

# How the Tobacco Industry May Pay for Public Health Care Expenditures Caused by Smoking: A Look at the Next Wave of Suits Against the Tobacco Industry

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## INTRODUCTION

Although studies show that 400,000 or more Americans die annually from health problems caused by cigarette smoking,<sup>1</sup> tobacco companies have yet to lose a single cent in final judgments awarded to plaintiffs in lawsuits asking for health-related damages.<sup>2</sup> This information is cited often and is shocking to many, but may soon be obsolete. While tobacco companies have had remarkable success defending their products against individual smokers in personal injury cases during the past several decades, their seemingly impenetrable armor is beginning to show signs of wear. For example, in 1996, for the first time ever, a cigarette company has settled a health-related lawsuit.<sup>3</sup> In addition, a private plaintiff recently won an award of \$750,000 in a Florida trial court.<sup>4</sup> This judgment is not the first win for a plaintiff at the trial court level, but would be the first final judgment if it is sustained on appeal.<sup>5</sup>

While these developments alone do not threaten the tobacco industry, the trend that they illustrate does pose a threat. The legal and political climate in America appears to be shifting, and, if that is the case, the tobacco companies may be

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1. Charles Marwick, *Tobacco Control Report Card Fails Some Federal Entities, Gives All Tough Future Assignments*, 271 JAMA 645, 645 (1994).

2. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 878 (1992). Until 1996, tobacco companies had not even paid any money in (reported) settlements of health-related lawsuits linked to smoking.

3. In March 1996, Liggett Group reached a settlement with Mississippi, West Virginia, Florida, Louisiana, and Massachusetts in those states' lawsuits to recover health care costs caused by smoking. The settlement called for a cash payment of \$5 million to be split among the five states, a continuing payment to the states out of Liggett's profits, and an agreement to eliminate advertising aimed at children. The settlement also left open the door for other states to join at a later date; this would result in an adjustment in the amount each state would receive from Liggett's profits. Anna W. Mathews, *Liggett Settlement Could Be Broadened*, THE NEWS & OBSERVER (Raleigh), July 24, 1996, at D1, available in 1996 WL 2889399; Milo Geyelin, *Liggett, Five States Set Pact Covering Treatment of Smoking-Related Illnesses*, WALL ST. J., March 18, 1996, at A3.

4. This judgment is pending appeal. Nick Ravo, *Smoker's Suit Brings Award of \$750,000 in Florida*, N.Y. TIMES, Aug. 10, 1996, at 8.

5. *Id.*

forced to pay for the health problems and the financial consequences caused by smoking.

In addition to measuring the costs of tobacco in subjective terms,<sup>6</sup> another way to measure the costs of America's<sup>7</sup> tobacco problem is to look at the economic costs, both direct and indirect, associated with smoking. Many commentators argue that, while smoking is an activity that should be allowed in our free society, tobacco companies and those who smoke should directly and completely bear the costs of smoking, and the government should eliminate any subsidies that are provided to tobacco by non-smokers.<sup>8</sup> From an economic perspective, this recommendation makes perfect sense: if tobacco companies and smokers bear the true, unsubsidized, cost of smoking, the increased expense will cause a decrease in smoking.<sup>9</sup>

One particular class of subsidies that the government provides to tobacco companies and smokers is Medicaid, Medicare, and other public health programs. While smokers and non-smokers pay equally into the system of subsidized health care for the poor and elderly in this country, smokers disproportionately drain the system of its resources. Recently proposed federal legislation included estimates that, in 1994, illnesses and diseases attributable to tobacco use cost the government \$16 billion in Medicare expenditures, and \$3 billion in Medicaid expenditures, and stated that those programs will be insolvent in seven years.<sup>10</sup>

This Note will focus on federal and state governments' responses, both in legislatures and courts, to rising expenditures made necessary because of smoking-related illnesses and diseases. Part I looks briefly at the Medicare and Medicaid system and examines cost estimates of smoking on the programs that fund public health. Part II examines the federal, and some selected state governments', preliminary responses to this situation through new legislatively-created causes of action as well as the more traditional common law causes of action. Part III considers a number of factors involved in the potential success or failure of the current strategies. They include politics, public policy issues, and the comparative advantages and disadvantages of different litigation

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6. While some people suffer from the long-term effects of smoking, others never experience these effects. Additionally, many smokers derive at least short-term pleasure from smoking. This Note does not attempt to address these subjective measures, but focuses on quantifiable health care expenditures.

7. Although scholars, politicians, and the general public are increasingly debating the international issues concerning smoking, this Note will focus only on America's problems with and responses to cigarette smoking. Also, this Note will only consider the legal smoking of tobacco products and will not deal with other controlled substances.

8. Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 OHIO ST. L.J. 405, 406 (1991).

9. This assumes that people are able to stop smoking. Although addiction may lessen some smokers' willingness to substitute cheaper goods for tobacco, some smokers would no doubt quit if tobacco prices rose dramatically.

10. S. 2245, 103d Cong., 2d Sess. (1994). These estimates of cost only include expenditures for inpatient hospital services. The bill estimates that these programs initially will cost a total of \$128 billion on such illnesses and diseases and that over the next 20 years, illnesses and diseases attributable to smoking will cost the Medicare trust funds at least \$800 billion.

strategies. While it is impossible to predict the ultimate success of these strategies in a field this open, this Note attempts to weigh their relative strengths and weaknesses and determine which ones seem most likely to provide reimbursement to the various levels of government involved.

#### I. MEDICARE, MEDICAID, AND OTHER PUBLIC HEALTH-CARE EXPENDITURES ATTRIBUTABLE TO SMOKING

The system of subsidized health care for the elderly and poor in the United States is currently not in a sound financial position and is in danger of becoming insolvent in the next decade.<sup>11</sup> One response to this problem has been a push in the last few years for health-care reform, including Medicare and Medicaid reform. Another response, the focus of this Note, has been for government officials at the state and federal level to attempt to make tobacco companies pay for the expenses the system has incurred as a result of citizens' smoking.

In order to determine the total amount spent by our federal and state governments on tobacco-related illnesses, and therefore the tobacco companies' potential liability, it is necessary to have reliable figures of actual costs incurred. A joint effort of the University of California and the Centers for Disease Control ("CDC") has produced the most persuasive study on this subject.<sup>12</sup> This study estimates that of the \$308.7 billion spent on direct medical care<sup>13</sup> in 1987, \$21.9 billion (or 7.1%) was attributable to smoking. When adjusted for 1993 figures, the study estimates that a total of \$50 billion was spent to treat smoking-related illness and disease.<sup>14</sup>

More pertinently, the study also reports on the amount of money spent by Medicare, Medicaid, and other public sources that smoking necessitated. In 1987,

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11. *Id.*

12. *Current Trends: Medical-Care Expenditures Attributable to Cigarette Smoking—United States, 1993*, 43 MORBIDITY & MORTALITY WKLY. REP. 469 (1994) [hereinafter *Medical-Care Expenditures*]. This study used data from the 1987 National Medical Expenditures Survey and from the Health Care Financing Administration. The researchers used figures from 1987 and then calculated a total expenditure figure for 1993 by adjusting the 1987 figure. The model categorized participants as a "smoker" or "former smoker" as a person exposed to smoking for a minimum of 15 years, and controlled for confounding factors such as "age, race/ethnicity, poverty status, marital status, education level, medical insurance status, region of residence, safety-belt nonuse, and obesity." *Id.* at 469-70. *But cf.* Willard G. Manning et al., *The Taxes of Sin: Do Smokers and Drinkers Pay Their Way?*, 261 JAMA 1604 (1989) (This study argues society's medical care costs caused by smoking are not as high as thought by some because, although smokers pay into the health care system, they often die prematurely and therefore do not drain the system of resources in their old age. The study also offsets revenue derived from excise taxes paid by tobacco companies, an issue which is discussed in Part III of this Note.).

13. Direct medical-care expenditures include expenses from prescription drugs, hospitalization, physician care, home health care, and nursing home care. *Medical-Care Expenditures*, *supra* note 12, at 470.

