The Heritage Foundation
Backgrounder
Executive Summary

No. 1315 July 30, 1999

FEDERAL LITIGATION AGAINST THE TOBACCO INDUSTRY: ELEVATING POLITICS OVER LAW

TODD F. GAZIANO

In his 1999 State of the Union Address, President Bill Clinton announced that he had directed the U.S. Department of Justice (DOJ) to pursue a federal lawsuit against the tobacco industry to recover the costs that smoking supposedly imposed on Medicare and related programs. But this decision to use litigation to achieve what the Administration could not secure last year through legislation is fraught with serious problems. Regardless of what anyone thinks about the legislative options, this litigation approach is wrong and would undermine the rule of law.

The President's instruction to the DOJ to sue the tobacco industry amounted to a seemingly abrupt reversal of the legal position taken by career and political officials in the Department. When the states sued to "recover" similar Medicaid costs, both Attorney General Janet Reno and the DOJ spokesman stated that the federal government had no independent cause of action against the tobacco companies for losses under Medicaid, Medicare, or any other program. They said that the cause of action, if it existed, belonged to the states alone. For two years, senior DOJ officials refused every effort by the states and others to get the Department to reverse its position—at least until the President directed the DOJ to do so.

But the DOJ's original determination was correct. The United States Supreme Court has categorically rejected the federal government's attempt to bring suit to recover other medical costs when such a suit was not expressly allowed by statute. The Supreme Court refused to create or expand the scope of federal tort law beyond that set forth in federal statutes, explaining that—unlike state courts—federal courts cannot create new tort law. The Supreme Court also has noted that a medical reimbursement claim is not really about tort law at all; it is about federal fiscal policy, for which Congress alone is responsible.

Although Congress has created a few limited grounds for recovery of medical costs, there is no statute that allows the federal government to bring the type of suit contemplated against the tobacco

Published by
The Heritage Foundation
214 Massachusetts Ave., N.E.
Washington, D.C.
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industry. The two statutes most likely to be invoked are the Medical Care Recovery Act and the Medicare Secondary Payer Act, but neither provides a valid basis for the broad Medicare recovery suit being discussed. Other statutes mentioned as possible grounds for suit are even more baseless.

In addition, almost every government and independent expert who has studied the costs of smoking has concluded that it does not cause a net economic loss to government. This is because smoking affects the timing of health care costs more than the total costs for the typical individual. The costs paid by government for many tobacco-related diseases are offset by savings to government retirement and health programs that otherwise would provide longer coverage and different end-of-life care. As the authors of a widely cited article in *The New England Journal of Medicine* noted, "If people stopped smoking, there would be a savings in health care costs, but only in the short term. Eventually, smoking cessation would lead to increased health care costs." This means that state and federal tobacco taxes are a windfall to government at both levels and that tobacco use enriches public treasuries. And this is even *before* the $246 billion in "payments" from the 1998 state tobacco settlement are added to state coffers.

Nevertheless, the DOJ has assembled a new team of lawyers who are willing to pursue the President's dubious directive. The DOJ has even requested an additional $20 million appropriation to pursue this baseless lawsuit. Tellingly, the DOJ has not said what its theories of liability or damages are. It is presumptuous for the Administration to push a funding request without answering the most basic questions about its intentions and legal theories, particularly when the likely theories of liability and damages (and the history of the state litigation) make such a suit highly questionable at best. Unfortunately, the appropriations battle could be only the first of many skirmishes over the litigation—unless Congress or the federal courts end the lawsuit promptly.

The planned federal suit against the tobacco industry is not really about recovering Medicare costs or vindicating legal rights; it is best explained as an attempt to use the majesty and might of the federal government to force an unjust settlement with no basis in law. Regardless of the merits of the legislative options available to Congress, everyone should oppose a naked attempt to misuse the courts in order to impose industry-wide regulation by litigation. Accordingly:

- Congress should refuse to appropriate any money for a baseless suit. It should tell the Administration that no special appropriation will be considered again until the Attorney General submits a detailed legal opinion that includes a legitimate theory of liability and damages as well as satisfactory responses to numerous unanswered questions about the suit.

- Congress should enact an express prohibition against the use of any federal funds to file such a lawsuit unless and until it is satisfied with the DOJ's answers to these questions.

- Congress should seriously consider permanent legislation that would prevent the worst abuses of government reimbursement lawsuits and provide fair treatment to all defendants.

- The lower federal courts should follow the Supreme Court's instruction and summarily dismiss any claim for reimbursement that is not expressly authorized by statute, and the courts should not hesitate to award attorneys' fees to the defendants for frivolous or bad-faith litigation.

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In his 1999 State of the Union Address, President Bill Clinton announced that he had directed the U.S. Department of Justice (DOJ) to pursue a federal lawsuit against the tobacco industry to recover the costs that smoking supposedly imposed on Medicare and related programs.[1] But this decision to use litigation to achieve what the Administration could not secure last year through legislation is fraught with serious problems. Regardless of the merits of the legislative options, this litigation approach is wrong and would undermine the rule of law.

The President's instruction to file a federal lawsuit appears to be an abrupt reversal of the legal position taken by numerous career and political officials in the Justice Department. When the states sued to "recover" similar Medicaid costs in recent years, both Attorney General Janet Reno and the DOJ spokesman stated that the national government had no independent cause of action against the tobacco companies for losses under Medicaid, Medicare, or any other program. They stated that the cause of action, if it existed, belonged to the states alone.[2] Nevertheless, the DOJ believed the federal government might claim a share of any recovery received by the states because the federal government helped to fund the Medicaid program.[3]

In other words, the Justice Department determined that it could not lawfully sue the tobacco companies as a party, but it might require the states to share a portion of any award they received. For two years, senior DOJ officials refused every effort by the states and others to get the Department to

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1. Presidential Papers of William Jefferson Clinton, 35 Weekly Comp. Pres. Doc. 78 (Jan. 19, 1999).
2. See *infra*.
3. See, e.g., John Schwartz, "U.S. Wants Share of State Tobacco Deals," *The Washington Post*, November 5, 1997, p. A19; Doug Bandow, "Medicaid 'Reimbursement' Litigation: Is the Issue Really About Principle or Is It Money?" *ALEC Policy Digest*, No. 1, September 1998, pp. 3–4.

reverse its position—at least until the President told them to do so.

As bad as the state tobacco lawsuits and the 1998 master settlement were, at least the settlement was supposed to put an end to the reimbursement-type claims. Predictably, however, the states did not want to share their windfall with Washington, and they asked Congress whether they could keep it all. Meanwhile, major federal legislation in 1998 designed to impose new taxes and regulations on the tobacco industry failed in Congress.

It was in that climate that the President apparently decided to seek through litigation what he could not achieve through legislation. So he declared that the federal government would try its own luck at picking the pockets of the tobacco industry, with several of his political aides explaining that the litigation was simply a tactic intended to force a favorable settlement.

But the DOJ's initial review of the law was correct. The United States Supreme Court has categorically rejected the federal government's attempt to bring suit to recover other medical costs when such a suit was not expressly allowed by statute. The Supreme Court refused to create or expand the scope of federal tort law beyond that set forth in federal statutes, explaining that—unlike state courts—federal courts cannot create new tort law.

The Supreme Court also has noted that a medical reimbursement claim is not really about tort law at all; it is about federal fiscal policy, for which Congress alone is responsible. Although Congress has created a few, limited grounds for recovery of medical costs, there is no statute that allows the federal government to bring the type of broad suit contemplated against the tobacco industry.

In addition, almost every government and independent expert who studied the costs of smoking has concluded that it does not cause a net economic loss to government. Although the personal costs of smoking, including premature death, may be tragically high, the proposed government suit neither could nor does seek to recover such private costs.

As for the costs imposed on government programs, smoking affects the *timing* of health care costs more than the total costs for the typical individual. This is because the costs paid by government for many tobacco-related diseases are offset by savings to government retirement and health programs that otherwise would provide longer coverage and different end-of-life care.[4] As the authors of a widely cited article in *The New England Journal of Medicine* noted, "If people stopped smoking, there would be a savings in health care costs, but only in the short term. Eventually, smoking cessation would lead to increased health care costs."[5]

This means that state and federal tobacco taxes are a complete or at least partial windfall to government at both levels, and that tobacco use enriches public treasuries.[6] And this is even *before* the $246 billion in "payments" from the 1998 state tobacco settlement are added to state coffers. Thus, it is hard to see how the government has suffered any economic damages from smoking.

