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Folder Title:
Tobacco: Medicaid/National Governors Association POTUS Letter

Stack:	Row:	Section:	Shelf:	Position:
S	66	4	4	2

December 29, 1997

The Honorable Arne H. Carlson
Governor of Minnesota
St. Paul, Minnesota 55155

Dear Arne:

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

Working together, we have made extraordinary progress this year in our fight to reduce the death and illness caused by tobacco. My overriding goal in seeking bipartisan national tobacco legislation is to make the most of this historic opportunity to keep our children from smoking.

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

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

Sincerely, BILL CLINTON

BC/SSK/RSM/DWB/efr-efr-lynn (Corres. #3769789)
(12.carlson.ah)

cc: IGA, 106 OEOB
cc: Wayna Wondwossen, 93 OEOB
cc: Sarah Knight, 93 OEOB
cc: Jerry Mande, 431 OEOB

THE WHITE HOUSE

WASHINGTON

December 5, 1997

The Honorable George Voinovich
and Colleagues
National Governors' Association
Hall of the States
444 North Capitol Street
Washington, D.C. 20001-1512

Dear Friends:

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

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

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Sincerely,

Bill Clinton

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WASHINGTON

December 5, 1997

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

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

Sincerely,

Bill Clinton

BOB GRAHAM
FLORIDA

File: Tobacco - Legislation
cc: EK, Tom, JRM

United States Senate
WASHINGTON, D. C. 20510

November 13, 1997

Dear Bruce:

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

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

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

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

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

With kind regards,

Sincerely,

Bob Graham

United States Senator

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

S.1471

105TH CONGRESS
1ST SESSION

S. ____

IN THE SENATE OF THE UNITED STATES

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

A BILL

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

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

SECTION 1. PROHIBITION ON TREATING ANY MEDICAID-RELATED FUNDS RECOVERED FROM ONE OR MORE TOBACCO COMPANIES AS AN OVERPAYMENT.

(a) PROHIBITION ON TREATMENT AS OVERPAYMENT.—Section 1903(d)(3) of the Social Security Act (42 U.S.C. 1396b(d)(3)) is amended—

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

(2) by adding at the end the following:

"(B) Subparagraph (A) and paragraph (2)(B) shall not apply to any amount recovered or paid to a State as part of a settlement or judgment reached in litigation initiated or pursued by a State against one or more manufacturers of tobacco products, as defined in section 5702(d) of the Internal Revenue Code of 1986.".

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

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

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

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

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

My overriding goal in seeking bipartisan ~~national~~ tobacco legislation is to make the most of this historic opportunity to reduce teen smoking.

~~I believe~~

I look forward to working with the states ~~you~~ and with Congress to find a mutually agreeable purpose for the funds generated by ~~national~~ tobacco legislation.

I would prefer ~~a legislative solution~~ ~~to the~~ to see the ~~question~~ ~~allocated~~ allocation of ~~funds~~ tobacco funds between federal and state govt ~~resolved~~ resolved through legislation, and

JRM —
How about this?
BR

December 29, 1997

The Honorable Richard Cullen
Attorney General of the
Commonwealth of Virginia
900 East Main Street
Richmond, Virginia 23219

Dear Richard:

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

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

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

Sincerely,

BILL CLINTON

BC/SSK/RSM/DWB/efr-efr (Corres. #3769759)
(12.cullen.r)
cc: IGA, 106 OEOB
cc: Wayna ~~Wondwossen~~, 93 OEOB
cc: ~~Jerry Mande, 431~~ OEOB

FACSIMILE TRANSMITTAL COVER SHEET

DATE: December 17, 1997

TO: Jerry Mande

FACSIMILE NO.: 456-6027

TELEPHONE NO.: 456-6018

FROM: John Benson
Special Counsel to the Assistant Attorney General
Civil Division

FACSIMILE NO.: (202) 514-8071

TELEPHONE NO.: (202) 616-0929 OR (202) 514-3886

NO. OF PAGES: Cover Sheet + 4

COMMENTS: Mr. Mande--

Phil Bartz asked that I run this by you before we send it out. If you could review it and let me know of any concerns or problems, I would appreciate it.

