Roundtable: State Attorney General Litigation: Regulation Through Litigation and the Separation of Powers

PROFESSOR DEBOW: In light of Attorney General Pryor's objective, effective, and spirited defense of my presentation, I have only one other comment to make about what Attorney General Humphrey said. Attorney General Humphrey, if I have misunderstood you, please correct me. I think you said, "What would happen if you waited around for state legislatures to change tobacco policy?" Let me just remind everybody that every state legislature has already enacted taxes on cigarettes and regulations on cigarettes. It is not a question of whether the legislature will fail to do anything, so that, unless you have an activist attorney general, there will be no legal policy here. It is a question of how much legal policy you want. Different states have reached different levels of taxation on cigarettes,[1] different states have different restrictions regarding marketing to minors, but every state has some taxation of cigarettes, and some regulation of their sale. How much more regulation do you want?

ATTORNEY GENERAL HUMPHREY: You must remember what the foundation of action in our government is. Usually it is based upon facts. If you do not have the facts, you cannot act. With all due respect to Attorney General Pryor, my colleague from Alabama, there existed tons of information that no one knew about except the tobacco companies. When the legislatures received access to this information, they began to act, though they were under pressure from industry lobbyists. The fact is they are acting on the new information. So is Congress. I think you will continue to see more of this kind of action take place over the next decade because of the new facts.

AUDIENCE MEMBER: It seems a pretty powerful case that something went wrong in the tobacco settlement litigation. Yet I am not at all persuaded by the diagnosis that separation of power problems caused the litigation to go wrong. If you think about it, the attorneys general did not, and could not, do anything that private lawyers could not do if they were willing to take the financial risk. In fact, legislators can do it. So the question is what did go wrong, and it seems to me problematic that none of

[1] *See* FEDERATION OF TAX ADMINISTRATORS, STATE EXCISE TAX RATES ON CIGARETTES (Jan 1, 2001), at http://www.taxadmin.org/fta/rate/cigarett.html (last visited May 30, 2001).

these cases went with judgment through the court, not even in Minnesota. And so, we are missing the court's interpretation. Why? I suggest one possible reason is that a conspiracy existed between the trial lawyers, the attorneys general, and the tobacco companies against the public.

ATTORNEY GENERAL HUMPHREY: I think the reason in Minnesota that the tobacco companies finally settled was that they understood what the circumstances were in our court, which I think was different than in other courts. They realized the very high risk that punitive damages would be assessed. There were not punitive damages assessed in our case. The reality is that there could have been much more. I think the industry realized that and said, "You know, we better cut our losses." They spent a lot of money trying to make sure they did not have any losses.

I do agree with part of your argument, however. I do not think the premise should be the argument of separation of powers here. I want to strongly emphasize where Minnesota's case came from. We were enforcing state law. This was not about usurping somebody else's power. We were doing exactly what we have done in other antitrust, fraud, and deception cases. The results, of course, were rather significant. But this was a very, very significant industry that had caused very, very real harm and had violated the laws in very strong ways.

PROFESSOR DEBOW: Professor Fried, whenever I find myself in disagreement with you, I wonder where I have misstepped. I do not see how a private attorney could possibly sue to recover money that the state government has paid out to cover smoking-related illnesses. How could they do that without the cooperation of the state attorneys general? It seems to me a claim that only the states could bring.

ATTORNEY GENERAL PRYOR: Private attorneys could not do that.

AUDIENCE MEMBER: I think that is a fair point.

ATTORNEY GENERAL PRYOR: There are some other dynamics to the multistate litigation that I think are worth mentioning. You must look at the history of this litigation, and not just include the state litigation against the tobacco industry. Instead, you should include the municipal litigation against the firearms industry, and include what I think eventually is going to happen with the rest of the federal government suit against the tobacco industry. Moreover, look at the Blue Cross & Blue Shield cases against the tobacco industry.[2] They have been pretty unsuccessful.

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[2] *See, e.g.*, Int'l Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc., 196 F.3d 818 (7th Cir. 1999); Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc. 191 F.3d 229 (2d Cir. 1999), *cert. denied* 120 S. Ct. 799 (2000) (mem.); Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc., 185 F.3d 975 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 789 (2000) (mem.); Steamfitters Local Union

ATTORNEY GENERAL HUMPHREY: With the exception of Minnesota.[3]

ATTORNEY GENERAL PRYOR: With the exception of Minnesota. Particularly when they are brought in federal courts, tobacco class actions have been really unsuccessful. I think every federal court of appeals that has heard the matter has thrown these cases out.[4]

Consider the prospect of having all the forces of state government—and not just some wealthy personal injury trial lawyer—marshaled against you. It is a terrible situation to have a state attorney general, the representative of the people, vilifying a "big, bad industry." They see you in the forum of their choice. Let's call it what it is: if you are that industry, you are getting ready to get home-cooked with a multi-billion dollar judgment against you.

