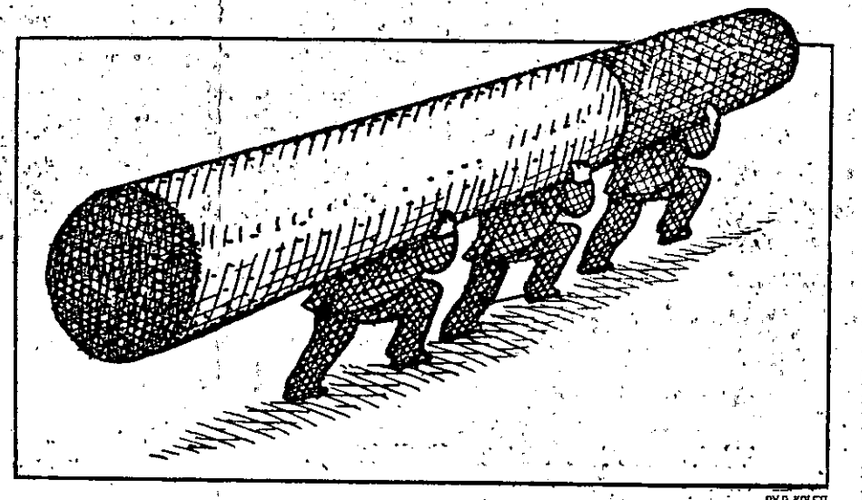
The tobacco litigation alleges a conspiracy to fix product quality. Specifically, it alleges that for decades cigarette manufacturers have agreed among themselves not to compete on product safety. This agreement allegedly included both an agreement not to independently market safer tobacco products and an agreement to withhold product safety information. Obviously, these two parts of the alleged conspiracy are linked: If a firm cannot advertise the relative safety of its cigarettes, there is not much point in it investing money to make safer cigarettes.

Why might manufacturers ever agree to fix cigarette quality in this way? For the same reason firms sometimes agree to fix prices: to prevent individual firms from pursuing their individual interest in expanding market share by engaging in costly competition. To prevent them, in short, from competing by raising quality, just as price-fixing prevents them from competing by lowering price.

Either price or quality competition can, after all, eat away industry profits. Remember the airline industry before deregulation. The government set prices at high levels. But because airline quality was not completely regulated, airlines tended to engage in costly quality competition. They offered better meals and more frequent flights with more empty seats. In the end, such quality competition ate away all the profits from the excessively high prices.

Obviously, one does not enter into agreements expecting them to have no effect. Thus, if this conspiracy is proven, the cigarette manufacturers themselves must have thought that without their agreement individual cigarette producers would have made safer cigarettes in an effort to expand their individual market share. Further, if individual cigarette makers had sold safer cigarettes, they would have also had an incentive to advertise the true harm of their rivals' cigarettes.

And, indeed, the complaints in the tobacco litigation recount evidence that some individual cigarette makers did in fact develop safer cigarettes, but refrained from selling them because of this antitrust conspiracy. Instead, cigarette makers held these less carcinogenic cigarettes off the market, keeping them in reserve to retaliate in case other manufacturers breached the conspiracy by competing on product safety. Likewise, the complaints recount evidence that cigarette makers developed valuable product information on cigarette safety, but withheld it from the market.



BY P. KOLSTI,

The social tragedy is that without this conspiracy the free market might have produced what government regulation has so far been unable to provide: better information, fewer smokers and safer cigarettes. Instead, the cigarette industry has been one of the few industries to show no improvement in product safety for decades.

Compare the cigarette industry to, say, the car industry. Automobile firms vigorously compete on safety features, and advertising about safety differences is ubiquitous. Volvo talks endlessly about the strength of its doors in side collisions. Mercedes used to brag about its anti-lock brakes before they became an industry standard.

There is nothing comparable in the cigarette industry. True, cigarette makers have marketed cigarettes that are filtered, low tar and low nicotine. But they have never advertised these cigarettes as less carcinogenic or less addictive, such advertising being allegedly foreclosed by both the conspiracy and the true facts. For the complaints recount evidence that clever product design in fact made filtered, low-tar and low-nicotine cigarettes more dangerous and addictive than regular cigarettes, meaning their introduction was not genuine competition on product safety at all.

Note that these antitrust claims are not vulnerable to the cigarette makers' favorite defense: that everyone knows cigarettes are carcinogenic and assumed the risk by smoking them. Even if this were true (and much information was distorted or withheld), what antitrust entitles us to is not just the right to make price-quality trade-offs when buying but the right to have the ideal price-quality trade-offs available to us through competition. Just as it would be no defense to a price-fixing conspiracy that buyers know they are paying too much, so too it is no defense to a quality-fixing conspiracy that buyers know the quality is too low.

After all, if automakers conspired to make no car safer than a Yugo, they could not defend themselves by saying that buyers know that cars in general (or Yugos in particular) are unsafe and must regard such risks as outweighed by the benefits of driving. For the conspiracy would be taking away from us the right to choose the safer cars that competition would produce. Likewise, smokers are entitled not to be saddled with a restrained market where all they can buy are Yugo cigarettes.

Such short-circuiting of the competitive process is precisely what antitrust law is meant to redress. And just what adherents of the free market should vigorously oppose.

The writer is a professor at Harvard Law School and counsel for health fund plaintiffs in tobacco cases in several states.

ToS - medicare recr

DATE: 8-18-98

PAGE: 5-A

USA TODAY

TOBACCO LAWSUIT: The Clinton administration is considering suing major tobacco companies to recover costs of treating sick smokers in federal programs such as Medicare. The Medical Care Recovery Act allows the government to recover costs of treating people if a third party's negligence caused the illness. Some Justice Department lawyers see problems with that approach, but there also is talk of seeking legislation to explicitly allow such a suit. Some states won settlements from tobacco companies and pushed the industry into a global settlement, but it fell apart in Congress.

Some in the administration say the companies might be pressured back into negotiations under the threat of a federal lawsuit that could seek tens of billions of dollars for smokers covered under Medicare or insurance programs for federal workers, veterans and military personnel.

Tob - 8cT -
medicare suits

July 28 Ogden/Perelli

"tort-like" state statutes? fed this in anything else? fed part ca assn?

① Purely equitable Theories - restitution/unjust enrichment/indemnity
not a tort of law either way. Prob not fed law → ST law.
seems dubious where law/eq merge - really just a view
maybe in states that have sep law/equity - Then
exist separately.

② Nuisance - "We don't bring them"
often equitable remedies - abatement
where there's $ damages, not much

③ Parens patriae??
Words are nice, but doesn't translate into damages.

④ Quasi-sov capacity -
8Ct cases w/ states bringing such cases;
all w/ injunc reme that we found.

⑤ Civil RICO - fed dist ct in CA. → ~~recent~~ threw out claim.
FL 8th ct. also considered - kept claim in.
problems: some cases say "STs can't recover"
but not particularly analogous
predicate acts: mail/wire fraud injury to business/property

MCRA/MST - Haven't looked further.
stat evidence

Std Oil - Unless dmg passes,
partic where dealing w/ fed benefits prog.
- novel theories? caselaw doesn't grab on.
- Caselaw does grab on to involvement of military.

Antitrust - conspir to prevent making of safer cigarette
but to ↑s nicotine addict-

IL Brief: have to be immed victim.

Minn - survived bec they have ↓ rule

Md - survived (SJ)

Fx - both threw out.

Negligence ??

Fraud ?? -

Point how did their misrep affect pub policy?

Assump of Special Duty.

Undertaking to research whether smoking is dang.

survived in Ch, but in way that made it impossible to win.

Tob-set - medicare suits

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Vuja De -- Industry Moving Ahead With Plan B. Raising Estimates. Outperforms MO, RN, UST.

Gary Black (212) 756-4197
Jon Rooney (212) 756-4504

July 14, 1998

TOBACCO

AGs Throw Ball Back To Congress –Which Doesn't Want It. Outperforms MO, RN, UST.

Stock	Rating	Price	YTD Perf	Earnings 1998E	Earnings 1999E	Earnings 2000E	P/E 1998E	P/E 1999E	Relative P/E 1998E	Relative P/E 1999E	'98-02 Growth	EV/ EBITA	Current Yield
MO	O	$40	(12)	$3.17	$3.50	$4.00	12.6	11.4	49	47	13%	7.5	4.0%
Cash EPS				$.62	$.75	$.85	11.7	10.7	45	44			
RN	O	23	(33)	$2.30	$2.70	$2.85	10.0	9.3	39	38	9%	6.4	8.2%
Cash EPS				$.65	$.75	$.90	4.7	5.9	24	24			
UST	O	28	(25)	$2.53	$2.75	$3.00	11.1	10.2	43	42	9%	6.9	5.8%
S&P 500		1,178	21	45.75	48.70	51.25	25.7	24.3	100	100	7%	--	1.3%

HIGHLIGHTS

1. The attorneys general threw the tobacco ball back into Congress' lap yesterday, giving Congress one last chance to pass comprehensive tobacco legislation before the AGs proceed with their own state-only settlement with the industry. We continue put high odds on the two sides reaching an agreement by end of summer to settle the remaining 46 state cases for $200 billion.

