21. Tobacco and the Rule of Law

Congress should

- deny funding for the Justice Department's suit against cigarette makers,
- enact, under the Commerce Clause, legislation that abrogates the multistate tobacco settlement, and
- deregulate the growing of tobacco and the manufacture and advertising of tobacco products.

Ten months after tobacco companies and 46 state attorneys general settled their differences for a quarter of a trillion dollars, the U.S. Department of Justice decided that it wanted a share of the plunder. DOJ's complaint alleges that cigarette companies have conspired since the 1950s to defraud the American public and conceal information about the effects of smoking. Specifically, the government contends that industry executives knowingly made false and misleading statements about whether smoking causes disease and whether nicotine is addictive.

On the one hand, DOJ promotes its novel lawsuit to recapture health care outlays for smoking-related diseases. On the other hand, the same watchdog agency stands idly by while tobacco companies and state attorneys general team up to violate the antitrust laws. The multistate tobacco settlement, a cunning and deceitful bargain between the industry and the states, allows the tobacco giants to monopolize cigarette sales and foist the cost onto luckless smokers.

Congress can take affirmative steps to counteract those abuses of executive power: first, by denying funds for DOJ's suit and, second, by enacting legislation that abrogates the multistate tobacco settlement. At the same time, Congress should deregulate tobacco farming and the advertising of tobacco products and reject any attempt to regulate tobacco as a drug.

Deny Funding for the Justice Department's Suit against Cigarette Makers

In its latest litigation against the tobacco industry, the federal government sought to recover billions of dollars annually in federal health care expenditures—mostly Medicare outlays—related to smoking. DOJ's legal theory was modeled after the states' lawsuits, which were designed to replenish depleted Medicaid coffers. Like the states, the federal government argued that it can sue tobacco companies without stepping into the shoes of each smoker. That way, so the theory goes, DOJ would not be subject to the "assumption-of-risk" defense that was a consistent winner for the industry over four decades of litigation.

As you would expect, Bill Clinton understands the assumption-of-risk principle perfectly well. Indeed, his former veterans affairs secretary, Jesse Brown, invoked it when the government itself was threatened with liability for having provided millions of soldiers with cigarettes over the years. It would be "borderline absurdity" to pay for "veterans' personal choice to engage in conduct damaging to their health," he said. "If you choose to smoke, you are responsible for the consequences."

Evidently, that principle applies only if the accused is a government agency, not a private company. In its lawsuit DOJ asserted that it could recover from the tobacco industry merely because smoking injured someone protected by Medicare—even if that person, having voluntarily assumed the risk of smoking, could not recover on his own. The same tobacco company selling the same cigarettes to the same smoker, resulting in the same injury, would be liable only if the smoker is a Medicare recipient and the government is the plaintiff. Otherwise, the assumption-of-risk defense would apply. Liability hinges on the injured party's Medicare status, a happenstance utterly unrelated to any misconduct by the industry—and a legal doctrine that doesn't even pass the laugh test.

The federal government also wanted the court to ignore the traditional tort law requirement that causation be demonstrated smoker by smoker. Instead, DOJ sought to adduce only aggregate statistics, which indicated a higher incidence of certain diseases among smokers than among nonsmokers. For example, statistics show that smokers are more likely than nonsmokers to suffer burn injuries. So tobacco companies would have to pay for many careless persons who fell asleep with a lit cigarette. Similarly, the industry would be asked to shell out for persons who had heart attacks and other "smoking-related" diseases—but never smoked. Without indi-

vidualized corroborating evidence, aggregate statistics suggest liability. Only common sense dictates otherwise.

To reinforce and supplement its bizarre tort theories, DOJ relied on three statutes: the Medical Care Recovery Act, the Medicare Secondary Payer Act, and the civil provisions of the Racketeer Influenced and Corrupt Organizations Act. In alleging a violation of RICO, which was supposed to be invoked against organized crime, the government has stooped to what nowadays is a standard bullying tactic of plaintiffs' attorneys. This time, however, DOJ has to deal with an embarrassing admission, tucked away in the final sentence of the press release that announced its lawsuit: "There are no pending Criminal Division investigations of the tobacco industry."