14. *Id.* The report acknowledges that much of this increase from \$21.9 billion in 1987 to \$50 billion in 1993 is the result of increased medical care prices across the board. *Id.*

the amount spent on these programs totaled \$9.512 billion.<sup>15</sup> This amount jumped to \$21.36 billion in 1993.<sup>16</sup> Overall, the study estimates that in 1987 the government picked up the tab for over forty percent of the medical care costs for treatment of illnesses and diseases attributable to smoking.<sup>17</sup>

While these numbers are astoundingly large, the study describes them as an underestimate of the real costs of medical care that are attributable to smoking because of two factors which did not play a part in the statistical model.<sup>18</sup> First, the study underestimates costs because direct medical costs are limited to the categories listed above<sup>19</sup> and do not include costs such as treatment for burns due to smoking-related accidents, care for low-birthweight babies of mothers who smoke, and disease from environmental tobacco smoke ("ETS")—also called second-hand smoke.<sup>20</sup> Second, the study underestimates real medical care costs attributable to smoking because indirect costs of morbidity and early mortality,<sup>21</sup> estimated at \$6.9 billion and \$40.3 billion respectively for 1990, are excluded from the study.<sup>22</sup> Adding these figures to the direct costs of health care could more than double the total figure calculated for medical care expenditures attributable to smoking.<sup>23</sup>

In addition to the University of California/CDC study, other studies have estimated the amount the federal government spends on health care as a result of smoking. United States Senators Frank Lautenberg and Tom Harkin sponsored a bill in Congress on June 28, 1994, which had the purpose of "provid[ing] additional methods of recovering costs to the Federal Government health care programs attributable to tobacco related illnesses and diseases."<sup>24</sup> The proposed

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15. Medicare expenditures attributable to smoking were \$4.485 billion, Medicaid expenditures attributable to smoking were \$2.244 billion, "other federal" spending amounted to \$2.091 billion, and "other state" spending equaled \$692 million. *Id.* at 471.

16. *Id.* The article states that medical care expenditures attributable to smoking equaled \$2.06 per pack for the 24 billion packs of cigarettes smoked in 1993 (for a total of \$49.4 billion). The article says that \$0.89 of the \$2.06 per pack was paid by public sources. When the \$0.89 per pack is multiplied by 24 billion (packs sold in 1993), this results in the \$21.36 billion figure paid by the various levels of government for medical care attributable to smoking. This includes "other federal" and "other state" spending in addition to Medicare and Medicaid spending.

17. *Id.*

18. *Id.* at 472.

19. The categories included in the study are prescription drugs, hospitalization, physician care, home-health care, and nursing home care. *Id.* at 472.

20. While the economic costs of illness and disease from ETS are not available at this time, there is a persuasive body of literature developing that suggests that the effects of ETS are more serious than has been thought in the past. Studies estimate that approximately 53,000 people die each year from exposure to ETS, and litigation involving victims of ETS is blossoming in many areas of the country. Sheryl Stolberg, *Unwilling Fighter in War on Secondhand Smoke Health*, L.A. TIMES, May 27, 1994, at 1.

21. *Medical-Care Expenditures*, *supra* note 12, at 472. Examples of indirect costs are days lost from work to smoking-attributable sickness and loss of productivity because of premature death of smokers.

22. *Id.*

23. *Id.*

24. S. 2245, 103d Cong., 2d Sess. (1994).

bill estimated that the government spent at least \$19 billion on tobacco-attributable illnesses and diseases in 1994—\$16 billion in Medicare expenditures and \$3 billion in Medicaid expenditures.<sup>25</sup>

Taken as a whole, these statistics show that tobacco-attributable medical expenditures create an immense economic problem, but they still only show part of the problem. These studies deal mainly with federal expenditures; they miss the fact that the states also contribute significant funds to the Medicaid system,<sup>26</sup> and spend money operating other purely state programs that incur similar expenses. Estimates are not available from all or even most states, but, in the process of the new wave of state litigation, Florida estimated expenses which that state incurred because of tobacco-related illness.<sup>27</sup> While the state lists expenses incurred due to each of several categories of disease,<sup>28</sup> the total reaches an astounding \$289 million per year.<sup>29</sup> Since the lawsuit filed by Florida sought to recoup smoking-related medical care expenditures over five years, the State requested \$1.4 billion in damages.<sup>30</sup> Since these figures are only requested damages, some people may rightfully question the impartiality of these amounts. As estimates, however, they show that the states spend a *very large* sum of money on diseases and illnesses that are caused by smoking.

## II. RECENT LEGISLATION AND LITIGATION BY THE STATES AND THE FEDERAL GOVERNMENT

The problem of public expense associated with tobacco-related illnesses and diseases is, of course, not a new one. The possibility that the government might be able to sue to recover such expenses is also not new,<sup>31</sup> but only recently have officials at different levels of government taken action. At last count, eleven states have filed lawsuits asking tobacco companies to reimburse their tobacco-related health care expenditures and other states have announced intentions of following in their footsteps.<sup>32</sup> Additionally, federal legislation designed to

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25. *Id.*

26. See Theodore N. McDowell, *The Medicare-Medicaid Anti-Fraud and Abuse Amendments: Their Impact on the Present Health Care System*, 36 EMORY L.J. 691, 697 (1987).

27. See Mike Thomas, *Money to Burn*, ORLANDO SENTINEL, May 21, 1995, at 8, available in LEXIS, News Library, ORSENT File (discussing the costs associated with smoking and the lawsuit filed by the State of Florida to recoup medical expenditures caused by smoking).

28. These are: \$197.5 million spent on the treatment of respiratory disease, \$18.2 million on lung cancer, \$17.3 million on other types of cancer, \$43 million on stroke, and \$13.2 million on heart disease. *Id.*

29. *Id.*

30. *Id.* An early ruling by the Florida courts, however, has limited the State by only allowing recovery for money spent to treat smoking-related illness and disease after the statute was passed. James Cahoy, *Florida Supreme Court Upholds Most of Tobacco Liability Law*, West's Legal News, July 3, 1996, available in 1996 WL 365758.

31. Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269, 314 (1977).

32. Cahoy, *supra* note 30; Mathews, *supra* note 3. These states are Connecticut, Florida, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Texas, Washington, and West Virginia. See also *Tobacco: Massachusetts Governor Signs Legislation Authorizing*

support a similar federal lawsuit was proposed in Congress in 1994<sup>33</sup> and could be again if the climate for such action proved favorable. The states have taken a variety of approaches to litigating this issue. The approaches run the gamut from statute-based litigation in Florida<sup>34</sup> to filing a suit in equity in Mississippi.<sup>35</sup> While the states and federal government have taken different paths in litigating these actions, there are many similarities in the way they have attacked the problem. This Part of the Note describes the decidedly different approaches taken in Florida and Mississippi, two leading states in this battle. This Part also briefly describes the ongoing litigation in some other selected states and discusses the proposed relevant federal legislation.

### *A. Florida's Approach*

Florida presents one of the most interesting and novel case studies among the various approaches to the current wave of tobacco litigation. In April, 1994, the Florida Legislature passed amendments to the Medicaid Third-Party Liability Act<sup>36</sup> and those amendments took effect on July 1, 1994.<sup>37</sup> This legislation, which has been called "the most significant piece of legislation ever to come out against the tobacco industry,"<sup>38</sup> creates a cause of action through which Florida can sue tobacco companies directly to recoup money spent on Medicaid to treat tobacco-related illness and disease.<sup>39</sup> The Medicaid Third-Party Liability Act forms the cornerstone of Florida's litigation<sup>40</sup> and will be the focus of this discussion.

The Florida legislature includes a clear statement of intent at the beginning of the legislation: "[I]t is the intent of the Legislature that Medicaid be repaid in full and prior to any other person, program, or entity."<sup>41</sup> Further, the law makes clear

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*Suits Against Tobacco Industry*, Product Liability Daily (BNA), July 25, 1994, available in LEXIS, BNA Library, BNAPLD File [hereinafter *Massachusetts Legislation*]. In addition to the state lawsuits, San Francisco recently became the first city to pursue this type of action against the tobacco companies. Rachel Gordon, *S.F. Hauls Tobacco Industry into Court*, SAN FRANCISCO EXAMINER, June 7, 1996, at A1. While this action is interesting to show the magnitude of this legal movement, it is beyond the scope of this Note, which will discuss only state and federal action.