2. Our Washington sources say the Administration is highly unlikely to file a Medicare recovery action against the tobacco industry. The federal government, unlike the states, cannot claim ignorance about the dangers of tobacco, having published at least a dozen surgeon generals reports since the first one in 1964, and requiring federal warning labels on packs since 1966. Any claim to recover Medicare expenditures must be filed in federal court, which has shown a penchant for tossing out these type claims.

3. We believe the real agenda for the Administration talking up a federal Medicare recovery action is to pressure the industry to agree to new legislation that gives the FDA jurisdiction over tobacco – which would dovetail with a state-only settlement of AG claims. This week, Senate Democrats will try to attach a bill calling for FDA jurisdiction over tobacco to one of the appropriations bills up for review. We believe Democrats will not get the 51 votes needed to give the FDA jurisdiction.

4. We still expect the House to pass a narrow youth tobacco/drug access bill, such as the one outlined by Deborah Pryce a few weeks back (strict retail access, limited FDA authority, fines on retailers who sell to minors, fines on teens who buy cigarettes illegally, no excise tax increase). The House is expected to take up the tobacco issue the week of 7/27. If the AGs and the industry reach a state-only agreement, Republicans are unlikely to pass any final tobacco bill this year (House-Senate conference next session)..

5. Washington AG Christine Gregoire indicated that the drop dead date for Congress to pass comprehensive tobacco legislation is September 14 -- the start of the Washington Medicaid trial. Judge Finkle will rule by next week on the defense's motion for summary judgment on the remaining three state claims. If these claims are dismissed, tobacco stocks could move up sharply.

6. We reiterate outperform ratings on Philip Morris, RJR, and UST.

ADDITIONAL DETAILS

1. **AGs still want Congress to act -- much to Republicans' dismay.** Our discussions with one attorney general who was at the five-hour tobacco meeting yesterday in Durango, CO, indicate there was strong agreement to move forward with a state only settlement -- if Congress failed to pass comprehensive tobacco legislation this year. The AG strategy, spelled out by lead negotiator Christine Gregoire (AG Washington state) in the press this morning, appears to be three-fold: 1) Keep the pressure on Congress to pass comprehensive legislation that follows the June 20 accord before Congress adjourns in October; 2) Allow the six AGs negotiating for the AGs to move forward with discussions to settle all remaining and unfiled AG claims; 3) Move forward with the states' individual litigation, in case neither of the two settlement options pans out.

   Our interpretation of this mixed message is that the vast majority of the AGs support the notion of a state-only deal -- but only once it becomes clear that Congress "cannot get the job done it was supposed to do" (Christine Gregoire). As Maryland AG Joe Curran put it, "[My] preference is for national legislation ... but if Congress doesn't do something, we will not just sit and wring our hands." One major concern expressed by the attorney general we talked to was that by announcing now that they favor a state-only settlement, the AGs remove the incentive for Republicans to pass any sort of tobacco legislation this year, given the political cover that such a state-only settlement generates (Logic -- If the teen smoking issue is already being addressed by the states, the federal government needn't do anything). The AGs clearly would prefer a national deal to a state-only deal, since the former would give the FDA jurisdiction over tobacco, penalize the industry if it failed to meet youth lookback targets, and impose tougher marketing restrictions than the states could get locally. Unfortunately, this is not the message Republicans want to hear, since it forces Republicans to do something on tobacco, rather than run out the clock. There are now just 7 weeks left in this session of Congress -- including just two for the Senate and three for the House before the August break.

   One other comment about the AG discussions: Money does not appear to be the main stumbling block, despite the reports in the media that the industry needs to cough up more cash. To settle the remaining 46 states, the Attorneys General "asking" price appears to be $196 billion -- putting the likely final settlement figure within the $180 - $200 billion range we talked about last week (cigarette prices would go up by about $.35/pack over five years). We doubt the upfront money (AGs want $15 - $20 billion) is as much an issue as made out to be, since upfront funds of $15 - $20 billion could be spread over five years, as it was in Minnesota, given the graduated nature of the ongoing payment stream, which ramped up from $4 billion in year 1 to $8 billion in Year 5 under the original terms of the June 20 accord. Amortizing $15 billion over five years ($6 - $7 in Year 1, $2 over next four years) means that the $.35/pack price hike would occur at once in Year 1, and stay level.

2. **Why the Administration won't file a national Medicare claim.** The Administration's comments that they are examining "in a very preliminary way" whether to file a claim against the industry for recovery of Medicare expenditures, appears to be a threat designed to get the industry to go along with new tentative legislation that gives the FDA clear jurisdiction over tobacco -- which the industry agreed to in the June 20 accord. White House staff indicated

yesterday that a suit to recover Medicare expenditures (Medicare is for those over 65 and for those disabled), which could total $12 billion per year (federal portion of state Medicaid smoking-related expenses is another $8 billion per year -- hence, the numbers quoted in the press of $20 billion per year), is one of several options under discussion. White House press secretary Mike McCurry made it clear yesterday that the Administration would not likely move forward with any such claim until after Congress adjourned (October 9) and until there was no chance for a comprehensive settlement.

In theory, the United States government can sue to recover Medicare expenses under 42 USC §2651. Cases interpreting that law have said that the United States has a direct action against the alleged tortfeasor and is therefore not subject to defenses that the tortfeasor might have used against the injured party. We believe 42 USC § 2651 appears provides a more clear-cut right for the United States to directly recover medical expenses from third parties, such as the tobacco companies, than the state laws provide for the recovery of their Medicaid expenses. However, for reasons we point out below, an economic recovery claim brought by the federal government would probably be more difficult to win in court than a state recovery action.

According to 42 USC § 2651, in any case where the U.S. furnishes medical care "under circumstances creating a tort liability upon some third person to pay damages, ...the United States shall have a right to recover from said third person the reasonable value of the care and treatment." The statute goes on to explain that the United States' right to recover shall be subrogated to any right or claim that the injured or diseased person has against the tortfeasor to the extent of the reasonable value of the care and treatment. This provision seems unclear, but the cases interpreting the statute clarify its meaning. Federal cases interpreting 42 USC § 2651 say the United States government has three ways for recovering medical and hospital care: (1) by subrogation; (2) by intervening or joining in any action brought by an injured person; and (3) by instituting such action itself or in conjunction with the injured person. Another case says: "In construing the Medical Care Recovery Act, the Courts have uniformly held that the United States is not merely subrogated to the injured party's claim, but has an independent cause of action under the Act." In that case, a woman suffered injuries while riding as a passenger in a car driven by her husband. Under the law of Arkansas, where the accident happened, a passenger cannot sue the driver of the car in which she was riding. But the United States was allowed to sue the husband because the court found that the United States was not subrogated to the wife's claim.

Other cases explain that when the United States pays a victim's medical expenses, the injured person is not entitled to recover the amount of those expenses from the tortfeasor -- only the United States has the right to recover that money. The purpose of 42 USC § 2651 was to prevent injured people from double recovery -- once from the government and once from the tortfeasor. One federal case focused on this issue, ultimately finding: "42 USC § 2651 is clear -- the Federal Medical Care Recovery Act gives the United States an absolute, direct right of action to recover the reasonable value of medical expenses provided by law to anyone injured through the tortious conduct of a third party."

We believe it will be far more difficult for the federal government than the states to succeed in their claims for recovery of expenses for tobacco injuries. Unlike the states, the federal government has a long paper trail of documents showing awareness to the dangers of tobacco (1964 Surgeon General's Report and every one since then; federal warnings labels on packs of cigarettes since 1966). Moreover, any claim filed by the Department of Justice on behalf of the federal government would have to be filed in federal court, which has demonstrated a penchant for tossing these type claims out. Yesterday, a fourth federal court, this time in Maryland, threw out a union health care recovery action brought against the tobacco industry, using the same logic as employed by federal judges in PA, CA, and FL, who had previously dismissed similar claims.

