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TOBACCO LITIGATION: MEDICAID THIRD PARTY LIABILITY AND CLAIMS FOR RESTITUTION

I. INTRODUCTION

On May 23, 1994, Mississippi Attorney General Mike Moore filed suit against major tobacco manufacturers¹ in an attempt to recover state Medicaid expenditures.² Although previous attempts to impose liability on the tobacco industry had met with failure, Attorney General Moore hoped that by substituting the state as plaintiff, in place of the individual tobacco user, the traditional tobacco industry defense of assumption of the risk, or some variation thereof, might be bypassed.³ Whereas the individual smoker often presents an isolated, unsympathetic figure, the plaintiff state appeals to common economic concerns. Thus, pointing to the costs incurred by Medicaid in treating tobacco related illness and disease, the state asserts an equitable claim for restitution, independent of the tobacco user.⁴ Since the filing of this landmark suit, twenty states have followed with similar actions, and numerous others stand poised to follow suit.⁵ This unprecedented assault on a wholly legitimate industry has potentially wide ranging application. Therefore, a considered and thorough examination of the reasoning underlying this theory of liability is necessary.

II. TOBACCO LITIGATION

Tobacco litigation is often divided into three distinct phases: (1) cases arising from the publicity surrounding early medical reports regarding tobacco's effect on health; (2) cases filed following the success of asbestos litigants in the 1970s; and (3) the current suits alleging an industry wide

1. The major tobacco companies are The American Tobacco Co., Liggett Group, Inc., R.J. Reynolds Tobacco Co., Philip Morris, Inc., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., and United States Tobacco Co. These companies, along with tobacco trade associations, The Council for Tobacco Research—U.S.A. Inc., and The Tobacco Institute, Inc., will be referred to collectively as the "tobacco industry" in this comment.

2. Moore *ex rel.* Mississippi v. American Tobacco Co., No. 94-1429 (Miss. Ch. Ct. Jackson County filed May 23, 1994).

3. Michael C. Moore & Charles J. Mikhail, *The Fight Against Tobacco: A New Attack on Smoking Using an Old-Time Remedy*, 111 DHHS PUB. HEALTH REP. 192, May 1996.

4. *Id.*

5. Arizona, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oklahoma, Texas, Utah, Washington, West Virginia, and Wisconsin have filed Medicaid recovery suits. See *infra* note 72. Other states are in the midst of studying similar actions. See, e.g., *Alaska to Sue Tobacco Giants*, SEATTLE TIMES, Jan. 14, 1997, at B2. But see *AG Decides Not to Sue Tobacco Firms to Recover Medicaid-Related Expenses*, 5 Health Care Policy Rep. (BNA) No. 6, at D-44 (Feb. 10, 1997).

conspiracy to conceal material information.⁶ This comment does not attempt a detailed history of tobacco litigation, but notes significant recent restitution based developments.

A. Preemption

In 1965, Congress passed legislation requiring prominent warnings on all cigarette packages, advertisements, and billboards.⁷ This legislation, commonly known as the Federal Cigarette Labeling and Advertising Act, forced manufacturers to include on packages "conspicuous statements" regarding the adverse effects of tobacco use.⁸ In 1969, Congress again addressed this area when it passed the Public Health Cigarette Smoking Act⁹ amending the existing labeling act and including a preemption clause.

In *Cipollone v. Liggett Group, Inc.*,¹⁰ the Supreme Court held that this clause preempted all state causes of action directed toward smoking and health as they related to the advertising or promotion of cigarettes.¹¹ Thus, the statute specifically preempted actions founded on a failure to warn of the dangers of smoking through advertising or promotion.¹² Conversely, actions premised on state law not related to advertising or promotion of cigarettes, with respect to health, are not preempted by federal law.¹³ Plaintiffs'

6. Jill Hodges, *Tobacco Tenacious in the Courtroom; Industry has Flourished Through Decades of Litigation*, STAR TRIBUNE (Minneapolis & St. Paul), Sept. 15, 1996, at 19A.

7. 15 U.S.C. § 1333 (1996).

8. 15 U.S.C. § 1333(b) (1996). Manufacturers currently use a rotation of four statements, each preceded by the caption "SURGEON GENERAL'S WARNING." Specifically, the warnings advise (1) "Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy," (2) "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health," (3) "Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight," or (4) "Cigarette Smoke Contains Carbon Monoxide." 15 U.S.C. § 1333 (1996).

9. 15 U.S.C. § 1334(b) (1996). "No requirement or prohibition based on smoking and health shall be imposed upon State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.* Conversely, the 1965 Act has been held to preempt only a requirement that additional warnings be placed on cigarette packages. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 519-20 (1992).

10. 505 U.S. 504 (1992).

11. *Id.* at 524.

12. See, e.g., *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 300 (1996) (citing *Cipollone* for the proposition that a plaintiff's claims based on fraudulent concealment or failure to warn after 1969 are preempted by the Federal Cigarette Labeling and Advertising Act); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515 (D. Kan. 1995) (holding post-1969 warning claims are preempted); *Greisenbeck v. American Tobacco Co.*, 897 F. Supp. 815 (D. N.J. 1995) (holding claim of inadequate warning is preempted).

13. *Cipollone*, 505 U.S. at 528-30. The Court held that claims based on breach of

attorneys viewed the multiple opinions¹⁴ generated by the fractured Court as an invitation to frame causes of action in terms unrelated to warnings.¹⁵ Defining the practical parameters of preemption will necessarily involve further litigation.

B. Class Action Litigation

Anti-tobacco forces suffered a setback in *Castano v. American Tobacco Co.*¹⁶ when the Fifth Circuit Court of Appeals rejected an ambitious attempt by plaintiffs to obtain class certification for a class comprised of "all nicotine dependent persons in the United States."¹⁷ Plaintiffs alleged that the defendant tobacco companies knew of nicotine's addictive quality and intentionally used it to hook smokers.¹⁸ The Fifth Circuit found that the district court erred in certifying the class, noting both inadequate analysis as to the effect on potential class members of variations in state laws and unresolved questions as to whether common issues would predominate over individual issues.¹⁹ The court explained that the class "independently fail[ed] the superiority requirement" of the rules.²⁰ Consequently, the court reversed and remanded with instructions to dismiss the complaint.²¹

Most significantly, the court strongly disfavored class action form for mass tort cases based on "novel" and "untested" theories.²² Although the class action may better serve the interests of judicial economy, the course

express warranty, fraudulent misrepresentation of a material fact, or conspiracy to misrepresent facts are not preempted. *Id.* at 526-30. *See also* Mangini v. R.J. Reynolds Tobacco Co., 875 P.2d 73 (Cal. 1994), *cert. denied*, 115 S. Ct. 577 (1994) (holding claim that advertising featuring Joe Camel illegally targeted minors was not preempted under *Cipollone* analysis).

14. Justice Stevens authored the plurality opinion which synthesizes the essential holding of the Court. *Cipollone*, 505 U.S. at 508. Justice Blackmun wrote an opinion concurring in part and concurring in the judgment. *Id.* at 531 (Blackmun, J., concurring). Justice Scalia penned a dissenting opinion. *Id.* at 544 (Scalia, J., dissenting).

