A NEW ATTACK ON SMOKING
Using an Old-Time Remedy

SYNOPSIS

THIS ARTICLE FIRST will explain the reasons behind and goals of state recoupment actions against the major cigarette manufacturers, their lobbying arm and trade association, and their public relations firms (collectively referred to as the "tobacco industry") for the recovery of Medicaid and other indigent care expenditures on smoking-related illnesses. These are, primarily, to relieve the heavy financial burden on state treasuries and to stop the tobacco industry from targeting children in advertising and promotions. To put this new legal approach in perspective, the article presents a brief historical background to the tobacco industry's litigation strategy: to wear down opponents through delay and intimidation, to cast doubt on science, and to wrongfully invoke the attorney-client privilege against disclosure of incriminating evidence.

Next the authors discuss the states' strategy: each filing one suit seeking equitable remedies under theories of restitution/unjust enrichment, indemnity, public nuisance, and injunctive relief to protect the interests of minors, instead of maintaining thousands of product liability claims on behalf of individual smokers. This will be followed by a critique of the industry's response to state actions: political attacks against attorneys general and trial lawyers and charges that the lawsuits would hurt business as well as a variety of legal challenges, including an imaginative but risky defense that if smoking indeed causes disease and attendant health care expenditures, then the tobacco industry ought to be given a credit against those expenditures for the taxes generated by its business and the "savings" which inure to the states from the premature deaths of smokers (the cost of geriatric care, for example).

The article will wrap up by impressing on health officials and other readers what is at stake in these actions and what their success or failure will mean for the Medicaid program.

THE ATTORNEY GENERAL OF MISSISSIPPI AND CO-COUNSEL LAY OUT THEIR CASE AGAINST THE TOBACCO INDUSTRY.

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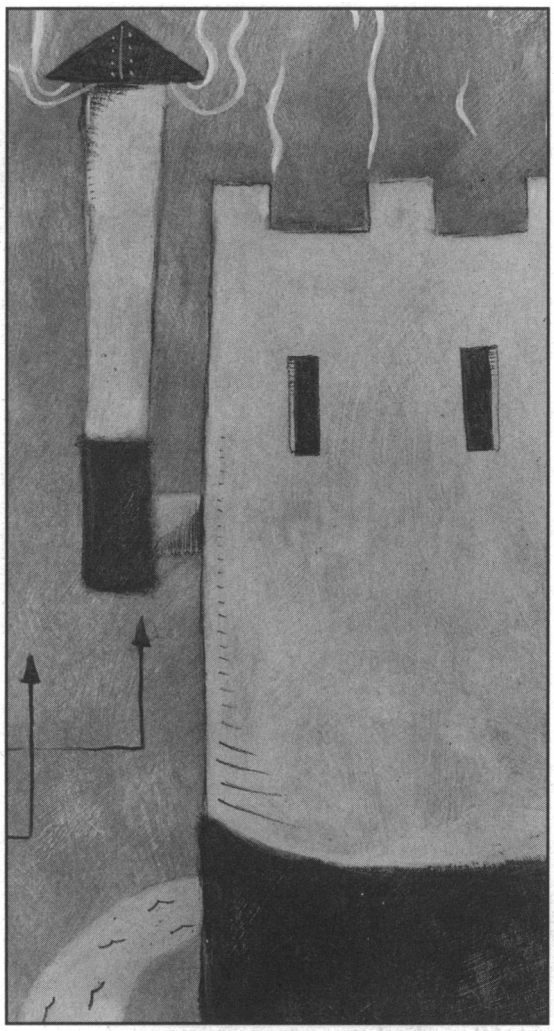
Tobacco is the most lethal consumer product ever sold. It kills an estimated 419,000 Americans every year,[1] despite the fact that these deaths are entirely preventable. More people die from tobacco use than from AIDS, alcohol, illicit drugs, homicides, suicides, fires, automobile crashes, and other accidents combined.[2]

No other product with tobacco's characteristics could be legally sold in the U.S. market. Were tobacco introduced today for the first time, it would be treated like marijuana or cocaine. Yet tobacco is legally sold to adults. The industry that sells it denies its harmful and addictive effects and spends billions of dollars to make it appear acceptable, desirable, and safe. The tobacco industry uses sinister advertising and marketing techniques that strongly appeal to adolescents.[3] Though the industry denies targeting young people, the leading cigarette brands smoked by minors are marketed using cowboys and cartoon characters.[4]

Illustration by James Genus

The law requires the State of Mississippi to pay the health care costs of indigents.[5] Accordingly, the State of Mississippi spends approximately $100 million of taxpayers' money every year on tobacco-related illnesses through Medicaid, the state employees' insurance plan, and state-funded hospitals. Other states also spend millions on indigents with smoking-related illnesses.

We now know that the tobacco industry knew as far back as the early 1950s that its product was hazardous to the health of American consumers. Yet, in a callous pursuit of profits, it deliberately and systematically suppressed information about the adverse effects of smoking and its knowledge that nicotine was an addictive drug at a catastrophic cost in American lives and well-being. Governments—including the State of Mississippi—have been forced to assume the heavy financial responsibility of caring for smoking victims who could not afford to pay for their own health problems. The industry's lies and deception continue to this day. The image of tobacco industry executives testifying under oath before Congress in May of 1994 that nicotine is not addictive is indelibly marked in the minds of the American public.[6]



On May 23, 1994, the State of Mississippi filed the first state recoupment action for the recovery of Medicaid and other indigent care expenditures on smoking-related illnesses. The state's reasons and goals are:

- it is only fair that the tobacco industry, not the taxpayers, pay for the pain and suffering the industry knowingly inflicted on thousands of Mississippians and to relieve the heavy financial burden its actions have placed on the state's treasury;
- it is the right thing to do;
- to protect the public health;
- to stop the industry from peddling its dangerous drug to vulnerable children and teenagers who become hooked on nicotine; and
- to end the taxpayers' subsidy of a multibillion-dollar enterprise and to recover money which the state needs for, among other things, education and economic development.