3. **What does Congress do now?** We keep hearing rumors that Senate Democrats will try to push

through a new piece of very narrow tobacco legislation that focuses exclusively on FDA jurisdiction over tobacco, and which would dovetail with the state-only settlement being contemplated between the industry and the AGs. The FDA legislation, which Democrats hope could be attached as an amendment to one of the appropriations bills now under review, would not call for any federal excise tax increase. Investors should recall that the technical maneuver used by Senate Majority Leader Lott to pull the McCain bill in June was a budgetary point of order – that the McCain bill violated the terms of last year's balanced budget agreement, and which then required 60 votes to overcome. An amendment such as the FDA provision, referred to as the Harkin amendment, would not be subject to a budget point of order. Yesterday, Senate Democrats tried again unsuccessfully to attach the "McCain II" bill (before amendments) to the Agriculture Appropriations bill, but were struck down (55-43 along party lines) after Republicans raised a budgetary point of order (43 votes in favor were 17 votes short of the 60 needed). If Democrats tried instead to amend an unrelated bill with the Harkin amendment giving the FDA jurisdiction over tobacco, Democrats would need 51 votes to pass it. Republicans could first file a motion to table the amendment – for which they would also need 51 votes.

Given the mixed message sent yesterday by the attorneys general (Congress should be given one last chance to pass a comprehensive bill before AGs strike a new accord with industry), the House appears to have no choice but to pass a focused tobacco youth access bill such as the one outlined by Deborah Pryce a few weeks back (strict retail access, limited FDA authority, fines on retailers who sell to minors, fines on teens who buy cigarettes illegally, no excise tax increase). The House is expected to consider the tobacco issue the week of 7/27 -- leaving little time before the House adjourns for its Summer recess (August 7 - September 7). The approved House bill would then be "held at the desk" of the Senate until the Senate returns from its Summer recess September 1. Absent a state-only agreement by the time the Senate returns, the Senate would likely approve a variation of the Pryce youth access bill by mid- to late-September, which would still give both House and Senate Republicans cover to say they did something about teen smoking. Our best guess is that the AGs and industry would then announce their state-only settlement toward the end of September, since, at that point, they will know there is no chance for a comprehensive settlement along the lines of the June 20 accord or Hatch-Feinstein bill. This state-only settlement would give Republicans additional cover to wait until the next session of Congress (i.e., House-Senate conference next year) to enact a final tobacco bill that clears both chambers.

Lead AG Christine Gregoire indicated yesterday that Congress' deadline for passing a comprehensive tobacco bill is September 14 -- the start of the Washington Medicaid trial. Investors should note that the judge in this case, Judge George Finkle, will issue a ruling by next week on the defense's motion for summary judgment on the remaining three claims. The judge had previously dismissed three other claims in November 1996. If any or all of these three remaining claims are tossed, investors will likely bid up tobacco valuations in anticipation of a state-only deal.

July Dick Scruggs mtg

42 USC 2651(a)

MCRA - can be used for Medicare as well.
cases - say ~~could~~ should be liberally construed
Waxman memo - says has to be serviceman
But: statute not so restrictive
Also, (b) refers specifically to servicemembers, so (a) should be more.

MCRA - subrogation rt as well / altern not exclu. does have to stand in shoes of smoker
but separate - e.g. defenses, such as S of L, that would be good ag't indiv, are not nec good ag't gov't.
independ. rts of injured or diseased person

also ~~or~~ might be able to go ag't insurers.
could also try to say that they have undertaken a duty - and become insurers themselves.

Gary Black - MCRA gives ~~x~~ more serious threat - although he says we must proceed under subrogation

Can bring these actions ~~in~~ in state ct - anywhere

Only FL of 4 recovering states has statute

Miss, Tx, Minn - none had statute

Int says this - convert to subrogation

Ct said:

IND COLL MOTIONS
MASS
OKLA

MD
WASH
IOWA
} ruled w/ industry - none to prove indiv cases

1st Ct

Ct's:
not a subrog claim
can prove thru valid stat means -
it's an injury to a popul. -
not an individual.

our arg - This is an aggregate claim

- RICO -

Can you sue in state court w/out fear of removal??
All state suits have been remanded.
Why?

Ceresi
Scruggs / Miley?
Castano / lawyers.
Texans

} In here?
at least on top of recovery

Tob-ltr.-Medicare suits

Privileged & Confidential

DRAFT

RE: Possible Civil Litigation Against the Tobacco Manufacturers Relating to Federal Health Care Costs Associated with Tobacco

The purpose of this memorandum is to provide an assessment of possible litigation that the United States (or some component thereof) could bring against tobacco manufacturers to recover federal health care costs associated with tobacco use and to obtain other relief designed to reduce youth smoking or smoking generally. We assume that such other relief might include injunctive relief that goes beyond the FDA's current Regulation.

In analyzing the likelihood of success of such litigation, it is necessary to evaluate the numerous legal and practical obstacles separately. Although opinions may vary as to the magnitude of each obstacle, it is important to recognize that any of them could cause the litigation to be dismissed or otherwise fail. If the government were to fail on any of the legal issues discussed below, a lawsuit against the tobacco industry would not be viable. Given the fact that the legal theories that we would be advancing are novel, we believe that the chances of success of any such lawsuit under current law are low. Moreover, the practical obstacles with respect to gathering and marshaling the evidence related to health care costs caused by tobacco use are enormous. Because the United States Department of Health and Human Services (HHS), Health Care Financing Administration (HCFA) does not appear to retain the data in the form needed to evaluate a lawsuit, it will require a significant amount of time and a dedication of vast resources to develop the facts necessary to evaluate bringing such a suit. Bringing such a suit would require a massive commitment of legal resources by the Department of Justice.

Below we also discuss the proposed Graham legislation, a bill that would establish a federal cause of action to recover federal health care costs associated with tobacco, permit aggregation of claims and use of statistical evidence, and eliminate certain defenses that the tobacco companies might raise. Although it would not solve all of the legal and practical obstacles to bringing suit against the tobacco industry, it would significantly increase the chances of success of such a suit.

I. Current Tobacco Litigation

A. Actions Brought by States. The most significant litigation faced by the tobacco industry are the pending suits brought by 40 state Attorneys General against tobacco manufacturers. Mississippi, Florida, Texas, and Minnesota have obtained settlements for billions of dollars and a variety of injunctive remedies. Although these suits have been proceeding slowly since the announcement of the June 20, 1997 Resolution, they are likely to become more active because the Resolution was dependent on enactment of comprehensive federal legislation. The suit brought by the state of Washington is scheduled to go to trial in September.

The suits brought by the state Attorneys General have alleged a collection of novel theories of recovery. In many cases, these theories have relied on particular features of state common law and special consumer protection statutes that give the state government broad rights to recover for fraud and other misconduct. State theories include:

1. The tobacco manufacturers, the Council for Tobacco Research, and others undertook a special duty to render services for the protection of the public health and to disclose scientific research about smoking and health, but, in fact, conspired to suppress the research to the detriment of the public health.

2. The tobacco manufacturers conspired to restrain trade by suppressing health information about smoking and use of tobacco and the development of a safer cigarette.

3. The tobacco manufacturers maintained a monopoly over the sale of cigarettes by controlling and suppressing research, development, production, and marketing of a safer cigarette.

4. The tobacco manufacturers violated state consumer protection laws by intentionally misrepresenting that there is no causal connection between smoking and adverse health effects, and that use of tobacco is not addictive.

5. The tobacco manufacturers falsely advertised their products to young people and others.

6. The tobacco manufacturers have been unjustly enriched by avoiding paying for the consequences of their illegal activity, i.e., the health care costs to be borne by the states.

None of these theories has been adjudicated or decided, and no judgment has been reached validating the theories. Minnesota's amended complaint is attached as tab 1.

B. Suits Brought by Individuals/Class Actions. As it has for the past thirty years, the tobacco industry is currently defending litigation brought by smokers in various courts throughout the country. Putative class actions seeking smoking cessation programs (the so-called Castano class actions) are pending in at least 6 states. A trial court in Maryland has certified a class of smokers in state court. None of these cases has resulted in a judgment or settlement.

Individual actions have resulted in only two verdicts for plaintiffs, one for $750,000 and another for $950,000 (both are still on appeal). On June 22, 1998, however, the Florida Appeals Court overturned the $750,000 verdict because the lawsuit was barred by the statute of limitations. That court also reversed key rulings on admissibility of documents, and found that the Federal Cigarette Labeling and Advertising Act precluded the plaintiff from arguing that cigarette warning labels were inadequate.