33. S. 2245, 103d Cong., 2d Sess. (1994).

34. See Recent Legislation, 108 HARV. L. REV. 519, 525 (1994).

35. Junda Woo, *Mississippi Wants Tobacco Firms to Pay Its Cost of Treating Welfare Recipients*, WALL ST. J., May 24, 1994, at A2.

36. FLA. STAT. ANN. § 409.910 (West 1996 & Supp. 1996).

37. *Tobacco: New Law Permits State to Sue to Recover Medicaid Funds from Tobacco Companies*, Product Liability Daily (BNA), June 20, 1994, available in LEXIS, BNA Library, BNAPLD File [hereinafter *Tobacco: New Law*].

38. Claudia MacLachlan, *States May Follow Florida's Novel Attack: Reimbursement Suits Can Target Tobacco Companies*, NAT'L L.J., May 16, 1994, at B1.

39. See FLA. STAT. ANN. § 409.910(6)(a).

40. Dexter Douglass, general counsel for Governor Lawton Chiles, filed litigation under the statute on February 21, 1995. *Florida Sues Over Tobacco-Related Costs*, L.A. TIMES, Feb. 22, 1995, at D2. Florida is relying heavily on this statute, but also included common law claims in the litigation. Lucy Morgan, *Senate Votes to Repeal Tobacco Suit Law*, ST. PETERSBURG TIMES, May 2, 1995, available in 1995 WL 5769414.

41. FLA. STAT. ANN. § 409.910(1).

from the outset that the government, irrespective of any claim a Medicaid recipient might have, would be the first party entitled to receive any damage awards.<sup>42</sup> While this seems to be a very basic idea, this purpose is *critical* to the Florida strategy and shapes many of the substantive and procedural provisions in the law.

The Medicaid Third-Party Liability Act sets up a structure for a lawsuit that is very similar to that of a class action.<sup>43</sup> This tool allows the government to aggregate its claims, without the burden of identifying each individual recipient, and to file one suit against the tobacco companies that are allegedly responsible for the expense.<sup>44</sup> While this is sure to create massive and very complex litigation, it is a practical alternative to forcing the government to sue on each individual claim of Medicaid benefits and it makes sense within the framework of the legislation.

Section 409.910(9) of the Florida law contains other provisions which build on this concept. First, the statute allows the issues of causation *and* damages to be “proven by use of statistical analysis.”<sup>45</sup> Because this type of lawsuit is a state action, the harm here is that suffered by the state. In this case, under the statute, harm is measured as “the aggregate of harms that a large population of individuals . . . suffers.”<sup>46</sup> As such, the use of statistics is fairer and more accurate than it would be in an action by an individual because statistics are inherently fairer when used to predict results over a large population.<sup>47</sup> Given the Florida statute’s reliance on class action principles, suits filed under the statute seem tailor-made for the use of statistics, given its focus on the aggregate, not the individual, harm.

Second, the statute allows the government to proceed under a theory of market share liability.<sup>48</sup> Again, this seems to be necessary to the structure of litigation under the statute, and fits into the framework presented while furthering the

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42. *Id.* The section says that “[M]edicaid is to be repaid in full . . . regardless of whether a recipient is made whole or other creditors paid,” and that when the “resources of a liable third party become available at any time, the public treasury should not bear the burden of medical assistance.” *Id.* While some principles in the law (such as elimination of key defenses, discussed below) do apply to an action in which a recipient sues for recovery, the law spells out the fact that such recovery “shall not act to reduce the recovery of the agency pursuant to this section.” *Id.* Further, under the Medicaid Third-Party Liability Act, the recipient does not have the right to become a party to litigation brought by the State. FLA. STAT. ANN. § 409.910(12)(a).

43. *See* FLA. STAT. ANN. § 409.910(9). The term “class action” is not used in the Florida statute, but the language used is quite similar to that contained in Federal Rule of Civil Procedure 23. The Florida statute, for example, includes language describing the cause of action as involving a large number of recipients that would make it “impracticable to join or identify each claim” and one in which there are “common issues of fact or law.”

44. *See* FLA. STAT. ANN. § 409.910(9)(a).

45. *Id.*

46. Recent Legislation, *supra* note 34, at 528.

47. *Id.*

48. FLA. STAT. ANN. § 409.910(9)(b). The state may proceed under the theory of market share liability “provided that the products involved are substantially interchangeable among brands, and that substantially similar factual or legal issues would be involved.” *Id.*

purpose of focusing on the harm to society and not to the individual. Since such litigation will not involve looking at the individual and what brand of tobacco each smoked, this mechanism will allow the State to sue all major brands and then recover damages based on each company's share of the market.<sup>49</sup> While this will inevitably be more difficult to accurately apply than it might appear, it is a system of liability that should work well within the confines of this action.

Third, the statute states that the "concept of joint and several liability applies to any recovery on the part of the agency."<sup>50</sup> This, again, reinforces the idea that the main purpose behind this law is to give the State the best opportunity to realize recovery if it is victorious in litigation.

Other aspects of the legislation tilt the playing field in favor of Florida even more explicitly. The most important of these provisions is section 409.910(1) which, among other things, abrogates "comparative negligence, assumption of risk, and all other affirmative defenses normally available . . . to the extent necessary to ensure full recovery by Medicaid from third-party resources."<sup>51</sup> Traditionally, in individual lawsuits by plaintiffs, these common law defenses have barred recovery.<sup>52</sup> This language makes clear that the legislature intends that the government be able to pursue suits such as the one contemplated, and that the State, because of its unique position in relation to the tobacco companies,<sup>53</sup> should not be precluded from recovery by the defenses that have historically hampered individual plaintiffs.

Another provision which has somewhat less clear language declares that "[c]ommon-law theories of recovery shall be liberally construed to accomplish [the purpose of this legislation],"<sup>54</sup> and that "the evidence code shall be liberally construed regarding the issues of causation and of aggregate damages."<sup>55</sup> While the exact purpose of these provisions is somewhat cryptic, they create a safety net for Florida, and could apply to a wide range of decisions a judge could make.<sup>56</sup>

Perhaps the least discussed provision of the Florida law is the fraud control amendment.<sup>57</sup> This section of the law states that "[i]n cases of suspected criminal violations or fraudulent activity . . . the department is authorized to take any civil action permitted at law or equity to recover the greatest possible amount,

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49. Recent Legislation, *supra* note 34, at 529.

50. FLA. STAT. ANN. § 409.910(1).

51. *Id.*

52. *See* Rabin, *supra* note 2, at 871. Also, remember that no individual private plaintiff has won a final judgment or successfully settled a case against tobacco companies in litigation involving the health risks of tobacco. *Id.* at 878.

53. The State, unlike its constituent citizens, has never smoked a cigarette, and thus should not be held to the same standard. *See* Karen E. Meade, *Breaking Through the Tobacco Industry's Smoke Screen: State Lawsuits for Reimbursement of Medical Expenses*, 17 J. LEGAL MED. 113, 137 (1996) (citation omitted).

54. FLA. STAT. ANN. § 409.910(1).

55. FLA. STAT. ANN. § 409.910(9).

56. The reference to the evidence code, in particular, could open the door for courts to admit the statistical or epidemiological evidence which is necessary to the success of litigation brought under the statute.

57. FLA. STAT. ANN. § 409.910(19).



including . . . treble damages.”<sup>58</sup> While the scope of this provision does not appear to extend beyond common law remedies, it sends a message that Florida intends to get tough on those who defraud the publicly funded medical system. While it is unclear at this point if tobacco will be a target for this provision, that possibility seems likely in the wake of allegations that tobacco companies have knowingly misled the public for many years regarding a number of issues.<sup>59</sup>

Though Florida has passed legislation which Richard A. Daynard, head of the Tobacco Products Liability Project, described as “subtle and accurate in its draftsmanship,”<sup>60</sup> the State is going beyond the text of the law in its attempt to succeed in litigation. In pursuing litigation, the State has attempted to match the talent hired by the tobacco companies. From the earliest cases in which the tobacco companies were sued for tort damages, they have always retained the “most prestigious law firms in the country” to pursue their defense.<sup>61</sup> Traditionally, but with some exceptions, the plaintiffs’ attorneys in these cases have been personal injury attorneys practicing alone or in very small firms.<sup>62</sup> In contrast, in the current case, Florida has “an army of private-product liability attorneys ready to handle the case.”<sup>63</sup> They have accomplished this by implementing a contingency plan which calls for twenty-five percent of any final judgment to go to those attorneys.<sup>64</sup> While this agreement could deplete any possible judgment, it does help assure that legal talent is available. Additionally, this plan could also save Florida money—if this risky litigation is not successful—by saving the state a major portion of the investment needed to pursue the action.

