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ON SMOKING AND HEALTH

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<P>ASH TESTIMONY HIGHLIGHTS DEAL'S CONSTITUTIONAL PROBLEMS
[07.15.3]

Senate Judiciary Committee Hearings on the Proposed Settlement</P>

<P>Here is testimony by Action on Smoking and Health (ASH) which will be
presented to the Senate Judiciary Committee on Wednesday highlighting many
of the constitutional problems raised by the proposed deal:</P>

<P>TESTIMONY OF PROFESSOR JOHN F. BANZHAF III

EXECUTIVE DIRECTOR AND CHIEF COUNSEL,

ACTION ON SMOKING AND HEALTH (ASH),

AND PROFESSOR OF PUBLIC INTEREST LAW,

GEORGE WASHINGTON UNIVERSITY</P>

<P>ABSTRACT: Because of its novelty and the lack of any precedent
where a similar deal was enacted into legislation to protect another industry
from liability, it is impossible to say with any certainty whether many
of the provisions of the proposal would pass constitutional muster. However
one can say:</P>

<P>1. Many of the provisions, if enacted, probably cannot begin to be tested for several years because of problems like standing, ripeness, and the doctrine of avoiding direct constitutional challenges wherever possible.</P>

<P>2. Even once those challenges can be brought, it will take many years for them to be resolved through many appeals through the federal and state systems.</P>

<P>3. Thus the issue of unconstitutionality will hang over the head of any legislation like the Sword of Damocles for some time.</P>

<P>4. A number of the provisions raise serious questions of violation of Due Process and the Right of Trial by Jury.</P>

<P>5. In addition, there are major problems under the 10th Amendment since the legislation not only seeks to interfere with and displace the substantive law of the various states, but also the very procedures by which they try cases.</P>

<P>6. Analogies to Workers' Compensation, the Black Lung Trust Fund, and even the Vaccine Bill are flawed, since all deal with prospective injuries. This bill would seem to be unprecedented because it purports to seriously limit the right of people already injured to sue in the future, and to

very substantially limit their ability to receive the awards which state juries may feel are appropriate.</P>

<P>7. Permitting a federal court to tell judges in hundreds of individual state courts, none of whom are parties to its proceedings, that documents cannot be admitted in evidence because they are protected by trade secrets or other privileges, even if the state does not recognize such a privilege, appears to be a gross and unconstitutional overreaching of federal power into states' affairs.</P>

<P>MAIN TESTIMONY</P>

<P>I write as Chief Counsel of Action on Smoking and Health (ASH), the nation's oldest and largest antismoking organization, and as a Professor of Law who has taught Administrative Law and Torts (including Product Liability) Law for more than 25 years, to very briefly suggest what I believe to be serious constitutional problems in the proposed tobacco settlement or deal [“deal”].</P>

<P>Before doing so, however, it may be well to note that most if not all are unlikely to be subject to any judicial determinations for many years because of problems of standing, ripeness, etc., and will therefore hang like a Sword of Damocles over the heads of all those affected for that

period. as well as the additional years necessary to resolve appeals all the way to the U.S. Supreme Court from both federal and state court systems.</P>

<P>DUE PROCESS AND THE RIGHT TO TRIAL BY JURY</P>

<P>May I respectfully suggest that one cluster of problems occurs under both the Due Process clause as well as the right of trial by jury. This occurs because the deal prohibits the granting of punitive damages and limits or caps the amount of money injured persons may recover and/or receive under certain circumstances.</P>

<P>If -- to exaggerate its effect to more clearly see the problem -- federal legislation provided that persons injured by a gun could not recover more than \$100 in damages, few would doubt that a valuable legal right had been completely extinguished, and that the right to a determination of the appropriate amount of damages by a jury of one's peers had been violated.</P>

<P>To arbitrarily limit the right of victims of smoking to recover to only a few billion dollars in any one year -- especially when smoking is estimated to result in total real out-of-pocket costs of over \$100 billion in any one year, with almost 500,000 people (including nonsmokers) killed, and millions more crippled -- similarly would seem to reduce the right to sue and to have a meaningful jury trial -- to a pale illusion.</P>