The future course of litigation against the tobacco industry is difficult to predict. Richard Daynard, chairman of the Tobacco Products Liability Project at Northeastern University, believes the release of confidential tobacco documents, the recent settlements with the states, and the collapse of the comprehensive legislation will result in the filing of thousands of individual cases. Nonetheless, there has been no identifiable change in the law that would suggest that suits initiated by smokers will be more successful in the future. Moreover, the Florida appellate court's opinion and the comments of jurors in the Minnesota case suggest that the odds of individual recovery against the tobacco industry have not increased significantly. In particular, although millions of pages of documents have been released by the Minnesota court, it is unclear whether those documents contain information that would overcome the principal defenses of the tobacco companies to smoker initiated suits, *e.g.*, assumption of risk.

C. Litigation Involving the Federal Government. On the federal level, the Fourth Circuit is currently considering the FDA's authority to regulate tobacco products, including the advertising and marketing of such products. In addition, it has been publicly disclosed that there is an ongoing federal criminal investigation involving the tobacco industry.

The consequences of civil litigation brought by the United States to recover health care costs would be enormous -- for the government, the tobacco manufacturers, and the public. We would be committing ourselves to the biggest affirmative lawsuits the United States has ever filed. Moreover, the future viability of tobacco manufacturers would be threatened if the United States recovered the full dollar amount for health care associated with tobacco products. The tobacco companies will have every

incentive to defend these suits vigorously; settlement at anything more than a small fraction of the possible liability would be very unlikely.

II. Possible Theories of Recovery by the United States.

In order to bring any law suit against the tobacco industry, the United States must have a legal basis for going to court. Whether referred to as a cause of action or a claim for relief, the sufficiency of the United States' legal basis for seeking monetary damages from the tobacco industry would likely be challenged at the outset of the litigation on a motion to dismiss. If a court determined that the United States had not stated a valid claim for relief, the case would be dismissed in a matter of months. Various possible theories of recovery are explored below.

A. State Law Causes of Action

Although the lawsuits brought by the state Attorneys General have resulted in some high profile settlements, as well as the June 20, 1997 Resolution, they do not provide good analogs for a lawsuit brought by the federal government. As a general matter, the United States cannot recover health care costs based on state common law theories, absent a federal statute authorizing such recovery. Under *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), the United States was held not entitled to recover, under a common law theory, the health care costs of a serviceman injured by a third-party motorist through alleged negligence. By refusing to allow a common law remedy, the Court left it to Congress to create a cause of action by which the United States could recover its health care costs (which Congress did in the Medical Care Recovery Act, discussed below).

In addition, state statutes specifically differ in important ways from their federal counterparts. Many state legislatures have gone further than Congress in authorizing their attorney general to litigate on behalf of its citizens. Thus, many of the tort, equitable, and consumer protection theories advanced by the State Attorneys General would be of limited, if any, use to the federal government if it attempts to recover health care costs related to tobacco use.

B. Possible Claims Under Existing Federal Law

Because state law theories by themselves are unlikely to be of much use, the United States would have to proceed under a federal statute to recover tobacco-related health care costs. The vast majority of expenditures by the federal government related to health care derive from Medicaid, Medicare, and the direct provision of medical care by federal agencies required to provide such care. Both Medicaid and Medicare have specific statutory provisions defining the federal government's right to recover certain expenditures. The Medical Care Recovery Act ("MCRA") authorizes the government

to recover for medical care provided directly to individuals. Each of these statutes is discussed in turn.

1. Medicaid

Among other things, Medicaid mandates that each state "take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the [state's Medicaid] plan." 42 U.S.C. § 1396a(a)(25)(A). Where such liability is found to exist after Medicaid payments have been made, each state "will seek reimbursement for such assistance . . . where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery. . . ." 42 U.S.C. § 1396a(a)(25)(B); *see Philip Morris, Inc. v. Harshbarger*, 946 F. Supp. 1067, 1077 (D. Mass. 1996) (federal law requires states "to pursue liable third parties for amounts paid on behalf of Medicaid beneficiaries"). When recoveries are made from third parties, the previous Medicaid expenditures for the services at issue are to be treated as overpayments, 42 U.S.C. § 1396b(d)(2)(B), and overpayments are to be deducted from amounts to which the states are entitled in subsequent quarters. 42 U.S.C. § 1396b(d)(2)(A). *See generally Massachusetts v. Philip Morris, Inc.*, 942 F. Supp. 690, 692-93 (D. Mass. 1996).

The federal government does not have an apparent legal basis to commence litigation on its own against the tobacco companies for Medicaid expenses stemming from tobacco-related illnesses. There is no authorization within the Medicaid statute for the federal government to sue third-party tortfeasors directly. In fact, the argument can be made that, by explicitly providing a mechanism to allow the states to pursue these claims, Congress apparently did not intend that these claims be pursued directly by the federal government. *See National Railroad Passenger Corp. v. Nat'l Assoc. of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies."). The federal government's sole avenue for recovery of Medicaid outlays may be through deductions from future payments to states that have recovered from the tobacco industry. To this point, the federal government has pursued its share from the states that have settled lawsuits with the Liggett Group and has sent letters reminding the states of its claim on settlements reached with the tobacco industry. Indeed, when HHS/HCFA informed the states of Florida, Mississippi, and Texas of its right to share in their tobacco settlements, there was an outcry in Congress.

how about requiring other states to do so? how does fed govt usually ensure that states pursue such suits? Just an incentive system?

2. Medicare

a. Pertinent Statutory and Regulatory Provisions.

The Medicare Secondary Payer ("MSP") statute, which was enacted in the 1980s to stem the skyrocketing cost of the Medicare program, permits the United States to recover payments made for medical care when another source of payment is available under "a primary plan." The MSP statute provides the United States with a right to recover "against any entity which is required or responsible . . . to pay . . . under a primary plan. . . ." 42 U.S.C. § 1395y(b)(2)(B)(ii); *accord* 42 C.F.R. § 411.24(e). When a Medicare payment is made, it is "conditioned on reimbursement . . . when notice or other information is received that payment . . . has been or could be made [under a liability insurance policy or plan (including a self-insured plan)]." 42 U.S.C. § 1395y(b)(2)(B)(i). The United States has a separate subrogation right as well. 42 U.S.C. § 1395y(b)(2)(B)(iii); 42 C.F.R. § 411.26(a).

in the statute?

so - more than standing in shoes?? why is this separate?

b. Use in Liability Context

Use of the MSP statute in this context would be novel and difficult. Although HCFA pursues claims frequently at an administrative level and on an individual basis, most of the statutory and regulatory provisions have not been interpreted by the courts. Moreover, the theory that we would have to pursue is not based on a natural reading of the statute. Thus, virtually all issues that might arise in this litigation have substantial litigation risk.

① "primary plan" question

To prevail, the United States would first have to establish that the tobacco manufacturers are a "primary plan" within the meaning of the statute. The statutory definition of "primary plan" includes "a liability insurance policy or plan (including a self-insured plan)." 42 U.S.C. § 1395y(b)(2)(A). "Liability insurance" is defined as "insurance (including a self-insured plan) that provides payment based on legal liability for injury or illness or damage to property" and specifically includes product liability insurance. 42 C.F.R. § 411.50(b). The regulations state that liability insurance payments include any amount paid as a deductible. 42 C.F.R. § 411.50(b). If the manufacturers are not insured (or are less than fully insured), the United States would further have to establish that they are self insured within the meaning of the statute and regulations. The regulations, while untested and perhaps contrary to principles commonly found in the law of insurance, take a broad view and state that any "plan under which an individual, or a private or governmental entity, carries its own risk instead of taking out insurance with a carrier" is self insured. 42 C.F.R. § 411.50(b). A "plan" under Medicare regulations is "any arrangement, oral or written, by one of more entities, to provide health benefits or medical care or assume legal liability for injury or illness." 42 C.F.R. § 411.21. Our argument would have to be that the tobacco manufacturers are themselves or have a "self-insured plan" and thus are subject to secondary payer liability. Fix

are they insured?

self-insured? meaning?

??

Why? Don't they have liability insurance?

Mostly cover they're self insured; if they don't — why is that so controversial?

② required or responsible

The United States would also have to establish that the tobacco manufacturers are "required or responsible" to pay for the services HCFA has provided to Medicare beneficiaries. 42 U.S.C. § 1395y(b)(2)(B)(ii). In most cases, HCFA relies upon the Medicare beneficiary to establish that a tortfeasor is required or responsible to pay. The vast majority of these cases do not require litigation; usually a settlement is reached in which the United States is paid for its claim. While HCFA frequently makes demands upon alleged tortfeasors (or their insurers) based upon information that is obtained from Medicare beneficiaries and their payment records, we are not aware of any published decision in which the United States has undertaken to prove in the first instance the underlying facts that establish the tortfeasor's liability to the Medicare beneficiary.

not nec. by statute

But nothing in stat law requires this result.