15. *See, e.g.*, Cantley v. Lorillard Tobacco Co., 681 So. 2d 1057 (Ala. 1996) (finding a claim for fraudulent suppression of facts related to the risks of smoking preempted, but finding a design defect claim not preempted).

16. 84 F.3d 734 (5th Cir. 1996).

17. *Id.* at 738. This broad group included not only smokers diagnosed as being nicotine-dependent by medical practitioners, but also smokers who were advised that smoking would be injurious to their health by medical practitioners and still continued to smoke. *Id.* at 737 n.1.

18. *Id.* at 737.

19. *Id.* at 740.

20. *Id.* at 746.

21. *Id.* at 752.

22. *Id.* at 737, 747-48.

litigation may take is speculative and imprecise.²³ The court preferred an approach whereby individual litigants would pursue the new theory, develop the relevant common and individual issues, and establish general principles in multiple courts.²⁴ Once this "maturing" process progressed, the propriety of class certification could be ascertained more easily.²⁵

C. Settlement

On March 15, 1996, the Liggett Corporation,²⁶ a major cigarette manufacturer in the United States, entered into a proposed settlement with five states.²⁷ The settlement called for Liggett to provide five million dollars plus a percentage of profits for twenty-five years in return for the states dropping Liggett from their individual suits seeking Medicaid reimbursement costs.²⁸ Prior to this agreement, a unified tobacco industry had steadfastly refused even to discuss settlement. Following the settlement announcement, anti-tobacco forces mobilized in a concerted effort to capitalize on the apparent weakness in tobacco industry solidarity.²⁹ These efforts attempted to put political pressure on state attorneys general to file suits against members of the tobacco industry on the basis of Medicaid restitution.³⁰

23. *Id.* at 747.

24. *Id.* at 748.

25. *Id.* at 747. On November 4, 1996, attorneys in Arkansas filed suit in federal court under the same theory pursued in *Castano* hoping to obtain class certification "on behalf of all Arkansans who have bought and smoked cigarettes" manufactured by the tobacco industry defendants. Patricia Manson, *Smokers Sue, Say Scheme Got Them Hooked*, ARK. DEMOCRAT-GAZETTE, Nov. 5, 1996, at 1B. Additional private suits have been filed in Louisiana, New York, California, Maryland, New Mexico, and Washington D.C. *Id.*

26. Liggett Corp. is controlled by Liggett Group Inc., which is a subsidiary of Brooke Group Inc. *Liggett Settles Suits By Five States Seeking Medicaid Costs Reimbursement*, 7 Medicare Rep. (BNA) No. 11, at D-37 (Mar. 22, 1996). Bennett S. LeBow serves as Chairman, as well as Chief Executive Officer, of the Brooke Group. *Id.* LeBow has been orchestrating an attempted takeover of R.J. Reynolds. *Id.*

27. These states are Florida, Louisiana, Massachusetts, Mississippi, and West Virginia. *Id.*

28. Specifically, the agreement calls for the states to share a million dollar payment up front, followed by another four million dollars payable over the next ten years. Additionally, the states will share in a percentage of Liggett's pretax income for the following twenty-five years. Depending upon how many states join the settlement, the percentage will range from 2.5% to 7.5%. *Id.*

29. *States Rush to File Medicaid Tobacco Suits*, 4 WASH. HEALTH WEEK (Atlantic Information Services, Inc.) No. 20 (June 3, 1996). Keeping in mind that the first of these Medicaid suits was filed nearly two years prior to this settlement and that only a handful of states had filed prior to the settlement, within roughly six months following the settlement another eleven states filed suit. Significantly this was also the period immediately following the *Castano* decision.

30. *Id.* In West Virginia, where Governor Gaston Caperton originally opposed the

Liggett has maintained its renegade posture by negotiating for a possible deal wherein Liggett is dropped as a defendant in return for turning over previously unreleased internal documents.³¹

III. MEDICAID REIMBURSEMENT LEGISLATION

Noting the failure of private plaintiffs in obtaining class certification, and recalling the Liggett settlement, anti-tobacco organizers turned their attention to the state as a plaintiff. By virtue of administering Medicaid,³² states are able to assert an interest in tobacco litigation. Specifically, states claim they are forced to bear the cost of tobacco related health care for indigents.³³ Thus, the state asserts a claim not simply derived from subrogation, but based on an equitable claim for restitution distinct from injury suffered by the individual.³⁴

A. Federal Statutory Authority

In enacting Medicaid, Congress provided that the participating states must include in their administration plan a procedure for recovering funds from third parties liable for the injuries of Medicaid recipients.³⁵ This "restitutionary" principle is not subject to the states' discretion. The comprehensive scheme adopted by the participating state must include proper recovery procedures.³⁶

Medicaid suit filed by Attorney General Darrell McGraw, a \$200,000 check representing the first payment to the state from Liggett pursuant to the settlement quickly brought about the Governor's full support. *Caperton Joins Effort to Recoup Medicaid Funds From Tobacco Firms*, 4 Health Care Policy Rep. (BNA) No. 17, at D-35 (April 22, 1996).

31. Michael Grunwald, *Cigarette Firm Offering Documents; Liggett Act Could Shake Industry*, BOSTON GLOBE, Jan. 10, 1997, at F1.

32. The Supreme Court described Medicaid as a cooperative federal-state program designed to facilitate the provision of medical care to indigents. *Wilder v. Virginia Hosp. Assoc.*, 496 U.S. 498, 502 (1990).

33. Moore & Mikhail, *supra* note 3.

34. Moore & Mikhail, *supra* note 3.

35. 42 U.S.C. § 1396a(a)(25) (1996). The state plan must take all "reasonable measures to ascertain the legal liability of third parties." *Id.*

[I]n any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the cost of such recovery, the State . . . will seek reimbursement for such assistance to the extent of such legal liability

42 U.S.C. § 1396a(a)(25)(B) (1996).

36. 42 U.S.C. § 1396a(a)(25) (1996). *See also* HCFA State Fiscal Administration Rule, 42 C.F.R. § 433.138 (1996).

This recovery provision does not create a new federal right, but is dependent on the substantive state law of the jurisdiction in which recovery is sought.³⁷ If a state does not recognize a particular theory of liability, the Medicaid statute does not compel the creation of such a right.³⁸ However, where an action is available under state law, the state is required to pursue such action against the liable third party.³⁹ The states are free to fashion more stringent remedies internally.

B. State Statutory Authority

Both Florida and Massachusetts passed third party Medicaid liability acts of their own in 1994.⁴⁰ Each act sought to increase the ability of the state to recover from tobacco companies.⁴¹ Florida's statute, which increased potential liability for third parties by extraordinary measures, was directly attacked by the tobacco industry.⁴² As Massachusetts's act was not so far-reaching, the tobacco industry did not challenge the act directly, but mounted more subtle attacks during proceedings regarding the removal of Massachusetts's suit to federal court.⁴³

1. *Florida's Medicaid Third Party Liability Act*

Florida's legislature statutorily eliminated affirmative defenses for "liable third parties,"⁴⁴ including assumption of the risk and comparative negligence,⁴⁵ applied the concept of joint and several liability to any

37. *Massachusetts v. Philip Morris Inc.*, 942 F. Supp. 690, 694 (D. Mass. 1996).

