Tobacco—Lawsuit

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The New Profiteers of the Tobacco War

Rule of Law

By Jonathan Turley

Where there is war, there are war profiteers. The tobacco wars are no exception. In the wake of huge personal-injury awards and the U.S. tobacco companies' settlements with state governments, the war profiteers are racing to court to get their share of the spoils. The latest litigants include foreign governments, health-insurance companies and the federal government. All are seeking to claim their own shares of the tobacco purse.

The new litigants have one thing in common: They have actually suffered no injury from tobacco. Their legal theories range from the implausible to the incredible, but hope springs eternal when billions of dollars are in the balance.

Six countries have just consolidated their cases in a federal court in Washington, D.C. These newly found tobacco victims include Guatemala, Brazil, Bolivia, Nicaragua, Panama and Venezuela. A dozen other countries, including Russia, are reportedly considering lawsuits of their own.

The six countries claim that they were shocked—*shocked!*—to learn that tobacco could be harmful to their citizens. This epiphany appears to have occurred shortly after U.S. tobacco companies agreed to fork over $200 billion to the states in the tobacco settlement. These nations now insist that, like the American states, they too were deceived about the risks of smoking and, due to this deception, they allowed their citizens to engage in a harmful practice. Now, racked with guilt, they have come to express their outrage—and seek massive damages.

And so the federal court will be witness to a truly bizarre scene: countries with often infamous records on human rights or the environment seeking health-based damages in the name of their citizens. In Guatemala, the justification for the suit may be found in that country's "Historical Clarification Commission," which recently argued that the U.S. and private companies are responsible for "the country's archaic and unjust socio-economic structure." In Brazil, the government insists that it would have taken steps to protect its citizens from tobacco if only it had known that smoking was addictive. In Russia, the short life expectancy of many citizens makes tobacco illnesses look like a long-term investment. (Nevertheless, while the Russian government pursues a tobacco claim in Washington, the Duma is considering a tobacco monopoly in Moscow, thereby claiming both the profits and damages from this product.)

Notably, the suing countries' anger doesn't extend to their own domestic tobacco companies. Some of these countries actually have monopolies on tobacco or have domestic companies supplying a large share of the market. Guatemala insists that, while U.S. tobacco companies "lied to Guatemala . . . by misrepresenting cigarettes as harmless," its domestic companies (which control virtually 100% of the market) were also deceived and were not part of the fraud.

Brazil is the world's leading exporter of tobacco but claims that it is also an unwitting victim of Big Tobacco. Brazil's moral outrage studiously avoids its own tobacco companies, which in the past year were cited 11 times by the U.S. for exporting tobacco containing 20 prohibited pesticides that are hazardous to human health. Likewise, it was a Brazilian subsidiary that introduced *fumo louco*, or "crazy tobacco" to the world market. Genetically altered to increase nicotine, *fumo louco* continues to be grown in Brazil and is so potent that farmers can become dizzy harvesting the crop.

Of course, when one considers the claims of our own health-insurance companies, these foreign suits look like the harmless pursuit of an alternative source of foreign aid. Blue Cross/Blue Shield once vehemently opposed the right of patients to sue it for uncompensated care. When it comes to their own suits, however, the Blues take a far more liberal attitude. The Blues have now gone to court to seek recovery of insurance payments due to tobacco injuries; this is despite the fact that their policyholders have already paid them for any losses in the form of higher insurance premiums. When policyholders in Minnesota sought an injunction to force the Blues to reimburse them for money acquired in the state settlement, the Blues got the action dismissed.

> *Their legal theories range from the implausible to the incredible, but hope springs eternal when billions of dollars are in the balance.*

But it's the federal government that sets the standard for war profiteering. Consider: The federal government intends to seek damages for a product that it has long subsidized and long taxed as a major source of general revenue. The federal government's take from cigarette sales, currently 24 cents a pack, will increase to 39 cents by 2002. State taxes are often twice the federal level. As with the state settlement, any federal damages would likely be tied to future tobacco sales, only increasing the federal dependence on nicotine products. Smoking may be hazardous to your health but quitting would be positively lethal for your government.

The injury claimed by the U.S. government is equally questionable. As gruesome as it may be to contemplate, tobacco illnesses actually appear to save the federal government billions in veterans' benefits, Social Security, Medicare, disability and other federal programs. A study by Harvard economist Kip Viscusi found that smokers actually produce a net benefit for the government of 32 cents per pack.

(!)

If war is politics by another means, this is truly a war only Clausewitz could appreciate. After Attorney General Janet Reno informed the Senate that there was no legal basis for a federal action against tobacco companies, Mr. Clinton announced in his State of the Union address that there would be a federal action to recoup billions in damages. In a move that would make most slip-and-fall lawyers blush, the Justice Department must now find a way to justify the president's promise of billions in damages after it publicly rejected any good-faith basis to sue.

Of course, all wars begin with dreams of glory that are rarely achieved. Even if these litigants can secure a beachhead in federal court, they face some challenges as the tobacco wars progress. Earlier this month, for example, the major tobacco class action suit in Florida experienced a sharp reversal of fortune when an appellate court ordered trials on each individual claim. Such rulings now could turn the federal litigation into a legal version of invading Russia in the winter.

This isn't to say that the tobacco companies shouldn't be sued. There are legitimately injured parties who have every right to seek relief. These new litigants, however, weren't drawn to court by the victims but by the spoils of the tobacco war. They are indisputable proof that the first casualty of any war is the truth.

Mr. Turley is a professor of law at George Washington University.

Tobacco Lawsuit

Russia's Rule by Racketeers

By Stephen Handelman

The director of a small, lucrative Moscow real estate brokerage firm once explained to me why he avoided paying taxes. It wasn't just the high rates, then approaching 40%, he said. What particularly worried him was the requirement to provide a statement of income to state bureaucrats, whom he feared would pass on the information to local Mafia lords. He knew what would happen then—a demand for an increase in the protection rate he was already paying to the same armed groups in order to remain alive in the city's Wild West economy.

That was in 1993, less than a year after the introduction of "capitalism" to the new Russian state. Things have only gotten more sophisticated since then. This week, the House Banking Committee, chaired by Iowa Rep. Jim Leach, will look into allegations that organized-crime groups and government officials have laundered billions of dollars in Russian assets through Western banks. But where most of those reports have concentrated on the remarkable ease with which the money crossed international borders, the key problem has usually been overlooked: the collusion between criminals and government bureaucrats that lies at the heart of the Russian failure to live up to the promise of postcommunist democracy.

Not a Secret

The emerging financial and political power of Russian organized crime was never a secret. Anyone who lived in Russia in the late 1980s and early 1990s knew that the astonishing explosion of entrepreneurship that accompanied the gradual weakening of Communist Party control had a dark side. Firebombings of cooperative restaurants, brutal murders, kidnappings and mysterious bomb blasts suggested even then that a force was already at work replacing the tyrannical state with a terrifying dictatorship of racketeers.

More than 80% of Moscow businesses were already paying protection money or forced to engage "silent partners" by 1993, and in that same year, government authorities acknowledged that organized crime accounted for 30% to 40% of Russia's annual turnover in goods and services. Nevertheless, the Western response to the contagion reflected the official Russian government line: Corruption was merely the price to be paid for the chaos of a transition economy. Eventually, the reformers would gain control, and channel all this criminal energy to productive uses.

How wrong we were. Russia's Mafia godfathers have now graduated from small-time extortion and protection schemes developed in the chaos of a black-market economy to become world-class crime czars. They are likely to dominate 21st-century transnational crime the way Microsoft dominates information technology. And these Armani-clad, computer-savvy, Russian-accented Bill Gates wannabes could not have done it without the collusion, both witting and unwitting, of governments in the East and West.

Russia's Mafia godfathers are likely to dominate 21st-century transnational crime the way Microsoft dominates information technology.

In the current political debate in the U.S. over "who lost Russia," it's worth taking a closer look at who these CEOs of Russian crime really are, and how they got that way. Hollywood would have a difficult time casting them, since they don't quite fit the usual preconceptions of mafia overlords. There are two distinct categories.

The first is almost as old as the Russian state: the robber brigand of Russian folklore who lives outside and in opposition to the czar's rule. Shortly before the 1917 Russian Revolution, such men, known as *Vory v Zakonye* (Thieves in Law) were taken as role models by Marxist revolutionaries who admired their skill in organizing paramilitary societies and adopted their modus operandi of preying on the rich and terrorizing government functionaries.

Thieves' societies operated with varying degrees of success through the Soviet era. Many Vory considered themselves "dissidents" to the Soviet system and achieved a quiet cult status underground, but with the liberalization of the Soviet economy in the 1960s they became crucial players in the black-market economy, often striking up informal partnerships with local government officials and security organs. In some southern Russian towns, the local Vor had more power and authority than the Communist Party secretary. Except for the distinctive tattoos that identified his status to the cognoscenti, he was to all appearances just another elderly pensioner.

With the collapse of the Soviet state, many of these men and the organizations they led emerged from obscurity. They represented one of the few "institutions" left standing on the vast territories of the old federation, and they commanded a huge source of free capital that could be invested in the Russian economy. Their only competition in this regard was the Communist Party itself, whose enormous reserves of cash were being quietly transferred to the newly established banks, brokerages and businesses. The two principal sources of financial capital in postcommunist Russia found a mutual interest in reviving their old partnership, but it did not happen smoothly. The jockeying for control over the spoils of the old communist state came with a murderous internecine violence not seen in Russia since the civil war of the 1920s. Many Vory lost their lives in mob-style assassinations; others adapted to the new world.

Out of this synergy emerged the second category of crime bosses, the so-called Authorities. Sleeker, more profit-oriented and better-educated, they came from those sectors of the population that had developed mutually beneficial links with the classic underworld in the Soviet era while being sophisticated in the ways of the larger world: former KGB operatives, former Communist Party and Komsomol officials, state-enterprise managers, smugglers. They were as indistinguishable from the population as the Vory of old, except now they looked like the new bankers, politicians and government officials they were. To coin a phrase, they were Comrade Criminals—masters of white-collar intrigue who were able to fuse the ruthless entrepreneurial tactics of the old criminal gangs with the networks of the Communist Party *nomenklatura* elite. It is this fusion of ruthlessness, financial skill and international sophistication that has made them a unique global force.

The problem was—and still is—to distinguish them from the legitimate entrepreneurs and honest officials of New Russian society. The amorphousness of their control and wealth has made it hard for ordinary Russians, much less Western observers, to know who is who—or, more aptly, who is behind what. What makes the picture even more confusing is that the crime CEOs themselves are not necessarily figures of abuse in many parts of Russia. The gangs' folkloric claim to be the embodiment of Russian national ideals, religious virtue and state order has made them attractive to ultranationalist groups, young people and many others who feel victimized by the inequities of Russian economics. Last year the Moscow press reported that one provincial governor openly courted a local mobster (who was already contributing to major charities) to help pay the salaries of workers in his region.

What's Illegitimate?

To make matters even more complicated for outsiders, the line between legitimate and illegitimate economic activity has never been clear. The "democratic" economic reforms of the 1990s were instituted in the same way as state-led initiatives throughout Russian history: with a minimum of debate and with no plausible infrastructure to govern their enforcement. If Russia's criminal bosses exploited the legal vacuum, so did ordinary Russians. The Moscow real-estate broker sent his money abroad as eagerly as the crime bosses who were receiving protection payments from him and the government bureaucrats who were getting a cut of the profits. An estimated $200 billion has left Russia since 1991, and no small part of that comes from the "legitimate" earnings of ordinary Russians who have, under the circumstances, responded rationally to a system in which only the fittest survive.