In this case, the only way to establish that the tobacco manufacturers are required to pay would be to establish their liability for tobacco-related injuries and diseases suffered by Medicare beneficiaries. As noted above, individual plaintiffs suing tobacco manufacturers have been largely unsuccessful in establishing the liability of tobacco manufacturers for smoking related deaths, disease, and disability. A lawsuit by the United States would have to overcome the same difficulties of establishing liability that so far have defeated almost every individual plaintiff who has brought such an action. Our difficulty would be compounded by the fact that our action would be a derivative action in which we would not have primary access to much of the proof (e.g., the Medicare beneficiary's medical records) needed to establish our claims.

long way down road

Is this clear? why?-- e.g. AgR

Nor clear why prim plan has to be liable to - under (+ hence = our derivatively) or ours? If latter, not clear some/which defenses do apply.

The determination of what law governs the manufacturers' liability for tobacco-related injuries will be complex. Although the rights and obligations of the United States arising from the operation of federal programs are governed by federal law, *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979), *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943), state law may be incorporated as the federal rule of decision where application of state law would not frustrate specific objectives of the federal program, *Kimbell Foods*, 440 U.S. at 728. Although we may argue that a uniform federal law is required, courts would likely apply state substantive law to determine whether the tobacco companies are liable in tort for the injuries to Medicare beneficiaries. *Cf. Heusle v. National Mut. Ins. Co.*, 628 F.2d 833 (3d Cir. 1980).

③ what law?

maybe this would be better - take advantage of best state laws recently passed.

3. Medical Care Recovery Act (MCRA).

Many federal agencies, including the Departments of Veterans Affairs, Defense, Army, Navy, and Air Force, and the Indian Health Service, are required by law to provide health care services directly to certain individuals.

who?
how much?
what about insurers?
FEHBP

When the United States is the provider of health care (or, under a couple of statutes, just the payer), the Medical Care Recovery Act ("MCRA") provides the United States with a broad range of remedies to recover the cost of its medical care. The United States may intervene or join in any action or proceeding brought by the injured or diseased victim. 42 U.S.C. § 2651(d). The United States may institute its own action against the tortfeasor in the event the victim does not commence his or her own action within six months after the government has furnished care and treatment. *Id.* In addition, the United States may require the victim to assign his or her claim against the tortfeasor to the United States, to the extent of the United States' right of recovery. 42 U.S.C. § 2651(a). The MCRA also provides that the United States is subrogated to any rights or claims of the injured or diseased person against the tortfeasor. *Id.*

So clear auth to sue for at least these costs.

almost much a lot of $$ how much?

?

The MCRA would authorize the United States to pursue an action in tort against the tobacco companies for the reasonable cost of care provided by various federal programs. State substantive law is typically applied in MCRA cases to determine whether tort liability exists, but not all state law procedural restrictions would apply; nor would state consumer protection or antitrust laws be likely to apply.

4. Antitrust Theories.

The antitrust claims that the State Attorneys General have lodged are unique, and may be inconsistent with the broader context of antitrust enforcement; for example, raising the price of cigarettes to reduce youth consumption does not square well with the antitrust laws' goal of reducing prices to market levels. It may be difficult to establish the antitrust injury needed to proceed under federal law, and the remedies traditionally available in antitrust cases may not advance the public health goals that the President has announced. Moreover, at this time, we are not aware of a factual basis to pursue federal antitrust remedies.

III. Other Legal Obstacles

If the federal government brought suit directly against tobacco manufacturers and were determined to have a federal right of recovery on behalf of Medicare beneficiaries (or to recover funds under MCRA), it would have to establish the liability of the tobacco manufacturers under state tort law. We would then have to establish the liability of the tobacco manufacturers under each state's law where such beneficiaries reside. Because state tort laws are not uniform, to obtain nationwide relief we would have to assert, at the least, fifty-one separate, aggregated claims for relief reflecting the fifty-one different state (and D.C.) tort law systems and beneficiaries in each jurisdiction. Moreover, like the plaintiff in any liability suit, the United States would have the burden of proof as to liability, causation,

not clear — see above

could just choose a few to start

and damages. All three elements present substantial hurdles. Regardless of the state where such a suit (possibly a test case) was brought, there would be substantial legal obstacles to the pursuit of damages from the tobacco industry. In many cases, the relevant legal rulings might come several years into the litigation and would effectively end the case.

All next same as states, right?

A. Aggregation

Accordingly, the burden of bringing individual claims for the tens of millions of Medicare recipients would be insurmountable. Unless the United States was permitted to aggregate potential claims on behalf of Medicare beneficiaries, it would be impossible to bring a lawsuit to recover from the tobacco industry.

The trend in federal law, however, is against permitting aggregation of claims in mass tort actions, such as in the tobacco context. *See Castano, et al. v. American Tobacco Co.*, 84 F.3d 734 (5th Cir.1996); *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), *aff'd* ___ U.S. ___, 117 S.Ct. 2231 (1997); *Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.1995). The federal courts have held that such class actions, like the Castano suits, do not present sufficient common issues of fact to proceed as class actions.

But this is diff kind of theory — again, who is industry liable to — smokers (+ derivatively us) or us? looks like latter if so, the 2 aspects are very diff.

Neither the MSP Act nor the MCRA expressly provides for aggregation of claims, separate and apart from the Federal Rules of Civil Procedure. Indeed, it appears that MCRA may require each case to be litigated individually, with the United States standing in the shoes of the recipient of medical care. The MSP Act provides the United States with both a direct right of action against a responsible party and a right of action based on subrogation (in which we assert the injured party's rights). 42 U.S.C. 1395y(b)(2)(B)(ii) and (iii). HCFA's regulations accord with this interpretation. 42 C.F.R. 411.24. However, even when being sued directly, a third party may assert defenses available against the injured party in the context of disputing whether it is a "responsible party." See Health Ins. Ass'n of America v. Shalala, 23 F.3d 411, 420 (D.C. Cir. 1994), cert. denied, 513 U.S. 1147 (1995). As the Fifth Circuit has explained, "the government stands exactly in [the Medicare beneficiary's] shoes when recovering from the available insurance funds." *Waters v. Farmers Texas County Mut. Insur. Co.*, 9 F. 3d 397, 401 (5th Cir. 1993).

Why? And so does MCRA, right?

so what's the diff btw this + subrogation?

READ THIS CASE

Although we would argue that our lawsuits are not class actions under Rule 23 of the Federal Rules of Civil Procedure, because like the states, we are suing to recover our aggregate costs, it is likely that the courts would view our efforts based on the rights of millions of individual injured tobacco users in light of Rule 23. A court could decide this issue early in the litigation, although many class action motions are not decided until several years into a lawsuit.

B. Liability, Causation, and Damages

What has happened to states on this?

Although for practical reasons aggregation would be critical to any law suit against the tobacco industry, it would be of little help if the United States were forced to prove liability, causation, and damages for each beneficiary and against each defendant manufacturer. The problems of demonstrating causation in the individual case, with variables such as when the individual began to smoke, what information was available at the time, and what brands the individual smoked over time, would create enormous burdens. Only if the government can use generalized theories of causation, enterprise liability, and statistical models for damages could such a suit proceed. Once again, these ideas are untested in the federal courts -- and in most state courts. Absent statutory authority for such proof, a federal court may be hesitant to permit it. Although some federal district courts have permitted statistical sampling to determine amounts that providers overcharged Medicare, *see Chaves County Home Health Servs. Inc. v. Sullivan*, 732 F. Supp. 188 (D.D.C. 1990), the federal courts have routinely rejected statistical theories of causation and enterprise liability when considering mass torts brought under state law. *See, e.g.*, *Kurczi v. Eli Lilly & Co.*, 113 F. 3d 1426 (6th Cir. 1997) (rejected enterprise liability under Ohio law); *Miller v. Wyeth Laboratories, Inc.*, 43 F. 3d 1483 (10th Cir. 1994) (same under Oklahoma law); *City of Philadelphia v. Lead Indus. Assoc. Inc.*, 994 F. 2d 112 (3d Cir. 1993) (same under Pennsylvania law). State courts have been similarly hesitant to permit introduction of such evidence. Indeed, it was for this reason that certain states, such as Florida, enacted statutes expressly to authorize use of statistical evidence and market share liability.

Even if a court did permit use of such proof, there may be constitutional limits that would require the court to allow tobacco manufacturers to challenge liability, causation, and damages with respect to each individual beneficiary. The Florida Supreme Court determined that, even though the state was permitted to use statistical evidence in its affirmative case, the Constitution requires that the tobacco companies be permitted to discover and admit evidence concerning individual beneficiaries; thus, it is likely that any suit would require review of millions of individual records and an examination of assumption of risk and other defenses in millions of individual cases.

