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Regulation By Litigation:

The New Wave of Government-Sponsored Litigation

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CENTER FOR LEGAL POLICY
AT THE MANHATTAN INSTITUTE

Regulation By Litigation:

**The New Wave of Government-
Sponsored Litigation**

*State Attorneys General
and the Power to Change Law*

*The Politics and Economics
of Government-sponsored Litigation*

*Government-Sponsored Litigation
—What's Next?*

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Center for Legal Policy at the Manhattan Institute

The Federalist Society

U.S. Chamber of Commerce Institute for Legal Reform

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Opening Letter

With increasing frequency, lawsuits are being brought on behalf of state and local governmental entities seeking recovery for public harm allegedly suffered from the sale or use of some legal product. The suits have been identified by some as a new form of social engineering through the litigation process, and there has been much debate over whether they are attempts to resolve in court what are essentially legislative questions—tax rates and regulatory policies applicable to specific products. Tobacco, firearms, and lead paint are the most recent targets of such lawsuits, but some have suggested that suits involving alcohol, gambling, health care, and other products or services could well be on the horizon.

These novel suits raise difficult questions about how our society allocates resources, regulates commercial speech, and formulates rules of law. They also present important questions regarding how state or local political figures can become the engines for rules of tort law that may have been consistently defeated either in the legislature or when advanced by private litigants in the courts. Is this a useful balance in our political system or an abuse of power?

To respond to these questions The Manhattan Institute, The Federalist Society, and the U.S. Chamber of Commerce held a conference on the subject in June of 1999. This publication is an edited transcript of that conference. The conference sponsors want to thank Kim Kosman for her fine editing of the transcript. We note that the footnotes throughout the text are hers and are intended to provide the reader with information useful to understanding comments made by the conferees. We also wish to thank the conference panelists whose contributions made possible an informative, provocative, and revealing transcript.

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Panel One

State Attorneys General and the Power to Change Law

Panelists:

Honorable Scott Harshbarger

Former Massachusetts Attorney General

Honorable Bill Pryor

Alabama Attorney General

Honorable Eliot Spitzer

New York Attorney General

Mr. Michael Wallace

Phelps Dunbar, Litigator for the Defense

Dr. Donald Vinson

*Chairman, U.S. Chamber of Commerce Institute for Legal Reform
(Discussion Leader)*

DR. DONALD VINSON: A new trend is developing in the legal system in this country. With increasing frequency, lawsuits are being brought on behalf of state and local government entities. These suits seek to recover for public harm allegedly suffered from the sale of legal products. The most obvious examples today are tobacco and firearms, but there's already speculation about future litigation targeting alcohol, gambling, and chemicals, just to name a few.

The suits have been identified by some as a new form of social engineering through the litigation process. Others claim that these cases are being driven by the desire of state and municipal governments for revenue—revenue that can be raised without imposing new or increased taxes.

Finally, since most of these cases involve the use of outside counsel retained on a contingency fee basis, some claim that

these cases are driven primarily by the financial interests of the plaintiffs' bar.

These novel suits raise important and difficult questions. Are these kinds of cases within the proper law enforcement authority of the state attorneys general? What are the political and economic motivations behind this litigation? Where is the trend going? These and other questions will be explored by four distinguished individuals representing diverse points of view.

ATTORNEY GENERAL BILL PRYOR: Two years ago, I warned in editorials published in the *New York Times* and the *Wall Street Journal* that the lawsuits filed by my fellow state attorneys general against the tobacco industry threaten the entire business community.¹ Since then, the legal landscape has deteriorated to the point where we are here today to discuss the new business of government-sponsored litigation. My objection to this new wave of lawsuit abuse is that it violates a key principle that underlies the American understanding of the rule of law. I will explain my objection and outline four abusive features of this litigation. I also will offer four ideas for curtailing this abuse.

Eleven years ago, Justice Antonin Scalia was the lone member of the Supreme Court to vote to declare the independent counsel provisions of the Ethics in Government Act unconstitutional. The beginning of his dissenting opinion, which I think it's fair to say is more popular now than it was in 1988, is worthwhile reading. He wrote:

It is the proud boast of our democracy that we have a 'government of laws and not of men'. Many Americans are familiar with that phrase; not many know its derivation. It comes from Part the First, Article XXX of the Massachusetts Constitution of 1780, which reads in full as follows: 'In the Government of this Commonwealth, the Legislative Department shall never exercise the Executive and Judicial powers, or either of them; The Executive shall never exercise the Legislative and Judicial powers, or either of them; The Judicial shall never exercise the Legislative and Executive powers, or either

of them...to the end that it may be a government of laws and not of men. The framers of the federal Constitution also viewed separation of powers as the central guarantee of a just government.²

The recent government suits against the tobacco and firearms industries trample upon this central feature of the rule of law. The aim of this litigation is to shift the awesome powers of legislative bodies—powers to control commercial regulation, taxation, and appropriation—to the judicial branch of government. With that shift comes an assault on civil rights, democratic representation, and free enterprise.

The government suits against the tobacco and firearms industries involve commercial regulation that, in a legislative arena, would be impossible to achieve. The national tobacco settlement, for example, imposes unprecedented advertising and other marketing restrictions on the manufacture and sale of tobacco products. The settlement creates a complicated regulatory scheme that bans the use of cartoons in tobacco advertising, the sale of clothes with brand-name logos, sponsorships of most forms of commercial entertainment, and even some forms of lobbying. Anti-tobacco activists could not have enacted legislation on this scale in either Congress or in a substantial number of state legislatures. Indeed, they tried and failed.

From a legal standpoint, these restrictions could not have been achieved without violating, for example, the free speech clause of the First Amendment. Further, the historic respect in the common law for freedom of contract and private property is undermined when the manufacturer of legal but dangerous products is ordered to pay huge sums for harms that were unforeseeable.

By utilizing litigation to achieve new regulation, the proponents of government expansion have a powerful tool. What had been impossible, legally and politically, suddenly becomes possible—even attractive or worse, inevitable. If the new regulations are “voluntarily” accepted by industry through a settlement agreement, then the constitutional and other legal objections become moot. Political consensus becomes irrelevant.

The main objective of the tobacco lawsuits, despite the rhetoric of the proponents, was to raise revenue. Indeed, the tobacco settlement represents the largest government-imposed increase in the price of a legal product in the history of the United States. Using lawsuits to raise revenue is far easier than raising taxes the old-fashioned way. This method bypasses the need for representatives of the voters to approve the tax. Messy restrictions, such as requiring the revenue measure to originate in the House of Representatives, can also be avoided.

The myth told by the proponents of these lawsuits is that the new revenue involves payment of damages. Compensatory damages, in theory, involve retroactive compensation (payment for past harm) plus limited prospective relief (payment for future harm caused by past wrongdoing). The tobacco settlement involves neither. There are no damages for past losses. Indeed, Professor Kip Viscusi of the Harvard Law School has proved that cigarette taxes more than offset the governments' costs for treating tobacco-related illnesses.³ The tobacco deal requires the industry to create a new revenue stream based on current government costs, with no credit for existing tax collections. That revenue stream continues forever without regard to the good or bad conduct of the industry.

Tobacco lawsuits, in addition to invading the legislative power to make law and raise revenue, co-opt the power of appropriation. This intrusion has sparked some battles in states where both governors and legislators want to control the spending of tobacco revenue. The most egregious example involves the billions of dollars paid to attorneys without legislative appropriation. The pay-off to these attorneys makes these lawsuits a remarkably inefficient way to raise revenue. In addition, the settlement creates a multi-billion dollar foundation for health research and disease prevention without legislative approval or oversight.

