NLWJC - Kagan
DPC - Box 053 - Folder-006

Tobacco-Settlement: State Money [1]

Tob - set - State to money

United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510–6200

March 11, 1999

The Honorable Arlen Specter
Chairman, Appropriations Subcommittee
on Labor, Health and Human Services, and Education
711 Hart Office Building
Washington, DC 20510

The Honorable Tom Harkin
Ranking Member, Appropriations Subcommittee
on Labor, Health and Human Services, and Education
731 Hart Office Building
Washington, DC 20510

Dear Senator Specter and Senator Harkin:

We understand you will be holding a hearing on Medicaid third party liability as it relates to recovery of tobacco settlement funds in your subcommittee on Monday. As Chairman and Ranking Member of the Committee on Finance, we object to this incursion into our committee's jurisdiction.

The amendment offered by Senator Hutchison and adopted during the markup of the emergency supplemental bill fundamentally rewrites Medicaid law. Medicaid changes can have enormous financial consequences for the federal government and deserve to be considered in the appropriate committee of jurisdiction. In addition, the Hutchison proposal alters the balance of delegated responsibilities between the federal government and the states in the operation of the Medicaid program. The Finance Committee needs to consider the precedent at stake.

The Finance Committee will continue to exercise its sole jurisdiction over Medicaid. If the emergency supplemental bill with the Hutchison amendment does not move forward, it would be our intention to reschedule our hearing on Medicaid and tobacco recovery, with a view to marking up the Hutchison bill.

Sincerely,

Bill

William V. Roth, Jr.

Daniel Patrick Moynihan

Tob - nr - state money

Lisa M. Kountoupes
03/23/99 06:40:12 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: House Supplemental and tobacco

meehans folks tell me it was not made in order at rules for the floor so it looks like a conference fight. also they are dropping their bill today.
Cynthia A. Rice

Cynthia A. Rice 03/23/99 05:54:04 PM

Record Type: Non-Record

To: FOLEY_M @ A1 @ CD @ LNGTWY, Lisa M. Kountoupes/WHO/EOP
cc:
Subject: House Supplemental and tobacco

Is there any new information about the House Supp and tobacco? Last we knew the Bliley bill was not in . . .

Message Copied To:

foley_m @ a1 @ cd @ lngtwy
Elena Kagan/OPD/EOP
Joshua Gotbaum/OMB/EOP
Daniel N. Mendelson/OMB/EOP
Caroline R. Fredrickson/WHO/EOP

Educ - IDEA
and
Tob - rct - state money

Cynthia A. Rice 03/11/99 07:52:34 PM

Record Type: Record

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

cc: J. Eric Gould/OPD/EOP, Tanya E. Martin/OPD/EOP, Jonathan H. Schnur/OPD/EOP
Subject: Tobacco recoupment language with IDEA

med_idea.wpd Here's the Chafee language with tobacco prevention at 20% and IDEA at 37% (see bottom of page 2).

With state tobacco settlement funds at about $8 billion a year, this would add $3 billion a year in federal funds to IDEA. According to figures Tanya got from OMB, an additional $11 billion would need to be added to reach a federal share of 40 percent.

Current spending: federal govt pays $4.3 billion or 11% of about $39 billion in cost.

With this amendment: federal govt pays $7.3 billion or 19% of about $39 billion in cost.

Tanya E. Martin
03/12/99 01:06:31 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP

cc: See the distribution list at the bottom of this message
Subject: Re: Tobacco recoupment language with IDEA

I'd recommend one change to the IDEA legislative cite (in bold below):

> "(ii) certifies that at least 37 percent of such amounts received during the fiscal year will be expended on activities required by the **Part B of the** Individuals with Disabilities Act (20 U.S.C. 1411 et. seq.).

"Part B" is the specific section that covers the provision of funds to states and school districts to help pay for the additional costs of services that are needed to educate children with disabilities. I recommend limiting the above cite to Part B -- if the entire bill is referenced states could direct these funds to personnel training , infant and toddler intervention programs -- and a host of other good things that are not directly related to the (up to 40%) federal commitment to help states and local school districts with funding for special education services.

Message Copied To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Laura Emmett/WHO/EOP
J. Eric Gould/OPD/EOP
Jonathan H. Schnur/OPD/EOP

Tob-set-state money

Cynthia A. Rice 03/14/99 07:01:19 PM

Record Type: Record

To: Tanya E. Martin/OPD/EOP
cc: See the distribution list at the bottom of this message
bcc:
Subject: Re: Tobacco recoupment language with IDEA

med_idea.wp Thanks -- here's the language with the change

Tanya E. Martin

Tanya E. Martin
03/12/99 01:06:31 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP
cc: See the distribution list at the bottom of this message
Subject: Re: Tobacco recoupment language with IDEA

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Message Copied To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Laura Emmett/WHO/EOP
J. Eric Gould/OPD/EOP
Jonathan H. Schnur/OPD/EOP

Modified version of Chafee recoupment bill with funds for IDEA

A BILL

To amend title XIX of the Social Security Act to permit the Secretary of Health and Human Services to waive recoupment under the Medicaid program of certain funds received by a State from manufacturers of tobacco products if a State uses a portion of such funds for tobacco use prevention and reduction programs.

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

Section 1. Short Title.

This Act may be cited as the "_____ Act of 1999".

Section 2. Findings.

Congress makes the following findings:

(1) Tobacco products are the foremost preventable health problem facing America today. More than 400,000 individuals die each year as a result of tobacco induced illnesses and conditions.

(2) Virtually all new users of tobacco products are under legal age. Every day, 3,000 young people become regular smokers. Of these children, 1,000 will die prematurely from a tobacco-related disease.

(3) Tobacco products are inherently dangerous and cause cancer, heart disease, and other serious adverse health effects.

(4) Medicaid is a joint Federal-State partnership program designed to provide health care to citizens with low-income.

(5) On average, the Federal Government pays 57 percent of the costs of the Medicaid program, and no State must pay for more than 50 percent of the cost of the program in that State.

(6) The comprehensive settlement of November 1998 between manufacturers of tobacco products (as defined in section 5702(d) of the Internal Revenue Code of 1986) and States, and the individual State settlements reached with such manufacturers, include claims arising out of the Medicaid program.

(7) It is in the interest of the public health to target a portion of the funds received by States as a result of such settlements towards combating

the problem of youth smoking.

Sec. 3 WAIVER OF RECOUPMENT UNDER THE MEDICAID PROGRAM OF TOBACCO-RELATED FUNDS

(A) IN GENERAL-Section 1903 (d)(3) of the Social Security Act (42 U.S.C. 1396b (d)(3)) is amended-

(1) by inserting "(A)" before "The"; and

(2) by adding at the end of the following:

"(B) The Secretary shall waive the applicability of subparagraph (A) and paragraph (2)(B) with respect to amounts recovered or paid to a State as part of the comprehensive settlement of November 1998 between manufacturers of tobacco products (as defined in section 5702(d) of the Internal Revenue Code of 1986) and States, or as part of any individual State settlement or judgement reached in litigation initiated or pursued by a State against one or more such manufacturers, if, with respect to a fiscal year, the Governor or Chief Executive Officer of the State-

"(I) certifies that at least 20 percent of such amounts received during the fiscal year will be expended on activities to reduce tobacco use described in subparagraph (C); and

"(AA) includes as part of such certification a written description of how such amounts will be expended; and

"(BB) supplements and does not supplant the level of funds expended by the State in 1998 for similar activities in the State, as defined in subparagraph (E);

and

"(ii) certifies that at least 37 percent of such amounts received during the fiscal year will be expended on activities required by Part B of the Individuals with Disabilities Act (20 U.S.C. 1411 et. seq.).

"(C) For purposes of subparagraph (B)(I), activities to reduce tobacco use consist of tobacco use prevention and reduction programs, including-

"(I) counter-marketing and counter-advertising;

"(ii) school and community-based education and prevention programs;

"(iii) smoking cessation programs (including training for health care professionals and providers on how to conduct such programs);

"(iv) enforcement of laws relating to tobacco products; and

"(v) evaluation and surveillance of the effectiveness of such programs and activities.

"(D) Nothing in subparagraph (B) shall be construed as limiting the authority of the Secretary under this title to-

"(I) require reports and conduct investigations to ensure that a State is complying with a certification submitted under that subparagraph and clause (iii) of that subparagraph; or

'(ii) limit or deny Federal payments under this section to a State that has failed to so comply.

"(E) Funds described in subparagraph (B)(i) shall be used to supplement not supplant other Federal, State, or local funds provided for any of the purposes described in subparagraph (C) and shall not be used as State matching funds. To receive funds under subsection (B)(i) States must demonstrate a maintenance of effort. This maintenance of effort is defined as the sum of --

(i) an amount equal to 100 percent of Federal fiscal year 1998 State spending on the programs under subparagraph (C) and

(ii) an amount equal to the product of the amount described in paragraph (1) and

(AA) for 1999, the lower of -

(I) general inflation as measured by the consumer price index for the previous year; or

(II) the annual change in the Federal appropriation for the program in the previous fiscal year; and

(BB) for subsequent fiscal years, the lower of -

(I) the cumulative general inflation as measured by the consumer price index for the period between 1998 and the previous year; or

(ii) the cumulative change in the Federal appropriation for the program for the period between fiscal year 1998 and the previous fiscal year.

The maintenance-of-effort requirement in paragraph (i), and the adjustments in paragraph (ii), apply to each program identified in paragraph (i) on an

Tob-set - state money

HHS DRAFT
w/ CR edits

Dear Senator:

I am writing to express the Administration's strong opposition to the provision approved last week by the Senate Appropriations Committee as part of the FY1999 supplemental appropriations bill that would prohibit the federal government from recouping its share of Medicaid funds included in the states' recent settlement with the tobacco companies. The Administration is eager to work with the Congress and the states on an alternative approach that ensures that ~~the federal share of~~ these funds ~~is~~ are used to reduce youth smoking and for other shared state and national priorities.

Under the amendment approved by the committee last week, states would not have to spend ~~not~~ a single penny of tobacco settlement funds ~~would have to be used~~ to reduce youth smoking. The amendment also would have the practical effect of foreclosing any effort by the federal government to recoup tobacco-related Medicaid expenditures in the future, without any significant review and scrutiny of this important matter by the appropriate congressional authorizing committees.

Section 1903(d) of the Social Security Act specifically requires that states reimburse the federal government for its pro-rata share of Medicaid-related expenses that are recovered ~~from liability~~ cases involving third parties. The federal share of Medicaid expenses ranges from 50 percent to 77 percent, depending on the state. States routinely report third-party ~~liability~~ recoveries as required by law. In ~~1997~~ 1998, for example, states recovered some ~~$639~~ million from third-party claims; the federal share of these recoveries was ~~$365~~ $400 million. ~~Estimates for FY1998 are $643 million recovered, with a federal share of $400 million.~~ Over the last five years, federal taxpayers have recouped over $1.5 billion from such third party ~~liability~~ recoveries. 64%

Despite recent arguments by those who would cede the federal share, there is considerable evidence that the state suits and their recoveries were very much based in Medicaid. In fact, in 1997, the states of Florida, Louisiana and Massachusetts reported the settlement with the Liggett Corporation as a third-party Medicaid recovery, and a portion of that settlement was recouped as the federal share.

