MEDICAID REIMBURSEMENT FROM TOBACCO MANUFACTURERS: IS THE STATES' LEGAL POSITION EQUITABLE?

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INTRODUCTION

Smoking cigarettes was once considered to be glamorous. However cigarettes have incurred the wrath of the public in the 1990s, evoking strong opinions from all sides. Many cities and counties have passed no-smoking ordinances, numerous private employers have reduced the availability of smoking areas, and various airlines have banned smoking on domestic and international flights. As consumer groups and medical studies report more evidence of the health risks of smoking, the anti-smoking sentiment in America has grown stronger. Even the federal government has joined the campaign against smoking with the Food and Drug Administration's regulations that prohibit the sale of tobacco to minors.[1] These regulations represent a step toward the federal government's regulation of tobacco as a drug.[2]

Over the years, as smokers have become ill from smoking tobacco, they have individually sued tobacco manufacturers for their injuries. To date, tobacco companies have successfully defended these suits.[3] Through various litigation tactics[4] and an emphasis on the personal responsibility of smokers, the tobacco manufacturers have generally avoided paying damages.[5]

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1. *See* Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996) (codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, and 897).

2. President Clinton has put the tobacco industry under the Food and Drug Administration's jurisdiction and has declared nicotine to be an addictive drug. *See* Richard Tomkins, *Tobacco Giants Face Huge Claims; Will Big Tobacco Go Up in Smoke?*, ROCKY MTN. NEWS, Sept. 8, 1996, at 3A. If approved by Congress, the settlement recently reached between the states and the tobacco industry regarding Medicaid reimbursement suits would allow for regulation of tobacco by the FDA. *See* Milo Geyelin, *Tobacco Firms Quiet on Fees to be Paid to Plaintiffs Lawyers Under Settlement*, WALL ST. J., Dec. 15, 1997, at B16.

3. *See* Tomkins, *supra* note 2.

4. *See infra* Part I. For example, tobacco companies would prolong every stage of litigation, especially discovery. *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857-59 (1992).

5. *See* Tomkins, *supra* note 2. However, a case in Florida did result in a

Presently, the growing public disdain for smoking is reflected in the recent wave of lawsuits filed against tobacco manufacturers. However, this onslaught differs from prior waves of tobacco litigation. Not only are more individuals suing through class actions,[6] but many states have also filed suits against tobacco manufacturers for reimbursement of Medicaid[7] expenditures for tobacco-related illnesses.[8] In June 1997, these states entered into a settlement agreement with the tobacco industry;[9] this agreement, however, has not yet received the necessary approval of Congress. Thus, the states will proceed with their suits until Congress accepts the settlement agreement.[10]

This comment discusses the states' suits for Medicaid reimbursement, focusing on Florida's claim in particular, and argues that the states should not be able to obtain special advantages which are not available to individual claimants. Part I of this comment discusses the background of tobacco tort litigation and the various claims and defenses used in tobacco liability suits. Part II examines the status of the states' suits and, in particular, the statute that creates Florida's cause of action and the Florida Supreme Court's decision upholding most of that statute. Part III focuses on the inequitable nature of the states' suits for Medicaid reimbursement. Part IV concludes that

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$750,000 verdict against Brown & Williamson Tobacco Corp. in favor of an individual smoker who sued for damages for lung cancer and emphysema. *See* Carter v. Brown & Williamson Tobacco Corp., 96 Fla. Jury Verdict Rep. 9-50 (Fla. Cir. Ct. Aug. 8, 1996). The tobacco company plans to appeal this verdict. *See* Christina Kent, *Tobacco Firm Pays for Failure to Warn*, AM. MED. NEWS, Aug. 26, 1996, at 1.

6. *See, e.g.*, Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995) (certifying class of nicotine dependent smokers who have used products of defendant tobacco companies), *rev'd*, 84 F.3d 734 (5th Cir. 1996) (decertifying class with instructions to dismiss class complaint); R. J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) (approving class action lawsuit against tobacco manufacturers although only allowing Florida state citizens to participate in the class).

7. Medicaid is a joint federal-state program offering health care to low income individuals. *See generally* 42 U.S.C. §§ 1396-1396a (1995); *see also infra* Part III.C.

8. *See, e.g.*, Minnesota v. Philip Morris Inc., No. C1-94-8565 (D. Minn. filed Aug. 17, 1994); Florida v. American Tobacco Co., No. 95-1466AO (Fla. Cir. Ct. filed Feb. 21, 1995).

9. *See* Jeffrey Taylor, *States Urge House Republicans to Keep Tobacco Dollars from Federal Coffers*, WALL ST. J., Dec. 9, 1997, at A24.

10. Florida, Mississippi, and Texas settled their suits with the tobacco industry in separate agreements. *See* Michele Kay, *Legislator Says Morales Played Politics with Deal; Politics Light up After Settlement*, AUSTIN AM.-STATESMAN, Jan. 18, 1998, at A1; *States Can Keep Tobacco Spoils*, SALT LAKE TRIB., Dec. 9, 1997, at A4; *see also infra* notes 50-54 and accompanying text.

the equities should prevent the states from obtaining special advantages in their Medicaid suits against the industry.

I. THE REIGN OF THE TOBACCO GIANTS: A HISTORY OF TOBACCO LITIGATION

Tobacco litigation has been described as occurring in "waves"[11] which are distinguished by the claims and defenses used in each era. The initial wave of litigation began in the 1950s following the first reports that smoking was a possible cause of cancer.[12] This first wave involved mostly negligence and breach of warranty claims against cigarette manufacturers.[13]

A notable case from this era is *Ross v. Philip Morris & Co.*[14] In *Ross*, the plaintiff smoked for almost thirty years before learning that he had cancer of the throat; as a result, he endured an operation that left him breathing through a hole in his neck.[15] In his suit against the tobacco manufacturer, Phillip Morris & Co., the plaintiff lost on his primary claims, which included negligence and breach of implied warranty.[16] On appeal, the court approved the trial court's jury instruction for breach of implied warranty.[17] The court held that "[n]o Missouri case has imposed such a strict responsibility upon a manufacturer" when the "defendant's cigarettes may have conformed to cigarettes generally" and the "defendant may have had no reason to suspect that smoking its cigarettes could produce cancer."[18] The court further reasoned that while cigarettes carry an implied warranty that they are reasonably fit for the purpose of smoking, this

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11. *See* Rabin, *supra* note 4, at 854; Jill Hodges, *Tobacco Tenacious in the Courtroom: Industry Has Flourished Through Decades of Litigation,* STAR-TRIB. (Minneapolis), Sept. 15, 1996, at 19A.

12. *See* Hodges, *supra* note 11.

13. *See* Rabin, *supra* note 4, at 859.

14. 328 F.2d 3 (8th Cir. 1964).

15. *See id.* at 5.

16. *See id.*

17. *See id.* at 6. The trial judge instructed the jury:

> A manufacturer of products, such as cigarettes, which are offered for sale to the public . . . for human use or consumption, impliedly warrants that its products *are reasonably wholesome or fit for the purpose for which they are sold, but such implied warranty does not cover substances in the manufactured product the harmful effects of which no developed human skill or foresight can afford knowledge.*

Id. (alteration in original).

