

ADVERTISEMENT



Los Angeles Times

LOG IN



## Untested Theory Becoming Tobacco Firms' Top Threat

By HENRY WEINSTEIN AND JACK NELSON

AUG. 4, 1996 12 AM PT



TIMES STAFF WRITERS

PASCAGOULA, Miss. — It was an ingenious, if untested, legal theory--hatched by four old law school friends searching for the “master stroke” that might finally beat the tobacco companies in court.

For decades, the companies have been sued by smokers who alleged that cigarettes damaged their health, but the firms never had to pay a dime in damages. Their invincible defense: Smokers had exercised “personal choice” and assumed the risk of health dangers.

Looking for the crack in that armor, these ‘Ole Miss’ grads--including the attorney general of Mississippi--reasoned that the state had suffered its own considerable damage from tobacco-related illnesses. Why shouldn't Mississippi file suit against the major cigarette companies to recover medical costs the state incurred treating smokers?

“The state of Mississippi didn't smoke cigarettes, but the state of Mississippi has had to pay about \$100 million a year for the care of our residents who smoked after they were deceived by the cigarette companies about the addictive nature of their products,” said state Atty. Gen. Mike Moore.

ADVERTISING

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**



---

**SUBSCRIBE**

---

When Mississippi filed its lawsuit in the Chancery Court here May 23, 1994--the first health-related suit ever by a government agency against the \$45-billion-a-year tobacco industry--the case looked like a long shot lodged by an aggressive prosecutor.

Twenty-six months later, no one is taking Moore lightly, least of all the cigarette companies.

Nine other states and one city have filed similar lawsuits seeking to recoup the cost of treating indigent Medicaid patients, while three other states and Los Angeles County have announced their intention to sue. Still other states are considering such a move.

These Medicaid suits now represent “the most ominous legal threat” facing the tobacco makers, said Stanford University law professor Robert Rabin.

The states are suing for their share of their contributions to the federal program. The sums involved are staggering. Every state is asking for at least hundreds of millions of dollars, and some, such as Connecticut, Florida, Maryland, Massachusetts and Texas, are asking for more than \$1 billion in restitution and damages. Additionally, the states want to prohibit what they call the companies’ illegal marketing of their products to people under 18.

In essence, the attorney generals are seeking to establish for the first time that the tobacco companies have as much obligation to compensate the states for damages caused by their product as an oil company has for the cost of cleaning up a spill. The cigarette companies say they will vigorously defend themselves and expect to win these cases, like those in the past.

The suits represent “a novel and extreme departure from well-established law,” said David Bernick, who is representing Brown & Williamson Tobacco. “These attorney general cases involve jurisprudential and practical problems that are so fundamental they should never go to trial,” he added.

Daniel Donahue, R.J. Reynolds deputy general counsel, also contends that the lawsuits are a “politically correct” attempt to, in effect, tax them for selling a legal product. That, they say, can only be done by a legislative body.

---

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**

×

---

**SUBSCRIBE**

The attorney generals express confidence in their ability to prevail in court. But they also make it clear that they have broader goals. “We want to be an agent of change,” said Minnesota Atty. Gen. Hubert H. Humphrey III. “We want these companies to change their ways and fund a public education campaign about the dangers of smoking.”

Moore, who has been traversing the country encouraging other attorney generals to join the fray, states his goal in grander terms: “I’m trying to get as many states involved as possible to make this a national movement. . . . That may get the companies to come to the table for a settlement to make a safer product, stop selling to kids and make reparations.”

**Conspiracy Charge** At the heart of the Medicaid cases is the contention that the cigarette companies have known since the early 1950s that their products were dangerous to people’s health. While claiming to be sponsoring independent research, the companies allegedly suppressed information about the hazards and the addictive character of nicotine, the prime ingredient in cigarettes, and acted in collusion to prevent development of a safer cigarette.