Furthermore, you have the prospect of not being able to post an appeal bond without bankrupting your company. Suddenly, you have a real problem. And that is the prospect that the tobacco industry faced in this litigation. It was significant, and it could be duplicated. This was a very complicated predicament, and I do think that there are separation of powers issues at stake when you look at it from that perspective.

ATTORNEY GENERAL HUMPHREY: In this matter, the states exercised their sovereignty—the tobacco litigation involved several states that petitioned at the request of the tobacco industry. A condition of accepting the June 20th proposal was that several states would be allowed to come forward to Washington, D.C. and lobby on behalf of a settlement that would preempt not only preceding cases, but pending litigation before state courts.

As a result of this, some of my colleagues told me, "We're shutting

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No. 420 Welfare Fund v. Philip Morris, Inc. 171 F.2d 912 (3d Cir. 1999), *cert. denied*, 120 S. Ct. 844 (2000) (mem.); Castano v. Am. Tobacco Co., 84 F.3d 734, 747 (5th Cir. 1996) (decertifying plaintiff class because of the novelty of plaintiff's claims, stating that "certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication"); Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc., 113 F. Supp. 2d 345, 388 (E.D.N.Y. 2000) (granting defendant cigarette companies' motion for summary judgment on direct fraud, RICO Smoking Reduction Action, and RICO Investment Action; denying defendants' motion for summary judgment on RICO Payment Action, and Subrogated RICO Payment Action).

[3] For information about the May 8, 1998 Minnesota Blue Cross & Blue Shield settlement agreement, which was separate from the Minnesota state settlement with the tobacco industry, see http://www.mnbluecrosstobacco.com/home.html (last visited Mar. 11, 2001).

[4] *See, e.g.*, Regence Blueshield v. Philip Morris, Inc., No. 99-35203, 2001 U.S. App. LEXIS 3246, at *8-9 (9th Cir. Feb. 28, 2001) (dismissing Blueshield's claim for lack of standing); Health Care Serv. Corp. v. Brown & Williamson Tobacco Corp., 208 F.3d 579 (7th Cir. 2000) (affirming the dismissal of Blueshield's complaint for failure to state a proper claim of subrogation).

you down." Others said, "Whatever we do, we respect the independence of what your state is doing." I thought that was a pretty good principle. But apparently, it was not going to apply when you had billions of dollars hanging in front of you. Moreover, when you looked at the details, as the blue ribbon task force headed by Drs. Koop and Kessler did,[5] you found that the very things that the industry said they were not going to do, they continue to do.[6]

The tobacco industry reacted to the criticism and to Minnesota's efforts in two ways. First, the industry wanted to shut down the litigation. Second, the manufacturers wanted states, particularly Minnesota, to stop leaking newly discovered and damaging information about the industry's marketing tactics. Despite the industry's reaction, Minnesota pressed on, and now has the most comprehensive international document base in the world on these matters. I believe that Minnesota organized the largest discovery process in the history of the country.

The tobacco industry dangled a lot of money before us, but Mississippi Attorney General Mike Moore and I stood together, and said, "If we're going to get in this, we better be willing to go all the way to the wall. We can't just wait around for the money." I meant it when I said that, and we went all the way. *We* decided when to settle, and what the settlement would require.

Next, I would like to discuss the roles of private lawyers and public lawyers. When you talk about these roles in the context of the tobacco industry, you must ask what you would do to find out if companies were acting illegally, and what you would do when you found the illegal actions that were taking place.

When I discovered what the tobacco companies were doing, I took responsibility on behalf of the citizens of my state.

AUDIENCE MEMBER: I would like to make one comment about the assertion that these suits went all the way. They did not, in fact, go to trial. With a few exceptions, there were no judgments, and no appellate review. In fact, I think in these suits, large amounts of money changed hands largely by discretionary and often invisible processes.

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[5] *See* John M. Broder, *Health Panel Set to Attack Tobacco Deal*, N.Y. TIMES, June 28, 1997, at A6; Jeffrey Taylor, *Task Force Asks for Stiffer Tobacco Penalties*, WALL ST. J., July 9, 1997, at A2.

[6] *See* C. EVERETT KOOP & DAVID KESSLER, REPORT OF THE KESSLER-KOOP ADVISORY COMMITTEE ON TOBACCO POLICY AND PUBLIC HEALTH RELEASED JULY 9, 1997, *available at* http://www.tobacco.neu.edu/Extra/hotdocs/kk7-97.htm (last visited Mar. 14, 2001); C. Everett Koop, *Tobacco Deal Lets Industry Off Too Easily*, USA TODAY, June 25, 1997, at A13.