<P>CONTRASTING WORKERS' COMPENSATION, BLACK LUNG, AND
VACCINES</P>

<P>Those who argue that such a drastic curtailment of fundamental rights
is nevertheless constitutional usually point to systems like workers' compensation,
the black lung trust fund, and the recently-adopted vaccine legislation.
But those analogies are not only flawed; they tend to highlight the constitutional
problems inherent in this proposed deal.</P>

<P>All of these systems deal only with prospective injuries, those which
will occur if at all only after the legislation becomes effective. It would
seem, by analogy, that Congress can constitutionally provide, for example,
that any adult who begins smoking after the year 1999 can recover only
such diminished damages as Congress may provide. That is because the limitation
on recover is known beforehand, and the person can govern his conduct accordingly</P>

<P>However, this deal purports to tell millions of people who have smoked
for many years, allegedly because of misrepresentations by the tobacco
industry, that they may never recover more than a pittance, even though
the damage has already been done to their bodies. It would be as if Congress
passed legislation limiting the total amount of recovery for injuries caused
by auto accidents which have already occurred, or for injuries caused by

the ingestion of a drug where the results did not become known for many years.</P>

<P>In short, it is respectfully suggested that there is a fundamental distinction between limiting remedies for actions persons may take after legislation has become effective [PROSPECTIVE INJURIES] and injuries which they have already suffered [PRE-EXISTING INJURIES]. This is especially true since many people alive today who may have (for example) deadly cancer cells growing in their lungs may not yet realize their plight because the carcinoma is too small to show up on an x-ray.</P>

<P>In other words, they cannot sue now, in the absence of the demonstrable injury, simply because they have been exposed; and, once their injury is manifest by x-rays or other tests (and they then have only a small chance of living more than 1 year), Congress would deny them a remedy commensurate with their injury and the degree of wrongdoing by the defendants.</P>

<P>By the way, it should be noted that Congress, in passing the recent vaccine bill, structured it in such a way as to carefully avoid this very problem. Under the bill the parents of children allegedly injured by a vaccine are given an additional more speedy remedy against the federal government, but their right to bring a tort action if they wished is expressly preserved.</P>

<P>INTRUSION INTO STATE'S RIGHTS IN VIOLATION OF THE 10TH AMENDMENT</P>

<P>Another cluster of issues seems to arise because the proposed deal would intrude so fully into the rights of states and their citizens to make most fundamental decisions for themselves.</P>

<P>It arises first in the decision to change the substantive law with regard to tobacco litigation in such a way as to limit the amount successful plaintiffs from any state can collect in any given year. Not only does this intrude upon the right of states to make this determination for themselves; it also means that states which adopt laws and procedures which favor tobacco plaintiffs and high awards can actually harm states which wish to provide only more moderate awards -- since the awards of the second will be cut if the judgements in all of the states exceeds the maximum payout amount in any given year.</P>

<P>Indeed, one could easily imagine a situation where the legislators and/or judges of some states would deliberately try to provide very large judgments of many times what they would ordinarily award, simply so that if they have to be cut back (e.g., by 50%) under the terms of the legislated deal, their citizens will still get reasonable compensation. This, of course,

would directly affect states which do not adopt such an artifice, since their citizens would likewise have their awards cut back by the same 50%.</P>

<P>INTRUSIONS INTO STATE'S PROCEDURAL RIGHTS</P>

<P>Even if it were possible to constitutionally justify an intrusion into the rights of individual states to determine issues of substantive law for themselves (e.g., that it is necessary to regulate and protect interstate commerce in cigarettes), it is much harder to justify an intrusion into the right of states to determine the procedures their courts follow to try cases.</P>