According to the lawsuits, the conspiracy began in late 1953 at a secret meeting at New York’s Plaza Hotel after cigarette manufacturers were presented with the first major studies showing a link between lung cancer and smoking. Citing documents unearthed in recent years, the suits allege that the industry, working with public relations firm Hill and Knowlton, formed a research arm whose public face was to conduct independent research to answer questions about smoking and health, when in fact it suppressed and distorted the facts about the health hazards and addictive nature of its products.

ADVERTISEMENT

Moore and the other attorney generals say the conspiracy continues to this day, including the 1994 congressional testimony of cigarette company presidents that they believed their products are not addictive.

Minnesota’s case, filed three months after Mississippi’s, is more expansive than the Mississippi suit and appears to

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**

✕

Lawyers pressing the lawsuits say they will present their cases in four interlocking parts:

**SUBSCRIBE**

\* A plethora of medical studies showing the link between smoking and various illnesses including lung cancer and heart disease.

ADVERTISEMENT

\* State records and expert testimony showing taxpayer expenditures for treating indigent smokers.

\* Documents that detail the industry's alleged conspiracy of deceit, including the manipulation of nicotine levels to increase smokers' addiction.

\* Information about the defendants' efforts to hook children into tobacco use through sophisticated, targeted advertising.

All the companies named in the suits deny wrongdoing. They are cigarette makers Philip Morris, R.J. Reynolds Tobacco, Brown & Williamson Tobacco and its parent company B.A.T. Industries, Lorillard Tobacco Co., the American Tobacco Co., the United States Tobacco Co.; the Council for Tobacco Research; the Tobacco Institute, a lobbying arm, and Hill and Knowlton.

ADVERTISEMENT

Tobacco industry lawyers object to the assertion that the states can seek damages without presenting the same kind

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**

×

Also, the industry contends that the states have not been damaged because they each have excise taxes on the sale of cigarettes.

**SUBSCRIBE**

s in

And in perhaps their most controversial argument, cigarette industry lawyers have argued in pretrial hearings that if and when these cases go to trial, they are entitled to present evidence that their clients have saved money for the states because of the premature deaths of smokers, who as a consequence were no longer the beneficiaries of taxpayer supported programs such as Medicaid and Social Security.

All of those defenses are vigorously contested by the attorney generals in and out of court.

ADVERTISEMENT

As to the contention that many smokers must be deposed, Moore stressed that Mississippi's case is not a smoker lawsuit where individuals would recover damages, but a taxpayer lawsuit akin to litigation where a state seeks to recover the cost of abating chemical waste dumped by a corporation.

This is one of the threshold legal points that will determine the scope and nature of the cases. So far, the judges in Mississippi and Minnesota have issued orders permitting the companies to depose 20 Medicaid recipients, far less than what the companies want. Moreover, it remains to be seen what role those depositions will play in the trials.

The lawyers pressing the lawsuits gave short shrift to the other industry contentions. Tom Pursell, the deputy attorney general in Minnesota, asserts that it is ludicrous for the companies to say that the collection of excise taxes on cigarettes prevents the states from seeking damages. "Consumers paid those taxes, not the companies." And further, Pursell said, "just because you pay taxes doesn't entitle you to break the law."

His boss, Humphrey, became nearly apoplectic about the so-called "early death" argument. "How sick can you get!" he exclaimed at his office in St. Paul. "It boggles my mind that an industry would use that argument."

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**

×

---

**SUBSCRIBE**

High-Powered Foes To wage this new assault on the tobacco industry, the states have linked forces with high-powered private attorneys who have won major victories against corporate giants.

In the past, said John F. Banzhaf III, director of Action on Smoking and Health and a longtime industry critic, individuals suing the tobacco companies have been represented by small law firms that were outgunned by the vastly superior resources of the well-financed firms representing the cigarette companies.