The Medicaid Third-Party Liability Act is a dramatic and controversial piece of legislation which was quickly challenged by the tobacco companies. In one of the first volleys in the litigation, Philip Morris, Inc. and Associated Industries of Florida (“AIF”), a business group, challenged the constitutionality of the law, claiming that it “is an unconstitutional intrusion by the legislature into the powers of the judicial branch and completely disregards existing Florida rules of procedure and practice, and the constitutional guarantees for the separation of power [sic].”<sup>65</sup> In response, Florida argued that the state agency “still bears the burden of proving threshold liability issues and establishing the aggregate

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58. *Id.*

59. See ELIZABETH M. WHELAN, A SMOKING GUN: HOW THE TOBACCO INDUSTRY GETS AWAY WITH MURDER 93 (1984); Christopher J. Farley, *Cough Up That Cash*, TIME, Mar. 6, 1995, at 47.

60. See MacLachlan, *supra* note 38. Fredric G. Levin, a plaintiff’s attorney from Pensacola, drafted the legislation. *Id.*

61. Rabin, *supra* note 2, at 859 (citation omitted).

62. *Id.* at 858. The most notable exception came in the second wave of tobacco litigation in which plaintiffs’ attorneys who had experience in toxic tort (generally asbestos) cases joined ranks and resources against the tobacco companies. *Id.* at 866, 869.

63. *Florida Sues Over Tobacco-Related Costs*, *supra* note 40.

64. *Id.*

65. *Tobacco: Philip Morris Challenges New Florida Law Authorizing State to Sue for Reimbursement*, Product Liability Daily (BNA) (July 15, 1994), available in LEXIS, BNA Library, BNAPLD File [hereinafter *Philip Morris Challenges New Florida Law*] (quoting plaintiffs’ joint statement).

harm"<sup>66</sup> and that any third party can deny liability or deny that the products involved are "substantially interchangeable among brands."<sup>67</sup>

The first ruling concerning the constitutionality of the statute produced mixed results.<sup>68</sup> The Florida trial judge upheld the constitutionality of the law concerning market share liability, abrogation of defenses, and use of statistics.<sup>69</sup> This ruling was a victory for the State, the defendant, in the litigation. However, the plaintiffs did not lose every issue, as the trial judge also ruled that Florida could only seek damages for tobacco-related Medicaid costs incurred after the July 1, 1994 effective date of the law.<sup>70</sup> This limited the amount of damages that the State could recover to much less than the requested \$1.4 billion. Second, the trial judge ruled that the agency which the law designates to bring this lawsuit, and which also licenses "every hospital, physician, nurse, nursing home, . . . and every Medicaid provider," is unconstitutionally structured.<sup>71</sup>

On appeal, the Florida Supreme Court cleared up some of these issues further. Florida's highest court recently ruled that Florida's statute was "neither arbitrary nor capricious. It [was] a rational response to a public need."<sup>72</sup> First, the court, speaking through Justice Ben Overton, reversed the trial court in ruling that the agency designated to bring this suit under the statute is organized constitutionally.<sup>73</sup> This should resolve any problems that Florida may have had concerning standing to sue. Second, the Florida Supreme Court rejected arguments by the tobacco companies that limiting their access to affirmative defenses made the Florida law unconstitutional.<sup>74</sup> Third, the court ruled that the law's provision allowing the use of statistical evidence was a valid exercise of the legislature's power.<sup>75</sup>

While these rulings were a partial victory for the State, the other parts of the decision were not as favorable. Most notably, the court ruled that Florida must identify each individual recipient of Medicaid for which reimbursement is sought.<sup>76</sup> Only through this process, said the court, can "a defendant . . .

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66. *Tobacco: Florida Defends Constitutionality of Law Authorizing Suits Against Cigarette Firms*, Product Liability Daily (BNA) (Aug. 5, 1994), available in LEXIS, BNA Library, BNAPLD File [hereinafter *Florida Defends Constitutionality*].

67. *Id.* (quoting defendants' answer to complaint).

68. *Constitutionality of Law Allowing Florida to Sue Tobacco Firms Upheld*, 4 Health L. Rep. (BNA) 25 (June 22, 1995), available in WL at 4 BHLR 25 [hereinafter *Constitutionality Upheld*]; *Florida v. American Tobacco Co.* (Florida Palm Beach County Circuit Court) (#CL-95-1466A0); *Associated Indus. of Fla., Inc. v. Agency for Health Care Admin.*, No. 94-3128 (Fla. Cir. Ct. Leon County ruling issued June 16, 1995).

69. *Constitutionality Upheld*, *supra* note 68, at 25.

70. *Id.*

71. *Id.*

72. Cahoy, *supra* note 30 (quoting Justice Overton in *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So.2d 1239, 1257 (Fla. 1996)).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

challenge improper payments made to individual recipients.<sup>77</sup> Although the scope of information that the State must supply about each recipient is unclear at this point, this could significantly broaden and complicate the discovery process involved for this type of action, and prove a major roadblock to recovery. The court also upheld the trial court in ruling that the State can only seek reimbursement for payments made after the statute's effective date of July 1, 1994.<sup>78</sup> Finally, the court ruled that the State can pursue the tobacco companies under a market share liability theory or under joint and several liability, but can not use both simultaneously.<sup>79</sup>

The Florida Supreme Court ruling clears up many of the state law issues, but the tobacco companies are very likely to appeal their claims to the United States Supreme Court. Others have also discussed constitutional issues surrounding the law in question. Professor Laurence Tribe, who is working for Florida on this case, has commented that "Florida's law is constitutionally sound, intelligent, eminently fair and consistent with federal law."<sup>80</sup> Scott Richardson, the author of a comment on a related topic, has also discussed the constitutional issues surrounding the Florida law.<sup>81</sup> While his analysis of the procedural due process challenge by the tobacco companies does not come to a firm conclusion, he notes that cases from the United States Supreme Court have discussed the issue of eliminating defenses and concluded that a "state legislature could alter, or even set aside the common-law rules of negligence, assumption of risk, [or] contributory negligence."<sup>82</sup> Further, the Supreme Court has generally allowed state legislatures a wide measure of discretion in such matters unless they act in an "arbitrary and unreasonable" manner.<sup>83</sup>

The constitutional issues surrounding this law are unique and present problems and possibilities that have not been debated before. While initial decisions indicate that courts will approve of this type of statute, there will be many rulings before an answer is reached. In an effort to reach some middle ground, the trial court in Florida has ordered that mediation talks take place between the parties to the lawsuit.<sup>84</sup> If these talks fail (every indication is that they have not yet been very successful)<sup>85</sup> then trial for the matter will be set for August, 1997.<sup>86</sup>

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77. *Id.* (quoting *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So.2d 1239, 1254 (Fla. 1996)).

78. *Id.*

79. *Id.*

80. *Florida Defends Constitutionality*, *supra* note 66.

81. Scott Richardson, Comment, *Attorney General's Warning: Legislation May Now Be Hazardous to Tobacco Companies' Health*, 28 AKRON L. REV. 291, 321-24 (1995).

82. *Id.* at 323 (discussing *New York Cent. R.R. v. White*, 243 U.S. 188 (1917)).

83. *Id.* at 323-24 (discussing *Arizona Copper Co. v. Hammer*, 250 U.S. 400, 419 (1919)).

84. *Big Tobacco, State Begin Talks on Suit*, ORLANDO SENTINEL, July 25, 1996, at C1, available in LEXIS, News Library, ORSENT File.

85. *See id.*

86. Robin Fields, *Two Sides Gain Little Ground in State Tobacco Suit*, SUN-SENTINEL (Ft. Lauderdale), July 25, 1996, at B4, available in LEXIS, News Library, SUNSEN File.

