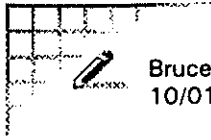


NLWJC - Kagan

DPC - Box 053 - Folder-003

**Tobacco-Settlement: Scruggs
Proposal**

Tob - ser - medicare suit
and
Tob - ser - scuffe 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.

Tobacco-medicaid suit
and
Tobacco-Schiff proposal

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

Record Type: Record

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

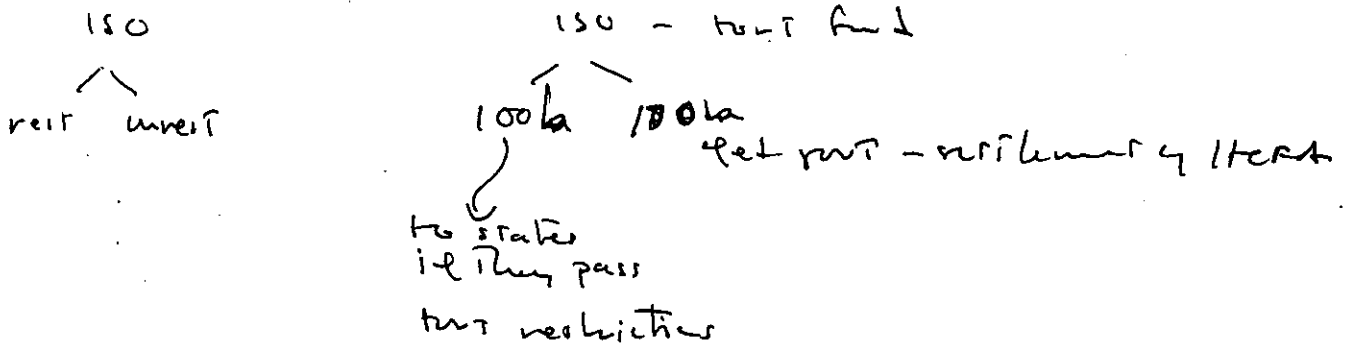
cc:

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.

3 funds	3006	
states - unvested	states - vesting	trust
goes today		trust July 10/1/98 - 10/1/99
180	120	1090 (305)



BL:

- 175 ~~to~~ to states free choice
 - 125 ~~to~~ to " if agree to menu and passes liability protection
 - 100 to fed trust for whatever it wants
- trust fund w/ whatever left over, going to states (restricted)

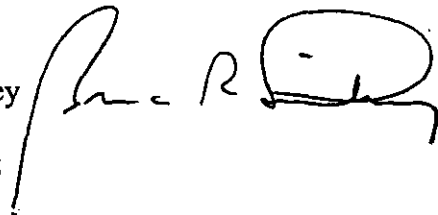
Tob - ser - Scruffs
proposal

THE WHITE HOUSE
WASHINGTON

MEMORANDUM TO THE PRESIDENT

cc: Erskine Bowles
Bruce Reed

From: Bruce R. Lindsey



Date: October 5, 1998

Re: Tobacco Settlement

If the tobacco industry wants a "comprehensive" settlement, we have discussed a proposal that would give them, and us, most - but not all- of what was in the June 20, 1997 settlement agreement.

Under our proposal and using \$375 billion over 25 years as the overall settlement amount, the states would get \$175 billion in unrestricted payments. The federal government would receive \$50 billion in exchange for releasing its Medicaid reimbursement rights. \$50 billion would be placed in a trust fund to pay tort judgments in the future. The final \$100 billion would be used to pay tort judgments unless the states passed legislation restricting tort damages along the lines of the June 20 agreement and agreed to spend the money on a menu of programs similar to the menu in the McCain bill. Once a state passed such legislation, that state's portion of the \$100 billion would go to the state to be used for one or more of the menu programs.

In addition to paying dollars, the tobacco industry would agree to all of the advertising and marketing restriction in the June 20 proposal. What we do not get - and what would upset the liberal and public health communities - is FDA jurisdiction. That would be left to the 4th Circuit / Supreme Court and, if necessary, Congress.

The Attorney Generals' settlement is a week to ten days away so we don't have much time. If the states reach an independent settlement with the tobacco industry, the only leverage we would have for a "federal" settlement is a possible Medicare suit - which the Department of Justice continues to resist.

Tob-set-Scruggs proposal

THE WHITE HOUSE
WASHINGTON

August 26, 1998

MEMORANDUM FOR ERSKINE BOWLES

FROM: Elena Kagan

SUBJECT: Tobacco

Attached is a one-pager to give to the Attorney General. As you can see, I have labeled the proposed agreement the "Scruggs Proposal"; if you would prefer me to describe it differently, please let me know.

Two further thoughts occurred to me as I was writing up the one-pager. First, we must figure out whether our trade obligations prevent us from entering into certain kinds of agreements to protect farmers (e.g., an agreement by the companies to buy a set amount from American farmers). Second, we should consider whether the punitive damage set-off suggested by Scruggs will lead states to adopt laws prohibiting the award of punitive damages against tobacco companies, thus providing the companies with the protection they long have wanted against punitive damages.