Some also have argued that the states are entitled to reap all the rewards of their litigation against the tobacco industry and that the federal government can always sue in the future to recover its share of Medicaid claims. This argument contradicts the law and the terms of the recent state settlement. As a matter of law, the federal government is not permitted to act as a plaintiff in Medicaid recoupment cases and was bound by the law to await the states' recovery of both the state and federal shares of Medicaid claims. Further, by releasing the tobacco companies from all relevant claims that can be made against them subsequently by the states, the settlement effectively precludes the federal government from recovering its share of Medicaid claims in the future through the established statutory mechanism. The amendment included in the Senate supplemental bill will foreclose the one opportunity we have under current law to recover a portion of the billions of dollars that federal taxpayers have paid to treat tobacco-related illness through the Medicaid program.

The President has made very clear the Administration's desire to work with the Congress and the states to enact legislation that resolves the federal claim in exchange for a commitment by the states to use that portion of the settlement for shared priorities which reduce youth smoking, protect tobacco farmers, assist children and promote public health. I would urge you to oppose efforts to relinquish the legitimate federal claim to settlement funds until this important goal has been achieved.

Sincerely,

Tob - set - state money

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

March 16, 1999

The Honorable Tom Bliley
Chairman
Committee on Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I am writing in regards to the Senate Appropriations Committee's approval of an *emergency* spending bill with a rider that would prevent the federal government from claiming any of the $246 billion tobacco settlement with the States. The Federal Government has a statutory obligation to recover some of this settlement. In addition, I am extremely concerned by this unorthodox move to change the authorizing language of the Medicaid program, which has long been under the jurisdiction of the House Commerce Committee.

On average, the Federal Government contributes 57 percent of the dollars that the States spend their Medicaid programs, and, consequently, the Federal Government is entitled to approximately 57 percent of the tobacco settlement that is related to Medicaid expenditures. The States argue that they are entitled to the full amount of the settlement because they initiated the lawsuit. The language in the Medicaid statute maintains that the States have the responsibility "to ascertain the legal liability of third parties...to pay for care and services received under the [State's Medicaid] plan." In turn, the States are required to credit the Federal Government for its share of Medicaid expenditures recovered from liable third parties. There is no reason to believe that this requirement would not apply to the tobacco settlement.

The States also argue that because the settlement language did not specify which portion of the amount is intended for Medicaid expenditures, the Federal Government has no statutory claim on the money. This is a weak argument. Medicaid claims were indisputably at the core of the States' litigation. A June 1997 memo from the Attorney General of Indiana to the other State Attorneys General explains that "States are in the business of administering Medicaid, and Medicaid reimbursement was the primary element of damages for most, if not all, suing States." In addition, the States have explicitly waived in the settlement language any right to further

The Honorable Tom Bliley
Page 2

recovery of health care expenditures, thereby closing the door to any further recoupment of Medicaid funds.

The Senate Appropriations Committee's action would sidestep the Commerce Committee's jurisdiction. For over 20 years, the Commerce Committee has had the responsibility for authorizing the program, and any changes in the authorizing language should be passed through the Commerce Committee. The emergency spending bill passed by the Senate Appropriations Committee would change the authorizing language of the Medicaid statute. Regardless of how the Commerce Committee would resolve this matter, it should be considered under regular order, with complete hearings and markups. Members are entitled to learn from the Governors how they intend to spend this money, and whether the funds will be used for tobacco and health related programs.

As you know, Bill Young, the Chairman of the House Appropriations Committee, has indicated that the emergency spending bill should be clean and free of the tobacco rider, and we should support him in blocking this rider. We need to act cooperatively in order to ensure careful consideration of this matter.

Thank you for your attention to this matter.

With every good wish.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Tob - ser - state money

Lisa M. Kountoupes
03/09/99 07:01:24 PM

Record Type: Record

To: Lawrence J. Stein/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: tobacco in the House

Hansen/Meehan are planning to introduce their bill on wednesday. they are trying to get the bipartisan support of members with tobacco interests. they will be seeking a statement of support from us if they reach the 100 sponsors mark with a significant number of republicans.

Waxman is working with Dingell (he had tried to get Obey and Rangel, but i do not think that effort is panning out) to introduce an alternative as early as wednesday which would claim the entire 57% for the federal government, but return approximately $3.2 billion of the annual total to the states with strings. Approximately $800m/year would be used for a national education campaign, farmers and communities and minorities. they will want support from us. Bruce Reed and Jack Lew told Mr. Waxman today that the President did not say he wants to keep any of the money and that their approach departs from our stated preference.

Message Copied To:

Mindy E. Myers/WHO/EOP
Caroline R. Fredrickson/WHO/EOP
Cynthia A. Rice/OPD/EOP
Elena Kagan/OPD/EOP
Joshua Gotbaum/OMB/EOP
Thomas L. Freedman/OPD/EOP

Tob-rec-state money

Fred Duval 03/12/99 11:05:03 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject:

Iowa AG Tom Miller called to tell me he will join Mike Myers, Ohio AG Betty Montgomery and others testifying on tobacco recoupment on Mon am. They will endorse the Harkin amendment.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Cynthia A. Rice/OPD/EOP
William H. White Jr./WHO/EOP
Mickey Ibarra/WHO/EOP

Tob-set - state money

Thomas L. Freedman
03/03/99 10:20:14 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Recoupment and farmers

Bruce asked me to check in with congressional offices on how they would prefer the recoupment language on farmers to read: should the states be credited for money that explicitly goes through the trusts set up under the Phase II agreement or should states be credited for funds spent in more general categories such as "promoting economic development in regions injured by reduced sales or price of tobacco." I checked with Senator Robb's staff who is the main Dem. in the Senate now on the subject, and Rep. Etheridge's staff who took a lead role last year and ag. staff. They all preferred we didn't have any bill, but if there is a bill want us to use the general categories not the trusts. Gov. Patton's staff felt the same. Another very good argument for the general categories is the current drafting of the Phase II trust language. Although not finalized, the language requires that while some of the states have their own trusts, the tobacco companies will appoint a national board to oversee overall distribution of funds and deal with direct allocation of funds in some of the smaller states like Ohio. I'd guess we wouldn't want to put money into a system where they have so much control.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Cynthia A. Rice/OPD/EOP
J. Eric Gould/OPD/EOP
Mary L. Smith/OPD/EOP

Tob-sct-state money

Cynthia A. Rice 03/02/99 06:38:59 PM

Record Type: Record

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

cc: Christopher C. Jennings/OPD/EOP, Jeanne Lambrew/OPD/EOP, Devorah R. Adler/OPD/EOP
Subject: Federal tobacco claims

Here's how we've responded to date to the "how can these be Medicaid claims" question

q&a0222b.wpd

A few additional facts that might be helpful:

- The nation's leading expert on tobacco-related costs, Leonard S. Miller of the University of California, estimated that tobacco cost Medicaid $13 billion in 1993 -- far ~~less~~ more than the $8 billion a year the states settled for. (The article was published in the March/April 1998 Public Health Reports and was cited by CBO in its tobacco analysis last year. Miller is the same expert the states relied upon to provide state estimates that formed the basis of their settlement formula).

- The states gave up both state and federal Medicaid claims in exchange for the tobacco settlement funds -- the November settlement document releases the tobacco companies from all claims that the states "directly, indirectly, derivatively, or in any other capacity ever had, now have, or hereafter can, shall or may have" against the tobacco companies -- which includes Medicaid claims. Thus all states gave up their Medicaid claims in exchange for the settlement funds they received.

- The Medicaid statute (Title XIX of the Social Security Act) says:

1. The state plan must provide that "the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties.... that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the state can reasonably expect to recover exceeds the costs of such recovery, the state or local agency will seek reimbursement for such assistance to the extent of such legal liability." (section 1925(a)(25) of the Social Security Act)
2. "Expenditures for which payments were made to the state under subsection (a) shall be treated as an overpayment to the extent that the state or local agency administering such plan has been reimbursed for such expenditures by a third party pursuant to the provisions of its plan in compliance with section 1902(a)(25)." (section 1903(d)(2)(B) of the Social Security Act)

Tobacco and Medicaid in California
February 22, 1999 POTUS

Q: How do you answer Governor Gray Davis's comments that California is not getting reimbursed at all for Medicaid costs because they took Medicaid out of their suit?

A: Both the Justice Department and HHS have analyzed the issue of tobacco recoupment carefully and concluded that the settlement is for Medicaid claims.

First, states have an obligation under Medicaid law to pursue funds owed to the Medicaid program. Thus, states that sued for tobacco-related health costs should have included tobacco-related Medicaid claims in their suits -- as all or almost all did. Moreover, states cannot sue only for state Medicaid costs; they are obliged by Medicaid law to sue for the federal costs at the same time. Since the federal government pays on average 57 percent of Medicaid claims, the states are obliged to share those recoveries with the federal government.

Second, the states gave up both state and federal Medicaid claims in exchange for the tobacco settlement funds. For example, the November 1998 settlement document releases the tobacco companies from all claims that the states "directly, indirectly, derivatively, or in any other capacity ever had, now have, or hereafter can, shall or may have" against the tobacco companies -- which includes Medicaid claims. Thus all states gave up their Medicaid claims in exchange for the settlement funds they received.

Tob-ser - state money

Selected State Plans and Governors' Proposals:
State Tobacco Settlement

Michigan ($8.5 billion / 25 years; $315 million / 1 year)

Gov. Engler wants to use a significant portion of the settlement funds for college scholarships for students who excel on state achievement tests. He is willing to use some of the money for health programs - on a one time basis but he first wants to ensure that the money is available for scholarships. Detroit News, 2/11/99

Massachusetts ($7.9 billion / 25 years; $293 million / 1 year)

Gov. Cellucci proposed establishing a trust fund and using the settlement money to pay for existing health care programs. His only initiative is $500,000 to study tobacco control programs. Cellucci is under criticism by Democrats that settlement money should be used to fund the state's acclaimed tobacco control program rather than substitute current state spending on public health programs. Boston Globe, 2/11/99

New York ($25 billion / 25 years; $818 million / 1 year)

Gov. Pataki proposed using three-fourths of the settlement dollars to fund capital projects in an effort to reduce the state's debt. Times Union, (Albany) 2/04/99

Louisiana ($4.4 billion / 25 years; $163 million / 1 year)

Gov. Foster proposed to sell the state's $4.4 billion share of the settlement to get up-front cash of $2.3 billion to retire the state's debt and increase teachers' salaries. The Advocate, (Baton Rouge) 1/3/99

Tob-set- state money

Cynthia A. Rice 03/04/99 06:50:16 PM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc: J. Eric Gould/OPD/EOP
Subject: CORRECTED Daily Report

Both the Harkin amendments failed by voice vote (change it if you can)

Tobacco: Hutchison amendment -- The Hutchison bill letting states keep all tobacco settlement funds was added to the Senate Supplemental today by voice vote. Harkin, Durbin and Specter spoke against it. Harkin had two amendments [a) 25 percent of funds for tobacco control and b) limit the bill's effect to two years] -- both failed by voice vote. Before the markup, Senator Roth had sent a letter to Senator Stevens saying Appropriations Committee action on the Hutchison bill would "bypass the jurisdiction of the Finance Committee" and that the bill "has enormous ramifications for the Medicaid program and should be thoughtfully considered through the committee process." He noted the amendment was not paid for and urged the committee, if it was compelled to act, to prevent recoupment in 1999 or 2000 to give the Finance Committee time to act. The Hutchison bill now has 40 co-sponsors, including 9 Dems (Graham, Leahy, Torricelli, Feinstein, Murray, Lincoln, Bayh, Robb and Levin -- the last two co-sponsored 3/3)

--------------------- Forwarded by Cynthia A. Rice/OPD/EOP on 03/04/99 06:51 PM ---------------------------

Cynthia A. Rice 03/04/99 06:10:02 PM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc: J. Eric Gould/OPD/EOP
Subject: Daily Report

Food Stamps: Possible Washington Post Story -- Judy Haveman called both USDA and HHS to ask questions about federal and state roles in the Food Stamp program. She indicated she was writing a story for Friday, but it's not clear what her angle is.