18. *Id.* at 10.

warranty did not include substances in cigarettes that may cause harm of which "*developed human skill or foresight*" was unaware.[19] The *Ross* court was not alone in coming to this conclusion for implied warranty claims.[20]

However, a few of the first wave plaintiffs came close to success.[21] A noteworthy example is *Green v. American Tobacco Co.*[22] In this case, the United States Court of Appeals for the Fifth Circuit certified a question to the Florida Supreme Court regarding the relationship between manufacturer knowledge and breach of implied warranty of fitness. The Florida Supreme Court stated that the "seller's actual knowledge or opportunity for knowledge of a defective or unwholesome condition is wholly irrelevant to his liability on the theory of implied warranty."[23] However, this triumph was short-lived, for later the Fifth Circuit declared that some defect in the cigarettes must be found in order to find the manufacturer liable; because there was no defect in the cigarettes, the tobacco company was not liable for the plaintiff's health problems.[24]

The tobacco companies successfully defended against the first wave lawsuits. However, because the public was not aware of the dangers of smoking and its link to cancer at the time those plaintiffs became ill, tobacco companies could not use the "freedom of choice" argument as a defense.[25] Instead, the tobacco companies pursued litigation strategies to combat these suits. As a general rule, the companies did not try to settle any claims for smoking-related harm.[26] Rather, the manufacturers prolonged

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19. *Id.* at 6 (alteration in original) (quoting the trial court's jury instruction of which the Eighth Circuit approved).

20. *See, e.g.*, Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963) (requiring plaintiff to show for breach of implied warranty that the cigarettes had an element which might result in harm based on existing human knowledge).

21. *See* Rabin, *supra* note 4, at 861.

22. 325 F.2d 673 (5th Cir. 1963).

23. *Id.* at 675 (quoting the Florida Supreme Court's response to the certified question).

24. *See* Green v. American Tobacco Co., 409 F.2d 1166 (5th Cir. 1969) (en banc) (per curiam) (reversing the panel decision in rehearing and adopting the reasoning of Justice Simpson's dissenting opinion from that prior hearing).

25. *See* Rabin, *supra* note 4, at 859. The freedom of choice, or personal choice, argument focuses on the smoker's awareness of the risks of cancer and the smoker's conscious choice to continue smoking. *See id.* This argument represents the use of the assumption of the risk and contributory or comparative negligence defenses by tobacco manufacturers. *See id.* at 870-71.

26. *See id.* at 857. This rule against settling cases pervaded all waves of

every stage of the litigation process. This practice was particularly prevalent during discovery when tobacco companies would thoroughly study a plaintiff's lifetime conduct to find any other possible causes for the cancer.[27]

Although the first wave proved unsuccessful for plaintiffs, a second wave arose in the 1980s which was prompted by the success of the asbestos litigation.[28] To respond more effectively to the tobacco companies' strategies of unending discovery requests and pretrial motions, plaintiff's lawyers tried to increase the communication among themselves.[29] In addition, plaintiffs began to emphasize tort rather than warranty claims.[30] As a result of this new emphasis and a new version of strict liability in the courts, plaintiffs could focus on the dangerous *nature* of tobacco rather than the foreseeability of that danger.[31]

The tobacco companies continued their first wave litigation strategies of unending pretrial motions and lengthy discovery to prolong the litigation process.[32] Some plaintiffs were able to make it to trial, but other claimants experienced the same lack of

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litigation. However, this strategy has begun to crumble. In March 1996, Liggett Group became the first in the industry to yield when it settled a class action suit for millions of dollars although the company denied the tobacco-cancer link. *See Another Nail in Coffin of Tobacco Firms' Credibility,* USA TODAY, Oct. 24, 1996, at 12A. In addition, Liggett Group recently entered a settlement with the states pursuing Medicaid reimbursement for tobacco-related illnesses. *See An Anti-Tobacco Victory Settlement with Liggett Marks Dramatic Gain for States Blaming Industry for Smoking-Related Costs—But Where's California?,* S.F. EXAMINER, Mar. 23, 1997, at C14. In this settlement, Liggett Group admitted to both the addictive quality of tobacco and the tobacco-cancer link. *See id.* The rest of the industry has also become more willing to settle cases. Tobacco manufacturers settled a class action suit by flight attendants for injuries resulting from the inhalation of secondhand smoke. *See* Mark Curriden, *Big Tobacco Settles Secondhand Smoke Suit; Cigarette Makers Agree to Put $300 Million Into Research Fund in Flight Attendant Case,* DALLAS MORNING NEWS, Oct. 11, 1997, at 1F. In addition, the rest of the industry has settled the Medicaid reimbursement suits with the states; however, the agreement is not effective until Congress accepts its terms. *See infra* text accompanying notes 49-53.

27. *See* Rabin, *supra* note 4, at 857-59.

28. *See id.* at 864-65; Hodges, *supra* note 11. The success of the asbestos litigation gave second wave plaintiffs and their attorneys hope of attaining similar victories. *See* Rabin, *supra* note 4, at 864-65.

29. *See* Rabin, *supra* note 4, at 866 n.80. This increased communication included monthly newsletters, annual conferences, and greater coordination between plaintiffs' attorneys. *See id.*

30. *See id.* at 866.

31. *See id.*

32. *See id.* at 867.

success demonstrated in the first wave of tobacco litigation.[33] Furthermore, in most of the suits that actually went to trial, tobacco companies successfully invoked the assumption of risk and contributory negligence defenses based on the public's knowledge of the harmful effects of cigarettes.[34]

In the second wave of litigation, *Cipollone v. Liggett Group, Inc.*[35] initially gave plaintiffs hope for recovery. The plaintiff, Tom Cipollone, won his suit at trial by claiming that the tobacco company should have given the public better warnings concerning the health risks of tobacco use.[36] Cipollone received a jury verdict of $400,000.[37] However, this success was short-lived because the verdict was overruled by the United States Supreme Court.[38] Addressing Cipollone's "failure to warn" claim, the Court held that the Federal Cigarette Labeling and Advertising Act[39] did not preempt state law damages claims; however, the Public Health Cigarette Smoking Act of 1969[40] did preempt failure to warn claims if the claims "rel[ied] on omissions or inclusions" in tobacco advertising.[41] This loss concluded the second wave of tobacco litigation.[42]

Now a third wave of tobacco litigation is beginning. The emergence of tobacco industry documents containing information about tobacco's addictive qualities has energized suits in this latest wave.[43] More people are suing the tobacco manufacturers individually and through class actions.[44] In addition, the states are

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33. *See, e.g.*, Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230 (6th Cir. 1988) (affirming dismissal of failure to warn claim and directed verdict for tobacco company for claim that cigarettes are defective or unreasonably dangerous).

34. *See* Rabin, *supra* note 4, at 870-71; *see also supra* note 25.

35. 693 F. Supp. 208 (1988).

36. *See id.*; Hodges, *supra* note 11.

37. *See* Hodges, *supra* note 11.

38. Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); *see also* Hodges, *supra* note 11.

39. Pub. L. No. 89-92, 79 Stat. 282 (codified in scattered sections of 15 U.S.C.).

40. Pub. L. No. 91-222, 84 Stat. 87 (codifying section 2 at 15 U.S.C. § 1340 and amending various sections in 15 U.S.C.).

41. *Cipollone*, 505 U.S. at 530-31.

42. As a result of the preemption of some failure to warn claims, individual plaintiffs can bring fewer claims of this type. *See id.*

43. *See* Hodges, *supra* note 11.