<P>Under the deal, no state court -- regardless of the wishes of the judges or legislators of the state -- could permit class actions nor even the consolidation or aggregation of similar causes of action. So, in the most extreme cases where two or more suits by smokers raise virtually identical issues (e.g., assume twin brothers who smoke the same brands equally), a judge could not permit those suits to be consolidated for trial to save the valuable time and resources of state courts already strained to the limit with drug and other cases. It is hard to think of a more unwarranted intrusion by the federal government into the way in which states operate their judicial systems.</P>

<P>EXAMPLES OF OTHER UNWARRANTED INTRUSIONS: PUNITIVE DAMAGES</P>

<P>It appears that the proposed deal would also represent an unwarranted intrusion upon the right of state governments to operate their own legal systems by prohibiting any award whatsoever of punitive damages. While it might be argued that the federal government does have that right as a necessary incident to regulating and protecting interstate commerce in cigarettes, that argument has very serious problems.</P>

<P>While the federal government could argue that it -- by itself -- made a determination as to the appropriate measure of punitive damages and incorporated that into the statute, it is hard to see, for several reasons, how such a determination has been made.</P>

<P>First, most of the industry documents which appear to indicate the extent of industry wrongdoing have not yet been made public, in part because they are still being screen over issues of privilege. Moreover, evidence of wrongdoing is now actively being obtained by several federal grand juries, at least one of which is now reportedly granting immunity to key witnesses; a major indication that criminal wrongdoing has been uncovered. It is hard to see how Congress could claim to have made that very determination when most of the evidence is still secret, and may not come to light for years.</P>

<P>At the very least, before such a determination is made, Congress should take certain basic steps. First, it should subpoena for itself all of the documents now under review and make an independent determination as to whether any privileges apply. In this regard it should be noted that Congress is not bound by judicial determination of privilege, and to a large extent make its own determination on such issue as its recently did with a Senator's diaries.</P>

<P>Second, relevant committee of Congress should be briefed on what evidence of criminal wrongdoing has been uncovered by the Justice Department's investigation, and the timing of that proceeding. Anything less would appear to be an abdication of responsibility, and possibly doom the constitutionality of that portion of the legislation.</P>

<P>Second, speaking of abdication of responsibility, the amount of punitive damages has been determined, but not by Congress. Instead it had been determined in secret meetings by persons who are not even federal officials, and the amount was reportedly arrived at as a result of horse-trading on many different features and parts of the proposed deal, and not as an independent determination of appropriate punishment.</P>

<P>Third, one can hardly argue that the amount set forth in the deal is

"punitive" or "punishment" in any real sense of the word. It is widely reported that the tobacco industry plans to pay all of the settlement amount, including that portion supposedly representing punitive damages, simply by raising the price of a pack of cigarettes -- a move which the FTC has warned could even lead to antitrust violations.

A fine where the guilty pays not one penny can hardly be called "punitive," or a fair legislative determination of what appropriate punitive damages should be.</P>

<P>Fourth, contrary to established tax law which prohibits the deduction of punitive damages as a business expense, the deal provides that all of the payments -- including that portion which allegedly represents punitive damages - - will be fully tax-deductible. If these were truly punitive damages -- thereby arguably justifying the federal government taking that power from state courts - - why are taxpayers going to be asked to pay over thirty percent?</P>

<P>Finally, it should be noted that the determination of punitive damages has traditionally been a judicial rather than a legislative determination. Thus, while a legislature may certainly by law set general standards to guide courts in the determination of the appropriate amount of punitive damages, a precise determination of the amount of punitive damages by the legislature rather than the judiciary seems to be not only inappropriate

but unconstitutional -- especially when it is the federal legislature interfering with state judicial systems.</P>

<P>DENIAL OF A RIGHT TO A FAIR AND MEANINGFUL TRIAL</P>

<P>Finally it is respectfully suggested that prohibition on punitive damages, coupled with an outright ban on class actions and aggregations, to which is also added an unrealistically low yearly payout limit, may effectively robs victims of smoking of any meaningful right to a fair trial.</P>