Tobacco: Hutchison amendment -- The Hutchison bill letting states keep all tobacco settlement funds was added to the Senate Supplemental today by voice vote. Harkin, Durbin and Specter spoke against it. Harkin had two amendments [a) 25 percent of funds for tobacco control and b) limit the bill's effect to two years] -- the latter failed by voice vote; the former was brought up for a vote. Before the markup, Senator Roth had sent a letter to Senator Stevens saying Appropriations Committee action on the Hutchison bill would "bypass the jurisdiction of the Finance Committee" and that the bill "has enormous ramifications for the Medicaid program and should be thoughtfully considered through the committee process." He noted the amendment was not paid for and urged the committee, if it was compelled to act, to prevent recoupment in 1999 or 2000 to give the Finance Committee time to act. The Hutchison bill now has 40 co-sponsors, including 9

Tob - mr - State money

Cynthia A. Rice 03/03/99 03:47:41 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: More news on Hutchison amendment

---------------------- Forwarded by Cynthia A. Rice/OPD/EOP on 03/03/99 03:49 PM ---------------------------

J. Eric Gould 03/03/99 03:30:51 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP

cc:

Subject: Hutchison amendment

Spoke to Ann Ford and they are working the issue pretty hard. They are having state public health people call Approps. members.

Hutchison is still planning on offering the amend. with no offsets / she thinks that CBO's estimate is wrong. Some Reps. are unhappy with this approach and believe it will undermine their efforts in the long run.

Bryant had told folks that Graham was objecting to Hutchison bringing up the bill in this context.

Roth was weighing in on Stevens to get him to oppose the Amendment.

Harkin is taking the lead for the Dems. Lautenberg will assist Harkin.

Govs. are making calls to Committee members to support the amendment.

₰ Tob - set - state money

Cynthia A. Rice 02/22/99 02:30:39 PM

Record Type: Record

To: Barry J. Toiv/WHO/EOP
cc: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP
bcc:
Subject: Re: Please answer the following questions for me:

Let me answer 2 out of the 3:

(1) $18.9 billion is 57 percent of the payments OMB estimates the states will get from the tobacco industry in FY 2001, 2002, 2003, and 2004. (Because the payments from the industry will be adjusted by volume of cigarettes sold, there is some estimating involved.)

(3) Yes.

We'll get back to you on (2).

Barry J. Toiv

Barry J. Toiv

02/22/99 02:18:00 PM

Record Type: Record

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

cc:
Subject: Please answer the following questions for me:

1. How did we come up with the $18.9 figure for 2001-2004 -- does it represent 57% of something?

2. Joe was asked specifically today about Governor Gray Davis's comments that California is not getting reimbursed at all for Medicaid costs because they took Medicaid out of their suit. What's the answer to that? (I might want to post an answer to this one in the back of the press room.)

3. We are only trying to direct states how to spend the $18.9 plus future years of our share, not their share as well, correct? YES

Tob - ser - state money

Cynthia A. Rice 02/23/99 06:58:25 PM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc: J. Eric Gould/OPD/EOP
Subject: Tobacco -Daily

Tobacco Settlement Funds -- Tuesday afternoon's Congress Daily reported that today Senator Lott told the governors "It's your money, and you should be able to keep it." Hastert apparently said "From our point of view, we don't have designs on that." Congress Daily reported that three of the four congressional leaders pledged to go along with the governors' desire to keep all the money, including Daschle, but only quoted Daschle as saying "You committed reserves and committed the effort." Gephardt was silent on the issue.

Tob-ar-state money

Guidance on Tobacco Recoupment Policy
February 22, 1999

Q: The NGA has made its top legislative priority for the 106th Congress the Hutchison-Graham bill, which protects tobacco settlement funds awarded to states from claims by the federal government. The Governors say that there is no basis for federal recoupment because (1) the states assumed all the burden and risks of litigation and (2) much of the settlement money is for non-Medicaid claims. Why aren't they right?

A: First, we believe the state tobacco settlement is a real step in the right direction. We all share the same commitment to reducing youth smoking. Every day, 3,000 children become regular smokers and 1,000 have their lives shortened as a result.

Second, the President believes we must do more to protect children and reduce youth smoking. He will continue to push for legislation to increase the price of cigarettes so fewer young people start to smoke, hold the tobacco companies accountable for their youth marketing practices, and reaffirm the FDA's authority to regulate tobacco products. In addition, the Justice Department is planning a suit to recover from the tobacco companies the health care costs incurred by Medicare and other federal programs as a result of smoking.

On the question of tobacco recoupment, we have an obligation under current Medicaid law to recoup the federal share of the tobacco settlement. The federal government pays an average of 57 percent of Medicaid costs, and states routinely reimburse us for the federal share of Medicaid collections. Both the Justice Department and HHS have analyzed this issue and concluded that the bulk of the state tobacco settlement is for Medicaid costs.

Still, the President has said all along that he is committed to working with the states and Congress to enact legislation to settle the federal government's claims in exchange for a commitment by the states to use tobacco money to prevent youth smoking, protect tobacco farmers, improve public health, and assist children. The President's budget specifically assumes no recoupment until FY 2001 ($18.9B between 2001 and 2004) so that we can reach an agreement this year. We want to start work on this kind of agreement as soon as possible.

Governors and legislatures will come under tremendous pressure to spend these funds on things that have nothing to do with children or tobacco farmers or reducing youth smoking. The Administration will oppose any legislation that completely gives up the federal share of the states' tobacco settlement -- without any commitment by the states to use these monies to prevent youth smoking, protect tobacco farmers, improve public health, or assist children.

Q: Why are you trying to recoup state funds when you are filing a federal lawsuit to obtain reimbursement for federal tobacco-related costs?

A: These two claims are separate and distinct. Under current law, the federal government cannot pursue Medicaid claims directly; states are under a legal obligation to pursue them and the federal government must recoup its share from the states. The Justice Department litigation will seek reimburse for federal claims outside of Medicaid, including tobacco-related health costs in Medicare, the Federal Employee Health Benefits program, military and veterans benefits, and the Indian Health Service.

Tob - set - state money

Cynthia A. Rice 02/09/99 06:22:23 PM

Record Type: Record

To: Nicole R. Rabner/WHO/EOP
cc: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP
bcc:
Subject: Re: tobacco recoupment menu and child care

David Kass was in a meeting I attended today, and he is already pushing for child care.
Nicole R. Rabner

Nicole R. Rabner

02/09/99 10:54:51 AM

Record Type: Record

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

cc:
Subject: tobacco recoupment menu and child care

The child care advocates (principally CDF and the National Women's Law Center) have caucused as they promised on the question of whether child care should be on the menu of state spending of federal tobacco settlement dollars. Their answer is now YES, on the basis that it does not foreclose any appropriations options for child care. They plan to push this position with Kennedy, Kerry, etc., knowing that many congressional staff are grappling with the same question.

Tob - set - state money

EC-6 Tobacco Settlement Funds (Amendment in the form of a substitute)

On November 23, 1998, our state attorneys general reached a state settlement agreement with tobacco manufacturers. Combined with the settlements from the four states that had individual lawsuits, the tobacco manufacturers agreed to pay out a total of $246 billion over twenty-five years to the states.

It is the nation's Governors' position that states are entitled to all of the funds awarded to them in the tobacco settlement agreements without federal seizure for so-called Medicaid overpayment. Our states endured all of the risks and expenses during the arduous negotiations and litigation necessary to reach final agreements. The federal government did not join in or assist in the lawsuits, even though they were invited to do so. Most importantly, the carefully crafted agreement reflects only state costs based on issues like anti-trust violations, consumer fraud, consumer protection, and racketeering. Therefore, there is no legitimate federal claim on the settlement funds.

We call on Congress and the administration to amend the Social Security Act to prevent federal seizure of state tobacco settlement funds.

The nation's Governors are committed to spending a significant portion of the settlement funds on smoking cessation programs, health care, and related programs. However, they wish to spend these funds on state programs that are tailored to the individual needs of their citizens.

Tobacco Settlement Resolution

The nation's Governors wish to commend all of the bipartisan cosponsors of S. 346 and H.R. 351, the state tobacco settlement protection bills. The original sponsors, Sens. Hutchison and Graham and Rep. Bilirakis recognized that the states are entitled to all of the funds awarded to them in the tobacco settlements without federal seizure.

The cosponsors recognize that states endured all of the risks and expenses during the arduous negotiations and litigation necessary to reach final agreements. The federal government did not join in or assist in the lawsuits, even though they were invited to do so. Most importantly, the carefully crafted agreement reflects only state costs based on issues like anti-trust violations, consumer fraud, consumer protection, unjust enrichment, conspiracy, and racketeering.

The legislation affirms that Medicaid recovery provisions in the Social Security Act do not encompass, and were not intended to apply to situations in which states initiate lawsuits on behalf of all their residents against manufacturers of products, asserting a variety of consumer protection and other causes of action, and that therefore, there is no legitimate federal claim on the settlement funds.

The Governors offer their full support for this legislation and are committed to working with members of Congress to ensure its ultimate passage and implementation.

Tob - set - state money

DRAFT 3/1

Medicaid Recoupment

1. Settle the federal claim (57% of the tobacco settlement funds) in exchange for a commitment that states spend the funds on shared national and state priorities to prevent youth smoking, protect tobacco farmers, improve public health, and assist children. This commitment, defined in legislation, would apply to all years of tobacco settlement (not just the five year budget window).

2. Define shared national and state priorities in legislation as:

   a. Tobacco prevention -- prevention, education, enforcement, cessation, evaluation

      → Floor of 15, 20, 25%? (15%=$720 mi/yr; 20%=$960 mi/yr; 25%=$1.2 bi/yr)
      → Require Secretary to certify tobacco plan which must include certain elements?

   b. Tobacco farmers -- a) payments to tobacco farmer trust funds established by recent settlement and/or b) direct payments to quota owners and active producers; career development, financial planning, or educational assistance; economic development grants

   c. Public health: community health centers and other providers of health care for the uninsured, CHIP/Medicaid outreach, CHIP match (up to 6% of total), maternal and child health, and mental health

      → ~~Should CHIP presumptive eligibility language be included? (was in McCain)~~

   It is still hanging on by a thin string. If there ends up being a long list (which we don't want), there would not be a Medicaid score and therefore we might want to consider presumptive eligibility.

   d. Anti-drug efforts -- safe and drug free schools, substance abuse treatment

   e. Child care -- child care block grant and early learning fund

3. Maintenance of effort: state spending on specified uses must be in addition to historic spending.

4. States would remit to the federal treasury the $2.9 billion CBO-scored cost.

   Do states get credit for this $2.9 bi payment, e.g., is the federal share they must spend on specified purposes lowered by the amount of the payment? If so, a given percentage set-aside for tobacco prevention would be smaller through 2004.

   15% = $600 mi/yr through 2004, then rising to $720 mi/yr;
   20% = $800 mi/yr through 2004, then rising to $960 mi/yr;
   25% = $1 bi/yr through 2004, then rising to $1.2 bi/yr.

