

Trampling ON the LAW

Volenti non fit injuria
"To one who is willing, no wrong is done."

By Jason Lewis

It is difficult to imagine a doctrine more crucial to the law than that of consent. As Peter Huber, a senior fellow at the Manhattan Institute, points out, the "old common law took the concept seriously enough to render it in Latin."

In contracts or torts, a willingness to expose oneself to a hazard has relieved defendants of legal culpability for centuries under English common law — from which we inherited ours. The notion of "consenting adult" is one reason that after 40 years of litigation the tobacco industry has emerged relatively unscathed from plaintiffs who sue for damages due to smoking-related illness or even death.

But the business of law surely appears to be to increase the business of law. The state of Minnesota, along with Blue Cross and Blue Shield of Minnesota (not to mention their lead counsel in the case, Robbins, Kaplan, Miller and Ciresi), stand to profit handsomely if they prevail in their attempt to recover damages from the tobacco industry for the costs of treating smoking-related illnesses.

The state and BCBS contend that the industry misled the public about the dangers of smoking in violation of Minnesota's fraud and antitrust statutes. They are seeking compensatory damages of \$1.77 billion, plus punitive damages, and plan to ask for a ban on "youth marketing" among other things.

However, before Attorney General Hubert Humphrey III rides tobacco litigation to the governor's mansion before BCBS attempts to transfer the costs of doing business from its shareholders to others, and before the plaintiffs' attorneys reap yet another windfall to they can spit some of the profits back into Democratic campaign coffers, it is worthwhile to take a look at what this lawsuit lottery is doing to the rule of law.

What about responsibility?

States seeking compensation for their Medicaid expenses due to tobacco (37 still have suits pending) "have gone to great lengths to avoid the traditional theory for third-party reimbursement, known as subrogation," according to Michael Debow, law professor at Sanford University in Alabama.

As Debow explains, under this customary rule of law, the state "is said to 'step into the shoes' of the Medicaid recipient, and is thus subject to any defense that the tobacco companies could assert against the individual if the state had brought the suit," including the defense that smokers assumed the risk.

Under the state's "novel approach" (Florida even codified its legal machinations by enacting legislation), tobacco companies can no longer assert certain defenses based on personal responsibility because they are now directly liable to the state rather than to the smokers. Moreover, states are relieved of proving that any particular person's illness was actually caused by smoking. They need only show "statistical proof of causation."

Good thing, because the states don't even know how many Medicaid patients used tobacco or if those related costs are higher due to smoking alone. Theoretically, the industry could be held liable if a Medicaid recipient falls asleep with a lit cigarette.

This is a classic case of judicial activism endorsing a lawsuit without a real plaintiff; indeed, as we shall see, a cause of action without injury. According to Alabama Attorney General Bill Pryor, we are treading on dangerous legal ground here that "cannot succeed under any traditional understanding of law."

Of course, fraudulent misrepresentation, of which the states accuse the tobacco industry, can trump assumption-of-risk. So why are the states so eager to avoid that line of defense? Because proving fraud demands more than just a misrepresentation; it must result in an injury caused by the plaintiff's inducement to act on the basis of such deception. Robert Levy, senior fellow in constitutional studies at the Cato Institute, says to override the assumption-of-risk defense, a plaintiff must show that he or she "relied on the misinformation." Even though the industry may have withheld or concealed data, if a plaintiff had "access to correct information from other sources, he may not have altered his behavior" anyway.

However, since the states are not filing their suits on behalf of injured smokers, but for Medicaid costs borne by the public treasury, the issue of defaming smokers is irrelevant. Instead, as Levy explains, a state will have to "demonstrate that its officials, or its taxpayers, or perhaps the public at large — not just smokers — relied on the industry's misrepresentations as a material inducement, not to smoke, but to participate in the federal Medicaid program."

Well, let's see. It's been nearly a century since 14 states, at the behest of the National Anti-Cigarette League, banned the sale of cigarettes for, in the words of the Tennessee Supreme Court when it upheld the statute, their "noxious and deleterious" effects. Public health advocates have been issuing warnings on the addictive nature of nicotine long before the Medicaid program came into existence. And insurance companies have been charging tobacco users higher premiums for decades.

And now, after 29-plus years of explicit warning labels and anti-smoking campaigns conducted by the government itself, we're told that our politicians were duped into insuring thousands of Minnesotans under Medicaid? Business executives at BCBS who had access to reams of public and private research data didn't know what they were voluntarily insuring? Indeed, in a 1982 decision, the Supreme Court, while allowing states to pursue fraud cases, interpreted the 1969 cigarette-labeling law as preempting suits alleging that the industry had failed to warn consumers.

Far from being fooled, the state of Minnesota actually suffers from what is referred to as "unclean hands." By distributing confiscated or contraband cigarettes to patients in veterans' homes and other institutions, including juvenile correctional facilities, our newfound guardians of health exacerbated any harm attributable to tobacco. And by investing taxpayer money in tobacco stock the state was profiting from its activity in no fewer than 10 ways.