38. *Id.*

39. *Id.*

40. Florida Medicaid Third-Party Liability Act, FLA. STAT. ANN. § 409.910 (West 1996); Massachusetts Third-Party Liability Act, MASS. GEN. LAWS ANN. ch. 118E, § 22 (West 1996) and 1994 Mass. Acts, ch. 60, § 276.

41. Although neither act on its face is limited to tobacco, Massachusetts specifically authorizes action "against any liable third party who is a manufacturer of cigarettes" 1994 Mass. Acts, ch. 60, § 276. Florida Governor Lawton Chiles issued an executive order limiting active enforcement of the third party liability act solely to the tobacco industry. Fla. Exec. Order No. 95-105 (Mar. 28, 1995).

42. *Agency for Health Care Admin. v. Associated Indus.*, 678 So. 2d 1239 (Fla. 1996), *petition for cert. filed*, 65 U.S.L.W. 3433 (Dec. 5, 1996).

43. *Philip Morris Inc.*, 942 F. Supp. at 691-92.

44. Exactly who fits the definition of "liable third party" is unclear. Whether this indicates that a third party must be found liable outside of the Medicaid Third Party Liability Act, or whether this refers to a party found liable after application of the Act presents a problem of statutory interpretation. See Richard N. Pearson, *The Florida Medicaid Third-Party Liability Act*, 46 FLA. L. REV. 609, 613 (1994).

45. FLA. STAT. ANN. § 409.910(1) (West 1996). "Principles of common law and equity as to . . . comparative negligence, assumption of risk, and all other affirmative defenses

recovery,⁴⁶ eliminated the need to identify individual recipients in large claims,⁴⁷ allowed the market share theory of liability,⁴⁸ eliminated the defense of statute of repose,⁴⁹ permitted the use of statistics to prove causation and damages,⁵⁰ and permitted treble damages in cases of criminal violations.⁵¹ The act explicitly states that in addition to automatic subrogation to the rights of the Medicaid recipient, the Agency for Health Care Administration⁵² has a recovery cause of action independent of any rights of the Medicaid patient.⁵³ The act immediately raises due process and equal protection questions when applied.⁵⁴ Concerned over the breadth of this legislation, Associated Industries of Florida, Inc. immediately filed suit challenging the constitutionality of the legislation and eventually came before the Florida Supreme Court.⁵⁵

The court concluded that the abrogation of affirmative defenses was constitutional on its face, while expressly reserving judgment on whether such abrogation would survive a challenge as applied.⁵⁶ The court then struck down the portion of the act allowing the state to proceed without identifying individual Medicaid recipients, finding that it created an untenable violation of procedural due process by statutorily mandating a presumption that Medicaid payments were properly made, without affording defendants an opportunity to rebut this presumption.⁵⁷ Finally, the court upheld the state's proceeding under joint and several liability or under market share liability, but prohibited proceeding under both, declaring the two "fundamentally incompatible."⁵⁸

normally available to a liable party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources;" *Id.*

46. *Id.*

47. *Id.* § 409.910(9)(a).

48. *Id.* § 409.910(9)(b).

49. *Id.* § 409.910(12)(h).

50. *Id.* § 409.910(9).

51. *Id.* § 409.910(19).

52. The Agency for Health Care Administration is an independent agency located within Florida's Department of Professional Regulation and charged with the regulation of health care activities in the state. *Associated Indus.*, 678 So. 2d at 1243.

53. FLA. STAT. ANN. § 409.910(6) (West 1996).

54. For an excellent discussion illustrating the absurd results possible under this act, see William W. Van Alstyne, *Denying Due Process in the Florida Courts: A Commentary on the 1994 Medicaid Third-Party Liability Act of Florida*, 46 FLA. L. REV. 563 (1994).

55. *Associated Indus.*, 678 So. 2d at 1239.

56. *Id.* at 1243.

57. *Id.* at 1255-56.

58. *Id.* at 1556-57.

As a result of the *Associated Industries* ruling, the state must identify individual recipients of Medicaid, and consequently show causation.⁵⁹ Following the decision, the state filed an amended complaint against the tobacco industry.⁶⁰ On September 16, 1996, Judge Harold Cohen of the Palm Beach County Circuit Court dismissed fifteen of eighteen claims by the state, leaving only post-1994 claims for negligence and products liability, along with a claim for injunctive relief.⁶¹ Judge Cohen reasoned that the 1994 amendments to the state third party liability act allowed the state to pursue an independent action and that claims such as these could not be brought for events prior to the amendment.⁶² The state is still able to seek restitution for pre-1994 claims pursuant to traditional theories of subrogation.⁶³ The order also required the state to identify, within thirty days, each individual Medicaid recipient for whom the state seeks recovery of benefits.⁶⁴ The effect of this order was limited, however, when Judge Cohen subsequently ruled that the identification numbers of the Medicaid patients satisfied the state's discovery burden.⁶⁵ By allowing the state to proceed without naming the individual Medicaid patients, the court limited tobacco companies' ability to depose individuals or otherwise attempt to discover relevant medical information.

2. *Massachusetts' Medicaid Third Party Liability Act*

Massachusetts's third party recovery act is much less detailed and much less radical than the one passed by Florida. While the state is expressly given a "separate and independent cause of action" against "manufacturers of cigarettes," as well as a subrogation right, no special provisions eliminate traditional defenses.⁶⁶ Although the tobacco industry may be able to launch an equal protection attack against the act's singular specification of cigarette

59. The Florida Supreme Court rejected Associated Industries's request for a rehearing as to the constitutionality of the abrogation of affirmative defenses in an order entered Sept. 6, 1996. *Florida Supreme Court Denies Rehearing on State's Medicaid Law*, 10 Mealey's Litig. Rep.: Tobacco No. 10 (Sept. 19, 1996).

60. Complaint, *Florida v. American Tobacco Co.*, No. CL 95-1466-AO (Fla. Cir. Ct. Palm Beach County filed Aug. 7, 1996).

61. *Many Pre-1994 Claims Dismissed From Florida's Medicaid Recovery Case*, 10 Mealey's Litig. Rep.: Tobacco No. 10 (Sept. 19, 1996).

62. *Id.*

63. *Id.*

64. *Id.*

65. *State Can Submit Patient ID Numbers in Medicaid Reimbursement Suit, Court Says*, 4 Health Care Policy Rep. (BNA) No. 43, at D-28 (Oct. 28, 1996).

66. MASS. GEN. LAWS ANN. ch. 118E, § 22 (West 1996) and 1994 Mass. Acts, ch. 60, § 276.

manufacturers, this subject was not addressed by the Massachusetts federal district court in a memorandum opinion remanding the case back to state court.⁶⁷

IV. MEDICAID REIMBURSEMENT ACTIONS

Since May 23, 1994,⁶⁸ when Mississippi filed the first state claim attempting to recover from the tobacco industry based on Medicaid expenditures, numerous other states followed suit.⁶⁹ County officials filed similar claims in Cuyahoga County, Ohio, and Los Angeles County, California, while city officials filed suit in New York City.⁷⁰ Even the Health Minister of British Columbia announced plans to file a comparable suit in Canada.⁷¹ Most of these suits have been filed in state circuit courts,⁷²

67. *Philip Morris Inc.*, 942 F. Supp. at 690.