The Tobacco Industry's Historical Litigation Strategy

When medical and scientific information about the dangers of smoking and its link to lung cancer and other diseases was publicized in the early 1950s, the first wave of tobacco litigation was instituted by lawyers who expected either that the industry would settle claims quickly to avoid protracted litigation or that they would win a landmark court victory. But their hopes were soon dashed when all the cases in the first wave were either lost or abandoned by plaintiffs or their counsel. Only about ten went to trial. The results were the same in the second wave of cases filed in the 1980s.[7]

Wear the Opponent Down. The tobacco industry had adopted a strategy never to settle a single claim, a strategy unique in the annals of tort litigation. Fully cognizant that in 1954 alone 25,000 Americans had died of lung cancer—and the figures were rising[8]—the industry could easily project the vast number of claims which might be brought each year if claimants and personal injury lawyers believed that tort suits could be settled for sizeable sums of money. "The industry," wrote a student of the early wave of tobacco litigation, "saw its very existence threatened and responded in an uncompromising fashion."[7]

The essence of the tobacco industry's litigation strategy has been to wear down opponents. Through delay and intimidation by conducting endless discovery and filing an array of pretrial motions and making a multitude of procedural challenges, all the while hindering meaningful discovery by plaintiffs, the industry has made cigarette disease litigation expensive, time consuming, and oppressive, and thwarted the determination of a case on its merits.[9] Industry representatives have even boasted about these tactics, as reported in the *Los Angeles Times*, which quoted an industry lawyer explaining in a confidential memorandum why several California cigarette liability cases were dismissed:

> [T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expen-

sive for plaintiffs' lawyers, particularly sole practitioners. "...To paraphrase General Patton, the way we won those cases was not by spending all of [R.J.] Reynolds' money, but by making that other son-of-a-bitch spend all of his."[10]

Despite the overwhelming success of the industry's defense strategy, there was a positive outcome to the second wave of tobacco litigation: revelations from secret industry documents and courageous whistleblowers that for over thirty years the industry has been aware of the serious health hazards of smoking and the addictive nature of nicotine.

The industry has known for years that nicotine is the pharmacological agent that explains tobacco use: its research was conducted on nicotine's effect on the functions of the body, not on its taste or flavor. For example, in July of 1962, Sir Charles Ellis, Scientific Advisor to the Board of Directors of the British American Tobacco Company (BAT), presented a paper at a conference in Southampton, England, in which he called nicotine a "very fine drug."[11] And after reviewing the findings of a research project on the effects of nicotine by BAT's American subsidiary, Brown & Williamson Tobacco Corporation (B&W), the company's General Counsel, Addison Yeaman, wrote in a private and confidential memorandum that the company was "in the business of selling nicotine, an addictive drug effective in the release of stress mechanisms."[12] RJR Nabisco's former Chief Executive in the mid-1980s, F. Ross Johnson, was quoted in the *Wall Street Journal* in 1994 as saying about nicotine in cigarettes: "Of course it's addictive. That's why [people] smoke the stuff."[13]

The State of Mississippi spends approximately $100 million of taxpayers' money every year on tobacco-related illnesses through Medicaid, the state employees' insurance plan, and state-funded hospitals.

Cast Doubt on Science. Other recent revelations show vividly how members of the industry entered into a conspiracy—carried out through sophisticated public relations campaigns and unrelenting propaganda, as well as aggressive lobbying efforts—not only to conceal from the public and state and federal health officials the truth they possessed about the link between smoking and lung cancer and other illnesses but also to cast doubt on the information about smoking and disease issued by the scientific and medical community. In a May 1972 Tobacco Institute memorandum from Fred Panzer (the vice president) to Horace R. Kornegay (the president), Panzer admits to and describes the industry's strategy for defending itself in litigation, politics, and public opinion as "brilliantly conceived and executed over the years" in order to "cast[] doubt about the health charge" by using "variations on the theme that, 'the case is not proved.'" The memorandum further advocates more aggressive lobbying and public relations efforts to provide tobacco industry sympathizers among the general public and in government with evidence "that smoking may not be the causal factor [in disease]," because until that time, the industry supplied them with "too little in the way of ready-made credible alternatives."

A recent report by the Subcommittee on Health and the Environment of the U.S. House of Representatives describes how the industry, with the help of the public relations firm of Hill and Knowlton, carried out its conspiracy by forming the Tobacco Industry Research Committee (now the Council for Tobacco Research [CTR]) in 1953. CTR's purported goal was to provide "aid and assistance to the research effort into all phases of tobacco use and health" because of the industry's ostensible concern

Table 1. Amount[a] and percentage of total medical care expenditures attributable to cigarette smoking, by age group and expenditure category, United States, 1987[b]

	Physician[c]		Drugs		Hospital		Home-health care[d]		Nursing home		Total	
Age group (years)	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent
19–64	$5,185	8.3	$224	1.8	$6,995	8.2	$371	4.9	NA	...	$12,775	7.6
65 or older	$1,439	5.9	$303	3.9	$4,358	6.6	$861	8.6	$2,156	6.6	$9,117	6.5
Totals	$8,624	7.7	$527	2.6	$11,353	7.5	$1,232	7.0	$2,156	6.6	$21,892	7.1

SOURCE: MMWR 1994;43;471.

[a]In millions,based on reported medical care expenditures of $308.7 billion during 1987.

[b]Weighted data.

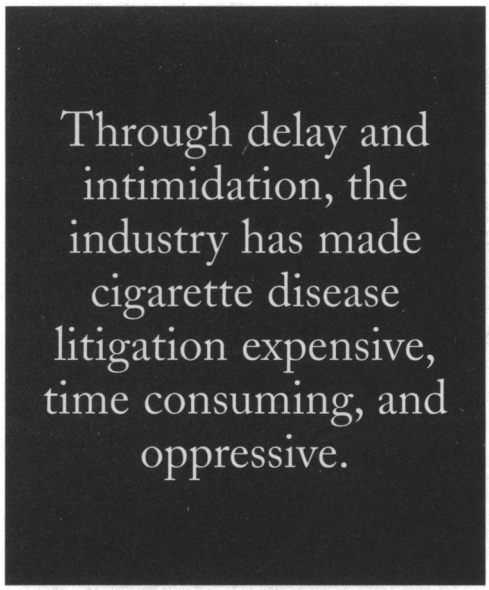
[c]Includes hospital-based outpatient and emergency care and care in physicians' offices.