Attorney General Humphrey even introduced legislation, while in the state legislature, allowing designated smoking sections for high schoolers of age. The good news is that many of those students decided to quit smoking as adults. There are now 44 million former smokers in this country, and most gave up the habit by themselves.

Let us also remember the states have willingly (there's that word again) reaped the tax windfall from cigarettes for decades. Smokers pay an average tax of 51 cents per pack for the right to light up, in

Excerpts

Excerpts from documents filed in the St. Paul Circuit Court of the state of Minnesota and Blue Cross and Blue Shield ("State") vs. the tobacco companies ("Tobacco").

State: This action arises out of a decades-long combination and conspiracy of willful and intentional wrongdoing by the leading cigarette manufacturers and their trade associations, which together control virtually the entire industry in Minnesota and are defendants herein.

Tobacco: Whether or not consumers smoke cigarettes is a matter of individual choice. Defendants assert that individuals are responsible for the choices they make, since information concerning possible health consequences associated with tobacco has been broadly available to the public, and commonly known for decades — even centuries.

State: The defendants' collective conduct has resulted in an unprecedented impact on the public health, in both human and economic terms. The death toll in one year alone from cigarette smoking equals the number of American lives lost in battles in all the wars this country has fought this century. Overwhelmingly, the new recruits in this death march are children and adolescents.

Tobacco: The state, acting through various state agencies and departments, has for almost 90 years demonstrated its awareness of the alleged health risks associated with smoking, starting with its enactment of an outright ban on the sale of cigarettes in 1909. Notwithstanding this knowledge, the state chose to repeal its ban on the sale of cigarettes in Minnesota, license cigarette distributors, impose excise taxes on the sale of the product and itself distribute cigarettes at various state facilities.

State: In part because of its concentration, the cigarette industry has long been one of America's most profitable businesses, with profit margins estimated in at least the 30 percent range. The industry continues to harvest billions of dollars in profits each year from domestic sales alone. In addition, the concentration of the industry has allowed the manufacturers and their two trade associations to engage in a decades-long conspiracy relating to the issue of smoking and health and to direct their considerable profits to further that end.

Tobacco: Defendants deny that they were negligent in any fashion and deny that they suppressed or concealed any information regarding the health risks of smoking from the public. Defendants also contend that their lawyers acted properly at all times and that they did not participate in any suppression or concealment of information.

Star Tribune illustration by Jim Freling

effect paying in advance for costs they might impose on governments. The states clearly participated in the so-called conspiracy by licensing tobacco, and receiving tax revenue from it. Maybe that's why it took Minnesota 30 years to press its claim.

Because of copious amounts of tax revenue generated from tobacco — a total net benefit of nearly \$10 billion — the states' legal premise of nonsmokers subsidizing smokers is fantasy. Professor W. Kip Viscusi of Harvard Law School calculates that the additional health-care costs of smoking aren't even enough to offset the cost savings to taxpayers from forgone pensions and nursing home care, as well as other costs associated with old age — which, as we know, many smokers never see.

Viscusi estimates additional health-care costs to be 50 cents per pack, but total lifetime savings so far outweigh the expense that smokers actually save society around \$2 cents per pack. Studies from the Netherlands and the Rand Corp. point to the same conclusion. It may be ghastly, but it is the essence of the state's case. Unfortunately, presiding Judge Kenneth Fitzpatrick refused to allow such data in court.

Top-dollar legal fees

As much as anything else, this is about hardball politics and money, a byproduct of socialized medicine and runaway contingency fees. Mississippi Attorney General Mike Moore picked his No. 1 campaign contributor, Richard Scruggs (who also received \$2.4 million in fees from the state's asbestos litigation) to lead his Medicaid recovery suit. Minnesota taxpayers have the right to know why Attorney General Humphrey chose to award Hibdon, Kaplan, Miller and Ciresi a 25 percent fee arrangement, when Texas, Illinois, Indiana and West Virginia had lower percentages.

The Wall Street Journal reported last fall that four lawyers who helped to settle Florida's billion-dollar windfall were now demanding 25 percent of the settlement, or \$1.4 billion. Florida Attorney General Bob Butterworth couldn't even stomach that one, calling it "enough to choke a horse." Gov. George W. Bush has filed a legal challenge to the whopping \$2.3 billion contingency fee as part of the recent Texas settlement in the interest of taxpayers who may end up paying for it.

This is not a defense of tobacco or the executives who run the industry, but of personal responsibility and the rule of law, even applied to those we like the least. The citizens of Minnesota, and the nation for that matter, shouldn't debate themselves into thinking they can jeopardize the rights of one industry without threatening others. Today we target Joe Camel for marketing to kids; tomorrow the Budweiser frogs. To retroactively impose a system of liability that no one could have foreseen is an egregious abuse of state power. It is tantamount to a legal lynching justified on the basis that the tobacco industry and its executives deserve it. Perhaps, but shouldn't we give them just a little due process before we hang them?

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