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Senator Durbin

Tobacco Litigation for Medicaid Recoveries

QUESTION: As you know, attorneys general from 23 states are suing the tobacco industry to recover health care costs incurred by states for tobacco-related injuries. Yesterday, I joined 4 other Senators in a letter urging Department of Justice to join those suits. Does the Department intend to pursue recoveries on behalf of the United States?

ANSWER: As you stated, a number of states are suing to recover costs incurred under Medicaid for tobacco related illnesses. The Department has been closely following this litigation, but has not intervened. Medicaid is a joint federal/state program administered by the Health Care Financing Administration (HCFA) within the Department of Health and Human Services (HHS). The federal government provides funds to states to help finance certain health care programs, but state agencies are primarily responsible for administering Medicaid. Any money owed to the federal government for Medicaid related illnesses would be owed to HCFA; accordingly, DOJ would bring a tobacco-related lawsuit at the request of HCFA and HHS. To date, there has been no request from HHS and HCFA to join the on-going litigation.

I would also point out that, under the Medicaid statute, states are obligated to pursue recoveries of health-care costs from potential third-party tortfeasors. If states recover Medicaid costs, they are further obligated to reimburse the federal government a portion of those costs. The federal government does not have an independent cause of action under the Medicaid statute to pursue recovery of Medicaid funds from third parties.

Should states refuse to reimburse the federal government, remedies are available to HCFA through both the administrative process and the district court. HCFA has notified and will continue to notify states of their statutory obligation to reimburse the federal government a portion of their recoveries.

Similarly, under current Medicare law, there is no provision for a direct lawsuit by the federal government against tobacco companies. Again, however, if a private lawsuit against the tobacco industry is successful, HCFA would be entitled to any recovery of Medicare costs that individuals are awarded. If a global settlement by the states included private parties, the federal government could notify attorneys for either the plaintiffs or the defendants of their obligation to repay the federal government.

United States Senate

WASHINGTON, DC 20510

April 29, 1997

The Honorable Janet Reno
Attorney General
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear Attorney General Reno:

We are writing to strongly urge that you follow the lead of the 23 state Attorneys General in seeking to recover the approximately $20 billion in tobacco-related health care costs borne by federal taxpayers each year.

Smoking is the most pressing public health issue facing our nation. It not only costs lives, over 400,000 deaths per year, it also costs taxpayers billions of dollars. In fact, the Centers for Disease Control and Prevention (CDC) report that medical expenses directly related to smoking cost the United States $50 billion annually. In addition, the United States economy loses $50 billion a year from lost productivity due to tobacco-related illnesses and premature death.

Over the past couple of years, 23 states have decided to try to recoup some of the Medicaid costs from the tobacco companies. Many others states are considering similar legal action. These lawsuits cut across party and regional lines: from the North, South, East and West, Democratic and Republican governors and attorneys general have all joined the effort to recover taxpayers dollars spent on Medicaid recipients suffering from tobacco-related diseases and illnesses.

But the states bear only part of the burden. The Federal government spends billions of dollars a year on illnesses and diseases that result from tobacco use, including $10 billion in the Medicare program, $5 billion in the Medicaid program, and almost $5 billion in other Federal Health programs. It is time the Federal government join with the states in seeking reimbursement for the huge health care costs smoking and the use of tobacco products impose on American taxpayers.

We know that you have been considering options for legal action in this area. We urge you to act promptly to have the Federal government join the states in taking action so that tobacco-related costs to federal programs and taxpayers can be recovered. We appreciate your consideration of our request and look forward to your response.

Sincerely,

United States Senator

United States Senator

United States Senator

United States Senator

United States Senator

TALKING POINTS REGARDING THE FISCAL IMPACT OF THE STATES' TOBACCO LITIGATION ON MEDICARE AND MEDICAID

Introduction

- Since 1994, twenty-four (see attachment) states have filed lawsuits against the major tobacco companies in an effort to recover smoking-related health care costs. Recent events indicate that the next several months may prove to be a litigation watershed for the American tobacco industry. Liggett Group, Inc., has become the first tobacco manufacturer to settle with the states. In doing so, Liggett agreed to pay damages, to submit to federal advertising restrictions, and to admit that cigarettes are addictive and have been marketed to children. Liggett also promised to disclose internal documents that would reportedly incriminate the other tobacco companies.

- This summer the first state lawsuits are scheduled to go to trial. In the wake of these developments, the two largest tobacco companies, R.J. Reynolds and Philip Morris, reportedly have begun settlement discussions with the states' attorneys generals. In an unprecedented change of strategy, the industry now appears willing to pay significant sums to the states in exchange for settlement of the present suits and immunity from future litigation.

- Since the first state sued (Mississippi in 1994), the Department has closely monitored the progress of this litigation. However, to date, the Department has not been involved in any discussions concerning a universal settlement between the states and the tobacco industry. We are defending the FDA's regulations from a challenge by the tobacco manufacturers and have recently gotten a good decision from the district court. Apart from continuing to defend the FDA's regulations on appeal, however, Justice has no plans for any additional litigative roles.