At bottom, these lawsuits involve the familiar activist tactic of using the judiciary to change the law. Two and a half years ago, Dick Scruggs said at a Federalist Society conference that, in the light of

the misconduct of the tobacco industry, “It really doesn’t matter what legal theory you use.” His point was simple: the tobacco suits were vehicles for changing the law. The attorneys general used novel legal theories and crafted their complaints to avoid the traditional remedy of subrogation, which allows defendants powerful arguments of assumption of risk, contributory negligence, and statutes of limitation.

These lawsuits were filed en masse to politicize the judicial process while a public relations campaign said it was “all about kids.” These lawsuits represent the antithesis of the rule of law, for the end was used to justify the means.

For those who want to curb this new form of lawsuit abuse, I offer four ideas. First, some consideration needs to be given to a legislative ban of government suits against manufacturers for indirect harm, except for the traditional remedy of subrogation. If governments sue industries for harm primarily suffered by citizens, such as smokers, then the industry should be able to assert well-established defenses of contributory negligence, assumption of risk, and statutes of limitation. The government should not have rights to sue that are superior to the rights of the citizens on whose behalf the lawsuits are filed.

Second, there either needs to be a ban of contingent fee contracts for government attorneys or tighter regulation in this area. For a long time, contingent fee contracts were considered unethical. The justification for these fees was the need for poor persons with valid claims to have access to the legal system. Governments do not have this problem. Governments are wealthy because they have the power to tax and condemn. Governments control access to the legal system. The use of contingent fee contracts allows governments to avoid the appropriation process; it creates the illusion that these lawsuits are being pursued at no cost to the taxpayers. These contracts also create the potential for outrageous windfalls, or even outright corruption, for political supporters of the officials who negotiated the contracts.

Third, government suits against industry should be subject to fair venue rules. There was a fair amount of forum shopping in the tobacco suits, and I suspect it is occurring in the firearms suits as well. The usual presumption in favor of the plaintiff's choice is unfair to an out-of-state corporation, especially when the government plaintiff actually controls the entire court system.

Fourth, these suits should require special rules for appeals. In a "bet your industry" lawsuit, it could be impossible for the defendants to post an appeal bond. When government pursues novel legal theories against entire industries for enormous sums of money, there needs to be a fair chance for the appellate courts to ensure that the process is fair and the law is sound.

In American political thought, we have a rich history of trying to limit the power of government. Our forefathers understood the dangers of unchecked power. We should follow that tradition by prohibiting governments from using civil lawsuits for abuses against our citizens. For two years I resisted intense pressure to join the tobacco litigation because I am firmly committed to the rule of law and limited government. Lawsuit abuse by government is the most serious challenge to the rule of law today. The free market and the cause of human liberty cannot survive much more of this litigation madness.

ATTORNEY GENERAL ELIOT SPITZER: Looking over the legal landscape of the past few years, there has been a tremendous redistribution of legal power away from Washington and back to the states. Most strikingly, in the *Lopez* case, it was determined that the federal government doesn't even have the authority to prohibit guns within a thousand feet of schools. It seems a logical conclusion that states must take on a larger law enforcement role. Who better than the state attorneys general to step into the void and ensure that the rule of law is enforced?

Individuals, companies, and entities of all sorts must comply with their legal obligations. They may not hide information from government. I don't tolerate this with drug dealers; I don't tolerate this

with tobacco companies. It is worth noting that tobacco companies had not been losing cases in the court system. They had not been losing in jury trials; indeed, they had been winning virtually every jury verdict. What brought them to the table was that the lies that they had perpetrated for years were being exposed to the public—they were finally being forced to tell the truth.

The plaintiffs' bar was not out of control in tobacco litigation. Parenthetically, I would never enter into an agreement with the plaintiffs' bar on a contingency fee basis to give away billions of dollars. But that has nothing to do with the tobacco settlement. The tobacco settlement has to do with public health. This wasn't considered a revenue source. Maybe there are some who had that as a motivation, but I would say that there are an awful lot of doctors and health advocates whose primary motivation was to rid the public of one of the most significant health dangers that we have ever faced. I would add, moreover, that it is wrong to impugn the motivation of people who have done more to protect kids than just about anybody else.

There are two major types of litigation, at present, which demonstrate that attorneys general across the country can—and must—step forward into a void to ensure that the rule of law is enforced. I am referring to health and antitrust cases. Both types of litigation are being used these days as paradigms for what is good or bad, and I'm happy to debate these cases from the perspective of somebody who believes that there is, of necessity, an aggressive role to be played by attorneys general.

To make an overarching point: these cases do not make new law. They contain no new theories of liability. They contain no new tort theories. These are not efforts to redefine tort liability or antitrust law. Each of these cases is predicated upon decades of tort theory or antitrust law that is settled and accepted. That said, the beautiful thing about the law is that it is always there to be debated. Observers will disagree; intellectual ferment will continue. The law is dynamic. Does anybody debate the fact today that we should be able to go to court to ensure that there

is integration? Does anybody debate the fact that we should be able to go to court to prevent sexual harassment in the workplace? This is the evolution of the law. These are things that are necessary and integral to what has made this country a wonderful place.

I think those who want the status quo imposed upon the law are expressing a fear of progress. We cannot reject the notion of the law's evolution. We cannot reject the notion, especially in today's world, where federalism has rightfully pushed much more authority back to the states. We cannot reject the notion that states should step forward into this void and bring cases against industry, whether it's tobacco or Microsoft.

MR. MICHAEL WALLACE: I'm pleased to be here to talk a little bit about how we've done things in Mississippi. I will try to stay away from the philosophical issues that the first two speakers have touched upon. I would like to give you, from my perspective, a little history of how all this began, and how it ended in Mississippi litigation.

The power of attorneys general to change law was put directly to the test in Mississippi when our attorney general, Mike Moore, decided to sue the tobacco companies, as well as half a dozen of his own constituents, on the theory that they had caused the state to incur healthcare costs. Governor Kirk Fordice sought a writ of prohibition from the Supreme Court of Mississippi to block General Moore's suit.⁴ I represented Philip Morris in that case and presented oral argument on behalf the defendants. By a vote of 6-to-1, the supreme court refused to decide whether or not General Moore could bring the suit. Instead, it denied extraordinary relief and said it would determine, after the trial was over, whether or not it should ever have begun.

Our tobacco litigation in Mississippi has gained such notoriety that one would be justified in thinking that this was our supreme court's most important recent decision. This would be a mistaken assumption. The most important decision of our supreme court didn't

even rate an opinion, but only a short order refusing to lower a supersedeas bond on appeal.

In 1995, a Hinds County jury handed down a half-billion dollar damage judgment in a business dispute against the Loewen Group, a Canadian chain of funeral homes.⁵ Our rules in Mississippi provide for the immediate enforcement of a judgment unless the debtor posts a bond of 125 percent of the judgment. The trial judge wouldn't lower it—he demanded the full \$625 million. Our rules permit the supreme court to lower a bond, but by a vote of 7-to-2, they wouldn't do it, either. Unable to pay the judgment, Loewen was faced with the choice of bankruptcy or settling for whatever sum the plaintiffs would accept. The choice proved to be illusory. After paying a reported \$130 million, Loewen went into bankruptcy earlier this month.

