

NLWJC - Kagan

DPC - Box 054 - Folder-002

Tobacco-State Settlements [2]

Tob - state settlements

Ron Klain @ OVP
11/18/98 11:01:26 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP

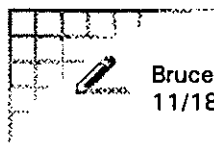
cc: Elena Kagan/OPD/EOP, Patricia M. Ewing/OVP @ OVP, Sarah A. Bianchi/OPD/EOP

Subject:

I don't disagree. But the specific question on the table is what he says if he gets asked, in Q&A, on Thursday, "Are you urging the states to sign on by tomorrow's deadline?," and I take it our answer is

"That is up to each state to decide for itself. And whatever the states do, there is much unfinished work here in Washington: we must affirm the FDA's jurisdiction to protect children from the dangers of smoking, and enact meaningful penalties on the tobacco industry if it continues to target our children."

703-state settlements




Bruce N. Reed
11/18/98 10:52:59 AM

Record Type: Record

To: Ron Klain/OVP @ OVP

cc: Elena Kagan/OPD/EOP, Sarah A. Bianchi/OPD/EOP, patricia m. ewing/ovp @ ovp

Subject: Re: VP - Thurs 

This is a stupid argument. If you stick to what the President said Monday, you can say what you need to say about how there's much more to do in Congress. It goes without saying that states have to decide for themselves based on the strength of their own cases. But the President did say, "This is an important step in the right direction". He did not say, "We're going to sit this one out again because the attorneys general only got a 40-cent price increase."


Tobacco state settlements

Ron Klain @ OVP
11/18/98 10:31:21 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP

cc: Elena Kagan/Opd/Eop, Sarah A. Bianchi/Opd/Eop, Patricia M. Ewing/OVP @ OVP

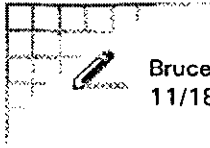
Subject: Re: VP - Thurs 

I think it is more than a few hardliners, first of all. The critics of the agreement even include public health officials who supported the first settlement, and many of our allies in Congress.

Secondly, again, I assume our position is that each state should decide what is best for itself in this regard. I didn't hear the President on Monday urge states to approve the agreement.

Third, it is important to point out -- without criticizing the settlement -- what was not -- and could not have been -- included in it. Again, the goal here is NOT to criticize the settlement, but to explain to folks why the settlement does not end the need for federal action.

Congress is the bad actor, not the settlement. But the settlement is not a panacea, which I am sure you would agree with. And I would hate to see us blamed for any "buyers remorse" that emerges from states accepting the deal. And if state acceptance is inevitable anyway, why squander credibility with validators whose support we may want for future, controversial steps we take on this issue -- steps which, unlike this settlement, that will truly be our own actions.




Bruce N. Reed
11/18/98 10:06:02 AM

Record Type: Record

To: Ron Klain/OVP @ OVP

cc: Elena Kagan/OPD/EOP, Sarah A. Bianchi/OPD/EOP, patricia m. ewing/ovp @ ovp

Subject: Re: VP - Thurs 

The important thing is to lay failure at Congress's feet, not suggest that the settlement is somehow deficient because it doesn't include things like FDA jurisdiction that states couldn't get in a settlement or in the courtroom. If the VP sounds ambivalent about the state settlement on the eve of the deadline for state decisions, that will be misinterpreted as backing away from what the President said Monday. And what good will it do? Doyle and WI signed on yesterday; Harshbarger could end up the only holdout, and even he might sign on. It's not worth ticking off 35 Dem AGs to score a few points with a few hardliners in the public health community, when you can focus on the real enemy here, which is Congress.

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Ninth: the Federal Tobacco Legislation Offset (including any carry-forwards arising from such offset) shall be applied to the results of clause "Eighth";

Tenth: the Litigating Releasing Parties Offset (including any carry-forwards arising from such offset) shall be applied to the results of clause "Ninth";

Eleventh: the offset for claims over pursuant to subsection XII(a)(4)(B) (including any carry-forwards arising from such offset) shall be applied to the results of clause "Tenth";

Twelfth: the offset for claims over pursuant to subsection XII(a)(8) (including any carry-forwards arising from such offset) shall be applied to the results of clause "Eleventh"; and

Thirteenth: in the case of payments to which clause "Fifth" applies, the allocated shares of such payments assigned to each individual Settling State pursuant to such clause (as such shares have been reduced by clauses ~~"Sixth"~~ "Sixth" through "Twelfth," and without undoing the allocation described in clause "Seventh") shall be added together to state the aggregate payment obligation of each Participating Manufacturer with respect to the payments in question. (In the case of a payment to which clause ~~"Fifth"~~ "Fifth" does not apply, the aggregate payment obligation of each Participating Manufacturer with respect to the payment in question shall be stated by the results of clause "Twelfth.")

X. EFFECT OF FEDERAL TOBACCO-RELATED LEGISLATION

The enactment of federal tobacco-related legislation shall not affect the payments to be required under this Agreement except as follows:

(a) If federal tobacco-related legislation is enacted [on or before November 30, 2002,] and if such legislation provides for payment(s) by any Original Participating

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Manufacturer (whether by settlement payment, tax or any other means), all or part of which are actually made available to a Settling State ("~~Federal Funds~~" Funds"), each Original Participating Manufacturer shall receive a continuing dollar-for-dollar offset for any and all amounts that are paid by such Original Participating Manufacturer pursuant to such legislation and made available to such Settling State (except as described in subsections (b) and (c) below). Such offset shall be applied against the applicable Original Participating Manufacturer's share (determined as described in the first sentence of clause "~~Seventh~~" "Seventh" of subsection IX(j)) of such Settling State's Allocated Payment, up to the full amount of such Original Participating Manufacturer's share of such Allocated Payment (as such Allocated Payment has been reduced by adjustment, if any, pursuant to the NPM Adjustment) and the offset for miscalculated payments). Such offset shall be made against such Original Participating Manufacturer's share of the first Allocated Payment due after such Federal Funds are first available for receipt by such Settling State. In the event that such offset would in any given year exceed such Original Participating Manufacturer's share of such Allocated Payment: (1) the offset to which such Original Participating Manufacturer is entitled under this section in such year shall be the full amount of such Original Participating Manufacturer's share of such Allocated Payment, and (2) all amounts not offset by reason of subsection (1) shall carry forward and be offset [(with interest at the prime rate)] in the following year(s) until all such amounts have been offset.

(b) The offset described in subsection (a) shall apply only to that portion of Federal Funds, if any, that are either unrestricted as to their use, or restricted to any form of health care or to any use related to tobacco (including, but not limited to, tobacco

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education, cessation, control or enforcement) (other than that portion of Federal Funds, if any, that is specifically applicable to tobacco growers or communities dependent on the production of tobacco or Tobacco Products). Provided, however, that the offset described in subsection (a) shall not apply to that portion of Federal Funds, if any, whose receipt by such Settling State is conditioned upon or appropriately allocable to:

- (1) the relinquishment of [significant] rights or benefits under this Agreement (including the Consent Decree); or
- (2) actions or expenditures by such Settling State, unless:
 - (A) such Settling State chooses to undertake such action or expenditure;
 - (B) such actions or expenditures do not impose significant constraints on public policy choices; or
 - (C) such actions or expenditures are both: (i) related to health care or tobacco (including, but not limited to, tobacco education, cessation, control or enforcement) and (ii) do not require such Settling State to expend state matching funds in an amount that is significant in relation to the amount of the Federal Funds made available to such Settling State.

(c) Subject to the provisions of subsection IX(i)(3), Subsequent Participating Manufacturers shall be entitled to the offset described in this section X to the extent that they are required to pay Federal Funds that would give rise to an offset under subsections (a) and (b) if paid by an Original Participating Manufacturer.

(d) Nothing in this section X shall (1) reduce the payments to be made to the Settling States under this Agreement other than those described in subsection IX(b) and

PRIVILEGED AND CONFIDENTIAL - 10/30/98 REVISED DRAFT

subsection IX(d) (or corresponding payments under subsection IX(i)) of this Agreement; or (2) alter the Allocable Share used to determine each Settling State's share of the payments described in section IX(b) and subsection IX(d) (or corresponding payments under subsection IX(i)) of this Agreement. Nothing in this section X is intended to or shall reduce the total amounts payable by the Participating Manufacturers to the Settling States under this Agreement by an amount greater than the amount of Federal Funds that the Settling States could elect to receive.

[XI. INDEPENDENT AUDITOR

(a) Independent Auditor to Make All Calculations. An Independent Auditor shall calculate and determine the amount of all payments owed hereunder, including the adjustments, reductions and offsets thereto (and all resulting carry-forwards, if any), as well as the allocation of such payments, adjustments, reductions, offsets and carry-forwards among the Participating Manufacturers and among the Settling States. The Independent Auditor shall promptly collect all information necessary to facilitate such calculations. Each Participating Manufacturer and each Settling State shall as promptly as practicable provide the Independent Auditor with information and documentation sufficient for it to perform such calculations.

(b) Identity of Independent Auditor. The Independent Auditor shall be a major, nationally recognized, certified public accounting firm jointly selected by agreement of the Original Participating Manufacturers and the NAAG executive committee, who shall jointly retain the power to replace the Independent Auditor and appoint its successor. The Independent Auditor shall have no existing connection with any Participating Manufacturer and shall not represent any Participating Manufacturer. The costs and fees

Ron Klain @ OVP
11/17/98 02:46:48 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP

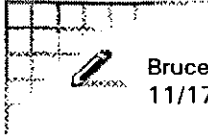
cc: Elena Kagan/Opd/Eop, Sarah A. Bianchi/Opd/Eop, Patricia M. Ewing/OVP @ OVP

Subject: Re: VP - Thurs 

Of course, he should not contradict what the President said yesterday. But right now, public health groups are lobbying the states not to sign on to the agreement; AGs are lobbying states to sign on to the agreement -- do we have a position? If so, why? What analysis do we possess that indicates that we have a reason to believe that a particular state would be better off under this agreement than they would be pursuing their own lawsuit -- or vice versa? I just don't understand what basis we would have for offering states any advice on this question -- any more than we advised them to sue or settle in the first place.

As for the rest, I think it is key that we not attack the settlement -- but also, that we not allow the tobacco industry to portray the settlement as more than it is. It does not penalize tobacco companies for continuing to market to minors; it does not provide financial inducements to reduce marketing to minors; it does not provide the FDA with jurisdiction to prevent marketing to minors. Again, that is not the fault of the AGs -- that is not what they were trying to do with this deal. But in making it clear why Congress needs to act, we must make it clear what is the unfinished business left after this settlement is reached.

Tobacco - state settlements



Bruce N. Reed
11/17/98 02:35:04 PM

Record Type: Record

To: Ron Klain/OVP @ OVP

cc: Elena Kagan/OPD/EOP, Sarah A. Bianchi/OPD/EOP, patricia m. ewing/ovp @ ovp

Subject: Re: VP - Thurs

We're happy to help with the VP's remarks. But he shouldn't undercut what the President said yesterday. His message should be exactly the same as the President's: The state settlement is a step forward. But only the national government and esp. the Congress can take the full range of steps necessary to set a national policy on reducing youth smoking, such as confirming the FDA's authority to regulate tobacco products. The last Congress put partisanship ahead of progress. We'll make tobacco legislation a top priority in the new Congress.

He can and should go to town attacking Congress. But it would be bad faith, bad policy, and bad politics to pull the rug out from under Tom Miller and a host of other AGs (most of them D's) who are signing onto this deal because it's the best they can do without Congress.

Ron Klain @ OVP
11/17/98 12:33:22 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP
cc: Sarah A. Bianchi/OPD/EOP, Patricia M. Ewing/OVP @ OVP
Subject: VP - Thurs

Bruce/Elena: As you know, the VP is scheduled to do an anti-smoking on Thursday, national smoke-out day. Because of the intense criticism the state deal is getting from the health groups, on the one hand, and the sense that we have endorsed it, on the other, I am concerned about making sure we are all in synche for this event.

Because I am only going to be in for a few hours today and Wednesday, I'd appreciate if you guys could work with Pat Ewing on some language for this. I assume it would suggest WH neutrality on whether states should opt-in/opt-out of the deal, combined with a sharp point about how the deal does not protect teens, do FDA, etc.

Thanks.



Cynthia A. Rice

11/16/98 06:51:25 PM

Record Type: Record

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

cc:

Subject: Jeff Tietz called me noting a problem in the settlement

As I noted in my earlier email regarding the state settlement, if federal tobacco related legislation is enacted before 11/30/2002, then each original participating manufacturer shall receive a dollar for dollar offset for all amounts paid by such manufacturer pursuant to such legislation and actually made available to such setting state. Such an offset would only apply to federal funds to states that are (1) unrestricted or (2) restricted "to any form of health care or to any use related to tobacco (including, but not limited to, tobacco education, cessation, control, or enforcement.)"

Jeff sees a problem I hadn't noticed -- would this provide tobacco companies with an offset for any federal funds to states for health spending, whether tobacco related or not, that are paid for by tobacco tax funds? I had read this as "any form of health care...related to tobacco" but he is reading it as "to any form of health care / or to any use related to tobacco."

He's urging us to get the AGs to get the language clarified, which sounds like a good idea to me. What do you think?

The entire text of the provision is as below:

X. EFFECT OF FEDERAL LEGISLATION

(a) If federal tobacco-related legislation is enacted on or before November 30, 2002, and if such legislation provides for payment(s) by any Original Participating Manufacturer (whether by settlement payment, tax or any other means), all or part of which are actually made available to a Settling State ("Federal Funds"), each Original Participating Manufacturer shall receive a continuing dollar-for-dollar offset for any and all amounts that are paid by such Original Participating Manufacturer pursuant to such legislation and actually made available to such Settling State (except as described in subsections (b) and (c) below).

Such offset shall be applied against the applicable Original Participating Manufacturer's share (determined as described in step E of clause "Seventh" of subsection IX0)) of such Settling State's Allocated Payment, up to the full amount of such Original Participating Manufacturer's share of such Allocated Payment (as such share had been reduced by

adjustment, if any, pursuant to the NPM Adjustment and has been reduced by offset, if any, pursuant to the offset for miscalculated or disputed payments).

Such offset shall be made against such Original Participating Manufacturer's share of the first Allocated Payment due after such Federal Funds are first available for receipt by such Settling State.

In the event that such offset would in any given year exceed such Original Participating Manufacturer's share of such Allocated Payment: (1) the offset to which such Original Participating Manufacturer is entitled under this section in such year shall be the full amount of such Original Participating Manufacturer's share of such Allocated Payment, and (2) all amounts not offset by reason of subsection (1) shall carry forward and be offset in the following year(s) until all such amounts have been offset.