44. *See, e.g.*, Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995) (certifying class of nicotine dependent smokers who have used products of defendant tobacco companies), *rev'd*, 84 F.3d 734 (5th Cir. 1996) (decertifying class with instructions to dismiss class complaint); R. J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) (approving class action lawsuit against tobacco man-

filing suits against the tobacco industry for reimbursement of Medicaid expenses from tobacco-related illnesses.[45]

II. THE QUEST FOR MEDICAID REIMBURSEMENT BY THE STATES

A. *The Status of the States' Suits Against the Tobacco Industry*

In May 1994, Mississippi became the first state to bring suit against the tobacco industry to recover Medicaid expenditures for tobacco-related illnesses.[46] Mississippi hoped to recover amounts it had spent during the last forty years, which it estimated to be between $2.4 billion and $3.2 billion.[47] Since Mississippi filed suit, forty other states including Minnesota and Florida have followed Mississippi's lead by filing claims to recover their expenditures.[48] Only the Minnesota case has gone to trial; the other states have just filed suit or the parties are proceeding with pre-trial motions or discovery.[49]

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ufacturers although only allowing Florida state citizens to participate in the class).

45. *See, e.g.*, Minnesota v. Philip Morris Inc., No. C1-94-8565 (D. Minn. filed Aug. 17, 1994); Florida v. American Tobacco Co., No. 95-1466AO (Fla. Cir. Ct. filed Feb. 21, 1995).

46. *See* Beverly Pettigrew-Kraft, *Judge to Rule Next Month in Tobacco Case*, REUTER EUR. BUS. REP., Dec. 19, 1994, *available in* LEXIS, News Library, Reueub File.

47. *See id.*

48. *See* Judy Fahys, *Hatch Unveils Tobacco Battle Plan; Legislation Seeks $398.3 Billion and New Marketing Regulations*, SALT LAKE TRIB., Nov. 13, 1997, at A9. Other states that have filed suit include Alabama, Arizona, Connecticut, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Michigan, New Jersey, Oklahoma, South Carolina, Texas, Utah, Washington, and West Virginia. In addition, the District of Columbia has filed a similar claim. The governor of Arizona ordered the Arizona attorney general to drop the State's suit because of the litigation expense and the inherent difficulties with the claim. *See Tobacco Firm Challenges Cancer Study*, CHI. TRIB., Oct. 19, 1996, at 10. However, contrary to the governor's instructions, the Arizona attorney general expanded the suit. *See Arizona A.G. Expands Suit Despite Governor's Push to Have It Dropped*, MEALEY'S LITIG. REP.: TOBACCO., Nov. 14, 1996, *available in* WL, 10 No. 14 MLRTOBAC 5. The other states suing the tobacco manufacturers are claiming to have Medicaid expenditures similar to the amounts for which Mississippi is asking. For example, the Illinois state attorney general has indicated that during a 13 year period alone, from 1980 to 1993, the state made $2.75 billion in Medicaid payments for smoking-related illnesses. *See* Sue Ellen Christian & Ken Armstrong, *Illinois Joins the Pack Suing Tobacco Firms*, CHI. TRIB., Sept. 18, 1996, at 1. Interestingly, North Carolina is prohibited from suing the industry by statute. *See Group Puts Spotlight on Smoking Deaths*, GREENSBORO NEWS & REC., Dec. 8, 1997, at B7.

49. *See* Alan Johnson & Jodi Nirode, *Ohio Hasn't Joined Tobacco Lawsuit,*

The burden of this pending litigation by so many states with enormous resources created an incentive for the tobacco industry to change its tactics. In a dramatic turn of events, the tobacco industry reached a settlement with the states in June 1997.[50] The proposed settlement requires the tobacco industry to pay the states $368.5 billion for reimbursement of tobacco-related Medicaid expenditures[51] and the FDA to regulate tobacco as a drug.[52] In return, the tobacco industry would receive immunity from class actions and from punitive damages for past wrongful conduct.[53] However, before the settlement becomes final and binding, it must receive congressional approval.[54] Because it is uncertain whether Congress will grant this approval, the states' suits against the industry have continued to proceed. Thus, the implications of these suits remain important.

Many of these states are pursuing common-law and equity claims,[55] and the nature of these claims have allowed the states to obtain certain advantages. For example, the tobacco companies in these cases cannot use affirmative defenses against the states because the states have effectively abolished affirmative defenses against them.[56]

COLUMBUS DISPATCH, Oct. 28, 1996, at 1A; Karren Mills, *Minnesota Opens Fire on Tobacco Companies*, AUSTIN AM.-STATESMAN, Jan. 27, 1998, at A3.

50. *See* Taylor, *supra* note 9.

51. *See id.* However, it should be noted that while this settlement was proposed to settle all of the states' cases, Florida, Mississippi, and Texas have separately negotiated settlements with the industry. *See id.*; Kay, *supra* note 10.

52. *See* Geyelin, *supra* note 2.

53. *See Tobacco Deal Questions and Answers*, GREENSBORO NEWS & REC., June 22, 1997, at A2. However, individuals could still sue and recover compensatory damages including lost wages and pain and suffering. *See id.* In addition, punitive damages would be available for future misconduct. *See id.*

54. *See id.*

55. Many states are pursuing common-law and equity claims to the exclusion of, or in addition to, statutory claims. For example, in addition to its common-law claims, Maryland has filed equity claims including unjust enrichment and equitable restitution. *See Maryland, Industry Battle Over Whether State Has Common Law Right to Recover Medical Costs*, Mealey's Litig. Rep.: Tobacco, Jan. 9, 1997, *available in* WL, 10 No. 17 MLRTOBAC 14 [hereinafter *Maryland, Industry Battle*]; *Subrogation, Assignment Only Remedies, Industry Says in Seeking Dismissal of Maryland Medicaid Case*, Mealey's Litig. Rep.: Tobacco, Dec. 19, 1996, *available in* WL, 10 No. 16 MLRTOBAC 13 [hereinafter *Subrogation, Assignment Only Remedies*]. Mississippi is also pursuing common-law and equity claims. *See* Pettigrew-Kraft, *supra* note 45 (noting that Mississippi is "pursuing the suit as an equity case").

56. *See, e.g.*, Christian & Armstrong, *supra* note 47.

Because it provides an interesting example of the states' actions in this area, Florida's legislative abolishment of affirmative defenses and the subsequent challenge to that action by the tobacco industry is the focus of this comment. Florida's statute gave the State a cause of action and expressly gave it certain substantive and procedural advantages.[57] As a result, the subsequent lawsuit against the tobacco industry provides a prime example of the ways in which some states are trying to tip the scales in their favor because it explicitly addresses many issues that are raised indirectly in the suits involving common-law and equity claims.

B. Florida's Statute and Its Review by the Florida Supreme Court

Medicaid authorizes the states to pursue reimbursement from third parties who are responsible for the Medicaid expenditures.[58] For many years, Florida was allowed to recover Medicaid expenses using traditional subrogation claims against liable third parties who had caused harm to Medicaid recipients.[59] Subrogation allows one party who pays an obligation to obtain relief from another party who ultimately should have paid the obligation.[60] Under the subrogation theory, Florida would "stand in the shoes of the subrogor" or injured party and be subject to any defenses that the defendant would have against the injured party.[61]

However, in 1990 and 1994, the Florida legislature made significant modifications to its subrogation statute.[62] The result of these modifications was the Medicaid Third-Party Liability Act ("MTPLA"),[63] under which the State is suing the tobacco

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57. *See infra* Part II.B.