The Loewen decision confirmed that the effective power to change state law rests not in the hands of any elected state officials, but in locally elected trial judges and the juries they empanel. Any judgment that cannot be appealed because it cannot be bonded is law of the most immediate character. Because judges cannot file lawsuits, the trigger to invoke their power is in the hands of those who can. General Moore reached for that trigger when he filed his suit against the tobacco companies in his hometown of Pascagoula.

The arbitrators in the tobacco case who awarded General Moore's lawyers \$1.4 billion were apparently impressed by their creativity. Apparently they didn't agree with General Spitzer that these were well-established principles in law. Even the dissenting arbitrator credited them with being the first to develop a theory upon which the state might sue. What was even more impressive in Mississippi, however, was the haste with which they put that theory together. The Mississippi legislature had already adopted a tort reform act, which governed all products liability cases as of July 1, 1994. Had General Moore failed to beat that deadline, every one of his theories would have been thrown out of court as directly contrary to the people's will.

General Moore beat the deadline by having his claims heard by a chancellor without the presence of a jury. The people who rule consistently for the tobacco companies were cut out of the case on the first day by the decision to go to chancery court. He beat the deadline with a month to spare; unfortunately for him, however, he had other statutes that stood in his way.

When Congress adopted the Medicaid Program, it required each state to vest control of the program in a single state agency. By act of the legislature, Mississippi chose the governor as that single state agent and established the division of Medicaid in his office. Full authority over all litigation, as well as everything else dealing with Medicaid, was vested in the governor. Federal regulations allowed the governor to solicit the aid of other officials, such as the attorney general, but it specifically provided that these officials could not change any administrative decision or otherwise substitute their own will.

As required by law, General Moore certified to the federal government that the state plan vesting full authority in the governor was in full compliance with state law. General Moore, however, had a change of heart when Governor Fordice challenged his authority to sue for the recovery of Medicaid money. General Moore took the position that Mississippi's constitution of 1890 granted him sole and complete authority over all of the state's legal affairs. The attorney general alone, he argued, could decide what suits would be filed, what legal theories advanced, and what claims settled. To the extent the legislature had given any of that authority—and in Medicaid it had given all of that authority—to the governor, General Moore said that it had violated the constitution.

The courts of this country are the places where the power of the state is brought most immediately to bear on its citizens. Legislatures may establish general policies; executive officials may plan policy administration. It is only a court that can authorize men with badges and guns to take away a citizen's money and put a citizen in jail. One might think, therefore, that it is important to determine *which* elected official has the authority to invoke the power

of the courts. Certainly the Chief Justice of the Mississippi Supreme Court thought that was important. He found that, by filing the suit, General Moore was taking for himself power given by the legislature specifically and solely to the governor. "The situation placed before us," wrote Chief Justice Lee, "is that of an attorney blatantly filing lawsuits without having a client, or at the very least, client authorization." The rest of the court disagreed. Indeed, they saw no need to resolve the issue. Recognizing that a writ of prohibition is an extraordinary remedy, the court declined to express a view before the trial. The attorney general could try his case and the tobacco companies could bond the resulting judgment; only then would the supreme court determine whether the attorney general had authority to file the suit.⁶ The attorney general would be allowed to pull the trigger, and then, if anyone was left standing, the court would decide whether he had the authority to pick up the gun.

The result of the non-decision was not only foreseeable, it was predicted by the chief justice. He expected the defendants to choose settlement over the huge costs of the unauthorized lawsuit. With the court unwilling to grant relief before a trial, the defendants could hardly expect it would be of any assistance after the judgment. The Loewen case told them that the price of review on appeal would be a bond for 125 percent of the judgment. Faced with such a monumental risk and such a monumental sum, a settlement was made.

Mississippians still do not know who is in charge of their Medicaid program. They do know, however, that anyone with a filing fee can disregard the statutes and change their laws. As General Spitzer has noted, this is nothing new. Judicial evolution has been going on rapidly for the past fifty years. But the money available for these law-changing efforts has increased immeasurably in this era of unlimited solicitation of personal injury plaintiffs.

General Moore's genius was to marry the fees produced by the mass tort litigation with the authority of the state. The first power that the English people exercised over their kings was the power

of the purse: to deny them tax revenues for unpopular causes. General Moore has recently boasted that the representatives of the people of Mississippi tried but failed to do just that. Key leadership in the Mississippi legislature, he noted, instructed him not to spend one dime of taxpayer money in this litigation. He was, nevertheless, able to circumvent centuries of parliamentary democracy by turning to the plaintiffs' bar to provide him funds that representatives denied him. It's a great deal for everyone—except those who take self-government seriously. I will close by recalling the words of Alexander Hamilton, who took self-government seriously indeed. In the government he helped design for the United States, the clash between the executive and the attorney general, like we saw in Mississippi, could never occur. In Federalist 70, he explains why the United States Constitution provides for a unitary executive:

Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity. From either, and especially from all these causes, the most bitter dissensions are apt to spring. Whenever these happen, they lessen the respectability, weaken the authority, and distract the plans and operation of those whom they divide.

For a prosecutor, independent from his chief executive, whether Mike Moore or Ken Starr—for both of whom I have the greatest respect—that sort of independence is a certain recipe for danger and bitter dissension.

ATTORNEY GENERAL SCOTT HARSHBARGER: Michael Moore is a personal hero of mine for many reasons, not the least of which is that he represents the very best of what an attorney general should be. He is somebody who, against great odds and acting independently, endeavored to address an issue that had not been effectively addressed under the law, in Congress, or in many of the states. But beyond that, I admire him because of the resistance he has encountered. Indeed, if you do your job well as an

attorney general, you should expect to face resistance. The attorney general's job is to try to define what, under the law, is in the public interest. This requires great courage and independence.

One of the great things about federalism is that the states are different. So are the powers of the attorneys general. There is a tendency to get confused in discussing this issue. When states act against national defendants that appear in a number of states, it appears that all attorneys general act under the same powers and responsibilities. That is not the case. We all have to adapt to the laws of our states. I think it's important to understand that as attorney general in Massachusetts, my job was to uphold the law of the Commonwealth, to enforce the law equally and fairly, to hold individuals accountable, and to hold businesses responsible when they violated the law. I did that in the interests of all the other businesses, for example, who were competed against unfairly by law-breaking companies. It is, to some extent, the attorney general's duty to create a level playing field. As attorney general, I had a law enforcement role and a role as a consumer protector.

My view of the role of the attorney general is very traditional—use the powers you have to enforce the law and support articulated public policy goals. In Massachusetts, for example, we greatly reduced the cost of workers' compensation. One of the reasons is that the law was changed by the legislature. There also happened to be 125 prosecutions, by my office, of people who violated the law and who engaged in workers' compensation fraud. We prosecuted not only workers, but insurance companies, doctors, and lawyers. We learned that businesses could do many things to affect reform, like engage in effective risk loss prevention programs. Insurance companies could actually investigate claims, and not simply pay them out of hand. In other words, for my office, the law was a very important tool and a part of a comprehensive effort to address a problem that faced businesses and workers. I saw my role as someone who supported a broadly stated public policy.