[d]Includes Medicare- and Medicaid-certified services and other reported services.

NA=not applicable.

about people's health, which—it assured the public—was "paramount to every other consideration in [its] business."[14]

In reality, the industry's hidden agenda was to launch a massive public relations effort to counter mounting evidence linking tobacco to lung cancer. This campaign was to be "entirely 'pro cigarettes,'" and its objective was to "promote[] cigarettes and protect[] them from present and future attacks," by reassuring the public that "there is no proof of the claims which link smoking and lung cancer."[15] The documents examined by Congress reveal that a main objective of CTR-sponsored research was not to find an answer to the effect of smoking on health; rather, it was to demonstrate "by the very breadth of research...that questions regarding tobacco use and health are far from being resolved."[16] In other words, if the issue were settled, there would be no need for more research.



This sinister plan and transparent farce continue to this day. CTR's Executive Director, Dr. James Glenn, testified before Congress on May 26, 1994, that CTR was indeed independent and objective and that after spending millions of dollars and conducting thousands of research projects, a causal link between smoking and disease has not been established. An extensive investigation into CTR by the *Wall Street Journal* led it to conclude that the organization was at the center of "the longest-running misinformation campaign in U.S. business history."[17]

Invoke Attorney-Client Privilege. The success of the industry's strategy has been largely due to the involvement of its lawyers in both internal and external scientific research. Cigarette manufacturers accomplished this amazing scheme by wrongfully creating a right to the confidentiality of various documents that they wished to conceal by sending these documents through their legal departments and law firms at every opportunity. They could then claim the documents to be protected against disclosure by the attorney-client or attorney-work product privileges. Industry lawyers would seek approval from the tobacco companies for CTR "Special Project" research grants.[18] If the results of the tests were adverse to the industry (contrary to its public posture that smoking was not a health hazard) the results would, by virtue of the legal overview, be regarded as privileged scientific reports prepared in anticipation of litigation, thus not discoverable by plaintiffs' lawyers.

For example, fearful that the results of overseas biological research projects done by its British parent would be discoverable by U.S. plaintiffs' lawyers, B&W lawyers urged BAT to involve lawyers in the early stages of those scientific experiments. "Direct lawyer involvement is needed," wrote J. Kendrick Wells III, now Assistant General Counsel for Product Litigation at B&W, "in all BAT activities pertaining to smoking and health from conception through every step of the activity."[19]

After reviewing the B&W documents, Yale Law School ethics professor Jeffrey C. Hazard, Jr. concluded that industry lawyers abused the attorney-client privilege. "There is no possible reason," exclaimed Professor Hazard, "for a law firm to be [recommending the hiring of specific scientists for projects on smoking and health] except to gain the protection of the privilege."[20] Professor Stanton Glantz of the University of California at San Francisco put it best when he said:

> It's an amazing situation, because to have a group of lawyers basically selecting scientific research...completely goes against the normal process in which scientific investigations are conducted.[19]

Not surprisingly, these new revelations prompted yet a

Table 2. Amount[a] and percentage of total medical care expenditures attributable to cigarette smoking, by age group and source of payment, United States, 1987[b]

	Self		*Insurance*		*Medicare*		*Medicaid*		*Other Federal*		*Other State*		*Other*		*Total*	
Age group (years)	*Amount*	*%*	*Amount*	*%*	*Amount*	*%*	*Amount*	*%*	*Amount*	*%*	*Amount*	*%*	*Amount*	*%*	*Amount*	*%*
19–64.....	$2,274	17.8	$6,119	47.9	$728	5.7	$1,086	8.5	$1,571	12.3	$600	4.7	$396	3.1	$12,775	100
65 or older.....	$2,325	25.5	$1,185	13.0	$3,756	41.2	$1,158	12.7	$520	5.7	$91	1.0	$82	0.9	$9,117	100
Totals[c].....	$4,599	21.0	$7,304	33.4	$4,485	20.4	$2,244	10.2	$2,091	9.5	$692	3.2	$478	2.2	$21,892	100

SOURCE: MMWR 1994;43;471

[a]In millions.

[b]Weighted data.

[c]Numbers may not add to totals because of rounding.

third wave of tobacco litigation. It includes, in addition to the first- and second-wave suit strategies of personal injury and wrongful death claims, several class actions: one of a group of flight attendants exposed to secondhand smoke; another, of Kansas residents who purchased, used, and have become addicted to smokeless tobacco; a third, the largest class action in history filed in March of 1994 in a Louisiana federal court on behalf of tens of millions of "nicotine-dependent" smokers, defined as those who have made at least one unsuccessful effort to quit.