(b) The offset described in subsection (a) shall apply only to that portion of Federal Funds, if any, that are either unrestricted as to their use, or restricted to any form of health care or to any use related to tobacco (including, but not limited to, tobacco education, cessation, control or enforcement).



Cynthia A. Rice

11/16/98 10:33:58 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP
cc: Elena Kagan/OPD/EOP, Christa Robinson/OPD/EOP
bcc:
Subject: Re: Could you ask Josh... 

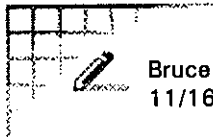
They've run the numbers, and they think we should say "between \$.40 and \$.50 per pack."

Essentially, the estimates start at \$.39/pack in year 1 and reach \$.53/pack in year five (in FY '99 dollars).

Bruce N. Reed

*time of this is upfront?
w price settlements?*

*Black says - 30 by yr 1
35 by yr 5*

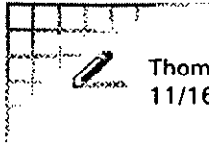


Bruce N. Reed
11/16/98 09:54:17 AM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP
cc: Elena Kagan/OPD/EOP
Subject: Could you ask Josh...

how much OMB is scoring this at? 40 cents?



Thomas L. Freedman
11/16/98 03:09:07 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP
cc: Mary L. Smith/OPD/EOP, Laura Emmett/WHO/EOP
Subject: Farmers part of settlement

The farm groups say (Judge) Carlton had a conference call with them at 11 today. He said that on Monday they will identify a trust fund for farmers. States that grow tobacco and sign on to the agreement will be able to appoint trustees to divvy up the funds. Governors of the growing states that sign on will do the appointing. Both NC and KY are expected to sign on (I guess NC's Easley did his press conference at 2 today). The farmers think the size of the trust fund is yet to be determined, but will not be a subset of the overall agreement. Each state will get money based on how much tobacco it grows. McConnell and Bunning offices called KY growers group today to say they would be fighting to keep the tobacco program. Carlton asked the farmers to help fight the coming "Clinton tax." The NC farmers sounded more suspicious of things than KY. It may be too early to confirm this, they will all get a feel from their constituents.



Cynthia A. Rice

11/16/98 03:07:29 PM

Record Type: Record

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

cc:

Subject: No surprises in the settlement

I've quickly read through the settlement (except the exhibits). No surprises, but a few interesting details:

The allowable one brand name sponsorship per year includes a single national or multi-state series or tour (e.g. any number of NASCAR races held in different states as part of a national tour). Events in adult-only facilities and using corporate names are unlimited. Sponsorships of concerts, events with an intended youth audience or youth contestants, or team sports are prohibited except B&W may sponsor either the C country music festival or the Kool jazz festival. Companies don't have to break contracts in effect as of 8/1/98 until they expire or for three years whichever comes first. No brand names on stadiums, arenas, or sports teams.

Outdoor and transit ads are banned, but are defined to exclude: any ads in adult facilities or tobacco manufacturing plants, signs smaller than 14 sq feet in retail establishments, ads promoting an adult only event at the site of that event.

Cartoons are banned and are defined as:

- (1) "Cartoon" means any drawing or other depiction of an object, person, animal, creature or any similar caricature that satisfies any of the following criteria:
 - (1) the use of comically exaggerated features;
 - (2) the attribution of human characteristics to animals, plants or other objects, or the similar use of anthropomorphic technique; or
 - (3) the attribution of unnatural or extrahuman abilities, such as imperviousness to pain or injury, X-ray vision, tunneling at very high speeds or transformation.

The term "Cartoon" includes "Joe Camel," but does not include any drawing or other depiction that on July 1, 1998, was in use in any State in any Participating Manufacturer's corporate logo or in any Participating Manufacturer's Tobacco Product packaging.

I assume the later phrase is to protect the Camel packaging?

Documents: Manufacturers have to maintain at their own expense until 2010 document web sites for existing and new documents except those for which the industry is asserting privilege, trade secrets, etc. Unfortunately, the type of docs are listed in the exhibits, so its hard to tell how

complete this is.

Public education: the \$1.45 billion for public education is \$250 million in year 1 and \$300 mi/yr in years 2-5.

National foundation: There are detailed goals for the national foundation (funded at \$250 million total over 10 years), including "developing and disseminating model advertising and education programs to counter the use by youth of substances that are unlawful for use or purchase by youth with an emphasis on reducing youth smoking." What does this mean for our Thursday VP announcement? The foundation shall have a board with 11 directors (

Effects of federal legislation: If federal tobacco related legislation is enacted before 11/30/2002, then each original participating manufacturer shall receive a dollar for dollar offset for all amounts paid by such manufacturer pursuant to such legislation and **actually made available to such setting state.** Such an offset would only apply to federal funds to states that are (1) unrestricted or (2) restricted "to any form of health care or to any use related to tobacco (including, but not limited to, tobacco education, cessation, control, or enforcement.)"

Draft 11/16/98 12:45pm

Waldman

PRESIDENT WILLIAM J. CLINTON
REMARKS ON TOBACCO SETTLEMENT

THE WHITE HOUSE

November 16, 1998

[Insert on Iraq]

Today is an important day in the long struggle to protect our children from tobacco. The settlement between the Attorneys General and the tobacco companies is a step in the right direction for our nation. It reflects the first time that the tobacco companies will be held financially accountable for the damage that their product does to our nation's health. I want to thank Attorney General Gregoire and all her colleagues for their efforts to bring the tobacco companies to justice.

With this settlement, we are moving forward -- but we have much more to do. Only the national government can take the full range of strong steps needed to protect our children from tobacco. So it is up to Congress to act, to rise to its responsibility to pass national tobacco legislation.

My administration began that effort nearly four years ago, when the Food and Drug Administration put in place a strong crackdown on tobacco advertising aimed at teenagers. This was the broadest and most significant effort yet to protect our children from tobacco. But it has been challenged in court by the tobacco companies from the beginning. Today, I want to report that the Solicitor General will ask the Supreme Court to resolve this matter.

But let's be clear: When it comes to protecting our children from tobacco, it is up to Congress to finish the job. This past Congress began with strong momentum toward action, only to see national tobacco legislation derailed by partisanship and special pleading. In the new Congress, I am determined that we will choose progress over partisanship. Comprehensive national tobacco legislation -- including protection for tobacco farmers -- must be one of the top priorities for the new Congress, and I will work hard to see that it becomes law.

We should always remember the stakes. Each day that Congress fails to act, more than 3000 children start smoking, and more than 1000 of them will die early as a result. Each day that Congress fails to act, our children continue to be targeted by a multimillion dollar marketing campaign designed to recruit what tobacco industry documents call “replacement smokers.” With strong legislation, we can save one million lives in the first five years. Our duty is clear: to protect our children; to wrap a loving arm around them; and to give them the future they deserve.

**PRESIDENT CLINTON:
WORKING TO REDUCE TEEN SMOKING**

November 16, 1998

"We should remember the stakes. Each day that Congress fails to act, more than 3,000 children start smoking, and more than 1,000 of them will die early as a result. Each day that Congress fails to act, our children continue to be bombarded by massive a marketing campaign aimed at recruiting what tobacco industry documents call 'replacement smokers.' With strong legislation, we can save one million lives in the first five years. Our duty is clear: to protect our children, to wrap a loving arm around them, and to give them the future they deserve."

President Bill Clinton
November 16, 1998

Today, President Clinton will declare that the proposed state tobacco settlement, which holds the tobacco industry accountable for targeting children, is a step in the right direction and will call on Congress to finish the job and pass comprehensive tobacco legislation that will help reduce teen smoking. The President will also underscore the Administration's strong commitment to the FDA tobacco rule, which confirms the FDA's authority over tobacco, by noting that the Solicitor General has decided to seek the Supreme Court's review of a recent decision by the Fourth Circuit denying a rehearing in the FDA case.

THE PROPOSED STATE SETTLEMENT IS A STEP IN THE RIGHT DIRECTION. President Clinton has worked very hard over the last three years to reduce the number of teen smokers and hold tobacco companies accountable for their marketing of cigarettes to children. Today, state Attorneys General will unveil a proposed settlement with major tobacco companies. The President sees this proposed settlement as a real step in the right direction, but will make clear that there is still a great deal left for Congress to do to ensure a substantial reduction in youth smoking.

ANTI-TEEN SMOKING LEGISLATION WILL BE ONE OF THE PRESIDENT'S TOP PRIORITIES FOR THE NEXT CONGRESS. The President will call on the next Congress to finish the job and enact national tobacco legislation. Passage of this legislation will be one of the President's top priorities for the next Congress. The American people want progress not partisanship. They want Congress to protect children, not special interests. The new Congress has the chance to put politics aside and do what the last Congress failed to do -- act now to prevent three million children from starting smoking and save one million lives over the next five years.

THE CLINTON ADMINISTRATION WILL SEEK SUPREME COURT REVIEW OF THE FOURTH CIRCUIT FDA DECISION. The President will reiterate his support for the FDA tobacco rule, which confirms FDA authority over tobacco products. Since this rule was announced in 1995 the tobacco industry has challenged it in court. Last week, the Fourth Circuit Court of Appeals denied the Administration's request for a rehearing in the FDA case. Today, the President will make clear that the Solicitor General has authorized the filing of a petition in the Supreme Court seeking review of the Fourth Circuit's decision in this matter. This decision is crucial, confirming the FDA's authority over tobacco products is necessary to help stop young people from smoking before they start by stopping advertising targeted at children and curbing minors' access to tobacco products. If the leadership in Congress would act in a bipartisan manner and pass comprehensive tobacco legislation to confirm the FDA's authority, this matter could be taken out of the courtroom.

THE WHITE HOUSE
WASHINGTON

November 16, 1998

TOBACCO SETTLEMENT ANNOUNCEMENT

DATE: November 16, 1998
LOCATION: Roosevelt Room
BRIEFING TIME: 3:00 pm - 3:30 pm
EVENT TIME: 3:35 pm - 4:00 pm
FROM: Bruce Reed

I. PURPOSE

To declare that the proposed state tobacco settlement is a step in the right direction and call on Congress to finish the job.

II. BACKGROUND

You will make a statement declaring that the proposed state tobacco settlement is a step in the right direction and calling on Congress to finish the job. This is an opportunity to praise the state Attorneys General for their perseverance in this fight to hold the tobacco industry accountable for targeting children; it is also an opportunity to announce that enacting national tobacco legislation to finish the job will be one of your top priorities in the next Congress. You will also underscore the Administration's strong commitment to the FDA tobacco rule, noting that the Solicitor General has decided to seek Supreme Court review of the Fourth Circuit's decision invalidating the rule. You will be joined by seven state Attorneys General following the unveiling of their package at the National Press Club.

National Tobacco Legislation will be one of your Top Priorities for Next Congress.

You will announce that enacting national tobacco legislation will be one of your top priorities for the next Congress. The new Congress has the chance to put politics aside and do what the last Congress failed to do -- act now to prevent three million children from starting smoking and save one million lives over the next five years.

The Solicitor General will Seek Supreme Court Review of the Fourth Circuit FDA Decision.

You will reiterate your support for the FDA tobacco rule which you unveiled in 1995 and which the tobacco industry has challenged in court ever since. Last week, the full Fourth Circuit Court of Appeals denied the Administration's request for a rehearing of the panel decision invalidating the FDA rule. You will make clear that the Solicitor General has authorized the filing of a petition for certiorari in the Supreme Court seeking review of the Fourth Circuit's decision in this matter. Confirming the FDA's authority over tobacco products is necessary to help stop young people from smoking before they

start by stopping advertising targeted at children and curbing minors' access to tobacco products. If the leadership in Congress would act responsibly, it would enact bipartisan comprehensive tobacco legislation to confirm the FDA's authority and take this matter out of the courtroom.

III. PARTICIPANTS

Briefing Participants:

Bruce Reed
Bruce Lindsey
Mickey Ibarra
Elena Kagan
Cynthia Rice

Event Participants:

YOU

Attorney General Christine O. Gregoire, Washington
Bruce Reed

Standing on Stage, but not speaking:

Attorney General Gale Norton, Colorado
Attorney General Tom Miller, Iowa
Attorney General Dennis C. Vacco, New York
Attorney General Heidi Heitkamp, North Dakota
Attorney General W.A. Drew Edmondson, Oklahoma
Attorney General Mike Fisher, Pennsylvania

IV. PRESS PLAN

Pool Press.

V. SEQUENCE OF EVENTS

- **YOU** will be announced into Roosevelt Room accompanied by Bruce Reed and Attorney General Christine Gregoire.
- Bruce Reed will make welcoming remarks and introduce Attorney General Christine Gregoire
- Attorney General Christine Gregoire will make remarks and introduce **YOU**.
- **YOU** will make remarks.
- **YOU** will have an opportunity to answer questions from the press and then you will depart.

VI. REMARKS

Provided by Speechwriting.

**PRESIDENT CLINTON WILL DECLARE STATE TOBACCO SETTLEMENT A STEP
IN THE RIGHT DIRECTION AND CALL ON CONGRESS TO FINISH THE JOB**
November 16, 1998

Today, President Clinton will declare that the proposed state tobacco settlement is a step in the right direction and call on Congress to finish the job. The President will praise the state Attorneys General for their perseverance in this fight to hold the tobacco industry accountable for targeting children and announce that enacting national tobacco legislation to finish the job will be one of his top priorities in the next Congress. The President also will underscore the Administration's strong commitment to the FDA tobacco rule, noting that the Solicitor General has decided to seek the Supreme Court's review of the Fourth Circuit's latest decision.

Proposed State Settlement is a Step in the Right Direction

The President will make his comments on the proposed state tobacco settlement following the unveiling of the package by the state Attorneys General at the National Press Club. While the President will say the settlement is a real step in the right direction, he will say there is still a great deal left for Congress to do to ensure a substantial reduction in youth smoking.

National Tobacco Legislation will be one of the President's Top Priorities for Next Congress

The President will announce that he will push the Congress to finish the job and that enacting national tobacco legislation will be one of his top priorities for the next Congress. The American people want progress not partisanship. They want Congress to protect children, not special interests. The new Congress has the chance to put politics aside and do what the last Congress failed to do -- by acting now to prevent three million children from starting smoking and saving one million lives over the next five years.

The Solicitor General will Seek Supreme Court Review of the Fourth Circuit FDA Decision

The President will reiterate his support for the FDA tobacco rule which he unveiled in 1995 and which the tobacco industry has challenged in court ever since. Last week, the Fourth Circuit Court of Appeals denied the Administration's request for a rehearing in the FDA case. Today the President will make clear that the Solicitor General has authorized the filing of a petition for certiorari in the Supreme Court seeking review of the Fourth Circuit's decision in this matter. Confirming the FDA's authority over tobacco products is necessary to help stop young people from smoking before they start by stopping advertising targeted at children and curbing minors' access to tobacco products. If the leadership in Congress would act responsibly, it would enact bipartisan comprehensive tobacco legislation to confirm the FDA's authority and take this matter out of the courtroom.