Tob-set - state money

Cynthia A. Rice 03/03/99 11:24:05 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Hutchison may try to add bill to supplemental at full cmte markup tomorrow

Harkin's staff reports that they've heard the rumour that Hutchison plans to offer her recoupment bill to the supplemental bill at the Senate Approps markup tomorrow afternoon.

Harkin's staff current idea is to offer a second degree setting aside 30% of funds for tobacco prevention.

Message Sent To:

Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
J. Eric Gould/OPD/EOP
Christopher C. Jennings/OPD/EOP
Jeanne Lambrew/OPD/EOP
Devorah R. Adler/OPD/EOP
Joshua Gotbaum/OMB/EOP
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Ingrid M. Schroeder/OMB/EOP
Caroline R. Fredrickson/WHO/EOP
Lisa M. Kountoupes/WHO/EOP

Tob - st-state money

THE WHITE HOUSE

Domestic Policy Council

DATE: 2/8

FACSIMILE FOR: Laura Emmet

FAX: 62876
PHONE:

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): 2

COMMENTS: Will you have Elena review?
This is a fact sheet Shalala asked
her people to do re: recoupment

02/08/99 17:28 FAX ☒002

HCFA FACT SHEET
February XX, 1999
Contact: HCFA Press Office (202) 690-6145

DRAFT #45

The States' Tobacco Settlement and Medicaid Recoupment

On November 16, 1998, 46 states agreed to a settlement joining 4 states that had previously settled. with the major tobacco companies that would, in part, reimburse these states for their Medicaid expenses in treating people for tobacco-related health problems. The Health Care Financing Administration administers the Medicaid program at the federal level and pays, on average, 57 percent of the expenses paid out by the states' Medicaid programs.

A March 31, 1968 amendment to Title XIX of the Social Security Act specifically requires that states reimburse the federal government for its pro-rata share of Medicaid-related expenses that are recovered from liability cases involving third parties. Specifically, the law states:

> *"If a state receives FFP [federal financial participation] in Medicaid payments for which it receives third party reimbursement, the State must pay the federal government a portion of the reimbursement determined in accordance with the FMAP [Federal medical assistance percentage] for the state."*

It is important to recognize that unlike the states, the federal government is not authorized by the Medicaid statute to sue third parties directly. This does not mean, however, that Congress intended to abdicate its claim to such recoveries. Rather, the Medicaid statute protects the federal government's interests by explicitly making the states responsible for both pursuing these recoveries, reporting them to HCFA, and ensuring that the federal government receives the share to which it is entitled.

U.S. taxpayers have paid a substantial portion of the Medicaid costs that were the basis for the state tobacco settlements. HHS and the Department of Justice have reviewed the law, as currently written, and determined that it applies to this situation and that HCFA is obligated to seek recovery from the states of the federal share of any recoveries or settlements relating to Medicaid expenditures, including tobacco-related settlements.

~~However~~, the Administration will ~~has delayed action on claiming the federal share of the state tobacco settlements until FY 2001, in order to~~ work with the states and Congress over the next year to resolve these federal claims through mutually agreeable tobacco legislation. For example, the Administration could agree to waive federal claims to this money in exchange for a commitment by the states to devote the federal share of the recovered Medicaid funds to ~~specified tobacco prevention activities, such as reducing youth smoking and promoting public health.~~

support shared national and state priorities which prevent youth smoking, protect tobacco farmers, improve public health, or assist children.

Tob - ser - state money

STATEMENT OF BRUCE REED ON MEDICAID TOBACCO RECOUPMENT
February 3, 1999

The Administration will oppose the legislation introduced by Senator Hutchinson, which would completely give up the federal share of the states' tobacco settlement -- without any commitment by the states to use these monies to prevent youth smoking, protect tobacco farmers, improve public health, or assist children. An average of 57 percent of state recoveries is reimbursement for costs borne by ~~the~~ federal taxpayers~~government~~, and the Administration believes that these funds should be spent on purposes related to tobacco, public health, and children. The Administration will work with the states and Congress to enact tobacco legislation that resolves the federal claim to settlement funds in exchange for a commitment by the States to use the federal share to support our ~~these~~ shared state and national priorities.

Tob-sr - state money

TOBACCO MENU OPTIONS

I. Issues

- [redacted] What programs should be included on a menu and what percentage should be allocated between tobacco / kids?

- **STRUCTURE.** How should these menu items be defined?

- **OFFSETS.** How should the $2.9 billion federal share be offset?

II. Menu

Possible proposals include:

- **50% Tobacco / 50% Kids.** State a broad position allowing latitude in future negotiations (Tobacco could include prevention and enforcement as well as farmers; kids could include: child care, health (CHIP) and child welfare.)

- **Tobacco Control / Farmers / Kids.** A broad menu of three items. Non-tobacco growing states would not have to spend on farmers.

- **Fixed Percentage on Tobacco Control with Menu of other Items.** Additional items could include:

  - Tobacco farmers
  - Maternal and Child Health Bureau's Title V program
  - Child Care and Development Block Grant
  - Child Welfare Programs (Title IV-B)
  - SAMHSA grant programs
  - Safe and Drug Free Schools program
  - CHIP matching funds

Menu Requirements. (1) Funds from the grants may not be used as state match for Federal programs (except CHIP); (2) there will be a MOE on a program-specific basis; and (3) federal spending will be netted for amounts spent on federal programs (possible OMB proposal).

III. Structure

Tobacco Control Programs. To be determined is the level of specificity to these programs and whether farmer assistance is included or is separate to ensure that dedicated monies assist farmers. Tobacco control programs could be described in broad terms, such as:

1. Activities for tobacco use prevention and control including community based programs similar to programs currently funded by the NIH and assistance to local governmental entities to conduct appropriate anti-tobacco activities; and

2. Counter-marketing programs designed to discourage the use of tobacco products by

individuals, to encourage those who use such products to quit, and to educate the public about the hazards of exposure to environmental tobacco smoke implemented through contracts or grants to eligible entities.

Or, a more specific menu similar to McCain, which includes:

- A media based counter advertising campaign to discourage the use of tobacco products;
- State, community and school-based education and prevention programs to discourage the use of tobacco products;
- Evidence-based tobacco use cessation programs, consistent with the most recent tobacco use cessation guidelines issued by the Agency for Health Care Policy Research or are approved as safe and effective for tobacco use cessation by the FDA; and
- Activities to enforce youth access restrictions in order to reduce the sale and distribution of tobacco products to individuals under 18 years of age.

Assistance to Farmers. Legislation could allow states to direct funds to assist tobacco farmers through:

- **Farmer State Trusts.** States could make additional contributions to the Phase II State Trusts recently agreed to by the industry and governors of tobacco growing states. The 11 tobacco growing states will establish separate state trusts with $5 billion in industry payments; or
- **Authority to USDA**. States could fund a program authorized in legislation, to be designed by the Secretary of USDA, to assist tobacco farmers.

IV. Estimates and Offsets

The Administration's budget assumes that Medicaid costs were the basis for the states' recovery, whereas CBO assumed that only half of the state settlement funds were attributable to Medicaid. Moreover, CBO assumed that there is a 25 percent probability that HCFA will successfully retrieve the funds from the states, while the Administration's budget assumes full recovery. As a result of CBO's estimate, any bill that would waive HCFA's ability to recoup the Federal share in exchange for a commitment by the States to use the Federal share to support shared state and national priorities would require a $2.9 billion pay-for.

OMB: Estimated Effects of Recoupment Policy (in billions)

FY	2000	2001	2002	2003	2004	**2001-2004**
		4.6	4.7	4.8	4.8	**18.9**

CBO 1/98 Baseline: Estimated Effects of Recoupment Policy (in billions)

FY	2000	2001	2002	2003	2004	**2001-2004**
		.68	.74	.76	.79	**2.9**

Possible offsets include:

1. Requiring the states to pay $2.9 billion to the federal treasury; or
2. Requiring the states to accept $2.9 billion less in federal block grants; or
3. Increase the excise tax on tobacco products to cover the lost federal share (HHS is checking whether an excise tax triggers offset provisions contained in the state settlement).

Tob-set - state money (recoupment)

Cynthia A. Rice 01/26/99 10:18:08 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:

Subject: CBO Score of Tobacco Recoupment

I was told tonight that CBO released its score today, estimating that the federal government will recoup $2.9 billion over 5 years and $6.8 billion over 10 years from the state tobacco settlements. CBO estimates states will collect $48 million over 5 and $97 million over 10 from the settlements and that 1) about half that is Medicaid; 2) the federal Medicaid share is 57%; 3) the feds recoup about 25% of what they're owed.

Message Sent To:

Bruce N. Reed/OPD/EOP
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Tob - scr - state money

CAMPAIGN for TOBACCO-FREE Kids

NATIONAL CENTER FOR TOBACCO-FREE KIDS

TO: State Advocates

FROM: TFK Staff

DATE: 12/23/98

SUBJECT: Background on Federal Claim to a Portion of the Funds from the November 1998 Agreement between the states and the tobacco industry

---

While public health advocates have properly focused on the implications of the November 1998 Agreement between the states and the tobacco industry for their upcoming state legislative sessions, there is one issue related to the agreement that will in all likelihood require Congressional consideration in 1999.

It may be that the states will not receive all of the funds from the agreement. Many of these cases included a claim by the states seeking to recoup the Medicaid money that they spent treating tobacco-caused disease. Now, the federal government has indicated it has a claim to a portion of these funds because it pays more than 50% of the costs of the Medicaid program.

The states have responded by saying that they will ask Congress to waive any claim the federal government has to these funds and do so without placing any restrictions on how the states spend the money. The federal government's claim and how it is resolved directly effects how much money the states receive and whether they are required by federal law to spend any of that money on programs to reduce tobacco use. Therefore, this issue is important to public health organizations at both the state and national level.

The purpose of this Memo is to alert you to the issue and the policy options that are available. Your assistance and input will be vital if and when Congress takes up the states' request for the federal government to waive its right to any of the settlement funds. Until this issue is resolved state legislators cannot be sure that they will actually receive the amount set out in the agreement.

BACKGROUND:

MEDICAID AND THE STATE LITIGATION AGAINST THE TOBACCO INDUSTRY

When the State of Mississippi became the first state to sue the tobacco industry in 1994, one of its primary claims was that Mississippi was entitled to reimbursement from the tobacco industry for the substantial costs incurred by the state through the Medicaid program for treating tobacco-caused disease.

Many of the other state lawsuits included similar Medicaid claims. At the time of the November 1998 Agreement, many, but not all state cases against the tobacco industry included claims for Medicaid reimbursement. Some states based their case entirely on other types of claims, such as anti-trust and consumer fraud issues. In several other cases, courts dismissed the Medicaid claim during the pre-trial stage of the litigation.

CURRENT MEDICAID LAW

The Medicaid program is a federal/state partnership with each paying a portion of the program's costs. On average the federal share of the Medicaid program is nearly 60 percent. The federal share varies from state to state depending on per capita income and other state specific factors. The federal share ranges from 50 to 80 percent of the total cost of the program in the different states.