*B. Mississippi's Approach*

While Florida has aggressively pursued a statute-based action against tobacco companies for reimbursement of Medicaid expenses, the Mississippi attorney general, Mike Moore, has just as actively pursued an action based on common law theories of recovery. On May 23, 1994, Mississippi became the first state to sue the tobacco companies in this type of action by filing suit in state court in Jackson County.<sup>87</sup> In a surprising development, the Mississippi action, under Moore's strong leadership, recently made headlines by helping produce the first-ever settlement by a tobacco company in a health-related lawsuit.<sup>88</sup> The Liggett Group, which settled with Mississippi and four other states,<sup>89</sup> is the smallest of the major tobacco firms and controls only about two percent of the U.S. market for tobacco,<sup>90</sup> so the Mississippi lawsuit will continue against the bulk of the defendants.

In an interesting strategic move, Mississippi filed suit in the Chancery Court, a court of equity.<sup>91</sup> While the tobacco companies initially achieved removal of the action to federal court, the state was successful in having the case remanded to the state courts.<sup>92</sup> Even though the Mississippi Court of Equity generally does not handle such large cases, concentrating on family law and divorce actions, Moore thinks that the equity court is the right forum for this new type of lawsuit.<sup>93</sup> According to Trey Bobbinger, an assistant attorney general, the State of Mississippi has "pled state law claims" with its primary theory being "unjust

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87. See Sarah C. Campbell, *Mississippi Sues Tobacco Firms for Recovery of Medical Care Costs*, THE COM. APPEAL (Memphis, Tenn.), May 24, 1994, at A1, available in 1994 WL 6066857.

88. See Mathews, *supra* note 3.

89. See *id.*

90. *Inside Health Care Reform: States Rush to File Medicaid Tobacco Suits*, 4 WASH. HEALTH WK., June 3, 1996, available in 1996 WL 8886696.

91. *Tobacco: Mississippi Seeking Remand of Lawsuit Demanding Health Care Monies from Industry*, Product Liability Daily (BNA) (July 27, 1994) available in LEXIS, BNA Library, BNAPLD File [hereinafter *Mississippi Seeking Remand*].

92. See *id.*; see also Milo Geyelin, *Tobacco Companies Are Set Back by Actions in Florida, Mississippi*, WALL ST. J., Feb. 22, 1995, at B1.

93. Woo, *supra* note 35.

enrichment, an equitable theory."<sup>94</sup> Moore explains that "[t]he lawsuit is premised on a simple notion: you cause the health crisis, you pay for it."<sup>95</sup>

The Mississippi suit is very similar to the Florida suit in a number of ways. First, and most significantly, the State is attempting in this single action to recover expenses for tobacco-related illness and disease for all recipients of assistance, as opposed to suing individually on each claim.<sup>96</sup> Mississippi also intends to use statistical analysis in a manner similar to that used in Florida to prove the crucial issues in the case.<sup>97</sup>

Like Florida, Mississippi has developed a plan which will encourage lawyers from the private sector to lend their expertise. Unlike Florida, which promised a percentage of any recovery to private lawyers, Mississippi has not implemented a contingency fee plan. Instead, the Mississippi Attorney General "plans to try to compel the tobacco companies to pay the private lawyers' fees" in the event of a victory.<sup>98</sup> Notwithstanding that victory is far from certain, it appears that this strategy has been successful in tempting at least some talented private sector lawyers into the fray on the side of the State.<sup>99</sup>

Because this lawsuit has had more time to develop than some of the other similar lawsuits, several defendants, including R.J. Reynolds Tobacco Company, have filed answers that indicate the type of defenses they will mount.<sup>100</sup> One defense mentioned by R.J. Reynolds is that Mississippi's claims are "barred because the state permits, regulates, facilitates, and reaps revenues from cigarette sales."<sup>101</sup> This defense appears to be the classic assumption of risk defense, recast to apply to the state instead of to the individual smoker. R.J. Reynolds also defends on the ground that any damages won should be offset by tax money paid to the state as a result of the sale or use of tobacco.<sup>102</sup> In an early ruling, Mississippi apparently won at least a partial victory in the battle over which defenses the tobacco companies may assert. On February 21, 1995, the

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94. *Mississippi Seeking Remand*, *supra* note 91. Mississippi is also seeking recovery under the theory of public nuisance and claims that the tobacco companies have attempted to "mislead and confuse the public about the true dangers associated with smoking." Woo, *supra* note 35. In support of its claim that tobacco companies have been dishonest, Mississippi recently subpoenaed Jeffrey Wigand, a former tobacco industry executive. Before Wigand could testify, however, a Kentucky judge ruled that a confidentiality agreement with his employer barred his testimony. See *Tobacco Source Silenced*, CHI. SUN-TIMES, Nov. 26, 1995, at 51. Since then, Wigand has given deposition testimony in the Kentucky case and in a suit by Brown & Williamson against him claiming breach of confidentiality, theft, and fraud. See *Wigand Depositions Begins in Tobacco Case*, West's Legal News, July 17, 1996, available in 1996 WL 397598.

95. Campbell, *supra* note 87.

96. See Woo, *supra* note 35.

97. See *id.*

98. *Id.*

99. See Campbell, *supra* note 87.

100. See *Mississippi Seeking Remand*, *supra* note 91.

101. *Id.*

102. *Id.* The article quotes the assistant to the chairman of the Mississippi Tax Commission as claiming that the state collects \$90 million annually in "tobacco-related revenues." See *infra* part III of this Note for further discussion of this issue.

Chancellor of the Chancery Court in Jackson County issued an "order that struck 'the affirmative defenses of the defendants.'"<sup>103</sup> While this decision was only that of a trial court, and will surely be appealed to the highest levels, it is an indication that the court does not disfavor this type of lawsuit.

### C. Other States

Florida and Mississippi have been the most aggressive states so far in the reimbursement suits that are starting to spring up around the country, but other states are following the trend. While some of them are using suits similar to the ones already discussed,<sup>104</sup> others are pursuing different theories and strategies.

Perhaps the most interesting and important of these suits is found in Minnesota. The State of Minnesota, along with Blue Cross and Blue Shield of Minnesota,<sup>105</sup> filed suit in August, 1994, seeking recovery under theories of antitrust conspiracy and consumer fraud.<sup>106</sup> Minnesota has followed in Mississippi's footsteps by engaging the assistance of private attorneys and asking the courts to order that the tobacco companies pay the State's costs in the event of a victory.<sup>107</sup>

Minnesota's suit is interesting because of the theories the state is forwarding. In the words of Minnesota Attorney General Hubert Humphrey III, "[p]revious lawsuits have said the tobacco companies should pay because their products are dangerous. . . . This suit says they should pay because their conduct is illegal."<sup>108</sup> The tobacco companies dismiss this suit as nothing new, and predict that their unblemished litigation record will stand.<sup>109</sup>

The focus of the proof in this litigation appears to be quite different from that in other states. The plaintiffs intend to center their case around the December, 1953, meeting of tobacco executives in New York City.<sup>110</sup> Advertisements claiming that smoking tobacco was safe, which conflicted with two studies which had just been released, appeared in Minnesota and all over the United States following that meeting.<sup>111</sup> The lawsuit claims both that this advertising misled the

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103. Geyelin, *supra* note 92.

104. On July 10, Massachusetts Governor William Weld signed legislation similar to, but more limited than, that in Florida which could support similar litigation. *Massachusetts Legislation*, *supra* note 32.

105. In an early ruling, a court has decided that Blue Cross and Blue Shield of Minnesota can proceed as a party in the lawsuit, despite the objections of tobacco company lawyers. See Ed Gaulin, *Tobacco Companies Dealt More Setbacks: Minnesota Ruling Lets Insurer File Lawsuit*, THE ATLANTA J.-CONST., July 26, 1996, at A3, available in LEXIS, News Library, ATLJNL File.