Nevertheless, the DOJ in recent months has assembled a new team of lawyers, composed mostly of anti-tobacco advocates, who are willing to pursue the President's questionable directive. The DOJ even requested an additional $20 million appropriation from Congress to fund this baseless lawsuit.

When the Senate took up the Commerce–Justice–State appropriation bill on July 22, 1999, it took a neutral stance. It did not approve the special appropriation request, but it also failed to pass important language that would prohibit the

4. See *infra*.

5. Jan Barendregt *et al.*, "The Health Care Costs of Smoking," *The New England Journal of Medicine*, Vol. 337, No. 15 (October 9, 1997), p. 1052.

6. See *infra*.

use of general funds for such a suit.[7] House Members will likely have to vote on this line item when the corresponding House bill is debated on the floor, and the issue will remain an active one during any conference on the two bills. Even then, the appropriations battle could be the first of many skirmishes over the tobacco litigation—unless Congress or the federal courts end the lawsuit promptly.

Yet the Administration has not even said what its theories of liability or damages are in this case. Its silence is understandable, given that there are no legitimate theories that would support a federal lawsuit of this nature. But it is presumptuous for the Administration to push a request for funding without answering even the most basic questions about its legal theories, particularly when the likely theories of liability and damages (and the history of the state litigation) make such a suit highly questionable at best.

The planned federal suit against the tobacco industry is not really about recovering Medicare costs or vindicating legal rights; it is best explained as an attempt to use the majesty and might of the federal government to force an unjust settlement that has no basis in law. Regardless of the merits of the legislative options still available to Congress, every American should oppose the Administration's blatant attempt to misuse the courts in order to impose industry-wide regulation through litigation. Accordingly:

- **Congress should refuse to appropriate any money for a baseless suit.** No special appropriation should be considered again until the Attorney General submits a detailed legal opinion that includes a legitimate theory of liability and damages and provides satisfactory answers to the numerous questions about the lawsuit.[8]
- **Congress should enact an express prohibition against the use of any federal funds to file such a suit** until and unless Congress is satisfied with the answers to the questions raised about the Administration's liability and damage theories.
- **Congress should seriously consider permanent legislation,** such as the Litigation Fairness Act (S. 1269), that would prevent the worst abuses of government reimbursement lawsuits and provide fair treatment for all defendants.
- **The lower federal courts should follow the Supreme Court's instruction and summarily dismiss any claim for reimbursement that is not expressly authorized by statute,** and the courts should not hesitate to award attorneys' fees to defendants who are subjected to frivolous or bad-faith litigation.

Congress and all Americans should bear in mind that the contemplated lawsuit is not simply a policy issue with short-term consequences; it appears to be another step that would seriously undermine the rule of law. Adherence to the rule of law is a defining principle that separates an arbitrary and tyrannical government from a constitutional democracy. Despite some recent attacks on the rule of law, it remains a bedrock principle of America. But like all liberties, the rule of law must be sustained and defended with constant vigilance. Even small exceptions to it over time can weaken its protections for everyone.

Thus, each assault on the rule of law should be opposed as a matter of fundamental principle. Because the contemplated federal litigation against the tobacco industry poses such issues of fundamental principle, no one should compromise or surrender until the protection of liberty is assured.

7. See Saundra Torry and Helen Dewar, "Possible Tobacco Suit Clears Hurdle: Senate Removes Restriction That Might Have Killed Action," *The Washington Post*, July 23, 1999, p. A10. The committee report on S. 1217, however, does include some helpful language that would make it more difficult for the DOJ to file suit.
8. Many of the most important questions are set forth in two sections later in this paper.

UNHEALTHY PRECEDENTS: LESSONS FROM THE STATE LITIGATION

The state Medicaid "reimbursement" or "recoupment" lawsuits that began several years ago were highly improper as a matter of law—although not as a matter of politics. Even with the power, influence, and financial resources the states brought to bear (and operating in their own courts), the states lost most of the early rounds of their lawsuits under traditional legal principles. The state judges were appropriately skeptical of the new and tortured legal theories advanced by the states and disallowed many of them. The states feared that their suits would fare no better than a thousand private suits brought against the tobacco companies up to that time in which the juries had uniformly rejected liability, generally on the ground that the smokers had knowingly and voluntarily assumed the risk.[9]

Unprincipled Legislation

Faced with this setback, several states then enacted special statutes stripping the tobacco companies of their traditional defenses in the pending suits and allowing the states to establish causation and damages in novel and unfair ways.

The states did not change the law for *all* future plaintiffs and defendants or for *all* types of suits. Instead, first Florida and then Maryland and Vermont passed legislation that essentially provided that, in recoupment-type litigation in which the state was the plaintiff, the defendants were denied such venerable defenses as the assumption of risk, the requirement of proof of individual damages, and the normal statute of limitations "*to the extent necessary to ensure full recovery by Medicaid.*"[10] The statutes also eliminated the requirement that the state identify those allegedly injured by the tobacco companies; allowed causation and damages to be shown by use of statistical analysis without proving an actual link between tobacco use and the injury in particular individuals; and permitted the state to proceed under a market share theory, which allowed the state to treat all cigarettes (regardless of the tar and nicotine level) as exactly equal in health risk.[11]

A good analogy is to imagine a statute that allowed the state to bring suit against car manufacturers for all automobile wrecks that previously occurred in the state. Under the hypothetical statute, the state would not have to reveal the names of the individuals injured or the circumstances of each crash. The state simply could supply a total loss figure for automobile-related injuries and provide expert testimony on how much the manufacturers should pay. Under the hypothetical statute, the manufacturers could not argue that the accidents were caused by driver negligence. The manufacturers could not show that some of the wrecks occurred decades ago and that the normal statute of limitations had expired long ago on such claims. Nor could the manufacturers argue that they had already paid for many of the claims through a special tax or that the state never suffered a loss. When the state inevitably won the rigged suit, each manufacturer then would be forced to pay an amount of the award proportional to its market share, without regard to whether the cars it manufactured were Volvos or Pintos. Essentially, this is what Florida, Maryland, and Vermont purported to do to cigarette manufacturers, except that a few well-connected attorneys were also beneficiaries of the corrupt statute.

Heightened Potential for Abuse. Robert Levy, who is a senior fellow in constitutional studies at the Cato Institute, explained that there is a "quantum difference between altering the common law [that applies to everyone] and eviscerating a [particular] company's ability to dispute the charges

9. The key legal principles involved in the private suits are discussed later in this report. See also Robert A. Levy, "Tobacco Medicaid Litigation: Snuffing Out the Rule of Law," Cato Institute *Policy Analysis* No. 275, June 20, 1997.

10. See Bandow, "Medicaid 'Reimbursement' Litigation," pp. 5–8, 16–19; Levy, "Tobacco Medicaid Litigation," pp. 7–8. The italicized language is from Florida's statute.

11. Bandow, "Medicaid 'Reimbursement' Litigation," pp. 5–8, 16–19; Levy, "Tobacco Medicaid Litigation," pp. 7–8.

brought against it."[12] And as nationally syndicated columnist Doug Bandow wrote in a scholarly monograph for the American Legislative Exchange Council, "The potential for abuse is most evident when the state is a party and [it] eliminates a particular defense or defenses only when the state [benefits]."[13]

This particular abuse (rigging the rules to enrich the state) was most apparent in Maryland's acrimonious legislative debate to revive its floundering lawsuit by special legislation. Lawyer-lobbyist Peter Angelos, who stood to gain hundreds of millions of dollars with his own sweetheart contingency deal, helped push the bill through the legislature.[14] Maryland Governor Parris Glendening was surprisingly frank in describing what was going on when he said, "Give me three more Peter Angeloses, and we don't have to worry about the budget."[15] In the end, Florida, Maryland, and Vermont left very little to chance. They passed laws that "almost automatically [held] cigarette makers liable for Medicaid costs."[16]

The state statutes raised serious constitutional questions involving the separation of powers, due process, equal protection, takings, bill of attainder, and ex post facto concerns. Nevertheless, the Florida Supreme Court modified some aspects of the Florida law and narrowly upheld the rest as "a rational response to a public need."[17] This led other states to consider how easy it would be to win if their legislatures enacted a similarly unprincipled statute. As a result, several states were considering such legislation at the time of the global settlement.