Under current Medicaid statutes it is the state's responsibility to "ascertain the legal liability of third parties." The federal statutes prevent the federal government from suing the tobacco companies or other third parties to recover Medicaid costs. The Medicaid statute protects the federal government's interest by making the states responsible for pursuing third parties, reporting them to the federal government and ensuring that the federal government receives its share. <u>The federal government is required by statute to recover the federal portion of any state recoveries from liable third parties.</u>

<u>THE NOVEMBER 1998 SETTLEMENT AGREEMENT'S TREATMENT OF THE STATES' MEDICAID CLAIMS</u>

The agreement covering 46 states does not distinguish how much of the settlement money is being paid for each type of claim in each lawsuit. Therefore, it is impossible to say with precision how much of the $206 billion is for Medicaid reimbursement and how much is for other causes of action.

The drafters of the agreement de-emphasized the Medicaid issue, presumably to strengthen their argument that the federal government is not entitled to a large share of the overall amount. It is unclear how effective this strategy will be because the settlement agreement resolves all Medicaid claims that were brought by the states or could have been brought by the states. Thus, it eliminates the ability of the federal government to seek these funds.

The Clinton Administration has said that it will assert a claim to a portion of these funds. It has said that the law does not give it the authority to administratively waive the federal government's claim. The Governors have responded that they will resist any effort by the federal government to claim these funds. The Governors and the federal government also disagree about how much of the settlement dollars are related to Medicaid costs.

WAIVER DEBATE IN 105TH CONGRESS

In September the Governors sought to have a provision inserted into the Omnibus appropriations bill that would have waived the federal governments claim to any of the settlement funds with no strings attached.

The ENACT Coalition took the position that it did not object to the waiver provided that the states were required to spend a proportion of the funds on programs to reduce tobacco use. The Clinton Administration took the position that it would agree to a waiver, only if the waiver was conditioned on the federal share being spent on programs selected by the states from a menu of programs specified by federal legislation. This menu originally included a number of children's health programs and childcare, but the Administration said they would add tobacco.

Some members of Congress opposed any waiver altogether. They fell into two categories: tobacco control allies who want the federal government to use the federal share for tobacco control; and those who believe that allowing states to keep the money sets a bad precedent for the Medicaid program and want any funds recovered to go back into the program.

Given the lack of consensus, the states' effort to pass the waiver at the end of the last Congress did not succeed.

POLICY OPTIONS

There are FOUR options:

1) Congress could do nothing. In that case, the federal government would pursue its claim. If no agreement was reached with the states as to the amount to which the federal government was entitled, the federal government would unilaterally begin to withhold future Medicaid payments to the states until it received the amount to which it claims it is entitled.

This would prompt the states to go to court. This option threatens to tie up at least a portion of the money.

2) Congress could mandate that some of the funds be returned to the federal government. In that case the money could go to the treasury, be set aside for the Medicaid program, or be earmarked for other functions, including tobacco prevention. This will result in less money going to the states.

3) Congress could waive the federal government's share of the settlement money. This is the option preferred by the states and the Governors. This would free up the money for the states' use.

   a) If Congress agrees to waive its right to these funds, it could allow the money to be returned to the states with no conditions as to its use, or

   b) Congress could condition any waiver on the states' agreement to spend some or all of the federal share on programs or goals specified by Congress, including programs to reduce the death toll from tobacco.

The National Governors Association and a number of individual Governors have indicated that securing a waiver of the federal claim on any of the settlement funds is a high priority in the next Congress.

BUDGET IMPLICATIONS

Any waiver poses a serious budget issue. If the federal government is entitled to receive funds from the state cases under current law, any waiver of the funds will have to be offset by a comparable reduction in spending or increase in revenues elsewhere.

At the time of the attempt at the close of the last Congress to pass legislation to waive the federal claim of any settlement funds, the Congressional Budget Office estimated that the federal costs associated with waiving the federal share for the four states that had already settled plus an unknown number that it predicted would win or settle was $1.7 billion over 5 years. It is expected that these costs will increase now that 46 additional states have sued and the Congressional Budget Office is in the process of calculating new estimates. The estimates could be as high as $10-15 billion over 5 years.

POSITION OF ENACT AND THE PUBLIC HEALTH COMMUNITY

Proposed Position

ENACT does not oppose the states' effort to obtain a waiver provided that the waiver is conditioned on the states spending a specified portion of the money to adequately fund programs to reduce tobacco use and the toll from tobacco. These cases were brought to reduce the harm caused by tobacco. It only makes sense that a sufficient portion of these funds be used to accomplish that goal. If this occurs, a waiver could benefit tobacco control efforts nationwide.

The CDC has circulated estimates about the resources necessary for a comprehensive tobacco control plan in each state. These estimates include a high and low estimate. The low estimate would require that about 25% of the total amount the states receive be used for programs to reduce tobacco use. Any federal waiver should at a minimum require the states to set aside at least this amount out of their portion of the settlement funds for programs to reduce tobacco use. ?

One risk to a position geared to the CDC's recommendations is that some may see the figure as the maximum that a state should spend on tobacco related programs. There is a risk that this position might affect the debate in those few states where there is a strong possibility that the state itself will earmark more for tobacco control. This risk is probably offset by the fact that many states are not talking about spending any of the money to reduce tobacco use and many others are talking about spending only a small proportion for these purposes.

Risk to the Proposed Position: The Governors feel strongly about receiving all of the money from the November 1998 agreement. It is unclear how they will respond to organizations that oppose this effort.

Risk if a Waiver is granted With No Strings Attached: The November 1998 agreement places no restrictions on how the states spend the money they receive. If the states receive the federal share of the money with no strings attached, there is no assurance that any of the money will be spent for public health or for tobacco control purposes.

Benefit to the Proposed Position: A waiver conditioned on the states spending a specified portion of the funds on programs to reduce tobacco use may be the best guarantee that the November 1998 agreement will result in the sustained funding of tobacco control programs at the state and local level.

Tob - set -
state money

THE GOVERNOR OF THE STATE OF FLORIDA

LAWTON CHILES

Bruce Reed -
we need to
respond
cc. Fred
DuVal

November 24, 1998

Mr. John Podesta
Chief of Staff to the President
The White House
Washington, DC 20500

Dear ~~Mr. Podesta:~~ John

I appreciate you looking at this and hope you can move on it as quickly as possible. I look forward to hearing from you soon.

With kind regards, I am

Sincerely,

Lawton

LAWTON CHILES

EK/CJ/CR -
WE NEED TO CHECK THIS OUT
WITH DOJ & PREPARE
A RESPONSE ASAP.

THANKS -

BR

WHEREAS, in February 1995, the State of Florida filed suit against the tobacco industry to recover expenses incurred by the State in treating smoking-related illnesses of its citizens.

WHEREAS, in August 1997, the State of Florida settled all pending civil claims with the tobacco industry, including, but not limited to, those claimed under the Florida Medicaid Third Party Liability Act, punitive damages, Racketeering under the Florida RICO Act, and various other State statutory theories. The monetary value of the State of Florida's recovery from the tobacco industry over the next 25 years under the August 1997 Settlement Agreement is estimated to be approximately $11.3 billion.

WHEREAS, in October 1998, the State of Florida amended its settlement with the tobacco industry under the "Most Favored Nation" Clause or its August 1997 Settlement Agreement. The monetary value of the State of Florida's additional recovery from the tobacco industry over the next 5 years is estimated to be approximately $1.75 billion.

WHEREAS, due to certain pre-trial orders entered by the trial court in Florida's litigation against the tobacco industry the State of Florida was limited in the amount of Medicaid damages it could recover to only those damages incurred from July 1, 1994 (the effective date of amendments enacted to Section 409.910, Florida Statutes) through August 25, 1997 (the date of Settlement). Florida was prohibited by Court order from seeking Medicaid damages for the period prior to the enactment of the amendments to Section 409.910; prohibited from seeking future Medicaid damages; and prohibited from claiming federal Medicaid damages under the Florida RICO Act. Thus of the approximately $13 billion in damages recovered by Florida less than $1 billion was attributable to Medicaid damages.

WHEREAS, a dispute has arisen between the State of Florida and the Health Care Finance Administration (HCFA) of the United States Department of Health and Human Services regarding reimbursement of monies recovered by the State of Florida under its Settlement Agreements with the tobacco industry.

WHEREAS, the State of Florida asserts that none of the monies recovered from the tobacco industry to reimburse State-borne expenses attributable to treating smoking-related illnesses are properly recoverable by HCFA as a recoupment of Medicaid expenses and HCFA asserts a right to a substantial share of the entire $13 billion recovered by the State of Florida.

WHEREAS, as a means of settling the current dispute, the State of Florida and HCFA have agreed to enter the following settlement agreement.

THEREFORE, the undersigned parties, on behalf of the State of Florida and the United States agree as follows:

In any year in which the State of Florida, through its Legislature and Governor, appropriate 50% of the funds recovered from the tobacco industry for any or all of the enumerated programs listed on Exhibit A to this agreement, HCFA shall determine that the amount of Medicaid recoupment owed is "zero" and shall make no claim to any funds recovered by the State of Florida from the tobacco industry in that year nor shall they attempt to offset any other federal funds available to the State of Florida including through the Medicaid program.

EXHIBIT A

1. The State program under the maternal and child health services block grant under title V of the Social Security Act (42 U.S.C. 701 et seq.);

2. Funding for child care under section 418 of the Social Security Act, notwithstanding subsection (b) (2) of that section;

3. Federally funded child welfare and abuse programs under title IV-B of the Social Security Act;

4. Programs administered within the State under the authority of the Substance Abuse and Mental Health Services Administration under title XIX, part B of the Public Health Service Act;

5. Safe and Drug-Free Schools Program under title IV, part A, of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7111 et seq.);

6. The Department of Education's Dwight D. Eisenhower Professional Development program under title II of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6601 et seq.); and

7. The State Children's Health Insurance Program authorized under title XXI of the Social Security Act (42 U.S.C. 1397aa et seq.).

*Funding for these programs shall be used to supplement and not supplant other Federal, State or local funds provided to any of the programs described above.

Tob - ser - state money

Florida Tobacco Proposal

WHEREAS, in February 1995, the State of Florida filed suit against the tobacco industry to recover expenses incurred by the State in treating smoking-related illnesses of its citizens.

WHEREAS, in August 1997, the State of Florida settled all pending civil claims with the tobacco industry, including, but not limited to, those claimed under the Florida Medicaid Third Party Liability Act, punitive damages, Racketeering under the Florida RICO Act, and various other State statutory theories. The monetary value of the State of Florida's recovery from the tobacco industry over the next 25 years under the August 1997 Settlement Agreement is estimated to be approximately $11.3 billion.

WHEREAS, in October 1998, the State of Florida amended its settlement with the tobacco industry under the "Most Favored Nation" Clause or its August 1997 Settlement Agreement. The monetary value of the State of Florida's additional recovery from the tobacco industry over the next 5 years is estimated to be approximately $1.75 billion.

WHEREAS, due to certain pre-trial orders entered by the trial court in Florida's litigation against the tobacco industry the State of Florida was limited in the amount of Medicaid damages it could recover to only those damages incurred from July 1, 1994 (the effective date of amendments enacted to Section 409.910, Florida Statutes) through August 25, 1997 (the date of Settlement). Florida was prohibited by Court order from seeking Medicaid damages for the period prior to the enactment of the amendments to Section 409.910; prohibited from seeking future Medicaid damages; and prohibited from claiming federal Medicaid damages under the Florida RICO Act. Thus of the approximately $13 billion in damages recovered by Florida less than $1 billion was attributable to Medicaid damages.

WHEREAS, a dispute has arisen between the State of Florida and the Health Care Finance Administration (HCFA) of the United States Department of Health and Human Services regarding reimbursement of monies recovered by the State of Florida under its Settlement Agreements with the tobacco industry.