106. Gordon Slovit, *State, Blue Cross Sue Tobacco Industry*, STAR-TRIB. (Minneapolis/St. Paul), Aug. 18, 1994, at A1, available in LEXIS, News Library, BUSDTL File.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *See id.*

public and that the major tobacco companies should now be held liable as a result of their illegal conduct.<sup>112</sup>

In an early ruling, the United States Supreme Court, without comment, recently upheld a lower court ruling which provided Minnesota with access to a database indexing the tobacco companies' internal documents.<sup>113</sup> In the State's battle to sift through over nine million documents,<sup>114</sup> this ruling could prove crucial. Additionally, this ruling is the first of its kind and could provide precedent to allow the release of this type of database in other pending cases.<sup>115</sup>

West Virginia also entered the fray and sued the large tobacco companies last year on a variety of common law theories including nuisance, unjust enrichment, and fraud.<sup>116</sup> This lawsuit has probably been the least successful of any of the suits discussed so far. In May, 1995, the trial judge in the case dismissed eight of the ten claims brought by the State because, under West Virginia law, the Attorney General is only authorized to sue under statutes unless the Governor gives authorization to sue under the common law.<sup>117</sup> Additionally, West Virginia had decided to pursue the lawsuit with the help of private attorneys working under a contingency fee plan. In October, 1995, however, the trial judge ruled that the State could not pursue this litigation through a contingency fee plan, but could continue with the help of private attorneys working under fee arrangements.<sup>118</sup> This lawsuit demonstrates that state law is powerful in controlling many of these lawsuits and may provide a barrier to recovery for some states.

One state that is attempting to avoid this barrier is Texas, which recently filed a lawsuit in federal court in Texarkana.<sup>119</sup> While this action is still in its formative stages, it alleges several grounds for recovery, including antitrust, racketeering, mail and wire fraud, products liability, and restitution.<sup>120</sup> The lawsuit seeks \$4 billion in damages, the largest figure among the pending

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112. *Id.*

113. David Phelps, *High Court Ruling Backs Access to Data in State Tobacco Suit*, STAR-TRIB. (Minneapolis-St. Paul), May 29, 1996, at A1, available in LEXIS, News Library, BUSDTL File.

114. *Id.*

115. *Id.*

116. *Tobacco: Attempts to Hold Tobacco Firms Liable for Costs Lose Ground in Florida, West Virginia*, Product Liability Daily (BNA) (May 5, 1995), available in LEXIS, BNA Library, BNAPLD File [hereinafter *Attempts Lose Ground*].

117. *Tobacco: West Virginia Court Says State Cannot Sue Tobacco Companies on Contingency Fee Basis*, Product Liability Daily (BNA) (Nov. 21, 1995), available in LEXIS, BNA Library, BNAPLD File. The antitrust and consumer protection claims were allowed to go forward.

118. *See id.*

119. Kathy Walt, *Texas Sues Tobacco Industry*, HOUS. CHRON., March 29, 1996, at A1, available in LEXIS, News Library, HCHRON File.

120. *Id.*; see also John Gonzalez, *State Sues Tobacco Industry: Texas Seeks Recovery of Medicaid Expenses*, THE FORT-WORTH STAR-TELEGRAM, March 29, 1996, at 1, available in 1996 WL 5529968.

lawsuits, and adds makers of smokeless and "roll-your-own" tobacco as additional defendants.<sup>121</sup>

If this lawsuit is successful, the judgment proceeds would be split among parties in a unique fashion: Texas would keep thirty-three percent,<sup>122</sup> the federal government would receive fifty-two percent, and private lawyers enlisted to try the case would receive the remaining fifteen percent.<sup>123</sup> While other states have fought to keep money with the state and out of the hands of the federal government,<sup>124</sup> Texas has apparently recognized that much of the money used to treat smoking-related illness and disease is federal money and has apportioned any potential recovery to acknowledge this fact.

#### *D. Federal Government*

While the federal sponsors of legislation, Senators Harkin and Lautenberg, modeled their proposed law after Florida's Medicaid Third-Party Liability Act, they have not had Florida's success.<sup>125</sup> Even though the federal bill did not become law, it could always be reintroduced in Congress. Further, examining the similarities and differences between the two laws helps explain the issue of reimbursement and how best to address it.

The similarities of the Florida law and the federal bill are numerous. They both call for a similar class-action type of lawsuit and allow the use of aggregate measures in the action.<sup>126</sup> Additionally, both plans allow the use of market-share liability in apportioning liability.<sup>127</sup>

The differences in the two pieces of legislation, however, are more interesting and enlightening. The first difference, and the most significant, is that the federal bill did not limit recovery to Medicaid, but extended recovery to include Medicare, the veterans' health care program, and "any other similar Federal health care program."<sup>128</sup> Given the amount of money that the federal government spends on Medicare,<sup>129</sup> this is a natural and logical extension of the Florida legislation.

The second difference is that the federal bill did *not* contain a clause which eliminated the common law defenses such as assumption of risk. While the necessity of such a provision is in question (as described above, the defenses were struck at the early stages of the Mississippi litigation) the provision is one

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121. Gonzalez, *supra* note 120.

122. This money would go to Texas's general fund. *Id.*

123. Stuart Eskenazi, *Texas Files \$4 Billion Tobacco Lawsuit*, AUSTIN AM.-STATESMAN, March 29, 1996, at A1, available in LEXIS, News Library, Austin File. The lawyers for Texas include several attorneys from Texas and Harvard professors Laurence Tribe and Arthur Miller. Gonzalez, *supra* note 120.

124. *See Tobacco Lawsuit Settlement Issue Gets Cleared Up*, THE COM. APPEAL, Aug. 2, 1996, at A18.

125. S. 2245, 103d Cong., 2d Sess. (1994).

126. *See supra* text accompanying notes 43-44.

127. *Id.*

128. S. 2245, 103d Cong., 2d Sess. § 3(a)(3) (1994).

129. S. 2245. As previously noted, the bill estimated the federal expenditure on Medicare to be over five times that on Medicaid. *Id.*



of the most important in the Florida legislation and clearly indicates the legislature's purpose.

Third, in a minor addition, the federal bill would have allowed for the use of statistical and epidemiological evidence.<sup>130</sup> While one author has argued that Florida's admission of statistical evidence could possibly extend to epidemiological evidence by analogy,<sup>131</sup> a clear statement through the law is the best way to ensure admissibility of such evidence.

Fourth, the federal law would have allowed the government to proceed under alternative theories of "concerted action or enterprise liability, or both, if warranted by the facts presented to the court."<sup>132</sup> With evidence mounting that tobacco companies acted together to mislead the public about the dangers of smoking, these alternative theories could have proved valuable and significant. Next, Part III will compare and contrast the strategies pursued by the various government plaintiffs in these lawsuits, to illuminate the similarities and differences in the strategies pursued, and to comment on the strengths and weaknesses of the various strategies.

### III. POLICY OR POLITICS—WHICH WILL MAKE THE DIFFERENCE?

As this Note has set forth, there are several reimbursement actions in progress, about to happen, or in the planning stages. In this age when budget shortfalls are the norm instead of the exception, policy and politics dictate that the government garner funds from all available sources. While it may make good policy to seek reimbursement for tobacco-related public medical expenditures, politics plays perhaps even a greater role than policy in the debate surrounding these suits. This Part highlights the strengths and weaknesses of the various approaches, sets forth some policy arguments for and against this type of action, and introduces the political issues surrounding the debate.

Florida's litigation, based on the Medicaid Third-Party Liability Act,<sup>133</sup> is the most prominent reimbursement lawsuit in the country.<sup>134</sup> The greatest strength of the Florida action is its overall structure, which follows from its central purpose of achieving reimbursement.<sup>135</sup> Specific provisions that call for the use of market share liability or joint and several liability and statistical evidence complete the picture of a law which is efficient and potentially damaging to the tobacco company defendants. While the law is very well-drafted and thoughtful, there are areas of weakness and uncertainty that are worth exploring. First, a critic has complained that the law "is too broad because, although it is tailored for application to cigarettes, its terms sweep to include in their ambit all products

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130. S. 2245, § 3(c).

131. See Richardson, *supra* note 81, at 329.

132. S. 2245, § 3(d).

133. FLA. STAT. ANN. § 409.910 (West 1995 & Supp. 1996).

134. Mississippi has won the first settlement award from Liggett, a huge victory, but Florida's lawsuit is still much larger in terms of potential liability and has garnered more publicity.