All About Money. Faced with the collusive and unjust nature of the new state suits (as well as a poisoned political atmosphere), the defendants agreed to a staggering settlement involving the payment of roughly $246 billion to the states and tens of billions more to the private contingency-fee lawyers.[18] Of necessity, this money will be extracted for decades to come—mostly from low-income smokers—in higher cigarette prices.

Those who negotiated the settlement were sensitive to the fact that, even though the demand for cigarettes is fairly inelastic, there are some limits to how much some smokers will pay for cigarettes. Most industry analysts believed that the

12. Levy, "Tobacco Medicaid Litigation," p. 9.

13. Bandow, "Medicaid 'Reimbursement' Litigation," p. 16.

14. Daniel LeDuc and Michael E. Ruane, "Maryland's Power Player; Orioles Owner Masters Political Clout," *The Washington Post*, March 28, 1999, p. C1.

15. *Ibid*.

16. Bandow, "Medicaid 'Reimbursement' Litigation," p. 5.

17. *Agency for Health Care Administration* v. *Associated Industries of Florida, Inc.*, 678 So. 2d 1239 (Fl. 1996). The Florida Supreme Court struck down as unconstitutional the provision of the statute that allowed the state to withhold the names of individuals who were allegedly injured, and it stated that other provisions might be unconstitutional as applied in a given case. It also limited the suspension of the statute of limitations and restricted the market share damages theory in conjunction with the rule of joint and several liability. But it essentially upheld the rest of the statute in an embarrassing 4–3 opinion.

18. The master state settlement is especially problematic in the manner and unbelievable amount with which it buys off the private plaintiffs' attorneys who concocted many of the absurd legal theories. Even one of the leading trial attorneys for several states, Richard Scruggs, once admitted that the attorneys' fees are "a little obscene." Bandow, "Medicaid 'Reimbursement' Litigation," note 7. For further discussion of this topic, see Stuart Taylor, Jr., "How a Few Rich Lawyers Tax the Rest of Us," *National Journal*, June 26, 1999, pp. 1866–1867 (Lawyers' "fees are likely to mount to an obscene $12 to $15 *billion*…with some lawyers netting more than $100,000 per hour worked. Left in the ruins were the ethical and legal obligations of lawyers to charge reasonable fees."); Christopher Caldwell, "Dirty Deals in Smoke-Free Rooms," *The Weekly Standard*, January 4, 1999, pp. 20–23; Michael Barone, "Trying the Lawyers," *U.S. News & World Report*, June 28, 1999, p. 34; Clay Robinson, "FBI Raises Questions in State's Tobacco Suit," *Houston Chronicle*, February 18, 1999, p. 1 (involving alleged criminal corruption and extortion in Texas).

unprecedented settlement amount reflected the most the states thought they could get without bankrupting the industry and killing the goose that would lay the golden eggs.[19]

One aspect of the settlement, in particular, helps show that the state suits were not about any real wrongdoing, but about extracting money with no basis in legal liability. The states implicitly agreed to require new entrants into the tobacco market to charge the same high prices as the settling defendants, and to make payments to the states similar to those that would be required of the settling defendants. The settlement agreement provides that if the states did not do this, the payments would be reduced in relation to the defendants' combined loss of market share.[20]

This provision violates basic antitrust principles (unless the "payment" is really a tax), hurts consumers, hurts new entrants, and has no relationship to alleged wrongdoing. But it is understandable that the settling defendants would try to protect their shareholders' interests in the coordinated litigation shakedown: If the suit was not really about wrongdoing and the "payments" were just a tax by a different name, then new entrants should pay the same tax. The states seemed to agree.

Thus, the state officials sold out their consumers (and their states' legislative sovereignty) for a pot of gold. That many legislators were happy to avoid the political costs of raising tobacco taxes explicitly and gladly abdicated their legislative powers to legal thugs made matters worse, not better.

Legal Principles Assailed in the Tobacco Litigation

From the brief summary provided above, it should be evident that the state recoupment litigation represented a serious assault on the rule of law itself. The rule of law encompasses many important ideals. One of its most important components is the principle that the protections of the law must not be waived in order to reach what is deemed by the government to be a "just" result. The protection of the law must be applied in the same way to everyone, whether the parties to a lawsuit are powerful, popular, or decidedly unpopular. This concept is expressed by a phrase that was once taught to all schoolchildren in America: Ours is "a nation of laws and not of men."

A related corollary of the rule of law is that like cases are to be handled and resolved in the same manner. Clever lawyers can always find some distinction in the facts of a supposedly new case, but if the *relevant* facts are the same, then the case should be handled and resolved no differently than every other case of its type. This means that novel legal theories are not justified by the supposed noble purpose of a lawsuit.

The state lawsuits and the contemplated federal lawsuit against the tobacco industry to reimburse the government for smoking-related Medicaid and Medicare payments conflict with these ideals. Among the many doctrines of law that normally would apply to the recovery of damages, the federal lawsuit against the tobacco industry likely would attempt to displace the venerable doctrines of (1) assumption of risk, (2) proximate cause, and (3) proof of individual damages.

Assumption of Risk. The assumption of risk doctrine prevents someone who voluntarily accepts a known risk from recovering damages when the foreseeable risk materializes. For example, a professional boxer should not be able to sue his opponent if he gets a broken nose in a fair fight.

One does not need to know the precise probabilities of injury to legally assume the risk

19. Of course, the tobacco industry is a legal one—a point often lost by activists who would arbitrarily deny it rights otherwise protected by the Constitution and laws of the United States. To the extent the states have claimed that they want to eliminate smoking, however, they now have a powerful incentive not to pursue policies that would accomplish that goal.

20. See Master Settlement Agreement, Section IX and Exhibit T, available at *www.naag.org/tob2.htm*. Exhibit T is a "model" statute that the states could pass in conformity with this plan that would automatically eliminate any reduced payments.

involved. All that is necessary is that the general nature of the risk be known. In the boxing example, a boxer need not know the precise probability of receiving various types of injury in each fight before he can assume the risk of injury. This is true even if the injury he ultimately sustains is an extremely rare one, as long as it is consistent with a fair fight. With regard to the risks of smoking, "not only is there substantial awareness of the smoking hazards," but people actually "appear to overestimate the risks as compared with the levels in the scientific evidence."[21]

The assumption of risk principle is a valuable rule for reasons other than that it comports with our sense of morality and justice. It is especially valuable in a free society in which different people are willing to accept different levels of risk. Without the assumption of risk rule, society would be forced either to (1) provide an implicit subsidy and encouragement for some peoples' risky behavior or (2) reduce the number of choices in the exercise of free will. Neither option is very attractive to people who cherish freedom.

Proximate Cause/Remoteness Doctrine. The doctrine of proximate cause is designed to hold those who are directly responsible for damages liable and to prevent them from shifting the blame to those who are not directly or "proximately" at fault. For example, if someone leaves his keys in his car and a thief steals the car and hits someone in a high-speed chase, the thief is liable for the injury. The car owner may have been a "but for" cause of the theft (but for his negligence, the particular theft might not have taken place), but the owner was not a direct or proximate cause of the accident.

The problem with "but for" causation is that it is limited only by a lawyer's imagination. The city that laid out the streets would be a "but for" cause in the example above, as would the injured person's parents and a thousand other people. As a consequence, the law must and does establish the cutoff point for liability.

There may be more than one person responsible if there is more than one direct cause, but those who are a remote "but for" cause are not liable. This is why the proximate cause principle is also referred to as the "remoteness doctrine." One important test of "proximate causation" is whether there was a "superseding or intervening cause" that broke the normal chain of causation. If there was a superseding or intervening cause of an injury, a remote "but for" actor is released from liability for the resulting injury. In the car chase example above, the criminal acts (car theft, high-speed driving, resisting arrest) are superseding/intervening causes of the wreck; they break the chain of causation and release the car owner of responsibility. Though the owner was negligent in leaving his keys in his car, his negligence was not a proximate cause of the wreck.

Proof of Individual Damages. Every plaintiff normally bears the burden to prove his individual damages that were proximately caused by each defendant. Smoking may cause or contribute to various diseases, but it is not the only cause or even the leading cause of many such illnesses.

Consider, for example, the effect of smoking on heart disease, which many advocates claim is responsible for over 100,000 deaths per year.[22] A person's genetic makeup, lack of exercise, eating fatty foods, not eating other healthful foods, general obesity, not drinking moderate amounts of alcohol and black tea[23] are all causes or contributors to heart disease. Although medical researchers have some idea of the relative impact of various risk factors, there is still a large degree of disagreement and uncertainty. At worst, however, smoking

21. W. Kip Viscusi, *Smoking: Making the Risky Decision* (New York: Oxford University Press, 1992), p. 7, as quoted in Bandow, "Medicaid 'Reimbursement' Litigation," p. 9.