John Benson

December 17, 1997

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

Dear Mr. Dingell:

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

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

Enacted in 1965 pursuant to Title XIX of the Social Security Act, Medicaid is the federal government's primary means of providing health care coverage to indigent Americans who are aged, blind or disabled, or who qualify under the Aid to Families with Dependent Children Program. Medicaid is a joint federal/state program in which the federal government provides funds to states to help finance health care programs. "The Federal Government shares the costs of Medicaid with States that elect to participate in the program. In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services." *Atkins v. Rivera*, 477 U.S. 154, 156-57 (1986) (citations omitted). State agencies have the primary responsibility for administering this program. The federal share of the states' expenditures varies from 50 percent to ~~86~~ percent, depending on per capita income. At the federal level, ~~Medicaid is administered by~~

78

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

Among other things, Medicaid mandates that each state "take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the [state's Medicaid] plan." 42 U.S.C. § 1396a(a)(25)(A). Where such liability is found to exist after Medicaid payments have been made, each state "will seek reimbursement for such assistance . . . where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery . . . ." 42 U.S.C. § 1396a(a)(25)(B); *see The New York State Department of Social Services v. Bowen, 846 F.2d 129, 131 (2nd Cir. 1988)*. When recoveries are made from third parties, the previous Medicaid expenditures for the services at issue are to be treated as overpayments, 42 U.S.C. § 1396b(d)(2)(B), and overpayments are to be deducted from amounts to which the states are entitled in subsequent quarters. 42 U.S.C. § 1396b(d)(2)(A).[1]

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

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

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

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

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

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

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

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

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

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

Sincerely,

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

Andrew Fois
Assistant Attorney General

December 5, 1997

The Honorable George Voinovich
and Colleagues
National Governors' Association
Hall of the States
444 North Capitol Street
Washington, D.C. 20001-1512

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

Sincerely, BILL CLINTON

BC/SSK/RSM/emu (Corres. #3769774)
(12.nga)
cc: IGA 106
cc: Jerry Mande, 431
cc: W. Wondwossen, 93
cc: Sarah Knight, 93

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Sincerely, BILL CLINTON

BC/SSK/RSM/emu (Corres. #3773036)
(12.doyle.je)

SEND TO:
c/o Lynne Ross
National Association of Attorneys General
Suite 110
750 First Street, N.E.
Washington, D.C. 20002

cc: IGA, 106
cc: Jerry Mande, 431
cc: W. Wondwossen and Sarah Knight, 93

NATIONAL GOVERNORS' ASSOCIATION

George V. Voinovich
Governor of Ohio
Chairman

Thomas R. Carper
Governor of Delaware
Vice Chairman

Raymond C. Scheppach
Executive Director

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

November 7, 1997

242177

The President
The White House
Washington, DC 20500

Dear Mr. President:

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

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

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

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

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

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

Sincerely,

George V. Voinovich
Governor of Ohio

Thomas R. Carper
Governor of Delaware

David M. Beasley
Governor of South Carolina

Lawton Chiles
Governor of Florida

Howard Dean, M.D.
Governor of Vermont

Michael O. Leavitt
Governor of Utah

Bob Miller
Governor of Nevada

Roy Romer
Governor of Colorado

Tommy G. Thompson
Governor of Wisconsin

NATIONAL GOVERNORS' ASSOCIATION

NGA Policy

EC-6. TOBACCO SETTLEMENT FUNDS

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

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

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

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

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

11/17/97 MON 12:43 FAX 202 456 5426 PLM 005

NOV 10 1997 (84)

STATE ATTORNEYS GENERAL

A Communication From the Chief Legal Officers
Of the Following:

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

November 7, 1997

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

Dear Mr. President:

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

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

Recently, the federal government has asserted that it is entitled to a significant share of the states' recovery, whether that be through settlement or other recovery, on the basis that it represents the federal share of Medicaid costs. The federal government makes this claim despite the fact these recoveries will represent success in <u>state</u> suits, under <u>state</u> law theories, for a variety of claims unrelated to Medicaid payments. The federal government has declined to bring its own suit against the industry.

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

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

Thank you.

Sincerely yours,

Bruce M. Botelho
Attorney General of Alaska

Toetagata Albert Mailo
Toetagata Albert Mailo
Attorney General of American Samoa

Grant Woods
Attorney General of Arizona

Winston Bryant
Attorney General of Arkansas

Daniel E. Lungren
Attorney General of California

Gale A. Norton
Attorney General of Colorado

Richard Blumenthal
Attorney General of Connecticut

M. Jane Brady
Attorney General of Delaware

John M. Ferren
Corporation Counsel of D.C.