Mtg - C. Greig - re settlement

11/4/98

MN - cleaned up billboard ban

product placement

3 inj relief: targeting women,

suppression of research

market misrep

merchandise

T.I. / C.T.R. / C.I.A.R (etc group) - all disbanded

any others must meet acc criteria

Documents - all in MN; all future in litig; user-friendly,
avail on internetList of leg They have agreed not to oppose - all related to
children

state + local

what of national ??

Reporting reqs on contributions -

restrictions on lobbying (non corp. culture reqs)

No facial challenge to any provisions re kids already
enacted.

Private - can't do anything thru 3Ts

No use of market names (Spice Girls)

Minimum pack size

No pits w/out absolute proof of age

No Joe Camel

[Disfranch over ownership - internal]

to enforce tobacco laws/cases decrease

Pos of \$ for AGs - no need for them to seek approval.

Pos of \$ for public education purposes - extra advertising

\$ is less than June 20 for states

but some of set provisions:

a) volume adjustment

b) inflation - 3% or CPI

c) nonpartic manufacturers

if 8% come in → additional monies are triggered.

?? for every 1% decrease (from ^{current} 97.5%), 3:1

d) nonsettling states - Their share goes away (not paid)

e) previously settling states

Smaller from cities/counties take care of

State attys fees + costs are paid.

Re private attys -

Federal of tax - states get less if fed pass tax - pass proceeds directly on to states

Tobacco Q&A
October 6, 1998

Q. What do you think of the potential settlement between the states and the tobacco industry?

A. We are watching with interest to see whether there is a settlement reached between the states and the tobacco companies. The terms of the possible settlement, as we understand them, will be only a first step -- although a significant one -- toward substantially reducing youth smoking. Congress will still have a lot of work to do in this area, and we will continue to push for comprehensive legislation that will achieve all our goals.

Fred Duval 10/05/98 12:52:38 PM

Record Type: Record

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

cc: Mickey Ibarra/WHO/EOP, William H. White Jr./WHO/EOP, Emory L. Mayfield/WHO/EOP

Subject: AGs- tobacco

I spoke to Iowa AG Tom Miller and Az AG Grant Woods - two of the "hard-liners" on the tobacco talks. They report that the current terms are not much different from those I described to you a few weeks ago - although the counter-marketing money has been increased to \$300 mil. The hard liners want some additional restrictions on marketing (such as restrictions on "human forms" e.g. Marlboro Man).

From here, the AG negotiating team is meeting with the other AGs in small groups this week. The 8 "hard-liners" for example are meeting tomorrow with Greggiore etc. Then the negotiating team will be meeting with AGs by region later this week. Their goal, of course, is to get unanimity on the deal.

Tob - rec - state money



Cynthia A. Rice

10/13/98 04:39:00 PM

Record Type: Record

To: Laura Emmett/WHO/EOP

cc:

Subject: tobacco recoupment

----- Forwarded by Cynthia A. Rice/OPD/EOP on 10/13/98 04:40 PM -----

Fred Duval 10/13/98 02:50:31 PM

Record Type: Record

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

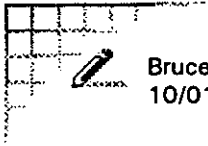
cc: Mickey Ibarra/WHO/EOP

Subject: tobacco recoupment

Sen Mack has told Gov Chiles that Sen Lott asked Erskine if we were ready to talk about tobacco and whether we would buy the Chiles proposal. Erskine reportedly said no. Chiles is worked up thinking this violates the commitment made at the meeting between Chiles and Erskine that we attended. I fully appreciate how vague Chiles request was, and how vague but generally supportive ("we can do business on this") we were. There must be some fine print here not getting reported. Do either of you know what transpired and have advice for what to tell Chiles.

Thank you.

Tobacco industry performance
and
Tobacco state settlements



Bruce N. Reed
10/01/98 11:13:30 AM

Record Type: Record

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

cc:

Subject: rjr worth more dead than alive

RJR: Russia's Problems Don't Change Odds of Spinoff. The Coming Proxy Fight. Outperform.

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

September 30, 1998

TOBACCO

HIGHLIGHTS

1. We have cut RJR estimates to \$2.20 in 1998 (from \$2.40; we had previously quantified exposure of \$.15/share in Russia), and to \$2.40 in 1999 (from \$2.50). Our going forward assumption is that Russia will generate zero profits in 1998, and \$10-\$15 million in 1999. With no profits in low-tax Russia, management has increased its estimated 1998E tax rate to 45.5%, from 43.0%.
2. The estimate cut, which was largely expected, was offset by news that 3Q domestic tobacco profits will be up about +10% (+4-5% previously expected) on an approximate (7%) volume decline (industry -6%; reflects trade deloading following Spring price increases). This suggests that RJR, following B&W's lead, is finally cutting back on promotional spending behind Doral.
3. We do not expect RJR to cut its dividend (1998 dividend \$2.05, vs. \$3.75 cash earnings, 55% payout; M 52% payout; UST 65% payout) until Nabisco is spun off (early-1999). Our standalone RJR Worldwide Tobacco 1998E estimates are now \$1.45 reported EPS (\$1.55 in 1999), \$2.55 cash EPS (\$2.70 in 1999), 1998E fixed charge coverage of 3.1x (3.3x in 1999).
4. The estimate cut does not change prospects for a spinoff of Nabisco. In fact, the continued terrible operating results at both RJR International and Nabisco, combined with our view that raider Carl Icahn (13-14MM shares) will announce another proxy fight to unseat management (filing deadline Nov. 26), increases the pressure on RJR to spin out Nabisco once there is a new AG deal.
5. We believe the market has overreacted to what is old news, especially when one considers that RJR likely has no choice but to find an international partner to beef up distribution and management. With a 35% cut in RJR estimates since beginning of the year, shareholders have lost faith in management's ability to fix RJR's problems, and should increasingly attach a change in control premium to RJR's shares. If Icahn

attracts as a partner a strong consumer products veteran, he could get 60% + of the proxy vote.

6. While Philip Morris does not appear to be having anywhere near the same problems that RJR is having in Russia -- much better management team and local distribution -- we have said that we would cut \$.05/shar out of our Philip Morris 1998 numbers (to \$3.10) if PM told us that its Russian profits were zero (\$150 million current estimate -- about 3% of PM International)

7. Settlement update: We believe the key obstacle holding up the deal is the parties' intent to make sure that "substantially all" of the AGs opt-in to the deal once it is announced (Friday or next Monday is our best bet). We have heard that the opt-in period for the AGs will be relatively short -- likely 7-10 days from day of announcement. We have also heard that there will some monetary incentive that RJR and B&W (portion of upfront payments borne by MO) forfeit if they fail to sign up during the opt-in period.

INVESTMENT CONCLUSIONS

We reiterate our outperform rating. Assuming there is a new AG agreement, we see little downside for RJR, even with continuing problems in Russia. Either one of two outcomes seems likely: One, RJR will enter into the AG settlement, spin off Nabisco, and shareholders will be rewarded with a sum-of-the-parts valuation (estimate \$40 -- RJR's stake in Nabisco is now worth \$23.75 per share. Even with the estimate cut, RJR's worldwide tobacco business (\$1.45 in reported EPS and \$2.55 in cash EPS), is worth potentially \$15 - \$18 per share, at 10 - 12x reported earnings, or 6-8x cash earnings). If RJR elects not to join the settlement, which would suggest no spinoff, we have no doubt there would be a change in control at RJR next year as shareholders elect to unseat the current Board and management. In the latter situation, we would expect the new Board to adopt the settlement put in place by Philip Morris and Loews, install a new management team that can fix RJR International, and move to unlock value via spinoffs, asset sales, etc. That said, we still prefer Philip Morris and UST over RJR, which is likely worth more dead than alive. Our price target remains \$40.

Tobacco Q&A
July 10, 1998

Q: What do you think of the rumoured plan for the states to settle with the tobacco industry?

A: No matter what the states do, Congress has a responsibility to do its part and reduce youth smoking, by reaffirming FDA's full authority over tobacco products, imposing heavy surcharges on tobacco companies that keep marketing cigarettes to young people, and providing funds for critical public health efforts, such as medical research, cessation programs, and tobacco counteradvertising. We're going to keep working to build upon bipartisan support for these measures. Nothing the tobacco companies do will let the House and Senate Republican leadership off the hook.

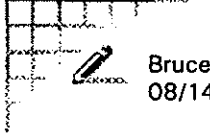
Background: Tobacco industry analyst Gary Black reports that his sources say the states and the industry are close to announcing a deal to settle all the remaining state attorneys general claims which would include:

- Payments of \$180-\$200 billion over 25 years, resulting in about \$.35 cent per pack increase over five years.
- Advertising and marketing restrictions that were part of the Minnesota settlement (no billboards or transit advertisements; no promotional products which bear the brand name, logo, or recognizable color or motto of a brand; no direct or indirect payments for product placements in movies).

It would not include, among other things:

- Recognition of FDA authority over tobacco products or the additional advertising restrictions that were part of the FDA rule (the industry would continue to fight the FDA in court).
- Surcharges on companies that continue to market their products to children.
- Funding for public health efforts such as medical research, cessation programs, and tobacco counteradvertising.

Black predicts that this deal will be reached after Congress adjourns for its August recess and before the Washington state trial is set to begin September 22nd.



Bruce N. Reed
08/14/98 05:43:21 PM

Record Type: Record

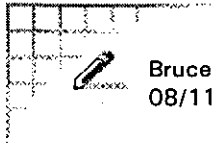
To: Elena Kagan/OPD/EOP, Cynthia A. Rice/OPD/EOP, Cynthia Dailard/OPD/EOP

cc:

Subject: Update on State talks

I talked to Moore and Gregoire. The talks will not resume until the week of Aug. 24th. The CEOs were meeting today to decide whether to resume the talks at all. Gregoire thinks that if the talks resume, they will go quickly, because she needs a decision either way by the week of Sept. 14th. But she says there appears to be a real split between PM and RJR. In the four state settlements, PM agreed to help with RJR's cash-flow problems by picking up a disproportionate share of the cost, but PM is no longer willing to do so (because RJR turned around and used the money it would have had to spend on settlements to increase spending on promotions). RJR is now worried that PM wants to maximize its competitive advantage by making RJR pay its share of the upfront payment and agreeing to some advertising restrictions that will make it harder for RJR to reverse its declining market share. RJR would then be incredibly vulnerable to another Marlboro Friday, where PM slashes prices to gain market share. She'll let us know what she hears from the CEOs.

Tob - state settlements
and
Tob - medicare suits



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

Record Type: Record

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

cc:

Subject: blablaba

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

HIGHLIGHTS

1. We believe the current tobacco environment is similar to 1986-87, when sentiment turned dramatically as the 2nd tobacco litigation wave collapsed. From 12/85 to 9/87, Philip Morris' relative multiple soared from 55% to 90%, as a wave of favorable appellate rulings convinced investors that bankruptcy risks were way overdiscounted, and Philip Morris' stock price tripled (S&P +70%).
2. Our discussion with senior executives suggests that the subpar investment performance of the group over the past 18 months is likely to compel all company boards to take more aggressive stances in accelerating earnings growth and unlocking values through buybacks, dividend hikes, and asset distributions. This is what happened between 1985-1990 (MO tripled earnings and dividends). After an 18-month absence, Loews (LTR) has now resumed its buyback program, despite the Tisches' bearishness on the market.
3. On Friday, the House joined the Senate in recess until Labor Day, and Republican leaders conceded officially there would be no tobacco legislation passed this year. With a \$.10/pack excise tax increase passed last September now scheduled to go into effect in 2000, and another \$.05/pack hike due to begin 2002, we believe it will be at least a few years before Congress attempts to tackle tobacco again, given the tortured and exhaustive process the McCain bill was put through before it was finally killed this summer.
4. We expect a new settlement between the industry and the 46 attorneys general who have not settled by Labor Day. We expect the industry, having taken off a week to assess the renegade provisions (what to do about manufacturers who don't join the deal) will have concluded that the renegade provisions on the table -- states vow to bring claims against manufacturers and retailers who don't comply; states' payments, already volume adjusted, fall further if renegade share increases -- are sufficient. We perceive that Philip Morris and most large wholesalers believe the renegade problem is better dealt with by beefing up trade programs.
5. Expected decertifications of state class actions by the highest courts in Maryland (any day) and Louisiana (this Fall) are the likely catalysts that will convince investors that the Engle class action, which begins after Labor Day in West Palm Beach, FL and will last three months, will also be decertified by the Florida Supreme Court, in early-1999. In the history of mass tort personal injury actions, we find no record of any multi-phase trial ever reaching the individual stage (defendants settled or class was decertified).
6. We expect the Florida trial court that heard Widdick, or the same 1st Circuit appellate court that overturned Carter, to throw out the Widdick (aka Maddox) verdict under the same reasoning (preemption, 1963 B&W evidence not appropriate, documents should have been protected under attorney-client privilege). This would erase the one remaining loss on the

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

7. Risk #1: If there is no state-only settlement, we see 5% downside. The Washington Medicaid trial begins October 14. The judge has dismissed all but three claims -- conspiracy, anti-trust, and violation of Washington's Consumer Protection Act (CPA). While the latter permits only injunctive relief, anti-trust violations and conspiracy combined with CPA would permit money damages. The judge has ruled that the industry can introduce evidence that the state collected more in excise taxes than it claims in damages.]

8. Risk #2: If the Administration files its own Medicare/Medicaid recovery action to get the industry to cough up money for the federal government and accept FDA jurisdiction, we could see 5% downside as investors worry that this new action might trigger fraudulent conveyance claims. Any federal claim, however, would have to be filed in federal court (have dismissed 5 of 5 labor union / health care claims). The federal government, unlike the states, shows a clear paper trail of knowledge of tobacco's risks.

9. We reiterate our outperform ratings on Philip Morris (price target \$60), RJR Nabisco (\$40), and UST (\$40).



Cynthia A. Rice

08/14/98 03:58:05 PM

Record Type: Record

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

cc:

Subject: Antitrust report from Perrelli

Yesterday afternoon I got a report from Perrelli on what their antitrust division is doing to follow up with the state AGs. They've reached out to Gregoire et. al. Not much is happening now because of vacation schedules. DOJ is planning to outline some general parameters to the AGs, and then ask them to come back to them with any specific proposals they could evaluate. I pushed Perrelli about couldn't they do more to help the AGs come up with a creative solution, but he pushed back saying 1) there probably isn't one that's permissible -- the tobacco companies are just going to have to live with the risk of having the small companies undercut them and 2) they don't think it would be appropriate to deviate from standard procedure, which involves evaluating proposals brought to them.

Recompment - Medicaid

1. Poss of settlement -

some min floor that fed govt would have to recover.
↳ g.f. estimate

- ① Go for it all
- ② Go for 87% as settlement ②a Go for set lesser %age
- ③ Go for smaller amt plus conditions - not there yet
- ④ Do an agreement + present it to Congress
↳ with whom???