Two dozen prosecutors and FBI agents had conducted a five-year, multi-million-dollar inquiry during which they dissected allegations and plowed through documents for evidence that tobacco executives perjured themselves and manipulated nicotine levels. Whistle blowers and company scientists testified before grand juries. The outcome: not a single indictment of a tobacco company or industry executive.

Nonetheless, Attorney General Janet Reno somehow conjured up a RICO claim that accused the industry of the very same infractions for which grand juries could not find probable cause. Here's just one example, count number three: In November 1959, the industry "did knowingly cause a press release to be sent and delivered by the U.S. mails to newspapers and news outlets. This press release contained statements attacking an article written by then–U.S. Surgeon General Leroy Burney about the hazards of smoking." There you have it—racketeering, in all its sordid detail.

DOJ's claims under the Medical Care Recovery Act aren't much better. The MCRA, passed in 1962, was intended to circumvent a 1947 Supreme Court case that denied a right of recovery under federal common law for government medical outlays for a soldier's injuries caused by a defendant's negligence. In no instance has the MCRA ever been used to reclaim Medicare expenditures. Indeed, because the MCRA was enacted three years before Medicare, it could not have been within the contemplation of Congress that Medicare costs would be recoverable.

As a fallback, DOJ is also claiming under the Medicare Secondary Payer Act. That 1980 statute expressly covers Medicare expenditures, but the MSPA is invoked against an injured party or his private insurer, not against a tortfeasor. The purpose of the statute is to prevent an injured party from recovering twice—once from a private insurer and a second

time from Medicare—or to ensure that a private insurer isn't let off the hook for a legitimate claim just because the claim might otherwise be covered by Medicare. The MSPA has never been employed to establish liability for an injury; it was designed for cost recovery only after liability has been determined.

That legal analysis is well-known to the Clinton administration, which is why Attorney General Reno repeatedly rejected a federal cause of action against tobacco companies for Medicare reimbursement. Commenting on the DOJ lawsuit, former Clinton aide Rahm Emanuel put it this way: "If the White House hadn't asked, [Reno] would never have looked at it again."

So it's politics, not law, that's driving this litigation. This past September, a federal judge dismissed the government's claims under the MCRA and the MSPA, but the RICO claim is still pending. Congress can put an immediate stop to DOJ's attempted extortion by denying funds to continue the lawsuit.

Enact, under the Commerce Clause, Legislation That Abrogates the Multistate Tobacco Settlement

While DOJ presses its campaign to extort money from hapless tobacco companies, the Antitrust Division looks the other way as those same companies, in collaboration with state attorneys general, commit what is arguably the most egregious antitrust violation of our generation—a collusive tobacco settlement that is bilking 45 million smokers of a quarter of a trillion dollars.

The Master Settlement Agreement (MSA), signed in November 1998 by the major tobacco companies and 46 state attorneys general, transforms a competitive industry into a cartel, then guards against destabilization of the cartel by erecting barriers to entry that preserve the 99 percent market dominance of the tobacco giants. Far from being victims, the big four tobacco companies are at the very center of the plot. They managed to carve out a protected market for themselves—at the expense of smokers and tobacco companies who did not sign the agreement.

To be sure, the industry would have been happier had the settlement not been necessary. But, given the perverse legal rules under which the state Medicaid recovery suits were unfolding, the major tobacco companies were effectively bludgeoned into negotiating with the states and the trial lawyers. Finding itself in that perilous position, the industry shrewdly bargained for something pretty close to a sweetheart deal.

