

Volume 2, No. 1, “Up In Smoke: Coming to Terms with the Legacy of Tobacco”

Tobacco Litigation’s Third-Wave: Has Justice Gone Up In Smoke?

David Hyman

Written just prior to the settlement between the tobacco industry and forty-six states, David Hyman’s analysis questions the validity of claims brought forth by the states in their efforts to bring down the tobacco industry. Hyman focuses exclusively on the extent of damage that Medicaid programs and their beneficiaries have *actually* experienced due to cigarettes as well as the “pediatricizing” of the anti-tobacco movement – that is the marketing of anti-tobacco messages in the name of the well being and safety of children.

Hyman’s primary contention with the states’ attempt to recover for Medicaid losses is that the states have inflated the expenses actually incurred due to their tobacco consumers. Specifically, Hyman criticizes the states’ attempts to recover for the *total* expenditures incurred through the smoking population rather than the *incremental* expenses – which he argues are virtually non-existent. He further argues that the resulting gain from cigarette excise taxes as well as foregone pensions and Social Security in fact surpasses losses incurred by the state and federal governments from caring for smokers. If in fact the latter is true, and the tobacco industry holds out that the government benefited more than it suffered, why was the tobacco industry so willing to settle? Hyman argues that this willingness is not a reflection of the merits of plaintiffs’ claims, but rather an indicator of the realities of the tort system and how unsympathetic big pocket defendants often fare. Furthermore, by filing suit in equity, the states effectively avoided the impact of the doctrine of subrogation, which would have subjected them to the historically invoked affirmative defenses of assumption of risk and contributory negligence raised against individual plaintiffs. And as Hyman states, these litigation tactics made it abundantly clear to the tobacco industry that they were up against a lynch mob – one from which they were eager to escape.

The second prong of this article criticizing anti-tobacco advocates’ use of children as a proxy to recover from the tobacco industry is premised on the fact that while “teenagers make up approximately 2% of smokers, the rhetoric of tobacco reform has focused entirely on children.” He takes the position that since death results from tobacco use over a lifetime, “reduction in smoking saves the lives of children only in the most attenuated of senses.” Hyman further criticizes the use of taxation as a means to reduce teen smoking on the

grounds of fairness – that is there is a disjunction between the taxation of all tobacco consumers for the benefit of 2%. Hyman concludes with proposals for more appropriate and effective excise taxation policies as a means of addressing illegal purchases by underage individuals, proposals that are directed strictly at underage smoking and not the financing of unrelated government programs.

Announced to Trowned: A Journalist’s Comments on the Demise of the Tobacco

Settlement

Adam S. Levy

From the perspective of a journalist who covered the tobacco settlement, Adam Levy examines the shift of the settlement from “announced to trounced” in as little time as a year. In doing so, he elaborates on the settlement’s many beneficial provisions as well as its many negative consequences. He points out that these beneficial provisions were not a result of a grass roots efforts, but rather monetary motivation, as there were no heroes in the saga of the tobacco settlement.

The author expresses his belief that the tobacco settlement was never passed by Congress as due to the key players in the settlement failing to put aside their personal agendas for the need to compromise. In addition, he explores some lesser-known history behind tobacco litigation and the settlement, and offers an outlook for the future. He states the possibility of tobacco companies such as Philip Morris and RJR Nabsico filing for bankruptcy in the wake of all the tobacco litigation, which would put a halt to lawsuits and to most of the payments Congress now hopes to get from the industry. Furthermore, he points out that there is still some chance that the tobacco legislation killed by the Senate might yet reappear again in a different form.

The author concludes by stating that by having Big Tobacco 1) submit to regulation and 2) pay a large sum on account of its actions, the public health of the nation could be improved. He supports the notion that the industry may deserve to be loathed for denying the dangers of smoking while it full well knew that cigarettes were deadly and addictive. Lastly, Levy concludes that the only way to reach an accommodation with Big Tobacco is for the different sides- the tobacco companies, the states, the private plaintiff attorneys, and the others - to work together.