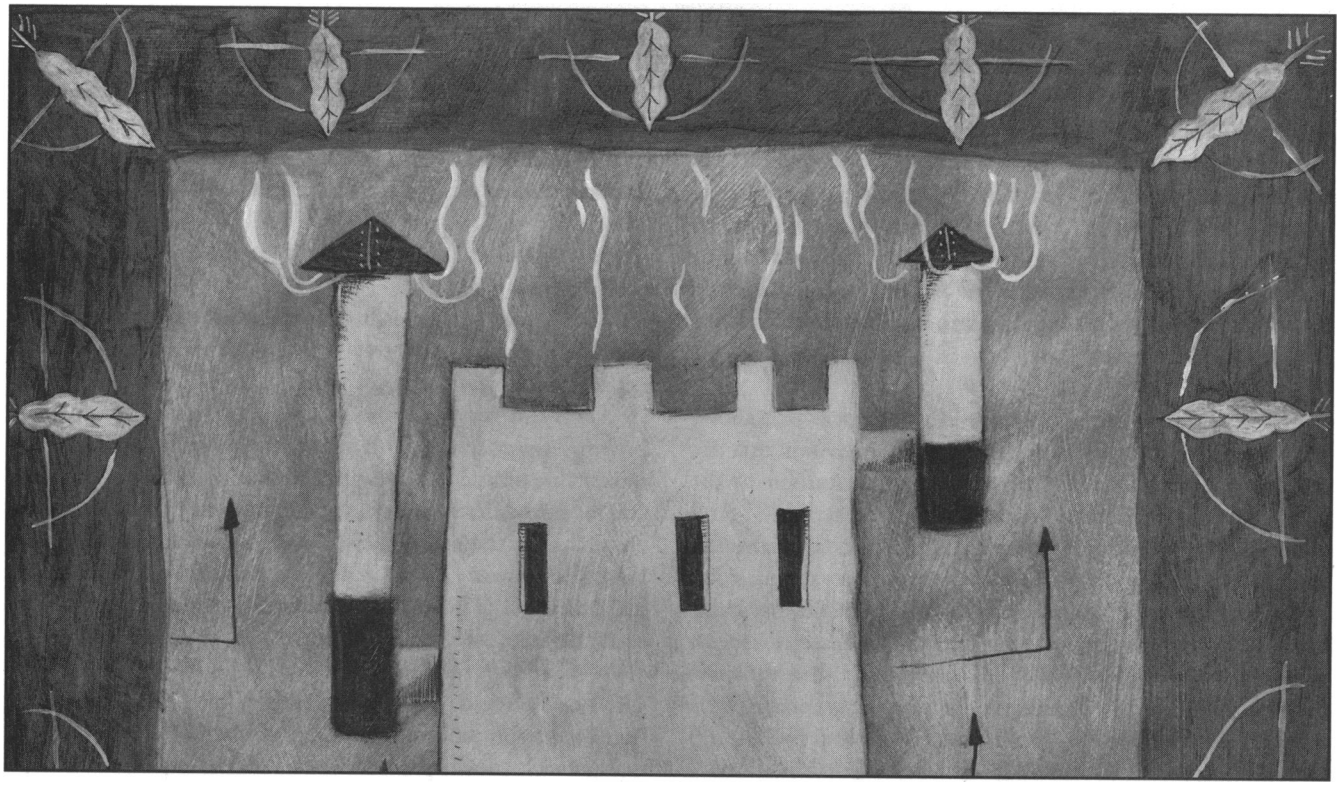
But the industry was unprepared for and totally caught off guard by the fourth wave of litigation. In May of 1994, the State of Mississippi filed the first of several state actions to recoup Medicaid and other indigent care expenditures on tobacco-related illnesses. The Mississippi action was followed by similar suits by Minnesota, West Virginia, Florida, Massachusetts, and Louisiana. Like Mississippi, all the state actions are primarily based on equitable theories of recovery, though some also allege antitrust and unfair trade practice violations. Maryland and Texas have announced their intention to file similar suits in the near future. More states are seriously considering joining the fray.

The suits are now more attractive after one of the cigarette manufacturers, Liggett Group, Inc., agreed to settle the states' claims by contributing an initial cash payment and a percentage of its pretax income for several years into a trust fund to be used to defray some of the states' health care costs on smoking-related illnesses. And if Liggett merges with R.J. Reynolds, the second largest cigarette maker, Reynolds would also become part of the settlement.

The Strategy of State Actions

Lawsuits by the states against the industry could theoretically have required the maintenance of thousands of separate suits for the recovery of expenditures on each health care recipient—an overwhelming task clearly beyond the capacity of the states or their judiciary. Since such an undertaking would have been nearly impossible, the states were left without a plain, adequate, full, or complete remedy at law, relief to which every suitor is entitled. The situation demanded that the states resort to equitable theories of recovery. Equitable theories were fashioned precisely for situations of inadequate legal remedies and to avoid a multiplicity of suits.[21] The first and foremost maxim of equity is that it "will not suffer a wrong without a remedy."[22]

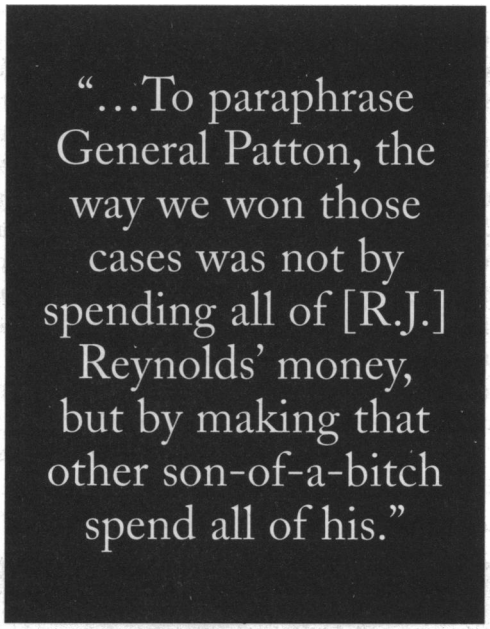
The Mississippi action cites claims for relief based on restitution/unjust enrichment, indemnity, common law public nuisance, and injunctive relief to protect the interests of minors (these are detailed below). The claims are not product liability suits for damages suffered by individuals; they are purely equitable and neither dependent upon, nor limited to, the common law claims available to individual smoking victims. The State is acting not as a surrogate of the tens of thousands of individual smokers whose health care bills it has had to pay, and it is not suing to recover anything for individual smoking victims. The State is suing in its own right to protect its interests and to recoup funds which will also inure to the benefit of the federal government. The suit's premise: unlike the smoker who had an illusory "choice" to smoke, the State had no choice in providing health care to its citizens suffering from tobacco-related illnesses who relied on the



State for their care.