22. Despite strong evidence that smoking plays a major role in lung cancer and other pulmonary diseases, some researchers question the accuracy of the heart disease mortality figures as well as the strength of the correlation between smoking and heart disease. See Robert A. Levy and Rosalind B. Marimont, "Lies, Damned Lies & 400,000 Smoking-Related Deaths," *Regulation*, Vol. 21, No. 4 (1998), pp. 24–29.

is unlikely to be the top risk factor for heart disease. Nevertheless, the federal government has attributed a certain number of heart disease deaths to smoking for research purposes.[24]

But what is necessary to advance scientific understanding is not what is necessary to prove a case in a court of law. What is necessary in a court of law is for each plaintiff to prove what damages were proximately caused by each defendant by a preponderance of the evidence. And during the course of discovery and trial, each defendant is entitled to examine the plaintiff's medical records and question the plaintiff to determine whether other causes of illness might be more likely in his case.

Application of These Doctrines. As was the case in the state suits, lawyers bringing a federal lawsuit against the tobacco industry would likely try to eliminate the doctrines of assumption of risk, proximate cause, and proof of individual damages by making absurd and contradictory arguments. Several states argued that the assumption of risk doctrine did not apply to their claims because the government never assumed any risk, even if the smokers did. The states also argued that cigarette manufacturers were the proximate cause of such illnesses as heart disease in a certain number of smokers, but the states tried to prevent the defendants from investigating medical records to see what other causes might exist for each smoker. Such tactics create many serious problems.

An insurance company that pays a customer's claims (say, for medical treatment) and then sues someone else for reimbursement must stand in the shoes of its customer. The insurance company is allowed to sue because its customer sold his potential legal claims as part of the insurance agreement. An important principle in this type of suit, which is called a "subrogation" suit, is that the insurance company can buy no greater rights to sue than its customer had to sell. Thus, the insurance company can only bring a lawsuit that its customer could have brought, and the defendant can raise any defenses against the insurance company's claim (including that the customer assumed the risk) that it could raise if the customer had filed the suit.

The government is the health care insurer for Medicare enrollees and should be treated no differently than a private insurer. This was the early ruling of most state courts before the states began to pass special legislation. Although the federal government may try to invent a new cause of action and assert that it is not a "subrogation" claim (to avoid pesky legal doctrines), the gravamen (or essential nature) of the new cause of action would still be the same as a subrogation claim. The same rules should apply to it—no matter what the federal government's esoteric theory might be called.[25] As Doug Bandow put it, "sophistry cannot hide the essential nature of the state's action—to seek reimbursement for medical expenses that those being treated are legally barred from collecting. The state does not have a higher claim of action than the individual allegedly harmed."[26]

Even if the assumption of risk doctrine is held not to apply directly in an Orwellian federal suit, it still might bar the federal claim indirectly—through the doctrine of proximate causation. If smokers knew of the risks and continued smoking anyway, then the smokers, not tobacco manufacturers, are the proximate cause of tobacco-related illness. The smoker's risky behavior is the superseding cause of his own illness and cuts off the remote chain of causation. If there is another direct

23. There is recent evidence that drinking black tea may be helpful in reducing the risk of heart disease. See, e.g., Emma Ross, "Research: Tea Reduces Heart Attack," Associated Press, July 9, 1999 (discussing research by the author's brother, Dr. J. Michael Gaziano, a cardiologist at Harvard Medical School).

24. Levy and Marimont, "Lies, Damned Lies & 400,000 Smoking-Related Deaths."

25. See Glenn Lammi, "Justice Department Tobacco Suit Would Undermine Civil Justice System," Washington Legal Foundation *Legal Opinion Letter*, Vol. 9, No. 7, March 5, 1999, pp. 1–2; Levy, "Tobacco Medicaid Litigation," pp. 3–4, 11–13.

26. Bandow, "Medicaid 'Reimbursement' Litigation," p. 10.

cause of the supposed "loss" to government programs, it is the government's choice to cover smoking-related illnesses (assuming they are as easily identified as the government maintains). The government could have refused to provide coverage for smoking-related illnesses under Medicare, as it has done for veterans' benefits, or it could have charged higher premiums for smokers. Thus, either the smoker is the sole superseding cause of the alleged loss to the government programs or the government is also complicit in the alleged financial loss to its own programs.

There are also some inherent contradictions in any attempt by the government to simultaneously evade the assumption of risk doctrine and the necessity of proving individual damages. There actually might be a few smokers who did not know of the basic risks involved in smoking, but it hardly seems fair to allow the government to raise such an individualized argument if the defendants are not allowed to examine individual smokers to determine the different causes of injury. Instead, the government may have to argue that (1) smokers could not assume the risk because the risks generally are unknown but (2) the risks are so well-known that aggregate damages can be calculated without individual proof of damages.

THE DOJ'S TOBACCO LITIGATION FLIP-FLOP

The Clinton Administration is rarely accused of a slavish consistency to any one position, but the Administration's about-face on whether the federal government can sue the tobacco industry to recover Medicare costs is even more abrupt and unjustified than other flip-flops. This reversal on what the law says, as opposed to a mere policy reversal, without explanation is worth exploring in greater detail.

DOJ's Original Position: "No Cause of Action"

Two years ago, career officials at the Department of Justice determined that the federal government had no independent cause of action for such claims. On April 30, 1997, Attorney General Janet Reno adopted their conclusion and testified before the Senate Judiciary Committee that "what we have determined was that [any such claim] was the state's cause of action and that we needed to work with the states, that the federal government does not have an independent cause of action [to recover Medicaid or Medicare funds]."[27]

That year, the DOJ spokesman, Joe Krovisky, also said that the "Medicare and Medicaid statutes do not provide explicit authority for the federal government to pursue suit."[28]

State officials and their attorneys also testified before Congress that the DOJ had informed them that the federal government could not join their suits or file its own suit because it did not have a cause of action against the tobacco companies for medical care reimbursement. Mississippi Attorney General Mike Moore, who was instrumental in getting other states to file suit, testified about his own and others' efforts to try to get the DOJ to join as well:

> We…wrote letters, had personal meetings, and urged the Federal Government through the Justice Department and others to file a lawsuit on behalf of Medicare…. We were informed that the Justice Department and others did not feel that they had a cause of action under the Federal statutory framework, so they could not file such a lawsuit.[29]

Richard Scruggs, a leading trial attorney who worked with several states on their lawsuits

27. *Hearings on Justice Department Operations Before the Senate Committee on the Judiciary*, 105th Cong., 2nd Sess., 72 (1997); see also *id.* at 186.

28. *Federal Filings Business News*, April 29, 1997; see also Adam Piore, "Senators Urge U.S. to Sue Over Tobacco Health Costs," *The Northern New Jersey Record*, April 30, 1997, p. A4 (which quoted Krovisky as saying "it would seem we don't have the authority to sue").

29. *A Review of the Global Tobacco Settlement Before the Senate Committee on the Judiciary*, 105th Cong., 2nd Sess., 39 (1997).

against the tobacco companies, testified that he strenuously urged the federal government to join their efforts but the DOJ determined that such an action would be illegal. In his words:

> [W]e made every effort in the world to get the Justice Department to initiate litigation similar to the litigation that we had initiated to recover Medicare funds that were related to smoking, and we couldn't get anywhere with them. They interpreted that law…the black letter law as saying that they could not seek to recover except for servicemen or federal employees, but not those on Medicare. So we made an effort to get them involved, and they basically refused us.[30]

It is highly unlikely that the DOJ's initial determination was made casually. The issue was one of the most hotly debated legal issues of 1997 and 1998; the state suits involved hundreds of billions of dollars; and it was a topic that the U.S. Attorney General would almost certainly be asked to address herself—and she was. Career DOJ attorneys are among the best and brightest legal scholars in government. It is simply inconceivable that their initial determination was the product of carelessness or a lack of attention.

Thus, throughout 1997 and 1998, the Department's position, communicated through DOJ officials directly and through third parties, was that there was no independent cause of action for the federal government to sue tobacco companies for medical cost reimbursements. Although these officials sometimes added—when they were questioned by pro-litigation Members of Congress—that they would continue to review the law, this is a typical (and arguably polite) hedge phrase political appointees mouth when they are questioned by a Member of Congress with an opposing view. There was still no public deviation from the DOJ's basic legal position until after the President told the Department that it should reverse course.