68. *Moore ex rel. Mississippi v. American Tobacco Co.*, No. 94-1429 (Miss. Ch. Ct. Jackson County filed May 23, 1994).

69. Other states to file Medicaid recovery suits include Arizona, Connecticut, Florida, Kansas, Louisiana, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oklahoma, Texas, Utah, Washington, West Virginia, and Wisconsin.

70. *New York City v. Tobacco Institute Inc.*, No. 406225/96 (N.Y. Sup. Ct. filed Oct. 17, 1996).

71. *Canadian Province Plans to Sue Tobacco Companies*, REUTER BUS. REP., Sept. 25, 1996, available in LEXIS, Nexis Library, CURNWS file.

72. *Arizona v. American Tobacco Inc.*, No. CV96-14769 (Ariz. Super. Ct., Maricopa County filed Aug. 20, 1996); *Connecticut v. Philip Morris Co.*, (Ct. Super. Ct., Stamford County filed July 18, 1996); *Florida v. American Tobacco Co.*, No. CL 95-1466-AO (Fla. Cir. Ct., Palm Beach County filed Feb. 21, 1995); *Indiana v. Philip Morris, Inc.*, (Indiana Sup. Ct., Marion County filed Feb. 19, 1997); *Iowa v. R.J. Reynolds Tobacco Co.*, (Iowa Dist. Ct., Polk County filed Nov. 27, 1996); *Kansas v. R.J. Reynolds Tobacco Co.*, No. 96-CV-919 (Kan. Dist. Ct., Shawnee County filed Aug. 20, 1996); *Louisiana v. American Tobacco Co.*, No. 96-1209 (La. Dist. Ct., Calcasieu Parish filed Mar. 13, 1996); *Maryland v. Philip Morris, Inc.*, No. 96-122017/CL211487 (Md. Cir. Ct., Baltimore City filed May 1, 1996); *Massachusetts v. Philip Morris, Inc.*, No. 95-7378 (Mass. Super. Ct., Middlesex County filed Dec. 19, 1995); *Michigan v. Philip Morris, Inc.*, No. 96-84281-CZ (Mich. Cir. Ct., Ingham County filed Aug. 21, 1996); *Minnesota v. Philip Morris, Inc.*, No. C1-94-8565 (Minn. Dist. Ct., Ramsey County filed Aug. 17, 1994); *New York v. Philip Morris, Inc.*, No. 400361/97 (N.Y. Sup. Ct., New York County filed Jan. 27, 1997); *Oklahoma v. R.J. Reynolds Tobacco Co.*, No. CJ-96-1499-4 (Okla. Dist. Ct., Cleveland County filed Aug. 22, 1996); *Washington v. American Tobacco Co.*, No. 96-2-15056-8SEA (Wash. Super. Ct., King County filed June 5, 1996); *West Virginia v. American Tobacco Co.*, No. 94-1707 (W.Va. Cir. Ct., Kanawha County filed Sept. 20, 1994); *Wisconsin v. Philip Morris, Inc.*, No. 97-CV-328 (Wis. Cir. Ct., Dane County filed Feb. 5, 1997).

however, Mississippi and New Jersey filed in their respective chancery courts.⁷³ Only Texas and Utah brought suit in federal court.⁷⁴

A. Theories

Although individual complaints vary from state to state, the underlying theory of recovery is largely the same: plaintiffs accuse the tobacco industry of conspiring to conceal the addictive nature of nicotine, and causing increased smoking and extensive smoking related illness and disease.⁷⁵ The state then bears the cost of treating these smoking related health problems through the administration of Medicaid, leading to the unjust enrichment of tobacco companies.⁷⁶

Most of the complaints allege the following basic causes of action: conspiracy, fraud or fraudulent misrepresentation, breach of warranty, negligent undertaking of a voluntary duty, and most significantly, restitution and unjust enrichment. Some states include allegations of design defect,⁷⁷ nuisance,⁷⁸ and violation of state consumer protection laws.⁷⁹ Texas and Utah have each filed RICO claims. Many of the states seek punitive damages, along with compensatory damages and equitable remedies aimed at preventing the sale of cigarettes to minors.⁸⁰ While legal theories account for a significant portion of the litigation, equitable theories of recovery are the driving force behind the suits.⁸¹

73. Moore *ex. rel.* Mississippi v. American Tobacco Co., No. 94-1429 (Miss. Ch. Ct., Jackson County filed May 23, 1994); New Jersey v. R.J. Reynolds Tobacco Co., (N.J. Super. Ct. Ch. Div., Middlesex County filed Sept. 10, 1996).

74. Utah v. R.J. Reynolds Tobacco Co., No. 2:96CV-0829W (D. Utah filed Sept. 30, 1996); Texas v. American Tobacco Co., No. 5:96CV91 (E.D. Tex. filed Mar. 28, 1996).

75. Amended Complaint, ¶ 1, Florida v. American Tobacco Co., No. CL 95-1466-AO (Fla. Cir. Ct. Palm Beach County filed Aug. 7, 1996).

76. *Id.*

77. Mississippi, Texas, Oklahoma, Utah, and Florida. See *supra* notes 72-74.

78. Mississippi, West Virginia, Utah, Oklahoma, and Iowa. See *supra* notes 72-74.

79. West Virginia, Utah, Michigan, Oklahoma, Washington, and Iowa.

80. Requests for injunctive relief range from requiring the tobacco industry to fund smoking cessation programs to administering educational programs designed to prevent minors from using tobacco. See, e.g., Amended Complaint, ¶ 208, American Tobacco Co., No. CL 95-1466-AO (Fla. Cir. Ct. Palm Beach County filed Aug. 7, 1996).

81. Moore & Mikhail, *supra* note 3. Mississippi Attorney General Moore suggests "the states were left without a . . . remedy at law. . . . The situation demanded that the states resort to equitable theories of recovery." Moore & Mikhail, *supra* note 3.

1. *Unjust Enrichment*

The common thread among all these actions is the idea of unjust enrichment, a theory defined, somewhat circularly, as the "[g]eneral principle that one person should not be permitted unjustly to enrich himself at expense of another"⁸² The remedy for unjust enrichment is restitution.⁸³ In tobacco cases, the states argue that the tobacco industry received enormous profits by selling tobacco to individual users who subsequently developed serious health problems created by the tobacco. The states then indirectly conferred a benefit upon the tobacco industry by paying the tobacco users' health care costs through Medicaid, an expense that should have been borne by the tobacco industry.⁸⁴ Thus, the states argue, they are due restitution.

2. *Conspiracy*

An additional front of attack waged by the states focuses on an alleged conspiracy within the tobacco industry to keep secret, for over forty years, information regarding the dangers of tobacco use.⁸⁵ This conspiracy allegedly extended to a sinister scheme to manipulate the levels of nicotine in cigarettes in order to control addiction.⁸⁶ Tobacco industry lawyers purportedly stymied development of "safe cigarettes" in order to avoid the inference that existing products were marketed despite knowledge of the health risks.⁸⁷ Plaintiffs in the Minnesota suit assert internal tobacco industry papers were destroyed.⁸⁸ These papers allegedly illustrated a knowledge of the dangers of tobacco use.⁸⁹

The conspiracy theory provides a mechanism by which the states hope to avoid preemption. The allegations of conspiracy to conceal knowledge of nicotine's addictive nature are not directly aimed at the quality of warnings on tobacco products. Thus, they are not preempted by federal law under the *Cipollone* analysis.⁹⁰

82. BLACK'S LAW DICTIONARY 1535 (6th ed. 1990).

83. RESTATEMENT OF RESTITUTION § 1 (1937).

84. Moore & Mikhail, *supra* note 3.

85. Henry Weinstein & Jack Nelson, *Untested Theory Becoming Tobacco Firms' Top Threat*, L.A. TIMES, Aug. 4, 1996, at A1.