Restitution/Unjust Enrichment. The State is entitled to restitution because it conferred a benefit on the tobacco industry, satisfied its debt, performed its duty, and saved it from expense and loss.[23] The industry has been unjustly enriched by not having to bear the economic byproducts of its enterprise—the enormous health care costs due to tobacco-related diseases. The State has been carrying that burden and thereby saved the industry great expense.

The Restatement of Restitution and case law[24] allow recovery by one who is forced to supply things or services to satisfy the requirements of public decency, health or safety, and to avert a public health crisis. The State did just that by paying the costs of the public health crisis which the tobacco industry created.



Indemnity. The State is legally obligated to the recipients of its aid. It is an innocent third party to the dealings between the indigent sick smoker and the industry and should be indemnified for its losses by shifting those costs to the industry.[25] The concept of indemnity calls for a shifting of loss, or a portion of it, unfairly borne by one party who was under a duty to pay for the loss for which the other is primarily responsible. The traditional industry line that smokers made a personal choice to smoke and should be responsible for their own health care simply does not apply to the State. The rationale behind the defenses of assumption-of-risk and contributory negligence is to deter negligence on the part of the injured plaintiff (the smoker) and to prevent him from getting a windfall when he is partially at fault for his injury. No such rationale or policy exists when the State is the plaintiff. Allowing it to recover its expenditures would neither reward smokers nor deter anyone from smoking.

Public Nuisance. Public nuisance is a concept which allows the state broad powers to protect against activities that are "an unreasonable interference with a right common to the general public."[26] Public health is just such a right.[27] And courts have frequently allowed governments to take action to recover their expenditures on such things as cleaning up water pollution and fighting fires.[28] Public entities have also been permitted to recover the costs of abatement against companies which dumped chemical wastes,[29] the expenses for removing a bridge deemed to be a public nuisance,[30] the costs of installing a public well to remedy ground pollution,[31] and the expenses of cleaning up discharged chemicals.[32] Here, the State acted to abate a public nuisance created by the industry by providing health care to keep Mississippians from getting sicker, or dying sooner, from smoking-related illness and disease.

Injunctive Relief To Protect Children. This claim is aimed at stopping the industry from targeting children in advertising and promotions and from selling cigarettes to minors. The industry is creating successive generations of addicted smokers, many of whom will ultimately get sick and create a health care crisis for, and a tremendous burden on, the State. And the industry's promotion of the sale and distribution of cigarettes to minors appeals to them in violation of law. A court of equity, as the superior guardian for children and whose protection is a major reason for its existence,[33] can provide such relief. Misdemeanor prosecutions for the sale of cigarettes to minors are not adequate for the alleged conduct of targeting minors in promotions and advertising. One suit in equity is superior to thousands of misdemeanor prosecutions.[34]

The Mississippi court sustained these equitable theories on February 21, 1995, and rejected the industry's efforts to have the case dismissed or transferred to a court of law to be tried by a jury, despite the industry's objection that its right to a trial by jury would otherwise be violated. There is simply no right to a jury trial in equity.[35] In a court of equity, a judge (known as the chancellor) hears the case and makes findings of fact and conclusions of law. In a court of law (where there is a jury), the judge makes rulings on the law; the jury decides disputed facts.

The Tobacco Industry's Response

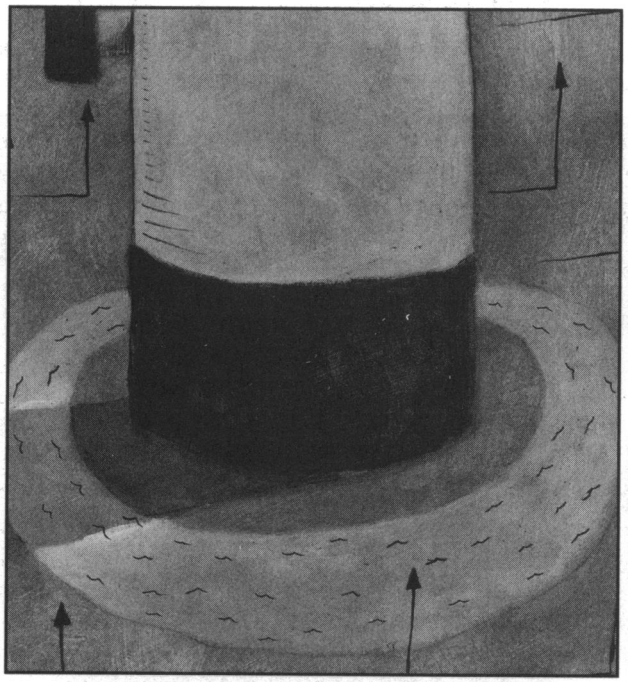
The traditional defense that smokers are responsible for their own conduct and thus assume the risk of illness is of no relevance in state recoupment actions based in equity. And it is this very feature of the states' equitable claims that presents the industry with what may prove to be an insurmountable obstacle to avoid accountability. Equitable claims call for new defensive tactics which have not previously been employed in the customary tobacco product liability litigation. The industry's shift in strategy can be seen in the political and legal assaults it has launched to defeat, or at least stall, the state actions.

On The Political Front. The industry continues to harp on "personal responsibility." That is, people who choose to smoke and get sick should pay their own medical expenses. Perhaps

so. But when smokers cannot afford to pay, taxpayers are required by law to pay those bills. It is only fair for the industry, which primarily caused the damage, to pay for it, not the taxpayers who caused none of it. State actions are not about personal responsibility; they are about corporate responsibility.

Other favorite industry arguments put forward to influence public opinion, and thereby state officials and the courts, are that the state actions are antibusiness; that tobacco is being singled out when other products contribute to illness and disease; and that tobacco is a legal product and states collect taxes from the sale of the product.