Money laundering—if that is even the proper description for the avalanche of funds that now flit back and forth between Russia and the West—is a symptom of what ails Russia rather than the disease itself. Our continuing inability to understand and respond to the sources of Russian "criminal behavior" and corruption ensures that the disease will worsen—and infect us.

Mr. Handelman is the author of "Comrade Criminal: Russia's New Mafiya" (Yale University Press, 1995).

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Tobacco-
Lawsuit

Cynthia A. Rice 09/24/99 02:55:50 PM

Record Type: Non-Record

To: Anna Richter/OPD/EOP@EOP
cc: leanne a. shimabukuro/opd/eop@eop, irene bueno/opd/eop@eop, j. eric gould/opd/eop@eop
bcc:
Subject: Re: URGENT -- FINAL CLEARANCE -- FY00 CJS Conference Letter

We should edit the paragraph on tobacco as follows. This incorporates edits from Justice. Burce said he didn't need to see it, but if he or Eric are available you might show them.

Tobacco Litigation. The Administration urges the conferees to provide an additional $20 million for the Justice Department's litigation to recover the tobacco-related health costs borne by taxpayers. Smoking-related health costs cost taxpayers billions of dollars each year through Medicare, veterans' and military health, and other federal health programs, and American taxpayers should not have to bear the responsibility for these staggering costs. ~~The Administration is disappointed that the House and Senate have not provided direct appropriations requested for tobacco litigation, which would force the Department to use base funds to develop claims to recover money on behalf of the American people.~~ Given that the States settled their claims against the tobacco industry for more than $200 billion and that Federal health care costs substantially exceed those of the States, the $20 million requested by the Administration is small compared to potential recoveries. In addition, in light of the resources that will be spent to defend against this litigation, $20 million is necessary for the Department to represent effectively the taxpayers' interest.
Anna Richter

Anna Richter
09/24/99 12:51:17 PM

Record Type: Record

To: Cynthia A. Rice/OPD/EOP@EOP, Leanne A. Shimabukuro/OPD/EOP@EOP, Irene Bueno/OPD/EOP@EOP, J. Eric Gould/OPD/EOP@EOP

cc:
Subject: URGENT -- FINAL CLEARANCE -- FY00 CJS Conference Letter

Just came in...Need sign off by 3:00 or it goes without it. Thanks.

---------------------- Forwarded by Anna Richter/OPD/EOP on 09/24/99 12:49 PM ---------------------------

Sandra Yamin
09/24/99 12:36:14 PM

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To: See the distribution list at the bottom of this message

SEPTEMBER 22, 1999, WEDNESDAY - 13:00 Eastern Time

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Tobacco
Lawsuit

HEADLINE: NEWS CONFERENCE WITH
ATTORNEY GENERAL JANET RENO
AND ACTING ASSISTANT ATTORNEY GENERAL
FOR THE CIVIL DIVISION DAVID W. OGDEN
TOPIC: FEDERAL TOBACCO LAWSUIT
U.S. DEPARTMENT OF JUSTICE
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WASHINGTON D.C.

BODY:
TRANSCRIPT BY: FEDERAL NEWS SERVICE 620 NATIONAL PRESS BUILDING WASHINGTON, DC 20045

THIS IS A RUSH TRANSCRIPT. ------------------------
ATTY GEN. RENO: This morning the United States filed a lawsuit in federal court in Washington D.C. against the major cigarette companies. In the complaint the United States alleges that for the past 45 years the companies that manufacture and sell tobacco have waged an intentional coordinated campaign of fraud and deceit. As we allege in the complaint, it has been a campaign designed to preserve their enormous profits whatever the cost -- in human lives, human suffering, and in medical resources.

The consequences have been staggering. Each year 400,000 Americans die from smoking cigarettes. And as a result, each year the federal government alone spends more than $20 billion in taxpayer money just to treat diseases caused by cigarettes.

Last December, after an extensive review by Justice Department lawyers, I concluded there was a sufficient basis to prepare a litigation plan against the major tobacco companies. And for the last months, lawyers on the Justice Department's tobacco litigation team have worked to develop the facts and the law to make a final decision on whether to proceed. Today we are moving forward.

Today we filed a lawsuit that seeks to recover from the tobacco companies the billions of dollars that American taxpayers spend each year on smoke-related illnesses. As millions of cigarette smokers have gone into the hospital for lung cancer and emphysema, the American taxpayer has footed the bill. And over the bill that bil added up.

Today, on behalf of the taxpayer, we're asking the tobacco companies to pay their fair share.

The companies named in today's complaint have long dominated the market for cigarettes in the United States, and over the last five decades, as discussed in the complaint, they have conducted themselves without regard to the truth, without regard to the law, and without regard to the health and life of the American people.

Internal documents that have come to light in recent years demonstrate that the cigarette companies have known more than they let on. They knew far better than the rest of us that smoking increases the risk of disease and death; they knew that nicotine is extremely addictive; they knew that the success of their business depends on inducing new customers, typically under 18 years of age, to become hooked on nicotine. That's why they targeted our youth, and that's why every day nearly 3,000 young people take up smoking.

As our complaint also asserts, the cigarette companies realized, since at least 1953, that the truth poses a mortal threat to their businesses. Rather than divulging what they knew to be true, the companies sought to convince the American people of their concern for the public's well-being. As our complaint makes clear, at no time did they honor that commitment. Instead, at every turn they denied that smoking causes disease, and denied that it is addictive. As the complaint alleges, they placed profits above the public health.

Our goals in this lawsuit are simple. We want to recover health- care expenditures paid out by the federal government to treat tobacco- related illnesses. We want to require the tobacco companies to disgorge the funds that they earned through their unlawful conduct. We want to require the tobacco companies once and for all to disclose all relevant research on smoking and health. And we want to engage in counter-advertising and other public education campaigns to better warn our young people about the dangers of smoking.

I pledge today that we will work tirelessly to ensure that justice is done.

I now want to introduce David W. Ogden, the acting assistant attorney general of the Civil Division, who will discuss the lawsuit in greater detail.

David? MR. OGDEN: Good morning.

As the attorney general has indicated, we allege that four and a half decades of misconduct by the cigarette companies has, not only harmed the public health, but it has cost the American taxpayer billions of dollars. That is why we are bringing this lawsuit today. The misconduct we allege spans more than 45 years.

Based on internal documents, we allege that the chief executives of the cigarette companies met at the Plaza Hotel in New York City, in January 1954, and agreed there to wage a long-term public-relations campaign based on fraud and based on deception.

We allege that, in carrying out that campaign, they pulled no punches. For decades, they repeatedly and consistently denied that smoking cigarettes causes disease, despite their knowledge that it does. They repeatedly and consistently denied that cigarettes are addictive, even though they have long known, and deliberately exploited, the addictive properties of nicotine.

And they repeatedly and consistently stated that they do not market cigarettes to children, despite using marketing strategies that ensure minors continue to serve as their major source of "replacement smokers," a phrase actually used by cigarette company officials in their internal memoranda to describe America's youth.

We allege that the unlawful campaign went further than simple fraud. Under the campaign, we allege that the tobacco companies agreed to assure the public of their concern about issues of smoking and health. And we allege that, as part of that campaign, they promised to conduct independent objective research to safeguard the public health and to divulge whatever they learned.

In fact, however, we allege that they designed a research campaign to ensure that damaging conclusions were not reached and to generate faulty studies to cast doubt on the truth. And when they did not like the conclusions they reached, those conclusions never saw the light of day.

Based on their internal documents, we also allege that they agreed not to do research to make cigarettes safer and not to compete with each other through safer cigarettes.

As our complaint alleges, the tobacco companies targeted this campaign at existing smokers, who they have understood to be addicted to nicotine, and to young people, who are the companies' major source of new smokers. Based on the companies' internal documents, we allege that their goal was to create doubt in the minds of the American public and to maintain an open controversy and public debate.

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If they could raise false doubt in addicted smokers about the risks of smoking, few would muster the strength to quit. The alleged campaign was very effective, as the death toll and staggering health bills attest.

Today's suit relies upon three federal statutes. The first statute is the Medicare Care Recovery Act, or MCRA. MCRA provides that the United States government may sue to recovery medical costs when three conditions are met. First, a person is injured or suffers a disease; second, a circumstance exists where a third party is legally responsible for that injury or disease; and third, the United States is authorized by law to provide or pay for the medical treatment. Here we believe that millions of people have sustained injuries or suffered disease as a result of the unlawful conduct alleged in our suit. And the United States, through many federal programs, including Medicare, Defense Department health programs, Veterans Administration health programs, and others, has paid for their medical treatment.

The secondary payer provisions of the Medicare statute provide a second independent basis for recovery. Both this statute and MCRA, which I've already discussed, give the government a right to seek these funds separate and apart from any claims the individual patients might have. We allege that the tobacco companies violated tort law in several ways, including fraud, failure to warn, product defect, and voluntary undertaking, as well as violating state consumer protection statutes.

Finally, we are also relying on the civil provisions of the Racketeer Influence and Corrupt Organizations statute, or RICO. Under RICO, we allege that the tobacco companies committed numerous acts of fraud. As a result, we are seeking remedies, including disgorgement of ill-gotten profits, full disclosure of all documents on smoking and health, and funds for public education and smoking cessation campaigns.

In bringing this action, we owe a major debt to the state attorneys general, who brought and pursued similar lawsuits against the tobacco companies, lawsuits which settled for more than $200 billion over 25 years. Those suits forced the companies to disclose millions of pages of previously secret documents that have revealed the scope of the tobacco companies' misconduct we allege in our complaint. While extremely successful, those lawsuits concerned only Medicaid payments, payments made on behalf of lower-income Americans, which are borne both by the states as well as the federal government. But those state suits did not seek the billions of dollars the federal government spends on medical programs other than Medicaid.

That's what today's suit seeks to do.

I want to publicly thank and acknowledge the extraordinary efforts of our career Justice Department attorneys, who have worked since February to put together this case. The lawsuit that we have brought today is the result of their careful review of the facts and their recent analysis of the law. I am profoundly grateful for their efforts and their assistance. And I believe that, upon the conclusion of this litigation, the American people will owe them a debt of gratitude.

I would be happy to answer any questions you may have.

Q You are really talking about -- I mean, taking all the factors, when you take in how long this has been going on, recovery on the part of others, triple RICO damages, disgorging of the legal profits -- you are really talking about trillions of dollars, not billions of dollars. And if you are successful, you are talking about the possible end of the American tobacco industry. Do you see this suit in those terms?

MR. OGDEN: I do not. It is certainly not a goal of the litigation -- nor do I expect that this will bring about an end of the tobacco industry or the bankrupting of any companies.

In fact, just to clarify, we are not seeking treble damages under the RICO statute. We are invoking the equitable provisions of the civil RICO statute under which we can seek disgorgement of ill-gotten gains; that is -- we can require the payment of those profits that the tobacco companies made as a result of the fraud we allege. And we are also seeking injunctive relief.

Yes?

Q The major complaint talks about "all past actions, current actions and future actions." You are talking about a tremendous amount of money here, not the $200 billion that the states are given to 2020; you are talking about a huge chunk of money that could cripple this industry.

MR. OGDEN: I think it conceivably could be a large amount. The amount will have to be proved as a result of the proof that's adduced in the case. We are not suing with respect to future actions. We are seeking to stop the conduct. We are seeking future damages based on the past actions. Yeah?

Q (Inaudible.)

Q Will you -- (inaudible) -- an outside lawyer to try the case? Or why haven't you hired that person yet?

MR. OGDEN: We have made no final decision on that question.

The career lawyers in the department have done a superb job preparing the case. They are a very, very talented group of lawyers.