The DOJ's Original Determination Was Correct

The Department's original determination has the special virtue of being correct. In *United States* v. *Standard Oil Co. of California*, the U.S. Supreme Court categorically rejected the federal government's attempt to bring suit to recover medical costs when such a suit was not expressly allowed by statute.[31] The Supreme Court rejected the invitation to create or expand the scope of federal tort law beyond that set forth in federal statutes, explaining the difference between state courts of general jurisdiction that were permitted to develop theories of tort law and federal courts which were not.[32]

The Supreme Court also noted another problem with the government's theory, which it said is not really about tort law at all:

> [T]he issue comes down in final consequences to a question of federal fiscal policy…the federal fiscal and regulatory policies which the Government's executive arm thinks should prevail in a situation not covered by traditionally established liabilities. Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours. Congress, not this Court or the other federal courts, is the custodian of the national purse.[33]

The Supreme Court noted that Congress does create new federal causes of action for reimbursement when it deems it necessary: "When Congress has thought it necessary to take steps to prevent

30. *Id*. at 125.

31. 332 U.S. 301, 313–17 (1947).

32. *Id*. at 313 (the government's "argument ignores factors of controlling importance," including "the narrower scope, as compared with that allowed of general common-law jurisdiction, for the action of federal courts in such matters").

33. *Id*. at 314.

interference with federal funds, property or relations, it has taken positive action to that end."[34] The Court also pointed out that Congress is in the best position to weigh the competing issues of settled expectations and unfair surprise, and can fine-tune any new cause of action, for example, by making it apply only prospectively.[35]

Finally, the Court reasoned that it was particularly inappropriate for the judiciary to create or recognize a cause of action when the United States was the party seeking that result:

> Here the United States is the party plaintiff to the suit. And the United States has the power at any time to create the liability. The only question is which organ of the Government is to make the determination that liability exists. That decision…is in this instance for the Congress, not for the courts. Until it acts to establish the liability, this Court and others should withhold creative touch.[36]

The *Standard Oil* decision is still good law, and there is no statute that allows the federal government to bring suit to recover medical costs of this type.

The two statutes most likely to be invoked in any federal lawsuit against the tobacco industry are the Medical Care Recovery Act (MCRA) and the Medicare Secondary Payer Act (MSPA), but neither provides a valid basis for the type of broad suit contemplated by the Administration. In its 37-year history, the MCRA has never been used to seek reimbursement of Medicare costs from anyone.[37] A careful reading of its terms and history reveals (including to the original career DOJ staff) that it applies to medical services provided to U.S. military personnel and perhaps to other federal employees, but not to all Medicare enrollees.[38]

If the MCRA provided a cause of action under Medicare for aggregate losses, Congress would not have passed the MSPA in 1980 and amended it several times since then. The MSPA allows the federal government to recover certain limited costs paid by Medicare. It allows the federal government to sue or intervene in an action against an insurance plan, certain other "secondary" providers, and medical providers and beneficiaries, but not an alleged wrongdoer.[39] There is not one single reported case in which the federal government tried to use the MCRA or MSPA to recover Medicare costs against an alleged wrongdoer.[40]

Other statutes that have been mentioned, including the antitrust laws and the Racketeer Influenced Corrupt Organizations Act, are even more baseless as possible grounds for suit. None of these statutes supplies the Administration with a valid cause of action (except perhaps for costs incurred for military personnel under the MCRA).[41] As *The Wall Street Journal* recently reported, each of these four statutes mentioned as a possible basis for suit "would require leaps of logic and backdoor strategies that offend the legal sensibilities of some career Justice Department lawyers."[42] This is because the Supreme Court held in *Standard Oil* that when Congress has created limited causes of action to recover medical costs in some contexts, that presents the strongest

34. *Id*. at 315.

35. *Id.* at 315–16.

36. *Id*. at 316–17.

37. J. V. Schwan, "The Federal Government Has No Legal Case Against the Tobacco Companies," *CSE Issue Analysis* No. 92, Citizens for a Sound Economy Foundation, June 14, 1999, p. 4.

38. 42 U.S.C. §§ 2651–53; Schwan, "The Federal Government Has No Legal Case," p. 4.

39. 42 U.S.C. § 1395y(b)(2).

40. Schwan, "The Federal Government Has No Legal Case," pp. 4–5.

41. See *ibid.*, pp. 2–6.

42. David S. Cloud, "U.S. Faces Hurdles to Recovering Tobacco Health Costs," *The Wall Street Journal*, May 27, 1999, p. A28.

case against the courts creating other broad causes of action by judicial fiat.[43]

The Only Change Is Political, Not Legal

There has been no change in federal law since the DOJ determined that it could not bring suit against the tobacco industry (except to reinforce that position), but there has been a sea change in attitudes affecting tobacco suits generally. From 1954 until recently, more than 1,000 lawsuits were brought against tobacco manufacturers without a single plaintiff's victory.[44] That record is not because tobacco products have no adverse effect on smokers' health (they do). In some cases, juries may have doubted that the plaintiff's particular illness was caused by smoking, but in the overwhelming number of cases, juries concluded that smokers knew of the health risk and voluntarily assumed the risk.

One marked change in recent years is that demagoguery against the tobacco industry by public officials has grown increasingly common, including blaming the industry for costs which the officials know do not exist. This focused vitriol against the tobacco industry increases the risk that jurors will disregard the normal legal rules in a case brought against a cigarette manufacturer. This demagoguery not only undermines the operation of the law and important legal principles, but also undermines the importance of individual responsibility.

There also has been a change in the perceived willingness of the tobacco industry to pay huge sums in response to a rhetorical and unprincipled suit. With the master settlement, the tobacco companies thought they had made a good deal for themselves, but by paying off the extortionists, they inflicted an injury on the operation of the law and funded an unprincipled segment of the trial bar to go after other targets.

In this way, the tobacco companies are partly to blame for what has transpired. Although the tobacco companies are more likely to fight the federal government's clear lack of legal authority to bring suit, they still have to contend with the raised expectations of a greedy government and a public that is even more confused about the distinction between politics and law.[45]

Tobacco Industry "Wrongdoing": A Red Herring. The recent evidence of tobacco company culpability by itself should not have had that much of an impact on public opinion and no impact on the law. It is argued that industry documents released in the past few years show that, while tobacco companies denied that tobacco is addictive and downplayed the risks of smoking, this was contrary to some of their own evidence.[46]

The physiology of addiction is complex and lends support to some medical arguments about the nature of chemical addiction and its individual variability. But as a matter of public relations, it was unwise for tobacco companies to advance an argument that runs counter to the lay use of the term "addiction" and the common experience of millions of smokers.[47] Although tobacco companies have a corporate responsibility to respond to exaggerated claims about the dangers of smoking,[48] it also would be wrong for them to try to

43. 332 U.S. at 315–16.

44. Jeff Jacoby, "Due Process, Even for Big Tobacco," *The Boston Globe*, June 16, 1998, p. A27.

45. In addition, those most likely to defend against litigation abuses because of their love of law may grow frustrated by capitulation that undermines a principled position. See, e.g., Robert A. Levy, "Clinton's Illegal Assault on the Tobacco Industry," *The Wall Street Journal*, February 8, 1999, p. 23.

46. The evidence is certainly subject to contrary interpretations, but there is no reason to wade into that dispute here, because any interpretation of the documents is irrelevant to the purported litigation.

47. Although most smokers find it difficult to quit, only one-third of people who have smoked and one-half of frequent smokers still continue to do so. Thus, even if smoking is "addictive" as that term is commonly used, it is not so addictive that a majority of smokers cannot quit (indeed, most quit "cold turkey"). Levy, "Tobacco Medicaid Litigation," pp. 15–17; Bandow, "Medicaid 'Reimbursement' Litigation," p. 11.

downplay the health risks of smoking. Even assuming such wrongful behavior, however, it adversely affected no one's opinion.