135. See FLA. STAT. ANN. § 409.910.

liability."<sup>136</sup> That critic has also complained that the law "is too narrow because it does not extend to reimbursement for Medicare expenditures."<sup>137</sup>

The first criticism requires a two-part analysis. The first should ask why it is that the law, which does not mention tobacco explicitly, is defective simply because it could potentially be used against other products. After all, alcohol almost certainly causes health problems, and even less virulent products such as red meat and processed sugar probably cost Florida and other states precious public funds for additional health care. Another response to this argument is that the Medicaid Third-Party Liability Act does not guarantee recovery—the state still must prove liability, including causation. In the case of the vast majority of non-tobacco products on the market,<sup>138</sup> however, courts have not recognized inherent danger in their use.<sup>139</sup> Although juries have recognized the dangers of tobacco and have often had little problem finding causation, plaintiffs have nevertheless been denied recovery for a variety of reasons, including the tobacco companies' successful use of affirmative defenses.<sup>140</sup> These differences between tobacco and non-tobacco products would almost certainly derail any action that a state official might decide to bring under a Florida-type law against a product other than tobacco.

Even assuming that others could bring such an action, the general political climate is another huge limiting factor. While Florida business groups<sup>141</sup> have come out against the law, there has been no indication that an official would really sue anyone but cigarette manufacturers under this law. To make this crystal clear, in March, 1995, Governor Chiles of Florida issued Executive Order 95-109 that directed Florida agencies to apply the law only against tobacco companies.<sup>142</sup> The federal bill, by its terms, applied only to tobacco.<sup>143</sup> While this cannot guarantee that a Florida-type law will not be used against other products, there has been no indication that anyone in any level of government in any state intends to extend the reach of such a law. In the final analysis, the very thought that an attorney general would bring a "red meat products liability action" seems rather absurd in today's political climate.

The second criticism leveled against the Florida law—its underbreadth—is salient and worth exploring in more detail. While it is true that the Florida law

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136. Recent Legislation, *supra* note 34, at 529.

137. *Id.*

138. The most often-mentioned product, alcohol, presents very interesting issues, but is beyond the scope of this Note.

139. Senator Harkin notes in his support of the federal legislation that tobacco, unlike beef, sugar, and other products, is the "only product on the market today that when used as intended causes death, disease, and disability." 140 CONG. REC. S2245, 7784, 7786 (daily ed. June 28, 1994). This distinguishes tobacco from all other products including alcohol, which, recent studies show, has health benefits when used responsibly.

140. *See* Rabin, *supra* note 2, at 860-70.

141. AIF, a party to the countersuit against Florida, is the most prominent example of this type of group. *See supra* text accompanying note 65.

142. *Tobacco: Florida Lawmakers May Repeal Law Allowing Recovery of Funds from Tobacco Firms*, Product Liability Daily (BNA) (Apr. 7, 1995), available in LEXIS, BNA Library, BNAPLD File.

143. S. 2245, 103d Cong., 2d Sess. (1994).

does not include provisions for reimbursement of Medicaid expenditures, the federal bill was considerably more broad, asking for reimbursement for Medicaid, Medicare, and other similar government programs.<sup>144</sup> This comes close to curing the underbreadth problem, but still falls short of full reimbursement of the costs of tobacco to our public health system. For example, one recent proposal puts forth the idea that public hospitals should be able to bring lawsuits against tobacco (and alcohol) manufacturers for un-reimbursed expenditures for treatment of illness and disease which these products cause.<sup>145</sup> This illustrates that, even if litigation under a Florida-type law (or even the broader federal proposal) were successful, liability would probably not reach a level that would bring full reimbursement for all health expenditures that tobacco has made necessary. A possible alternative would be to include these additional expenditures, such as public hospital expenses not covered by Medicaid, in the same litigation in which the state sues for Medicaid reimbursement. The state could then share the amount it recovers with the public hospitals in the state.

There are other ways to address the problem of underinclusiveness. One method would be to ask for other types of damages. One such category of damages, which has not been addressed adequately,<sup>146</sup> is money spent to treat people who are sick as a result of exposure to ETS. According to available statistics, thousands die each year as a result of exposure to ETS and many more become sick.<sup>147</sup> While exact figures of health care expenses are not available as to the economic cost of this problem to the public, the sums involved are obviously huge. While such damages would be more speculative than damages from direct exposure to tobacco smoke, new and more persuasive scientific evidence is coming out every day which establishes the link between exposure to ETS and illness and disease.<sup>148</sup> At some point the evidence will be persuasive enough that, under the statistical approach to liability found in the Florida law, causation issues may be surmountable and reimbursement will be possible.

Apart from these concerns, a second major issue that must be addressed in examining a state reimbursement law like the Florida Medicaid Third-Party Liability Act is the political battle surrounding such a statute. The Florida law was passed in the spring of 1994 with little fanfare even though it is highly controversial today.<sup>149</sup> There was little commotion over this bill because Governor Chiles arranged to have a friend in the legislature attach it to the end of a "noncontroversial Medicaid bill during the [Florida legislative] session's

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144. *See id.*

145. Raymond E. Gangarosa et al., *Suits by Public Hospitals to Recover Expenditures for the Treatment of Disease, Injury and Disability Caused by Tobacco and Alcohol*, 22 *FORDHAM URB. L.J.* 81, 84 (1994).

146. *See Medical-Care Expenditures*, *supra* note 12, at 472.

147. *See supra* note 20.

148. *E.g.*, CENTERS FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH & HUMAN SERVS., *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL* 7 (1986).

149. *See* Linda Kleindienst & John Kennedy, *Law Declares Medicaid War on Tobacco*, *ORLANDO SENTINEL*, May 27, 1994, at C1, available in LEXIS, News Library, ORSENT File.

waning hours.”<sup>150</sup> Shortly after its passage, however, tobacco lobbyists read the bill, realized its implications, and with a “howl of outrage,” went to work arguing for its repeal.<sup>151</sup> The tobacco lobby has been quite successful in this endeavor, and both houses of the Florida legislature have voted to repeal the law.<sup>152</sup> Only the determined efforts and the veto power of Governor Chiles have kept the law on the books.<sup>153</sup>

The initial “success” of the Florida law dwarfs that of its cousin, proposed (federal) Senate Bill 2245, which was introduced in 1994. That bill had no success, as evidenced by its total lack of a record after introduction.<sup>154</sup> The history of these two pieces of legislation, the first two of their kind, shows that passing a law like the Florida Medicaid Third-Party Liability Act may be impossible without “smoke and mirrors.”

So, what is the lesson from this? In April, 1994, the Florida legislature passed the Medicaid reimbursement statute and the battle looked like it would move from the Florida capitol building to the State’s courtrooms. With the future of the law uncertain, but looking promising following the Florida Supreme Court ruling, the battle once again is being fought on two fronts—the courts and the political arena. While public sentiment seems to be largely in favor of making tobacco companies pay their own way in society,<sup>155</sup> the lobbying power of the tobacco industry is unmatched and obviously still very effective.<sup>156</sup>

This means that if lawsuits go forward, a state with a reimbursement statute should still forcefully argue its case based on federal law and common law theories of recovery. Such an approach would provide a safety net in case its statutory authorization to sue disappears or proves less powerful than anticipated.<sup>157</sup> It goes without saying that states without a statute similar to the one in Florida must rely on federal law and common law as their primary weapons as they pursue reimbursement.

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150. *Id.*; see also Thomas, *supra* note 27.

151. Morgan, *supra* note 40.

152. According to a newspaper, one of those who voted for the repeal was Senator Childers, one of the principal “architects” of the law when it passed in 1994. *Id.*

153. The Governor vetoed S.B. 42 (the repeal measure) which had been approved in the Florida House of Representatives and in the Florida Senate. Morgan, *supra* note 40. Though the tobacco companies were “optimistic” that the legislature would override the veto, so far the law is still on the books. In Texas, although there is no statute analogous to the one in Florida, a similar political battle has begun over pending litigation. See Bruce Nichols, *Texas Suit Sends Signal to Tobacco Firms*, THE DALLAS MORNING NEWS, June 30, 1996, at 1H, available in LEXIS, News Library, DANNEWS File.

154. S. 2245, 103d Cong., 2d Sess. (1994). There is no record of this bill being referred to a committee or having any kind of vote.

155. *Attempts Lose Ground*, *supra* note 116. In speaking with reporters, Governor Chiles cited an independent public opinion poll in which 63% of the public stated that they think tobacco companies should pay for part of the health care costs they are responsible for creating.