It's certainly possible that we would go outside the department to bring so in, as a Justice Department employee, to work this case. We certainly would not proceed based on any contingent arrangement. But no final decision has been made about that.

Back here?
Q This is a question for the attorney general.
The tobacco companies and their representatives say that this is "regulation by prosecution" and that this is a political act; that the president raised this in his State of the Union address in January, that the Justice Department had testified before Congress in 1997 that it didn't think it had a cause of action.
What is your response to the notion that this is a political act, following through on the wishes of the White House, as opposed to something that has a sound legal basis?
ATTY GEN. RENO: First of all, with respect to the 1997 testimony, that related to Medicaid, which is a cause of action that the states hold. And our lawyers advised us at the time that we must look to the states to recover any federal monies that were expended and that we stood behind the states in that regard.
That does not relate to the issue of Medicare and other payments made by the United States government.
MORE

And we have continually looked at that, because this has been a matter of real concern to me over the years as people first told me that we did not have a cause of action with respect to Medicaid. Then we looked carefully at the statutes, went through all our possible causes of action, and in December of last year reached the conclusion that there was a basis for framing some litigation, but that it was going to require a tremendous effort. We advised the White House that we thought we could perfect a cause of action, but that it would have to be our determination after reviewing the facts. And we did so based on the evidence and the law and reached the conclusion that we could file this cause of action.
Q Mr. Ogden, the industry in the last couple of decades hasn't fooled anybody, or very many people, and certainly not the federal government, which puts warning labels on cigarette packages. The government has said it believes cigarettes are dangerous and addictive. So do you have -- is one of the big obstacles for you all to prove that the damages you seek to recover for are for those peoplead no clue that smoking was dangerous, who were duped by this campaign, or can you include everybody, even those who already knew that smoking was dangerous and did it anyway?
MR. OGDEN: You have to realize a number of things about the lawsuit.
The first is it's dealing with a 45-year campaign over which time the amount of information that was in the public was radically different over that time. What we can -- what we believe we can show, what we've alleged is that the tobacco companies throughout that period and even on to the present time had superior knowledge to anything that the rest of us had about the properties of their cigarettes, both in terms of the threat that they pose to the public health, in terms of their addictiveness, in terms of what they might do to make a safer product, and the like, and that they deliberately withheld that information from the American public. What we hope to be able to show and what we expect to be able to show is that their deliberate falsehoods about their knowledge and what they knew and their attempt to create a controversy caused a large number of people to continue smoking, and that, indeed, was the very purpose of the disinformation campaign that they waged. They tried to get people to rely on them, to get to the bottom of the smoking and health controversy, and they created that.
Their goal was to create doubt. Remember, the key constituency for this campaign was addicted smokers, people who they knew, but it was not publicly understood, were chemically dependent on a substance. And they believed that if they could create enough doubt, that would dissuade large numbers of people from quitting, and that was the nature of the fraud.
LANGUAGE: ENGLISH

LOAD-DATE: September 22, 1999

Tobacco Suit Is Latest Abuse Of the Rule of Law

By Robert H. Bork

At least when the nation decided to end the "scourge" of alcohol, it had the political courage to ratify the 18th Amendment making Prohibition the law of the land.

Not so in these pusillanimous days. Now, as then, we are in the throes of a reform campaign waged with the vigor and self-righteousness of the bluenoses of old. This time their target is cigarettes, not whiskey. But our politicians no longer have the courage to legislate the end of what they condemn. Instead, they resort to lawsuits in an effort to end smoking by destroying the tobacco companies. The end, apparently, justifies any means, no matter how fraudulent.

States attorneys general have filed multibillion-dollar suits, allegedly to recover the medical expenses the states have incurred caring for victims of smoking. Never mind that the states have made far more money taxing cigarettes than they spend on medical care. If that were all, we could shrug, as we usually do, at the cynicism of our elected officials. Unfortunately, the damage runs deeper than the pillaging of shareholders in the tobacco companies.

* * *

The Department of Justice has just filed suit to recover the estimated $25 billion spent by federal, military and civilian insurers on smoking-related illnesses. This follows the settlement by tobacco companies with the states that calls for payment of more than $240 billion over 25 years. It is, unfortunately, to be expected that states would file such suits. (Not for nothing is the National Association of Attorneys General—NAAG for short—often called the National Association of Aspiring Governors.) But one might have hoped that the Justice Department, even under Janet Reno, was above such chicanery. Not so.

The real damage done by this noxious mixture of governmental greed and moralism is not to the tobacco companies' shareholders (they should have seen it coming and got out a long time ago) but to what we still, with increasing irony, call the rule of law.

The federal and the state suits suffer from the same defect, which ought to be fatal. All of these governments have known for more than 30 years that smoking creates health risks. Yet with that knowledge, they all permitted the sale of tobacco products and profited nicely, indeed enormously, from excise taxes. How can A tell B he may lawfully sell a product that A knows will cause injury and then sue B for the injury caused? Maybe the people injured could sue B, or A as well, but the one party that should have no cause of action, no complaint whatever, is A.

In the case of tobacco, the people who smoked and were harmed should have no cause of action either. Governmental and private organizations for decades have been pounding the message that smoking is deadly; cigarettes even come with an explicit government warning. Smokers are harassed in restaurants and expelled from their offices to catch pneumonia on the sidewalks. You cannot be sentient and unaware of the risks of smoking.

The lame answer to all of this is that nobody had a choice because smoking is addictive and the tobacco companies hid that fact from the government and from smokers. First and least important, tobacco is not addictive as medical science has long defined addiction. Second, everybody not in solitary confinement for the past four decades has known that using tobacco can be habit-forming.

The law is being deformed in other ways as well. Government suits against the tobacco companies are designed to remove the defenses that could, justifiably, be asserted against individual plaintiffs. While many juries are disinclined to relieve smokers of the consequences of their own informed choices, the government can try to avoid that defense by arguing that it assumed no risk; others did. But of course the government that authorized the sale of a known dangerous product did assume the risk that, under its own laws, it would have to pay when the risk became a fact. The Justice Department's suit would also render irrelevant smokers' lack of reliance upon any company statements as well as the various statutes of limitation.

If that were not enough, the government is charging a violation of the Racketeer Influenced and Corrupt Organizations law—a statute enacted to deal with organized crime—to force the tobacco companies to disgorge their "illicit profits." No wonder President Clinton thinks the companies will buckle and settle. Perhaps they ought to countersue to force the government to pay back its illicit taxes.

* * *

The Justice Department's complaint is only the most recent, and it will be by no means the last, effort to use litigation to bludgeon private firms in order to accomplish a prohibition that government could not muster the political support to legislate. Gun makers are beginning to face the same problem. Why not sue oil companies whose gasoline leads to traffic deaths, or fast-food chains whose products contribute to heart disease?

The only difference is political. If the product is sufficiently unpopular with the politically correct, massive public propaganda efforts will ultimately make lawsuits possible. That is what happened here. Yet even Ms. Janet Reno not long ago told a Senate committee that "the federal government does not have an independent cause of action." But the White House insisted, and the attorney general now says she has studied the matter carefully and—presto!—there is a cause of action after all.

Law has been warped for political purposes repeatedly, and never more so than in this administration. Is there no judge who will call this case what it is—an intellectual sham and a misuse of the courts to accomplish through litigation what cannot be won through legislation?

Mr. Bork is a fellow at the American Enterprise Institute.

Tobacco - Lawsuit

THE WALL STREET JOURNAL
THURSDAY, SEPTEMBER 23, 1999

Japan's Yen for a Weak Currency

By Martin Feldstein

Japan has called for a coordinated currency intervention by the Group of Seven industrial countries to weaken the yen and thereby strengthen its economy. That proposal should be rejected as both unnecessary for its purpose and undesirable in its effects. Japan can always reduce the yen by itself if it really wants to and if the U.S. and other countries do not stand in the way. The real question the G-7 finance ministers should discuss when they meet in Washington this weekend is whether Japan should be permitted to depress the yen artificially in order to gain a trade advantage.

Japan's desire for a weaker yen is understandable. Japanese leaders correctly fear that the 30% rise of the yen against the dollar over the past year will reduce the country's exports and increase its imports. Although Japan's trade surplus is currently very large, any significant reduction in it would threaten the economy's fragile recovery. The recent two-quarter rise in gross domestic product provides only a feeble sign of hope. First-quarter growth was bought by massive government spending; second-quarter annualized growth was less than 1%. If the rising yen causes exports to fall by 10% and imports to rise by 10%, the effect would be to cut Japan's GDP by more than 2%, turning a weak recovery into an outright downturn.

Virtually Zero

The yen has been rising despite an apparently strong interest-rate differential in favor of the dollar. Short term interest rates in Japan are virtually zero: The three month money market interest rate in Japan is less than 0.05% while the corresponding dollar interest rate is 5.3%. Why would any investor want to buy yen when the apparent return on dollars is so much greater?

The answer is that the expected return to a currency investment is not just the interest rate but also the anticipated appreciation of the currency. An investor will be better off holding yen deposits rather than dollar ones if the interest differential in the yen-dollar exchange rate strengthens over the year by more than the 5%. For example, someone who buys yen at 106 per dollar and expects to sell those yen a year from now at 100 per dollar would make a 6% profit on the transaction, more than enough to compensate for the interest difference.

But why would investors expect the yen to keep rising? For two related reasons. First, Japan has an enormous current-account surplus (3% of GDP) while the U.S. has an even more oversized current-account deficit (3.5% of GDP). This year, that deficit has forced foreign investors to accumulate dollar investments at a rate of about $250 billion, adding to the accumulated net foreign investment in the U.S. that now exceeds $1.5 trillion. The reluctance of global investors to go on accumulating dollar investments at such a pace, with the associated exchange-rate risk, means that the dollar must continue to fall if American goods are to be more competitive in world markets, slowing the rise of U.S. imports and increasing exports.

Second, inflation in Japan is now negative and particularly so for the products Japan exports. The yen must rise if those goods are not to become even more competitive and Japan's trade surplus is not to widen further.

Japanese policy makers have been trying to strengthen domestic demand so that the economy can expand even if the rising yen reduces net exports. With short-term interest rates close to zero, there is little the central bank can do to stimulate demand. Instead, the government has dramatically increased its spending, provided capital to commercial banks, promoted bank mergers in order to facilitate the expansion of credit to business borrowers, and encouraged structural and corporate reforms. But it's unlikely that these measures will accomplish very much, save to further balloon the deficit (now 10% of GDP) and cause the country's unemployment rate to rise, as it has every year since 1991.

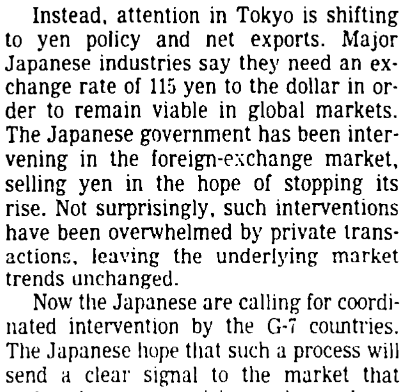
Board of Contributors

There is no reason why the G-7 countries should participate in an exercise in yen devaluation that would inevitably raise dollar and euro interest rates and weaken its trade balance.

There are some constructive things Japan could do to stimulate domestic spending. Substantial reforms of land-use rules could encourage more house building. A shift from government infrastructure spending to personal tax cuts would also help. Sadly, there seems little prospect for such changes now.

Too High for Comfort?