On the contrary, state actions are probusiness. The health care crisis created by the industry has a devastating effect on the business community and the economy of the states by way of premature deaths, higher insurance premiums, increased employee absenteeism due to illness and lost productivity. The tobacco industry is not pulling its weight in the business community because the consumers of tobacco products pay the taxes, not the industry. Other businesses pay taxes and thus subsidize the tobacco industry. Tobacco is the only product that when used as intended leads to illness and death. Other products may contribute to illness but are necessary to sustain life. For example, despite potential for high fat content, milk contains calcium and beef has protein. Nothing in tobacco is good for human health. And just because a product is legal does not entitle those who manufacture, market, and sell it to defraud the public, to knowingly make citizens sick, and to fill their pockets with huge profits at the expense of financially strapped taxpayers.



Joining the chorus of 'how ominous would be the consequences of state actions to business' are some politicians and business groups, such as Mississippi Governor Kirk Fordice and the Mississippi Manufacturers Association (MMA). Their criticism of, and opposition to, the lawsuits are a testament to the industry's political power and influence. Governor Fordice and the MMA filed papers in the equity court in support of the industry's efforts to snuff out the Mississippi action. To date, they have been unsuccessful. The crux of their argument: the lawsuit will stifle economic development and discourage outside investment in the state, resulting in the loss of thousands of jobs. But this is just a scare tactic.

It is regrettable that the politicians who pander to this pernicious industry opt for a "healthy business climate" over healthy Mississippians; and that the prospect—though imagined—of the loss of thousands of jobs overrides any consideration for the loss of thousands of lives at the hands of the tobacco industry, and for preventing tobacco use among children. There is simply no room for sacrificing or compromising the health and well-being of the public. Mississippi and the nation can ill afford an irresponsible business enterprise such as the tobacco industry. Having sick employees as a result of tobacco-related illnesses, with the attendant financial strain on business by way of higher insurance premiums, lost working time and diminished productivity, cannot be regarded as good for business.

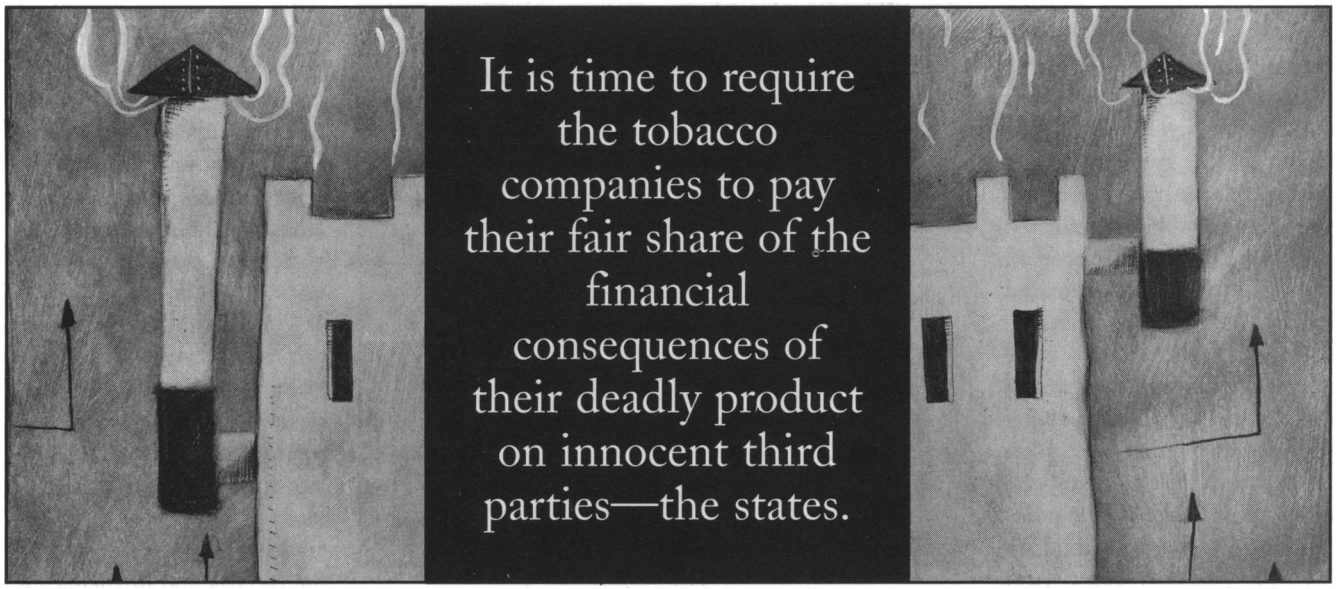
A final criticism of state actions is that they are trial lawyers' lawsuits. It is charged that in the end, if there were a monetary recovery, the federal government would be reimbursed its share of Medicaid funds and the states would lose money after paying for legal fees. That is, of course, pure propaganda spread by the industry to discourage other states from taking similar action. In Mississippi, the State will ask the court to set fees over and above the recovery to recover legal costs. Without lawsuits, the states are sure to recover nothing.

Unfortunately, states do not have the resources to bring such lawsuits. In Mississippi, the State will not spend one penny of tax dollars in its litigation. Instead, a team of capable and experienced private lawyers are taking the risk and financing the suit on behalf of the State; and they will only be paid if and when they recover money from the tobacco industry. The industry, to whom money is no object, spends hundreds of millions each year in legal fees on the best defense lawyers in the country, and has not once paid a penny in damages to injured smokers. It will take a team of experienced and financially able trial lawyers to take on the industry and its army of lawyers. That is the only way to have any chance of winning.

On The Legal Front. In court, the industry has made a variety of substantive and procedural attacks against state actions. One of three major challenges has been to the authority of attorneys general to bring such actions. In Mississippi, because the Division of Medicaid is under the Office of the Governor, the industry argues that a suit to recover Medicaid expenditures cannot be maintained without the Governor's approval (he has not authorized and disapproves of the lawsuit).