None of these generalized methods of proof necessarily cures the basic problems that individual plaintiffs have had in suing cigarette manufacturers for smoking related death, disease, and disability. A lawsuit by the United States would have to overcome difficulties of establishing liability that so far have defeated almost every individual plaintiff who has brought such an action. Although the Minnesota court rejected the assumption of risk defense, it did so in the context of a suit brought under consumer protection, antitrust, and other theories. Because any federal suit would, under current law, not have the benefit of these theories and because, under the MSP Act or the MCRA, the federal government would stand in the shoes of its beneficiaries, the assumption of risk defense is likely to pose a significant obstacle.

Finally, the federal government may have to face a significant defense to its claim for damages -- namely, that the untimely death of smokers ultimately saves the government money due to death's inevitability and federal costs associated with the aged. This defense was excluded on public policy grounds in the Minnesota case, but could prove more problematic in federal court. I don't see why - There just is no effort of this kind provided for in the statute

C. Statute of limitations

Because of statutes of limitations, it will be difficult for the United States to recover for Medicare or other costs expended more than six years ago. The six-year statute of limitations in 28 U.S.C. § 2415(a) generally applies to the United States' right to recover under the MSP laws, and should apply to any case filed against tobacco manufacturers. In a suit against the tobacco manufacturers where no underlying suit has been initiated by Medicare beneficiaries, the earliest possible accrual date for a cause of action is the date on which Medicare makes a payment for which the tobacco companies are required or responsible to pay.

how much?

The tobacco manufacturers would argue that an action that requires the United States to prove the tort liability of the defendants is not an action "founded upon any contract express or implied in law," 28 U.S.C. § 2415(a), but an action "founded upon a tort," 28 U.S.C. § 2415(b), to which the three-year statute of limitations found in section 2415(b) would apply. If this shorter statute of limitations were to apply, the amount of money available for recovery would be sharply reduced.

The courts may also require the United States to establish that the tobacco manufacturers are legally "responsible to pay" these liability claims. In Health Ins. Ass'n of America v. Shalala, 23 F.3d 411, 418-420 (D.C. Cir. 1994), cert. denied, 513 U.S. 1147(1995), the District of Columbia Circuit held that HCFA exceeded its authority in adopting a regulation that attempted to impose liability even though, the requirements for payment under the plan had not been met, and therefore, payment could not reasonably be expected to be made. It is possible, then, that the United States will have to prove that the claimants or HCFA have met all requirements for filing a claim for payment within the meaning of 42 U.S.C. §1395y(b)(2)B)(i)and that the manufacturers will be able to raise all defenses that, outside of the MSP context, would otherwise be available under state law; this may include state statutes of limitations related to the state tort theories that we would pursue. We would argue that, in the tort context, where there is no issue raised by a contractual agreement entered into by the claimant and an insurance company, that the requirements imposed by the *HIAA* case simply do not apply.

what is this?

IV. Actions for Injunctive Relief

In order to reform the industry and reduce teen smoking by changing the way tobacco companies do business, any law suit against the tobacco industry would have to seek a large measure of

injunctive relief. In the cases brought by the State Attorneys General, state consumer protection statutes were the key vehicles for such injunctive relief. Federal consumer protection laws are analogous, but they are simply less effective than the laws of some states, such as Minnesota. If we were to pursue such relief, the most likely bases for a cause of action would be 18 U.S.C. § 1345, which provides for civil injunctions based on violations of the federal mail and wire fraud statute, and the Federal Trade Commission Act.

Although greater injunctive relief may be obtained through settlement, it may be difficult to obtain through litigation the broad injunctive relief that would replicate the sorts of regulatory provisions in comprehensive tobacco legislation. Any injunctive relief would have to be related to the alleged violation. For example, misleading advertising or using the mails to make fraudulent statements may lead to injunctions prohibiting or rectifying such conduct, but there is little likelihood that such activities will persuade or permit a court to impose the sorts of broader relief that may be desirable. A court might impose ongoing disclosure obligations or penalties for future misleading advertising, but might well choose not to impose lookback surcharges on the industry.

A. Civil Injunctions under Mail and Wire Fraud Theories.

18 U.S.C. § 1345 states, in relevant part, "if a person is violating or about to violate this chapter or section 287, 371 (insofar as such violation involves a conspiracy to defraud the United States or an agency thereof), or 1001 of this title . . . the Attorney General may commence a civil action in any Federal court to enjoin such violation." The authority for an action under § 1345 will be dependent on what can be demonstrated about the tobacco manufacturers' criminal fraud activity. *See United States v. Fang*, 937 F. Supp. 1186 (D. Md. 1996) (showing of reasonable probability that offense is being committed--or showing of probable cause, which is functionally the same--is required by the government); *United States v. Belden*, 714 F. Supp. 42 (N.D.N.Y. 1987) (solely past conduct will not justify injunction).

While a determination of what predicate offense could serve as grounds for a § 1345 injunction would necessarily have to be made on a case by case basis, one possibility would be to utilize 18 U.S.C. § 1001, the general false statement statute. To the extent that cigarette manufacturers concealed or covered up material facts which affected the government's ability or willingness to regulate tobacco under FCLAA or any other statute, those acts or omissions could possibly violate § 1001. *E.g, United States v. Fern*, 696 F.2d 1269, 1273 (11th Cir. 1983) (Section 1001 prohibits false statement that affects the exercise of government functions).

B. The FTC Act.

Section 45 (a) of Title 15 prohibits unfair or deceptive acts or practices in or affecting commerce. 15 U.S.C. § 45(a). This section provides the simplest basis for asserting jurisdiction over tobacco manufacturers. *See* 15 U.S.C. § 52 (false advertising concerning

food, drugs, devices, services, or cosmetics); *Federal Trade Commission v. Liggett & Myers Tobacco Co.*, 108 F. Supp. 573 (S.D.N.Y) (rejecting FTC argument that cigarettes are a drug), *aff'd*, 203 F.2d 955 (2d Cir. 1953). Various forms of relief are available under the FTC Act, including, but not limited to, temporary restraining orders, preliminary injunctions, and civil penalties.

C. How These Cases Would Be Litigated

An action under section 1345 or the FTC Act would necessarily allege -- whether implicitly or explicitly -- that tobacco companies misled consumers as to the safety and health affects of tobacco use. Any injunctive relief would likely have to withstand commercial speech objections raised by the tobacco manufacturers, advertisers, and retailers regarding any advertising or access restrictions to be imposed by injunction. We have not consulted the FTC, but an action brought under the FTC Act likely would require additional direct evidence related to marketing to children and/or false advertising.

V. Practical Obstacles

A. Documentary Hurdles

In addition to the legal hurdles to prevailing in a suit to recover health care expenses from tobacco companies, the burden of developing the facts necessary to pursue such litigation would be enormous. Under Rule 11 of the Federal Rules of Civil Procedure, any factual assertions made in a complaint must either have "evidentiary support" or be likely to be obtained as the result of discovery. Shortly after filing suit, Rule 26 of the Federal Rules of Civil Procedure could require us to disclose our basis for alleging what the tobacco-related health care costs were, so we must have this information ready.

The development of "evidentiary support" sufficient to file a complaint consistent with the obligations of Rule 11 is a daunting task. The HHS/HCFA, does not maintain payment records in a form that links monetary payments to illnesses caused by tobacco use. Developing such information will not be easy. Whereas it is relatively easy to identify injuries resulting from an automobile accident (through diagnostic and trauma codes), the process is far more complicated where the link between a particular injury or illness and an alleged causative agent is less obvious (such as ailments resulting from cigarette smoking). Moreover, not only must the agency establish a link between the illness and the tobacco, but it also must identify the individual beneficiary as a smoker. To recover for federal medical expenses related to cigarette smoking, the government must be able to link a particular illness (such as emphysema) to cigarette smoking and then identify as a cigarette smoker the specific beneficiary who received federal benefits for treatment of that ailment.

how did states do this?

At this time, HHS/HCFA does not have anywhere near the funding, computer resources, or personnel (both in terms of numbers and training) to develop the information that would be needed to litigate this case. At a minimum, HHS/HCFA would be required to dedicate tens of millions of dollars and to divert scarce resources in order to prepare the information necessary to file the complaint.

B. Legal Resources

Assuming HHS/HCFA can begin to provide an evidentiary basis for a case, the Department of Justice would have to assemble a litigation team of many lawyers, paralegals, and expert witnesses to pursue the investigation, evaluate the evidence, and prepare to litigate the cases. This would require a considerable allocation of resources and must be done, as with the HHS/HCFA data development, before suit can be filed.