The yen appreciates against the dollar (U.S. dollar value of 100 Japanese yen)



Instead, attention in Tokyo is shifting to yen policy and net exports. Major Japanese industries say they need an exchange rate of 115 yen to the dollar in order to remain viable in global markets. The Japanese government has been intervening in the foreign-exchange market, selling yen in the hope of stopping its rise. Not surprisingly, such interventions have been overwhelmed by private transactions, leaving the underlying market trends unchanged.

Now the Japanese are calling for coordinated intervention by the G-7 countries. The Japanese hope that such a process will send a clear signal to the market that makes the yen stop rising and turn down, thus providing a few years breathing room for recovery. But the call is misplaced, because Japan is trying to drive down the value of its currency, not trying to reverse the decline of an overvalued one. Japan could simply announce that it wants an exchange rate of, say, 140 yen per dollar and is prepared to buy dollars for yen until it achieves that goal. Once markets saw that the Japanese were serious, the exchange rate would adjust and further dollar purchases would be largely unnecessary. The Japanese government could add that it recognizes that such an exchange rate cannot last indefinitely and that it expects to permit the yen to rise at, say, 8% a year, reaching 129 after one year, 119 after two years, and so on until the currency reaches a level at which intervention is no longer needed.

Pay a Price

Keeping the yen undervalued in this way for five years would contribute substantially to a Japanese economic recovery. Exporters and companies that recapture domestic markets from import competition would see their sales rise and would respond by increasing employment and investment in new plant and equipment. Although Japan would pay a price by buying dollars that would later be worth much less, the higher interest rate on the dollar securities held by the Japanese government than on the Japanese securities held by foreigners would achieve an income shift in Japan's favor. The stronger economy would reverse Japan's current deflation, but the resulting inflation need not be large, especially if the creation of yen to buy dollars were limited by a rapid adjustment of exchange-rate expectations or was offset by the government's open-market purchase of the newly created yen.

Coordinated intervention would run counter to the interests of the U.S. and Europe. A weak yen would exacerbate the U.S. trade deficit and would jeopardize Europe's nascent recovery. Even more significantly, the expectation that the yen-dollar rate would rise at 8% a year would cause investors to borrow dollars and invest in yen until the interest differential just balances the 8% expected rate of yen appreciation. Since Japanese interest rates cannot fall further, the adjustment of the interest differential would have to occur by an increase of the dollar interest rates to at least 8% from today's 5% level.

There is no reason why the G-7 countries should participate in an exercise in yen devaluation that would inevitably raise dollar and euro interest rates and weaken its trade balance. The key issue for the G-7 finance ministers is whether Japan should be free to pursue such a yen devaluation policy by itself or whether such a policy should be opposed on the grounds that it is an unacceptable interference with trade. If the ministers conclude that such exchange-rate intervention is unacceptable, the yen will continue to appreciate and the Japanese will have to seek to expand the economy through structural policies at home. In the long run, that may be for the best.

Mr. Feldstein, former chairman of the president's Council of Economic Advisers, is a professor of economics at Harvard.

THE WALL STREET JOURNAL

THURSDAY, SEPTEMBER 23, 1999

National

The New York Times ON THE WEB

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October 13, 1999

Philip Morris Acknowledges Smoking's Link to Cancer

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- Join a Discussion on Tobacco Lawsuits

By BARRY MEIER

Philip Morris is acknowledging that scientific evidence shows that smoking causes lung cancer and other deadly diseases, after decades of disputing the findings of the United States Surgeon General and other medical authorities.

In recent years Philip Morris, the nation's largest cigarette maker, has moved closer to prevailing scientific opinion about the health risks of smoking, as it has faced increasing pressure from smoking-related lawsuits, regulators and Congress.

But on a new Internet site it unveiled on Tuesday as part of a $100 million corporate image campaign, the company unequivocally states there is an "overwhelming medical and scientific consensus that cigarette smoking causes" diseases including lung cancer, emphysema and heart disease.

It also states that smoking "is addictive as that term is most commonly used today."

The move by Philip Morris is part of a trend among tobacco producers to try to put health-related issues behind them after agreeing in the last two years to pay $246 billion to settle lawsuits brought by states seeking to recover their Medicaid costs for treating ill smokers.

By making more disclosures about smoking risks, producers also want to make it harder for those who start smoking now to sue by contending they were unaware of the dangers.

The Brown & Williamson Tobacco Company created a Web site with information on health issues last year, and the R. J. Reynolds Tobacco Company is creating one.

Several anti-smoking advocates who were read the new statements by Philip Morris said they were a marked shift for the company, particularly in the area of smoking and health. Previously, the company had contended, for example, that smoking was a "risk factor" or a "causal factor" in diseases like lung cancer, not that it caused the diseases.

"It is a profound change," said Dr. David A. Kessler, the former head of the Food and Drug Administration who began a Federal effort to regulate tobacco. "It really sets a new stage for regulation and legislation."

Matthew Myers, a lawyer with the Campaign for Tobacco-Free Kids, an advocacy group in Washington, agreed but added that Philip Morris still had not taken the final step.

"The acknowledgments seem to be an abandonment once and for all of the campaign of sowing doubts in the minds of consumers," Myers said. "But it falls a critical step short because it doesn't say whether Philip Morris agrees with these conclusions."

Last year, Geoffrey C. Bible, the company's chairman, testified before a Senate Committee that the company acknowledged that substantial evidence supported the "judgment that smoking plays a causal role" in diseases like lung cancer. Bible also testified that the company recognized that "under some definitions, cigarette smoking is addictive."

Bible declined on Tuesday to be interviewed. But responding to Myers's comments, Steven Parrish, a senior vice president at Philip Morris, said Philip Morris was "not going to dispute that smoking causes cancer."

He added, however, that the company still would require any plaintiff in a lawsuit to prove that their disease was caused by smoking rather than any other factor.

Parrish added that the change in Philip Morris's position was not the result of any new scientific findings. He said it had come because the company had decided to take a less combative and defensive position.

Asked why Philip Morris had not changed its stance earlier, he said, "That is all water under the bridge."

The company's new Internet site (www.philipmorris.com) is one part of the Philip Morris campaign intended to reshape its corporate image. Company officials said they would spend $100 million annually on the effort, which will include television advertisements emphasizing the company's charitable activities.

As part of the campaign, Philip Morris will also play down its role as a cigarette maker. For example, while the company Web site will contain the logos of two of its major divisions, Kraft Foods and

Tobacco Firms Try to Clear Smoke From Their Images

By Guy Gugliotta
Washington Post Staff Writer
Wednesday, October 13, 1999; Page A16

Philip Morris Cos., the holding company that includes the nation's largest tobacco firm, is launching a new television advertising campaign aimed at broadening its image to ensure the public thinks of it as producing something besides cigarettes.

The new ads come on the heels of another print and television campaign by Lorillard Tobacco Co., the nation's fifth-largest cigarette maker, designed to encourage parents to tell their children it's "uncool" to smoke.

The ad campaigns mark some of the first forays by the big tobacco companies to get back on the airwaves since they agreed to abandon television advertising in the early 1970s.

Both Philip Morris and Lorillard emphasized that the new campaigns are not part of the 1998 tobacco settlement requiring the companies to contribute about $1.5 billion to a nationwide anti-smoking education campaign.

Instead Philip Morris intends to spend $100 million per year independently on the program, an industry spokesman said, while Lorillard will spend a smaller but still significant amount of money.

"It's part of a much bigger effort that we're undertaking to be more accessible to the public and media, and to talk about issues, like tobacco, and drinking and driving," said Steve Parrish, Philip Morris Cos. senior vice president for corporate affairs.

Parrish said the ads were supposed to show that besides tobacco, Philip Morris is also the parent of popular brand names such as Kraft Foods, Maxwell House coffee, Post cereals and Miller Brewing Co. The company will open a Web site at www.philipmorris.com.

At the same time, Parrish added, the corporation wants "to tell people about our 40-year commitment" to fight social ills such as hunger and domestic violence, both featured in the television ads, along with Philip Morris's disaster relief efforts and support for a program that tries to discourage shopkeepers from selling cigarettes to underage smokers.

Anti-smoking advocates greeted the new campaigns with skepticism: "It's clearly an effort to gain innocence by association," said attorney

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Cliff Douglas, of Tobacco Control Law and Policy Consulting in Ann Arbor, Mich. "And indeed, Philip Morris has a long pattern of success in buying the support and acquiescence of good people and organizations by contributing to worthy causes."

Douglas also suggested there seems to be "a coordinated effort" by the companies to fill a void until a new round of settlement-funded advertising appears.

Douglas dismissed the Philip Morris ads as "a diversionary tactic to redirect the public's attention away from the addictive and lethal nature of the company's products," but he also criticized the Lorillard campaign--more directly aimed at discouraging tobacco use--as "ambiguous."

One Lorillard television ad shows a teenager picking his way through a dingy alley to where an appropriately sleazy older man is waiting to pierce his tongue.

Shot in grainy black-and-white, the ad conveys this impromptu surgical procedure as a painful, low-life experience. When it's over, the "surgeon" shakes out a pack of cigarettes and offers one to the boy.

"Do you think I'm crazy?" the boy sneers, and walks off with his new pierced tongue.

Miller Brewing, it does not show the distinctive logo of the Philip Morris tobacco division or the red-and-white chevron of its leading brand, Marlboro.

Parrish also said another goal of the campaign would be to redirect the often-acrimonious debate about smoking into a constructive one.

"This is a serious and good faith effort on our part to try to engage in a dialogue," he said.

Last year, Brown & Williamson Tobacco, a division of B.A.T. Industries P.L.C., revised its Internet site to reflect its stance on smoking and health issues. On it the company states it "believes that it is appropriate for the public health community to conclude and warn the public that cigarette smoking causes certain diseases.

Tommy Payne, an official of R. J. Reynolds, said the company was also creating a Web site. Payne said he believed the industry effort followed a recently settled round of lawsuits between cigarette makers and state attorneys general.

In those lawsuits, the states argued that cigarette makers should reimburse them for the cost of smoking-related health care costs because they had misled the public by vigorously disputing Government findings about smoking and disease.

"This is a new phase from a manufacturer's standpoint of how you talk about the issues surrounding cigarettes," Payne said.

As part of an earlier agreement between tobacco companies and state officials that collapsed in Congress last year, cigarette companies would have agreed not to have disputed public health findings about links between smoking and disease.

Tobacco producers, however, still face numerous legal problems. Last month, the Federal Government filed a major lawsuit that charges cigarette makers with fraud and seeks to recover billions in health care expenses.

Still, Dr. Kessler, the former F.D.A. Administrator, said he believed that the recent steps by Philip Morris were important in that they might give cigarette makers an opportunity to act on decisions they might have made decades ago.

"The tobacco industry could have gone down this road in 1964 but decided instead to engage in a campaign of fraud and deception that it is now paying for," he said.

- Philip Morris Companies, Inc.

1960S: THE SEQUEL

Philip Morris Admits Evidence Shows Smoking Causes Cancer

A1

By BARRY MEIER

Philip Morris is acknowledging that scientific evidence shows that smoking causes lung cancer and other deadly diseases, after decades of disputing the findings of the United States Surgeon General and other medical authorities.

In recent years Philip Morris, the nation's largest cigarette maker, has moved closer to prevailing scientific opinions about the health risks of smoking, as it has faced increasing pressure from smoking-related lawsuits, regulators and Congress.

But on a new Internet site it unveiled yesterday as part of a $100 million corporate image campaign, the company unequivocally states there is an "overwhelming medical and scientific consensus that cigarette smoking causes" diseases including lung cancer, emphysema and heart disease.

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The move by Philip Morris is part of a trend among tobacco producers to try to put health-related issues behind them, after agreeing in the last two years to pay $246 billion to settle lawsuits brought by states seeking to recover their Medicaid costs for treating ill smokers.