Tobacco Q&A
July 10, 1998

Q: What do you think of the rumored plan for the states to settle with the tobacco industry?

A: We're doing everything in our power to reduce teen smoking, and we're delighted that states are pressing ahead to do everything in their power. The only ones who haven't done anything yet are the Republican leaders in Congress, who conspired with the industry to kill a strong bill and have let the tobacco companies dictate a weak one.

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

Background:

Next week, the state attorneys general will meet to consider a possible new agreement between the states and the tobacco industry. The industry is interested in a new "state-only" deal that would give the states the \$200 billion over 25 years they negotiated last year in return for settling the state cases. No federal or state legislation would be required. The deal would produce a price increase of 30-35 cents per pack, but would not say anything about FDA authority, farmers, lookback surcharges, or federal investments in research, counteradvertising, cessation and so on (although states would have substantial funds to invest in counteradvertising, tobacco education and prevention, etc.). The industry would agree to the advertising restrictions from the Minnesota settlement (no billboards or transit advertisements; no promotional products which bear the brand name, logo, or recognizable color or motto of a brand; no direct or indirect payments for product placements in movies) which are less than those required in the FDA rule (now tied up in court). Apart from settling the state cases, the industry would receive none of the liability protections of the June 20th agreement.

If such a deal materializes, we believe we should challenge Congress to finish the job by passing a streamlined bill that includes a smaller (e.g. 50-cent) tax increase to pay for targeted tax cuts (marriage penalty, long-term care), along with FDA authority, counteradvertising, and lookback surcharges.

Medicaid Recoupment

Process: All states have some sort of Medicaid alleg.

Not as sep claim

Really part of claimed items

Quarterly submissions - each state - 3rd party collectors

Historically, HCFA has not contested

Statute is clear - states have oblig. to reimburse

If HCFA thinks state has not complied:

(1) Disallowance of items

Auditors go out

Track + battle w/ state

Notice of disallowance

Full payment

Departmental Appeals Bd

ERepayment

Fed Dist. Ct. AP Appeal

Repayment plan - by reg.

12 quarter rule

Prob some way to deal

w/ exceptional cases.

(2) Secy can determine st plan not in compliance w/ Medicaid laws 3P liab & provisions -

~~Practical diff~~ when amt of \$ is really lge,

Practical effect - bigger threat - can

cut off more dollars - whole or part of

plan

Similar appeal process in left same
But then City Appeals

States get to
hold on to \$

Any way to start
upholding before whole
adjud process is completed?

30 days

How do you figure out how much \$ you're entitled to.

We should say: All is Medicaid \$ until not shown.

9th Cir. case - upheld - incl. atty fees, pain expenses, med. expenses. NOT cut \$ to 10 around.

Fed share = tab.-related Medicaid payments to a state.

↓ There are ways to do it.

Single method followed in

lots of states - CPC pl

Miss. has better - econ model.

→ Federal share will be paid first.

And federal share prob. higher than the whole.

Medicaid payment - dominant amt. in every state

Might want to take all (even assuming no federal preference) and make them come forward w/ allocation theory. Tactical snarls.

HCFR can ask for whatever it wants in terms of info - prior to disallowing.

PR: Suppose they say: 100m Medicaid 100m punitive

Very hard to figure out how to do this,

if no federal - first rule

Who has the burden here??

↳ Inherently speculative

3 Settlement questions

Federal Claims + Collection, Act -

31 USC 3711a1

obtain the fed part!

Consistent w/ Act to settle?

Fear: If we don't collect,

someone sues as a collector

under Sui Tam

Anti-arbitration principle - exec branch can't circumvent approps process. Very complicated comes up frequently in environmental process.

Does this mean that even if you could do it, you'd have to spend it on health care?

Who challenges?

Rob - rrr - state settlements

NOTE

TO: Cynthia Rice

FROM: Harriet Rabb *HR*

SUBJECT: Gift Acceptance Authority

DATE: July 24, 1998

You asked this morning whether the Department of Health and Human Services was able to accept money to (i) develop and maintain a depository of the tobacco industry documents, and (ii) engage in or promote tobacco counter advertising.

The Public Health Service (of which the Centers for Disease Control, the National Institutes of Health and other entities within this Department are parts) has gift acceptance authority and can receive monies from other than appropriations to undertake activities related to the work and mission of the Public Health Service. The authority is to accept gifts, not to solicit them (which is not legally permitted.)

On first look, it would seem that the activities you mentioned are within the mission of the Public Health Service. Whether there are specific authorities to, for example, develop and run counter advertising campaigns, I do not know. During the course of this day I have not been told that there is any known legal impediment to doing the two tasks you mentioned.

You didn't ask me and this note doesn't address whether it is advisable for the Public Health Service to accept money for these purposes. The decision to accept such money is a policy one, and will have to be vetted with the Secretary.



Cynthia A. Rice

07/24/98 10:22:03 AM

Record Type: Record

To: Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP, Laura Emmett/WHO/EOP
cc: Cynthia Dailard/OPD/EOP
Subject: So far looks good for fed govt to accept private \$\$ for counteradvertising

Per your voice mail, Bruce, I'm checking into whether the federal government could accept funds for counteradvertising from a state settlement. Harriet Rabb is having discussions with the right lawyers, but she understands that the Public Health Service, of which CDC is a part, has "gift authority" i.e., can accept and use gifts. She'll get back to me with a more definitive answer later today.

I think we should add funds for document dissemination to the list as well. Also, don't forget to have the AGs push for the industry to hand over their index to the documents (the 4-A index).


For the record, O'Hara raised the question of whether we would want the President in the position of accepting a check from the AGs that they had gotten from the tobacco industry... i.e., this was something he couldn't get on his own, that he had to rely on the AGs for.

**JOSHUA
GOTBAUM**

07/10/98 09:34:17 AM



Record Type: Non-Record

To: Cynthia A. Rice/OPD/EOP, Bruce N. Reed/OPD/EOP, Elena Kagan/OPD/EOP
cc: Richard J. Turman/OMB/EOP
bcc:
Subject: Re: A new state-only AG settlement 

One point to keep in mind on a state-only plan: It cannot settle the issue of Medicaid recoupment.
(In fact, by making state settlements more likely, it will raise CBO's estimate of the amount we
should recoup. As a result, any legislation to eliminate the recoupment right of the US govt will
require even larger offsets -- without tobacco payments to cover them.)]


Cynthia A. Rice



Cynthia A. Rice

07/10/98 08:20:41 AM

Record Type: Record

To: See the distribution list at the bottom of this message
cc: Laura Emmett/WHO/EOP@EOP, Cathy R. Mays/OPD/EOP@EOP
Subject: Today's Tobacco Q&A 



q&a0710.wp

Message Sent To: _____



Cynthia A. Rice

07/10/98 12:37:33 PM

Record Type: Record

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

cc:

Subject: Re: AGs

fyi


----- Forwarded by Cynthia A. Rice/OPD/EOP on 07/10/98 12:41 PM -----

Fred Duval 07/10/98 12:36:16 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP

cc: Mickey Ibarra/WHO/EOP, Toby Donenfeld/OVP @ OVP, Ron Klain/OVP @ OVP

Subject: Re: 

not on substance - the two AGs I spoke to confirm what you've written. They both, however, wanted to strongly emphasize that the cig companies have hand-picked the AG negotiators - Wash, Colo, NY, Calif. and NC because they are not hard-line. This is not where the weight of opinion among the AGs is. It is not certain that fellow AGs would endorse a deal -

**Minnesota Office of the Attorney General
Hubert H. Humphrey III**

TO: Officials Concerned About Federal Tobacco Policy **DATE:** May 11, 1998
FROM: Luanne Nyberg, Senior Public Health Advisor **PHONE:** 215-1533 (Voice)
Minnesota Attorney General's Office 297-4036 (Fax)
297-7206 (TTY)

SUBJECT: Information Minnesota's Tobacco Settlement

After a four year battle, on Friday, Minnesota announced a historic agreement with the tobacco industry. This \$6.1 billion settlement obtains unprecedented public health achievements and meets all of the goals set by Attorney General Humphrey in 1994: an ironclad ban on marketing to kids; full disclosure of the truth; and damages commensurate with the harm done.

This settlement also shows that individual state cases can benefit all Americans. Minnesota's case dissolves the Council for Tobacco Research - the tobacco industry's "scientific arm"- which has been a tool in the tobacco industry conspiracy to mislead Americans about the dangers of smoking and health. It requires a nation-wide ban on the tobacco industry's secret payments to movie producers - there will no longer be tobacco product placement in movies. And, finally, by raising the settlement standard, it benefits Texas, Mississippi, and Florida - the other settling states who won "most favored nation" clauses when they settled their cases.

To better understand the details of Minnesota's tobacco trial and to answer questions you may have, you can read the Consent Decree and Settlement which have now been posted on our web site (<http://www.ag.state.mn.us/press/newssearch.qry?function=tobaccolitigationsearch>), or you can read the summary sheets that we have also prepared and posted on our web site (www.ag.state.mn.us). Included in the summary sheets are:

- 1) "At a Glance": Bullet points outlining the major provisions of Minnesota's tobacco settlement.
- 2) "The Overview": A three page summary of the agreement.
- 3) "Kids": A summary of the provisions won in the settlement that will directly benefit children.
- 4) "Truth": A summary of the full disclosure won by the Minnesota Attorney General's Office.
- 5) "Health": A summary of health provisions won for both adults and children.
- 6) "Reform": A summary of provisions that will force the tobacco companies to change the way they do business.
- 7) "Money": A payment schedule and an explanation of how the money obtained in Minnesota's case compares to the other settling states.

Tobacco-state settlements



OFFICE OF SCIENCE AND TECHNOLOGY POLICY

Science Division

Executive Office of the President

436 Old Executive Office Building

Washington, DC 20502

202-456-6130

202-456-6027 (FAX)

FAX TRANSMITTAL SHEET

DATE:

TO:

Kagan

PHONE NUMBER:

FAX NUMBER:

FROM:

Mandis

NUMBER OF PAGES (INCLUDING COVER SHEET):

5

Elena-

Here is the Doc ltr with Chris's my edits. I will be in my office until 7:30 pm. I will tell Phil Bartz at Justice to wait until I am tomorrow & you can call him with edits. 514-5421.

December 17, 1997

The Honorable John D. Dingell
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Dingell:

Thank you for your letter of December 1, 1997 to the Attorney General regarding an analysis of the entitlement of the Federal Government to a share of any tobacco settlement funds directed toward reimbursement of Medicaid expenses. Your letter was forwarded to me for response.

Since 1994, forty-two (42) states have filed civil lawsuits against the major tobacco companies in an effort to recover health care costs, including Medicaid costs, stemming from smoking-related illnesses. Certain states and the major tobacco companies reached a tentative settlement of these actions on June 20, 1997. This proposed settlement is contingent upon Congress approving various aspects of the agreement. As a result, the state lawsuits have continued. In early July, on the eve of trial, Mississippi settled its lawsuit for \$3.6 billion to be paid over 25 years, and \$136 million per year thereafter. Mississippi received its first payment under the settlement, a check for \$170 million, on July 15. On August 25, 1997, the state of Florida settled its lawsuit for \$11.3 billion. Florida received its initial payment under the settlement (\$550 million) on September 15, 1997.

Enacted in 1965 pursuant to Title XIX of the Social Security Act, Medicaid is the federal government's primary means of providing health care coverage to indigent Americans who are aged, blind or disabled, or who qualify under the Aid to Families with Dependent Children Program. Medicaid is a joint federal/state program in which the federal government provides funds to states to help finance health care programs. "The Federal Government shares the costs of Medicaid with States that elect to participate in the program. In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services." *Atkins v. Rivera*, 477 U.S. 154, 156-57 (1996) (citations omitted). State agencies have the primary responsibility for administering this program. The federal share of the states' expenditures varies from 50 percent to 86 percent, depending on per capita income. At the federal level, ~~Medicaid is administered by~~ ✓

the Health Care Financing Administration ("HCFA"), ~~an agency of the Department of Health and Human Services.~~ HCFA ensures that the state Medicaid programs comply with federal law. ✓

Among other things, Medicaid mandates that each state "take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the [state's Medicaid] plan." 42 U.S.C. § 1396a(a)(25)(A). Where such liability is found to exist after Medicaid payments have been made, each state "will seek reimbursement for such assistance . . . where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery . . ." 42 U.S.C. § 1396a(a)(25)(B); see *The New York State Department of Social Services v. Bowen*, 846 F.2d 129, 131 (2nd Cir. 1988). When recoveries are made from third parties, the previous Medicaid expenditures for the services at issue are to be treated as overpayments, 42 U.S.C. § 1396b(d)(2)(B), and overpayments are to be deducted from amounts to which the states are entitled in subsequent quarters. 42 U.S.C. § 1396b(d)(2)(A). ✓

The states are required to disclose the net recoveries, the total recoveries less their costs of recovery. ~~They may choose from a couple of different methods of determining this net amount. Each method gives the state an offset for attorney fees in the calculation.~~ ✓
Based upon these figures, the Secretary determines the federal government's pro rata share of the recovery - which is the same percentage used to compute the federal government's share of expenditures - and this amount is deducted from the government's next quarterly payment. 42 U.S.C. § 1396b(d)(3). In the past, where recovery from a third party consisted of both Medicaid payments and other state expenditures, the Secretary has agreed to an apportionment of the recovery, but the apportionment must accurately reflect the Medicaid portion of the total costs incurred. The Medicaid statute does not provide the Secretary with authority to waive the states' repayment obligation, and we are not aware of any instance where HCFA has given a waiver. ✓

The upshot of the foregoing is that the Medicaid statute is clear that the federal government is obligated to seek its share of

✓ There is no express authorization within the Medicaid statute for the federal government to sue third-party tortfeasors directly. As to the possible impact of this lack of express authorization, see generally, *National Railroad Passenger Corp. v. Nat'l Assoc. of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.")



any state recoveries related to Medicaid. While HCFA can determine (or negotiate with a state) a reasonable amount of reimbursement to the federal government, there is nothing which authorizes HCFA to waive repayment of Medicaid monies owed to the federal government. To the contrary, the Federal Claims Collection Act ("FCCA"), 31 U.S.C. § 3711(a)(1), provides: "(a) The head of an executive or legislative agency - (1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency." In addition, the Federal Claims Collection Standards, 4 C.F.R. § 102.1, provide:

- (a) Each Federal agency shall take aggressive action, on a timely basis with effective follow up, to collect all claims of the United States for money or property arising out of the activities of, or referred to, that agency in accordance with the standards set forth in this chapter.* * *
- (b) All agencies are expected to cooperate with one another in their debt collection activities.^{2/}

~~According to HCFA, the nationwide federal reimbursement matching rate for services to Medicaid beneficiaries is approximately 57% and has been remarkably constant from year to year. The matching rate for individual states is also known. Thus, arriving at an appropriate allocation of a specific state's recovery is certainly feasible.~~ If a state fails to reimburse HCFA for Medicaid monies that are recovered, HCFA can disallow the portion of that recovery which is owed to the federal government from future Medicaid funds provided to the state. See 42 U.S.C. § 1396b(d); 42 C.F.R. § 430.42 et seq. If a state protests the disallowance, an administrative appeal and a district court remedy are available to decide whether HCFA's disallowance was proper. Therefore, the existing administrative procedures do provide a mechanism for resolving federal/state disputes on allocation issues.