People have known for centuries that smoking tobacco was an "addictive" habit, and cigarettes were known to cause death and serious illness for many decades before the first Surgeon General's warnings appeared on cigarettes 33 years ago. For example:

- President John Quincy Adams said that he was "addicted to tobacco" (both smoking and chewing) for much of his youth, but on the advice of a physician friend, he quit in the 1810s. Writing in 1845, Adams said that he thought smoking reduced life expectancy by five years on average,[49] which was probably an exaggeration for that time period when most people lived shorter lives.
- President Ulysses S. Grant's physician attributed his death by cancer to smoking.[50]
- In 1892, *The New York Times* reported on efforts to have tobacco banned by Congress due to its serious health consequences and adverse affect on children.[51]
- In 1900, a U.S. Supreme Court opinion noted how common the belief was that cigarettes were harmful, particularly for young people, "and that communications are constantly finding their way into the public press denouncing their uses as fraught with great danger."[52]

Even more relevant to the recent arguments advanced by anti-tobacco advocates, there have been thousands of non-industry and government studies worldwide on the addictiveness and health consequences of smoking. According to the director of the Office of Smoking and Health at the Centers for Disease Control and Prevention in Atlanta, "Cigarette smoking and other tobacco use is the single most studied health risk factor in the history of medicine."[53] Medical studies dating from the 1930s have confirmed peoples' common beliefs about smoking and are consistent with more modern studies on the basic effects of cigarettes.[54] As for the availability of this information, the Library of Congress maintains a special collection with tens of thousands of books, journals, studies, and reels of microfilm dedicated to the health effects of tobacco.[55] Most other libraries have similar collections.

In short, people know there are serious risks involved in smoking, but as with many other activities in life that impose some risk, they choose to do it anyway. This is the meaning of freedom, which includes the right to take risks that others may think are foolish and the corresponding duty to bear full responsibility for the results.[56]

Moreover, if people tend to overestimate the risks associated with smoking—and there is strong

48. Levy and Marimont have argued that despite the very real risk of premature death and other serious diseases associated with smoking, the mortality figures and other health risks are often exaggerated by anti-smoking activists. Levy and Marimont, "Lies, Damned Lies & 400,000 Smoking-Related Deaths," pp. 24–29. But see Michael P. Eriksen, "The Real Hazards of Smoking," *The Indianapolis Star*, May 30, 1999, p. D3 (attempting a partial response to the Levy and Marimont study).
49. Handwritten letter from John Quincy Adams to Reverend Samuel Cox on August 19, 1845, quoted in J. B. Wight, *Tobacco: Its Use and Abuse* (Nashville: M. E. Church, 1889), pp. 204–205.
50. *Ibid.*, p. 84.
51. "Attack on Cigarettes," *The New York Times*, July 21, 1892.
52. *Austin* v. *Tennessee*, 179 U.S. 343, 348 (1900).
53. Eriksen, "The Real Hazards of Smoking."
54. Jacob Sullum, *For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health* (New York: Free Press, 1998), pp. 40–45. The Supreme Court also noted this fact in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 513 (1992).
55. *The Mission and Strategic Priorities of the Library of Congress, FY 1997–2004.*
56. See, e.g., Sullum, *For Your Own Good,* pp. 6–7.

evidence that they do[57]—then it simply is not material (in tort litigation) whether tobacco executives tried to downplay or conceal those risks. Dishonesty and fraud is serious business. It should justifiably enrage policymakers (if it is shown) and, if uttered under oath, should be prosecuted as perjury. But as Doug Bandow notes, it is not grounds to torture the law or engage in organized looting.[58]

The same is true for the allegation that industry executives lied to policymakers about the documents they possessed and improperly urged their attorneys to claim the information was legally privileged. Discovery abuse is bad and should be appropriately punished if proven, but it is difficult to argue that any essential "truth" about smoking was concealed from policymakers or the public or that they would have done anything differently if they had known this additional information. In short, the alleged misstatements and omissions did not adversely affect the opinion or actions of anyone.

The tobacco companies also were alleged to have targeted some of their advertising at children. Teen smoking is a special problem because few teenagers have the maturity to appreciate the risks of such a habit (even if they know what they are). But there is plenty of evidence that tobacco advertising has little effect on whether teens smoke—even if it does influence brand preference.[59]

Overall, teen smoking rates are determined by teen attitudes, which have almost no relationship to tobacco advertising (teen smoking rates increased in six European countries when tobacco ads were banned, and some countries have higher teen smoking rates than America).[60] An argument also can be made that teen attitudes are affected more by whether anti-smoking crusaders emphasize taking personal responsibility (when rates decline) or demonizing the tobacco companies (when rates increase again).[61]

But under *any* set of facts, recent advertising practices targeted at children hardly seem relevant to the *past* Medicare or Medicaid costs. Almost no one believes that the state tobacco litigation was really about teen smoking; if it were, it would have addressed that issue in a much more narrow way. Nor could a federal recoupment lawsuit provide a solution to the problem of teen smoking.

Even more to the point, all of the real or alleged wrongdoing has little or no bearing on the legal argument over whether the federal government has a valid cause of action to recover Medicare costs from tobacco companies. And it ought to be self-evident that a defendant's popularity should have no bearing on whether suit can be brought or on the legal defense a defendant is allowed to raise. Indeed, legal protections are most necessary for unpopular defendants. A change in public opinion should have no bearing on the operation

57. Viscusi, *Smoking: Making the Risky Decision*, p. 7.

58. Bandow, "Medicaid 'Reimbursement' Litigation," pp. 8–13.

59. See, e.g., Dominick Armentano, "Teen Smoking and the FDA," *Campbell Entrepreneur*, Spring 1996, p. 10; Jerry Taylor, "Should Cigarette Advertising Be Restricted?" *St. Louis Post-Dispatch*, December 11, 1995, p. B7; Bandow, "Medicaid 'Reimbursement' Litigation," p. 12; Levy, "Tobacco Medicaid Litigation," pp. 13–14; Daniel J. Murphy, "Can Gov't Stop Kids' Smoking," *Investor's Business Daily*, August 4, 1995, pp. 1–2.

60. Armentano, "Teen Smoking and the FDA"; Taylor, "Should Cigarette Advertising Be Restricted?"; Levy, "Tobacco Medicaid Litigation," pp. 13–14.

61. There is at least a correlation between the rates of teen smoking and the predominant focus of anti-smoking activists, which appeared to shift around 1993 from a campaign emphasizing personal responsibility ("just say no") to a campaign to demonize and destroy tobacco companies through litigation and FDA regulation. For a brief summary of the trends in teen smoking, see Bandow, "Medicaid 'Reimbursement' Litigation," pp. 11–12. A review of the positive trend up to 1993 (despite the advent of Joe Camel ads in 1988) can be found in *Preliminary Estimates from the 1993 National Household Survey on Drug Abuse*, U.S. Department of Health and Human Services, Advance Report No. 7, July 1994, tables 5A and 5B. See also Jonathan Rauch, "Hey, Kids! Don't Read This!" *National Journal*, July 10, 1999, pp. 2003–2004, which notes the same trend and attributes it to an analogous change in the anti-smoking campaign.

of the rule of law—assuming America still is a nation of laws.

The DOJ's Apparent Change of Position

Although the DOJ has not yet formally announced that it will file suit against the tobacco companies, it has taken several steps consistent with an intention to do so. First, it has confirmed that it is pursuing the issue in conformity with the President's directive.[62] Second, it has requested an additional $20 million from Congress to fund 40 attorneys in the Civil Division "to recover the expenses of federal health care programs for tobacco-related diseases."[63]

Given that the DOJ has millions of dollars for civil litigation, this funding request is peculiar in several respects. In a Department with over 10,000 lawyers, why is a special appropriation necessary for 40 additional lawyers to pursue just one lawsuit? And if the lawsuit is supposed to recover large sums of money, why must a $20 million investment be appropriated up front?

One possible theory for the appropriation request is that the DOJ does not think Congress will pass special legislation authorizing the suit, but it hopes to use any special appropriation or report language to bolster its position in court that Congress has indeed authorized the recoupment litigation. Although such an appropriation should not be interpreted by a court as overcoming the presumption against liability created in *Standard Oil*, there is at least a possibility that some court would accept the theory that if Congress authorizes funds for the suit, that implicitly changes the liability rule. This is a strong reason for Congress not to approve the request. If it does so, Congress should explicitly provide that it is not changing the underlying liability rules.

The third and rather dubious step the DOJ took toward the filing of a suit was to hire a consultant, Michael Ciresi, who was the lead attorney hired by Minnesota in its suit against the tobacco companies.[64] It is odd, to say the least, that a Department with some of the best and brightest attorneys in the country thought it had to formally consult an outside lawyer.