86. *Id.*

87. *Id.*

88. *Philip Morris Documents Missing*, UPI, Sept. 18, 1996, available in LEXIS, Nexis Library, UPI File.

89. *Id.*

90. See *supra* note 13 and related discussion.

3. *Fraud*

The claim of fraud is related to the conspiracy charge. The basic elements of fraud common to most jurisdictions are a false statement of material fact, knowledge that the statement is false, intent to induce reliance on the statement, and reliance on the statement resulting in injury.⁹¹ The fraud charge focuses on data published by the tobacco industry which allegedly misstated facts known within the industry regarding nicotine's addictive nature.

4. *Negligent Undertaking of a Voluntary Duty*

The states further assert that the tobacco industry, in response to emerging information about the health risks involved with smoking, issued public pronouncements indicating the tobacco industry's undertaking of a duty to research and report on the health effects of smoking.⁹² When a person voluntarily undertakes to render services necessary for the protection of another person, the assumed duty must be performed with due care.⁹³ Allegedly, the tobacco industry promulgated false reports, stifled publication of research detrimental to tobacco interests, and suppressed development of a safer cigarette.⁹⁴

5. *Other Theories*

Some states have opted to pursue additional claims based on unreasonably dangerous design, public nuisance, or violation of state consumer protection laws. Unreasonably dangerous design claims face the task of overcoming *comment i* to section 402A of the *Restatement (Second) of*

91. *Lance v. Wade*, 457 So. 2d 1008, 1011 (Fla. 1984). See also, *Kassab v. Michigan Basic Property Ins. Assoc.*, 491 N.W.2d 545, 548 (Mich. 1992); *Allen v. Mac Tools, Inc.*, 671 So. 2d 636, 642 (Miss. 1996); *New York v. Dean*, 540 N.E.2d 707, 709 (N.Y. 1989).

92. Amended Complaint, ¶¶ 173-79. *Florida v. American Tobacco Co.*, No. CL-95-1466-AO (Fla. Cir. Ct., Palm Beach County filed Aug. 7, 1996).

93. RESTATEMENT (SECOND) OF TORTS § 323 (1965). See, e.g., *Silva v. Hodge*, 583 So. 2d 231, 235 (Ala. 1991) (upholding finding of a voluntary undertaking to inspect an injury-producing hazard); *Lloyd v. State Farm Mutual Ins. Co.*, 860 P.2d 1300, 1303 (Ariz. Ct. App. 1992).

94. Amended Complaint, ¶¶ 63-75, *Florida v. American Tobacco Co.*, No. CL-95-1466-AO (Fla. Cir. Ct., Palm Beach County filed Aug. 7, 1996).

Torts,⁹⁵ which specifically removes tobacco from its coverage.⁹⁶ The *Restatement (Second) of Torts* defines public nuisance as “an unreasonable interference with a right common to the general public.”⁹⁷ Plaintiffs maintain the introduction of a dangerous product into the marketplace constitutes a public nuisance. State consumer protection laws, which vary according to jurisdiction, are statutory creations designed to protect consumers at large.

B. Tactics & Procedure

1. *Discovery*

Success in the Medicaid recovery actions ultimately may depend in large part on the limits placed on discovery. Tobacco companies will attempt to force the states to identify each Medicaid recipient for whom the state claims restitution.⁹⁸ Defendants intend to use this information, along with deposition testimony from the recipients, to controvert the question of causation, that is, whether the state can prove tobacco caused the health problems for which the recipient was treated.⁹⁹ The states hope to restrict this type of discovery in order to avoid the lengthy delays and exponential increases in costs associated with such a massive project. Early indications from Minnesota and Mississippi indicate the courts will allow limited deposition discovery.¹⁰⁰

Notwithstanding these limitations on the defense, Minnesota has successfully obtained over ten million pages of industry papers during discovery.¹⁰¹ Plaintiffs are seeking access to internal industry documents in an attempt to uncover the “smoking gun,” thus proving industry insiders

95. Section 402A creates strict liability for “one who sells any product in a defective condition unreasonably dangerous to the user or consumer” RESTATEMENT (SECOND) OF TORTS § 402A (1965).

96. *Comment i* specifically states “[g]ood tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful” RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

97. *Id.* § 821B.

98. *See Discovery Battle Still Rages In Mississippi's Medicaid Reimbursement Case*, 10 Mealey's Litig. Rep.: Tobacco No. 11 (Oct. 3, 1996).

99. In Florida, the district court refused to allow the tobacco industry's discovery request, finding that investigation and/or deposition of named Medicaid patients was not necessary under the Florida Third Party Liability Act. *State Can Submit Patient ID Numbers in Medicaid Reimbursement Suit, Court Says*, *supra* note 65.

100. Weinstein & Nelson, *supra* note 85. These courts issued orders allowing the industry to take depositions from only twenty Medicaid recipients. Weinstein & Nelson, *supra* note 85.

101. Weinstein & Nelson, *supra* note 85.

conspired to conceal nicotine's addictive quality and manipulated nicotine levels in order to promote addiction.¹⁰²

2. Procedure

The tobacco industry unsuccessfully attempted to remove some of the cases from state court to federal court.¹⁰³ The defendants argued that the federal legislative requirement of a recovery provision against liable parties brought the cases under federal question jurisdiction.¹⁰⁴ Tobacco companies further argued that because the federal government would receive its share of Medicaid payments from any successful state recovery, the federal government was an "unnamed plaintiff with a real interest in the suit."¹⁰⁵ Courts rejected both arguments, finding the states were proceeding under state law and were not acting as agents of, or suing on behalf of, the federal government.¹⁰⁶

In some states the tobacco industry filed a preemptive suit seeking an injunction against the filing of a restitution suit by the state.¹⁰⁷ The preemptive strike by the industry in Connecticut federal court claimed the Medicaid suit was unduly burdensome on interstate commerce, violative of due process and equal protection guarantees, and inconsistent with the Supremacy Clause of the Constitution due to preemption.¹⁰⁸ Courts have uniformly rejected this tactic and refused to enjoin the Medicaid suits.¹⁰⁹ Connecticut District Court Judge Peter Dorsey applied the *Younger*¹¹⁰ abstention analysis¹¹¹ when he dismissed the preemptive suit filed against

102. See *Discovery Battle Still Rages In Mississippi's Medicaid Reimbursement Case*, 10 Mealey's Litig. Rep.: Tobacco No. 11 (Oct. 3, 1996).

103. Federal courts in Connecticut, Louisiana, Maryland, Massachusetts, and Mississippi have remanded suits back to state courts. *Louisiana Medicaid Suit Remanded to State Court*, 10 Mealey's Litig. Rep.: Tobacco No. 7 (Aug. 1, 1996).