In sum, under the Medicaid statute, the states are obligated to pursue recovery of Medicaid funds from potential third-party tortfeasors. Given the stated nature and purpose of the states'

^{2/} The FCCA, 31 U.S.C. §§ 3711(a)(2) and (3), affords agencies, including HCFA, authority to suspend, compromise, and terminate collection action on claims of less than \$100,000. Taking such action on claims in excess of \$100,000 requires Justice Department approval.

tobacco lawsuits, it is evident here that the states have, in fact, sought recovery of Medicaid-related expenses from the tobacco industry. Accordingly, although we understand that ~~HHS is open to the possibility of an allocation of these Medicaid recoveries through a new legislative scheme~~, current law requires HCFA to seek recovery of the federal portion of reimbursements for Medicaid that may be part of any state tobacco settlement. ✓

Thank you for your inquiry. Please do not hesitate to contact me regarding this or any other matter.

Sincerely,

the Administration prefers
to see the allocation of
tobacco funds between federal
and state government resolved through
legislation

Andrew Fois
Assistant Attorney General

Tobacco - state settlements

THE WHITE HOUSE

WASHINGTON

December 5, 1997

The Honorable James E. Doyle
and Colleagues
State Attorneys General
Washington, D.C.

Dear Friends:

Thank you for your recent letter about comprehensive tobacco legislation. I appreciate your concern that such legislation should fully compensate states for tobacco-related costs.

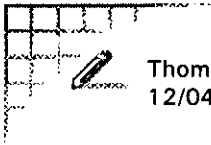
By working together, we have made extraordinary progress this year in our fight to reduce the death and illness caused by tobacco. In February, new Food and Drug Administration rules to reduce youth smoking took effect. In April, a federal judge in North Carolina affirmed FDA's authority to regulate tobacco products. In June, the state attorneys general announced a historic agreement with the tobacco industry to settle 40 state lawsuits against the tobacco companies. And in September, building upon the work of the FDA and the state attorneys general, I called on Congress to pass sweeping tobacco legislation that would dramatically reduce teen smoking. My overriding goal in seeking bipartisan national tobacco legislation is to make the most of this historic opportunity to reduce teen smoking.

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.

Again, thank you for your leadership on this important issue.

Sincerely,





Thomas L. Freedman
12/04/97 04:04:01 PM

Record Type: Record

To: Elena Kagan/OPD/EOP
cc: Laura Emmett/WHO/EOP
Subject: Tobacco meeting

Nothing of much significance happened. Treasury and HHS didn't come. We discussed House hearings on medicaid next week (Bilrakis) and the fact Nancy Ann was testifying. Bruce showed up late and said we should get the President's letter out by the hearing-- that it would make Chiles happy and he is testifying. The VP has a 12/16 smoking event in Seattle. We noted we should find out what money there is for tobacco, especially for states, in the FY '99 budget.



U.S. Department of Justice
Office of the Assistant Attorney General
Civil Division

George Jordan Phillips
Counselor to the Assistant Attorney General

950 Pennsylvania Ave., N.W., Room 3143
Washington, D.C. 20530
(202) 514-5713 Fax (202) 514-8071

FACSIMILE TRANSMITTAL COVER SHEET

TO: **Elena Kagan**
Deputy Assistant to the President for Domestic Policy
Old Executive Office Building, Room 218
Washington, D.C. 20501

DATE: 10/27/97

FACSIMILE NO: (202) 456-2878

TELEPHONE NO:

NUMBER OF PAGES: -12-
(EXCLUDING COVER SHEET)

COMMENTS: **Elena:**
Here is a draft memo that I thought might be helpful to you in preparation for this afternoon's meeting.
— George

CONFIDENTIALITY NOTICE

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U.S. Department of Justice

Civil Division

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Washington, D.C. 20530

October 24, 1997

MEMORANDUM

TO: George J. Phillips
Counselor to the Assistant
Attorney General

FROM: Jeffrey Axelrad J. Christopher Kohn
Director, Torts Branch Director, Commercial Litigation Branch
Civil Division Civil Division

SUBJECT: Federal Government's Role in Recovery of Tobacco Medicaid
Awards Obtained by the States

Pursuant to your request, attached is an analysis of the obligations of the federal government to recover the Medicaid portion of any state recovery from the tobacco industry.

cc: Donald Remy; Eugene Thiof; Michael Hertz

** DRAFT - 10/24/97 **

DRAFT**BACKGROUND**

Since 1994, forty-two (42) states have filed civil lawsuits against the major tobacco companies in an effort to recover health care costs stemming from smoking-related illnesses. Mississippi was the first state to file suit on May 23, 1994. The state of Florida filed its lawsuit on February 21, 1995. These lawsuits are based on novel legal theories and have met with mixed results. For example, Florida's case survived in large part because it was based on a state statute allowing it to use generalized causation evidence, while most of the claims in the West Virginia and Washington lawsuits have been dismissed.

The states and the major tobacco companies reached a tentative settlement of these actions on June 20, 1997.^{1/} It is contingent upon Congress approving various aspects of the agreement. As a result, the state lawsuits have continued. In early July, on the eve of trial, Mississippi settled its lawsuit for \$3.6 billion to be paid over 25 years, and \$136 million per year thereafter. Mississippi received its first payment under the settlement, a check for \$170 million, on July 15. On August 25, 1997, the state of Florida settled its lawsuit for \$11.3 billion. Florida received its initial payment under the settlement (\$550 million) on September 15, 1997.

Since Congress began considering the global tobacco resolution, some members (e.g. Sen. Kennedy) have indicated that the federal government's share of tobacco-related expenses should be addressed through any ultimate legislation.^{2/} If the federal government's rightful share of Medicaid funds is secured through Congressional action, HHS may not need to pursue recoveries from the individual states. Otherwise, HHS should seek recovery of these funds directly from the states.

BRIEF CONCLUSION

As explained below, the notion that Mississippi and Florida are not obligated to pass back a portion of their settlements to the federal government for its share of Medicaid expenses is untenable. By statute, the states are responsible for obtaining the reimbursement of Medicaid expenses from third-party tortfeasors and required to reimburse the federal government for its share. Moreover, the size of the potential jury verdicts -- mainly because of the federal share of the Medicaid damages sought -- was substantial leverage which brought the tobacco companies to the negotiating table. The states styled their actions as seeking recovery of smoking-related health care

^{1/} The smallest of the big six tobacco companies, Liggett Corp., had previously settled with the states in March 1996.

^{2/} Only one state, Alabama, has chosen legislation over litigation as the preferred method for recouping these costs. After analyzing the legal basis for litigation, the Alabama attorney general concluded that litigation was the improper method for recouping Medicaid costs *en masse* and refused to file suit. However, with the attorney general's support, a bill was recently introduced into the state legislature which would shift the costs to the tobacco industry by statute.

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costs. Now that they have recovered these costs, HHS should require the states to reimburse the federal government its fair share.

DISCUSSION

A. WHILE MEDICAID IS A JOINT FEDERAL/STATE PROGRAM, THE STATES ARE RESPONSIBLE FOR RECOVERING COSTS FROM THIRD PARTIES.

Enacted in 1965 pursuant to Title XIX of the Social Security Act, Medicaid is the federal government's primary means of providing health care coverage to indigent Americans who are aged, blind or disabled, or who qualify under the Aid to Families with Dependent Children Program. Medicaid is a joint federal/state program in which the federal government provides funds to states to help finance health care programs. *Commonwealth of Massachusetts v. Philip Morris, Inc.*, 942 F. Supp. 690 (D. Mass. 1996). "The Federal Government shares the costs of Medicaid with States that elect to participate in the program. In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services." *Atkins v. Rivera*, 477 U.S. 154, 156-57 (1986). State agencies have the primary responsibility for administering this program. The states have great latitude in defining eligibility and the amount, extent, and scope of coverage. At the federal level, Medicaid is administered by the Health Care Financing Administration ("HCFA"), an agency of the Department of Health and Human Services. HCFA ensures that the state Medicaid programs comply with federal law.

States complete and submit Quarterly Estimated Expenditure Reports in advance of incurring expenses. HCFA makes quarterly payments based upon these reports. To the extent the estimated reports over- or under-estimate a state's actual costs, reported in Final Quarterly Reports, subsequent quarterly payments are adjusted. The federal share of the states' expenditures varies from 50 percent to 86 percent, depending on per capita income.

Among other things, Medicaid mandates that each state "take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the [state's Medicaid] plan." 42 U.S.C. § 1396a(a)(25)(A). Where such liability is found to exist after Medicaid payments have been made, each state "will seek reimbursement for such assistance . . . where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery . . ." 42 U.S.C. § 1396a(a)(25)(B); see *Phillip Morris, Inc. v. Harshbarger*, 846 F. Supp. 1067, 1077 (D. Mass. 1996)(federal law requires states "to pursue liable third parties for amounts paid on behalf of Medicaid beneficiaries"). When recoveries are made from third parties, the previous Medicaid expenditures for the services at issue are to be treated as overpayments, 42 U.S.C. § 1396b(d)(2)(B), and overpayments are to be deducted from amounts to which the states are entitled in subsequent quarters. 42 U.S.C. § 1396b(d)(2)(A). See generally *Massachusetts v. Phillip*

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Morris, Inc., 942 F. Supp. 690, 692-93 (D. Mass. 1996).³

The estimated and final quarterly reports require disclosure of net recoveries (i.e., the total recovery less the costs of recovery, including attorney fees) from third parties. Based upon these figures, the Secretary determines the federal government's pro rata share of the recovery — which is the same percentage used to compute the federal government's share of expenditures — and this amount is deducted from the government's next quarterly payment. 42 U.S.C. § 1396b(d)(3). HCFA counsel advise that, where recovery from a third party consists of both Medicaid payments and other state expenditures, the Secretary will agree to an apportionment of the recovery, but the apportionment must accurately reflect the Medicaid portion of the total costs incurred.⁴ The Medicaid statute does not provide the Secretary with express authority to waive the states' repayment obligation, and HCFA counsel are not aware of any instance where a waiver has been given.

HCFA has advised us that five states have received payment from the Liggett settlement — Massachusetts, West Virginia, Mississippi, Florida and Louisiana. These states have been paid the first two (of 25) annual installments, or approximately \$291,600 for each state. We are told that HCFA sent letters to the five states reminding them of their obligation to report their recoveries, but only two states (Massachusetts and Florida) reported the first installment, and only two states (Massachusetts and Louisiana) reported the second installment. (Neither Florida nor Louisiana has reported monies received in connection with their settlements with other manufacturers, but HCFA believes that it is too early to say whether they will.) While the Secretary has the authority to estimate third party recoveries in the absence of self-reporting by the states, that has not been done. We are told that HCFA is considering additional correspondence to the states on the matter.

^{3/} To date, HCFA has stated that the federal government does not have a sound legal basis to commence litigation on its own against the tobacco companies for Medicaid expenses stemming from tobacco-related illnesses. There is no authorization within the Medicaid statute for the federal government to sue third-party tortfeasors directly. In fact, by explicitly providing a mechanism to allow the states to pursue these claims, Congress may not have intended that these claims be pursued directly by the federal government. See *National Railroad Passenger Corp. v. Nat'l Assoc. of Railroad Passengers*, 414 U.S. 453, 458 (1974) ("when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.")

^{4/} Should the states assert that the tobacco recoveries do not include repayment for the federal share of Medicaid or that they include a disproportionately small amount of federal recovery, we can rely on *Zinman v. Shalala*, 67 F.3d 841 (9th Cir. 1995), a Medicare case in which the court held that payments made in settlement of liability claims cover expenses paid by Medicare, regardless of how the parties characterize the payment.

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According to HCFA, the nationwide federal reimbursement matching rate for services to Medicaid beneficiaries is approximately 57% and has been remarkably constant from year to year. The matching rate for individual states is known. Thus, arriving at an appropriate allocation of a specific state's recovery is certainly feasible. If a state refuses to reimburse HCFA for Medicaid monies that are recovered, HCFA can disallow the portion of that recovery which is owed to the federal government from future Medicaid funds provided to the state. See 42 U.S.C. § 1396b(d)(2)(5); 42 C.F.R. § 430.42. If a state protests the disallowance, an administrative appeal and a district court remedy are available to decide whether the state must reimburse HCFA. Therefore, the existing administrative procedures protect the United States' fiscal interests in any settlement between the states and the tobacco industry.⁸

While HCFA can determine (or negotiate with a state) a reasonable amount of reimbursement to the federal government, HCFA would seemingly not be authorized to waive completely all Medicaid monies owed to the federal government. The Federal Claims Collection Act ("FCCA"), 31 U.S.C. 3711(a)(1), provides: "(a) The head of an executive or legislative agency — (1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency." In addition, the Federal Claims Collection Standards, 4 C.F.R. 102.1, provide:

- (a) Each Federal agency shall take aggressive action, on a timely basis with effective follow up, to collect all claims of the United States for money or property arising out of the activities of, or referred to, that agency in accordance with the standards set forth in this chapter. * * *
- * (b) All agencies are expected to cooperate with one another in their debt collection activities.

The FCCA, 31 U.S.C. § 3711(a)(2) and (3), affords agencies, including HCFA, authority to suspend, compromise, and terminate collection action on claims of less than \$100,000. Taking such action on claims in excess of \$100,000 requires Justice Department approval.⁹

⁸ With respect to those states that have *not* sued the tobacco companies, HCFA advises that the federal government typically does not attempt to coerce states into bringing lawsuits that they deem non-meritorious or not cost-effective. Moreover, an attempt to calculate the federal share of Medicaid expenses spent to treat tobacco-related ailments faces significant administrative obstacles. This calculation would first require identification of the Medicaid expenses arising from tobacco. Identifying those costs and establishing the connection to tobacco may not be possible, at least at this point in time.