By making more disclosures about smoking risks, producers also want to make it harder for those who start smoking now to sue by claiming they were unaware of the dangers.

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"It is a profound change," said Dr. David A. Kessler, the former head of the Food and Drug Administration who began a Federal effort to regulate tobacco. "It really sets a new stage for regulation and legislation."

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Mr. Bible declined yesterday to be interviewed. But responding to Mr. Myers's comments, Steven Parrish, a senior vice president at Philip Morris, said that Philip Morris was "not going to dispute that smoking causes cancer."

He added, however, that the company still would require any plaintiff in a lawsuit to prove that their disease was caused by smoking rather than any other factor.

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A tobacco company lists the dangers after decades of disputing the evidence.

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The New York Times
WEDNESDAY, OCTOBER 13, 1999

SOME REPUBLICANS SPURN COMPROMISE ON TEST BAN PACT

DEAL WOULD DEFER ACTION

Senate Talks Continue Today on Leaders' Plan to Avoid Voting the Treaty Down

A1

By ERIC SCHMITT

WASHINGTON, Oct. 12 — Senate conservatives today rejected a compromise by the Republican and Democratic leaders to postpone action on a treaty banning underground nuclear testing.

Both leaders said they would resume talks on Wednesday to find wording acceptable to all senators, since the approval of all 100 would be needed to postpone the vote. Short of that, there are other parliamentary maneuvers available to the leaders that require only a simple majority.

The Senate majority leader, Trent Lott, said that if 100 votes could not be rounded up, he would be willing to let the treaty go to a vote. Both sides acknowledge that the treaty lacks the two-thirds majority needed to pass.

The setback illustrates the tricky political position confronting Mr. Lott, who is juggling the demands of 55 diverse Republicans. He is under pressure from hard-liners in his party who want to kill the treaty no matter what the political or international fallout, to extract concessions from Mr. Clinton.

Treaty supporters have warned that a Senate defeat of the accord would send a dangerous signal to emerging nuclear nations that it was acceptable to continue testing.

Today, Mr. Lott took a step toward averting a vote when he signaled that he would accept assurances from Senate Democrats to delay action on the treaty until President Clinton leaves office. Republicans had insisted that Mr. Clinton make that pledge,

Continued on Page A8

Continued From Page A1

but he has refused, and there was no sign that he would have any change of heart on the matter.

"If we can be guaranteed that it would be set aside and not come up in this Congress, then we could accept that," Mr. Lott told reporters after a spirited luncheon with other Senate Republicans.

After that, the Democratic leader, Thomas A. Daschle, answered Mr. Lott's call, saying in a letter that he would support Mr. Clinton's request to postpone the vote and would agree not to reschedule the treaty for a vote, absent "unforeseen changes in the international situation."

Republicans balked, and Mr. Daschle changed the phrase to "extraordinary circumstances," as defined by the two leaders. Democrats insisted on that provision in the event that Pakistan or India, for instance, resumed nuclear weapons tests.

But the wording still did not satisfy

Will the treaty be voted down or will a way of withdrawing it be found?

Republican hard-liners like Jon Kyl of Arizona and Jesse Helms of North Carolina, who complained that Democrats would use the "loophole" to seize upon the slightest global disturbance and wield the treaty as a campaign issue next year.

The objections killed a proposed deal that would have unfolded on the Senate floor between Mr. Lott and Mr. Daschle that could have defused the political and procedural brinkmanship that has engulfed the treaty since Mr. Lott surprised Democrats two weeks ago by answering their demand to bring it up and called for an early vote.

Under the tentative deal, Mr. Lott proposed sending the Comprehensive Test Ban Treaty back to the Foreign Relations Committee for hearings for the rest of Mr. Clinton's Presidency, as long as Mr. Daschle agreed not to try to bring it to the floor. Mr. Daschle was to have agreed, barring the "extraordinary circumstances." The agreement of all 100 Senators would be needed for the two-step process of stopping discussion of the treaty and then sending it back to committee.

Despite today's setback, a growing number of Democrats and Republicans seemed eager to postpone the vote. Senators John W. Warner, a Virginia Republican, and Daniel Patrick Moynihan, a New York Democrat, released a letter today to their two leaders, endorsing efforts to delay Senate action on the treaty until the next Congress convenes in 2001. About a dozen senators have signed the letter so far.

Secretary of State Madeleine K. Albright telephoned half a dozen moderate Republicans, urging them to consider the diplomatic consequences of allowing the treaty to be defeated.

Today, amid reports of a military coup in Pakistan, Mr. Lott scoffed at those concerns and said the unrest in Pakistan would not have any bearing on the Senate's action.

"Why should it have any bearing on this debate?" Mr. Lott said. "What we're talking about in this treaty is the national security of our own country. Nothing we do here will have any effect on the Government in Pakistan."

The behind-the-scenes maneuvering overshadowed the Senate's second day of debate on the treaty itself. Critics and supporters mostly read from prepared statements, speaking to a largely empty chamber.

Democrats expressed astonishment that Republicans would insist on voting on a pact that the President requested be withdrawn for national security reasons.

"The opponents of the treaty have won, for now," said Senator Joseph I. Lieberman, a Connecticut Democrat. "Why push for this vote if the President of the United States has asked for delay because of his fears? This isn't politics. This goes to the heart of our security."

But critics argued that the pact would permanently bind the ability of the United States to perform tests while rogue nations, and perhaps even China and Russia, might conduct nuclear explosions that would erode America's atomic deterrent. They have also said the treaty could not be adequately verified.

"The treaty is based on noble, idealistic goals, but it fails the hard-reality test," said Senator Jim Bunning, a Kentucky Republican.

The New York Times

WEDNESDAY, OCTOBER 13, 1999

Anna Richter
09/22/99 11:20:27 AM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP

cc:
Subject: Tobacco -- with some edits; can't we say something re: State of the Union.

---------------------- Forwarded by Anna Richter/OPD/EOP on 09/22/99 11:20 AM ---------------------------

Richard L. Siewert
09/22/99 11:19:50 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject: Tobacco -- with some edits; can't we say something re: State of the Union.

In the State of the Union, I said it was wrong for taxpayers to pay for the costs of lung cancer, emphysema, and other smoking-realted illnesses. Today, the Justice Department announced that the United States is filing suit against the major tobacco companies to recover those costs. Over the years, smoking has cost taxpayers billions and billions of dollars through Medicare, veterans' health, and other federal health care programs. The Justice Department is taking the right course of action: It is time for America's taxpayers to have their day in court.

Message Sent To:

Jennifer M. Palmieri/WHO/EOP@EOP
Anna Richter/OPD/EOP@EOP
Jason H. Schechter/WHO/EOP@EOP
Barry J. Toiv/WHO/EOP@EOP
Julia M. Payne/WHO/EOP@EOP

Specific Counts	Count One: Liability under the Medical Care Recovery Act Count Two: Liability under the Medicare Secondary Payer Provisions Count Three: Violation of Title 18: USC 1962 (c) Count Four: Violations of Title 18, USC Section 1962 (d); Conspiracy to Violate Title 18 USC Section 1962 (c)
Relief /Remedies Sought	**1) Damages for tortious and wrongful acts;** **2) Money damages in an amount sufficient to repay the United State for the sums it has spent or will spend;** **3) Costs of suit;** **5) Disgorgement of proceeds from violations of 18 USC 1962** **6) Permanent injunction to** a) prohibit acts of racketeering b) retrain companies from participating in management or control of Council for Tobacco Research or The Tobacco Institute c) Enjoin defendants from making false, misleading, or deceptive statements d) Prohibit defendants from engaging in public relation endeavor which misrepresents or suppresses information concerning health risks of cigarette smoking or addictive nature of nicotine e) Order disclosure and dissemination of all documents related to health consequences of smoking f) Order each defendant to fund, but have no part or influence over the control or decision making related to, a public education campaign administered and controlled by a third party, relating to the public health issues of cigarette smoking and nicotine addiction g) Order each defendant disclose and disseminate documents related to marketing and advertising that target and/or encourage children to purchase and consume cigarettes h) Order each defendant to make corrective statements regarding the health risks of cigarette smoking and the addictive properties of nicotine in future advertising, marketing, and promotion of their tobacco products; i) Order each defendant to fund, but have no part of or influence over the control of or decision making relating to, sustained cessation programs including the provision of medically approved nicotine replacement therapy for dependent smokers j) Order each defendant to fund, but have no part of or influence over, a sustained education campaign devoted to the prevention of smoking by children. k) Costs of this suit together with other and further relief that may be needed to restrain further violations of 18 USC 1962 to end the ongoing wrongful conduct of defendants. **7) That the court declare the defendants liable, jointly and severably, for future costs of hospital, medical, surgical, or dental care to be furnished or paid for the U.S as a result of past tortious and wrongful conduct of defendants.**
Type of trial sought	Jury trial

62846

Jeffrey A. Shesol
09/22/99 01:15:09 PM

Tobacco
Lawsuit

Record Type: Record

To: See the distribution list at the bottom of this message

cc: Joshua S. Gottheimer/WHO/EOP@EOP
Subject: draft remarks on tobacco lawsuit -- comments to Jeff Shesol ASAP 6-2796

Draft 09/22/99 1:00pm
Jeff Shesol

PRESIDENT WILLIAM J. CLINTON
REMARKS ON TOBACCO
THE WHITE HOUSE
September 22, 1999

In my State of the Union Address last January, I announced that the Justice Department was preparing a litigation plan to recover the costs of smoking-related illnesses. Over the years, smoking has cost taxpayers billions of dollars through Medicare, veterans' health, and other federal health care programs. Today, the Justice Department declared that the United States is filing suit against the major tobacco companies to recover the costs borne by taxpayers. I believe this is the right course of action. It is time for the tobacco companies to answer for their actions. And it is time for America's taxpayers to have their day in court. Thank you.

do more to fund PR
stop marketing to kids

Message Sent To:

Bruce N. Reed/OPD/EOP@EOP
Eric P. Liu/OPD/EOP@EOP
Cynthia A. Rice/OPD/EOP@EOP
Loretta M. Ucelli/WHO/EOP@EOP
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Don't acknowledge their tactics

TOBACCO -
LAWSUIT ANNOUNCEMENT

Bruce N. Reed
09/22/99 10:13:31 AM

Record Type: Record

To: Eric P. Liu/OPD/EOP@EOP, Cynthia A. Rice/OPD/EOP@EOP

cc:

Subject: agreed upon stmt

The Justice Department announced today that the United States is filing suit against the major tobacco companies to recover costs to the federal government of tobacco-related illnesses. Over the years, smoking has cost taxpayers billions of dollars through Medicare, veterans' health, and other federal health care programs. The Justice Department is right: It is time for America's taxpayers to have their day in court.

Proposed statement for President Clinton
re: Justice Department lawsuit against tobacco industry

Earlier today, the Justice Department announced that the United States is suing the major tobacco companies to recover the money that the federal government spends each year on smoking-related health care.

The case is the result of an analysis by the Justice Department's tobacco litigation team, which was formed earlier this year to analyze the facts and the law after the Attorney General determined that there were viable grounds for recovery of these monies.

I was notified of the decision yesterday by the Justice Department and am pleased that this issue will now be decided by the courts. Tobacco-related illnesses have cost American taxpayers billions of dollars through the Medicare system and other federal health care programs, and it is time for the judicial system to make a determination about the government's right to recover that money from the tobacco industry.

Sotu?

→ VPOTUS @ stand next to him?