Scruggs Proposal

What the companies give:

- \$368+ billion (\$428?), of which about \$200 billion goes to states (less if some states opt out); money to states is free and clear of all federal recoupment claims
- Industry-wide lookbacks
- All advertising and access restrictions in June 20th agreement
- Withdrawal of legal challenge to FDA rule; action to prevent other parties from continuing current suit or bringing new one (but how?)
- Undetermined protection for or payment to tobacco farmers

What the companies get:

- Settlement of federal suit and state suits (unless state opts out of money)
- Credit for punitive damages against payments to states -- e.g., if Mississippi court grants private plaintiff \$10 million in punitive damages, companies pay \$10 million less to Mississippi
- Undetermined market protection against non-settling companies (including new entrants) -- e.g., distinctions in way FDA regulates settling and non-settling parties

Tob - set - Scruggs proposal

Fred Duval 08/26/98 12:55:13 PM

Record Type: Record

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

cc: Mickey Ibarra/WHO/EOP

Subject:

I have learned that Atty Gen Mike Moore and Dick Scruggs have opened up some discussions with tobacco about the prospects of a broader settlement that would include the federal government Medicaid claims. Scruggs has or will be calling Erskine to seek his thoughts on this.

Tob - set - Scruggs proposal

Fred Duval 08/26/98 12:55:13 PM

Record Type: Record

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

cc: Mickey Ibarra/WHO/EOP

Subject:

I have learned that Atty Gen Mike Moore and Dick Scruggs have opened up some discussions with tobacco about the prospects of a broader settlement that would include the federal government Medicaid claims. Scruggs has or will be calling Erskine to seek his thoughts on this.

August 22, 1998

MEMORANDUM FOR THE PRESIDENT

THROUGH: Erskine Bowles

FROM: Bruce Reed
Elena Kagan

SUBJECT: Tobacco Idea

Dick Scruggs called us yesterday with an idea for how to achieve our goals on tobacco without legislation. We have discussed this idea with Erskine, and all of us believe that it is very interesting. If you agree that Scruggs's suggestion is worth pursuing, Erskine will take the steps necessary to do so. Until he does, we should not raise this idea with anyone else.

Scruggs proposes that the federal government enter into a consent decree with the tobacco companies to settle our claims for Medicare costs. As a matter of mechanics, we probably would do this by filing two documents simultaneously with a court: a complaint against the companies and a proposed settlement agreement.

Under Scruggs's proposed consent decree, the companies would make the payments called for in the June 20th settlement agreement -- i.e., \$368 billion plus capped industry-wide lookbacks. About \$200 billion of this amount would go to states settling their own suits against the companies, with the remainder going to the federal government. Any state that wished to continue its suit against the companies could do so, but the state's share of the money then would revert to the federal government. Scruggs had no view on whether the states should have to use some portion of their money for specified purposes (e.g., child care). He did note that the federal government would have to leave the full \$200 billion with the states, rather than seek to recapture its usual share of Medicaid recoveries.

In addition to containing these monetary provisions, the consent decree would require the companies to drop their legal challenge to the FDA rule and to accept the FDA's assertion of jurisdiction over tobacco products. The decree also would mandate that the companies adhere to all the youth access and advertising restrictions contained in the June 20th settlement agreement.

The consent decree of course could not give the companies the liability protections contemplated in the June 20th agreement; for that, an act of Congress is necessary. Scruggs suggests, however, that the decree contain some kind of set-off or credit for punitive damages. Under the scheme he proposes, a company could subtract from its required payment to a state any punitive damages awarded against the company in that state's courts, up to the full amount

of the required payment. Scruggs believes that the states will go along with this provision, even though it appears to put everything they get out of the settlement at some risk (at least if their courts award punitive damages).

Scruggs also proposes that the consent decree give the settling companies some kind of protection against new entrants to the tobacco market (or existing companies with tiny market shares). This protection, according to Scruggs, is necessary to alleviate the fear of the companies that agreeing to this settlement will allow new companies to undercut them. Although Scruggs is uncertain about precisely how to provide this protection, he suggests that the FDA agree to regulate settling companies somewhat differently from other companies -- for example, by agreeing not to ban products manufactured by settling companies, but retaining authority to ban products manufactured by all others.

Erskine and we believe that as outlined here and putting aside all legal questions, the settlement is deficient in two respects. First, the settlement does not include any protection for farmers. We could solve this problem by insisting that the companies agree to purchase a set amount of tobacco leaf each year from American farmers. Second, the settlement seems slightly underfunded. We need to get something -- even if not much -- more than the original \$368 billion (perhaps the \$428 in Senator Hatch's bill) to sell this settlement as a huge victory.

Even more important, we will have to address a number of legal issues before we can enter into this kind of settlement. First, we will have to figure out a legal way of giving about \$200 billion in settlement monies to the states; this provision potentially conflicts with the federal government's obligation to place legal awards in the U.S. Treasury for later appropriation by Congress or with the federal government's obligation to recoup a portion of state Medicaid recoveries. Second, we will have to find a sure way to protect the FDA rule; the settling companies' agreement to drop their suit is insufficient if other parties (*e.g.*, retailers, advertisers, other manufacturers) can continue the suit, or bring a very similar suit the next morning. Third, we will have to inspect very closely any proposals to give a competitive advantage to settling companies, in light of both our antitrust policies and our regulatory objectives.

All that said, we think this approach presents us with an exciting opportunity. According to Scruggs, key Wall Street analysts have told him that the industry might well be interested in this kind of deal. (Scruggs claims not to have talked with industry officials.) We think you should give Erskine the go-ahead to send out some feelers.