WHEREAS, the State of Florida asserts that none of the monies recovered from the tobacco industry to reimburse State-borne expenses attributable to treating smoking-related illnesses are properly recoverable by HCFA as a recoupment of Medicaid expenses and HCFA asserts a right to a substantial share of the entire $13 billion recovered by the State of Florida.

WHEREAS, as a means of settling the current dispute, the State of Florida and HCFA have agreed to enter the following settlement agreement.

THEREFORE, the undersigned parties, on behalf of the State of Florida and the United States agree as follows:

In any year in which the State of Florida, through its Legislature and Governor, appropriate 50% of the funds recovered from the tobacco industry for any or all of the enumerated programs listed on Exhibit A to this agreement, HCFA shall determine that the amount of Medicaid recoupment owed is "zero" and shall make no claim to any funds recovered by the State of Florida from the tobacco industry in that year nor shall they attempt to offset any other federal funds available to the State of Florida including through the Medicaid program.

EXHIBIT A

1. The State program under the maternal and child health services block grant under title V of the Social Security Act (42 U.S.C. 701 et seq.);

2. Funding for child care under section 418 of the Social Security Act, notwithstanding subsection (b) (2) of that section;

3. Federally funded child welfare and abuse programs under title IV-B of the Social Security Act;

4. Programs administered within the State under the authority of the Substance Abuse and Mental Health Services Administration under title XIX, part B of the Public Health Service Act;

5. Safe and Drug-Free Schools Program under title IV, part A, of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7111 et seq.);

6. The Department of Education's Dwight D. Eisenhower Professional Development program under title II of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6601 et seq.); and

7. The State Children's Health Insurance Program authorized under title XXI of the Social Security Act (42 U.S.C. 1397aa et seq.).

*Funding for these programs shall be used to supplement and not supplant other Federal, State or local funds provided to any of the programs described above.

Tob-Set - State money

THE WHITE HOUSE

WASHINGTON

November 24, 1998

MEMORANDUM TO THE CHIEF OF STAFF

FROM: Elena Kagan
Cynthia Rice

SUBJ: Tobacco Issue to be Raised Today by Governor Chiles

At your meeting this afternoon, Governor Chiles plans to give you a proposal regarding the state of Florida's tobacco settlement. Under this plan, the state of Florida would agree to spend 50 percent of its tobacco settlement funds on the menu of items we and the states agreed to in the McCain legislation. In exchange, HCFA would agree not to assert any claim to the state settlement funds.

The Justice Department previously has advised us that there are real legal obstacles to entering into such an agreement without Congressional approval. We will, however, immediately send the Governor's proposal to the Department for a legal opinion.

Additional Background on Medicaid Recoupment

Under current law, states must share with the federal government a portion of any Medicaid claims they recover (from any source, including lawsuits and third party insurers). The exact amount of the share is based on the percentage of the state's Medicaid costs that are paid by the federal government. This percentage varies by state according to a statutory formula and averages 57 percent nationwide. For Florida, the percentage is 50 percent. Although states do not dispute the federal government's right to recoup Medicaid funds generally, they argue that little or none of the tobacco settlement funds derive from Medicaid claims and thus recoupment should not apply.

In the McCain bill, the federal government waived its claim to a share of Medicaid funds in exchange for a requirement that the states spend 50 percent of their funds on a menu of seven items: child care; child welfare; the maternal and child health block grant; the substance abuse block grant; the safe and drug free schools program; Eisenhower education grants; and the state match for the children's health insurance program (subject to a six percent ceiling).

Tob - ser - state monies

BR - Agree we should oppose. It will make it easier to defeat if it costs $

JOSHUA GOTBAUM
08/31/98 07:33:42 PM

Record Type: Non-Record

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

cc: See the distribution list at the bottom of this message

Subject: Potential Rider to Senate L/HHS Bill on Medicaid Tobacco Recoupment

I assume that the Administration shouldn't support taking $1.5B over 5 from priority Labor/HHS/Education spending in order to assure the states that we won't recoup Medicaid tobacco recoveries *in the absence of comprehensive tobacco legislation*. Please let me know if we should discuss. Thanks.

---------------------- Forwarded by Joshua Gotbaum/OMB/EOP on 08/31/98 07:25 PM ---------------------------

Wm G. White 08/31/98 06:50:25 PM

HHS staff advise that they have recently been contacted by a staffer from Sen. Hutchinson (R-TX) regarding a potential rider to the L/HHS bill that would prohibit HCFA from recouping the Federal share of individual state settlements with the tobacco industry. [Current law requires HCFA to seek recovery of the Federal portion of reimbursements for Medicaid that may be part of any state tobacco settlements.]

Hutchinson's staff apparently called HHS to gather intelligence on whether the Administration would oppose or support such a provision. HHS has not gotten back to Hutchinson's staff on HHS' position, but called me to let me know. [Note: Texas is one of the four states that have settled with the tobacco industry.]

I advised HHS staff that they should not go back to the Hill with their response, given that OMB and DPC would likely have views on it. If the provision is eventually offered, this issue would be addressed in the L/HHS SAP.

Recommended Administration Position: Given that this potential amendment would be considered in an isolated appropriations bill and not in the context of comprehensive tobacco legislation, I recommend that the Administration oppose such a measure. Provisions prohibiting HCFA from recouping the Federal share of individual state lawsuits were included in most of the comprehensive tobacco bills debated earlier this year, including the McCain tobacco bill which the Administration supported. During consideration of the McCain bill, the Administration did not express opposition to this type of provision because it was part of comprehensive tobacco legislation and the Federal government stood to gain a substantial share of tobacco receipts.

How CBO Scored A Similar Provision in the McCain Bill: CBO staff scored a similar provision in the McCain bill as a cost of roughly $300 million a year/$1.5 billion over 5 years. CBO's baseline assumes that HCFA will recover a small portion of the funds (roughly $300 million a year) that would be awarded to States from the Tobacco industry as a result of the individual state law suits. Because the McCain bill prohibits HCFA from making these recoveries, CBO believes this provision would increase net federal spending by the rough amounts above. The OMB baseline does not assume that HCFA would recoup any dollars from the individual state settlements. Therefore, OMB would likely not score this type of provision as a coster.

POTUS Letter to the NGA: On 12/5/97, the President sent a letter to the NGA with the following paragraph:

"As you know, current law requires the Health Care Financing Administration to seek recovery of the Federal portion of reimbursements for Medicaid that may be part of any state tobacco settlements. I would prefer to see the allocation of tobacco funds between Federal and state government resolved through legislation, and I look forward to working with the states and with Congress to find a mutually agreeable purpose for the funds generated by tobacco legislation."

Please let me know if you concur with my recommended Administration position so that we may draft SAP language if the Hutchinson Amendment is eventually offered.

Message Copied To:

Cynthia A. Rice/OPD/EOP
Cynthia Dailard/OPD/EOP
Richard J. Turman/OMB/EOP
Victoria A. Wachino/OMB/EOP
Daniel N. Mendelson/OMB/EOP

Tob - set - state money

Bruce Reed
Elena Kagan
Chris Jennings
Cynthia Rice

NATIONAL GOVERNORS' ASSOCIATION
NATIONAL CONFERENCE OF STATE LEGISLATURES
NATIONAL ASSOCIATION OF ATTORNEYS GENERAL

October 13, 1998

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

Dear Mr. President:

As the closing hours of the 105th Congress approach, we want to reiterate in the strongest possible terms our support for legislation that protects tobacco settlement funds form seizure by the federal government. Without protection from federal recoupment, critical state initiatives already underway will be seriously jeopardized, and future state settlements will be significantly affected.

Putting this off until next year will only deepen the problem. The time to act is now. We stand ready to assist Congress and the White House in finding a reasonable compromise to ensure that tobacco settlement funds are protected from recoupment by the federal government.

Sincerely,

Tom Carper

Governor Thomas R. Carper
Chairman
National Governors' Association

Michael O. Leavitt

Governor Michael O. Leavitt
Vice Chairman
National Governors' Association

Mike Moore

Attorney General Mike Moore
President
National Association of Attorneys General

Christine Gregoire

Attorney General Christine O. Gregoire
President – Elect
National Association of Attorneys General

Daniel T. Blue, Jr.

Representative Daniel T. Blue Jr.
President
National Conference of State Legislatures

Tob - nr - state money

Cynthia A. Rice 10/01/98 11:20:30 AM

Record Type: Record

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

cc: Cynthia Dailard/OPD/EOP
Subject: Conrad/Waxman re: Medicaid recoupment

I also just got a phone call from Waxman's staff about this issue.

How much do we want to tell them? That we would be willing to accept a provision that included the NGA/McCain menu so long as it was paid for, but that we are not pushing it?

And who should return these calls? Bruce? Chris? Me? The Conrad call was from Tom Mahr and the Waxman call was from Karen Lightfoot.

---------------------- Forwarded by Cynthia A. Rice/OPD/EOP on 10/01/98 10:54 AM ---------------------------

Jerold R. Mande

10/01/98 10:29:23 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Cynthia Dailard/OPD/EOP, Sarah A. Bianchi/OPD/EOP
Subject: Tobacco: MCD federal share amendment.

Tom Mahr called to check on the WH view on enacting language to enable states to keep the federal MCD share from state tobacco suits. As you may know, there are rumors about members adding such language to the omnibus budget bill. Conrad has several concerns: 1) what would be the offset; 2) any provision should be limited to the 4 states that have settled -- to hold down the cost, and to keep this issue alive as an engine for tobacco legislation next year; 3) a majority of what would have been the federal share should go for state tobacco control. Conrad is considering speaking out on this subject and is considering generating a Congressional letter. He would like to know the WH position before he makes his next move. How should we respond? Thanks.

Message Sent To:

Tob - mr - state money

Bruce N. Reed
10/01/98 03:25:40 PM

Record Type: Record

To: Joshua Gotbaum/OMB/EOP

cc: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP, Cynthia Dailard/OPD/EOP
Subject: Re: Tobacco: If our position on Medicaid recoupment changes, please let us know.

I'm sure we'll remain lukewarm. But if enough Dems raise concerns, the Republicans may drop the idea. We'll let you know what we hear.

Tob - set - state money

JOSHUA GOTBAUM
10/01/98 02:01:01 PM

Record Type: Non-Record

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

cc: Cynthia A. Rice/OPD/EOP, Cynthia Dailard/OPD/EOP
Subject: Tobacco: If our position on Medicaid recoupment changes, please let us know.

If our position of luke-warm willingness to support changes, please let us know. (Since we've already taken it with the NGA.)

--------------------- Forwarded by Joshua Gotbaum/OMB/EOP on 10/01/98 01:58 PM ---------------------------

Jerold R. Mande
10/01/98 10:29:23 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Cynthia Dailard/OPD/EOP@EOP, Sarah A. Bianchi/OPD/EOP@EOP
Subject: Tobacco: MCD federal share amendment.

Tom Mahr called to check on the WH view on enacting language to enable states to keep the federal MCD share from state tobacco suits. As you may know, there are rumors about members adding such language to the omnibus budget bill. Conrad has several concerns: 1) what would be the offset; 2) any provision should be limited to the 4 states that have settled -- to hold down the cost, and to keep this issue alive as an engine for tobacco legislation next year; 3) a majority of what would have been the federal share should go for state tobacco control. Conrad is considering speaking out on this subject and is considering generating a Congressional letter. He would like to know the WH position before he makes his next move. How should we respond? Thanks.