Tobacco Wars and the New Minority

Donald W. Garner

Congressional efforts in forging a comprehensive settlement of the tobacco wars provoked a list of interesting questions that were vigorously debated over the last year. In “Tobacco Wars and the New Minority”, Donald W.

Garner addresses a question of fundamental purpose that was never seriously entertained: Is it fair to impose a half trillion dollars in new taxes on America's poorest and least educated adults as they strive to satisfy their addiction to nicotine?

In posing this question, the author seeks to advance two common sense and inextricably connected ideas. First, it is wrong to punish the poor for the benefit of others, and second, it is stupid to turn a public health initiative into a tax and spend issue and expect it to pass. Part I sets out a brief history of Washington's efforts to pass tobacco legislation, including an analysis of the bill sponsored by Senator McCain. Part II describes the unique economic and social status of smokers and considers whether the McCain bill was justified in its treatment of adult smokers. Part III suggests a much narrower legislative approach than Congress' attempt at tobacco legislation. Garner points out that this approach would not abuse smokers, and yet would serve the legitimate interests of public health.

The author concludes by stating that no idea, no initiative, no legislation designed to hold the tobacco giants accountable will be accepted at the federal level. He further concludes that by seeking to press their advantage over cigarette makers, President Clinton, Congress, tobacco lawyers, Attorney General, and all the special interest groups have lent credibility to the industry charge that tobacco legislation is really about more taxes, not more public health

The Manipulation of Public Opinion by the Tobacco Industry: Past, Present, and Future

Erin Myers

The tobacco industry has used its vast resources to implement a series of successful public relations strategies to defeat plaintiff's claims since the first industry wide lawsuit in 1954. Since then, the industry has utilized its tremendous wealth to sway public opinion and encourage victorious litigation. As evidence continues to emerge indicating foul play among the industry giants, their ability to influence the public may be a thing of the past.

In this article, Erin Myers examines the manipulation of public opinion throughout the second half of the twentieth century until 1998 by the tobacco industry. In Part I, the author examines the distinct phases of tobacco litigation, 1950-1970, 1980s, and 1990s with a focus on the manipulation of public opinion. In Part II, the author examines the shift in public opinion towards the tobacco industry and the industry's response. The author also examines the settlement previously proposed before Congress and the effectiveness of the industry's attempt to invoke public support. Finally, the author explores the effectiveness and morality of the tobacco industry's abuse

of resources in swaying public opinion along with its likelihood of success in the future.

The author concludes that the confirmed link between smoking and terminal illness has encouraged litigation against the tobacco industry for almost a half a century. Throughout this time, the tobacco industry relied on fraudulent tactics and manipulation to ensure successful results. The author concluded further, that the industry's suppression of information regarding the addictive nature of nicotine in order to advance public opinion that smokers had assumed the risk, turned against the industry since the release of information regarding widespread cover-ups by the industry. The author goes on to conclude that public resentment for past fraud far outweighs any sympathy that the industry might muster. Finally, the author concludes that due to the magnitude of the public resentment, the industry, which formerly relied on public support, may be pushed out of existence by the very same public.

The Price of a Soul: At What Cost Can the Tobacco Issue be Resolved?

- Maureen O'Doherty

On April 24th, 1998 the University of Maryland School of Law hosted "Up in Smoke: Coming to Terms with the Legacy of Tobacco", a symposium providing the opportunity for the exchange of views regarding the control of the use of tobacco products. In an introduction to the articles that are the products of this symposium, Maureen O'Doherty traces the societal and legal history of the tobacco industry stretching from 1776 until the present day. She begins by discussing the contrasting stigma once attached to tobacco use depending on one's social class, and recognizes this as cheap tool to keep classes in their place.

In tracing the history of tobacco laws, O'Doherty examines the levels of restrictions on tobacco use, ranging from the prohibition of planting tobacco with the exception of medicinal use, to encouraging the production by instituting a protective tariff- far from restricting the use of tobacco at all. As an example, she follows the "back and forth" shift of Connecticut laws beginning with a prohibition of tobacco use by any person under 21 years of age in 1647, lowered to under 16 years of age between 1647 and 1987, and then raised to 18 years of age in 1987.