Fiscal Impact of the States' Lawsuits on Federal Medicaid and Medicare Programs

Medicaid

- Enacted in 1965, Medicaid is the federal government's primary means for 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 certain health care programs. State agencies are primarily responsible for administering this program.

- The states have great latitude in defining eligibility and the amount, extent, and scope of coverage. At the federal level, Medicaid is administered by the Health Care Financing Administration ("HCFA"), a sub-agency of the Department of Health and Human Services.

- Under the Medicaid statute, the states are obligated to pursue recoveries of health-care costs from potential third-party tortfeasors. *See* 42 U.S.C. § 1396(a)(25); 42 C.F.R. § 433.138. Insofar as the states recover Medicaid costs, they are further obligated to reimburse the federal government a portion of the recovery in accordance with the Federal Medical Assistance Percentage. The federal government does not have an independent cause of action under the Medicaid statute to pursue recovery of Medicaid funds from third parties.

- When the first five states settled with Liggett in March 1996, HCFA reminded them of their obligation to reimburse the federal government its portion of any Medicaid recovery. Two of the states did reimburse the federal government some of the settlement proceeds, but the other three did not. HCFA is currently drafting a letter to remind the other suing states that if they settle with any tobacco company for Medicaid damages, they have a responsibility to credit the federal government its share.

- Insofar as the states recover any sums, HCFA would probably accept a reasonable allocation method for distinguishing Medicaid from non-Medicaid funds so long as the method gives weight to the relative size of all the claims involved. This allocation would result in the amount of the Medicaid claims being shown as a percentage of the total health claims which comprise the lawsuit brought by each state.

- If a state refuses to reimburse the HCFA for Medicaid monies that are recovered, HCFA can initiate a disallowance action for the portion of that recovery which is owed to the federal government. If a state still fails to voluntarily repay the federal government, an administrative appeal and a district court remedy are available to decide whether the state must reimburse the HCFA. Therefore, the existing administrative procedures provide a procedure for protecting the United States' fiscal interests in any settlement between the states and the tobacco industry.

Medicare

- Unlike Medicaid, Medicare is a 100% federally funded program whose primary purpose is to provide health insurance for the elderly. In general, Medicare is considered a primary payer of health care costs for its beneficiaries. That is, Medicare was designed to be an independent, primary payer vis-a-vis all other payers --- including private insurance companies and tortfeasors.

- Being a wholly federally funded program, any recovery by the states in their lawsuits would not include Medicare funds, and thus, the federal government would not be entitled to any portion of the award or settlement to defray Medicare costs.

- Because Medicare is intended as a primary payer, it is doubtful that the statute would allow a direct cause of action at this time by the federal government against tobacco companies who have injured Medicare beneficiaries. HCFA has never brought suit against a third-party tortfeasor to recover Medicare expenditures. However, insofar as any private lawsuit against the tobacco industry is successful, HCFA would be entitled to any recovery of Medicare costs that the individuals have obtained. Accordingly, HCFA may notify beneficiaries of their responsibility to reimburse the federal government if they recover Medicare health care costs. If a global settlement with the states included claims by private parties, the federal government thus could protect its interests by notifying either the plaintiffs' or the defendants' attorneys of their obligation to repay the federal government under the Medicare statute.

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

The Honorable Frank R. Lautenberg
United States Senate
Washington, D.C. 20510-3002

Dear Frank:

Thank you for your letter of March 13, 1996, to Attorney General Reno and myself regarding the possibility of the federal government filing a suit against tobacco companies to recover the costs of treating persons with tobacco-related illnesses.

Under current law, it is not necessary for the federal government to file a separate lawsuit to recover federal Medicaid costs. Under the Medicaid program, the states -- and not the federal government -- are responsible for seeking recovery of Medicaid expenditures from all liable third parties. 42 U.S.C. § 1396a(a)(25). The states are then obligated to credit the federal government with a share of such recoveries, based on the percentage of federal matching funds that paid for the underlying services. See 42 C.F.R. § 433.140(c). Thus, the federal government will benefit from any recoveries in the lawsuits brought by states, even though the federal government is not a party to the lawsuits.

This policy applies also to recoveries from settlements of lawsuits. The Health Care Financing Administration (HCFA) is aware of at least five states, including Massachusetts, West Virginia, Florida, Mississippi, and Louisiana, have reached a settlement with the Liggett Group. Liggett made its first installment under the settlement last month, paying each state $200,000. HCFA has been working with its regional offices and the states to assure that this amount is reported on quarterly Medicaid expenditure reports. On those reports, states may claim at least 50% federal participation in administrative costs (including legal costs). The next reports are due to the Health Care Financing Administration on July 30.

As you know, the Clinton Administration has taken unprecedented steps to address the serious public health problems caused by tobacco use, particularly among our children, and I appreciate your concern about the issue.

Sincerely,

Donna E. Shalala