Robert A. Butterworth
Attorney General of Florida

Thurbert E. Baker
Attorney General of Georgia

Charles H. Troutman
Attorney General of Guam

Margery S. Bronster
Attorney General of Hawaii

Alan G. Lance
Attorney General of Idaho

Jim Ryan
Attorney General of Illinois

Jeffrey A. Modisett
Attorney General of Indiana

Tom Miller
Attorney General of Iowa

Carla J. Stovall
Attorney General of Kansas

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

Richard P. Ieyoub
Attorney General of Louisiana

Andrew Ketterer
Attorney General of Maine

J. Joseph Curran, Jr.
Attorney General of Maryland

Scott Harshbarger
Attorney General of Massachusetts

Frank J. Kelley
Attorney General of Michigan

Hubert H. Humphrey, III
Attorney General of Minnesota

Mike Moore
Attorney General of Mississippi

Jeremiah W. Nixon
Attorney General of Missouri

Joseph P. Mazurek
Attorney General of Montana

Don Stenberg
Attorney General of Nebraska

Frankie Sue Del Papa
Attorney General of Nevada

Philip T. McLaughlin
Attorney General of New Hampshire

PeterVerniero
Attorney General of New Jersey

Tom Udall
Attorney General of New Mexico

Dennis C. Vacco
Attorney General of New York

Heidi Heitkamp
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Attorney General of N. Mariana Isl.

Betty D. Montgomery
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Attorney General of Oklahoma

Hardy Myers
Attorney General of Oregon

D. Michael Fisher
Attorney General of Pennsylvania

José A. Fuentes-Agostini
Attorney General of Puerto Rico

Jeffrey B. Pine
Attorney General of Rhode Island

Charlie Condon
Attorney General of South Carolina

Mark Barnett
Attorney General of South Dakota

John Knox Walkup
Attorney General of Tennessee

Dan Morales
Attorney General of Texas

Jan Graham
Attorney General of Utah

William H. Sorrell
Attorney General of Vermont

Christine O. Gregoire
Attorney General of Washington

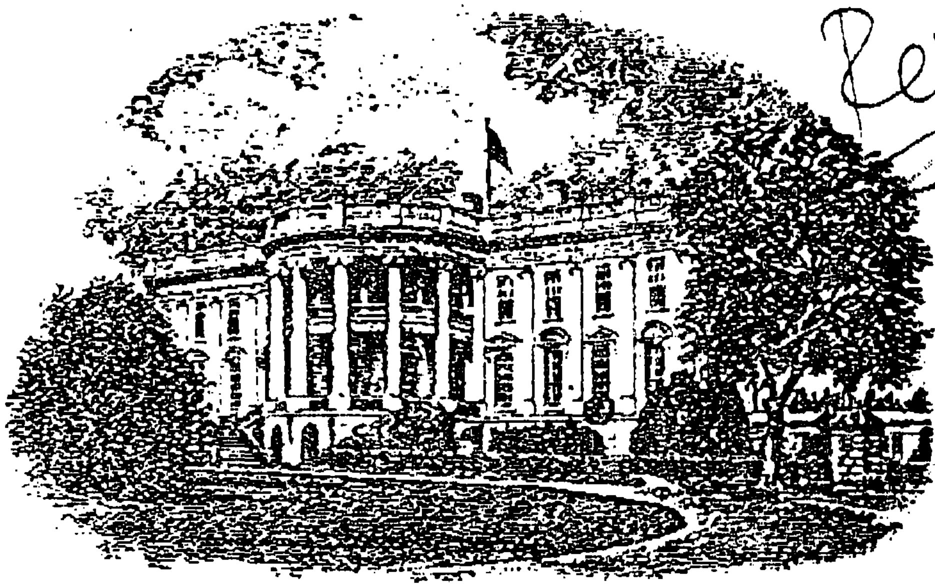
Darrell V. McGraw Jr.
Attorney General of West Virginia

James E. Doyle
Attorney General of Wisconsin

William U. Hill
Attorney General of Wyoming

The White House
Office of Presidential Letters and Messages

Resend



facsimile from Sarah Knight
phone: 202-456-5514
fax: 202-456-5426

To: Jerry Mande

No. of pages (including cover): 7 Date: 11/18/97

Phone: Fax: 66027

Comments: The AG letter. S

DATE:

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
200 INDEPENDENCE AVE., SW
WASHINGTON, D.C. 20201

PHONE: (202) 690-7627 **FAX: (202) 690-7380**

OFFICE OF THE ASSISTANT SECRETARY FOR LEGISLATION
ROOM 416-G HUMPHREY BUILDING

TO : Jerry Mande

OFFICE : White House

PHONE NO : ~~202~~ 456-6018

FAX NO : 456-6027

TOTAL PAGES (INCLUDING COVER) : 2

FROM:

[ ] RICHARD J. TARPLIN
[ ] HELEN MATHIS
[ ] KEVIN BURKE
[ ] SANDI EUBANKS BROWN
[ ] ROSE CLEMENT LUSI
[ ] STEPHANIE WILSON
[ ] HAZEL FARMER

REMARKS:

Here's Rick's sentence for the Medicaid letter

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

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

My overriding goal in seeking bipartisan national tobacco legislation is to make the most of this historic opportunity to reduce teen smoking. I would prefer to see the allocation of tobacco funds between federal and state government resolved through legislation, and I look forward to working with the states and with Congress to find a mutually agreeable purpose for the funds generated by tobacco legislation.