The author goes on to discuss the landmark suit for recovery of Medicaid expenditures related to illnesses caused by smoking, and "The Settlement" which ultimately follows. She recognizes the responsibility Congress is now faced with of considering legislation which grants authority on the FDA to regulate tobacco and then to draft a law which addresses the health, as well as economic concerns, of all those involved. Lastly O'Doherty, summa-

rizes the four articles of the symposium, and points out their common focus of the June 1997 settlement. She closes by stating that the articles provide a multi-view history of tobacco litigation, negotiation and legislation, and challenge the foundations laid out by the June 1997 settlement.

Tobacco Wars: Will the Rule of Law Survive?
- Robert A. Levy

In this article, Robert A. Levy criticizes the legal and equitable theories in underlying the Medicaid recovery suits. In doing so he argues that states suing tobacco companies have abandoned traditional tort law, and disregarded time-honored principles of individual liberty and personal responsibility. Levy alleges that the tobacco industry was effectively pressurized into the joining the proposed national settlement, even though both the settlement and the McCain bill, which replaced it, are damaging as a matter of public policy and unconstitutional as a matter of law.

Levy analyzes the implications of tobacco legislation for commercial speech, due process, federalism, the non-delegation doctrine, and litigants' right of access to courts. Furthermore he examines the government's authority to regulate tobacco through Congress's power under the Commerce Clause and the Taxing and Spending Clause. The author proposes that the correct disposition of the tobacco settlement is to bury it and start over. He argues that in order to secure the liberty of all citizens, we must defend and protect our least popular citizens, including tobacco companies, and further asserts that Congress should phase out tobacco support programs.

In conclusion, Levy discusses the frontline defense against inadequate labeling and other deceptive techniques, and defines this as common law fraud. He contends that the post-1937 view of the Commerce Clause that would permit federal government to dictate cigarette warning labels is incorrect. Alternatively, he states that a correct reading of the clause would obligate Congress to predicate any such legislation upon a determination that a federal uniform rule is imperative to facilitate the free flow of commerce. Lastly, Levy insists that state and federal courts must not allow state attorneys general to proceed with their Medicaid reimbursement suits, which deny due process to the tobacco industry.

Medicaid Recipients Denied Coverage For Smoking Cessation Pharmacotherapy

Kelly N. Reeves

According to Kelly N. Reeves, more than 42% of Medicaid

beneficiaries are smokers. The author points out that over the next 25 years, the Medicaid program is expected to spend \$39 billion dollars in direct and indirect health care delivery costs. While the FDA has approved several prescription and non-prescription drugs for smoking cessation, states are not required to provide Medicaid coverage for smoking cessation pharmacotherapy.

The author examines the optional Medicaid coverage provision in the Social Security Act that permits states to exclude Medicaid coverage for smoking cessation prescription drugs. The author also examines the legislative history and the availability of smoking cessation pharmacotherapy at the time of the passage of the Act in 1990. Next, the author examines the cost of cigarette smoking to Medicaid and the cost effectiveness of extending Medicaid coverage to smoking cessation prescription drugs. The author then examines, federal government smoking cessation initiatives espoused by several federal agencies and programs to illustrate that smoking cessation is clearly a priority of the national health agenda. Finally, the author proposes an amendment to the current law to eliminate state's optional coverage of smoking cessation prescription drugs and examines provisions of the defeated tobacco legislation that would have accomplished that task.

The author concludes that repealing the provision permitting states to optionally exclude Medicaid coverage for smoking cessation pharmacotherapy is a simple action that Congress could undertake to help Medicaid recipients who want to quit smoking. The author concluded further that smoking cessation pharmacotherapy could vastly improve the health and quality of life of Medicaid smokers, while simultaneously reducing the overall cost to the Medicaid program of providing health care to treat tobacco-related illness.