Message Sent To:

Bruce N. Reed/OPD/EOP@EOP
Elena Kagan/OPD/EOP@EOP
Cynthia A. Rice/OPD/EOP@EOP
Christopher C. Jennings/OPD/EOP@EOP
Joshua Gotbaum/OMB/EOP@EOP
David W. Beier/OVP@OVP

Tob - sr - state money

Kevin S. Moran 10/01/98 01:52:47 PM

Record Type: Record

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

cc: Cathy R. Mays/OPD/EOP, Laura Emmett/WHO/EOP

Subject: Re: Waxman

I just got more info from EBB. Waxman wants to meet with you all to tell you not to do McCain split of state money for tobacco. Erskine told him you all would meet. Should we work to set up a meeting? Do you need to do anything first? k

Tob - rcr - state money

Cynthia A. Rice 10/02/98 11:03:38 AM

Record Type: Record

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

cc: See the distribution list at the bottom of this message

Subject: What to say when people ask us our position on Medicaid recoupment

I know we want to sound lukewarm positive about the Chiles proposal. HHS leg affairs is getting calls about this. Should I have them use this language, which was in the Erskine letter to Senator Graham, in responding?

As you may recall, during the Senate consideration of tobacco legislation, we and the National Governors' Association supported the approach taken in the McCain legislation, which provided states with full funding if they agreed to spend half the money on an agreed-upon menu of seven programs. We continue to believe that this approach would be an acceptable solution to the issue.

Message Copied To:

Laura Emmett/WHO/EOP
Christopher C. Jennings/OPD/EOP
Jeanne Lambrew/OPD/EOP
Sarah A. Bianchi/OPD/EOP
Cynthia Dailard/OPD/EOP

Tob - set - state money

Mickey Ibarra
09/29/98 05:32:01 PM

Record Type: Record

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

cc:
Subject: Dem Govs & Tobacco

--------------------- Forwarded by Mickey Ibarra/WHO/EOP on 09/29/98 05:32 PM ---------------------------

[redacted]

Record Type: Record

To: Fred DuVal/WHO/EOP, Mickey Ibarra/WHO/EOP, Emory L. Mayfield/WHO/EOP

cc:
Subject: Dem Govs & Tobacco

My sources tell me the Dem Govs are going to be requesting a meeting on Tobacco and Medicaid in the immediate future. Supposedly, they have reached concensus on the menu and will want to push forward.

Tob - set - state money

THE WHITE HOUSE

WASHINGTON

September 21, 1998

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: Bruce Reed
Elena Kagan

SUBJECT: Tobacco Update

This memo (1) advises you of recent conversations we have had with an attorney for the industry, which confirm that the industry has no interest in expanding its expected settlement with the states, in the way suggested by Dick Scruggs, to include the federal government; (2) informs you of a recent NGA/NAAG proposal that Congress pass legislation eliminating the federal government's claim for a portion of state tobacco recoveries, and outlines a compromise proposal that Governor Chiles may suggest to you on Tuesday; and (3) outlines a new idea of Bruce Lindsey's to try to use the state settlement discussions to gain clear FDA jurisdiction over tobacco products.

1. Meyer Koplow, the outside counsel for Philip Morris, told us last week that the industry has no interest in bringing the federal government into its settlement discussions with the states. (Our initial conversations with Koplow took place the week before last, but Koplow took some time to speak with his client and get back to us.) According to Koplow, the industry does not think it makes sense to upset the state negotiations, given how close they are to success, in order to pursue a broader settlement whose prospects of completion are highly uncertain. (Koplow, of course, speaks only for Philip Morris, but if Philip Morris is not interested in talking with us, we can bet that no one else is either.)

In explaining this conclusion, Koplow first noted the legal complexities involved in crafting a comprehensive settlement -- in particular, the difficulty of insulating the liability protections and the FDA provisions from legal challenge. Although he thought there was some chance of resolving these issues to all parties' satisfaction, he said (correctly) that we would have to do much hard work before knowing whether such a resolution was possible. Koplow also noted the practical difficulties involved in the Scruggs scheme; for example, he believes that the states would not agree to any arrangement that would subtract punitive damages from their share of the money. Finally, Koplow stressed the "psychological" difficulties of attempting to reach an agreement. The industry, according to Koplow, simply does not trust us; it fears that we will bow to political pressure and increase our demands during negotiations.

Koplow left open the possibility that the industry would want to deal with us separately at some future time, after it had completed the state settlement. He noted that Philip Morris wants to resolve all government claims, including potential claims by the federal government. He implied that the kind of deal Philip Morris contemplates would not necessitate legislation and would include (1) money, (2) FDA jurisdiction, and (3) certain marketing restrictions excluded from the state settlement (in part so the industry has something to offer the federal government). He did not specifically raise liability protections in this context.

2. The National Association of Attorneys General (NAAG) wrote a letter to Congressional leaders last week urging them to pass legislation before Congress adjourns to "clarify that the Health Care Finance Administration should not assert any claims against state tobacco recoveries" (letter attached). We can expect the NGA to support this demand strongly; indeed, Republican Governors probably have talked already with Senator Lott and Speaker Gingrich about moving this legislation. A set of talking points prepared for Democratic Governors, for use in a recent phone call with the Administration, urges us to support the legislation, as does a letter that Senator Graham just sent you (talking points and letter attached).

Governor Chiles is meeting with you on Tuesday, primarily to discuss this issue. (As you know, Florida has a very special interest in the issue because it is one of four states to have completed a settlement with the industry.) Chiles may urge you to support a bill that simply eliminates the federal government's claim to any tobacco recovery, as described above. His staff, however, has suggested that Chiles may come in with a compromise option, predicated on the agreement we reached with the NGA in the context of the McCain legislation. Under this approach, the federal government would renounce its claim to a state recovery only when the state agreed to use half its money on a menu of seven items: child care; child welfare; the maternal and child health block grant; the substance abuse block grant; the safe and drug free schools program; Eisenhower education grants; and the state match for the children's health insurance program (subject to a six percent ceiling). This approach would give us exactly what we would have gotten from the "state side" of the McCain legislation, and we should seriously consider it -- especially given the alternative legislation that the NGA and NAAG are proposing.

We should note that any proposal restricting the federal government's ability to bring claims against the states will involve serious budget issues. The Congressional Budget Office currently projects that the federal government will recoup $1.2 billion over five years from state tobacco settlements; we can expect the Office to score even Chiles's compromise approach at approximately that amount. The Governors supposedly have agreed on a plan to reimburse the federal government for this cost, under which they would divide the cost amongst themselves based on their share of the total settlement funds. OMB is currently evaluating this proposal.

3. Bruce Lindsey has proposed a more ambitious plan for using our recoupment claims as leverage to get something out of a state settlement. Under the Lindsey plan, we would drop our recoupment claims if a state agreed to (1) take 45 percent of the money unrestricted; (2) use

45 percent of the money for the seven items on our menu; and (3) give over 10 percent of the money to a "tort fund" which would pay legal judgments against the industry. If the judgments failed to exhaust the tort fund, the remaining money in the fund would return to the unrestricted state pot. Conversely, if the judgments exceeded the tort fund, the remaining liability would come out of the restricted state pot -- and if that too were exhausted, would revert to the industry. In exchange for this potentially valuable benefit the industry would agree to FDA jurisdiction -- if possible, through the settlement itself; if not, by dropping its opposition to legislation.

The great virtue of this scheme is that it could make the state settlement partly our victory: if everything works correctly, we would achieve the important goal of full FDA jurisdiction. The scheme, however, raises at least three questions. First, we may not be able to convert this deal into an effective guarantee of FDA jurisdiction. The legal difficulty of getting regulatory jurisdiction through a settlement is heightened in this scheme because we probably could not be a party to the agreement; moreover, the industry's assurance that it would not fight a legislative solution (even if it is believed) hardly guarantees the result we want in a Congress replete with FDA-haters. Second, even if we could surmount this problem, the states may well refuse to consider this plan, given that it puts more than half of their money at risk of going back to the industry for legal judgments. Third, the left in our own party may react with outrage to this agreement, arguing that we effectively have "bought" FDA jurisdiction by granting the industry relief from liability. We would have to explore these questions more thoroughly before pursuing this option.

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CHRISTINE T. MILLIKEN
Executive Director
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Attorney General of Washington

VICE PRESIDENT
ANDREW KETTERER
Attorney General of Maine

IMMEDIATE PAST PRESIDENT
JAMES E. DOYLE
Attorney General of Wisconsin

September 17, 1998

Majority Leader Trent Lott
U.S. Senate
Washington, D.C. 20510

Minority Leader Thomas Daschle
U.S. Senate
Washington, D.C. 20510

Speaker of the House Newt Gingrich
U.S. House of Representatives
Washington, D.C. 20515

Minority Leader Richard Gephardt
U.S. House of Representatives
Washington, D.C. 20515

Dear Senators Lott and Daschle and Representatives Gingrich and Gephardt:

As state Attorneys General, we have communicated with Congressional leaders a number of times about youth smoking and tobacco litigation. Today we wish to reiterate our strong support for legislation that would protect state tobacco litigation or settlement recoveries from federal Medicaid recoupment claims.

Four states have already settled their lawsuits. A negotiating team is now seeking to reach a proposed settlement that would be made available to all of the other states and territories. However, whether the funds are paid through settlement or through court verdicts, the issue of Medicaid recoupment remains a constant concern for states.

A frequent misconception is that the state lawsuits are based entirely on recovering money through the Medicaid program. In reality, state lawsuits are based upon a variety of theories and measures of recovery. For example, many states are pursuing civil penalties under consumer protection statutes, treble damages under antitrust laws, or forfeiture of profits from sales of cigarettes to underage buyers. Some states have made no Medicaid-related claims at all.

The vastly better solution would be for Congress to clarify that the Health Care Finance Administration should not assert any claims against state tobacco recoveries. Instead, the funds can be better utilized in each state to compensate for and to counter the effects of cigarette smoking.

It is important that the legislation can be passed before Congress adjourns this year. We ask for your support for legislation like S.1471, H.R. 2938, or other mechanisms to ensure that tobacco settlement payments stay in their respective states. Thank you for your consideration.

Sincerely,

Bill Pryor
Attorney General of Alabama

Bruce M. Botelho
Attorney General of Alaska

Toetagata Albert Mailo
Attorney General of American Samoa

Grant Woods
Attorney General of Arizona

Winston Bryant
Attorney General of Arkansas

Daniel E. Lungren
Attorney General of California

Gale A. Norton
Attorney General of Colorado

Richard Blumenthal
Attorney General of Connecticut

M. Jane Brady
Attorney General of Delaware

John M. Ferren
Corporation Counsel of D.C.