→ by 3:15 pm

→ 2 statements, written for POTUS, spoken for later

Statement of the President
September 22, 1999

Today, the Justice Department announced that the United States is filing suit against the major tobacco companies to recover costs to the federal government of tobacco-related illnesses. Over the years, smoking has cost taxpayers billions of dollars through Medicare, veterans' health, and other federal health care programs. The ~~Attorney General~~ Justice Dept is right to hold the tobacco companies accountable. It is time for America's taxpayers to have their day in court.

(1)

Informal Summary of Justice Department Tobacco Brief
Prepared by DPC staff 9/22/99 12:30 pm based on quick read of brief.

Court in Which Litigation Filed	U.S. District Court for the District of Columbia
Companies Charged	Philip Morris, RJ Reynolds, Brown & Williamson, Lorillard, Liggett, American Tobacco Company, Philip Morris Companies, British American Tobacco, British American Tobacco Investments, Council for Tobacco Research, The Tobacco Institute
Statutes Cited in Complaint	Medical Recovery Act, Medicare Secondary Payer provisions of Medicare law, and civil provisions of 18 USC 1961-1968 -- Racketeer Influenced and Corrupt Organizations ("RICO") provisions
Summary of Charges	1) **Defendents have for many years sought to deceive the American public about the health effects of smoking**. They have repeatedly and consistently denied that smoking cause disease, though they have known since 1953 at the latest that smoking increases the risk of disease and death. Defendants have repeatedly and consistently denied that cigarettes are addictive even though they have long understood and intentionally exploited the addictive properties of nicotine. They have repeatedly and consistently denied that they do not market cigarettes to children while using advertising and marketing techniques to make their products attractive to children. Even though they have long understood the hazards caused by smoking and could have developed and marketed less hazardous cigarettes, defendants chose and conspired not to do so. 2) **In all relevant aspects, defendants acted in concert with each other in order to further their fraudulent scheme**. Beginning no later than 1953, the defendants formed an "enterprise" that functioned to achieve through illegal means the shared goals of maximizing profits and avoiding the consequences of their actions. 3) **In order to avoid discovery of their fraudulent conduct and the possibility that they might be called to account for their conduct, defendants engaged in a widespread scheme to frustrate public scrutiny by making false and deceptive statements and by concealing documents and research that they knew would have exposed their public campaign of deceit**. This scheme included making false and deceptive statements to the public and to congressional, judicial, and federal agency proceedings. 4) **Defendants' tortious and unlawful course of conduct has caused consumers of defendants' products to suffer dangerous diseases and injuries**. As a consequence, the Federal government spends more than $20 billion annually for the treatment of injuries and diseases caused by the defendants' products. Unless restrained by the court, the defendants are likely to continue their unlawful activities into the future.

THE WALL STREET JOURNAL
THURSDAY, OCTOBER 21, 1999

Tobacco Firms Suffer Setback as Court Revives Prospect of Big Damage Award

By MILO GEYELIN
Staff Reporter of THE WALL STREET JOURNAL

In a setback to tobacco companies, a state appeals-court panel in Miami revived the prospect of a massive lump-sum punitive-damage award in a class-action lawsuit on behalf of tens of thousands of allegedly injured smokers in Florida.

The ruling reverses a decision by the same three-judge panel last month that would have required any punitive award to be determined one smoker at time, in tens of thousands of individual trials, vastly diminishing the tobacco industry's risk in the suit.

Big tobacco stocks fell to 52-week lows on the news. In New York Stock Exchange composite trading, shares of **Philip Morris** Cos., the nation's largest cigarette maker, fell \$3.75, or 12%, to \$27. **R.J. Reynolds Tobacco Holdings** Inc. dropped \$3, or 12%, to \$22.9375.

Yesterday's two-sentence ruling by the Third District Court of Appeal didn't address the underlying legal dispute over whether punitive damages can still be awarded in a lump sum. But it put off any resolution until the next phase of the trial, set to resume next month, is over.

The ruling sets the stage for a potentially huge punitive award on behalf of all injured smokers in Florida who are represented in the class. During an appeal of any such award, the tobacco companies could be required to post a bond securing the full amount of the punitive award, plus interest.

In this unusual case, however, industry lawyers say that scenario is unlikely. Nonetheless, the decision rattled some analysts, who had hoped the appeals panel would re-examine whether the suit should proceed as a class action at all and dismiss it.

"This decision was the worst outcome of the appeal; [it] was the least likely outcome," said David Adelman, a tobacco analyst at Morgan Stanley Dean Witter & Co.

The trial is now set to pick up on Nov. 1 where it left off in Dade County Circuit Court in July, when a six-member jury found the nation's top five tobacco companies liable for causing lung cancer, heart disease and other injuries to tens of thousands of Florida smokers. The exact number of Florida smokers eligible to join the class and seek damages remains anybody's guess. Estimates from Miami plaintiffs lawyer Stanley Rosenblatt have varied from 40,000 to one million.

In the second phase of the trial, Mr. Rosenblatt and his wife, Susan, who is his law partner, will seek compensatory damages for three of the nine plaintiffs representing the class. According to the trial plan originally laid out by Dade County Circuit Judge Robert Kaye, punitive damages for the class representatives, if any, were also to be determined in this second phase of the trial. Damages for the unknown remaining members of the class—both compensatory and punitive—were to be determined in future trials.

But in August, after the jury's finding of liability, Judge Kaye revised the trial plan, allowing a lump-sum punitive award for all class members to be determined now, even though the number of eligible class members remains a loose estimate. The Third District, in a ruling on an industry appeal of Judge Kaye's modified trial plan for punitive damages last month, threw out the plan, saying punitive damages can only be awarded depending on the injuries proved in each individual case, and the degree of industry culpability.

Yesterday's ruling reversing that decision "puts the industry right back where it was a few months ago," said Credit Suisse First Boston analyst Bonnie Herzog. The appeals panel is expected to take up the issue again at the end of the second phase of the trial if there is a punitive-damage award.

Congress Rejects Bid By Baby Bells to Change Accounting Standards

By a WALL STREET JOURNAL *Staff Reporter*

WASHINGTON—House and Senate negotiators rejected a request from the Baby Bell phone companies to change a set of detailed accounting requirements after an intensive lobbying campaign that pitted the Bells against virtually every other big player in the phone business.

The Bells argued the federal standards impose an unfair burden and cost them \$270 million a year. Long-distance carriers, regulators and consumer groups said the change would hinder competition and cost consumers billions of dollars in higher phone rates.

Conferees deleted the proposed change from a budget bill funding the Commerce, State and Justice departments. Instead, the bill, which was passed last night requires the Federal Communications Commission to see whether changes can be made to accounting rules to help the Bells without affecting the agency's ability to set communications policy.

Under current law, companies that dominate their markets, such as the Bells in the local-phone markets, must keep financial records that conform to uniform accounting standards set by the federal government. Regulators use the data to set rates the carriers charge.

Sen. Mike Enzi, a Wyoming Republican who sponsored an amendment calling for the accounting change, said, "The unwillingness of the competitors and the FCC to recognize modern accounting standards will keep local telephone exchanges and their customers in the dark ages."

Lockheed Martin Seems Close to Deal To Sell $8 Billion of F-16s to Emirates

By ANNE MARIE SQUEO
Staff Reporter of THE WALL STREET JOURNAL

Lockheed Martin Corp., after years of haggling and missed deadlines, finally appears close to inking an $8 billion contract to sell 80 of its F-16 fighter jets to the United Arab Emirates.

U.S. Defense Secretary William Cohen, on a nine-nation tour of the Middle East, said that U.S. officials have resolved the technical issues that have so far blocked the deal, and that he hoped a deal might be announced before the annual Dubai Air Show in mid-November, the Associated Press reported.

U.S. officials have been negotiating to resolve the Emirates' concerns about being able to reprogram the aircraft's radar-jamming system for different threats, among other things. Now it's up to Lockheed Martin officials to hammer out the remaining financial issues of the sale, including agreeing on the size of an upfront payment and a schedule for future payments as aircraft get delivered.

"We're continuing to work with the UAE government toward the goal of having a signed contract later this year," said Lockheed spokesman Joe Stout.

Wrapping up this contract before year's end is important to Lockheed Martin, Bethesda, Md., which has seen its stock price lag amid a series of financial and management setbacks in the last year. The continuing success of the F-16, a single-engine fighter that costs about $40 million each, represents a promising stream of revenue in the years to come. Israel, Greece and Egypt placed large orders for the plane earlier this year, but the Emirates' is by far the largest.

"Given the broad psychology surrounding the whole defense sector right now, and more narrowly with Lockheed Martin, people would feel more comfortable if the company got this nailed down before the end of the year," said Merrill Lynch & Co. analyst Byron Callan.

If the contract is signed this year, the company would begin developing the special F-16 configuration that the Emirates is seeking, with the goal of delivering the first jet in early 2003. Those deliveries would then continue through 2005, keeping busy Lockheed's Fort Worth, Texas, facility where those jets are built.

Congress also needs to approve the contract after it is actually signed.

THE WALL STREET JOURNAL

THURSDAY, OCTOBER 21, 1999

TOBACCO-LAWSUIT

THE WHITE HOUSE

Domestic Policy Council

DATE: 11/30

FACSIMILE FOR: Bruce Reed / Eric Liu

FAX: 62878
PHONE:

FACSIMILE FROM: Cynthia Rice, Special Assistant to the President for Domestic Policy

FAX: 202-456-7431
PHONE: 202-456-2846

NUMBER OF PAGES (INCLUDING COVER): 3

COMMENTS: FYI - article on FDA case that was in Sunday's Post. As I mentioned to you, Bruce, I'm getting DOJ + HHS to clear some Q+A in case we need them

Tobacco Showdown Is Set

Supreme Court to Decide on FDA's Assertion of Authority

By JOAN BISKUPIC
Washington Post Staff Writer

The Supreme Court this week will begin deciding on the government's most formidable effort ever to stop smoking, as public pressure against the tobacco industry increases.

In 1996, the Food and Drug Administration broke with tradition and proposed regulating nicotine in cigarettes as a drug. In a plan to cut down on teen smoking, the agency issued rules that would restrict the marketing and sale of tobacco products to youth. It was a decisive moment for the government in the national controversy over a product that medical experts consider the primary cause of preventable disease and death. But after a lawsuit by tobacco companies, a federal appeals court ruled that the FDA lacked the authority to regulate tobacco.

The case has arrived at the Supreme Court, where it will be argued on Wednesday. An eventual decision by the justices not only will determine the fate of the program to prevent youth smoking, but, more broadly, will test a comprehensive federal endeavor to restrain a once powerful industry that is now under constant governmental, legal and societal assault.

In the four years since the FDA proposed its regulations, cigarette companies, once impregnable in court, have lost several high-dollar, personal-injury lawsuits, including the first phase of a Florida class-action dispute that could cost the industry billions of dollars.

In 1994, Mississippi, followed by a majority of the states, sued tobacco companies to recover health expenditures for smoking-related illnesses. The suits were settled last year for $246 billion.

Finally, in September, the Justice Department filed a lawsuit seeking compensation for the medical costs to the government of treating smokers and accusing tobacco companies of conspiring to defraud the public about the health risks of cigarettes.

"There is no question that the world in which the tobacco companies operate is changing," said former FDA commissioner David Kessler, who had signed the proposed rules to regulate nicotine and has closely followed the case. "No longer can they claim that tobacco is not an addictive substance. It is children who are becoming addicted, and the industry's major defense that smoking is a matter of adult choice is no longer credible."

But lawyer Bert Rein, representing Brown and Williamson Tobacco Corp., counters that the case before the high court is not about the health consequences of nicotine but about what kinds of regulations the FDA is authorized to set down. "We don't think this is a public health case," he said. "This is an effort by the FDA to grab power that the Congress never gave it."