As chief legal officer of the State, the Mississippi Attorney General has the constitutional and statutory authority to bring and maintain an action for the recoupment of public funds in matters of statewide interest,[36] a power which has been consistently affirmed by the Mississippi Supreme Court.[37] Standing to sue is, in simplest terms, having a "colorable interest" in the subject matter of the litigation and a stake in the controversy.[38] With the far-reaching detrimental effects of the industry's conduct on the State, and the solemn duties and obligations of the Attorney General under the constitution and laws of the State to preserve the rights and protect the interests of the general public, it is inconceivable and ludicrous for anyone to argue that the Attorney General lacks the requisite "colorable interest" in the circumstances which prompted the filing of the recoupment action.

The Mississippi equity court has agreed, though the industry continues to raise this argument in an entirely separate lawsuit filed against the Attorney General in the State Supreme Court. In West Virginia, however, the court ruled that the Attorney General lacks standing to bring equitable claims due to a peculiarity in West Virginia jurisprudence.



A second legal argument made by the industry for the first time in Mississippi—but which is certain to be made elsewhere—is that tobacco provides a net economic gain to the State and that the industry should, therefore, be given a credit for those "benefits" against the State's costs of treating cigarette-related illnesses. Consequently, the industry argues, it should be allowed to conduct broad and expansive discovery on that issue, seeking data and other information from the State regarding:

- sales and excise taxes paid by cigarette consumers;
- income and other taxes paid by health care providers (doctors, nurses, etc.) who care for indigents since, without smoking-related disease, these providers would not have had income on which the State collected taxes; and—as difficult as it may be to believe—
- health care and other "savings" resulting from the premature deaths of smokers (the cost of geriatric care being one example). The industry's euphemism for this early death premium is "benefits associated with cigarette smoking."

The State is resisting the industry's effort to make economic "benefits" an issue in the case and has sought an order from the Court disallowing the discovery and prohibiting the industry from offering any such evidence at trial, on both legal and public policy grounds as presented below.

Credit for Taxes. The law simply does not allow a party, much less a wrongdoer, a credit for the payment of taxes. Taxes are imposed to raise revenue to defray the necessary expenses of government, to promote the general welfare, and to protect the state's citizens.[39] Taxes are not debts in the ordinary sense and cannot be used as a credit between the taxpayer and the state.[40] Moreover, determining the amount of income tax paid by a physician on the money he received from treating a Medicaid patient suffering from a smoking-related illness, for example, would not take into account the fact that, were it not for cigarettes, the physician might well have spent that time treating a non-Medicaid, and better paying, nonsmoking patient, thus generating greater income on which a higher income tax would be imposed.

The industry is seeking to link taxes—which help pay for roads, police, etc. that permit the industry to do business in the state—to a product's health effects. The eventual conclusion to this argument would be that an industry able to show that its products do not cause adverse health effects would be entitled to a refund of sales taxes paid by consumers of that product. Courts cannot, and should not, play the role of accountant, or theoretical economist, totalling up all the ways in which a corporation pays to, or generates money for,

government, and receives benefits from it.

Additionally, a legal doctrine called the "collateral source rule" precludes a wrongdoer from getting credit for benefits his victim received from other sources.[41] None of the taxes for which the industry seeks a credit has been paid by the industry. Rather, these taxes are paid by others, namely consumers and health providers. If the State were seeking compensation for a negative economic impact (net loss) of the tobacco business on the State, such evidence might arguably be relevant. But the State is not asking for such relief. It only seeks reimbursement of its expenditures on tobacco-related illness and disease suffered by indigents, qualified recipients under Medicaid and employees under the State insurance plan. Public policy dictates that the tax revenues in question not be used to reward the tobacco industry with such a credit. To do so would force the State to subsidize the industry's wrongful conduct.

Benefiting from Early Deaths. Even more preposterous is the industry's claim for a credit for the early death of indigent Mississippi smokers. Allowing such a credit is contrary to public policy. A ruling in the industry's favor would cause the public to have great disrespect for the law.[42] The industry's argument is ghoulish; it is selling death as a benefit. This is offensive to human decency, an affront to justice, and uncharacteristic of civilized society.

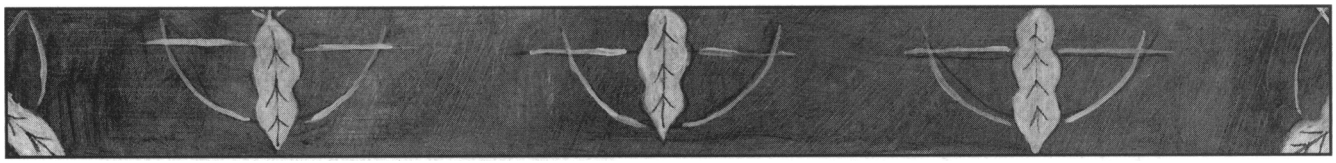
The industry should not be rewarded for relieving the State of the burden of caring for many of its elderly citizens. It is not doing the State a favor by killing smokers early and saving the State money; and the amounts the State seeks in restitution should not be reduced by such grizzly "savings." Using the industry's logic, states should invite it to multiply the shipments of cigarettes into the states so that more poor people can get sick and die from tobacco-related disease. After all, states would reap tremendous economic gains from these early deaths which would outweigh any losses due to expenditures on tobacco-related illnesses.

The basic premise for the industry's argument for a credit—for which it cites various studies commissioned by the industry and the reports of its apologists—is that the associated benefits of tobacco outweigh the smoking-related health care expenditures.[43] But the industry denies that smoking causes illness of any kind and ignores the obvious: economic activity associated with sales of tobacco would not disappear; the money would simply be spent by consumers on other goods and services, the production, distribution and sales of which would generate employment and tax revenues.[44] This was confirmed by a recent independent cost-benefit analysis of cigarette smoking in Michigan.[46] A soon-to-be-released study by two University of Michigan professors also concludes that tobacco will account for a net economic loss in every state except those which grow tobacco, and that states will be in better economic shape if people spent their money on consumer goods other than cigarettes.[45] In any event, no study of the net gain or loss of tobacco to the American economy can adequately factor in the heavy toll of the misery and death wrought by smoking.[46] The overall economic impact of smoking simply cannot be quantified with any degree of certainty.[46]

Individual versus Population-Based Assessments. Finally, in a desperate attempt to both delay the day of reckoning and revive its traditional defenses that smokers assume the risk of smoking, the industry is seeking to take the depositions and review the medical records of individual Medicaid recipients treated for smoking-related illnesses. The industry's motive is to make state actions expensive, time consuming, and unmanageable, by converting them into thousands of individual smoker cases because it fears epidemiology, statistics, and survey evidence. This, it argues, is necessary to test the accuracy of the diagnoses, to learn why each Medicaid recipient decided to smoke, and to test the validity and reliability of survey data or statistical models the states may use to prove damages. But none of these matters is relevant in recoupment actions in equity.