⁹ Specifically, heads of executive agencies:

- (2) may compromise a claim of the Government of not more than \$100,000

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A state's refusal to reimburse the federal government monies owed under Medicaid raises other concerns as well. Assuming a state's recovery of funds is for total Medicaid program losses, the state's failure to report this recovery to HCFA could constitute a false claim under the False Claims Act, 31 U.S.C. §§ 3729-3733 ("FCA"). It would constitute a "reverse" false claim because the state would be under-reporting an amount owed to the federal government. While the United States Department of Justice has complete discretion whether to pursue actions under the FCA, a private party ("relator") may sue under the FCA on behalf of the United States in a *qui tam* action. Even if the United States declines to intervene in the *qui tam* action, the private party may pursue the matter to final judgment and collect a portion of the recovery. HCFA's awareness of the nature of the false claim submitted by a state would not constitute an automatic defense to an action under the FCA. As discussed above, HCFA does have administrative authority to hold back Medicaid payments to a state if it determines that the state has under-reported amounts owed to HCFA. In the event the state and HCFA seek to negotiate a compromise on the amount to be returned to the federal government, the existence of a *qui tam* suit is likely to complicate such efforts because the relator could claim that the proposed compromise is not "fair, adequate and reasonable under all the circumstances," 31 U.S.C. § 3730(c)(2)(B), in which case a judge will rule on the adequacy of the compromise, and/or the relator will demand a percentage of HCFA's recovery. If HHS and a state reach agreement on a compromise prior to the filing of a *qui tam* suit, presumably that compromise is final and not subject to review in connection with a later filed *qui tam* case.

B. THE SETTLEMENTS OBTAINED BY MISSISSIPPI AND FLORIDA INCLUDE MEDICAID REIMBURSEMENTS.

Other than in the Liggett settlement, only two states (Mississippi and Florida) to date have negotiated separate settlements with the major tobacco companies. Based on the information presently available, the settlements reached by both Mississippi and Florida include compensation for Medicaid expenses caused by smoking related illnesses.

Since the initial filing of the states' suits, they have frequently been referred to in the press as

(excluding interest) or such higher amount as the Attorney General may from time to time prescribe that has not been referred to another executive agency for further collection.

(3) may suspend or end collection action on a claim referred to in clause (2) of this subsection when it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount recovered.

31 U.S.C. § 3711(a)(2), (3).

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the state Medicaid actions.³ In a recent order from the Texas lawsuit, the district court described the nature of the case as follows: "The State's alleged injuries are increased medical care costs caused by Medicaid recipients' consumption of tobacco products." *Texas v. The American Tobacco Co.*, No. 5-96CV-91 (E.D. Tex. 9/4/97). As summarized below, a brief review of the nature of suits, media descriptions, and court-filed documents support HHS in demanding a portion of these recoveries as the federal government's share of Medicaid expenses.⁴ If ultimately necessary, further analysis of court documents would probably support our position that Mississippi and Florida and the tobacco companies were litigating primarily over Medicaid expenses.

1. Mississippi

A review of Mississippi's complaint indicates that the state set out to recoup Medicaid expenses. As a basis for its lawsuit, Mississippi cited *inter alia* its state Medicaid statute. (See Compl., ¶ 1 (citing Miss. Code Ann. §§ 43-13-1 — 43-1-145.) The complaint further alleged that the suit was brought on behalf of, among other state agencies, the Mississippi Medicaid Commission (Compl., ¶ 7.) The state also averred that it has paid out hundreds of millions of dollars in health care expenses on behalf of indigents and other residents because of smoking related illnesses. (Compl., ¶¶ 40, 70, 79.)

We have obtained and provided to HHS expert reports produced by the state of Mississippi in its case against the tobacco industry.⁵ These reports demonstrate that the lion's share of damages sought by the state was for Medicaid expenses. For example, one report estimated the following:

Total Smoking-Attributable Expenditures for Mississippi, 1970-2000:

Medicaid.....	\$1,444,325,643
State employee plans	\$94,283,436
Uncompensated care.....	\$102,213,426.

(Max, Wendy, Estimate of Smoking-Attributable Public Expenditures for the State of Mississippi,

³ For example, Mealey's Tobacco Litigation Report, a bi-monthly legal periodical, typically has a section reviewing developments in the states' litigation which is entitled "State Medicaid Actions."

⁴ Assuming that the federal government is entitled to a portion of the states' recoveries, the next question is what percentage. If the settlement amounts solely reflected Medicaid expenses, HHS could easily determine the federal government's share. However, the settlement amounts may reflect compensation for non-Medicaid damages. The manner of segregating Medicaid dollars in the settlements is beyond the scope of this memorandum.

⁵ Max, Wendy, Estimation of Smoking-Attributable Public Expenditures for the States of Mississippi, 1970-2000", 4/15/97; Miller, Vincent P., Cigarette Smoking-Attributable Medical Care Expenditures Incurred by the State of Mississippi, 1970-2000, 3/8/97.

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1970-2000, 4/15/97 at 17.) Regardless of the formula used by Mississippi's experts, the percentage of damages attributable to Medicaid was at least 80%.

Some press reports also demonstrate that the state of Mississippi has recouped Medicaid dollars as part of its settlement. For example, according to an article in the Wall Street Journal, Mississippi Attorney General Mike Moore stated that unless Congress passed the national settlement, some portion of his state's settlement would have to be refunded to the federal government to cover its contribution to the state's Medicaid program.¹⁰ Nonetheless, when Mississippi originally settled with Liggett in March 1996, the state rejected HHS's request for a federal share of the award.¹¹ Last year, Moore successfully fought off a challenge from his governor regarding his right to pursue these costs on behalf of the state. Moore reportedly indicated that his suit was seeking to recover \$100 million per year that Mississippi spends through Medicaid on smoking illnesses.¹² According to one news article, "Moore also estimated that Medicaid represents 95 percent of public money spent on smoking-related illnesses."¹³

Mr. Moore testified before Congress on June 26, 1997, that his state's lawsuit sought to recover both state and federal Medicaid expenses. Senator Hatch inquired: "And does the settlement include compensation for the federal share of Medicaid, as well as the state share?" Mr. Moore responded: "There probably has been some confusion about that, and let me see if I can clear it up. The states filed lawsuits for recovery of both the state share and the federal share of Medicaid. . . . So basically, what we had on our parties who were filing for state Medicaid, the state match and the federal match, and that's all that's been contemplated within this settlement."¹⁴ During subsequent testimony, Mr. Moore described other state cases as "Medicaid cases."¹⁵

¹⁰ Milo Geyelin, Mississippi Becomes First State to Settle Suit Against Big Tobacco Companies, Wall Street Journal, July 7, 1997 at B8 (1997 WL-WSJ 2426746).

¹¹ See Tobacco Lawsuit Settlement Issue Gets Cleared Up, The Commercial Appeal, Aug. 2, 1996 (1996 WL 11059184). Assistant State Attorney General Trey Bobinger stated that all of the settlement money belonged to the state.

¹² Reed Branson, Moore Says Tobacco Suit Was His Duty, The Commercial Appeal, Sept. 5, 1996 (1996 WL 11063250).

¹³ Id.

¹⁴ U.S. Senate Committee on the Judiciary Holds Hearings on the Global Tobacco Settlement, 105th Cong., 2nd Sess., 1997 WL 351166 at 35-36 (June 26, 1997).

¹⁵ U.S. Senate Committee on Labor and Human Resources Holds Hearing Entitled "Public Health or Public Harm?" on the Proposed Tobacco Settlement, 105th Cong., 2nd Sess., 1997 WL 541196 at 45-46 (Sept. 3, 1997).

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There have been other public acknowledgments by Mr. Moore that his lawsuit sought and received Medicaid damages. After the Liggett settlement, Mr. Moore described Liggett's agreement to follow the FDA's regulations as "more important than the money states will receive for Medicaid expenditures."¹⁶ However, when Mississippi did receive payment from Liggett, Mr. Moore refused to reimburse the federal government.¹⁷ While negotiating the global settlement, Mr. Moore proposed that the federal government waive its share of Medicaid expenses.¹⁸ The Los Angeles Times reported that: "About half of the money states are seeking in lawsuits intended to recoup funds spent by Medicaid to cure smokers' ills came from the federal government, Moore said Thursday, and he has proposed that the funds be retained by the states in a settlement and that they be earmarked to provide health care for the nation's 10 million uninsured children."¹⁹ Such a proposal would have been nonsensical unless the state attorneys general were negotiating with federal funds. At the end of September, Mr. Moore reportedly insisted that the federal government was not entitled to any reimbursement.²⁰

Finally, although the memorandum of understanding between the state and the tobacco companies did not specify what percentage of the settlement was for Medicaid damages, it did settle all present or future claims that could be asserted "on behalf of the State of Mississippi and all of its governmental agencies, departments, political subdivisions (Miss. MOU, p. 1, 7/2/97.) This broad language presumably includes any claim by the state for future Medicaid monies. The state's release of the tobacco companies from future claims for Medicaid damages is strong evidence that it has been compensated for these funds.

2. Florida

Allegations within the state of Florida's complaint suggest that the settlement included compensation for Medicaid damages. The complaint alleged:

¹⁶ Focus on Tobacco Liggett Group: Final Settlement With States Announced, American Political Network, American Health Line, Vol. 4, No. 235, Mar. 18, 1996.

¹⁷ Feds Seek to Share In Settlement on Tobacco, Carion-Ledger, 1996 WL 9368931, Aug. 1, 1996.

¹⁸ Tobacco Field Global Settlement: New Payment Plan Being Drafted, American Political Network, American Health Line, Vol. 6, No. 47, June 5, 1997.

¹⁹ Henry Weinstein, Health Coalition to Offer Tobacco Policy in 30 Days Regulation... Talks on a Settlement with Industry Drag on, Los Angeles Times, National Desk, A23, June 6, 1997.

²⁰ HHS and States in Tobacco Tug-of-War?, Health Legislation & Regulation, vol. 23, no. 29, 1997 WL 14875789, Oct. 1, 1997.

DRAFT

For many years, the State has incurred significant expenses associated with the provision of necessary health care and other such necessary assistance under the Medicaid programs to Medicaid recipients numbering in the thousands who suffer, or who have suffered, from tobacco-related injuries, diseases, or sickness. This civil action sounds in both equity and common law and is also brought pursuant to Florida Statute § 409.910, *et seq.*, to obtain reimbursement of the State for the expenditures made to provide medical assistance to Medicaid recipients as a result of the actions of the defendants.

(Compl., ¶ 3, 2/21/95.) The state of Florida was joined as a plaintiff by the Agency for Health Care Administration (AHCA). The complaint further alleged that "the Florida Legislature has authorized the AHCA to initiate actions to recover the full amount of medical assistance provided by Medicaid. § 409.910, Fla. Stat." (Compl., ¶ 45.) AHCA is authorized to sue third parties "in order to recover in one proceeding all sums paid to provide medical assistance to all Medicaid recipients ..." (Compl., ¶ 46.) In fact, Florida based its case on specific amendments to its state Medicaid statute in 1994 which made it considerably easier for the state to pursue the tobacco companies. *See generally Agency for Health Care Administration v. Assoc. Industries of Florida, Inc.*, 678 So.2d 1239 (Fla. 1996). Like Mississippi, Florida contended that it has the health care expenses of indigents and others pursuant to the state Medicaid plan and that the tobacco companies should rightly bear those costs (Compl., ¶¶ 141-145.)

We are attempting to obtain any reports from the damages experts used by the state of Florida to confirm that the primary element of damages sought was Medicaid expenses.²¹

There have been press reports in which Florida state officials have acknowledged that a portion of their recovery must be used to reimburse the federal government. Prior to its settlement, the state Attorney General's office addressed this issue during jury selection in their case against the industry. A Florida paper reported that state attorney general Robert Butterworth indicated that most of any jury verdict would "go to the state's cash-poor health-care system and replenish the coffers of the Medicaid fund. The federal government also stands to gain 56 percent of any award because that is how much it contributes to Florida's Medicaid fund, he [Butterworth] said."²² Michelle Anchors, deputy general counsel to Gov. Chiles, was also reported as stating: "What we're

²¹ To support its damages' claims, Florida produced at least two reports: (1) "Estimates of Smoking-Attributable Medicaid Expenditures In Florida, Jeffrey E. Harris, M.D., Ph.D., 4/15/97"; (2) "Smoking-Associated Medicaid Expenditures, Florida, 1994-1997, 4/15/97." We have requested copies of those reports from the Florida attorney general's office.

²² Nicole Sterghos, Tobacco Suit Money Of Interest To Jurors, Ft. Lauderdale Sun-Sentinel, August 20, 1997, at 1B (1997 WL 11397365); Florida Will Seek \$12.3B in Damages In Tobacco Suit, Dow Jones News Service, August 18, 1997; Karen Testa, State Will Seek \$12.3 Billion in Damages, Associated Press, August 18, 1997.

DRAFT

going to have to prove is that cigarettes are defective, and that they caused diseases, and that Medicaid paid the costs of the claims for those diseases."²³

After Florida settled its case, one Florida newspaper reported: "So how much [of the settlement] is for Medicaid? 'I believe in my heart of hearts that 100 percent of it [Florida's recovery] is for other than Medicaid,' said Butterworth. Conceding his remark was facetious, Butterworth said the actual federal share would have to be negotiated."²⁴ However, Mr. Butterworth recently declared that "The federal government is doing all they can do to take 55 percent of this as their fair share of Medicaid [expenses] ... and we say, you're not going to get it."²⁵ This position may be more flexible than it seems because Mr. Butterworth has also stated: "[i]n a worst-case scenario, the federal government could come in and get the 55%. The best-case scenario is to completely keep that money in the state of Florida. ... But what's really going to happen, I think, is something in between."²⁶

Florida's settlement agreement with the tobacco companies concedes that at least a portion of the award is for Medicaid expenses. The agreement states, in pertinent part, that "the monies received under this Settlement Agreement constitute not only reimbursement for Medicaid expenses incurred by the state of Florida, but also settlement of all of Florida's other claims, including those for punitive damages, RICO and other statutory theories." (Settlement Agreement, Part B, ¶ 4, Aug. 25, 1997.) As with Mississippi, Florida thereby waived any claim for future Medicaid expenses stemming from smoking-related illnesses (Id. at Part C.)

CONCLUSION

Under the Medicaid statute, the states are obligated to pursue recovery of Medicaid funds from potential third-party tortfeasors. It appears that the states have sought recovery of Medicaid expenses from the tobacco industry under various theories of recovery. HHS has a right (and the obligation) under the Medicaid statute to recover the federal share of any such award. Accordingly, HHS should request any state ostensibly recovering Medicaid monies from the tobacco industry to

²³ Jury Selection Begins In Florida Suit Seeking Reimbursement Of Medicaid Funds, Toxics Law Reporter, vol. 12, no. 10, at 271, August 6, 1997.

²⁴ Martin Dyckman, Uncle Sam May Want Florida to Share, St. Petersburg Times, 23A, August 28, 1997. This article also noted that the tobacco lobbyists opposing the lawsuit reminded the state from the beginning that the federal government had a presumed share of any recovery.

²⁵ David Cox, Feds Want Chunk Of Tobacco Cash, Tampa Tribune, Nation/World Section, Sept. 19, 1997 (1997 WL 13833528).