ATTORNEY GENERAL HUMPHREY: I beg to differ. Several cases were conducted in open court with the approval of the court. And in *Engle v. R.J. Reynolds Tobacco Co.*,[7] there was a jury verdict, which is presently being appealed.[8] With all due respect, in Minnesota, nothing secretive took place. We had the media watching the proceedings day in and day out.

ATTORNEY GENERAL PRYOR: Your matter was conducted in the open, Mr. Humphrey, but other matters were not. It was only *after* these cases were settled that certain information became known. For instance, in Texas after a $17.5 billion settlement with the tobacco industry, former Attorney General Dan Morales was involved in a scheme to award his friend, private attorney Mark Murr, up to three percent of the settlement award.[9] The Morales-Murr scandal illustrates the very nasty relationships that have developed between some of the state attorneys general and the

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[7] 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

[8] *See* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1 (2000). Professor Erichson described the developments of the *Engle* class action:

> The most successful private action against tobacco to date is *Engle v. R.J. Reynolds Tobacco, Co.*, a Florida statewide class action of smokers that proceeded to trial in 1998 . . . . The *Engle* jury determined that the tobacco companies had deceived the public about the hazards and addictiveness of cigarettes, and subsequently awarded compensatory damages of $12.7 million for the three class representatives, and $144.8 *billion* in punitive damages, the largest monetary verdict in history . . . . Even if the *Engle* verdict is reduced or reversed on appeal, the jury's determination . . . stands as a testament to the power of government lawsuits to shift the balance of litigative power and to facilitate private class action success.

Id. at 14; *see also Tobacco Firm Posts $100 Million Bond*, SAN DIEGO TRIB., Nov. 8, 2000, at A10 (reporting that Philip Morris posted a bond in the *Engle* case, to secure an appeal of the almost $145 billion judgment levied against the company). Recently, Brown & Williamson Tobacco Corp. paid out its first damage award to Grady Carter, an ex-smoker. Terri Somers, *Ex-Smoker First to Collect From Big Tobacco*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Mar. 9, 2001, at A1. The Supreme Court of Florida heard Carter's case and upheld the jury verdict, reversing a lower court's decision that the statute of limitations had run on Carter's claims. Carter v. Brown & Williamson Tobacco Corp., No. SC94797, 2000 Fla. LEXIS 2318, at *34-35 (Fla. Nov. 22, 2000).

[9] *See* Barry Meier & Richard A. Oppel, Jr., *Inquiry Into a Tobacco Suit, Lawyer is Cited*, N.Y. TIMES, Feb. 17, 1999, at A10 (reporting that the Justice Department was investigating the role Mr. Murr played in the tobacco litigation); Richard A. Oppel, Jr., *Texas Official Says Favoritism Affected Fees in Tobacco Deal*, N.Y. TIMES, May 6, 1999, at A26. Oppel wrote that present Texas Attorney General John Cornyn filed charges in the Federal District Court of Texas, alleging that "former Attorney General Dan Morales had created bogus contracts for his friend, Marc. D. Murr, a lawyer from Houston . . . ." *Id.* As a result of these charges, Murr ultimately accepted the decision of a national arbitration panel to reduce his fees to $1 million paid by tobacco companies, and further agreed to abandon his effort seek additional fees from the state. Richard A. Oppel, Jr., *Scrutinized, Lawyer Takes Far Lower Tobacco Fee*, N.Y. TIMES, May 7, 1999, at A18.

private lawyers who represented the states in these secretive tobacco settlements.

ATTORNEY GENERAL HUMPHREY: That is one of the reasons we rejected the idea of secretive settlements in Minnesota. Instead, we merely said, "Nope. Pay what you owe."

PROFESSOR DEBOW: Kansas, North Dakota, and Texas have passed statutes to regulate contingent fee contracts awarded to outside lawyers in state actions.[10] They are roughly based on a model act that has been drawn up by the American Legislative Exchange Counsel (ALEC).[11] People that are interested in this could look at the model act that is on ALEC's website.[12]

ATTORNEY GENERAL PRYOR: I think the simple answer is that there was not a bid process in most of the states where you would think abuses occurred. For rigging to occur, there must have been a process to rig. In many states, a formal bidding process did not exist. You simply had attorneys general hiring their buddies. There was not any competition about it nor anything to rig.

ATTORNEY GENERAL HUMPHREY: I did not know Mike Ciresi[13] before our case.

ATTORNEY GENERAL PRYOR: I am not saying you did, Mr. Humphrey. I am simply saying that, in some of the states, there was no bidding process. It is not the normal presumption, at least in Alabama state government, that you would have a competitive bid process for privately contracted attorneys.