VI. Graham Bill

Given the difficulties of pursuing claims under current law we believe that proposed legislation, the so-called Graham bill, would provide a more substantial basis for the United States to recover against the tobacco manufacturers in litigation. This legislation would provide jurisdiction for the Attorney General to bring civil actions against tobacco manufacturers for recovery of costs incurred by federal health programs and would reduce the obstacles to litigation described above under current law. In short, although not a panacea, the Graham bill would make litigation a much more realistic option here. The text of the proposed Graham bill is attached as tab 2. It is important to note that the Supreme Court recently handed down a significant decision on Congress' authority to regulate economic rights and impose burdens retroactively that appears relevant to the proposed Graham bill. *See Eastern Enterprises v. Apfel*, No. 97-42, 1998 WL 332966 (June 25, 1998). The Office of Legal Counsel is currently evaluating the effect of that opinion on the Graham bill.

Any chance do this would
litigation — money?

A. Essential Elements of the Graham Bill

1. The elements of proof necessary to establish liability of the tobacco company to the injured person or entity will vary somewhat depending upon the applicable substantive law. In actions where the United States is suing to recover for health care expenses paid or provided directly to injured individuals, the United States will need to establish, as specified by the applicable law, the traditional elements of a tort cause of action: (i) a duty running from the tobacco company to the individual, (ii) breach of that duty, (iii) a proximate causal relationship between breach and injury to the individual, and (iv) injury. The draft bill allows the United States to establish the element of causation with statistical and/or epidemiological evidence (§ 1345a(a)(6)(C)), and affords it the benefit of certain presumptions (§ 1345a(a)(6)(E)). Furthermore, the Draft Bill deprives defendant tobacco companies of the defenses of contributory and comparative negligence

(although it is not clear whether assumption of the risk may still apply) in suits by the United States. (§ 1345a(a)(6)(D)).

2. In actions where the United States sues to recover expenses paid to states and other entities on behalf of individuals treated for tobacco-related conditions, the United States may be able to rely upon various legal theories (including federal and state statutes and common law, *see, e.g.*, theories relied upon by State Attorneys General) to establish liability of the tobacco company to the state or other entity. The proposed bill would give the United States the right to recover the health care expenses for whatever the United States paid for those costs as proved by statistical evidence unless the manufacturers demonstrate by clear and convincing evidence that the health care costs were not caused by tobacco use.

3. This bill is modeled after MCRA and the Florida statute which formed the basis for the state of Florida to recover against tobacco manufacturers. The specific provisions that the Florida Supreme Court struck down have been eliminated.

B. Improvements Over Current Law

The Graham bill would lessen the proof problems that currently face the federal government in bringing these actions. For example, the Graham bill authorizes the use of statistical data, creates a presumption on causation, and requires a jury instruction that nicotine is addictive. These features of Graham will assist in overcoming some of the major litigation hurdles that exist under current law. Even with these improvements, proving damages will be challenging because the precise amount of the costs incurred by the federal government for smoking-related illnesses is difficult to quantify. Therefore, even with Graham, it will be necessary for the federal government to develop statistical estimates of these costs which would be admissible and probative. To date, HHS/HCFA has not done statistical estimates of these costs, and, as indicated above, they believe to estimate these costs would take a massive effort requiring a level of resources that may be well beyond their budget or capability.

VII. Conclusion and Recommendation

Before we can consider bringing an action against the tobacco companies, HHS/HCFA has a formidable task in that it must prepare a litigation report generating and summarizing statistical evidence to support possible legal theories. This task will cost millions of dollars, will take several months at least, and may prove to be beyond the capacity of HHS/HCFA given its current state of computerization.

Assuming HHS/HCFA can generate the requisite statistical data and litigation report, the Department of Justice must assemble a substantial litigation team of lawyers, paralegals and expert witnesses to pursue an investigation, evaluate the evidence, and prepare to litigate the

case. Given our obligations under Rule 11, these predicate steps by both HHS/HCFA and the Department of Justice are required before we can bring suit.

The cost to prepare to bring such a suit, in terms of time and resources, would be staggering; the cost to litigate the case would be even greater. Under current law, however, our probability of success would not be great. As noted above, there are significant questions as to whether 1) the federal government has a cause of action to recover the health care expenses it paid for tobacco victims; 2) aggregation would be permitted; 3) statistical evidence and enterprise liability would be permitted; and 4) we could overcome the defenses that the tobacco companies have used so successfully to overcome private lawsuits in the past. On each of these issues, our chances of success range from fair to relatively low. If we lose on any one issue, it is unlikely that we would prevail in the litigation in a meaningful way.

If legislation along the lines of the Graham bill is enacted, we believe that the prospects for litigation would improve significantly. The cost of litigation preparation would still be enormous, but prospects for the litigation would be better, if HHS/HCFA can generate the data necessary to support litigation.

Another factor to be considered is the fact that HHS has not sought to recover the Medicaid dollars that states such as Florida and Mississippi received in their settlements with the tobacco companies. Up until now, we have put off seeking a recovery — to which the federal government is entitled — based on the possibility of a legislative solution. If we sue the tobacco companies under a Medicare theory, however, that issue will be highlighted.

Another alternative would be to develop legislation that would facilitate private litigation. Such legislation would provide for a federal action along the lines of the Graham bill, but would be modified to foster private suits -- including possible class actions -- without the need for federal intervention. It is our understanding that in other contexts, however -- such as the Product Liability Reform Bill -- the Administration has disfavored such "federalized" tort law. Nonetheless, if this is an approach for which there is interest, we are prepared to work with the Office of Legal Counsel to develop draft legislation.

Tob - rr - medicare suits

Bruce R
Bruce L
Cynthia Z

United States Senate

WASHINGTON, DC 20510

July 14, 1998

Attorney General Janet Reno
United States Department of Justice
Tenth Street and Constitution Avenue, NW
Washington, DC 20530

Dear General Reno:

We believe that the time has come for the federal government to initiate a lawsuit against the major tobacco companies to recover the enormous cost which the taxpayers incur each year to provide medical treatment for persons suffering from tobacco-induced diseases. Reliable estimates of the annual cost to the federal government for this care are well above twenty billion dollars. These costs are incurred in Medicare, in programs providing health care to veterans and to active duty military personnel and their families, in the Federal Employees Health Benefits Program, as well as in other federal health services. The tobacco industry should not be allowed to transfer to the taxpayers the immense cost of medical care to treat diseases which its product clearly caused. Industry documents which have come to light as a result of recent litigation conclusively prove that the tobacco companies have known of these health hazards for nearly forty years and deliberately sought to conceal them.

We share with the Administration the belief that this issue could best be resolved by comprehensive anti-smoking legislation, and we have worked actively to pass such a bill. However, the Republican leadership has repeatedly blocked efforts to enact this legislation. We cannot allow them to successfully shield the tobacco industry from all accountability for the health harm caused by cigarettes. While we still hope that this important issue will be addressed legislatively before the 105th Congress adjourns, we believe that the federal government should also be pursuing taxpayer claims against the tobacco industry in court.

These federal claims are directly analogous to the Medicaid claims brought successfully by several states. The willingness of the tobacco companies to enter into multi-billion dollar settlements of those cases clearly attests to the validity of such claims. We understand that these cases are highly complex and that the Justice Department may face certain legal hurdles which were not present in the state cases. However, the compelling nature of the evidence and the enormity of the harm warrant vigorously pursuing the federal claims.

Given the Clinton Administration's strong and courageous leadership on the tobacco issue, we are confident that our concern is shared by the President. The tobacco industry must be held accountable, and future generations of children must be protected from its addictive and lethal product.

Sincerely,

Senator Thomas A. Daschle Senator Edward M. Kennedy Senator Kent Conrad Senator Bob Graham

Senator Frank R. Lautenberg Senator John F. Kerry Senator Richard J. Durbin

Tob-ht-medicare mtg

BC TOBACCO-CLINTON

White House studying litigation on tobacco

WASHINGTON, July 14 (Reuters) - The White House said on Tuesday it was studying the possibility of suing the tobacco industry to recover health care costs related to smoking if Congress fails to pass comprehensive tobacco legislation.

``The issues about litigation and how the federal government recovers and recoups some of the cost that U.S. taxpayers have spent for the payment of health-care claims related to tobacco use and tobacco disease is clearly a concern, and how we would approach that issue has to be examined,'' White House spokesman Mike McCurry said. ``In a very preliminary way it's being examined, but first and foremost our interest is in comprehensive legislation.''