58. *See* 42 U.S.C. § 1396a(a)(25) (1994). For more information on the Medicaid program, see *infra* Part III.C.

59. *See* FLA. STAT. ANN. § 409.266(3) (West, WESTLAW through 1990) (repealed 1991).

60. *See* Casualty Indem. Exch. v. Penrod Bros., Inc., 632 So. 2d 1046, 1047 (Fla. Dist. Ct. App. 1993).

61. *Id.* Some of the defenses that a defendant may have against an injured party, such as a Medicaid recipient, include assumption of risk and contributory or comparative negligence. *See generally* Rabin *supra* note 4, at 870-71.

62. *See* FLA. STAT. ANN. § 409.910 (West Supp. 1997); Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239, 1244-45 (Fla. 1996) (4-3 decision), *cert. denied*, 117 S. Ct. 1245 (1997).

63. FLA. STAT. ANN. § 409.910 (West Supp. 1997).

industry.[64] This statute presents significant changes in the way that the State is allowed to sue the tobacco companies. When MTPLA was challenged by the tobacco manufacturers, the Florida Supreme Court upheld most, but not all, of the statute in *Agency for Health Care Administration v. Associated Industries.*[65]

1. Substantive Advantage: Elimination of Affirmative Defenses

Prior to MTPLA, Florida could pursue claims for Medicaid reimbursement through subrogation.[66] Under this regime, Florida would be subject to any defenses that the tobacco manufacturers might have against the Medicaid recipient. However, this changed with the enactment of MTPLA. MTPLA allows the State to sue liable third parties without being subject to any affirmative defenses that the third party might have against the Medicaid recipient:[67] "Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be *abrogated to the extent necessary* to ensure full recovery by Medicaid from third-party resources . . . ."[68] As a result, the tobacco companies cannot assert any affirmative defenses in Florida's suit for Medicaid reimbursement.

In *Agency for Health Care Administration,* the Florida Supreme Court upheld this denial of affirmative defenses in a facial challenge to the constitutionality of the statute because it did not view the change as violating due process or as denying court access in violation of the Florida Constitution.[69] In response

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64. *See* Agency for Health Care Admin. v. Associated Indus., No. 95-1466AO (Fla. Cir. Ct. filed Feb. 21, 1995). Associated Industries of Florida is the representative name of all of the tobacco companies subject to suit in Florida, and the Agency for Health Care Administration is the state agency created to pursue claims under Florida's MTPLA. *See Agency for Health Care Admin.*, 678 So. 2d at 1246-48.

65. 678 So. 2d 1239 (Fla. 1996), *cert. denied,* 117 S. Ct. 1245 (1997).

66. *See supra* text accompanying notes 58-60.

67. *See* § 409.910(1).

68. *Id.* (emphasis added). These affirmative defenses will still be active against the Medicaid recipient should the recipient attempt to recover directly from the third party. *See id.*

69. *See Agency for Health Care Admin.*, 678 So. 2d at 1250. The court was careful to note, however, that it did not consider the constitutionality of the statute when actually applied to a particular party and would not speculate as to whether

to the due process claim advanced by Associated Industries regarding the denial of affirmative defenses, the majority first noted that the United States Supreme Court has recognized that states "have the ability to fashion new tort remedies."[70] After referring to United States Supreme Court precedent,[71] the Florida Supreme Court stated that new causes of action created by states do not have to offer to defendants all of the usual defenses.[72] There is no absolute prohibition against the elimination of all affirmative defenses.[73] The court then examined several cases upholding the elimination of an affirmative defense as evidence that the elimination of defenses under MTPLA was not facially unconstitutional as a violation of due process.[74]

The majority also rejected Associated Industries' claim[75] that MTPLA's denial of affirmative defenses violated the Florida Constitution's access-to-courts provision.[76] The court relied on *Kluger v. White*,[77] where the Florida Supreme Court created a test to determine whether a legislature may take away a statutory or a common-law right of access to the courts.[78] The *Kluger* test requires the legislature to provide a reasonable alternative to protect the party whose right is being abrogated; otherwise, the legislature must establish an "overpowering public necessity" for abrogating the right and show that there is no other way to meet

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the statute would survive attack in such a situation. *See id.* at 1253. It is also important to note that the statute allows the State to sue for payments made to Medicaid recipients after July 1, 1994, the effective date of the statute. *See id.* at 1256. The State is not prevented from recovering payments made before this date, but to do so, it must sue under the traditional subrogation action that was in effect before MTPLA was passed. *See id.*

70. *Id.* at 1250.

71. Arizona Copper Co. v. Hammer, 250 U.S. 400 (1919) (deciding whether an Arizona statute under which an injured employee sued his employer was unconstitutional).

72. *See Agency for Health Care Admin.*, 678 So. 2d at 1251.

73. *See id.* However, the elimination of an affirmative defense must satisfy due process. *See id.*

74. *See id.* at 1251-53 (discussing Arizona Copper Co. v. Hammer, 250 U.S. 400 (1919); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987); Cason v. Baskin, 20 So. 2d 243 (1945); Waite v. Waite, 618 So. 2d 1360 (Fla. 1993); West v. Caterpillar Tractor Co., 336 So. 2d 80, (Fla. 1976)).

75. *See id.* at 1253.

76. *See* FLA. CONST. art. I, § 21.

77. 281 So. 2d 1 (Fla. 1973).

78. *See id.* at 4, *quoted in* Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239, 1253 (Fla. 1996), *cert. denied*, 117 S. Ct. 1245 (1997).

this necessity.[79] Associated Industries claimed that the *Kluger* test applied to defenses as well as claims, citing another Florida case, *Psychiatric Associates v. Siegel*,[80] as authority.[81] The court in *Agency for Health Care Administration* rejected this argument because no other cases supported Associated Industries' claim, and the court "recede[d] from any language" in *Siegel* suggesting that the *Kluger* test applied to the elimination of a defense.[82]

Thus, the elimination of affirmative defenses survived the facial challenge by Associated Industries. Although this elimination represented a dramatic change from the prior law and a method of tipping the scales in Florida's favor, not all of the advantages were upheld on review.

2. The Remains of MTPLA After *Agency for Health Care Administration*

First, under certain circumstances, the statute allowed the State to sue third parties for Medicaid reimbursement without identifying each Medicaid recipient affected by the third party's conduct.[83] However, in *Agency for Health Care Administration*, the Florida Supreme Court held this provision to be unconstitutional as a violation of due process.[84] The provision created a "conclusive presumption that every Medicaid payment is proper and necessitated by the defendant's conduct."[85] Thus, it violated due process because a defendant could neither challenge individual payments that might be improper due to fraud or misdiagnosis nor have the opportunity to prove that a Medicaid

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79. *See Kluger*, 281 So. 2d at 4, *quoted in Agency for Health Care Admin.*, 678 So. 2d at 1253.

80. 610 So. 2d 419 (Fla. 1992).

81. *See Agency for Health Care Admin.*, 678 So. 2d at 1253. *Siegel* indicates that "[t]he constitutional right of access to the courts sharply restricts the imposition of financial barriers to asserting claims or defenses in court." 610 So. 2d at 424, *distinguished in Agency for Health Care Admin.*, 678 So. 2d at 1253.

82. *See Agency for Health Care Admin.*, 678 So. 2d at 1253.

