

## **SUMMARY OF VERMONT'S TOBACCO LITIGATION**

### **1. 1997 State Court Litigation**

Vermont filed its first complaint against the tobacco industry in May of 1997. In so doing, Vermont created the paradigm for small state participation in the complex and expensive multi-state litigation against the tobacco industry. Vermont's strategy was to focus exclusively on law enforcement claims without inclusion of a Medicaid reimbursement claim.

Vermont's 1997 suit alleged that the industry violated various state consumer protection laws. The suit sought substantial penalties, as well as injunctive relief and attorneys fees. The suit did *not* seek reimbursement of Medicaid funds expended on tobacco-related illnesses.

In addition to the consumer protection claims, Vermont sought remedies under Vermont's Public Health Act. Vermont's Public Health Act provides for strict enforcement against anyone who creates potential harm to the public health "by virtue of any condition or any biological, chemical or physical agent". The statute calls for penalties up to \$10,000 per day.

Trial in this first suit was set for November 1999. The state hired outside counsel to assist with the trial.

The industry vociferously attacked Vermont's 1997 suit, especially the penalties sought thereunder. The industry filed a 63-page Motion to Dismiss the complaint in October 1997. This broad-based motion challenged Vermont's suit on numerous grounds, including: (a) the State's claims are preempted under the Federal Cigarette Labeling and Advertising Act ("the Labeling Act"); (b) penalties are impermissible under the Consumer Fraud or Public Health Acts without prior findings of a violation; (c) the penalties sought violate the Due Process and Ex Post Facto clauses of the U.S. Constitution; (d) the State's claims are barred by the statute of limitations; and (e) the Public Health Act is not intended to encompass marketing and use of tobacco products.

The briefing on the industry's motion was extensive: over 184 pages were filed by both parties on the issues presented.

In its March 25, 1998 decision, the trial court denied the industry's Motion to Dismiss in its entirety. The court held:

- (a) the Labeling Act did not preempt any portion of the State's complaint, because neither the claims nor the relief sought were requirements or prohibitions "based on smoking and health ... with respect to the advertising or promotion" of properly labeled cigarettes;

- (b) penalties could be obtained under the Consumer Fraud Act and the Public Health Act without a prior finding of a violation, because both statutes are remedial and civil in nature, rather than penal;
- (c) imposition of penalties sought by the State did not violate either the Due Process or Ex Post Facto clauses;
- (d) a six-year statute of limitations would apply to claims under the Acts, but in this case the industry's fraudulent conduct caused the limitations period to be tolled; and
- (e) the Public Health Act was intended to encompass the exact type of conduct alleged in the State's complaint.

After the industry's Motion to Dismiss was denied, the trial court set a discovery schedule. The State began to plan for discovery by organizing information relevant to tobacco issues in every state agency. When the Master Settlement Agreement was announced in November 1998, Vermont and the industry had begun the process of exchanging relevant information.

In addition, the 1997 suit spawned litigation about state jurisdiction over the Tobacco Institute ("TI"). Vermont vigorously fought TI's Motion to Dismiss for lack of personal jurisdiction, and the parties extensively briefed the issue. The trial court initially held that it did not have personal jurisdiction over TI. Vermont urged the court to reconsider its ruling. After the trial court refused to reverse its ruling, Vermont sought permission to appeal the issue to the Vermont Supreme Court. The Supreme Court granted the State permission to appeal, and Vermont again extensively briefed the issue. In all, the parties filed over 12 pleadings concerning the TI appeal alone. Vermont was poised to argue this appeal when the settlement was announced.

## **2. Tobacco Medicaid Reimbursement Law**

Vermont is unique among the states for its ability to enact strong and effective anti-tobacco legislation. In the 1960's, Vermont eliminated all billboards from the state. In 1993, Vermont enacted a clean indoor air act that prohibits smoking in almost all public places. And in 1997, Vermont enacted a youth access law that bans vending machines and self-service displays, and increases enforcement against illegal tobacco sales.

By the fall of 1997, it appeared that Congress might not approve the June 1997 global settlement. Moreover, a few states had lost their claims for Medicaid reimbursement through trial court decisions holding that the state lacked authority to seek reimbursement, or that such a claim was subrogated to the claims of the individual recipients.

Early in 1998, Vermont, joined by Maryland and Iowa, attempted to enact Florida-style statutes that explicitly allow the state to seek direct Medicaid reimbursement from the industry. Vermont and Maryland were ultimately successful in those efforts. On April 23, 1998, the Governor signed Vermont's Tobacco Medicaid Reimbursement Act into law. The Maryland legislature enacted its new law at roughly the same time. Because of these

efforts, other states were able to point to the Vermont and Maryland statutes as precedent for enactment of the same legislation in their own legislatures.