The DOJ says that Ciresi's knowledge of the tobacco industry documents made him valuable, but the content of those documents is irrelevant to whether the federal government has a valid cause of action to recover Medicare costs. What is even more improper is that the DOJ would not publicly disclose the complete terms of its contract with Ciresi. Ciresi's law firm demanded about $550 million in fees from its work on the Minnesota case.[65] Although Ciresi supposedly agreed to work at a "reduced" hourly rate for the federal government until June 30 of this year, the DOJ has not ruled out the use of outside contingency-fee lawyers in the future.

In addition to these tangible steps, several Administration officials have said that the litigation will proceed. Interestingly, the clearest statements have come from White House political and policy advisers and not the Administration's top lawyers. Bruce Reed, White House Domestic Policy Adviser, said the steps the Administration has taken demonstrate "that we are serious [about filing suit] and that the administration is moving full steam ahead."[66] Rahm Emanuel, former Senior Advisor to the President for Policy and Strategy, believed that the DOJ would never have revisited

62. See Cloud, "U.S. Faces Hurdles."

63. See, e.g., *Budget of the United States Government, Fiscal Year 2000* (Washington, D.C.: U.S. Government Printing Office, 1999), p. 89. The quoted language is from a later submission to Congress on file with the author.

64. Saundra Torry, "Lawyer Who Led Minnesota Case Will Advise U.S. on Tobacco Suit," *The Washington Post*, April 7, 1999, p. A19.

65. *Id.*

66. *Id.*

its views if the White House had not pressured it to do so.[67]

Although DOJ officials are "under heavy pressure" to bring suit, they reportedly still favor special legislation that would authorize it.[68] Attorney General Reno has said that she now is confident the Department can bring suit, but she has not said how or under what theory it will be done. According to *The Wall Street Journal*, "Ironically, one of the department's most ardent naysayers of the suit was civil-division chief Frank Hunger, widower of Vice President Al Gore's sister, who died from smoking-related lung cancer in 1984."[69] When the DOJ expressed its serious legal qualms about pursuing a case "that it doubts it can win on the merits…*The White House argued that the fight was more political than legal: Just sue and the industry will settle*."[70] According to the same article, "The Justice Department eventually relented and put together a team stocked with longtime tobacco industry foes."

Apparently, the DOJ has found some anti-tobacco activists who are not concerned with manipulating the litigation process for cause-oriented purposes. At this point, they just want tens of millions of dollars from Congress for their efforts; the basis for the suit apparently will come later.

QUESTIONS REGARDING A LIABLITY THEORY

Not only should Congress reject a special appropriation for the litigation at this time, but it also should enact an express ban on the use of staff time or appropriated money for a recoupment lawsuit against the tobacco industry. The prohibition should remain in effect at least until the Attorney General and other DOJ officials provide the appropriate congressional committees with some important information regarding the government's theory of liability and damages.

The most important questions the Administration should answer about its liability theory include the following:

- Is special legislation necessary to grant the federal government a cause of action to recover Medicaid and Medicare costs?
- Will the DOJ take the position that an appropriation for attorneys to pursue the litigation would serve as an authorization to bring suit?
- What is the precise legal basis of such a suit? Congress should insist on a formal, detailed legal opinion from the Attorney General, or one from the Office of Legal Counsel that she has endorsed.
- If the DOJ has changed its position and believes that special legislation is not necessary, what change in law justified this reversal?
- Will the DOJ attempt to eliminate its requirement to prove that particular defendants caused actual damages in particular individuals?
- Will the DOJ ignore the normal rules of causation and medical science and assert that all cigarettes are exactly the same in the way they affect individual smokers?
- Will the DOJ try to prevent the defendants from raising any of their traditional legal defenses, such as the assumption of risk, proximate causation, and the normal statute of limitations?
- The federal government provided free cigarettes to active duty military personnel until 1974. However, it has denied veterans' requests for coverage of diseases linked to smoking because it said that smokers assumed

67. Cloud, "U.S. Faces Hurdles" (reporting that the DOJ did in fact come "under heavy pressure" to reconsider its views).

68. *Id.*

69. *Id.*

70. *Id.* (emphasis added).

the risk of such illness. Will it approve those claims now?

- What other industries will the government target with recoupment-type litigation (alcohol manufacturers, the automobile industry, the fast food and "junk food" industries)? If it has no current plans for such litigation, how can Congress assure itself that the DOJ will not simply change its position as it did in the tobacco litigation?
- What other outside legal consultants and supposed "experts" will the DOJ hire, and will the DOJ make the terms of their contracts public?

QUESTIONS REGARDING A THEORY OF DAMAGES

Although President Clinton points to tobacco-related diseases as the basis of the government's loss,[71] the economics of such diseases actually proves the opposite. The private costs of smoking cigarettes do seem rather high to those who do not smoke them,[72] but that is true of many activities. As for the "burden" supposedly imposed on government, the economic costs of smoking borne by government are more than offset by the savings in government retirement and health programs from the early death of smokers who otherwise would require benefits for a longer period and different end-of-life care.[73]

In short, smoking has more of an effect on the timing of government expenditures and not as much impact on total costs. Even the venerable *New England Journal of Medicine*, an anti-smoking journal of great distinction, concluded that smoking saves health care expenditures: "If people stopped smoking, there would be a savings in health care costs, but only in the short term. Eventually, smoking cessation would lead to increased health care costs."[74] This means that state and federal tobacco taxes are a windfall to government and tobacco use is an economic boon to public treasuries.[75]

Some researchers doubt whether the actuarial savings to government health programs alone cover the total "social" cost of tobacco-related illnesses (which include both private and public costs), but almost every government and independent researcher has concluded that the government has no net loss in revenue as a result of smoking. Two years ago, the U.S. Department of Health and Human Services' Food and Drug Administration (FDA) published a regulation (which was later struck down) that contained the following admission:

> [T]he most detailed research on the issue of whether smokers pay their own way is the 1991 study by Manning, et al.…[who] concluded that there is no net externality, because the sum of all smoking-related externalities is probably less than the added payments imposed on smokers through [then] current Federal and State excise taxes.[76]

Just last year, the Congressional Research Service also concluded that, "all in all, smoking has

71. See President Clinton's 1999 State of the Union Address.

72. In the interest of full disclosure, the author enjoys an occasional cigar. In the author's personal calculus, the pleasure of a premium cigar is worth the risk. Also in the interest of full disclosure, the author notes that his pulmonologist father has been honorably and actively engaged in anti-smoking efforts for as long as the author can remember.

73. W. Kip Viscusi, "Cigarette Taxation and the Social Consequences of Smoking," in James Poterba, ed., *Tax Policy and the Economy* (Washington, D.C.: National Bureau of Economic Research, 1995), Vol. 9, p. 76; W. Kip Viscusi, "From Cash Crop to Cash Cow," *Regulation*, Summer 1997, p. 30.

74. Barendregt *et al.*, "The Health Care Costs of Smoking," p. 1052.

75. Viscusi makes this point in both studies cited above.

76. FDA Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396, 44,572 (August 28, 1995).

apparently brought financial gain to both the federal and state governments."[77]

As a legal matter, even if the government could show that smoking in general imposed net costs on Medicare or some other program, that would not be enough to establish that it suffered any damages from tobacco company conduct. As one tobacco lawyer convincingly argued, the government must show that the industry's wrongful conduct (assuming any can be proven) caused an increased level of consumption, and then it must show how much that increase in consumption cost the government.[78] Because any alleged misconduct probably had no discernible impact on the rate of smoking, this burden seems almost insurmountable.

The above-cited studies showing no net cost to government did not even consider the much higher implicit "taxes" that will now be paid by smokers to the state governments under the tobacco settlement reached last year. The government's revenue on cigarettes averaged roughly $0.53 per pack before the settlement.[79] That figure could double with the incredible $246 billion the tobacco companies agreed to pay the states. But either figure is large compared with the $0.28 that the tobacco companies are estimated to make per pack of cigarettes.[80] If previous taxes enriched the state and federal governments enormously (and they surely did), then the new payments have no claim to being a "user fee" at all. Moreover, because smokers are disproportionately represented in the lower income levels, this windfall to government is highly regressive.[81]

Thus, the tobacco tax and tobacco litigation "payments" can be described as a highly regressive cash cow with a nanny state–social engineering goal. That many people are untroubled by the paternalistic punch of this particular revenue scheme should make it no less problematic as a precedent for future social engineering.[82]

To accept the reasoning of the anti-tobacco activists means that it is appropriate to kill by taxation or litigation any legal industry if it contributes to some risk and becomes unpopular. And there are plenty of activists who want to do just that. Among the current targets are manufacturers of lead-based paints; alcohol (which surpasses tobacco in externality costs); guns; chemicals; meat and milk (or fatty foods in general); caffeinated beverages; cars; fast food; "junk food"; and pharmaceuticals (if they have unintended consequences). Indeed, the activists have as good a basis for going after television manufacturers and network broadcasters because TV viewing induces sloth, which is certainly not healthful.