104. *Massachusetts v. Philip Morris Inc.*, 942 F. Supp. 690, 692 (D. Mass. 1996).

105. *Id.*

106. *Id.* at 696. See also *Connecticut Medicaid Case Remanded Back to State Court*, 10 Mealey's Litig. Rep.: Tobacco No. 13 (Nov. 1, 1996).

107. See, e.g., *Philip Morris Inc. v. Blumenthal*, No. 396CV01121 (D. Conn. filed June 28, 1996); *Philip Morris Inc. v. Harshbarger*, No. 95-12574-GAO (D. Mass. filed Nov. 28, 1995); *Philip Morris, Inc. v. Morales*, No. 95-14807 (Tex. Dist. Ct., Travis County filed Nov. 28, 1995). Maryland, New Jersey, Utah, and Hawaii were also targeted for preemptive strikes. Andrew Blum, *Tobacco Industry Tries Pre-emptive Lawsuits*, NAT'L L.J., Sept. 23, 1996, at A6.

108. Complaint, ¶ 23, *Philip Morris Inc. v. Blumenthal*, No. 396CV01121 (D. Conn. filed June 28, 1996).

109. Andrew Blum, *Tobacco Industry Tries Pre-emptive Lawsuits*, NAT'L L.J., Sept. 23, 1996, at A6.

110. *Younger v. Harris*, 401 U.S. 37 (1971).

111. Steven Fromm, *Tobacco Takes A Hit*, CONN. L. TRIB., Jan. 6, 1997, at 1. Judge

Attorney General Blumenthal, finding an important state interest was at issue.

3. *Parties*

Although most of the defendants are the same in each case,¹¹² the plaintiffs differ in two notable respects. In Minnesota, in addition to the state, Blue Cross and Blue Shield of Minnesota, a private entity, is a named plaintiff.¹¹³ Following a challenge to Blue Cross and Blue Shield's standing to sue in *Minnesota v. Philip Morris Inc.*,¹¹⁴ the Minnesota Supreme Court found Blue Cross lacked standing to claim negligent undertaking of a voluntary duty.¹¹⁵ Conversely, the court found Blue Cross had standing to pursue claims arising under the state consumer protection and antitrust statutes.¹¹⁶ The legislature was empowered to expand the breadth of potential proper parties for the statutory causes of action; however, the tort claim required more direct damages.¹¹⁷

A second difference in plaintiffs involves the office responsible for bringing the state's suit. In Mississippi, Governor Kirk Fordice filed suit to prevent Attorney General Mike Moore from continuing to pursue the Medicaid suit.¹¹⁸ The Governor asserted that the Attorney General lacked authority to act for the state in contravention of the Governor's expressed policy as the state's chief executive officer.¹¹⁹ A similar conflict exists in Arizona between the Governor and Attorney General.¹²⁰

Dorsey determined an important state interest, Connecticut's fair trade act, was at issue and the defendants had a fair opportunity for review of constitutional matters in the state court. Although no state proceeding was underway when Philip Morris filed this suit, Judge Dorsey determined that the *Younger* abstention doctrine was applicable due to the preemptive nature of the filing. *Id.*

112. Defendant manufacturers include The American Tobacco Co., Liggett Group, Inc., R.J. Reynolds Tobacco Co., Philip Morris, Inc., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., and United States Tobacco Co. Other defendants include the tobacco trade associations, The Council for Tobacco Research—U.S.A. Inc., and The Tobacco Institute, Inc., as well as the public relations firm Hill & Knowlton, Inc.

113. Blue Cross and Blue Shield of Minnesota is a private non-profit Minnesota corporation which "occupies a different niche . . . than that of indemnity or insurance companies" due to a Minnesota statute allowing the creation of non-profit health service plan corporations. *Minnesota v. Philip Morris Inc.*, 551 N.W.2d 490, 495 (Minn. 1996).

114. 551 N.W.2d 490 (Minn. 1996).

115. *Id.* at 495.

116. *Id.*

117. *Id.*

118. Complaint, *Fordice v. Moore*, No. 96-M-114 (Miss. filed Feb. 17, 1996).

119. *Id.* at ¶ 47.

120. *Arizona AG Expands Suit Despite Governor's Push to Have It Dropped*, 10 Mealey's Litig. Rep.: Tobacco No. 14 (Nov. 14, 1996). Although political wrangling clearly

V. ARGUMENTS

Plaintiffs center this wave of tobacco suits around two major premises: first, the state is an innocent plaintiff to which the personal responsibility defense cannot attach; second, proof has surfaced that the tobacco industry knew of the addictive nature of nicotine, failed to disclose this information, and manipulated the nicotine level to influence tobacco users' behavior.¹²¹ The first premise is the foundation of the economic argument advanced by the states in their equitable claims, while the second premise supports the legal claims made by the states.

States claim standing through their status as Medicaid providers, asserting economic injuries caused by the tobacco industry's conduct.¹²² The Centers for Disease Control and Prevention (CDC) estimate that public programs, including Medicaid, paid for 43.3% of smoking caused expenses, roughly ten billion dollars in 1987.¹²³ A study conducted by the Center on Addiction and Substance Abuse (CASA) at Columbia University found that Medicaid spent three billion dollars in 1994 on inpatient hospital care attributable to tobacco use.¹²⁴

Plaintiffs also contend that the tobacco industry discovered the health risks and the dangers of nicotine addiction yet failed to alert the public.

accounts for the animosity between the Democratic Attorney General in Mississippi and the Republican Governor, both officers in Arizona are Republicans.

121. See, e.g., Jill Hodges, *Tobacco Tenacious in the Courtroom; Industry has Flourished Through Decades of Litigation*, STAR TRIBUNE (Minneapolis-St. Paul), Sept. 15, 1996, at 19A.

122. Not all the states have set a figure for damages, although those that have are asking for tremendous sums. New Jersey claims \$1.1 billion in annual costs for tobacco related health care. Don Plummer, *Billions at Stake as Lawsuits Force Showdown on Smoking*, ATLANTA J. & CONST., Sept. 15, 1996, at 5D. Arizona will seek \$500 million for past and future expenses. *Arizona to Seek Industry Compensation for Smoking-Related Health Care Costs*, 5 Health Law Rep. (BNA) 26, at D-10 (June 27, 1996); Connecticut will seek \$1 billion. Thomas Scheffey & Steven Fromm, *The Billion Dollar Gambit*, CONN. L. TRIB., July 22, 1996, at 1; Maryland will seek \$3 billion in compensatory damages and an additional \$10 billion in punitive damages. *Maryland Sues Tobacco Industry, Connecticut Announces Similar Plans*, 7 Medicare Rep. (BNA) 19, at D-30, (May 10, 1996); Texas will seek \$4 billion. *Texas Suit Against Tobacco Industry Seeks to Recover \$4 Billion in Costs*, 7 Medicare Rep. (BNA) 14, at D-41 (April 5, 1996); Michigan seeks \$2 billion in restitution, \$2 billion in anticipated future costs, and \$10 billion punitive damages. *Michigan Attorney General Files \$14 Billion Lawsuit Against Tobacco Companies*, PR Newswire (Aug. 21, 1996).

123. *States Rush to File Medicaid Tobacco Suits*, 20 WASH. HEALTH WEEK (Atlantic Information Services, Inc.) No. 4 (Jun. 3, 1996).