**** filed by:RB--(--) on 07/14/98 at 10:56EDT ****
**** printed by:WHPR(BTOI) on 07/14/98 at 11:48EDT ****

BC TOBACCO-CLINTON -2 WASHINGTON
White House studying -2
``The White House is interested in comprehensive tobacco legislation that will promote our public health goals. We are pushing hard for that, and that's first and foremost our interest,'' McCurry told reporters, in response to a question on whether the White House was considering suing the industry.
``We're also aware that we're going to have to deal with what other alternatives might be available if we can't get comprehensive legislation, but first and foremost we want comprehensive legislation,'' he said.
A White House official said a suit was only one of the alternatives being considered, but he declined to identify others. ``I wouldn't rank this necessarily above other ones, in the event we needed anything,'' he said.
``It's an exercise in looking down the road in the event that Republicans succeed in killing comprehensive tobacco legislation.''
He said the Department of Health and Human Services was taking part in the evaluation, but that the Justice Department would have to file any suit.
**** filed by:RB--(--) on 07/14/98 at 11:06EDT ****
**** printed by:WHPR(BTOI) on 07/14/98 at 11:48EDT ****

Wall St. passes

INDUSTRY'S 'TEST OF A TEST,' 3B

By Michael Diamond
USA TODAY

A1

Wall Street took the lead Monday to try and control the Year 2000 computer bug, launching a series of tests to see if U.S. markets will run into disaster in less than 18 months, when 1999 turns into 2000.

On the first day, at least, they were said to be bug-free.

"At this point, I haven't seen glitches," said Arthur Thomas, Merrill Lynch vice president and chairman of the Securities Industry Association's Year 2000 steering committee.

The test by 28 securities firms and 12 exchanges was the first in a $2 million, two-week dress rehearsal. It was a precursor to more comprehensive testing in the spring.

This is the first known comprehensive effort to check the compliance of corporate America for the so-called Y2K bug. The results could be a road map for other industries and government agencies.

Today, President Clinton will give the first official report of how the government is coping with the problem.

The Y2K concern has centered on computer programs that used two digits for dates — 98 for 1998, for example. For the year 2000, computers could read 00 to mean 1900 and crash, leading to system shutdowns and economic chaos.

The companies participating in the test account for half the billion shares traded on a typi-

But experts were cautious. The test was confined to one geographic area and excluded small securities firms and international markets.

"Given the scope of the test, (the results are) not beyond belief," said Steven Hock, CEO of Trlaxys Research, which studies the issue. "I'm a little skeptical that there were no Year 2000-related glitches at all."

Clinton pushed to sue tobacco firms

By Wendy Koch
USA TODAY

A1

WASHINGTON — The Clinton administration is being urged to look again at suing the tobacco industry to recoup billions of dollars in federal health care costs.

Two senior administration officials, who declined to be identified, confirmed that a federal lawsuit is being considered but cautioned that no decision will be made until Congress recesses for the year.

The officials say their first choice remains comprehensive legislation to curb teen smoking. But such a bill, by Sen. John McCain, R-Ariz., was killed last month in the Senate.

Sens. Ted Kennedy and John Kerry, D-Mass., are encouraging administration officials to pressure the industry with a lawsuit patterned after the 37 pending state lawsuits.

Kerry says the government should try to recoup money spent treating smoking-related illnesses under Medicare, Medicaid and veterans' programs.

The Treasury Department estimates the total annual cost of treating tobacco-related illnesses at $60 billion, of which about $21 billion is borne by the federal government.

For more than a year, lawmakers, public health advocates and state officials have lobbied the Clinton administration to take a legal sledgehammer to the industry.

Industry spokesman Scott Williams says the federal government would have a tough time proving its case in court. Unlike the states, Williams says, Washington has been warning Americans about tobacco's hazards since the first surgeon general's report in 1964 and even once encouraged smoking by giving free cigarettes to the military.

Today at a meeting in Durango, Colo., state attorneys general are expected to discuss their recent talks with the industry on an agreement that would settle their lawsuits without congressional approval.

USA TODAY • TUESDAY, JULY 14, 1998

tob-ai-medicare mtg

Tob - nr - medicare suits
Tob - nr - talking pts

Tobacco Q&A
July 14, 1998

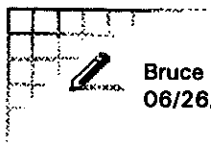
Q. Is it true, as reported in USA Today, that you are planning to file suit against the tobacco companies to recover billions of dollars in federal health care costs related to smoking?

A. First and foremost, we will continue to push Congress to enact comprehensive bipartisan legislation that will significantly reduce youth smoking. Of course, if Congress fails to act, we are going to consider all of our options. This includes exploring what we can do to reduce teen smoking by executive action, as well as a variety of other activities, which may or may not include bringing suit.

Q: But if the state attorneys general settle with the companies, won't that take the wind out of the sails of a Congressional bill?

A: Further action by the states can only increase pressure on Congress to do its part and help us finish the job -- by reaffirming FDA's full authority over tobacco products, imposing surcharges on tobacco companies that keep marketing cigarettes to young people, and launching a nationwide counteradvertising to warn young people not to smoke. We're going to keep working to build upon bipartisan support for these measures, and keep the pressure on Congress to pass a strong bipartisan bill this year. So long as 3000 young people start smoking every day, we're not letting Congress off the hook.

165-sct - medicare suits



Bruce N. Reed
06/26/98 11:14:02 AM

Record Type: Record

To: Nanda Chitre/WHO/EOP, Laura Emmett/WHO/EOP

cc: Cynthia Dailard/OPD/EOP, Elena Kagan/OPD/EOP
Subject: Re: Can you address the question below?

Mike's answer should be something like, right now, we're focusing on what we can do by executive action to carry out the McCain bill -- along the lines of the survey announcement we made earlier this week. If pressed, he can say he's unaware of anything else HHS is doing on tobacco.

[This question is the result of a Newsweek Periscope item suggesting that we are considering suing to recoup Medicare expenses. HHS currently has no plans to do so, but there's always a chance that could change, and the less said about it, the better.]

Tobacco Medicare suit

June XX, 1998

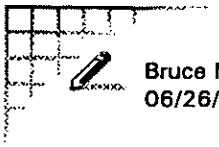
MEMORANDUM FOR THE ATTORNEY GENERAL

Every year, over 400,000 Americans die from diseases caused by tobacco. Recent litigation has brought to light thousands of documents which show that the tobacco industry misled the American people for decades about the deadly and addictive nature of tobacco. Forty-four states have brought suit against the industry seeking an end to tobacco industry practices and reimbursement for state health-related costs.

In light of these events, I hereby direct you to examine whether the federal government should bring suit against the tobacco industry and to report your findings to me within __ days. Your analysis should include but not be limited to:

- The types of suits that the federal government could bring against the tobacco industry (i.e., consumer fraud, Medicare reimbursement, etc.);
- The potential benefits and costs to the American people of pursuing such lawsuits, including the likelihood of prevailing, the potential awards, and the administrative burdens of such litigation; and
- What action, if any, the federal government could take to facilitate such suits.

Tob-sct - medicare suits



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- What action, if any, the federal government could take to facilitate such suits.

Tob-ser-medicare suits

Any letters

6-16 Medicare Tobacco suits

DOJ: 2 yrs ago - decided not to bring bc prospects of winning not very good + expenses would be enormous

Discussions w/ Gramm to address many of issues in legislation - not yet introduced.

Why hard now:

(a) Standing issue - under Medicaid statute, specific provision authorizing states to bring suit agt tob 3rd pty tortfeasors; no Medicare stat. hook of similar kind.

- On motion to dismiss - could be quick.

No cf/ activ directly agt Medicare tortfeasors.

Arg on our side: some stat hook, 33-year-old section, but never been used in this way. Credible argument - would get tested immediately

2> Never done independently; have joined lawsuits. More like indemnification claim (agt Π, if she lets $).

(b) Need to join indivs - some kind of class certif - when we try to certify

enabling leg/ of course makes easier

(c) Use of stat info - to prove claim. Rt to use stat info.

Don't really keep (info) in this way. Ethic of actually doing

(d) Face assump of risk defense - at least possible.

(e) Not clear that not to disc. is adverse ## -

VA-contrib negligence defense

Doesn't seem to matter much given legal theory.

Actuaries 1996 memo - smokers in program payments but in your count p. who never made, The program is a lot healthier.

Prob. have to bring 50 separate suits

Go to state that have passed these good statutes

Any way to break out Medicare statistics on state level.

Gramm leg -

Clearly creates cause of action

takes care of joinder + stat. issues

HHS - same people doing Y2K work -
huge expenditure of effort -
HCFA grind to total halt