Robert A. Butterworth
Attorney General of Florida

Thurbert E. Baker
Attorney General of Georgia

Gus F. Diaz
Acting Attorney General of Guam

Margery S. Bronster
Attorney General of Hawaii

Alan G. Lance
Attorney General of Idaho

Jim Ryan
Attorney General of Illinois

Jeffrey A. Modisett
Attorney General of Indiana

Tom Miller
Attorney General of Iowa

Carla J. Stovall
Attorney General of Kansas

A.B. "Ben" Chandler III
Attorney General of Kentucky

Richard P. Ieyoub
Attorney General of Louisiana

Andrew Ketterer
Attorney General of Maine

J. Joseph Curran, Jr.
Attorney General of Maryland

Scott Harshbarger
Attorney General of Massachusetts

Frank J. Kelley
Attorney General of Michigan

Hubert H. Humphrey, III
Attorney General of Minnesota

Mike Moore
Attorney General of Mississippi

Jeremiah W. Nixon
Attorney General of Missouri

Joseph P. Mazurek
Attorney General of Montana

Don Stenberg
Attorney General of Nebraska

Frankie Sue Del Papa
Attorney General of Nevada

Philip T. McLaughlin
Attorney General of New Hampshire

Peter Verniero
Attorney General of New Jersey

Dennis C. Vacco
Attorney General of New York

Heidi Heitkamp
Attorney General of North Dakota

Betty D. Montgomery
Attorney General of Ohio

Hardy Myers
Attorney General of Oregon

José A. Fuentes-Agostini
Attorney General of Puerto Rico

Tom Udall
Attorney General of New Mexico

Michael F. Easley
Attorney General of North Carolina

Maya B. Kara
Attorney General of N. Mariana Isl.

W. A. Drew Edmondson
Attorney General of Oklahoma

D. Michael Fisher
Attorney General of Pennsylvania

Jeffrey B. Pine
Attorney General of Rhode Island

Charlie Condon
Attorney General of South Carolina

Mark Barnett
Attorney General of South Dakota

John Knox Walkup
Attorney General of Tennessee

Dan Morales
Attorney General of Texas

Jan Graham
Attorney General of Utah

William H. Sorrell
Attorney General of Vermont

Julio A. Brady
Attorney General of Virgin Islands

Mark L. Earley
Attorney General of Virginia

Christine O. Gregoire
Attorney General of Washington

Darrell V. McGraw Jr.
Attorney General of West Virginia

James E. Doyle
Attorney General of Wisconsin

William U. Hill
Attorney General of Wyoming

cc: Senators Lugar and Harkin, Agriculture Committee
Senators Stevens and Byrd, Appropriations Committee
Senators Domenici and Lautenberg, Budget Committee
Senators McCain and Hollings, Commerce Committee
Senators Roth and Moynihan, Finance Committee
Senators Hatch and Leahy, Judiciary Committee
Senators Jeffords and Kennedy, Labor and Human Resources Committee
Senators Bob Graham and Connie Mack, Florida
Representatives Smith and Stenholm, Agriculture Committee
Representatives Livingston and Obey, Appropriations Committee
Representatives Kasich and Spratt, Budget Committee
Representatives Bliley and Dingell, Commerce Committee
Representatives Hyde and Conyers, Judiciary Committee
Representatives Archer and Rangel, Ways and Means Committee
Representatives Bilirakis, Hastings, and Shaw, Florida
Representative Hansen, Utah
Representative McInnis, Colorado
Representative Meehan, Massachusetts
Representative Pryce, Ohio
Representative Waxman, California

STATE OF DELAWARE
OFFICE OF THE GOVERNOR

THOMAS R. CARPER
GOVERNOR

MEMORANDUM

TO: DEMOCRATIC GOVERNORS

FROM: GOVERNOR TOM CARPER, NGA CHAIR
GOVERNOR PEDRO ROSSELLO, DGA CHAIR

DATE: September 17, 1998

SUBJECT: DGA CONFERENCE CALL 5 PM TODAY

It is unlikely that either of us will be able to participate in today's conference call with Erskine Bowles and Jack Lew. However, it is imperative that we take this opportunity to raise a number of issues of importance to governors. We have attached talking points on three top priorities: Ed-Flex, tobacco recoupment, and Indian Gaming, and are asking that you raise these issues during today's call.

It is likely that the Administration will play a key role in meetings with Congressional leaders to hammer out an overall deal to fund the government for the next year. White House support for these top priorities is critical.

ED-FLEX

- **Expansion of the current Ed-Flex Demonstration program this year is a top priority for Democratic governors and NGA. The President proposed in February at the NGA meeting to extend Ed-Flex to all states that meet certain criteria. NOW is the time to extend Ed-Flex to all states.**

- **NGA worked with Senators Wyden and Frist and with Representatives Castle and Roemer and with the Adminstration in drafting a bipartisan bill to ensure that the new flexibility includes strong accountability requirements.**

- **Many states are doing tremendous things in the area of school reform – the majority of states passed accountability and class size reduction initiatives in this legislative session. This flexibility will enhance the reforms that are taking place in the states.**

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FAX (302) 577 - 3118

- Some Democrats have expressed some concern that Ed-Flex would eventually lead to an education block grant (similar to what the Dollars to the Classroom bill tried to accomplish). Governors oppose that bill; however, there is strong bipartisan support for Ed-Flex. Ed-Flex does not allow states to combine federal, state, and local funds.
- Furthermore, Ed-Flex could actually circumvent the push for education block grants while ensuring that the new flexibility comes only with requisite accountability because: 1) states must have established plans for school improvement and must be accountable for results; 2) states must be willing to grant local school districts waivers of state rules; and 3) it will bring greater coordination to the administration of federal education programs.
- The Ed-Flex bill is budget neutral.

TOBACCO RECOUPMENT PROTECTION

- HCFA sent letters to all states last year asserting the federal government's rights over state tobacco settlement dollars using an obscure provision in federal Medicaid law. Without repeal of that provision all states with settlements and states that settle in the future could be required by HCFA to give more than half of their settlement dollars to the federal government.
- HCFA's logic is that since the lawsuits were brought on behalf of the state/federal program Medicaid that the federal government deserves its share.
- However, most states have little or no Medicaid claims involved in their lawsuits. Most states assert a variety of claims including consumer protection, fraud, racketeering, antitrust violations and health care costs
- States brought these suits with no assistance from the federal government and the federal government retains the ability to sue for their own costs in federal programs such as Medicare and Veterans.
- **Without repeal of the HCFA recoupment provision state settlement funds will be tied up for years in negotiation and/or litigation with the federal government. The funds will be unavailable for state efforts to curb teen smoking, improve children's health or expand child care and education programs.**
- **There is Republican leadership support for providing all states with protection from HCFA recoupment. They are ready to attach this protection to the continuing resolution to fund the government.**
- **Governors have agreed on a mechanism to pay for this provision with each state with a settlement paying a proportionate share to offset the $1.2 billion cost over 5 years to the federal government.**

INDIAN GAMING

- The Enzi-Sessions amendment to the FY1999 Interior appropriations bill passed the Senate under unanimous consent on Tuesday, Sept. 15th.

- The Amendment would continue the current moratorium preventing the secretary of the U.S. Interior from using federal funds to approve tribal-state compacts that have not first been approved by the state, as required by law.

- The amendment would also prohibit the secretary from promulgating a regulation or implementing a procedure that could result in tribal Class III gaming in the absence of a tribal-state compact or from going forward with any proposed rule on this matter in FY1999.

- Under the Secretary of Interiors' proposed rule, tribes can by-pass states when they feel states are not negotiating in good faith and when states assert sovereign immunity in court proceedings.

- The Secretary's proposed rule would preempt states' authority under existing laws and would give tribes incentive to avoid negotiating gambling compacts with states.

- Governors feel that since the Secretary's inherent authority includes the responsibility to protect the interests of the tribes, there would be a serious conflict of interest where the Secretary asserts judgment over disputes between states and tribes.

- **The Enzi - Sessions amendment does not affect current Tribal-State gambling compacts that are already in effect. This amendment would also continue to give the Secretary the ability to approve compacts mutually agreed to by Tribes and States.**

- **Governors, along with the nation's Attorneys General are currently in negotiations with Tribes, the Department of Interior, and the Department of Justice, to find feasible solutions to concerns both parties have with the Indian Gaming Regulatory Act.**

- **Governors urge the President to include the Enzi - Sessions amendment in a CR, giving all interested parties time to come to an agreement.**

BOB GRAHAM
FLORIDA

COMMITTEES:
FINANCE
ENVIRONMENT AND PUBLIC WORKS
VETERANS AFFAIRS
SELECT COMMITTEE ON INTELLIGENCE
ENERGY AND NATURAL RESOURCES

United States Senate

WASHINGTON, DC 20510-0903

September 15, 1998

B Reed
J. Lew
B. Nash
G. Sperling

Please get answers ASAP & prepare response
EB

The Honorable Erskine B. Bowles
Chief of Staff to the President
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. Bowles:

I sincerely appreciated the opportunity to meet with you on September 15, 1998, to discuss numerous mutual areas of interest. In order to track these issues more efficiently, I thought that it would be helpful to give you a brief outline of my concerns as they relate to each of these subjects. Where appropriate, I have enclosed more detailed information on particular issues.

Bruce Reed

First, as you know, in August 1997, the State of Florida settled a lawsuit with the tobacco industry for over eleven billion dollars. Governor Chiles has begun to use these funds to implement anti-tobacco programs and to fund the largest children's health insurance expansion in the State's history. Unfortunately, by laying claim to settlement funds as federal Medicaid dollars, the Health Care Financing Administration threatens to scuttle Governor Chiles' initiatives and leave hundreds of thousands of Florida's children uninsured. It is my hope that with the Administration's support, we can clarify legislatively that settlement funds belong to the settling state, not to the federal government. In fact, the National Governors Association ranks this issue as its top priority for the remainder of the session. I would very much appreciate the opportunity to work together with you to solve this critical problem.

OMB
Jack Lew

Second, during debate over the Agriculture Appropriations Bill, I sponsored an amendment to add emergency funds to several accounts within the Department of Agriculture to address the needs of Florida agriculture resulting from the extensive fires and extreme drought that occurred in the state over the course of this year. This amendment was accepted by the Senate pending a review by the Administration of the total dollar value of agriculture disasters nationwide. I understand through my communications with the Office of Management and Budget that the review referenced in this amendment has become a part of a larger effort by the Administration to identify supplemental funding needs. My staff has informed me that the Office of Management and Budget provided a firm date of Thursday, September 10, 1998 for the review of supplemental funding needs to be completed. To my knowledge, this information has not been released due to several pending, but unidentified, policy issues.

OMB

I would like to be updated on the following information: (1) When will the Administration's review of disaster needs be released? As you know, the retention of the Florida funds for disaster mitigation in the 1999 Agriculture Appropriations Bill is subject to your release of this document; and (2) what are the policy issues being reviewed as part of this process?

N Asst

Third, since early this summer, the Nuclear Regulatory Commission (NRC) has been operating with only three out of the five statutorily required commissioners. The NRC is in desperate need of a full commission staff to address the rising tide of relicensing applications from the nation's nuclear power plants, and to streamline the licensing review and approval process. The two (2) current candidates are: (1) Greta Dicus (D), a reappointment; and (2) Jeff Merrifield (R), a new appointment. I would ask that the Administration expedite the nomination process for these (2) two individuals in order to ensure their approval by the full Senate prior to its adjournment.

Gene

Finally, as a follow up to our September 9, 1998, phone conversation, I would like to re-iterate my strong interest in the appointment of a White House Commission to examine the issues surrounding seaport safety and security in the United States. In order to continue this effort, it is necessary for the Administration to issue an Executive Order that would establish the White House Commission on Marine Transportation. It is my sincere hope that an Executive Order could be issued in the upcoming weeks, and that the commission will be fully functional at the National Marine Transportation Safety Conference, which will convene on November 17-19, 1998, in Warrenton, Virginia.

I thank you again for taking the time to meet with me, and assisting me in moving these issues forward. If there is anything else that I can do to be of assistance in this matter, please do not hesitate to let me know.

Sincerely,

Bob Graham

United States Senator

Enclosures