83. *See* FLA. STAT. ANN. § 409.910(9)(a) (West Supp. 1997). The statute states that when "the number of [Medicaid] recipients . . . is so large as to cause it to be impracticable to join or identify each claim, the agency shall not be required to so identify the individual recipients"; instead, the agency can recover payments made to that class of recipients. *Id.*

84. *See* Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239, 1254 (Fla. 1996), *cert. denied*, 117 S. Ct. 1245 (1997).

85. *Id.*

recipient did not use the defendant's product.[86] As a consequence of this decision, Florida must now provide the identities of Medicaid recipients who received payments that the State is trying to recover from Associated Industries.[87]

Second, as originally enacted, Florida's MTPLA indicated that "the defense of the statute of repose shall not apply to any action brought under this section . . . ."[88] The Florida Supreme Court struck down this provision holding that claims that are barred for time purposes cannot be "revive[d]" by the state legislature without violating the due process clause of the Florida Constitution.[89]

Third, MTPLA allows the State to join its claims against third parties[90] and directs the courts to liberally construe common-law theories of recovery[91] as well as rules of evidence for damages and causation.[92] The Florida Supreme Court upheld all of these provisions.[93] Regarding the joinder provision, the court

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86. *See id.*

87. However, in November 1996, the Florida trial judge in the State's case ruled that the State does not have to give the tobacco companies the names of all of the Medicaid recipients for which the State is suing. *See Florida Judge Says State Does Not Have to Identify Medicaid Recipients*, Mealey's Litig. Rep.: Tobacco, Nov. 1, 1996, *available in* WL, 10 No. 13 MLRTOBAC 10. Otherwise, unending depositions would prevent the suit from progressing. *See id.* For each payment that the State wishes to recover, the State has given Associated Industries the corresponding Medicaid recipient's identification number and a list of medical providers. *See id.*

88. FLA. STAT. ANN. § 409.910(12)(h) (West Supp. 1997). A statute of repose "is a substantive statute which not only bars enforcement of an accrued cause of action but may also prevent the accrual of a cause of action where the final element necessary for its creation occurs beyond the time period established by the statute." WRH Mortgage, Inc. v. Butler, 684 So. 2d 325, 327 (Fla. Dist. Ct. App. 1996). The time period established by the statute of repose starts when an event specified in the statute occurs. *See id.* This statute differs from the statute of limitations which is a procedural bar preventing enforcement of a cause of action that has accrued. *See id.* The statute of limitations specifies the length of time during which a cause of action must be brought, and the time period is related to the date of accrual. *See id.*

89. *See Agency for Health Care Admin.*, 678 So. 2d at 1254 (referring to FLA. CONST. art. I, § 9). However, the court indicated that the state could bring claims that were not barred at the time the state filed suit and that the legislature could repeal the statute of repose. *See id.*

90. § 409.910(9). If Medicaid payments have been made to more than one person and the recovery of these payments from third parties "involve[s] common issues of fact or law, the agency may bring an action to recover sums paid to all such recipients in one proceeding." *Id.*

91. § 409.910(1).

92. § 409.910(9).

93. *See* Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239, 1255 (Fla. 1996), *cert. denied*, 117 S. Ct. 1245 (1997).

reasoned that the State can create new independent causes of action, as it has done with this statute, and that the joinder provision simply permits the State to join its claims.[94] As for the portions of the statute calling for liberal construction of theories of recovery and rules of evidence, the court read the provisions as "only directory"; thus there was no violation of the separation of powers.[95]

Fourth, MTPLA applies both market-share liability and joint and several liability.[96] The basis of market-share liability is that each defendant will only be liable for the percentage of total injuries representing its actual market share.[97] On the other hand, with joint and several liability, each defendant can be completely liable for all of the plaintiff's injuries.[98] The Florida Supreme Court held that while these two theories could be used separately, the State could not use both theories in the same suit because imposing joint and several liability would prevent defendants from being able to limit their liability to damages representing their market share.[99]

Finally, MTPLA authorizes the State to use statistical analysis in proving its case against third parties.[100] In construing this provision, the court held that the use of statistical analysis was within the rules of evidence and that the State still must prove its case within these rules.[101]

Thus, Florida's MTPLA alters the way in which the State can pursue recovery of Medicaid payments from third parties. Several changes are significant and affect how third parties, in

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94. *See id.* The joinder provision, according to the court, coincides with Florida court rules, promotes judicial efficiency, and thus is not unconstitutional. *See id.*

95. *See id.* The court noted that other statutes give similar indications to the courts and have not been determined to be violations. *See id.*

96. § 409.910(9)(b). Market share liability applies if the products are "substantially interchangeable among brands" and if "substantially similar factual or legal issues would be involved in seeking recovery against each liable third party individually." *Id.* Section 409.910(1) imposes joint and several liability.

97. *See Agency for Health Care Admin.*, 678 So. 2d at 1255-56. Thus, if a defendant proves that it has a market share of 20%, it will only be responsible for 20% of the damages awarded to the plaintiff.

98. *See id.*

99. *See id.* at 1256. However, the court did not invalidate either provision of the statute because the theories could be used independently of each other. *See id.*

100. § 409.910(9).

101. *See* Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239, 1256 (Fla. 1996), *cert. denied*, 117 S. Ct. 1245 (1997).

this case the tobacco companies,[102] can defend themselves in such suits. After *Agency for Health Care Administration*, the State may join all of its claims[103] against the tobacco companies and use either market-share or joint and several liability.[104] However, although Florida must identify the Medicaid recipients[105] and cannot avoid the application of the statute of repose,[106] the State will not have to face any affirmative defenses[107] and may prove its case using statistical analysis.[108]

III. THE INHERENT INEQUITY ASSOCIATED WITH THE STATES' SUITS FOR MEDICAID REIMBURSEMENT

At first glance, the suits against the tobacco industry by the states for Medicaid reimbursement appear to be equitable. The states have paid out billions in Medicaid payments for the treatment of smoking-related illnesses.[109] As a consequence, taxpayers who have generally not participated in causing this harm have had to unfairly pay for the smokers' medical treatment. Furthermore, smoking-related illnesses, such as cancer, have not resulted from an accident. Rather, the use of tobacco products has caused these illnesses.[110] In our society, people or

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102. Although the language of MTPLA applies to any third party that may be liable for Medicaid payments, the governor of Florida has indicated that this statute should only be used against tobacco companies and not against other product manufacturers. *See id.* at 1246.

103. *See id.* at 1255.

104. *See id.* at 1256.

105. *See id.* at 1254; *see also supra* note 86 and accompanying text.

106. *See Agency for Health Care Admin.*, 678 So. 2d at 1254.

107. *See* § 409.910(1); *Agency for Health Care Admin.*, 678 So. 2d at 1250. Associated Industries petitioned the United States Supreme Court for review of the Florida Supreme Court's decision. *See Associated Industries Takes Issue of Constitutionality of Medicaid Law to High Court,* Mealey's Litig. Rep.: Tobacco, Jan. 9, 1997, *available in* WL, 10 No. 17. MLRTOBAC 8. They claimed that the statute violated due process because it arbitrarily eliminated all affirmative defenses. *See id.* However, the United States Supreme Court denied the industry's petition for writ of certiorari. *See* Associated Indus., Inc. v. Agency for Health Care Admin., 117 S. Ct. 1245 (1997).

108. *See* § 409.910(9).