The Vermont Attorney General's Office obtained numerous opinions and testimony from many well-respected Vermont attorneys indicating that the statute was constitutional and an appropriate remedy to the industry's deception. The Vermont Attorney General's Office obtained a letter from Harvard Professor Laurence Tribe in support of the bill. In the letter, Tribe vigorously argued that Vermont's proposal was constitutional. With words that will assist any state seeking to enact a statute similar to Vermont's, Professor Tribe stated:

My conclusion is unambiguous and free of uncertainty: [Vermont's Tobacco Medicaid Reimbursement Act] comports fully with the state and federal constitutions and is free of constitutional infirmity.

\* \* \*

[T]here is nothing even arguably unconstitutional about legislation eliminating those "defenses" where the party seeking to prove financial injury and causation—here the State—did not assume any of the risks which those defenses are designed to reflect: The State, to put it simply, did not inhale.

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[The Act] is plainly constitutional on its face, and nothing in its terms creates a significant risk of unconstitutional application. Those who oppose it should be required to defend their policy objections by joining issue with the proponents on frankly policy grounds, without concealing their economic or philosophical argument in the protective mantle of constitutional rhetoric. That mantle is a mirage here; whatever the ultimate policy merits might be, this tobacco emperor has no clothes.

Despite the existence of the Master Settlement Agreement, Vermont's Tobacco Medicaid Reimbursement Act continues to be vital to state enforcement efforts against the tobacco industry. While present market conditions indicate that all relevant manufacturers are participating in the settlement, in the future new manufacturers may arise, either through changing market conditions or efforts by the Original Participating Manufacturers or the Subsequent Participating Manufacturers to evade their obligations under the November 1998 Settlement. The Act will be crucial to establishing liability against Non-Participating Manufacturers and asserting claims against the pool created by the NPM model legislation. Thus Vermont's Act creates a powerful enforcement weapon to ensure that, in the future, Vermont, as well as other states that enact similar provisions, will receive reimbursement of Medicaid money expended on tobacco-related illnesses.

### **3. Litigation Surrounding Vermont's Tobacco Medicaid Reimbursement Law**

#### **A. Federal Court Challenge by the Industry**

On the date that Vermont's Tobacco Medicaid Reimbursement bill became law, the industry filed in federal court a broad-ranging constitutional attack challenging the new law. The industry filed a Motion for Preliminary Injunction, and the Attorney General's Office filed a Motion to Dismiss. The briefing by both sides amounted to over 280 pages.

Vermont was poised to argue its Motion to Dismiss the federal challenge to the statute, and its opposition to the industry's request for a Preliminary Injunction, when the Master Settlement Agreement was announced.

#### B. Vermont's Second State Court Suit

In addition to responding to the industry's federal court challenge to Vermont's new law, Vermont filed its second complaint against the industry on July 7, 1998. This second state court suit asserted five causes of action for Medicaid reimbursement under the new Tobacco Medicaid Reimbursement Act.

The industry filed a Motion to Stay this second state court suit until the federal court case was decided. The Vermont Attorney General's Office opposed this motion, urging the court to allow the second state proceeding to move forward. The court did not render a decision before the settlement announcement in November 1998.

#### **4. Vermont's Role in Multi-State Activities**

Vermont was very active in multi-state activities leading to the settlement. The Vermont Attorney General's Office engaged in the following activities, among many others:

- Vermont was part of the core negotiating committee on the third settlement with Liggett, whereby this fifth largest tobacco company agreed to cooperate with the investigations of about 20 states into the practices of the industry.
- At the request of the national negotiating team, Vermont served as one of only two actively-litigating states that did not settle with Liggett in order to put pressure on the company to join the Master Settlement Agreement.
- Vermont was an active member of two committees involved with the negotiations that led to the Master Settlement Agreement: the Allocation Committee, and the Ad-Hoc Public Health Committee.
- Vermont worked closely with Vermont's congressional delegation and the local public health community regarding the proposed settlements.
- Through national counsel, Vermont participated in the multi-state discovery team that analyzed millions of industry documents in preparation for trial.

#### **5. Comparison of the Litigation Efforts of Vermont and Florida**

For a state with a *population of only 569,000*, Vermont's efforts were truly Herculean. In its efforts against the tobacco industry, Vermont expended over 5,200 hours of state

employee attorney time on its litigation, and another 1,100 hours in its successful efforts to enact the Tobacco Medicaid Reimbursement Act.

A comparison with the substantial efforts of the State of Florida (the only other state about which there is detailed information) puts Vermont's efforts into perspective. Florida, with a population of 14.6 million, is roughly 26 times Vermont's population. Vermont assigned 12 in-house attorneys and paralegals to its litigation, resulting in one legal staff member per 47,416 citizens, while Florida assigned 26 in-house attorneys and paralegals to its case, or roughly 1 legal staff member per 561,538 citizens. Thus Vermont's in-house personnel commitment, on a per capita basis, was more than 11 times Florida's commitment. It is also useful to look at the monetary commitment of both states on a per capita basis. Vermont, which settled in the middle of discovery, will seek reimbursement from the industry for in-house costs and fees that amount to \$1.32 per capita. By contrast, Florida, which settled on the eve of trial, sought reimbursement for in-house costs and fees that amounted to \$0.68 per capita.