I will briefly explain my view about the tobacco case and the potential case that involves gun manufacturers. I happen to think they

are unique. I do not think this is a slippery slope, but this is obviously a debatable issue. In the case of tobacco in Massachusetts, we brought our suit on behalf of kids and our taxpayers, 75 percent of who do not smoke. We were paying a quarter-billion dollars a year in medical costs for uninsured smokers as a result of their using this product. Illegal marketing practices were in effect that targeted underage smokers. The citizens of Massachusetts actually passed a referendum to tax tobacco, and we were already doing counter-advertising based on that taxation. The litigation, then, when begun in December of 1995, was in support of a broad community consensus on public policy. We intended to improve the public health, to stop practices that addicted kids to tobacco, and to see to it that tobacco companies play by the same rules as every other business. The tobacco industry was put on notice that it could no longer deceive people, and, if it caused damage or injury, it could be sued like every other business. I did not believe, in the tobacco case, that litigation was going to be the ultimate solution. It was our hope that it would trigger a broader, comprehensive approach and nationwide solution. Other attorneys general felt the same way.

With regard to guns, it's important to realize that these cases are being brought, at least in Boston, on some very traditional theories of tort law, such as willful blindness and negligent distribution. While there is a product liability count, it is one of five or six in this action. The motive behind litigation in Boston is not to—simply—hold gun manufacturers responsible for violent behavior. Through innovative, nationally recognized community police and prosecution models, we've lowered our crime rate to the lowest rate in 31 years. We have put gun traffickers in jail. The state is monitoring gun sales. We are doing everything in terms of prosecution that people say they want us to do, but we still have a wide range of guns getting in the hands of underage kids, which is a major cause of violence. This does not deny individual accountability or responsibility. We're holding everyone accountable. We're simply saying that those manufacturers who demonstrate willful blindness about where guns are going and fail to take common-sense

safety measures will also be held responsible for their actions, or failure to act.

As attorney general, I proposed handgun safety regulations that might have been agreed upon by the gun industry if this had not become a national issue. I proposed that common-sense safety measures that already applied to products on the market—toy pistols, baby bottles, aspirin caps—should be applied to guns. This proposal was rejected. This is the kind of effort that’s being made across the country—attorneys general are telling gun manufacturers that they are responsible for their marketing practices just like the rest of the business community. There’s a corporate responsibility piece here, just like there’s an individual responsibility piece; there is no reason that this product should be more dangerous than it has to be.

I might note that there were other areas we were involved in that were as controversial as guns and tobacco. People did not, however, rally and react in the same way to these other matters. Our office was active in hospital merger and conversion issues. We were concerned with bank mergers. We spent a lot of time insuring that Massachusetts’ retail stores could remain competitive. We penalized second-mortgage companies who victimized our citizens; we made them play by the same rules in Massachusetts that our own mortgage companies played by. We enforced the law on behalf of victims who otherwise had very little voice. This is the attorney general’s role, even if folks were not happy. But no one but tobacco and guns tried to claim we were acting unlawfully, or were the tools of trial lawyers, or tried to strip our powers.

My final point is this: there is a lot of hypocrisy in the arguments that are being made against the tobacco lawsuits and the potential gun manufacturing cases. When I proposed to use my consumer protection powers to deal with handgun safety, and when I suggested that Massachusetts might join in the tobacco litigation as the fifth state, I was told, by many people, that these issues ought to be addressed at the national level. I was told

that having one rule for Massachusetts and one rule for 49 other states is not fair, and I don't necessarily disagree with that assessment. What disturbed me, however, was that a major effort was also underway in Congress at the same time to avoid developing federal law that would preempt state discretion. There is a way to preempt state law action by passing comprehensive, relevant federal legislation. Until that sort of action is taken, however, it is hard to make the argument that states should not act because Congress should. You can not have it both ways.

Similarly, it is hypocritical when governors sign special legislation that precludes certain plaintiffs from bringing suit. If you don't like municipal lawsuits, there's a way to deal with that issue. It is ideological, not rational, to treat one industry differently than any other industry. What governor would dare sign a law that says that cities or individuals can not sue car manufacturers for producing defective products? What governor could survive who says you can't sue doctors or lawyers? You may not like the targets of guns and tobacco, but the discussion ought to be about the underlying principles. This discussion should not be cloaked under objections to excessive attorney general's powers.

DISCUSSION

GENERAL SPITZER (to General Pryor): Defining who the client is in one's capacity as attorney general is not as easy as it was in your representation of Philip Morris. Philip Morris is one corporation, or many subsidiaries, but you send them one bill and they send you back one check. According to the New York Constitution, I represent a diverse constituency. I have to represent the governor, executive agencies, the legislature, the New York Court of Appeals, and, of course, the public. With this in mind, when you say that Mike Moore went into court without a client, I think that's a questionable charge. The attorney-client relationship is very different for an attorney general than it is for a private sector attorney with a defined employer. I think Bill, Scott, and I would agree—as attorney general, you have to try to define what the public interest is. It's not as

though there is an individual who comes to you and defines it. This is where ideology plays a role: not politics, but ideology.

MR. WALLACE: General Spitzer is quite right: it is difficult for the attorney general to define who the client is because of the way our state governments are constructed. For the most part, they do not have unitary executives. But when I said Mike Moore didn't have a client, I was quoting Chief Justice Lee, who is quite familiar with our constitution in Mississippi.

The legal precedents in Mississippi say quite clearly that the agency charged by the legislature with a particular duty is, for all intents and purposes, the state of Mississippi when it is discharging that duty. The attorney general is to represent that agency. If the attorney general, in good conscience, can not do that, he is to pay for somebody else to represent that agency. Our law in Mississippi is, I'm sure, quite different than in other places; in our law, however, the chief justice is correct. When the legislature says the governor controls litigation, and when the attorney general certifies, to the federal government, that it is lawful for the governor to have sole authority over Medicaid litigation, that's what ought to happen. That is not what happened in our tobacco litigation.

GENERAL PRYOR (to General Spitzer): Elliott, I have great respect for you and the work you've done, particularly on law and order issues. Anyone who's familiar with my record in Alabama would know that the principal focus of my work has been much like your own: the prosecution of public corruption, white-collar crime, and fraud. There is much where we can agree. There were, however, things that occurred in tobacco litigation that you cannot ignore. You claim there was no new law developed—that simply isn't true.

I went to Chicago a couple of years ago and listened to Mike Moore make his pitch for having us join what was then a very small number of states suing the tobacco industry. He made it very clear: don't bring your lawsuit as a subrogation case. It was obvious that he was trying to craft new theories in equity. It was also very clear

that he thought it best to avoid jury trials—juries had historically sided with the tobacco industry.

In other states, attorneys general went even further. The second state to sue was the state of Florida, and they changed their subrogation law in the legislature in a very deceptive manner. When the changes were later discovered, it frightened the entire business community. There were results in other states that made it very clear that attorneys general were interested in changing the law. The Iowa Supreme Court threw out a Medicaid reimbursement claim. In Vermont, the legislature had to pass a special law to allow the attorney general to proceed. In Indiana, when the trial judge dismissed the entire case, one of our colleagues held a press conference, took the opinion of the trial court, and threw it in the trash can in front of television cameras. Now, that, in my judgment, is not respect for judicial decision-making.

To respond to your charge, I did not say that the only motivation here was revenue. It was clearly the main motivation. I say this because I was there. Most of the states weren't suing until the tobacco industry started talking settlement, and then the momentum was unbelievable. Why? Because of the money. It went to Congress, and the momentum was unbelievable. It got to be so expensive, it collapsed under its own weight. Were the doctors motivated by money and the public health advocates and the many others involved in this suit? I don't mean to suggest that they were. It is worth noting, however, that they are some of the same people who ended up criticizing this settlement as a sell-out. In many cases, they've challenged the national settlement.