The MSA forces all tobacco companies—even new companies and companies that were not part of the settlement—to pay "damages," thus foreclosing meaningful price competition. Essentially, the tobacco giants have purchased (at virtually no cost to themselves) the ability to exclude competitors. The deal works like this: Philip Morris, Reynolds, Lorillard, and Brown & Williamson knew they would have to raise prices substantially to cover their MSA obligations. Accordingly, they were concerned that smaller domestic manufacturers, importers, and new tobacco companies that didn't sign the agreement would gain market share by underpricing cigarettes. To guard against that likelihood, the big four and their state collaborators added three provisions to the MSA:

First, if the aggregate market share of the four majors were to decline by more than two percentage points, then their "damages" payments would decline by three times the excess over the two-percentage-point threshold. Any reduction would be charged against only those states that did not adopt a "Qualifying Statute," attached as an exhibit to the MSA. Naturally, because of the risk of losing enormous sums of money, all of the states have already enacted, or will soon enact, the statute.

Second, the Qualifying Statute requires all tobacco companies that did not sign the MSA to post pro rata damages—based on cigarette sales—in escrow for 25 years to offset any liability that might hereafter be assessed! That's right—no evidence, no trial, no verdict, no injury, just damages. That was the stick. Then came the carrot.

Third, if a nonsettling tobacco company agreed to participate in the MSA, the Qualifying Statute would not apply. In fact, the new participant would be allowed to increase its market share by a whopping 25 percent of its 1997 level. Bear in mind that all nonsettling companies combined in 1997 had roughly 1 percent of the market, which, under the MSA, could grow to 1.25 percent. Essentially, the dominant companies guaranteed themselves 99 percent of the market in perpetuity.

Perhaps of equal importance, the settlement has led to massive and continuing shifts of wealth from millions of smokers to concentrated pockets of the bar. Predictably, part of that multi-billion-dollar booty has started its roundtrip back into the political process—to influence state legislators, judges, attorneys general, governors, city mayors, maybe some federal officials. With all that money in hand, trial lawyers will see their political influence grow exponentially. Every day that passes more firmly entrenches the MSA as a fait accompli, and more tightly cements the insidious relationship between trial attorneys and their allies in the public

sector. The billion-dollar spigot must be turned off before its corrupting effect on the rule of law is irreversible.

An obvious way to turn off the spigot is to abrogate the MSA. Without question, the MSA violates the antitrust laws and the Constitution—specifically, the Commerce Clause (art. I, sec. 8) and the Compacts Clause (art. I, sec. 10), which provides that "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State." Indeed, what could be a more blatant violation of those two clauses than the MSA? It is a *multistate* agreement, negotiated without congressional consent, that preempts key federal functions like taxation and regulation of interstate commerce. The MSA authorizes states to exercise powers they could not otherwise exercise—for example, the collection of "damages" based on sales in other states, the interstate regulation of cigarette advertising, and the exaction of penalties against out-of-state companies that do not sign.

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If the MSA is allowed to stand, it will create and finance a rich and powerful industry of lawyers who know how to manipulate the system and are not averse to violating the Constitution or the laws. In short, the MSA should be dismantled, the legal fees refunded, price increases canceled, and competition restored. That's a tall order, but the stakes are immense.

Deregulate the Growing of Tobacco and the Manufacture and Advertising of Tobacco Products

If Congress truly wants to discourage tobacco consumption, it can start by phasing out farm support programs. There can be no rational explanation of why the Department of Agriculture should be promoting an activity that other federal and state agencies are attempting to restrain. True enough, tobacco quotas raise prices over the short term, and that reduces consumption. But the welfare of farmers, not a decline in cigarette sales, was and still is the justification for support programs. Moreover, the long-term effect of our quota system is to dissuade existing and prospective tobacco

farmers from seeking another livelihood. That exacerbates the problem by expanding supply and lowering price, which increases the use of tobacco products.

Equally counterproductive is regulation of the manufacture of tobacco products. Yet there is some sympathy in Congress for conferring on the Food and Drug Administration the power to regulate nicotine content. That would be an unconstitutional delegation of legislative discretion to an unelected and unaccountable administrative agency. Federal legislative authority to regulate tobacco, if it exists at all, is vested in Congress. Delegation of that authority to the FDA violates a centerpiece of our Constitution—the separation of powers doctrine—by vesting a single agency with lawmaking, enforcement, and adjudicative powers (see Chapter 8 on delegation).