Forty states are siding with the agency, saying that despite the multibillion-dollar settlement struck with tobacco companies last year, a comprehensive national plan to prevent teen addiction is needed. Their "friend of the court" brief notes that smoking among young people is on the rise and refers to "the decades-long conspiracy by the tobacco industry to conceal the deadly and addictive nature of its products."

"There is no shortage of attempts to attack and vilify the industry," said Scott Williams, a spokesman for five major cigarette companies, adding that the real issue is whether the agency, rather than Congress, has the power to take the initiative against tobacco.

For decades, the FDA resisted pressure from public health groups to regulate tobacco, saying it lacked the authority. But in 1996, the agency changed course, declaring the nicotine in cigarettes a drug that it could oversee based on the 1938 Food, Drug and Cosmetic Act. The law gave the FDA jurisdiction over drugs and devices "intended to affect the structure or any function of the body."

The FDA concluded that the way nicotine affects the body (for example, as a sedative, stimulant or appetite suppressant) was clearly "intended" by the cigarette makers. The agency said it reached that conclusion partly as a result of newly disclosed industry documents that it saw as showing that cigarette makers engineered their products to enhance the delivery of nicotine.

Acknowledging that it was diffi-

See COURT, A7, Col. 1

Big Tobacco on Trial

Major tobacco developments in the 1990s:

April 1994: Seven tobacco company executives testify before Congress that cigarettes are not addictive.

May 1994: Mississippi becomes first state to file a lawsuit against the tobacco industry seeking to recover the costs of treating sick smokers. Other states follow.

August 1996: Food and Drug Administration formally asserts authority to regulate nicotine in cigarettes as a drug and proposes restrictions on the sale, marketing and advertising of tobacco products to young people.

April 1997: U.S. District Judge William L. Osteen Sr. upholds FDA power to regulate sale and marketing of tobacco but invalidates advertising restrictions.

June 1998: Comprehensive tobacco legislation collapses in Congress.

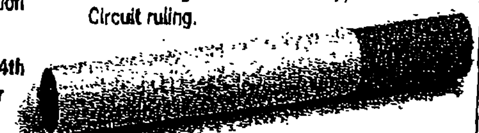
August 1998: U.S. Court of Appeals for the 4th Circuit rules the FDA lacks authority over tobacco.

November 1998: 46 states and major cigarette companies reach a $206 billion settlement over the costs of treating smoking-related illnesses. Four other states had earlier settled for about $40 billion.

July 1999: A Miami jury hearing the first class-action lawsuit against the tobacco industry finds cigarette companies responsible for the deaths and diseases of smokers.

September 1999: Justice Department sues tobacco companies to recover the costs of government medical care for sick smokers and alleges a conspiracy to defraud the public about the addictiveness of nicotine and smoking's health risks.

Dec. 1, 1999: Supreme Court is scheduled to hear oral arguments in FDA's appeal of 4th Circuit ruling.



THE WASHINGTON POST

Showdown Set Between FDA and Big Tobacco

COURT, From A2

cult to take on adult addiction and faced with evidence that smokers get hooked in childhood, the FDA aimed its initial regulations at teen smoking. It would have required retailers to check the IDs of cigarette and smokeless-tobacco buyers under age 27 and would have prohibited cigarette vending machines except in bars and other adult-only places.

Cigarette makers immediately sued, arguing that Congress had never given the FDA any authority to regulate cigarettes and smokeless tobacco. The government won the first round, when a federal trial judge ruled that the law was not limited to devices that have a medical purpose and that Congress did not specifically prohibit the FDA from regulating tobacco. However, the judge did reject the agency's planned ban on cigarette billboards near schools and other advertising limits, saying the FDA had exceeded its authority in those areas. The advertising provisions are not part of the current Supreme Court case.

On appeal, the 4th U.S. Circuit Court of Appeals reversed the trial court, ruling that the history of the 1938 act and FDA practice demonstrated that the agency lacked the power to control tobacco products as drugs. "In the 60 years following the passage of the act [in 1938]," the 4th Circuit said, "the FDA has repeatedly informed Congress that cigarettes marketed without therapeutic claims do not fit within the scope of the act." Noting the FDA's belief that cigarettes are unsafe, the court added that if the agency had the authority to regulate tobacco, it would have to ban cigarettes altogether, under the terms of the act.

"This case is about who has the power to make this type of major policy decision," the Richmond-based court concluded. "Neither federal agencies nor the courts can substitute their policy judgments for those of Congress."

The government's appeal, signed by Solicitor General Seth P. Waxman, who will argue the case on Wednesday, emphasizes that tobacco products have the "classic characteristics" of drugs such as tranquilizers, stimulants and weight-loss pills: "They are taken within the human body, they deliver a pharmacologically active substance to the bloodstream, and they have potentially dangerous effects."

The government contends that the tobacco regulations were the result of the most important public health initiative the FDA has undertaken in a half-century. It asserts that 92 percent of all cigarette smokers and 75 percent of all young people who use smokeless tobacco do so because they are addicted to the nicotine in the products.

Addressing the 4th Circuit's reasoning that if tobacco were considered a drug it would have to be banned because it is not safe, the FDA's lawyers maintain that the agency may allow a product to continue being marketed—with restrictions—if it finds that the dangers of banning the product outweigh the benefits. The FDA says that if it tried to ban tobacco, it would leave too many adult smokers with withdrawal symptoms and would create a dangerous black market.

In response, the major tobacco companies and the distributors and retailing groups that sued emphasize that the FDA has always based its regulations on the medical claims that a manufacturer makes—and that cigarette manufacturers make no such assertions. The companies argue that Congress never intended to delegate to the FDA the authority to regulate tobacco products but chose instead to regulate those products itself through a series of tobacco-specific statutes, such as the rules governing package labels.

"This case is about who has the power to make national policy for the regulation of tobacco products," declares an R.J. Reynolds Tobacco Co. filing, adding that the authority plainly rests with Congress.

Dozens of groups have filed "friend of the court" briefs supporting one side or the other in *Food and Drug Administration v. Brown and Williamson Tobacco Corp.* Public Citizen, for example, observes that tobacco use is the single most preventable cause of early death and disease in America and that each year about 1 million adolescents start smoking. On the other side, the Product Liability Advisory Council, made up of more than 100 major corporations, asserts that if the FDA's argument prevails, federal agencies will gain new authority to make major policy decisions at the expense of Congress.

Staff researcher Lynn Davis contributed to this report.

To: Ann O'Leary **Fax:** 456-2878

From: Office of Elementary and Secondary Education
U.S. Department of Education
Phone: (202) 401-0113 Fax: (202) 205-0303

Mike Cohen would like to extend a special invitation to you to attend his swearing-in ceremony this Friday. He hopes you can be there.

You Are Cordially Invited to Attend
The Swearing-In Ceremony of

MIKE COHEN

As Assistant Secretary for
Elementary and Secondary Education

2:00 p.m., Friday, December 3, 1999
Departmental Auditorium
Ground Floor
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, DC

Tobacco
[illegible]

Talking Points on U.S. v. Philip Morris, Inc., et al.

- Tobacco-related health care costs exceed $50 billion per year, and the Federal government pays a substantial portion of these costs. The States settled their litigation against the tobacco industry for more than two-hundred billion dollars. The Department of Justice's efforts to recover money properly owed to the Treasury in litigation brought on behalf of the American people is a matter of singular importance.

- The taxpayers of our country should have their day in court. Smoking is the nation's largest preventable cause of death and disease, and the American taxpayers should not have to bear the responsibility for the staggering costs. The tobacco companies should have to answer for misleading the American public and concealing information about the effects of smoking. Congress should side with the taxpayers and not the tobacco industry.

- Tobacco litigation will be a complex undertaking, with an immense evidentiary record and unprecedented potential damages. It is clear that the tobacco companies will spend far more than $20 million defending this matter – in a case with one State (Minnesota) a single defendant (R.J. Reynolds) stated in court that it spent more than $90 million simply to create and operate its litigation database (not counting its other legal expenses). In light of the billions of dollars the federal government spends on tobacco-related diseases, taxpayers are likely to recoup their investment in this litigation many times over.

- The Department's litigation, U.S. v. Philip Morris, Inc. et al., was filed on September 22, 1999. The litigation was brought under the Medical Care Recovery Act (MCRA) and the Medicare Secondary Payer Act (MSP) to recover money spent by the federal government on smoking-related health care costs, and under the Racketeer Influenced and Corrupt Organizations Act (RICO) to obtain equitable and other relief.

- The defendants -- the major tobacco companies, their parent companies, and their public relations organizations -- filed motions to dismiss the case in late December 1999. The motions have been fully briefed, and oral arguments on the motions have been scheduled for June 2 and June 14. The court has indicated that it expects to rule on the motions to dismiss by the end of the summer. The court has also indicated that, if the motions to dismiss are denied, the parties should plan for a trial in early 2003.

- The Department of Justice has assembled a first-rate trial team dedicated to litigating this case. They believe that the opposition papers that the Department has filed show that the Department has a strong case. The court may rule by the end of the summer, and the Department strongly believes that the motions should be denied.

- Pursuant to the court's direction, the parties have already commenced informal discovery in an effort to identify relevant documents and witnesses. Assuming the motions to dismiss are denied, the case will then proceed to active discovery. The United States will be expected to produce, literally, millions of pages of documents from our client agencies under very tight deadlines. In addition, the Department will be receiving millions of pages of documents from the defendants, which it must organize and review.

- The Department fully expects this litigation to be a massive and complex undertaking. Adequate funding levels will be crucial to ensuring that the Department can comply with its discovery obligations, and can process the information received from the defendants. The tobacco companies will spend far in excess of the amounts that the Department has requested in defending the matter. In light of the billions of federal dollars spent each year on tobacco-related diseases, we believe the taxpayers will recoup their investment in this litigation many times over.

- The Court has made it clear that the case is to proceed in a timely fashion and has specifically warned the government that it will not tolerate delay or the claim that the government has insufficient resources to comply with discovery orders or proper demands by the defendants.

THE WHITE HOUSE
WASHINGTON

DOMESTIC POLICY COUNCIL

FACSIMILE FOR: Eric L / Anna

DATE:

TELEPHONE:

FAX: 62878

FACSIMILE FROM: **ERIC GOULD**
ASSOCIATE DIRECTOR
FOR DOMESTIC POLICY

TELEPHONE: (202) 456-7871

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NUMBER OF PAGES (INCLUDING COVER): 6

COMMENTS: I promised this to you earlier.

E

Talking Points on Litigation Reimbursement for the Department of Justice

Over the last decade, the government has been faced with an unprecedented number of lawsuits of massive proportions. These suits generally involve the defense of federal agencies, with hundreds of millions if not billions of Treasury dollars at stake. Such lawsuits, involving mountains of documents and high-priced experts, are very expensive to litigate. The Congress recognized the need to make available to the Department resources in excess of appropriated funding when the Department's litigators engaged in cases "involving unusually high costs". The Congress also recognized that the Economy Act did not provide a sufficiently clear basis for reimbursement when it came costs associated with discovery of opposing parties' documents, litigative consultants, and salaries/benefits for attorneys and support staff. In the FY 1995 appropriations act for the Department of Justice, the Congress enacted the following provision:

> **Sec. 109. Notwithstanding 31 U.S.C. or any other law, in litigation involving unusually high costs, the Department of Justice may receive and retain reimbursement for salaries and expenses, for fiscal year 1995 and thereafter, from any other governmental component being represented in the litigation.**

Section 109 removed any concern, on the part of either client agencies or the Department of Justice, over inappropriate budget augmentation. Furthermore, it expanded the reimbursement authority beyond that available under the Economy Act. Using this authority the Department of Justice has received reimbursements from client agencies of nearly $339 million. These resources have been used to litigate cases with a potential liability to the Federal government totaling over $36 billion. Had these reimbursements not been available, the Department would have been unable to mount credible cases; and, the client agencies and the Judgment Fund would have suffered billions of dollars in losses.