My question for the panel is this: what do you think about some of the ideas that I've raised, about making sure that the process is fair? What do you think about regulating contingency fees for the reasons that I mentioned, and to create the appearance that this is not a corrupt process? What about the appeals bond issue, which was illustrated by Mike's comments? What about venue rules? Let's make sure this is a fair process and let's make sure that we adhere to established tort principles.

GENERAL HARSHBARGER: A month before I was going to bring my lawsuit, the tobacco industry did something interesting—they sued me in federal court. If I had done that, I would have been accused of bringing a frivolous lawsuit, playing politics, and not respecting the state law. These cases clearly raise many questions about lawyers’ tactics. I don’t think, however, that the process here resulted in poor representation for the defendants. They were hardly defended as if they were indigent.

QUESTIONS

AUDIENCE MEMBER: I was wondering if the panel would comment on contingency fees. Are there any circumstances in which attorneys general ought to use a contingency fee arrangement?

GENERAL HARSHBARGER: I can only comment on the Massachusetts experience. The tobacco case was one of the few times our office has ever used a contingency fee arrangement. Our policy, under most circumstances, was to use people from our office, rather than appointing private lawyers as special assistant attorneys general. When you do that, though, it is important that there be clear lines of supervision, especially if conflicts arise. My predecessor had used outside lawyers in the asbestos case. It had been done by a bidding process and with a very full review—all a matter of public record.

I used “contingency-fee” lawyers, as well as assistant attorneys general, in the tobacco case because I perceived tremendous legal odds against us. We had to have the legal resources to meet that kind of opposition, and I couldn’t justify putting the AAGs in our Trial Unit on this one case. In 1995, there were very few bidders for our side on this case. Most of the firms in Boston were conflicted out because they represented, in one way or another, one of the tobacco companies, at some point, somewhere. At this point, as everybody knows, there had never been any monetary recovery. For any law firm coming into this case, it was essentially viewed as *pro bono*. Once they agreed to join the case, we worked very closely

with our outside lawyers so that they were monitored and supervised. In all the other cases against businesses, *i.e.* Microsoft, other AG multi-state cases, we have done them all with our own staffs and blended staffs. I think people need to understand this.

In tobacco litigation besides Massachusetts, the contingency fees were arranged by each state. In our state these are matters of public record. Courts of each state determine what is a reasonable fee and what's not a reasonable fee. This is a matter of law in Massachusetts, no matter what happens in the arbitration process.

It is worth noting that the tobacco companies, as part of the settlement, agreed to pay the attorneys' fees separately. I'm not going to defend the fee arrangements across the country; I can only speak to Massachusetts...they agreed to pay the fees as part of the settlement. Had most attorneys general ever believed that in any way they were likely to be liable beyond this or that any amount was going to come back and be charged to the state, that would be, in my view, a total breach of good faith negotiations on the part of the tobacco companies. And, I think ultimately, that's why I hope reason will prevail here. Otherwise there would never have been a settlement—and the tobacco companies know that.

GENERAL PRYOR: Both Elliott and Scott have carefully considered this issue. There were various responses in the states and some of them were not nearly as responsible. In my own state, I appoint lawyers to represent the state, but the governor is responsible for determining how they're paid. There was a state senator who recently tried to strip my authority to appoint lawyers. The governor and I—and we are from different parties—fixed that problem and restored things back to the way they ought to be. In fact, we went further and made our law more specific about the lawyer-appointing process.

There ought to be checks and balances. I think Scott's method of taking competitive bids and having the governor sign off on the process is a very good idea. That method would, I think,

ensure that these kinds of arrangements are reserved for extraordinary circumstances.

AUDIENCE MEMBER (to the attorneys general): When you're exercising your discretion as to whether or not to initiate a suit, would you also take into consideration legislative approval of your decision? The way the tobacco industry is structured and the way that the settlement was structured, there's a high probability that the cost of the settlement went straight to your constituents in the form of price increases. Isn't that a relevant consideration when deciding whether or not to initiate a suit? If you're trying to recover Medicare fees, you could enact an extra tax, such as a state tax on tobacco products, and then you don't have to have a large contingent amount taken from recovery back to the state.

GENERAL SPITZER: In initiating any case, whether it's an effort to recover a claim against an individual who owes the state money or a more expansive claim, I undertake a complete analysis of the implications of the case. I ask myself, when seeking money damages or injunctive relief, what the impact will be. As with any litigation, you try to understand where you will be at the end of the day and who has been affected.

The likelihood that I would consult the legislature in this process is rather slight, however, because I do not believe it is appropriate to consult with political bodies before I initiate state litigation. This would mix the political and the legal, which I'm very hesitant to do. I do consult with executive agents who have relevant factual information. These agents have a necessary relationship with my office in the sense that they are occasionally our clients; there are reverberations or lawsuits that we file, for example, as part of our relationship with the Department of Environmental Conservation.

GENERAL PRYOR: I had a unique experience in this area. When I refused to join the tobacco litigation and said what my feelings were about this issue, I went one step further. I went to the legislature and proposed the largest tax increase, I think, in the history of the state of Alabama, a tax on tobacco products. The legislators

had told me they wanted this money to fund juvenile justice reforms and other projects, so I said here it is, vote on it.

The reception to this proposal was much chillier once I got to the legislature. It passed in the Alabama House of Representatives, but then died in the Alabama Senate. Many legislators wanted this money, but they didn't want to be held responsible for the price increases that would follow.

AUDIENCE MEMBER: Large amounts of money change hands in the form of attorneys' fees. The beneficiaries of litigation among lawyers are very frequently determined by highly discretionary and largely invisible rulings on such subjects as certification of a class, designation of class representatives, discovery rulings, and the like. How long do you think it will be before we have a very serious judicial scandal as a result of these developments?

MR. WALLACE: Don't be under the illusion that attorney general-driven cases are class actions. The whole point of attorney general litigation is that you don't have to go through the trouble and procedural protections that are inherent in class action suits. You don't ask whether the class is manageable, you don't ask whether the claims are similar. If the attorney general sues on behalf of the entire state, all of those steps are skipped, and you go directly to the merits of the lawsuit. The attorney general may or may not have authority to do this in particular cases, but either way, it's not a class action.

GENERAL HARSHBARGER: This is totally disingenuous. The attorney general ultimately is accountable to people. Whether you agree or don't agree with the attorney general in this kind of an action, the same procedural motions and rules apply for AG actions as for anyone else and judges certainly will review it. The whole first year and a half of tobacco litigation was devoted to fighting procedural issues and motions in court. That's not related to your wider point, but it speaks to whether the tobacco suit was or was not a class action.

I've heard the arguments from businesses and others that there is no protection that exists in terms of class actions brought by anyone. There is nobody really that monitors those. We all have seen the problems of class actions where the plaintiffs never got a penny! So I think that that can't be laid at the feet of the attorneys general in this area.

As to your other point, you are going to have to look at these cases on a case-by-case basis. I know what happened in Massachusetts. I know how we structured our case and how we tried to work out an arrangement, and how public it was and continues to be. You can still see what the documents are and what's going to happen, and people can judge on that evidence.

AUDIENCE MEMBER: A question about contingency fees. It would seem that when you enter into a contingency fee agreement, you're trading off services on the one side and a percentage of a valuable claim—choses in action, as lawyers would say—on the other side. That's an allocation of state property. Do you believe attorneys general have the authority, under state law, to dispose of property of the state? If so, has the legislature created appropriate rules in this area? If they have, who can participate and bid on those assets if you're putting them up for sale? Late in litigation, when it looks like there's clearly going to be a big reward, that's a very important question.