124. *Nicotine and Cigarettes: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 103d Cong., 2d Sess. (1994) (statement of Joseph A. Califano, Jr., Chairman and President of the Center on Addiction and Substance Abuse at Columbia University).

Plaintiffs point to industry memoranda which supposedly uncover the industry executives' awareness of the health risks and the conscious decision to develop a public relations disinformation policy.¹²⁵ Proof of such a conspiracy opens the door for the varied common law and statutory claims made by the states. While these legal claims depend on the ability of the plaintiffs to prove a conspiracy, the equitable claims face a more political battle.

A. Economic Arguments

Plaintiffs' equitable claims are based on economics; however, the defense prefers to concentrate on the issue of personal responsibility. Although the risks of tobacco use have been widely publicized for thirty years, tobacco users continue to indulge. Individuals bear the responsibility for their own actions and should retain the freedom to exercise their own discretion as to activities with potential health risks. Thus, tobacco users cause injury to the states, not tobacco manufacturers.

Tobacco industry defense attorneys answer the plaintiffs' economic arguments by citing the studies of economists who claim the tobacco industry more than pays for health care costs through higher excise taxes.¹²⁶ One commonly cited study was conducted by W. Kip Viscusi, a Duke University economist ("the Viscusi study").¹²⁷ The Viscusi study considered the higher medical costs incurred by smokers, higher insurance premiums, lost work time, and lost tax revenues due to smokers' earlier deaths. He then balanced these costs against the savings realized in nursing home, pension, and social security costs because of smokers' premature deaths.¹²⁸ According to Viscusi, the savings outweighed the costs by five cents per pack of cigarettes, and once excise taxes were considered, the difference increased nearly six times.¹²⁹ Clearly, arguments based on benefits accrued through death are better left to economic theorists than to juries. However, in an argument based solely on economics, such as a suit in restitution, the cold figures are directly relevant. Using figures of the Office of Technology

125. Moore & Mikhail, *supra* note 3.

126. Laura Mansnerus, *A Ghoulish Argument*, MEMPHIS COM. APPEAL, May 19, 1996, at 5B.

127. W. Kip Viscusi, CIGARETTE TAXATION AND THE SOCIAL CONSEQUENCES OF SMOKING (1994), Working Paper Series of Nat'l Bureau of Economic Research, Inc.

128. Smokers, who tend to die earlier than non-smokers, do not draw as much from social security, Medicare, and pension programs, yet they pay the same amounts into such programs. Jonathan Marshall, *Smokers Paying Their Way*, S.F. CHRON., Aug. 29, 1994, at D1.

129. Mansnerus, *supra* note 126, citing Viscusi, *supra* note 127.

Assessment (OTA) which estimate 1990 government spending totaled 8.9 billion dollars on costs directly associated with smoking, the tobacco industry points to the 13.3 billion dollars in excise taxes collected on cigarettes to support their theory that state tobacco revenues exceed state health expenditures.¹³⁰

Plaintiffs assert that courts should not consider an "offset" based on excise tax revenues, and, in Mississippi, have moved to disallow evidence of the economic impact of smoking.¹³¹ The states insist taxes are general revenues not subject to apportionment to health care cost, besides which the taxes are paid by consumers, not the industries.¹³²

A secondary economic defense is the contribution the tobacco industry makes to the national and local economies as an employer, taxpayer, exporter, and investment option. American tobacco growers produce roughly one billion pounds of tobacco annually, worth an estimated forty seven billion retail dollars, and contribute thirteen billion dollars in federal, state, and local excise taxes.¹³³ The economic impact of the tobacco industry is widespread, affecting a diverse range of parties, from small farmers to Wall Street investors.¹³⁴

Another question the states must answer is why, if tobacco is the evil the states claim, tobacco is not legislatively banned under Tenth Amendment police powers. The political answer may be that states have developed an addiction to the enormous tax revenues the industry provides.¹³⁵ A more attractive answer may be that political bodies are reluctant to infringe on

130. *States Rush to File Medicaid Tobacco Suits*, 20 WASH. HEALTH WEEK (Atlantic Information Services, Inc.) No. 4 (Jun. 3, 1996).

131. Moore & Mikhail, *supra* note 3.

132. Moore & Mikhail, *supra* note 3. Attorney General Moore asserts that as consumers, not the alleged tortfeasor, pay the taxes, the collateral source rule is applicable. The collateral source rule prohibits consideration of collateral sources of revenue or compensation in awarding damages. Thus, the rule allows double recovery where compensation is already received from a source other than the tortfeasor. See BLACK'S LAW DICTIONARY 292 (6th ed. 1990). In effect, this rule then serves a punitive, not compensatory, function, and is thereby inconsistent with a restitutionary basis of recovery.

133. Debbie Price, *Maryland Tobacco Farms See Cloudy Horizon*, BALT. SUN, Sept. 18, 1996, at 1A.

134. For example, when the Florida Circuit Court Judge dismissed fifteen of the eighteen counts in Florida's amended complaint on September 16, 1996, tobacco stocks received a boost the following day, including Philip Morris rising 2 1/8 and R.J. Reynolds rising 1/2. *Tobacco, Computer Stocks Register Solid Market Gains*, ATLANTA J. & CONST., Sept. 18, 1996, at 6D. Between August 8 and December 15, 1996 Philip Morris stock rose 26 percent, while over the same period R.J. Reynolds stock rose 20 percent. Cathleen Egan, *Tobacco Stocks Up Again*, THE COURIER-JOURNAL, Dec. 15, 1996, at 5E.

135. The Tobacco Institute claims that cigarette excise taxes are over \$13 billion annually. *States Rush to File Medicaid Tobacco Suits*, 20 WASH. HEALTH WEEK 4 (June 3, 1996).

individual freedoms. Public opinion polls tend to support this type of common sense reasoning, suggesting the public still strongly favors personal responsibility and harbors an abiding distrust of too much governmental intrusion.¹³⁶ The tobacco defendants also are quick to point to the fact that state legislatures have regulated the industry by licensing the sale of tobacco and setting minimum age requirements, thus impliedly condoning the sale of tobacco within regulation limits.¹³⁷

B. Policy Oriented Arguments

A major argument against allowing states to proceed against the tobacco companies on the basis of Medicaid restitution is the precedential impact of such a suit. If the states' claims are accepted by the courts, the states would then be free to launch assaults against other products that fall into public disfavor. The logical extension is to proceed against alcohol.¹³⁸ Certainly the same arguments advanced by the states against the tobacco companies apply to alcohol distributors. Indeed, the same reasoning behind the Medicaid suits applies equally to products such as milkshakes, cheeseburgers, and other high-fat foods with negative or minimal nutritional value.¹³⁹ Indigents require treatment for health problems caused by poor diet just as surely as they require treatment for smoking related health problems. Yet few can imagine a suit filed by the state against the fast food industry based simply on statistics showing the effects of high cholesterol diets. This

136. Wayne Slater, *Most in Polls Oppose State Tobacco Suit*, DALLAS MORNING NEWS, Jun. 30, 1996, at 1A. Slater cites a June, 1996 poll conducted by the Office of Survey Research of the University of Texas indicating 63% of those polled oppose the state's Medicaid restitution suit, while roughly one-third supported the suit. Eighty percent of those polled opposed individuals filing suit against the tobacco industry to recover for medical expenses, while only 16% supported such suits. *Id.*

137. *Arizona Files Suit Against the Tobacco Industry*, HEALTHLINE (Aug. 21, 1996).