²⁶ Tobacco Field Florida: Will Feds Claim Piece of Settlement?, American Political Network, American Health Line, vol. 6, September 19, 1997.

DRAFT

repay the federal government its share.

Tobacco - state settlements

Thank you for your recent letter about comprehensive tobacco legislation. I appreciate your concern that such legislation should fully compensate states for tobacco-related costs.

By working together, we have made extraordinary progress this year in our fight to reduce the death and illness caused by tobacco. In February, new rules by the Food and Drug Administration to reduce youth smoking took effect. In April, a federal judge in North Carolina said the FDA has the authority to regulate tobacco products. In June, the state attorneys general announced a historic agreement with the tobacco industry to settle 40 state lawsuits against the tobacco companies. And finally in September, building upon the work of the FDA and the state attorneys general, I called on Congress to pass sweeping tobacco legislation that would dramatically reduce teen smoking.

As you know, I have set forth a number of specific objectives that must be part of tobacco legislation. I know one of your key goals will be to recover tobacco-related state health care costs. I am committed to working with you and Congress to ensure fair and full state compensation through legislation.

Again, thank you for your leadership on this important issue.

DRAFT - medicaid letter to pres

October 26, 1997

TO: Elena
FROM: Chris and Jeanne
RE: EDITS TO THE TOBACCO LETTER

Attached are our hard-copy edits; below is the insert for that second-to-last paragraph.

The rationale behind the language below is that rather than emphasize the timing of the allocation with language like "until this change...", we try to make the distinction along the lines of what types of recoveries are subject to what types of laws. The first sentence should make it perfectly clear that we have no choice but to enforce; the latter sentences suggest that we acknowledge that there is a larger context, that tobacco settlements may be treated differently than other types of Medicaid settlements, and that we will work with states in it.

Jeanne will be out tomorrow, so please get comments to Chris by 11 am if possible.

Thanks!

INSERT

Tobacco settlement recoveries must be treated like any other Medicaid recoveries, as described above. However, we recognize that the treatment of tobacco settlement dispositions may change in the context of any comprehensive tobacco legislation considered by Congress next year. Given the States' roles in initiating tobacco lawsuits and in financing Medicaid programs, States will inevitably contribute to the development of such legislation, including the allocation of any resulting revenues. The Administration will work closely with States during this legislative process as these issues are decided.

Dear State Medicaid Director:

This letter describes

A number of States have settled suits against one or more tobacco companies to recoup costs incurred in treating tobacco-related illnesses. ~~I am writing to all States about~~ the proper accounting and reporting for Federal Medicaid purposes of amounts received from such settlements pursuant to Section 1903 (d) of the Social Security Act.

that may be subject

* As with any recovery related to a Medicaid expenditure, payments received should be reported on the Quarterly Statement of Expenditures for the Medicaid Assistance Program (HCFA-64) for the quarter in which they are received. Specifically, these receipts should be reported on the Form HCFA-64 Summary Sheet, Line 9E. This line is reserved for special collections. The Federal share should be calculated using the current Federal Medicaid Assistance Percentage. Please note that settlement payments represent a credit applicable to the Medicaid program irrespective of whether the monies are received directly by the State Medicaid agency or not. States that have previously reported receipts from tobacco litigation settlements must continue to report settlement payments as they are received.

as long as the State

* To the extent that some non-Medicaid expenditures and/or recoveries were also included in the underlying lawsuits, HCFA ~~would accept an allocation~~ reflecting the Medicaid portion of the recovery. ~~As always, HCFA is open to discussions on appropriate allocation proposals within the constraints of the statutory requirements with regard to Medicaid recovery. It will be a State's responsibility to provide necessary documentation to support a proposed allocation.~~

MOVE TO BEFORE PREVIOUS ¶
State administrative costs incurred in pursuit of Medicaid cost recoveries from tobacco firms qualify for the normal 50 percent Federal financial participation (FFP). They should be reported on the Form HCFA-64.10, Line 14 (Other Financial Participation).

SEE (INSERT)

The Administration's goal for any comprehensive tobacco legislation considered by Congress is that all affected parties -- such as the States -- be involved in the process and have the opportunity to have their concerns addressed. In that forum, it will be appropriate for the States to propose alternative dispositions of third party recoveries for tobacco-related illnesses. Until any legislative change, however, the States' current obligations are as described above.

If you would like to discuss the appropriate reporting of recoveries with HCFA, please call [redacted] at [redacted] to arrange for a meeting or conversation. We look forward to providing any assistance needed in meeting a State's Medicaid obligation.

Sincerely,

* As described in the statute, States must allocate ^{from} the amount of any Medicaid-related expenditure, "the pro-rata share to which the United States [Federal government] is equitably entitled."

** Only Medicaid-related expenditure remedies are subject to the Federal share requirement.

Hate Crimes Conference

- We are coordinating the participation of state and local officials in the White House Conference on Hate Crimes. We expect more than thirty elected officials and Native American leaders to attend. We are also coordinating plans for Attorney General Grant Woods (R-AZ), who will be serving as a member of the Hate Crimes Round Table panel discussion.

Tobacco

- The HHS IGA staff and the Health Care Financing Administration (HCFA) staff rolled out a Medicaid tobacco recovery letter to all fifty states on Monday, November 3. The IGA office at HHS made calls to representatives of the National Governors' Association, the National Conference of State Legislatures, the American Public Welfare Association, the National Association of Attorneys General, and the governors and attorneys general of Florida and Mississippi.
- The National Governors' Association (NGA) wrote you on Friday, November 7, to express that governors believe that no action should be taken by HCFA to withhold state Medicaid reimbursement prior to the development of settlement legislation. NGA also expressed that governors will strongly support clarification in that legislative package that tobacco settlement funds are not subject to federal recoupment. They believe recoupment is more appropriate for addressing billing errors than for inserting a federal claim into the multi-billion dollar, "state-driven" tobacco settlement. The governors are supporting legislation developed by Senator Bob Graham (D-FL) clarifying that funds made available to the states through individual state tobacco settlements or a national settlement are not subject to federal recoupment.

Grants Announcements

- We extended invitations to a number of mayors and elected officials to attend the Vice President's announcement of \$217.3 million in grants to support programs fighting crime and drugs in public and assisted housing. In addition to the Vice President, speakers included HUD Secretary Andrew Cuomo, General Barry McCaffrey and Mayor Jim Sills (D-Wilmington, DE). The speakers stressed the importance of creating safer communities in our cities' public housing through these anti-drug and crime programs. Several other mayors including Mayor Marion Barry (D-District of Columbia) also participated in the event.

Youth Outreach Meeting

- We are assisting our colleagues in OPL and Political Affairs with the upcoming Youth Outreach meeting. We are pleased that two local elected officials and a Navajo tribe member will participate in this November 12 meeting with you.

BOB GRAHAM
FLORIDA

Tobacco - state settlements



United States Senate
WASHINGTON, D. C. 20510

File: Tobacco - legislative

cc: EK, Tom, JRM

November 13, 1997

Dear Bruce:

Thank you for the opportunity to meet with you and Mr. Rich Tarplin on Wednesday, November 5 to discuss the National Tobacco Settlement.

As I indicated during our discussion, I have two principal concerns. First is the action initiated by the Health Care Financing Administration on November 3 to seek recoupment from states which had secured settlements from the tobacco industry through state-initiated litigation. Second is the reticence of the federal government to date in initiating its own litigation against or settlement actions with the tobacco industry for medical expenses incurred due to tobacco related diseases or illnesses.

Relative to the first matter, on November 8 I filed legislation to exempt from the recoupment statute 1903(d) of the Social Security Act judgments or settlements secured by states through litigation initiated against the tobacco industry. Enclosed is a copy of this legislation. I would appreciate any comments you might have and would appreciate the Administration's support of this legislation.

On the second matter, if I can be of any assistance in facilitating the position of the federal government in protecting its interests, I would be pleased to do so. At your suggestion, my office has contacted Assistant Attorney General Frank Hunger to discuss actions that the federal government could take, possibly outside the structure of the current settlement, to recoup losses resulting from tobacco related illnesses. In my opinion, the federal government could serve the American public well by following the lead of states that have been as aggressive and proactive as possible in protecting their interests.

Again, if I can be of any assistance on any of these issues, please do not hesitate to contact me or Mr. Bryant Hall, our Health Counsel, who may be reached at (202)224-1535.

With kind regards,

Sincerely,

A handwritten signature in black ink, appearing to read "Bob Graham".

United States Senator

Mr. Bruce Reed
Assistant To the President For Domestic Policy
1600 Pennsylvania Avenue, N.W.
Sperling Second Floor, West Wing
Washington, DC 20500

S. 1971

105TH CONGRESS
1ST SESSION

S. _____

IN THE SENATE OF THE UNITED STATES

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

A BILL

To prohibit the Secretary of Health and Human Services from treating any medicaid-related funds recovered as part of State litigation from one or more tobacco companies as an overpayment under the medicaid program.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. PROHIBITION ON TREATING ANY MEDICAID-RE-**
4 **LATED FUNDS RECOVERED FROM ONE OR**
5 **MORE TOBACCO COMPANIES AS AN OVER-**
6 **PAYMENT.**

7 (a) PROHIBITION ON TREATMENT AS OVERPAY-
8 MENT.—Section 1903(d)(3) of the Social Security Act (42
9 U.S.C. 1396b(d)(3)) is amended—

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

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

3 "(B) Subparagraph (A) and paragraph (2)(B) shall
4 not apply to any amount recovered or paid to a State as
5 part of a settlement or judgment reached in litigation initi-
6 ated or pursued by a State against one or more manufac-
7 turers of tobacco products, as defined in section 5702(d)
8 of the Internal Revenue Code of 1986."

9 (b) EFFECTIVE DATE.—The amendment made by
10 subsection (a) applies to amounts recovered or paid to a
11 State before, on, or after the date of enactment of this
12 Act.

Tobacco - state settlements

NATIONAL GOVERNORS ASSOCIATION

George V. Voinovich
Governor of Ohio
Chairman

Raymond C. Scheppach
Executive Director

Thomas R. Carper
Governor of Delaware
Vice Chairman

Hall of the States
444 North Capitol Street
Washington, D.C. 20001-1512
Telephone (202) 624-5300



November 7, 1997



242177

The President
The White House
Washington, DC 20500

Dear Mr. President:

When Congress reconvenes in January, one of its most important priorities will be the development of national tobacco settlement legislation. The nation's Governors look forward to working with you and with members of Congress to ensure that a final, comprehensive solution is found to the dozens of state lawsuits pending against the tobacco industry. The very fact that a solution is in reach is because of the hard work and leadership of Governors and the state attorneys general on behalf of the states.

An important component of the legislative debate will be the issue of control of tobacco settlement funds. The Governors attach the highest priority to clarifying that settlement funds negotiated by the states to settle state lawsuits must go to the states. Any efforts by the federal government to seek to recoup federal costs must be separate and distinct. Enclosed is a copy of the settlement funds policy we, the Executive Committee of the National Governors' Association, adopted last month.

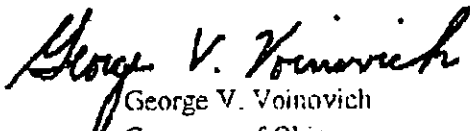
This issue of control of the settlement funds will be difficult to resolve, and clearly a discussion of the distribution of hundreds of billions of dollars demands congressional involvement. Unfortunately, it appears that the Health Care Financing Administration (HCFA) is not prepared to wait for Congress to act.

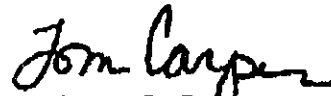
On November 3rd, HCFA contacted state Medicaid directors to begin the process of collecting what it perceives to be the federal portion of settlement funds attributable to Medicaid. Although in its letter HCFA mentions the importance of the congressional process, it effectively preempts that process by beginning to collect funds from those states that have already settled their individual lawsuits.

The Governors believe that no action should be taken by HCFA to withhold state Medicaid reimbursement prior to congressional development of settlement legislation. Further, the Governors will strongly support clarification in that legislative package that tobacco settlement funds are not subject to federal recoupment. Recoupment is more appropriate for addressing billing errors than for inserting a federal claim into the multibillion-dollar, state-driven tobacco settlement. Accordingly, the Governors are supporting legislation developed by Senator Bob Graham clarifying that funds made available to the states through individual state tobacco settlements or a national settlement are not subject to federal recoupment.

We appreciate your consideration of our concerns. If we can provide you with any additional background information, please do not hesitate to let us know.


Sincerely,



George V. Voinovich
Governor of Ohio



Thomas R. Carper
Governor of Delaware



David M. Beasley
Governor of South Carolina


Lawton Chiles
Governor of Florida


Howard Dean, M.D.
Governor of Vermont


Michael O. Leavitt
Governor of Utah


Bob Miller
Governor of Nevada


Roy Romer
Governor of Colorado


Tommy G. Thompson
Governor of Wisconsin



EC-6. TOBACCO SETTLEMENT FUNDS

Since 1994, forty-one states have filed lawsuits against the tobacco industry based on claims including consumer protection, fraud, antitrust violations, and health care costs. States initiated these suits to reduce youth smoking, secure public disclosure of tobacco documents, and recoup state health care costs, among other goals. On June 20, 1997, a historic agreement was reached between state attorneys general and representatives of the tobacco industry to settle these individual lawsuits through a national tobacco settlement. Without the years of state leadership and effort that went into the lawsuits, there would be no federal debate underway about how to craft national tobacco settlement legislation.

These state efforts already have begun to yield individual settlements with the tobacco industry, as well as the possibility of federal legislation that would include sizable awards. Now that states are being awarded actual settlement payments, the federal government has begun to express an interest in recouping federal health care costs, despite having declined to file its own suit. The nation's Governors attach the highest priority to clarifying that settlement funds negotiated by the states to settle state lawsuits must go to the states.

States may receive tobacco settlement funds in two ways: through state-specific agreements and through a national settlement. Some states already have closed individual lawsuits through state-specific agreements. In addition, any national settlement funds will be distributed among all states over a period of many years. Whether the settlement is state-specific or part of a national agreement, the federal government is not entitled to take away from the states any of the funds negotiated on the states' behalf as a result of state lawsuits. Any efforts by the federal government to seek to recoup federal costs must be distinct and separate.

Congress and the Clinton administration will spend the next several months developing wide-ranging legislation to enact a national tobacco settlement. The Governors must be full participants in this process to ensure that the states, having taken the lead in starting negotiations, are represented as legislation is drafted. This legislation will have to address a range of issues important to the states, including education, enforcement, and public health responsibilities; the Governors will be developing policy guidelines on these and other priorities. However, before they begin to develop a broader tobacco policy, the Governors want to make it clear that they will strongly oppose federal efforts to seize state tobacco settlement funds.

Interim Policy adopted by the NGA Executive Committee, October 17, 1997.