GENERAL SPITZER: As Scott said, one of the underlying misconceptions about the tobacco settlement is that the attorneys' fees are coming out of the public's pocket. That is not the case. They defendants have agreed to pay these fees. Now, you could argue they would have paid more in the settlement, but then you get into negotiation theory and pure hypotheticals. The tobacco companies are paying the attorneys' fees and, therefore, these fees are not state property. I don't say this to justify the fees. I never would have entered into those agreements and I criticized my predecessor for the terms, bidding process, and determination method his office used for choosing attorneys. This said, it is within the attorney general's authority, pursuant to the

state constitution, to handle the legal affairs of the state and to enter into these relationships.

MR. WALLACE: In Mississippi, our constitution places limits on the authority of any officer of the state government to alienate any asset of the state. Whether that has actually occurred is not clear because nobody has tested it. In many of the states, the attorney fee agreements are matters of public record. To the best of my knowledge, the attorney fee agreement in Mississippi is not. I have never seen it. I don't know anybody who has. It's not clear exactly what happened.

Panel Two

The Politics and Economics of Government-Sponsored Litigation

Panelists:

Honorable Jane Brady

Delaware Attorney General

Professor Lester Brickman

Cardozo Law School

Honorable John Cornyn

Texas Attorney General

Professor John Langbein

Yale Law School, Chancellor Kent Professor of Law and Legal History

Mr. Richard Scruggs

Scruggs, Millette, Lawson, Bozeman & Dent, Litigator for the Plaintiff

Honorable Richard Thornburgh

76th U.S. Attorney General

Mr. James Wootton

*Executive Director, U.S. Chamber of Commerce Institute for Legal Reform
(Discussion Leader)*

GOVERNOR RICHARD THORNBURGH: I want to emphasize the elected character of state attorneys general. We are all prisoners of our own experience and I'm not an exception. I've served as a United States attorney for Western Pennsylvania and as attorney general for two administrations. In each case, I was a lawyer with a client: the President of the United States and/or his delegates. Policy calls in each case were made by that client. The President was properly and politically accountable for policy decisions.

As governor of Pennsylvania for two terms, I had the unique experience of dealing with both an appointed and an elected attorney general. The constitution was amended during the time that I

was in office, so I was both client and onlooker as to the legal undertakings of the attorney general's office. Based on my experience, I have developed a strong preference for the appointed attorney general. I am not unrealistic; I realize that there is very little likelihood that states with elected attorneys general will switch to the appointment system. But I suggest to you that the differences between elected and appointed attorneys general are instructive to consider.

What we have seen more of lately is lawyer-driven rather than client-driven litigation. This is especially true because of the recent phenomenon of hiring outside counsel on a contingency fee basis. As David Rosenbaum noted recently in an article in *The New York Times*, "the potent alliance between well-heeled trial lawyers and state attorneys general against the tobacco industry has broadened everyone's thinking about creative legal remedies." In the area of tobacco, guns, health care, and lead paint, to name but a few, these creative remedies may soon become the order of the day.

I see two problems with this approach. First, there are serious separation of power questions that are raised in this context, especially where this type of subcontracting takes place. Our governments are divided into the legislative, executive, and judicial branches. It is somewhat difficult, I think, to insert a fourth separate litigating branch into this rubric, especially when it is subcontracted out to private parties. Moreover, this constitutional separation assumes that policy will be made by the legislative branch, executed by the executive branch, and adjudicated before the judicial branch. This ensures a maximum of accountability and responsibility to the voters and taxpayers.

Lately, as noted in the *New York Times* article from which, I previously quoted, "Public officials who are frustrated because they've been unable to get laws passed regulating an industry that makes a dangerous product, egged on by trial lawyers, have sued the industry to try to win in court what they cannot win in the political arena." Need I note at this juncture that it is in the political arena where policy is properly made?

The second problem with lawyer-driven litigation has to do with the increasing tendency to use these suits as off-budget sources of revenue. The tobacco settlement produced four billion dollars for Maryland, 25 percent of which is due their lawyer, Peter Angelos. Governor Glendening is reported to have said, “give me three more Peter Angeloses and we don’t have to worry about a budget.” A somewhat similar approach was taken by President Clinton in seeking to have the Justice Department litigate to secure funds to deal with the hemorrhaging of Medicare. This kind of approach throws the budget process completely out of kilter.

Finally, there is the matter of political motivation. I want to assure you that I do not view the National Association of Attorneys General as really standing for the National Association of Aspiring Governors. There is, however, a strong suspicion that many of these headline-grabbing suits may be undertaken to promote a personal political agenda rather than the public interest. More often than not, these political aspirations are fueled by substantial contributions from the bulging war chests of successful contingent fee litigators. In last year’s elections, two of the leading attorneys general in the tobacco battle went down to defeat. This may have taken some of the bloom off of this particular rose. A perception remains, however, that there is a conflict of interest, and this can be harmful to the health of the overall body politic.

I spent the better part of my public and professional career trying to remove the influence of partisan politics from the judicial selection process in my home state of Pennsylvania. This effort is perhaps most notable for its almost total lack of success. I wonder, lately, if a similar affliction affects our state attorneys general offices. At least some further legislative and executive input into these litigation decisions must be encouraged, for this is the exercise of their traditional constitutional functions.

PROFESSOR LESTER BRICKMAN: My thesis is simple. Partnerships between state governments and private attorneys amount to a corruption of both legal ethics and the legal process. Let me

start with a brief analysis of the tobacco settlement, which is the culmination of a wider process of privatizing public policy-making. The settlement mainly consists of the payment of billions of dollars to the states, and additional billions in commissions to lawyers who initiated and then facilitated a tax on tobacco products. While the parties to the settlement benefited--that is, the lawyers, the states' attorneys general, and the tobacco companies, tobacco consumers, who were unrepresented at the table, lost. So did state taxpayers, who would have been far better served by alternative tax strategies.

The commissions that I have referred to, the so-called "lawyers' fees," come out of the monies allocated to the states. They amount to a present value of approximately eight billion dollars. These fees are a total rejection of fiduciary principles and rules of legal ethics limiting fees to reasonable amounts.

Because of the great public outcry against multi-billion dollar contingency fees, the parties to the settlement substituted a so-called arbitration process, which operates in total secrecy. This arrangement is setting fees at even higher levels than the contingency fee contracts provided, amounting, in some cases, to hundreds of thousands of dollars an hour. Why is the arbitration process producing extravagant payments? One reason may be that the selection of two of the three arbitrators is effectively controlled by the lawyers. That is a corrupt process, and was established to divert public attention from contingency fee agreements that were wildly excessive and utterly incompatible with fiduciary principles and rules of legal ethics. By some measure, that process has turned out to be a conspiracy between the private lawyers, the states' attorneys general, and the tobacco companies to plunder the public till for mutual gain. Much of the money being paid to the lawyers rightfully belongs to state taxpayers under doctrines of *parens patriae*, fiduciary law, and rules of legal ethics.⁷

The corruption of state processes has been so thorough that it is virtually beyond the ability of the states to take any effective

remedial action. Recouping money that rightfully belongs to the states but was corruptly diverted to attorneys is possible, but only if Congress mandates the restoration of the rule of law and of legal ethics into the tobacco settlements.