109. *See supra* text accompanying notes 46-47. For example, Mississippi claims to have spent $60 to $80 million each year for 40 years on tobacco-related Medicaid expenses, for a total between $2.4 and $3.2 billion. *See* Pettigrew-Kraft, *supra* note 45. It is estimated that the State of Florida is attempting to recover costs approaching $2 billion. *See* Stephanie Artero, *Identity of Ill Smokers Protected; Judge: Ruling Will Avoid Cluttering Tobacco Trial,* PALM BEACH POST, Oct. 19, 1996, at 1A.

110. Of course, this argument operates on the premise that cigarettes actually

institutions who harm others are usually held liable for the resulting damages. As such, some argue that tobacco companies should be accountable for the foreseeable consequences of their enterprise and that it is unfair to place the burden on taxpayers.

This "fairness to taxpayers" argument is very appealing, particularly because nearly everyone pays taxes and some feel these tax dollars should not go toward medical bills for which other parties are responsible. Because of the popularity of this argument, states have used it to justify the advantages that they have created in their Medicaid suits. However, this justification must be weighed against an appealing equity argument on behalf of the tobacco companies.

A. The Inability to Present an Adequate Defense: The Abrogation of Affirmative Defenses

In their suits for Medicaid reimbursement, the states are attempting to avoid the difficulties associated with the traditional subrogation actions that have historically been used in these situations.[111] Individuals who have sued tobacco manufacturers for injuries resulting from tobacco use have for the most part been unsuccessful because of affirmative defenses such as assumption of the risk and comparative negligence.[112] Suing in subrogation would force the states to face these affirmative defenses because they would be asserting the rights of the injured individual who had received Medicaid payments.[113] To avoid this, states have either created causes of action that do not recognize affirmative defenses or have filed various non-subrogation claims including

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cause cancer. Although fought by the tobacco companies, this premise is supported by numerous studies showing the link between tobacco and cancer. For example, a study by the Beckman Research Institute and the Anderson Cancer Center discovered a "direct link" between lung cancer and cigarette smoking. *See Link Established Between Smoking and Lung Cancer*, Mealey's Litig. Rep.: Tobacco, Nov. 1, 1996, *available in* WL, 10 No. 13 MLRTOBAC 3.

111. *See* Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239, 1259-61 (Fla. 1996) (Grimes, J., concurring in part and dissenting in part), *cert. denied*, 117 S. Ct. 1245 (1997). While other states besides Florida are suing on common law, equity, and statutory claims that do not expressly prohibit affirmative defenses, they are not suing in subrogation. *See, e.g., Subrogation, Assignment Only Remedies*, *supra* note 54; Christian & Armstrong, *supra* note 47, at 1.

112. *See supra* Part I.

113. *See supra* text accompanying notes 59-60; *see also* Casualty Indem. Exch. v. Penrod Bros., Inc., 632 So. 2d 1046, 1047 (Fla. Dist. Ct. App. 1993).

unfair trade practices, equitable restitution, and unjust enrichment.[114] These doctrines help the states circumvent the assumption of the risk and comparative negligence doctrines.[115]

In *Agency for Health Care Administration*, the Florida Supreme Court held that Florida's statutory elimination of affirmative defenses was facially constitutional.[116] However, the dissent argued persuasively that the elimination of affirmative defenses under MTPLA was unconstitutional because it denied court access and violated due process.[117]

Regarding the statute's denial of access to the courts, the dissent argued that the legislature failed to meet the requirements for eliminating affirmative defenses under *Kluger v. White*.[118] Because the statute prevents the use of all affirmative defenses, the legislature did not provide an alternative method of protecting the tobacco manufacturers' rights.[119] In addition, the dissent contended that the second portion of the test regarding public necessity was not met since the legislature gave no explanation for the abrogation of the defenses.[120] The dissent also argued that federal law does not require the abolition of defenses in Medicaid reimbursement actions, and the legislature failed to establish that no other alternative would suffice to recover the payments.[121] Finally, the dissent argued that the majority arbitrarily dismissed the court's previous holding in *Psychiatric Associates v. Siegel*[122] that the right to court access encompasses defenses as well as claims.[123]

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114. *See, e.g.*, Philip Morris, Inc. v. Blumenthal, 123 F.3d 103, 104-05 (2d Cir. 1997); *Maryland, Industry Battle, supra* note 54. States filing non-subrogation claims do not face affirmative defenses because the states have never smoked cigarettes. *See* Christian & Armstrong, *supra* note 47, at 1. Thus, the states were never negligent in assuming the risk of smoking. *See id.*

115. *See* Christian & Armstrong, *supra* note 47, at 1.

116. *See Agency for Health Care Admin.*, 678 So. 2d at 1250. *But see supra* note 68.

117. *See Agency for Health Care Admin.*, 678 So. 2d. at 1258-60 (Grimes, J., concurring in part and dissenting in part).

118. *See id.* at 1258-59. Under *Kluger*, 281 So. 2d 1 (Fla. 1973), the legislature must provide a reasonable alternative to protect the party whose right is being abrogated; otherwise, the legislature must establish an "overpowering public necessity" for abrogating the right and show that there is no other way to meet this necessity. *See Agency for Health Care Admin.*, 678 So. 2d. at 1253.

119. *See id.*

120. *See id.* at 1259.

121. *See id.; see also infra* Part III.C.

122. 610 So. 2d 419, 424 (Fla. 1992).

123. *See* Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239,

The dissent raised valid points regarding the majority's argument. The majority dismissed too quickly its own statement in *Siegel* that the *Kluger* test applied to both claims and defenses. *Stare decisis* requires courts to give more deference to existing precedent. Furthermore, the *Kluger* test was not met in this situation. The Florida legislature summarily abolished all affirmative defenses in Medicaid reimbursement actions, leaving the tobacco industry with no other way to defend against these suits. The only explanation for this dramatic measure is that the State wanted to receive reimbursement. However, this is not a strong reason for such a dramatic change in the law. As a result, the legislature unconstitutionally restricted the tobacco manufacturers' access to the courts and their ability to provide an adequate defense.

The arguments regarding court access are specific to Florida law; however, the idea behind these arguments is compelling for other states pursuing Medicaid recovery claims. Florida legislatively prevented the tobacco industry from asserting affirmative defenses that would have been ordinarily available. States pursuing common-law and equity claims have also prevented the use of affirmative defenses by not suing in subrogation. For example, Connecticut has asserted various claims against the tobacco industry such as unfair, deceptive, and anti-competitive trade practices,[124] which do not allow the use of affirmative defenses.[125] As the dissent in *Agency for Health Care Administration* indicated, alternative methods of combating the problem of Medicaid costs may exist, such as higher excise taxes.[126] These alternatives should be explored before abolishing affirmative defenses. Otherwise, tobacco manufacturers are limited in their access to the courts of other states as well.

In addition to preventing court access, the dissent also argued that the elimination of affirmative defenses violated due process. Most cases cited by the majority in support of its holding

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1253 (Fla. 1996), *cert. denied*, 117 S. Ct. 1245, 1259 (1997). *Siegel* states: "The constitutional right of access to the courts sharply restricts the imposition of financial barriers to asserting claims or defenses in court." 610 So. 2d at 424, *cited in Agency for Health Care Admin.*, 678 So. 2d at 1253. The dissent cites to other cases supporting the statement in *Siegel* and concludes that the majority now only allows plaintiffs to obtain "constitutional redress." *See id.* at 1259.

124. *See* Philip Morris, Inc. v. Blumenthal, 123 F.3d 103, 104-05 (2d Cir. 1997).