The states plan to prove injury and causation by way of medical and scientific studies and expert testimony, not by health and behavioral data for individual Medicaid recipients. Smoking and health is one of the most studied subjects in the field of public health.[47] Even industry representatives admit that the causal link between smoking and disease can be answered readily from "existing [scientific] evidence"[48] and determined only through "scientific research."[49] The link cannot be established through depositions taken by lawyers using unscientific means. There is further no need to determine why an individual elected to smoke. The industry itself recognizes that self-reporting is unreliable and that any effort to rely on it is "an overly optimistic enterprise."[50] For years the industry has operated "psychological" facilities to study factors that motivate people to smoke to help in marketing and advertising its products.[51] The most reliable and efficient methods of learning why people smoke are properly designed, executed, and described surveys.[52]

The states are alleging that subgroups of their Medicaid populations suffered (or suffer) from smoking-related illnesses. They will, therefore, employ epidemiology to establish that smoking caused (or causes) disease in those populations. Epidemiology and statistics, not individualized proof, are the most reliable and efficient modes for proving causation of dis-



ease in populations.[53] Epidemiology is particularly well-suited to proving causation in state actions which concern smokers as a group, because there is a vast body of epidemiological studies that establishes the causal link between smoking and disease.[54] Additionally, statistical modeling is the most reliable and efficient method for proving group damages; it has been used by both state and federal courts for years.[55]

The damage estimate states will employ uses population-based data acquired from representative samples of national and state populations, and actual Medicaid expenditures. The estimates are not produced by summing damages to individuals on Medicaid or based on the characteristics and diseases of each of those individuals. The calculation of excess costs for smokers compared to nonsmokers will be based on a national sample of the population where a study of medical utilization expenses was conducted and the smoking behaviors and other factors were recorded. A "smoking-attributable fraction" will then be recalculated using this study and state-specific estimates of smoking and other behaviors. Even if it were possible to interview every single current Medicaid recipient, estimates could only be provided for the current year. Many Medicaid recipients have moved out of state, are no longer on Medicaid, or have died, and if alive will not provide a representative picture of individuals sick enough to require health care two to three years ago.

It is also important to note that the individualized proof the industry seeks unnecessarily implicates important privacy rights. These actions are brought by states, not individual smokers. The patients have not filed suit nor placed their conduct or medical condition in issue. They are not parties to state actions. Also, any due process concerns raised by the industry have no merit. Trial courts have wide latitude and discretion in limiting the scope, sequence, frequency, and forms of discovery.[56] This includes that the discovery not be conducted altogether, that it be done through methods other than those selected by the party seeking it (such as by written questions instead of by oral deposition), and that certain matters (such as the amount of taxes or the medical condition of health care recipients) not be inquired into.

The industry is not prevented from defending against the states' claims. It is free to test the states' population evidence and present population proof of its own to contradict it. It may present its own epidemiologists, statistics and survey experts. This is particularly likely considering all the scientific studies it has conducted and commissioned for over thirty years. The Medicaid program is an enormous program and has been in place for over twenty-five years. It has been studied exhaustively by statisticians who have conducted frequent audits, including of error rates in diagnoses and in the program's cost. The tobacco industry could offer experts to testify about those error rates, a process which is much less costly and time consuming—and much more reliable—than depositions of Medicaid recipients. Instead, what the industry proposes to do is "junk science."[57]

Conclusion

Much rests on the success of state actions to recover public expenditures on smoking-related illnesses. It is time to require the tobacco companies to pay their fair share of the financial consequences of their deadly product on innocent third parties—the states. The industry has had a free ride for far too long. As a result of these suits, one manufacturer has agreed to make such a contribution and to exercise corporate responsibility in the way it advertises and markets cigarettes to young people. It is hoped others will follow its lead. Success will also free up large sums of taxpayer money now spent on smoking-related disease for use in improving the states' health care systems and enabling them to better care for the increasing number of poor elderly citizens and children dependent on public health care.[58]

In Mississippi, injunctive relief against the targeting and promotion of cigarettes to children would slow down the creation of successive generations of smokers and spare our children, their families and friends, years of suffering and pain, and save their lives. Studies show that "[t]eens are the primary source of new smokers; after they turn 20, almost no one starts."[3] The greatest stake in state actions is without doubt the future of our children.

This issue's Public Health & the Law, on page 280, focuses on the FDA's proposal to regulate the sale and promotion of tobacco products to minors.

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56. *See* Rule 26(a)–(e), Miss. R. Civ. P.; *Hosford v. State*, 525 So.2d 789 (Miss. 1988); and *McCarty v. Kellum*, 1995 W.L. 571019 (Miss.).
57. The term "junk science" in this context has become popular usage after the publication of Peter W. Huber's book *Galileo's Revenge: Junk Science in the Courtroom* (1991), which is an assault on products liability litigation. In it Huber chronicles a series of mistakes made by the courts in admitting unscientific evidence by way of "expert" testimony (hence the term "junk science"). Huber maintains an unwavering faith in the integrity of today's scientific establishment and relentlessly highlights a need for the courts to defer to its *collective* judgment on complex scientific questions, and not to allow "hermit clinician[s]" to testify as to what they believe on the issue of causation as opposed to what is generally accepted by experts in the mainstream of the particular field of expertise.
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