The corrupt nature of the fee agreements and the fee-setting process flows from the method of selecting contingency fee lawyers. Many of the attorneys were selected, so it appears, on the basis of campaign contributions to states' attorneys general. It was pay to play all the way. We have heard it said, again and again, that bringing these tobacco cases involved great risk. If this is so, why did lawyers fight over the right to be designated as attorneys for the state? Why didn't attorneys general follow established state law when awarding these contracts and put them out for public bidding? Would lawyers have engaged in such bidding? News reports indicate that former Texas Attorney General Morales demanded one million dollars as the price for being designated as one of the Texas attorneys. It's no wonder that the selection process was shrouded in secrecy.

Not only were legal ethics rules regarding lawyers' fees egregiously violated in the tobacco cases, so too, was the rule of law itself. Contingency fee lawyers and the attorneys general used bare, brute force to bludgeon the tobacco companies into submission. Even though there were filings in state courts and one in federal district court, the object was not to litigate. The object was to raise the threat level high enough to coerce tobacco companies into suing for peace. The lawsuits had no basis in law. They were not founded on any tenable legal theory or precedent. This was simply state terrorism. The tobacco companies feared that state courts, when faced with the choice of fidelity to law versus transferring enormous amounts of wealth from out-of-state corporations to the states' coffers, would embrace the golden rule, namely, let's get some of that gold. That is the only reasonable explanation why the trial judge in the Minnesota tobacco case, for example, determined that his charge to the jury was not fit for public consumption and thus sealed it from public view.

It should come as no surprise that arraying the awesome power of the state with the financial interest of contingency fee lawyers is a corrupting process. Indeed, as a matter of policy, we do not allow the use of the power of government for self-enrichment since such a power would inevitably be misused.

Still another example of the corruption of the state-private lawyer partnership is the sale of the state's legislative authority as part of the Master Settlement. Under the settlement, states have agreed to bear a significant financial penalty if they fail to use their taxing power to enact legislation to effectively prevent start-up tobacco companies—unburdened by the settlement cost—from competing against Big Tobacco. Given the common interests of the states and the tobacco companies, it is perhaps not surprising that the states would act to protect the revenue stream of their tobacco company partners. But why wasn't so important a matter of public policy openly debated—as it would have been had the issue been raised in the course of debate before state legislatures? Because the tobacco settlements were negotiated in secret, not subject to public scrutiny—so much so that not a single mention of the unprecedented provision I am referring to has yet appeared in any newspaper.

Although some states acted very much as partners in a private deal, the settlements with tobacco are *not* a private deal to which the states happen to be partners. They are a public deal done privately. Resolution by the courts of political controversies, such as the regulation of tobacco or guns or whatever is next on the lawyers' agenda—and note, they set the agenda—is a corruption of the political process.

As Peter Huber has described in the June issue of *Commentary*, the “show trials” that were part of the trial lawyers' strategy were the product of a meretricious marriage. Trial lawyers sought multi-billion dollar commissions by moving political controversies from the legislatures to the courts; state and federal officials perceived the political benefits of litigation after they were unable to convince state legislatures to do the right thing.⁸

When public policy-making is removed from the legislature and, therefore, from political accountability, our republican form of government is undermined. However messy democracy is, attempts to correct its shortcomings invariably lead to less public accountability and more corruption. That is how we got to where we are.

What we have seen in the tobacco litigation is not the rule of law in action but a corrupt process—the corruption that inevitably attends the conjoining of the actions of: private lawyers motivated by unprecedented billions of dollars of financial gain diverted from the taxpayer’s coffers; state attorneys-general able to operate in secret; the coercive power of the state to create massive liability by hauling unpopular defendants before its courts; leading to the total evisceration of the fiduciary and ethical obligations of lawyers to their clients—the taxpayers of the state, and the “for sale” sign being hung out over a state’s legislative process.

MR. RICHARD SCRUGGS: I am part of the core group of Mississippi lawyers who, under the direction of Attorney General Mike Moore—not a bunch of trial lawyers—put together the legal theories that became the backbone of the Medicaid litigation against the tobacco industry. I participated in the settlement discussions with the tobacco industry, led part of them for most of the process, and went on to have the honor of representing some thirty states in their litigation against tobacco. I represented both Republican and Democratic attorneys general. Tobacco was very much a nonpartisan issue. There was a widespread intent to keep it that way. This was not a trial lawyer-driven litigation. It was attorney general-driven litigation and it was pursued for many good reasons.

Parens patriae lawsuits, like the tobacco cases, would not be possible were it not for the ability of some industries to frustrate the normal institutional counter-measures against practices that harm consumers. Tobacco is unique. It is the only product legally sold in the United States that, when used exactly as intended, will kill the consumer. That fact has been denied until recent years by the people who sold tobacco. Almost 500,000 Americans die every year from

tobacco use. Almost 3,000 children start smoking--and when I say children, that's under 18--start smoking every day in this country. About half of those people will die a very painful death from tobacco-related diseases.

I have never heard as much complaining about lawyers as I have over tobacco lawyers. There is absolutely no reason for it. I do not think that *parens patriae* cases, where attorneys general hire private lawyers on a contingency fee basis, will work in very many scenarios. I do not think you will see the tobacco phenomenon repeated again. I know that there are some lawyers and some attorneys general who are interested in litigation involving lead paint and guns and various other phenomena. These cases are not going to be as successful as tobacco because the normal legislative processes will not fail as it did in regulating this industry. Tobacco is a unique product and it deserved what it got.

The lawyers made about eight billion dollars so far. They recovered over \$250 billion dollars for their clients. Less than three percent of tobacco money went to the lawyers, not 25 percent. The lawyers assumed all of the financial and legal risks, and, had they lost the case, they would have been paid nothing.

Governor Thornburgh's observations about the separation of powers in this context are not well founded. The attorneys general, at least in most southern states and probably around the country, are independent constitutional officers. They have their own prerogative to bring lawsuits. The executive power, in many states, is not vested solely in the governor. It is vested in a number of constitutional officers to prevent the concentration of power. That was true in our state and it's true in most southern states with Reconstruction Era constitutions. Citizens of many states were afraid of Reconstruction governors. They did not want to give them much power. The attorneys general of these states, unlike the Attorney General of the United States, represent the people of the state and not the governor. These attorneys general are responsible to their clients, and their responsibility is gauged in elections.

To my knowledge, not a single attorney general has been unseated as a result of bringing tobacco litigation. A couple of attorneys general who brought tobacco suits were unsuccessful in their bids for governor, but several who did not were also unsuccessful in their campaigns. I do not think tobacco was a factor one way or the other in whether a candidate was successful.

The National Association for Attorneys General is a collegial group of men and women of both parties. Members work together to form a sort of safety net—they catch things that federal regulators and the Department of Justice is afraid, unwilling, or unable to deal with. This country is fortunate to have a strong National Attorney General Association and strong state attorneys general who are responsible to the voters.

ATTORNEY GENERAL JOHN CORNYN: I will not contend, as some have, that all lawsuits brought by attorneys general are bad things. The attorney general's role in consumer protection and in enforcement of antitrust laws, for example, is well established. Nor do I have any sympathy for the tobacco industry. Their culpability, frankly, is beyond doubt. I do disagree, however, with an argument made by Mr. Scruggs and some of my fellow attorneys general, namely, that attorneys general have the authority to hire contingency fee lawyers without the involvement of the state legislature.

This sort of hiring activity violates the state constitution in my state. It violates similar constitutional provisions in other states. The way that fees were structured in the tobacco litigation violates the traditional duty owed by a lawyer to his client. This is a recipe for abuse of power and even corruption. Rather than the phrase that is memorable out of *Jerry McGuire*—"show me the money"—this is really a story of *whose* money is involved. I think the money is the client's money, and that client is the taxpayer.