125. *See* Christian & Armstrong, *supra* note 47, at 1.

126. *See Agency for Health Care Admin.*, 678 So. 2d at 1259.

abolished one affirmative defense but may have left other affirmative defenses intact.[127] However, in MTPLA, the legislature has eliminated all affirmative defenses that tobacco companies could possibly use in defending against the State's suit.[128]

This is where the states are gaining a special advantage that is not available to the individual plaintiffs. Because Florida is the claimant, it is allowed to pursue its allegations without having to defend against any affirmative defenses that tobacco manufacturers could plead. However, individual plaintiffs must face affirmative defenses. This distinction between claimants should not matter because the state and the individuals have the same goals.[129] The State and the individual plaintiff would both want to recover expenditures for medical treatment: "A law that presumes to measure the liability of a party based on [whether an individual's medical expenses were paid by Medicaid] is completely arbitrary and violates due process."[130] Furthermore, the claims made by the State are "more accurately classified as a subrogation action grounded in tort" because the primary goal of the State is to receive reimbursement.[131] Thus, in reality, the identity of the claimant should not affect whether the tobacco manufacturers have affirmative defenses at their disposal, particularly when the goal is reimbursement of expenses.[132]

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127. *See id.* at 1260 ("Evolutionary modifications of specific defenses cannot be equated to the total abolition of affirmative defenses.").

128. *See* FLA. STAT. ANN. § 409.910(1) (West Supp. 1997).

129. *See Agency for Health Care Admin.*, 678 So. 2d at 1259-60. In discussing the arbitrary nature of distinguishing between the State and individuals as plaintiffs, the dissent argues:

> The distinction between the two examples, which permit[s] the State's claim against [the tobacco manufacturers] to succeed whereas [the Medicaid recipient's claim] may not, has nothing to do with the circumstances of how the illness was caused but is based only upon the fortuity that [the Medicaid recipient's] medical bills were later covered by Medicaid.

Id. at 1259.

130. *Id.* at 1259 (Grimes, J., concurring in part and dissenting in part).

131. Philip Morris, Inc. v. Blumenthal, 123 F.3d 103, 106 (2d Cir. 1997) (describing the State of Connecticut's suit which involves various claims including unfair business practices) (citation omitted). It should be noted that reimbursement is a primary goal of private insurers. When a private insurer sues a liable third party for payments that the insurer made to the insured, the insurer sues in subrogation.

132. *See* Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239, 1259-60 (Fla. 1996) ("Whether a claim is Medicaid-eligible has no more relevance in measuring whether a party may raise an affirmative defense than the question of whether [the claimant] has brown hair or blond hair."), *cert. denied,* 117 S. Ct. 1245 (1997).

A similar injustice occurs in states pursuing common-law and equity claims against the tobacco companies instead of suing under a legislative mandate. The tobacco industry cannot use affirmative defenses in those suits as well due to the type of claims brought by the states; yet, there is still the arbitrary distinction between claimants because these cases are treated differently from suits by individuals. This arbitrary distinction at least violates the traditional notions of due process and equality before the law.

One could argue that the elimination of affirmative defenses represents no more than the imposition of strict liability on tobacco manufacturers, a remedy that is within the power of states to impose. However, this analogy does not quite fit here. Individual smokers who sue the tobacco industry do not get the benefit of strict liability; rather, they are subject to affirmative defenses such as assumption of risk and comparative negligence. Why should only the states get the benefit of strict liability? The states, as entities, could not have smoked and so could not be subject to assumption of risk or comparative negligence defenses, but they did profit from the sale of cigarettes.[133] Based on these profits, it is not equitable for the states to get the benefit of a type of strict liability regime while individual smokers do not.

B. Unclean Hands: State Tobacco Tax Collections

Over the past several years, states have had to pay tremendous Medicaid bills, especially for tobacco-related illnesses.[134] Huge Medicaid expenses drain state funds and put an increasingly heavy burden on taxpayers to provide more revenue to meet these obligations.[135] Attempts to recover these expenditures from potentially liable third parties reduce the burden on otherwise innocent taxpayers who will have to pay the Medicaid expenses. However, a thorough analysis of the equities of the suits against tobacco companies by the states must include a consideration of the benefits that states have enjoyed from the sale of tobacco.

States have collected excise taxes on the sale of tobacco for more than forty years.[136] During the 1950s and 1960s, the

133. *See infra* Part II.B.
134. *See supra* Part III.A.; *supra* text accompanying notes 46-47.
135. *See supra* text accompanying notes 46-47.
136. *See* Center for Disease Control, *Trends in State and Federal Cigarette*

weighted average of state cigarette taxes was constant at approximately fifteen cents per pack, but since that time, the average has slowly increased and was slightly above fifty cents per pack in 1995.[137] Some states have levied excise taxes approaching one dollar per pack.[138] These tobacco taxes have generated significant revenues for states to use in various ways.[139]

Admittedly, these sums do not compare to the large amounts each state has spent to provide health care for tobacco-related illnesses.[140] However, states have been collecting these taxes for a long period of time. In the aggregate, the total tobacco tax revenues for at least the more populous states should approach, and perhaps exceed, the health care costs for which many states are now suing to recover from the tobacco industry.[141]

This factor is important to consider when analyzing the equities of the parties in these Medicaid suits, especially for the

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Tax and Retail Price—United States, 1955-1995 (visited Feb. 5, 1998) <http://www.cdc.gov/nccdphp/osh/cigtax.html>.

137. *See id.*

138. *See* Federation of Tax Administrators, *State Cigarette Tax Rates* (visited Feb. 4, 1998) <http://www.taxadmin.org/fta/rate/cigarett.html>. For example, Washington ranked first among all 50 states with a cigarette tax of $0.825 per pack while Massachusetts came in second and Michigan third with taxes of $0.76 and $0.75, respectively. *See id.*

139. For example, in 1994, Florida collected approximately $974 million in excise taxes from both alcohol and tobacco. *See* Search of Statistical Abstract of the United States, Card 489 (1996 CD-ROM). It is estimated that Florida's cigarette tax alone generates $440 million per year above the sales tax revenue. *See* Richard N. Pearson, *The Florida Medicaid Third-Party Liability Act*, 46 FLA. L. REV. 609, 633 (1994). Texas raised $974 million through combined alcohol and tobacco excise taxes, while Illinois generated $364 million. *See* Search of Statistical Abstract of the United States, Card 489 (1996 CD-ROM).

140. For example, Mississippi collected $91 million in 1992 from alcohol and tobacco excise taxes, Search of Statistical Abstract of the United States, Card 489 (1996 CD-ROM), but claims to spend between $60 and $80 million each year on Medicaid solely for tobacco-related illnesses. *See* Pettigrew-Kraft, *supra* note 45.

141. For example, Florida raises an estimated $440 million each year above its sales tax revenue from tobacco excise taxes alone. *See* Pearson, *supra* note 138, at 633. If this level of revenue is somewhat constant for even five years, the State of Florida would have over $2 billion in revenue from tobacco. It is estimated that Florida is trying to recover approximately $2 billion in Medicaid payments from tobacco manufacturers. *See* Artero, *supra* note 106. Although states with less revenue from tobacco taxes may not be able to exactly meet one year's Medicaid expenditures with tobacco tax revenue, the total revenue collected may be close to the expenditure level. *See supra* note 139.

states whose claims are not statutory.[142] All of the states are claiming to have special rights in the Medicaid suits, including the ability to sue under claims denying affirmative defenses to tobacco manufacturers and to prove causation generally without having to show it for all individuals who received Medicaid for tobacco-related illnesses.[143] Thus, states that have profited from the sale and use of tobacco are now asking for more money to cover Medicaid expenses from tobacco-related illnesses.