Moreover, if tobacco were to be regulated as a drug, Congress would simply be guaranteeing a pervasive black market in cigarettes. FDA regulation coupled with higher cigarette prices will inevitably foment illegal dealings dominated by criminal gangs hooking underage smokers on an adulterated product freed of all constraints on quality that competitive markets usually afford.

The war on cigarettes, like other crusades, may have been initially well-intentioned; but as zealotry takes hold, the regulations become foolish and ultimately destructive. Current attempts to control tobacco advertising are unwise. Not only are the public policy implications harmful, but there are obvious First Amendment violations that should concern every American who values free speech.

Industry critics point to the impact of tobacco ads on uninformed and innocent teenagers. But the debate is not whether teens smoke; they do. It's not whether smoking is bad for them; it is. The real question is whether tobacco advertising can be linked to increases in aggregate consumption. There's no evidence for that link. The primary purpose of cigarette ads, like automobile ads, is to persuade consumers to switch from one manufacturer to another. Six European countries that banned all tobacco ads have seen overall sales *increase*—probably because health risks are no longer documented in the banned ads.

If advertising were deregulated, newer and smaller tobacco companies would vigorously seek to carve out a bigger market share by emphasizing health claims that might bolster brand preference. But in 1950 the Federal Trade Commission foreclosed health claims—like "less smoker's cough"— as well as tar and nicotine comparisons for existing brands. To

get around that prohibition, aggressive companies created new brands, which they supported with an avalanche of health claims. Filter cigarettes grew from roughly 1 percent to 10 percent of domestic sales within four years.

Then in 1954 the FTC tightened its restrictions by requiring scientific proof of health claims, even for new brands. The industry returned to advertising taste and pleasure; aggregate sales expanded. By 1957 scientists had confirmed the benefit of low-tar cigarettes. A new campaign of "Tar Derby" ads quickly emerged, and tar and nicotine levels collapsed 40 percent in two years. To shut down the flow of health claims, the FTC next demanded that they be accompanied by epidemiological evidence, of which none existed. The commission then negotiated a "voluntary" ban on tar and nicotine comparisons.

Not surprisingly, the steep decline in tar and nicotine ended in 1959. Seven years later, apparently alerted to the bad news, the FTC reauthorized tar and nicotine data but continued to proscribe associated health claims. Finally, in 1970 Congress banned all radio and television ads. Overall consumption has declined slowly since then. In today's climate, the potential gains from health-related ads are undoubtedly greater than ever—for both aggressive companies and health-conscious consumers. Thanks in good part to ill-advised government regulation, however, those gains will not be realized. Instead of "healthy" competition for market share, we can probably look forward to more imagery and personal endorsements—the very ads that anti-tobacco partisans decry.

Conclusion

If the imperative is to reduce smoking among children, the remedy lies with state governments, not the U.S. Congress. The sale of tobacco products to youngsters is illegal in every state. Those laws need to be vigorously enforced. Retailers who violate the law must be prosecuted. Proof of age requirements are appropriate if administered objectively and reasonably. Vending machine sales should be prohibited in areas like arcades and schools where children are the main clientele. And if a minor is caught smoking or attempting to acquire cigarettes, his parents should be notified. Parenting is, after all, the primary responsibility of fathers and mothers, not of government.

Instead, government has expanded its war on tobacco far beyond any legitimate concern with children's health. Mired in regulations, laws, taxes, and litigation, we look to Congress to extricate us from the mess it

helped create. If Congress continues to subsidize tobacco farmers, regulate cigarette ads, and control the content of tobacco products, it will exacerbate the problem. Politicians on both the left and the right will attack products deemed by them, our moral overseers, to be bad for us. There will be no shortage of candidates as do-gooders take aim at everything from chocolate to automobiles, red meat to sporting equipment; the list is endless. Then we will have bequeathed to our children a two-part message more cancerous than cigarettes: First, it is okay to change the rules after the game has begun. Second, you can engage in risky behavior and then force someone else to cover the costs.

Suggested Readings

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—Prepared by Robert A. Levy