ATTORNEY GENERAL HUMPHREY: Let me share a little bit about the reality of what we faced in Minnesota. Only four people in our office represent the other state agencies in the government. If we were going to take on this case by ourselves, number one, we would have to shut down a lot of back representation, by moving people off that work, and onto the tobacco case.

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[10] KAN. H.B. 2627 (2000); N.D. CENT. CODE. § 54-12-08.1 (1999); TEX. GOV'T CODE ANN. §§ 404.097, 2254.101.2254.109 (1999).

[11] http://www.alec.org (last visited Feb. 13, 2001).

[12] *See Private Attorney Retention Sunshine Act, at* http://www.alec.org (last visited Mar. 13, 2001); *see also* Mark A. Behrens & Donald Kochan, *Let the Sunshine In: The Need for Open, Competitive Bidding in Government Retention of Private Legal Services*, PROD. SAFETY & LIAB. REP., Oct. 2, 2000, at 915.

[13] *See* Press Release, Blue Cross of Minnesota, Blue Cross & Blue Shield of Minnesota, Attorney General Commence Landmark Fraud, Conspiracy Suit Against Tobacco Industry (Aug. 17, 1994), *available at* www.mnbluecrosstobacco.com/toblit/newsreleases/1994/8_lawsuitannouncement.html (last visited Mar. 14, 2001) ("Robins, Kaplan, Miller & Ciresi will work with attorneys from [Blue Cross & Blue Shield] and the attorney general's office on the case . . . . Michael V. Ciresi is internationally recognized for his expertise in litigation.").

Secondly, we needed expertise in the civil litigation field that frankly, we did not have, even though Minnesota has been fairly aggressive and fairly active in the antitrust field. We were looking for outside expertise, which I think is one of the purposes for seeking special counsel help.

Third, we had a very real problem with the resource management at the time. So we went forward to look at what the contingency fee might be. We negotiated it down from the traditional one-third contingency fee. Fortunately, at the end of it, the fees were completely taken care of by the tobacco industry.

I understand why people argue about the validity of the basis for the tobacco litigation, but it does not serve our interests to assume that there was no foundation for these actions. Do you remember Federal Rule of Civil Procedure 11? Under Rule 11, if you do not have a foundation for your claim, you cannot bring the action, and you will be sanctioned if you do.

One of the reasons why the Minnesota tobacco case was not brought earlier was because we did not have the facts to confirm our suspicion of wrongdoing. The Attorney General should not take action when the facts do not support a claim, even when emotions may run high in the public arena. Thus, although we can dispute whether these cases might ultimately have been decided by a jury, it is not appropriate to say that there did not exist a legal and factual foundation to bring the actions. Indeed, there was, and in fact, the Florida cases now show that very clearly.

AUDIENCE MEMBER: Professor Schroeder, would you support a policy of executive oversight in multi-district cases, which would result in consistent settlement agreements?

PROFESSOR SCHROEDER: Yes, I think there is merit in that idea. These cases should not be immune from political oversight. The Attorney General meets with senior advisors on a daily basis, including the Assistant Secretary for Environment and Natural Resources. These are policy decisions of a major variety. I cannot imagine that they are not discussed at these levels. And if they are not, they should be. They ought to reflect a consistent administration policy, and should not be the product of some lower level constellation of actors who have put together a web from which the administration can then extract itself. So there needs to be some responsiveness to that.

ATTORNEY GENERAL HUMPHREY: Might I just suggest a novel crazy idea? I suggest that the Congress become more active in these matters. If we want to resolve some of the problems of the separation of powers, we should ask the legislative body, which you are attempting to say needs to be more engaged, to become engaged.

ATTORNEY GENERAL PRYOR: In closing, let us not forget that the tobacco industry was sued in the earlier part of the twentieth century, under the antitrust laws, because they were doing what?[14] They were conspiring to keep the price of cigarettes too high, and reap monopoly profits. Thus, they were sued for price-fixing. The novel theory of the state attorneys general is that the tobacco industry was hiding the facts, making cigarettes too plentiful, getting people hooked on them, and making them too cheap.

What we really needed was a settlement agreement to do exactly the opposite of the antitrust laws government officials had enforced half a century earlier.

ATTORNEY GENERAL HUMPHREY: Of course, that all started because of the collusion of meeting illegally in 1953 in New York, in violation of that earlier antitrust law.

ATTORNEY GENERAL PRYOR: Well, they sure were unsuccessful.

ATTORNEY GENERAL HUMPHREY: Ultimately they have been.

[14] United States v. Am. Tobacco Co., 221 U.S. 106 (1911).