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

A As you know, current law requires the Health Care Financing Administration to seek recovery of the federal portion of reimbursements for Medicaid costs that may be part of any state tobacco settlements.

THE WHITE HOUSE

WASHINGTON

December 5, 1997

The Honorable George Voinovich
and Colleagues
National Governors' Association
Hall of the States
444 North Capitol Street
Washington, D.C. 20001-1512

Dear Friends:

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

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

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

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

Sincerely,

Bill Clinton

THE WHITE HOUSE

WASHINGTON

December 5, 1997

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

Dear Friends:

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

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

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

Sincerely,

Bill Clinton

242086

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

Richard Cullen
Attorney General

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8948 TDD

November 7, 1997

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

Dear Mr. President:

It is my understanding that Attorneys General from a number of states have recently written to you to express their opposition to any federal efforts to divert from the states funds generated by any settlement with the tobacco industry. I agree that the states must be treated fairly in this regard.

Virginia shares your concern, and the concern of other states, that youth access to tobacco must be eliminated and we have taken strong measures to pursue this goal. At the same time, tobacco has great significance to the livelihood of many Virginians, including the tobacco farmers who grow the crop, the industrial workers who manufacture tobacco products and the dock workers who ship domestic tobacco and tobacco products overseas. We believe that any settlement that receives federal support, in order to be fair, must make adequate provision for all of these concerns and interests.

As further discussions take place with respect to federal support for a nationwide tobacco settlement, we look forward to working with your administration and with the leadership of Congress to make sure that these goals are met.

Very truly yours,

Richard Cullen

Richard Cullen
Attorney General of Virginia

6-6018 JC

Jerry would like you to sign off on this tonight
→ SB.

December 17, 1997

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

Dear Mr. Dingell:

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

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

Enacted in 1965 pursuant to Title XIX of the Social Security Act, Medicaid is the federal government's primary means of providing health care coverage to indigent Americans who are aged, blind or disabled, or who qualify under the Aid to Families with Dependent Children Program. Medicaid is a joint federal/state program in which the federal government provides funds to states to help finance health care programs. "The Federal Government shares the costs of Medicaid with States that elect to participate in the program. In return, participating States are to comply with requirements imposed by the Act and by the Secretary of Health and Human Services." *Atkins v. Rivera*, 477 U.S. 154, 156-57 (1986) (citations omitted). State agencies have the primary responsibility for administering this program. The federal share of the states' expenditures varies from 50 percent to 86 percent, depending on per capita income. At the federal level, ~~Medicaid is administered by~~

78?

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

Among other things, Medicaid mandates that each state "take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the [state's Medicaid] plan." 42 U.S.C. § 1396a(a)(25)(A). Where such liability is found to exist after Medicaid payments have been made, each state "will seek reimbursement for such assistance . . . where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery . . . ." 42 U.S.C. § 1396a(a)(25)(B); *see The New York State Department of Social Services v. Bowen, 846 F.2d 129, 131 (2nd Cir. 1988)*. When recoveries are made from third parties, the previous Medicaid expenditures for the services at issue are to be treated as overpayments, 42 U.S.C. § 1396b(d)(2)(B), and overpayments are to be deducted from amounts to which the states are entitled in subsequent quarters. 42 U.S.C. § 1396b(d)(2)(A).[1]

OK

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

unless we're saying what these choice are, delete

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

SHOULD THIS BE ITS OWN ¶ and Emphasized?

NO

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

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

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

said on previous page

Yes KN

The ~~Federal~~ share

Delete

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

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

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

* Not true - the Federal Share of "apportionment" is known, but not the apportionment itself.

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

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

Sincerely,

Andrew Fois
Assistant Attorney General

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

443

tobacco-state settlements

cc: Bruce
Chris
Terry

U.S. Department of Justice

Office of the Assistant Attorney General
Civil Division

George Jordan Phillips
Counselor to the Assistant Attorney General

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

August 26, 1997

HAND DELIVERY TO THE FOLLOWING RECIPIENTS:

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

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

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

RE: <u>State Settlements of Tobacco Lawsuits - Allocation of Damages to the Medicaid Program</u>

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

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

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

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

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

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

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

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

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

Sincerely,

George J. Phillips

cc: Frank W. Hunger
Enclosures