<P>Such restrictions mean that -- unlike the current class actions and state law suits -- litigation against the tobacco industry will have to continue to be conducted on a David vs. Goliath basis. Outside the bible, as experience with such trials show us, David rarely can win, and therefore lawyers for plaintiffs are very unlikely to be willing to bring even the most worthy case.</P>

<P>Few would disagree that a bill which said that plaintiffs's lawyers can't get more than \$100 in compensation for their work would be unconstitutional, since no lawyer would ever take a tobacco case on those terms. Similarly, it is respectfully suggested that the limits imposed in the proposed deal are likely to have the same effect. Here is how I explained it in an article entitled IF SMOKE CLEARS, TOBACCO DEAL STILL FACES FIRE by Judy Peres,

Chicago Tribune:</P>

<P>"If an attorney can't seek punitive damages and can't spread the costs of bringing a case among a number of clients, he's likely not to take the case," said John Banzhaf, a law professor at George Washington University and head of Action on Smoking and Health.</P>

<P>He offered an example: "Suppose someone has lung cancer. As an attorney, I know from experience he can collect maybe \$1 million--that's roughly what a life is worth. The standard contingency fee would give me about \$300,000.</P>

<P>"Lawyers can earn \$200 to \$300 an hour, so that's 1,000 hours. But the tobacco industry uses a scorched-earth litigation policy--they file endless motions, take endless depositions, appeal everything. They paper you to death. You'd have to spend far more than 1,000 hours."</P>

<P>In other words, the right to sue would be preserved on paper, but not in practice."</P>

<P>ONE ADDITIONAL EXAMPLE OF INTRUSION UPON STATE'S RIGHTS</P>

<P>Under the statute, determinations made by a special federal court on

issues related to admissibility of documents allegedly protected by the attorney- client privilege, the trade secret privilege, joint defense privilege, etc. would be binding on all state courts, even if they were not a party to the proceedings.</P>

<P>But states are obviously free to determine for themselves whether or not a document already in their possession or brought before their courts is protected under their own version of such privileges, or even, of course, to abolish many such privileges. For example, the Constitutional does not seem to require states to establish or have a trade secret protection.</P>

<P>Thus for a federal court to issue an order binding on all persons in the United States and all state courts, none of which are parties to its proceedings, with regard to matters of the state law of evidence, is not only unprecedented, but seemingly a gross overreaching of federal power into state affairs.</P>

<P>SUMMARY AND CONCLUSIONS</P>

<P>For all of the reasons very briefly set forth above, I believe that the unprecedented tobacco deal is fraught with many constitutional problems and uncertainties; indeed, it is fraught with those problems precisely because nothing like it has ever been done for any other industry including

the makers of asbestos, vaccines, other drugs, breast implants, etc.</P>

<P>Moreover, even persons such as the witnesses today, who have expertise in a variety of legal areas, cannot say with any degree of certainty whether or not any given provision will be found constitutional, especially since the provisions designed to carry out the terms of the agreement have yet to be crafted. Also, as noted previously, even if some such legislation were to be passed, it probably could not be challenged immediately because of problems like standing and ripeness, and even then a final resolution of those judicial challenges would take years.</P>

<P>In rare situations where the public need is arguably compelling, Congress may enact legislation despite very strong concerns that it may ultimately been held unconstitutional. Recent examples include the "line item veto" bill, the Balanced Budget Act (the Gramm-Rudman-Hollings act), the Flag Burning legislation, and other similar pieces of legislation.</P>

<P>But while the risk to children created by the largely-unregulated sale and advertising of cigarettes to children is certainly a major problem, it is hard to say that there is a burning public interest in taking those issues from the courts, agencies, and state institutional now dealing with them, and for the first time entering into a legislative deal to keep a tort feason profitably functioning.</P>

<P>For all those reasons, Action on Smoking and Health (ASH) respectfully suggests that the Congress not enact provisions as to which the constitutionality is dubious or even subject to significant doubt. We would be happy to provide additional information as requested.</P>

<P>Wednesday, July 15, 1997</P>

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