One need not be an apologist for the tobacco companies to oppose this trend. Even if the government itself resists the temptation to use the tobacco tactics against any other industry, there is

77. Jane G. Gravelle, "The Proposed Tobacco Settlement: Who Pays for the Health Costs of Smoking," *CRS Report for Congress*, March 17, 1998, p. 1.

78. Cloud, "U.S. Faces Hurdles."

79. Bruce Bartlett, "Where the Tobacco Tax Would Hit Hardest," *The Washington Times*, June 1, 1998, p. 31; Viscusi, "From Cash Crop to Cash Cow," p. 30.

80. Andy Newman, "The Economics of Cigarettes: Smoke One for the Tax Man," *New York Times Magazine*, February 28, 1999, p. 21.

81. The Joint Committee on Taxation estimated that half of the burden of an analogous excise tax (which would have the same effect as the settlement payments) would fall on people making less than $10,000 per year. See Viscusi, "From Cash Crop to Cash Cow," p. 31.

82. Indeed, Jonathan Rauch argues that the "[c]orruption of legal process is total when people cease to notice it." He believes that this happened in 1999 when the President announced the federal tobacco suit without so much as a fig leaf of legal cover—and everyone "clapped and clapped." Jonathan Rauch, "Read This or I'll Sue You," *National Journal*, February 6, 1999, pp. 316–317. His conclusion that the corruption is total and that people have ceased to notice the unprincipled developments is unsettling, and hopefully wrong.

no way to contain the legal precedents once they emerge from Pandora's box. Surely state or private litigants will want to use them, even if the federal government hesitates (at first) to do so. This is one of the primary costs of bending the rule of law to "get" a supposedly bad actor. Once bent, the rule of law is not very effective in containing the evil winds that will surely blow.[83]

With this in mind, the most important questions Congress should ask the Administration regarding its damage theory include the following:

- Plaintiffs seeking damages in civil litigation must have a good-faith basis for the amount sought in damages. Since the FDA, other government officials, and every reputable study have confirmed that there is no net economic loss to the government from tobacco-related illness, how can the government bring a claim in good faith?

- If the normal rules of a subrogation suit will not apply, then the collateral source rule that limits set-offs should not apply either. What are the precise elements of economic damage the government will seek to recover, and what set-offs will the government's theory allow? If an aggregate cost theory of damages is proposed, shouldn't the tobacco companies be entitled to prove aggregate savings?

- What are the total Medicare costs and savings associated with smoking, and what portion of them is the result of alleged tobacco company misconduct? How much was tobacco consumption increased by the alleged tobacco company misconduct, and how did that increase affect overall government costs? Can the foregoing be proven by anything other than conjecture, or will the government rely on rhetorical and emotional arguments alone?

- The federal government should not use tax-funded litigators in an unfounded suit or to impose significant costs and force an unfair settlement. To prevent this type of abuse, will the federal government offer to pay the tobacco companies reasonable attorneys' fees if the government brings a lawsuit and loses? Should Congress expressly require such an award of attorneys' fees out of the DOJ's appropriation? If not, why not?

- Congress was unable to agree on any new tobacco taxes as part of the debate on tobacco legislation last year. Why should Congress allow a suit that seeks to substitute litigation before an emotionally charged jury for its own lawmaking power?

- Because the costs of any potential award would be passed on to smokers who are primarily poor or low-income workers, why does the Administration favor this large and regressive form of tax to fund Medicare and related programs? Is the litigation social engineering masquerading as law, or does the Administration really intend this massive wealth transfer from the poor to the rich?

Legislation to End Litigation Abuse

Senator Mitch McConnell (R–KY) recently introduced legislation that would prevent the worst abuses of the "different rules for different defendants" approach to law. The Litigation Fairness Act of 1999 (S. 1269) provides that a state or federal government lawsuit to recover expenses paid on behalf of another person would have to prove the same elements and allow the same defenses as would apply in a suit brought by the person on whose behalf the services were provided or paid. Despite some federalism concerns with regard to its application to the states,[84] S. 1269

83. See Robert Bolt, *A Man for All Seasons* (New York: SBS Scholastic Book Services 1960, 1968 ed.), pp. 37–38. St. Thomas More refused to twist the law to defeat an evil man and save his own life. In Bolt's wonderful account, More is quoted as saying that he would refuse such a tactic, even to defeat the Devil: "And when the last law was down, and the Devil turned on you—where would you hide, Roper, the laws all being flat?… d'you really think you could stand upright in the winds that would blow then?"

would go a long way toward preventing the worst abuses in federal recoupment litigation.

The Litigation Fairness Act and measures like it deserve special attention in Congress because unprincipled recoupment litigation against many industries is being pursued and discussed actively.[85] Unfortunately, even legislation like S. 1269 might not prevent frivolous or politically motivated suits from being filed in the hope that an unfair settlement could be procured. Congress should do even more to stop inappropriate litigation from ever being filed. In the context of a federal lawsuit against the tobacco companies to "recover" nonexistent Medicare expenses, there will be several opportunities for Congress to do just that.

RECOMENDATIONS

To protect the rule of law against unprincipled litigation abuse, and to defend the separation of powers by which Congress makes the essential regulatory and taxing decisions for American industries, lawmakers and judges should take the following actions:

- **Congress should not appropriate any money for a baseless suit or for one that violates principles of fundamental fairness under the common law.** Congress should inform the Administration that no special appropriation will be considered again until the Attorney General submits a detailed legal opinion that includes a legitimate theory of liability and damages and provides satisfactory responses to numerous unanswered questions.
- **Congress should enact an express prohibition against the use of any federal funds to file such a suit** until and unless Congress is satisfied with the answers to the questions raised about the Administration's liability and damage theories.
- **Congress should seriously consider permanent legislation that would prevent abusive government reimbursement lawsuits and provide fair treatment to all defendants.**
- **The federal courts should follow the Supreme Court's instruction and summarily dismiss any federal claim for reimbursement that is not expressly authorized by statute,** and the courts should not hesitate to award attorneys' fees to the defendants for frivolous or bad-faith litigation.

CONCLUSION

Adherence to the rule of law is a defining principle that separates arbitrary and tyrannical government from a constitutional democracy. Despite some recent attacks on the rule of law, it remains a bedrock principle of America that no rogue leader can quickly or easily undermine.

Nevertheless, the rule of law and respect for it are not immune from erosion. Like all liberties, the rule of law must be sustained and defended with constant vigilance. Even small exceptions to the rule of law over time will tend to weaken its protections for everyone. Because the potential federal tobacco litigation would endanger such protections, no one should surrender or compromise in response to demagogic attacks.

Congress and the American people need to keep in mind that the contemplated federal lawsuit is not simply a policy issue with short-term consequences. The President's decision to try to pursue a federal tobacco lawsuit is so wrongheaded on so

84. An argument can be made that congressional action is not authorized under the Constitution's Interstate Commerce Clause, but a counter-argument can be made that subjecting manufacturers to inconsistent and arbitrary legal treatment interferes directly and substantially with interstate commerce. In any event, the bill is predicated on Congress's spending power, which is a more secure basis for congressional authority under current Supreme Court precedents. Further constitutional analysis is beyond the scope of this paper.

85. Besides the unprincipled litigation against the tobacco industry, activists have either begun or discussed similar government suits against gun manufacturers, the paint industry (for lead paint hazards), alcohol manufacturers, chemical manufacturers, HMOs, and several other industries. See previous discussion, *supra.*

many different levels that it can be explained only by a belief that the potential political payoff of demonizing an unpopular industry outweighs the damage to important legal principles.

But the rule of law is equally important no matter how strong the public consensus that the perceived evil should be stopped. As a line attributed to St. Thomas More illustrates, we defend the rule of law not so much for the person asserting its protection but for our own sake.[86]

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86. Bolt, *A Man for All Seasons,* p. 38. (In the passage cited above, More sums up the reasons why he would refuse to twist the law, even to defeat the Devil: "Yes, I'd give the Devil benefit of law, for my own safety's sake.")