Even for states pursuing non-equity claims, tobacco tax collections should be a significant factor in determining whether the states have gone too far by creating causes of action that unfairly prejudice the tobacco industry. In defending against their actions, these states might claim that they have unfairly borne the burden of medical illnesses that have resulted from tobacco use. However, these states have also received a windfall from smoking in the form of tobacco tax revenues. The windfall should help offset the burden; thus, this kind of justification falls short of warranting the measures that the states have taken.

Under current federal law, states are not prevented from seeking reimbursement because they have collected taxes on the sale of tobacco.[144] However, in determining whether the states have reached beyond acceptable boundaries in obtaining special advantages against the tobacco manufacturers, the collection of tobacco taxes should be considered. Given that the states have enjoyed the fruits of tobacco use, the overall equities of the parties appear to be somewhat different. At the very least, it weighs against the states' attempts to prevent tobacco manufacturers from presenting an adequate defense and may even warrant a prohibition on suits for Medicaid reimbursement.

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142. Many of the states suing under common-law claims also are pursuing claims in equity. *See, e.g., Maryland, Industry Battle, supra* note 54. A claimant with "unclean hands" generally cannot be successful with equitable claims. *See, e.g.*, Prism Partners, L.P. v. Figlio, No. 01A01-9703-CV-00103, 1997 WL 691528, at *6-7 (Tenn. Ct. App. Nov. 7, 1997).

143. *See, e.g.*, Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239 (Fla. 1996), *cert. denied*, 117 S. Ct. 1245 (1997); *see also* Christian & Armstrong, supra note 47, at 6-7.

144. Rather, states participating in the Medicaid program have a responsibility to seek reimbursements for Medicaid payments from responsible third parties in certain situations. *See* 42 U.S.C. § 1396a(a)(25)(B) (1994); *see also infra* Part III.C.

C. *No Federal Mandate for States to Pursue Unfair Actions Against Third Parties*

Some may argue that federal law mandates the states' inequitable treatment of tobacco manufacturers in the Medicaid recovery suits. However, there is no basis for this conclusion in the federal statutes governing Medicaid. Rather, the statutory language reveals that no such mandate exists.

Medicaid is a joint federal-state program that furnishes federal money to participating states to provide health care for low-income individuals.[145] State participation in the program is not required; states that do join, however, must satisfy various federal guidelines.[146] One of these federal guidelines requires that the "State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan . . . ."[147] If a state determines that a third party is legally liable for the medical care provided and that "the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability."[148] Thus, states participating in the program must attempt to recover the proceeds spent on medical care for which a third party is legally liable when it makes economic sense to do so. States currently suing the tobacco companies for Medicaid reimbursement are thus following the federal mandate to recover tobacco-related Medicaid payments from tobacco manufacturers.

However, the requirement that participating states attempt to recover Medicaid payments from potentially liable third parties does not compel the states to use causes of action that diminish the ability of third parties to defend themselves. The federal

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145. *See generally* 42 U.S.C. §§ 1396-1396a (1994). The states apply both federal and state money towards the health care costs. *See id.*; *see also* Methodist Hosp. v. Indiana Family & Social Serv. Admin., 860 F. Supp. 1309, 1314-15 (N.D. Ind. 1994).

146. *See Methodist Hosp.*, 860 F. Supp. at 1315. For example, Medicaid service providers may not refuse to provide medical care to individuals qualifying under the program simply because a third party may be liable for the medical costs. *See* 42 U.S.C. § 1396a(a)(25)(D) (1994).

147. 42 U.S.C. § 1396a(a)(25)(A) (1994) (citation omitted).

148. 42 U.S.C. § 1396a(a)(25)(B) (1994).

government only requires that a participating state have "in effect laws under which, to the extent that payment has been made under the State plan[,] . . . the State is considered to *have acquired the rights of such individual* to payment by any other [potentially liable third] party for such health care items . . . ."[149] Therefore, the language of this statute implies that a state suing for Medicaid reimbursement need only have laws in effect that allow the state to sue in traditional subrogation actions. However, states that are currently suing tobacco manufacturers are doing more than "acquiring the rights" of the Medicaid recipient; they are creating their own rights that are not subject to any of the affirmative defenses that the Medicaid recipient would have to face.[150]

Thus, while states are authorized to pursue claims against potentially liable third parties, federal statutes do not mandate the use of claims that provide legal rights beyond the traditional subrogation action. As a result, states cannot argue that their unfair impediments to the defense of tobacco companies are mandated or justified by federal law.

IV. CONCLUSION

After examining the Florida Medicaid reimbursement suit against tobacco manufacturers and analogizing to the suits by other states, it is apparent that these states are attempting to sue under the rights of individual Medicaid recipients without incurring any of the risks that have been associated with individual suits. At first glance, this attempt may seem fair given the harm that tobacco use can cause. However, a closer look indicates that the equities do not entirely favor the states. While the states have prevented tobacco companies from using affirmative defenses, they have simultaneously received millions in tobacco tax revenues.[151] Although federal statutes require states participating in Medicaid to attempt to recover from potentially

149. 42 U.S.C. § 1396a(a)(25)(I) (1994) (emphasis added).

150. *See* Agency for Health Care Admin. v. Associated Indus., 678 So. 2d 1239, 1260 (Fla. 1996) (Grimes, J., concurring in part and dissenting in part) ("The State has arrogated to itself a right that no other plaintiff can claim."), *cert. denied*, 117 S. Ct. 1245 (1997).

151. *See supra* notes 138-39.

liable third parties, the statutes do not mandate the use of claims with such inequitable effects.

Under current law, the question is not whether the states have the general power to sue the tobacco manufacturers, but how they should be able to maintain and prove their claims. However, there are still more fundamental questions of whether the states should be able to sue the tobacco industry and whether suing is the most cost-effective method to recover these proceeds.[152] Because of the potential that some or all of the states will not be successful in recovering reimbursement from tobacco manufacturers, states should consider other methods of increasing revenue such as higher excise taxes. Such methods may ultimately be more successful and further the goal of reducing the monetary and social costs of smoking.

Because Congress has not yet accepted the settlement with the tobacco industry and only one of the state suits has gone to trial, the impact of these suits is unclear. Regardless of the result, the fight has been a long and expensive one and may lead to dramatic changes in the way the states pursue claims against all types of third parties such as alcohol manufacturers and producers of other unhealthy or dangerous products.

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152. Federal statutes only require that the State sue to recover Medicaid payments from potentially liable third parties when the State reasonably expects to recover more than the costs incurred to obtain that recovery. *See* 42 U.S.C. § 1396a(a)(25)(B) (1994). For all of the states except Alabama, private attorneys are working on the state cases on a contingency basis under which they would receive 25% of any recovery. *See* Johnson & Nirode, *supra* note 48. While states using private attorneys on a contingency basis will not have to front any of the costs, lawyer's fees will significantly reduce any award. In addition, private lawyers may be influenced by the prospect of any potential recovery rather than the best interests of the public. *See id.* Using a state's own attorneys, however, would cost taxpayers millions of dollars. *See id.*