But in the Medicaid cases, the industry is facing a gantlet of government attorneys working hand in hand with a consortium of veteran and often well-heeled products liability lawyers. Those private lawyers are bearing the upfront costs of the lawsuits in return for the possibility of big fees down the road if they prevail. (In most states, there is a formal agreement providing that the private lawyers will get a percentage of the recovery--25% is typical.)

Moreover, in Minnesota, Massachusetts and Connecticut, the Blue Cross and Blue Shield insurance companies are helping underwrite the costs of the cases.

ADVERTISEMENT

Among the plaintiffs' lawyers are Michael Ciresi and Roberta Walburn, who worked on the mammoth Bhopal, India, chemical catastrophe, and H. Laddie Montague Jr., who helped win a \$5-billion verdict against Exxon Corp. in the Exxon Valdez oil spill.

Several of the others made their fortunes representing injured workers against asbestos companies. They include Richard Scruggs, Ron Motley and Peter Angelos, who parlayed his court victories into ownership of the Baltimore Orioles. These men are neither shrinking violets nor potted plants. Several own their own planes and have used them frequently in the course of this litigation.

Prime among them is Scruggs, who has flown his old friend Moore all over the country in his Lear jet as part of a

---

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**

✕

Also, Harvard law professor Laurence Tribe is providing pro bono guidance to four of the being assisted by a battery of medical economists, who are preparing damage models to p around the country.

---

**SUBSCRIBE**e  
ries

ADVERTISEMENT

To be sure, the tobacco companies are hardly lacking in top legal talent. In addition to their in-house lawyers, the companies are utilizing a bevy of barristers. All have retained at least two law firms in every state case.

In Mississippi, Philip Morris is represented by Washington's venerable Arnold & Porter as well as Houston's flamboyant Steve Susman and New York litigator Herbert Wachtell. He successfully represented the company in its 1995 libel suit against Capital Cities/ABC Inc. over a story that asserted that Philip Morris "spiked" cigarettes by adding nicotine in the manufacturing process.

R.J. Reynolds is utilizing Cleveland-based Jones, Day, Reavis & Pogue, the nation's second-largest law firm. Brown & Williamson has retained Atlanta's King & Spalding, whose partners include former Atty. Gen. Griffin Bell, and Chicago's Kirkland & Ellis, whose partners include Whitewater independent counsel Kenneth Starr.

The defense lawyers have responded to the latest round of litigation with all the vigor that has made their clients the nation's most successful corporate defendants.

ADVERTISEMENT

---

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**

✕

“If we believe the state does not have the authority, it seems to us an eminently good approach before the case is filed,” said R.J. Reynolds’ Donahue. “Why not get a resolution upfront?”

SUBSCRIBE

sues

None of the preemptive suits has succeeded so far, though they have angered several attorney generals.

“I believe the suit was filed with the sole purpose of intimidating my office from filing the suit. Obviously, that was unsuccessful,” said Texas Atty. Gen. Dan Morales.

ADVERTISEMENT

Maryland’s J. Joseph Curran said his office was visited three times by tobacco industry lawyers attempting to persuade him not to file his suit.

In Mississippi, Moore, a Democrat, has a battle on another front. Republican Gov. Kirk Fordice has challenged the attorney general’s right to file his case without Fordice’s permission. A trial judge rejected the governor’s argument. An appeal is pending in the state Supreme Court.

In several states, the companies have challenged the right of the attorney general to hire lawyers on a contingency fee basis. West Virginia is the only state where they have gotten a favorable decision so far.

The cigarette companies have sought to get some of the cases moved from state court to federal court. These efforts also have been unsuccessful. But the gravity of these procedural moves is illustrated by the big guns that both sides brought into the ring. In Massachusetts, the cigarette industry was represented by Wachtell, their ace in the ABC libel case. He was opposed by Tribe, who frequently argues considerably loftier issues in the U.S. Supreme Court. This time Wachtell lost.