138. Florida's Governor has said this type of action will be limited to tobacco; however, his general counsel, Dexter Douglas, when asked about alcohol, was quoted as saying, "At this point, we don't have the statistics to proceed in that regard You gotta take 'em one at a time." Carolyn Lochhead, *The Growing Power of Trial Lawyers*, 2 WEEKLY STANDARD No. 2, at 21 (Sept. 23, 1996).

139. Mississippi's Attorney General Moore glossed over such arguments when he noted, "[D]espite potential for high fat content, milk contains calcium and beef has protein. Nothing in tobacco is good for human health." Moore & Mikhail, *supra* note 3. Attorney General Moore's statement is directly contradicted by Food and Drug Administration research indicating nicotine helps weight loss, speeds the metabolism, and curbs appetites. *CNN Today* (CNN television broadcast, Feb. 10, 1997). Other researchers go further by suggesting nicotine may help prevent Parkinson's disease and Alzheimer's disease in addition to being a possible treatment for some other neurological disorders. Doug Thomas, *Studies Hint that Nicotine Helps*, OMAHA WORLD-HERALD, Jan. 20, 1997, at 28.

result lies somewhere down the slippery slope which begins with tobacco suits.

Caffeine provides an illustrative example. The long term health effects of daily doses of caffeine are subject to debate. Currently, caffeine is a socially acceptable drug, widely used despite possible deleterious effects. If caffeine is more definitively linked to a specific debilitation, states might then be obliged to pursue the coffee, tea, and soft drink industries. Following the lead of the tobacco restitution suits, attempts to recover retroactively clearly would be proper.

VI. POLITICAL ASPECTS

The political aspects behind these suits cannot be overlooked. Partisanship accounts for some of the attacks. Thirteen of the first seventeen state actions were initiated by democratic attorneys general.¹⁴⁰ In Mississippi, the Republican Governor, Kirk Fordice, sued the Democratic Attorney General, Mike Moore, to prevent the Attorney General from carrying on a suit against the tobacco companies.¹⁴¹ These partisan actions have followed traditional battle lines between stereotypical pro-industry conservatives and pro-government-intervention liberals. Because tobacco has provided campaign funds to politicians from both sides of the aisle, the effect of partisanship is limited.

Perhaps the most intriguing political aspect of these suits is the use of private plaintiff's attorneys hired pursuant to contingency fee agreements. By employing outside counsel, attorneys general hope to avoid a drain on state coffers while still securing a chance at some recovery. As the potential recovery is in the hundreds of millions of dollars in each state,¹⁴² the attorneys chosen to represent the states stand to earn significant fees. Significantly, there appear to be no restrictions on the ability of some attorneys general to appoint the outside counsel.¹⁴³ This has led to charges of political favoritism and cronyism.¹⁴⁴ States note the specialized nature of

140. Democratic Attorneys General filed the first ten suits, in Mississippi, Minnesota, West Virginia, Florida, Massachusetts, Louisiana, Texas, Maryland, Washington, and Connecticut respectively. Republican Attorney Generals have since filed suits in Kansas, Arizona, New Jersey, and Illinois.

141. Complaint, *Fordice v. Moore*, No. 96-M-114 (Miss. filed Feb. 17, 1996).

142. See *supra*, note 122 for a listing of damages sought in various states.

143. Louisiana, Mississippi, and Texas are identified as states which do not use competitive bidding. Lochhead, *supra* note 138.

144. Mississippi's Attorney General is identified as having "awarded the lead portion of the tobacco contract to his top campaign contributor." Lochhead, *supra* note 138.

the proceedings and argue that top legal talent is required for such complex litigation, making competitive bidding impractical.¹⁴⁵

Allowing the attorney general to appoint outside counsel at his discretion, and thus avoid financial restraints on the office, provides dangerous precedent. The attorney general is effectively given policy making power beyond the constraints of the office. If tobacco may be arbitrarily attacked in this fashion, then the attorney general is given the authority to crusade against whatever industry he chooses, and the power of the state's chief executive, as well as that of the legislature, is diminished.¹⁴⁶

VII. CONCLUSION

As the tobacco suits are similar in nature, the results of the first few suits should set the trend for the rest of the country.¹⁴⁷ Florida's Palm Beach County Circuit Court dealt a blow to the theory of an independent cause of action for the state, absent specific statutory authority, when it held that Florida must proceed under a subrogation basis for claims prior to the enactment of Florida's Medicaid Third Party Liability Act.¹⁴⁸ Following this ruling, the tobacco industry moved to dismiss suits in Texas and Maryland based on the failure to include subrogation based claims.¹⁴⁹ In West Virginia, common law claims were dismissed by the circuit court, which found that the plaintiff lacked the ability to sue except on statutorily identified grounds.¹⁵⁰ The legal claims of the states depend simply on the ability of the plaintiffs to prove a conspiracy. The danger in these suits lies in the restitution claims.

The judicial branch is not the arm of government charged with promulgating commercial regulations. That power is expressly reserved for the legislative branch of government.¹⁵¹ If the individual state legislatures find the costs of tobacco are burdening society, the legislatures are

145. Lochhead, *supra* note 138.

146. Texas's Attorney General is reportedly considering using outside counsel in environmental suits. Lochhead, *supra* note 138.

147. Mississippi has the first scheduled trial date, March 24, 1997. *States Rush to File Medicaid Tobacco Suits*, 20 WASH. HEALTH WEEK (Atlantic Information Services, Inc.) No. 4 (Jun. 3, 1996).

148. *Many Pre-1994 Claims Dismissed From Florida's Medicaid Recovery Case*, 10 Mealey's Litig. Rep.: Tobacco 10 (Sept. 19, 1996).

149. *Industry Pushes Dismissal of 11 Texas Case Counts*, 10 Mealey's Litig. Rep. No. 16 (Dec. 19, 1996); *Subrogation, Assignment Only Remedies Industry Says in Seeking Dismissal of Maryland Medicaid Case*, 10 Mealey's Litig. Rep. No. 16 (Dec. 19, 1996).

150. *Court Says State Agencies Can't Sue Tobacco Firms to Recoup Medicaid Money*, Health Care Daily (BNA), (Feb. 19, 1997).

151. U.S. CONST. art. I, § 8, cl. 3.

empowered to levy additional taxes, or if the burden is great enough, the legislatures may prohibit the sale of tobacco entirely pursuant to their police powers.

Tobacco is a popular target in the present political climate, but the procedures created to attack tobacco cannot be legitimately limited solely to tobacco once they are put in place. Other products are necessarily subject to the same type of attack. Governmental intrusion into areas of purely personal conduct, such as the use of tobacco, is unwarranted and unnecessary. The government cannot hope to mandate proper diet, reasonable exercise routines, or healthy lifestyles. Such encroachment into personal freedom simply is not a proper function of government. If the courts accept the restitutionary theory offered by the anti-tobacco forces, the back door will be opened to governmental action against virtually any type of product, despite legislatively set public policy.

Cliff Sherrill