2. Tobacco - state settlements

NOV 10 1997 (84)

STATE ATTORNEYS GENERAL
A Communication From the Chief Legal Officers
Of the Following:

Alaska, American Samoa, Arizona, Arkansas, California, Colorado, Connecticut,
Delaware, District of Columbia, Florida, Georgia, Guam, Hawaii, Idaho, Illinois,
Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts,
Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada,
New Hampshire, New Jersey, New Mexico, New York, North Dakota, Northern Mariana Islands,
Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina,
South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming

November 7, 1997

The Honorable William J. Clinton
President of the United States
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear Mr. President:

Over the last three years, 40 states and one commonwealth have filed suits against the tobacco industry. These state actions have served as a catalyst for change in an industry that has been widely perceived as untouchable.

As you may appreciate, the Attorneys General, who have brought these actions on behalf of the public, have shared common goals which you embraced on September 17. Through their lawsuits, the Attorneys General have asserted a broad range of claims against the industry seeking to reduce youth smoking, secure disclosure of documents, ensure change in the industry, and recoup state health care costs. The state actions assert a variety of legal theories. Many seek recovery of Medicaid payments made by the states for tobacco-related illnesses, as well as damages and penalties for violation of state antitrust and consumer protection laws. Indeed, in some states, the latter claims are the core elements of the lawsuit against the industry, as Medicaid-related claims have been dismissed by the courts or were not brought at all. As our state cases proceed to trial and judgment, to individual state settlement, or to resolution through the pending national settlement, the recovery to the states will represent a resolution of all the claims brought by the states, not just recoupment of Medicaid-related health care costs.

Recently, the federal government has asserted that it is entitled to a significant share of the states' recovery, whether that be through settlement or other recovery, on the basis that it represents the federal share of Medicaid costs. The federal government makes this claim despite the fact these

The Honorable William J. Clinton

November 7, 1997

Page 2

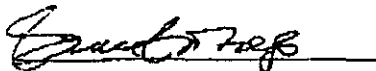
recoveries will represent success in state suits, under state law theories, for a variety of claims unrelated to Medicaid payments. The federal government has declined to bring its own suit against the industry.

On October 17, 1997, the National Governors' Association endorsed a policy regarding tobacco settlement funds. As stated in that policy, the Governors take the position that "they will strongly oppose federal efforts to seize state tobacco settlement funds." The Attorneys General are in agreement with this position and will advance this interest on behalf of our states. We urge your full consideration of the position advanced by the Governors and the Attorneys General.

It is the intention of the states that their damage payments be used within each state primarily for public health purposes. The citizens of our states are entitled to the benefit of the litigation we have prosecuted on their behalf and any settlement entered into to resolve their lawsuits. The Attorneys General urge you to take action to clarify the position of the Administration on this fiscal issue and work with us to achieve our shared goal of a changed tobacco policy for this country.

Thank you.

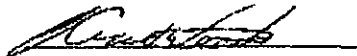
Sincerely yours,



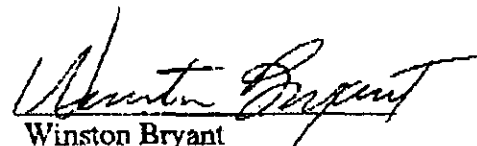
Bruce M. Borelho
Attorney General of Alaska



Toetagata Albert Mailo
Attorney General of American Samoa



Grant Woods
Attorney General of Arizona



Winston Bryant
Attorney General of Arkansas

Tobacco - state settlements

Florida Tobacco - Mtg

3rd party liab. statute

hunks - kids health

CL theories + spec law (18 counts)

15 dismissed

3rd amended comp - incl. PICO counts for 1st time
additional stat counts

sustained

threat of most of cur arps
damages - disgorgement of profits

Ch. Hd abil to get \$ on 3PL -

post-enactment 97-98

\$ actually paid - through The Medicaid program

Dkt favors of complaint:

Medicaid

Packetering

Fraud

Punitive Damages

Payment of SSO -

not denominated among them.

\$ not yet received w/in
meaning of statute

not in our possession yet
so doesn't trigger your
obligation

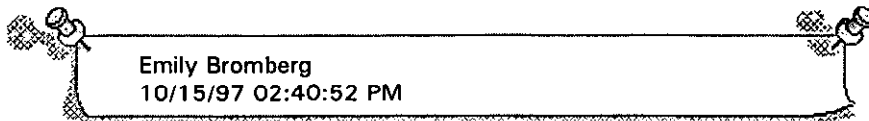
Dkt know w/in next few weeks -
fee dispute is very nasty

Find out what next steps -
-- reporting??

States want to be at table.
ie - generally on legislative

Public records request from DOT
Got under Governor's shield

called for
- depositions on damage
model?



Record Type: Record

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

cc:

Subject: nga and tobacco

tomorrow nga will release a policy resolution on tobacco that says hhs indicated that letters would be sent to states claiming that a portion of the funds from settlements belonged to the feds, that the govs believe that as a matter of law the entire amount belongs to the states, and that if the feds wanted part of the settlement they should have joined the lawsuits.

Message Sent To:

Fred DuVal/WHO/EOP
Mickey Ibarra/WHO/EOP
Christopher C. Jennings/OPD/EOP
Bruce N. Reed/OPD/EOP
Elena Kagan/OPD/EOP
Jeanne Lambrew/OPD/EOP

tobacco - state settlements

Fred Duval 09/26/97 11:46:08 AM

Record Type: Record

To: Mickey Ibarra/WHO/EOP, Emily Bromberg/WHO/EOP

cc: Elena Kagan/OPD/EOP

Subject:

I just got my first call from a DC Office Director on the HCFA/Tobacco issue. He indicated that other calls would follow. I would describe his language and tone as controlled fury and he warned me of being assaulted in Vermont. The Governors/NGA view (I'll bet this is the purpose of Ray's calls) is that the states litigated settlements while the feds stood on the sidelines and now swoop in to take their bite. They see this as any other litigation - not in the context of Medicaid money specifically - where the states win and the feds have no claim to any proceeds. We will definitely need a bit more depth of talking points for Vermont.



DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care
Financing Administration**Memorandum****DATE:****FROM:** Director
Center for Medicaid and State Operations**SUBJECT:** Cost Sharing in Tobacco Company Recoveries and Expenses--ACTION**TO:** Associate Regional Administrator
Division of Medicaid
Regions I-X

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

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

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

Page 2

State administrative costs incurred in pursuit of Medicaid recoveries from tobacco companies are matchable at the standard 50 percent administrative matching rate. Where a State contracts with an outside law firm for help in these actions, on a contingency fee basis, the State may report the gross recovery as a collection (at the current FMAP), and the contingency fee as an administrative cost (at 50 percent); or, at its option, the State may deduct contingency fees from the gross amount recovered, and report the net recovery as a collection.

True?

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

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

Sally K. Richardson

Attachment

cc: Regional Administrators

RO Letter to AR, CT, HI, IL, IN, IA, KS, MD, MI, MN, NV, NJ, NY, OK, TX, UT, WA, FL,
LA, MA, MS, WV and WI

Dear (SMA Director):

(Name of State) has settled its suit against one or more tobacco companies to recoup costs incurred by the State in treating tobacco-related illnesses. Pursuant to the settlement agreement, your State has and/or will receive periodic payments for costs incurred by the State Medicaid Program. I am writing about the proper accounting and reporting for Federal Medicaid purposes of the amounts received from such settlements.

As with any recovery related to a Medicaid expenditure, payments the State receives should be reported on the Quarterly Statement of Expenditures for the Medical Assistance Program (Form HCFA-64) for the quarter in which they are received. Specifically, these receipts should be reported on the Form HCFA-64 Summary Sheet, Line 9.E. This line is reserved for special collections: please identify the amount reported as tobacco settlement in the blank space provided. The Federal share should be calculated using the current Federal Medical Assistance Percentage. Please note that the settlement payments represent a credit applicable to the Medicaid program irrespective of whether the monies are received directly by the State Medicaid agency or not. States that have previously reported receipts from tobacco litigation settlements must continue to report settlement payments as they are received.

To the extent that some non-Medicaid expenditures and/or recoveries were also included in the underlying lawsuit, HCFA would accept an allocation reflecting the Medicaid portion of the recovery. If you would like to discuss this over the phone or in person, we would be happy to make the necessary arrangements for such a conversation with the appropriate individuals in Central Office. We are open to discussions on appropriate allocation proposals within the constraints of our Federal fiduciary responsibility with regard to Medicaid recovery. It will be your responsibility to provide the necessary documentation to support your proposed allocation. If you do not propose an allocation method, we will assume that the entire amount represents Medicaid recovery.

State administrative costs incurred in pursuit of Medicaid cost recoveries from tobacco firms qualify for 50 percent Federal financial participation (FFP). They should be reported on the Form HCFA-64.10, Line 14 (Other Financial Participation). If your State contracts on a contingency fee basis for outside assistance in this area, two options are available for reporting the recoveries and fees. You may report the gross recoveries on Line 9.E of the Form HCFA-64 Summary Sheet, while reporting the related contingency fees as an administrative cost on Line 14 (Other Financial Participation) of the Form HCFA-64.10. Alternatively, you may deduct the contingency fees from the gross amount recovered, and report the net recovery on Line 9.E of the Form HCFA-64 Summary Sheet.

Page 2 - State Medicaid Agency Director

If you would like to discuss these matters with HCFA, please call _____
at _____ to arrange for a meeting or conversation. We look forward to providing any
assistance you may need in meeting your State's Medicaid obligation as above described.

Sincerely,

To: BRUCE + ELEANA
From: Jeanne [and Chris]

see E-Mail message

RO Letter to AR CT HI IL IN IA KS MD MI MN NY NJ NY OK TX UT WA FL
LA MA MS WV and WI

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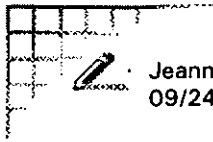
STRENGTHEN
Make any allocation subject to approval/review

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Page 2 - State Medicaid Agency Director

**If you would like to discuss these matters with HCFA, please call _____
at _____ to arrange for a meeting or conversation. We look forward to providing any
assistance you may need in meeting your State's Medicaid obligation as above described.**

Sincerely,



Jeanne Lambrew
09/24/97 04:59:38 PM

Record Type: Record

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

cc: Joshua Gotbaum/OMB/EOP

Subject: heads up on tobacco letter to states

I just got from OMB a letter that the Secretary want to send to states tonight if possible about the Federal share of any tobacco settlements. It is clarifying the claim that we have on the Medicaid recoveries as well as the process by which this is collected. I am working now wiht OMB and HHS on making it somewhat stronger, but there are obviously larger ramifications. States have not always acknowledged this claim and this could be news. Chris has not seen it (we are only learning of this now), but tends to think that it is a good marker to lay down if it does not weaken our position. We are inclined to let it go.

Any reason from your perspective to pull this? I am faxing it over now.

Jeanne



cc: Bruce
Chris
Terry

U.S. Department of Justice
Office of the Assistant Attorney General,
Civil Division

George Jordan Phillips
Counselor to the Assistant Attorney General

950 Pennsylvania Ave., N.W., Room 3143
Washington, D.C. 20530
(202) 514-5713 Fax (202) 514-8071

August 26, 1997

HAND DELIVERY TO THE FOLLOWING RECIPIENTS:

Ms. Harriet Rabb
General Counsel
Room 722A HHH
200 Independence Ave, S.W.
Washington, D.C. 20201

Ms. Nancy Ann Min
Deputy Administrator
Health Care Financing Administration
Room 314G HHH
200 Independence Ave, S.W.
Washington, D.C. 20201

Mr. Andy Hyman
Special Assistant to the General Counsel
Room 707F HHH
200 Independence Ave, S.W.
Washington, D.C. 20201

RE: State Settlements of Tobacco Lawsuits - Allocation of Damages to the Medicaid Program

Dear Ms. Rabb, Ms. Minn and Mr. Hyman:

Enclosed are some selected pleadings filed by the State of Mississippi in their recently settled lawsuit against the tobacco companies. These pleadings relate to the State of Mississippi's estimate of their damages attributable to smoking-attributable public expenditures.

We have just obtained these pleadings and have not thoroughly reviewed them, but it appears that Mississippi quantifies three programs for which it claimed damages: Medicaid, the Mississippi Comprehensive Health Plan (MCHP), and uncompensated care provided by three public hospitals. They assert two different damages estimates: one is called the Mortality Ratio Approach (MRA) and the other the Smoking-Attributable Mortality, Morbidity, and Economic Cost Program (SAMMEC).

Ms. Rabb, Ms. Min and Mr. Hyman
August 26, 1997
Page 2

Under the MRA approach they estimate that the smoking related costs from 1970 to 2000 for the Medicaid program is \$1,580,292,224, the MCHP is \$94,552,017 and the uncompensated public hospital cost is \$111,856,202. (Table 8. Total Smoking-Attributable Expenditures for Mississippi, 1970-2000 - Corrected June 8, 1997.)

Under the SAMMEC approach they estimate that the smoking related costs from 1970 to 2000 for the Medicaid program is \$841,966,174, the MCHP is \$76,495,700 and the uncompensated public hospital cost is \$105,684,825. (Table 8.)

These reports may be of some assistance to HHS in evaluating how Mississippi allocates the settlement proceeds between these programs.

Of course, under the Medicaid program the federal government would be entitled to a share of the damages attributable to the Medicaid program based on whatever percentage of the Medicaid program the federal government pays in Mississippi. Given that a payment of \$170 million was paid to Mississippi on July 15, 1997, pursuant to their settlement and that \$1 billion is going to be paid over the next year to Florida, it may be prudent for the appropriate officials at HHS to contact these states to determine what amounts of these settlements they plan to allocate to the Medicaid program and derivatively what amounts they plan to credit to the federal government.

I have also enclosed the Memorandum of Understanding reached on July 2, 1997, between the State of Mississippi and the tobacco companies.

I hope these documents are helpful to you. We are attempting to obtain similar documents from Florida and will forward them if we are able to obtain them.

Sincerely,

George J. Phillips

cc: Frank W. Hunger
Enclosures

to bacco - state settlements



George.Phillips @ justice.usdoj.gov
08/26/97 03:40:00 PM

Record Type: Record

To: Elena Kagan

cc:

Subject: Re: VA Letter for Review -Reply

Elena:

Pushing our new internet connection, I thought I would send you a copy of a letter that I sent to Harriet Rabb today which also included some documents from the Mississippi tobacco lawsuit which demonstrate how Mississippi calculated their damages, the majority of which were Medicaid related.

We suggest that the appropriate HHS officials contact Mississippi and Florida to ascertain how they plan to allocate the settlement proceeds with the federal government to ensure that such proposed allocations are reasonable.

Now, if the attached document makes it though the internet, a new age will have certainly dawned.

--George Phillips
514-5713

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TONY BARRY 69 JEN JONES

WYNDHAM