156. Thomas, *supra* note 27.

157. After all, reimbursement litigation under a statute is an unproven action. Until the constitutional challenges to the statute are handled by a high court, it is really unknown (and unknowable) what impact the statute will have on the litigation.

Texas is the first example of a state that has decided to pursue reimbursement through the federal courts. The Attorney General and his legal team have done this for a couple of strategic reasons that may serve as a model to other states if they are successful. The first reason that they filed in federal court was to avoid the overburdened state trial courts and attempt to move quickly toward trial.<sup>158</sup> Dan Morales, the Attorney General, has stated that he hopes to go to trial within eighteen months,<sup>159</sup> which would in itself set a precedent for this type of litigation.<sup>160</sup> The second reason that the Texas team has pursued reimbursement in federal court is that it wants to avoid the elected and partisan state judges of Texas and deal with the more independent federal judiciary.<sup>161</sup> While the success of the federal court action in Texas is very much in doubt, these strategies are interesting and could apply to many states which want to pursue reimbursement.

The Mississippi lawsuit best exemplifies a successful state approach using the force of existing state common law. By filing in a court of equity in Mississippi, the State was able to shift the focus from procedure—the favorite focus of the tobacco attorneys—to substantive fairness. The State implemented a litigation strategy similar to several provisions in the Florida statute, including a class action structure and use of statistical evidence.<sup>162</sup> What makes this unsurprising and completely rational is that, without these provisions, this breed of lawsuit could not succeed. Though states may be willing to work hard and invest money to prosecute these suits, to do so on a recipient-by-recipient basis would be financial suicide and is not really an option.

The Mississippi lawsuit relies in large measure on equitable theories of recovery. As such, one of the issues which has come to the forefront there and also exists in every state pursuing this type of action, is whether any recovery by the State should be offset by tax dollars collected by the State from excise taxes and other taxes aimed at tobacco products.<sup>163</sup> The tobacco companies, of course, argue that any recovery should be offset by the revenues collected by the states. In response, states argue that these lawsuits are completely unique and that tax revenues are irrelevant. As a legal issue, this has yet to be dealt with, but policy concerns mandate that any recovery not be offset by taxes that have already been collected. One reason for non-recovery is that the policy goal behind these suits is full reimbursement for health care costs caused by smoking—any offset would result in a recovery that would not be full reimbursement. Second, the bulk of revenues collected by the states comes from excise or sales taxes collected by the government from sales to smokers.<sup>164</sup> These lawsuits are different. Instead of collecting money from smokers, these lawsuits attempt to hold the manufacturers themselves liable for the damage they have caused to society. While this cost may

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158. Walt, *supra* note 119.

159. *Id.*

160. Nichols, *supra* note 153.

161. Walt, *supra* note 119.

162. See Geyelin, *supra* note 92.

163. See *Mississippi Seeking Remand*, *supra* note 91; see also Thomas, *supra* note 27.

164. Tobacco companies also pay significant corporate taxes, but these are the same as taxes paid by any other business.

ultimately be passed on to consumers,<sup>165</sup> it is an important difference that justifies recovery without an offset for tax revenue.

Overall, the success of this wave of lawsuits may ultimately rest on two key litigation strategies. First, the plaintiff states will need to achieve abrogation of defendants' affirmative defenses which were asked for by plaintiffs in Florida and Mississippi.<sup>166</sup> Mississippi achieved early success in its efforts to have the affirmative defenses of the tobacco companies struck (without the help of a statutory authorization); Florida has achieved a similar favorable ruling,<sup>167</sup> but with the added help of statutory authorization. Courts have thus far been willing to strike affirmative defenses in these types of actions because the affirmative defenses traditionally used by the tobacco companies, especially assumption of risk, are not appropriate in an action brought by a state. While an individual smoker may be viewed as having assumed a known risk,<sup>168</sup> the same argument has far less power when applied to a state.<sup>169</sup> Although tobacco is legal in America, the state has not assumed the *financial* risks associated with tobacco-related illness and disease any more than it has assumed the financial risks associated with welfare fraud. The assumption of risk defense traditionally balances the scales by disallowing recovery by a party that has, itself, behaved in a non-risk averse manner. Here, the state has not acted in a risky manner at all, but has just acted to provide health care to its indigent and aged population, and should not be barred from recovery by the assumption of risk defense.

The second litigation strategy that seems to distinguish these actions from past ones, and should help the states obtain reimbursement, is that all the states have a system set up which encourages private attorneys to lend their expertise to the state.<sup>170</sup> As noted above in Part II, tobacco companies have traditionally outnumbered and overwhelmed plaintiffs in lawsuits asking for health-related damages. The current group of litigants recognized that fact and have worked to combat it by providing incentives for investment by private lawyers and law firms. While a contingent fee system is acceptable and has apparently worked well to attract legal talent to Florida's and Texas's lawsuits, Mississippi's and Minnesota's approaches have also attracted legal talent. These approaches are better because they would not deplete any eventual recovery as Florida's and Texas's approaches would. If, however, attorneys' fees are denied in Minnesota's and Mississippi's suits under the American rule, Florida's and

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165. Thomas, *supra* note 27.

166. Oddly, the federal bill did not include such a provision. See S. 2245, 103d Cong., 2d Sess. (1994).

167. See *supra* part II.A.

168. The assumption of risk defense is, of course, more applicable to some people than to others. Claims that tobacco companies have misled the public about the dangers of smoking are common today, and would undercut the assumption of risk defense in some cases. Further, addiction creates other issues that complicate the assumption of risk defense. See Meade, *supra* note 53, at 138-39.

169. See *id.* at 139.

170. See *supra* part II.A. Florida has instituted a contingent fee set-up where private attorneys will share in any recovery while Mississippi and Minnesota have asked the courts to force the tobacco companies to pay their fees in the event of a victory.

Texas's contingent fee systems could be better. The point here is not particularly that one system or the other is more desirable, but that one type of these systems is necessary if these lawsuits are to achieve success. Only with the help of a team of highly-talented lawyers did private plaintiffs begin to see even marginal success against tobacco companies,<sup>171</sup> and likewise, states will need this advantage as well as the advantages of their unique positions as government entities if they are to win recovery against a tobacco company.

#### CONCLUSION

Reimbursement lawsuits have been characterized and mischaracterized in many ways. Some people call them gimmicks, while others call them a tax on consumers. They are neither. Instead, they are a new breed of lawsuit designed to make tobacco companies pay expenses they are responsible for creating. In this respect, such actions are not punitive, but only attempt to shift costs from society to those companies that profit from the sale of tobacco. These lawsuits not only do that, but attempt to shift costs in the most equitable and efficient manner available by allocating liability on a theory of market share liability.<sup>172</sup> This should result in neither overdeterrence nor underdeterrence, but should instead shift just the right amount of costs to the industry to allow the companies to make tough decisions about the true costs of tobacco.

Recently, a popular magazine noted that the Chrysler Corporation, which previously included a cigarette lighter and ashtray as standard equipment on its vehicles, now charges a premium for those items on its popular minivan.<sup>173</sup> What was once a subsidy to the smoker and a burden to the non-smoker is now an option that is paid for like any other piece of special equipment. While the analogy is not perfect, it does seem obvious that today, in our changing world, the government should ask no less of the smoker than the car manufacturer does and should be reimbursed for health care expenses that it incurs because of this deadly habit. This type of litigation does not seek a curtailment of smokers' rights. The federal and various state governments merely seek for tobacco companies and smokers to face up to their responsibilities—in this age of constant budget and medical care crises, no less is acceptable.

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171. See generally Rabin, *supra* note 2, at 864-66.

172. It is beyond the scope of this Note to discuss market share liability in full. For a description of how this system has worked in other contexts, see Andrew B. Nace, *Market Share Liability: A Current Assessment of a Decade-Old Doctrine*, 44 VAND. L. REV. 395 (1991); see also Christopher J. McGuire, *Market-Share Liability After Hymowitz and Conley: Exploring the Limits of Judicial Power*, 24 U. MICH. J.L. REF. 759 (1991).

173. See Bruce McCall, *A Hip Minivan?*, MEN'S J., Feb. 1996, at 33.