ADVERTISEMENT

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**

×



---

**SUBSCRIBE**

## Pitched Battles

If the early combat is any indication, these cases will be lengthy pitched battles. Nothing goes unchallenged.

That is not surprising given the high stakes, said UCLA law professor Gary Schwartz, co-author of a book on tobacco policy issues. "We're talking about a new pattern of claims that could impose a huge economic burden on a major American industry," he said.

The most extensive pretrial skirmishing has taken place in Mississippi and Minnesota, the first states to file their suits.

ADVERTISEMENT

Mississippi won its first major victory Feb. 21, 1995, when a judge rejected the defendant's motion to dismiss. Until then, Steve Bozeman, one of the four University of Mississippi lawyers who developed the case, did not know whether the theory would fly. "That was a great day. That was when we knew we had a lawsuit."

Later that year, a Minnesota trial judge spurned the industry's dismissal motion, paving the way for that suit to move ahead.

The industry appealed part of that ruling. In late July, the Minnesota Supreme Court rebuffed the tobacco industry's effort to knock Blue Cross/Blue Shield out of the case, on all but one count.

So far, the most extensive discovery has been conducted in Minnesota. The state has wrested more than 10 million pages of documents out of the tobacco companies and their trade associations during pretrial discovery. Most of those papers are still under seal in closely guarded depositories in Minneapolis and Guilford, England. Attorneys on both sides expect that several million more pages will be produced by the end of the year.

---

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**

×

For his part, RJR lawyer Donahue characterized Minnesota's documents as excessive and burdensome and said the pretrial discovery orders in Minnesota are the most invasive he has ever encountered. As an example, he cited a judge's order that the law firms turn over voluminous databases they had compiled while defending the industry in earlier suits.

Reynolds and the other defendants took that issue all the way to the U.S. Supreme Court--which declined to overturn the judge's order.

On the other hand, the defendants have made extensive discovery requests themselves, asking for state Medicaid payment records and other reports--key information as they attempt to challenge the validity of the states' claims about how much cost they have borne in treating smokers.

When and if the discovery material becomes public, the blizzard of paper should add substantially to the public's knowledge of how the cigarette industry has conducted itself for the past 40 years and just how much smoking-attributable illnesses have cost the states.

ADVERTISEMENT

During the past decade, a passel of damaging documents about the tobacco industry have emerged--including many stolen and then leaked by Merrell Williams, a former paralegal for a Brown & Williamson law firm. Others were released by Rep. Henry A. Waxman (D-Los Angeles), a major critic of the industry.

Walburn, the special counsel to Minnesota and Blue Cross of Minnesota, said it is her belief that the documents released to date "are only the tip of the iceberg."

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**

✕

That is one of hundreds, perhaps thousands, of industry documents that the states' attorneys general and juries. There is little doubt that the companies will resist these efforts.

SUBSCRIBE

before

ADVERTISEMENT

"We are fighting over every inch of turf in this case," Walburn said, "and even after we get a decision we have to fight over it again."

---

SUBSCRIBERS ARE READING

CALIFORNIA

When will California get more COVID-19 vaccine? Here's what we know

TELEVISION

Sharon Osbourne, unsure if she's 'wanted there,' might not return to 'The Talk'

LIFESTYLE

Take a journey inside the first issue of Image in 13 images

CALIFORNIA

He was the king of water in the desert. His abusive reign revealed a troubling culture

TELEVISION

As Sharon Osbourne drama plays out, Sheryl Underwood is chill: 'Forgiveness first'

---

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**



SUBSCRIBE

Subscribe for unlimited access

Subscribe for unlimited access

Follow Us



Copyright © 2021, Los Angeles Times | [Terms of Service](#) | [Privacy Policy](#) | [CA Notice of Collection](#) | [Do Not Sell My Personal Information](#)

LIMITED-TIME  
OFFER

**FREEDOM OF THE PRESS EVENT**  
**\$4 GETS YOU 4 MONTHS**