Civil Division Reimbursements (Dollars in Millions)							
	FY 1995	FY 1996	FY 1997	FY 1998	FY 1999	FY 2000 Est	Total
Reimbursements[1]	38.3	27.8	43.1	55.9	70.4	103.3	338.8

Some examples of the cases in which the "Section 109" authority has been critical in insuring an

[1] These reimbursements exclude those which derived their specific authorities such as the annual reimbursement from the National Childhood Injury Vaccine Trust Fund and the annual reimbursement for administering the Radiation Exposure Compensation Act. They also exclude reimbursements that derive exclusive authority under the Economy Act (e.g., instances where work is performed for a government entity, exclusively because of the economies of using Civil Division's infrastructure, rather than because the entity is a client agency).

outcome favorable for the Federal government are:

"A-12" McDonnell Douglas Corp and General Dynamics v. United States

Amount at issue: $2.7 billion, plus interest of about $200 million per day
Reimbursements received: $102.5 million from the Navy (1994 through 2000 est.)

This suit was brought by McDonnell Douglas in connection with the Navy's termination of the A-12 stealth fighter contract. To defend this suit, the government had to process some 80 million pages of documents, construct and operate a secure facility, and employ the services of an array of experts. The annual cost of this defense has been greater than the entire base funding available for litigation support services. Absent reimbursement, there would have been no effective defense; billions in unwarranted claims would have been forfeited by the United States.

Winstar v. United States

Amount at issue: approximately $30 billion
Reimbursements received: $188.1 million from the FSLIC Resolution Fund (1997 through 2000 est.)

This litigation consists of over 100 cases brought on behalf of 400 financial institutions. Claims alleging breach of contract were filed following enactment and implementation of the Financial Institution Recovery and Reform Enforcement Act. While the Supreme Court held the government liable on the three lead cases, it is the government's position that estimated damages are wildly exaggerated. As a result, the government is steeped in litigation to determine damages. The size of discovery is unprecedented, involving some 1 billion pages of documents. Absent reimbursement from the FDIC's FSLIC Resolution Fund (FRF), the government could not meet the court-mandated schedule for discovery and trial and would likely face default and or contempt citations. Absent adequate representation, the government would have to pay out billions of dollars in inflated claims.

"TSSAM" - Northrop Grumman Corporation Military Aircraft Division v. United States

Amount at issue: $1.2 billion
Reimbursements received: $7.9 million from the Air Force (1997 through 2000 est)

The suit brought by Northrop Grumman in connection with the Air Force's termination of the TSSAM stealth missile also involves massive discovery operations which must proceed in a tightly secured facility. The Civil Division's base budget never included funding for the construction of secure facilities, much less for the level of litigation support and consulting services needed to effectively represent Defense.

Bath Iron Works v. United States

At issue: $120 million
Reimbursements received: $2.4 million from Navy (1995 through 1996)

The suit brought by Bath Iron Works against the Navy involves a contract dispute associated with the Aegis ship building program. Base funding was insufficient to process the 7 million evidentiary documents. Reimbursement enabled the defense to proceed successfully, resulting in a payout of only $12 million – a mere fraction of the amount sought.

"Pit 9" - Lockheed Martin et. al. v. United States

At issue: $200 million
Reimbursements received: $2.3 million from Department of Energy (1999 through 2000 est)

The Department of Justice is defending the Department of Energy in this claim brought by Lockheed Martin in connection with its nuclear waste remediation work. With over 70 million pages of documents, outside funding was critical to the government's defense.

Hughes Communications Galaxy v. United States

At issue: $500 million
Reimbursements received: $147,000 from NASA (1997 through 1999)

This is a breach of contract case brought against NASA. The reimbursement is being used largely to provide NASA with the on-site support of litigation support specialists to assist in organizing documents for the discovery phase.

Morganti National v. United States

At issue: $120 million
Reimbursements received: $1.6 million form Bureau of Prisons (1998 through 1999)

This suit is another contract claim – involving the Bureau of Prisons. With over 600,000 pages of documents to review, the defense depends on reimbursement from the Bureau.

Central Arizona Water Conservation District v. United States

At issue: $1.1 billion
Reimbursements received: $3.9 million from Bureau of Reclamation (1996 through 1999)

The Department of Interior's Bureau of Reclamation is the client agency in this complex suit involving a claim and counterclaim regarding the construction of an aqueduct on the Colorado River needed to provide drinking water to counties in Arizona. The Civil Division has created data bases and provided extensive litigation support during the discovery, trial and settlement phase of this litigation. Substantial funds are likely to be recovered on behalf of Interior.

US ex rel. Johnson v. Exxon, and US ex rel. Wright v. Agip Petroleum Company

At issue: recoveries amounting to $218 million, to date
Reimbursements received: $197,000 form Interior Department (1998 through 1999)

This affirmative case involved the recovery of royalties for crude oil on federal and Indian lands. This case was partially funded through the Three Percent Fund. However, to comply with court orders to establish a document production facility in Denver, Colorado, additional funds were needed and the Division obtained reimbursement from the Department of Interior. This investment resulted in the following recoveries to date: $20 million from Mobile; $45 million from Chevron; $95 million form BP/Amoco; $32 million from Conoco; and $26 million from Oxy USA.

History of "Section 109"

In the early 1990's the Department of Justice saw a sharp increase in the number of massive litigations in which we were defending government agencies against billion dollar claims. The Civil Division had no funds in its base budget to take on the huge costs these cases involved, and severe restrictions on discretionary funds made the chances of receiving budget increases to cover such costs very remote.

We turned to our client agencies for assistance. Under the Economy Act, the agencies could reimburse the Department for litigation support costs related to organization and production of agencies' documents, because those were activities the agency itself could have conducted. However, the Economy Act did not provide as clear a basis for reimbursement when it came to the costs of discovery of opposing parties' documents, litigative consultants, and attorneys and support staff. Lack of adequate funding in those areas was having a profound effect on our ability to defend cases, especially in view of the increasing importance of expert consultants. The implications were governmentwide.

The crisis reached a peak when contractors sued the Navy for its termination of the A-12 stealth fighter contract. The stakes were staggering -- billions of dollars -- and the litigation costs unprecedented. The affirmative discovery expense plus the cost of consultants were far beyond anything the Civil Division's budget could afford. In response to this situation, the Department proposed, and Congress enacted, a provision in the 1995 Appropriations Act to clarify and broaden our reimbursement authority. Section 109 authorized reimbursement by client agencies "in litigation involving unusually high costs" for "salaries and expenses."

Section 109 removed any concern, on the part of either client agencies or the Department of Justice, over budget augmentation. Furthermore, it expanded the reimbursement authority beyond that available under the Economy Act.

The Civil Division has received reimbursement in about a dozen cases under the authority of Section 109. Absent that authority, the Division's ability to defend its client agencies would have been severely hampered. The government would have had no choice but to settle on unfavorable terms, with the consequent loss of hundreds of millions, or even billions of taxpayer dollars.

Tobacco – Lawsuit

cc: Eric L.

April 5, 2000

MEMORANDUM FOR THE CHIEF OF STAFF

FROM: Jack Lew

SUBJECT: Tobacco Litigation

The memo is to update you on our efforts to fund the Department of Justice's lawsuit against the tobacco industry. As we have discussed, Senator Stevens has voiced strong opposition to the Administration's plans to use agency reimbursements, particularly from DOD and VA, to supplement Justice funds for tobacco litigation. The Republicans have specifically threatened to include a provision that would take away Justice's authority (Section 109) to receive funds from agencies for tobacco litigation expenses. While we plan to mount a vigorous attack on any Congressional attempt to limit funding of the Administration's lawsuit, we have prepared fallback options that would allow the lawsuit to continue if the Appropriators repeal Section 109 or otherwise block reimbursements from DOD and VA. We believe that we can work with Senator Specter and Chairman Porter to at least not oppose HHS funding for this case.

Background/Where we are

As you know, last fall we were unable to get increased funding in the Commerce, Justice and State bill for Justice in 2000 for this case. However, we were successful in having stricken from the FY 2000 Senate report a specific prohibition on using funds for tobacco litigation expenses. We also tried to get funding in the Labor/HHS bill, but were unsuccessful. In the end, however, we had an understanding with the Appropriators that we were not prohibited from pursuing the case using existing resources to finance the litigation. This understanding is reflected in a July 22nd colloquy in the Senate among Senators Harkin, Hollings, Graham, Gregg and Durbin.

In response, Justice has found funding within its budget – \$1.8 million in the Civil Division and \$4 million in the Department's share of the Health Care Fraud and Abuse Control (HCFAC) account. We have supplemented this with reimbursements of \$2.65 million each from DOD, HHS and VA, bringing the total between DOJ and these agencies to \$13.75 million. Justice's latest estimate is that it will spend approximately \$13.6 million in 2000, including \$4 million for salaries and expenses, \$4 million for experts and \$5.6 million for automated litigation support. Justice is prohibited from reprogramming funds within its accounts without Subcommittee approval, which Chairman Rogers will not grant. VA and HHS did reflect these FY2000 reimbursements in their 2001 budget justifications sent to the Congress.

Senator Stevens et. al. are framing this as a process breach. We believe it is not, and believe the right ground to fight on is the loss of the tobacco suit.

Fallback Options

We have identified fallback options for addressing two possible ways Congress might attempt to block funding for the litigation.

The first option would allow continued funding if Congress blocks any reimbursements specifically from DOD and VA. Under this option we would expand the use of Justice's HCFAC funds and increase HHS's contribution. Justice would allocate an additional $2.8 million from its HCFAC funds, which are not subject to annual appropriations and are not under Chairman Rogers' purview. Justice will argue that these funds are already planned for use by the U.S. Attorneys, but given their $1.2 billion overall budget we believe they can absorb the additional cost. HHS would increase its reimbursement by $2.35 million for a total of $5 million -- we would let HHS identify the funding source, subject to OMB approval, once we advise them of their increased contribution. While neither Department knows about this option or will be eager to increase its funding for the case, we believe this may be the best alternative to a veto of the supplemental bill.

Options for Funding Tobacco Litigation
(dollars in millions)

	Current plan	Alternative
Department of Justice		
Civil Division	1.8	1.8
Health Care Fraud and Abuse Control	4.0	6.8
Department of Defense	2.65	0.0
Department of Health and Human Services	2.65	5.0
Department of Veterans Affairs	2.65	0.0
Total	13.75	13.6

If Congress simply repeals or restricts Justice's Section 109 authority, another option is to use the Economy Act as the authority to transfer funds to Justice from agencies represented in the litigation. The Economy Act is widely used in the Executive Branch for one agency to purchase goods or services from another agency. In this case, HHS or other agencies would "purchase" legal services from Justice. The Act has been used for just this kind of funding of complex litigation by interested agencies, but it is subject to the limitation that funds received by Justice can be used only for support services, and not for attorneys' salaries. This limitation is the reason that Justice had earlier decided not to use this authority in this case. In addition, there is another problem with this option: since the Economy Act is an even broader authority than the one Congress is objecting to now, Congress would likely be more opposed to a funding strategy that used it than they are to the present one. This option also does not overcome Congress' objection to funding from VA and DOD -- it only provides a different authority.