Richard Neustadt describes the separation of powers in America as "a government of separated institutions sharing powers." The idea behind it, of course, is that there is no such thing as an

independent agent who is a government actor. Even though separate functions of government exist, each branch of government is designed to be accountable. Power is checked and balanced by other powers and other branches.

In this context, consider the appropriation power. This power is exclusively granted to the legislature, which is not reflected in the attorneys' fee arrangements. If you accept that state attorneys general can contract with lawyers on a contingency fee basis without the involvement, consent, approval, or consultation of the legislative branch of government, you are saying, in effect, that the attorney general—an agent of the executive branch—has the power to appropriate the proceeds of a settlement or a judgment. Indeed, under this arrangement, the attorney general has the power of the purse; he need not have his power checked by any other branch of government. This is policy-making by the judicial branch through the use of entrepreneurial lawyers.

These lawsuits, at least in potential, are an end-run around representative democracy. I am not satisfied with the argument that, when the standard processes do not work, these kinds of lawsuits are necessary. I am not convinced that government has to hire outside lawyers on a contingency fee basis to see that justice is done.

Further, these are not suits that are made to be tried. None of these suits were brought to a conclusion. Rather than resting on established legal theories of causation and damages, these cases presented novel legal theories. These cases were based on a coercive power that is similar to that seen in private class action lawsuits: they cannot be tried because the ramifications of an adverse decision would be catastrophic. The defendants make the only decision they can—they figure out how much it will cost to buy off a lawsuit and then they purchase their peace.

Recently, breast implants have been vindicated—again. The blue-ribbon Institute of Medicine panel found, after years of investigation, no empirical evidence that silicone implants cause systemic

disease. The breast implant industry, however, has paid \$3.2 billion dollars to settle a class action lawsuit. This situation is revealing: even in the absence of proof, economic pressures are so great that an industry can not afford to go to trial. They must, out of necessity, try to settle on the best terms they can.

The tobacco litigation is a story about the importance of open government. When private agreements are entered into by government actors without debate and without the participation of the other branches of government, bad things can happen. Government officers, being human, cut corners when there is too much money and too much temptation.

Indeed, the story in my own state is a story of too much money and too much temptation. After the Texas tobacco case was settled and it was time to allocate payments, a sixth lawyer emerged who said he was on the case for approximately two years. This lawyer, Marc Murr, claimed to have a contingent fee contract with the state. Under agreement with the former attorney general, his fee was decided not by the court, but by a state arbitration panel. This panel was selected by Mr. Murr and by my predecessor. My predecessor went to the hearing and argued that Mr. Murr was entitled to a three-percent contingency fee, amounting to \$520 million dollars.

I found it necessary, upon taking office, to conduct an investigation into Mr. Murr's claim. My office discovered that the contracts he used to vindicate his case were backdated—they were basically doctored instruments. We presented our case against Mr. Murr in Texas federal court on May 5th. On May 6th, when we showed up prepared with evidence to back up these allegations, Mr. Murr dropped his claim to what was approximately \$259 million. Remember, his original claim was \$520 million. He was awarded \$260 million, but as it turned out, the tobacco industry, through the national arbitration panel, had awarded him one million.⁹ Mr. Murr relinquished any claim to the \$259 million dollars that he had against the state rather than take the witness stand, put his hand on the bible, and be subjected to cross-examination.

Mr. Murr, at this point, had already received payments from the tobacco industry through a million-dollar national arbitration panel award. He mailed that money back, I assume, because of the pressure created by our investigation. As of today, he has turned down, dropped claim to, or returned a total of \$260 million dollars. That matter is now pending before a federal grand jury in Austin, Texas, and is under FBI investigation.

In closing, there are things that might be done to address some of the concerns raised by tobacco litigation. Several days ago, Governor Bush signed Senate Bill 178 in Texas.¹⁰ This bill says that any time the attorney general decides to file a lawsuit and hire outside lawyers, this decision must be subject to the approval of both the legislature and the governor. This is not a decision whether to allow the attorney general to file a lawsuit. It merely determines who holds the power of the purse and who pays for outside lawyers. The bill also stipulates that any recoveries pursuant to these contracts are state funds, which I think is an important point. It says that any payment of attorneys' fees is subject to the usual appropriation process.

The tobacco story is a sad story in many ways that didn't have to be so depressing. As a result of considerable temptation, corners were cut and secret deals were made. This had catastrophic consequences.

ATTORNEY GENERAL JANE BRADY: Delaware did not file any litigation in the tobacco lawsuit. I was concerned about filing for practical, legal, and political reasons. In Delaware, both the governor and the attorney general have to sign any outside counsel agreement. The decision whether to bring an action, if I didn't hire outside counsel, was ultimately mine. I have that authority because I am an independent constitutional officer.

In making my decision about tobacco, I first considered our Court of Chancery. This court, which is internationally renowned for the certainty and reliability of its rulings, was not likely to impose liability based upon novel theories of culpability. Frankly, I believe the state attorneys general based much of their litigation on novel

theories. Some of the concepts they applied were traditional, but their application to the tobacco business—a business which markets and manufactures a lawful product—was not. I did not think, given our corporate legal environment, that we would prevail. Incidentally, my peers, who brought litigation in states such as Florida and Mississippi, understood that Delaware was a turf of choice for the tobacco industry. I think they were pleased that I didn't file suit.

Some of the practical considerations that entered into my decision not to file had to do with my relationship with the governor. The governor and I sensed that we had little support in the legislature for tobacco litigation. The governor had proposed a tax on cigarettes of, I think, 25 cents a pack. I actually stood with him—one of the few times I've supported a tax increase—and supported his proposal.

Since that tax failed in our legislature, we both decided there would be little support for the costs of litigation. While some of the costs, in other states, were covered by the attorneys, I had little hope that we would be able to defer the entirety of expenses. One state told me that its copying costs alone were in the tens of thousands of dollars because of the number of documents that were accumulated in the course of litigation.

In reference to outside counsel, I had a real aversion to a contingency fee arrangement. Even if we had filed, I would have been reluctant to contract with outside lawyers. Some of my reservations in this area come from my background. I know, from experience, that the motivation on the part of government attorneys is very different than the motivation of private counsel. The motivation of public attorneys is, or should be, to serve the best interests of the people they represent and to pursue equity, justice, and fairness. Contingency fee arrangements are not consistent with these motivations.

I reviewed the state's outside counsel relationships upon being elected as attorney general. We had a number of cozy relationships

with outside lawyers, largely because the legislature will not give my office the staff to perform certain legal functions. My office revised that process. We now take bids for all legal work for the state. The contracts are definite, for either a durational or transactional term, and we negotiate hourly rates, number of hours, and other terms of the relationship. Our new approach is inconsistent with contingency fee arrangements.

In addition to these factors, I decided not to join the tobacco litigation because of my own political calculations. I was in the middle of reelection in November of 1998, and I took public sentiment seriously. One of our state papers chooses a topic of the week. In one issue, it asked readers if Delaware should bring a tobacco lawsuit. The paper received numerous responses. Not one said, "sue tobacco."

I knew the decision not to sue required some courage. In many ways, it would have been easier to jump on the tobacco bandwagon like so many of my colleagues. They had little interest in the merits or the intricacies of the litigation. Some were actually surprised when their cases weren't prevailing in pretrial litigation motions as a result of their arguments' weaknesses.

It is worthwhile to note that the public sentiment and the media sentiment were quite different. By not suing, I had the support of the public. By choosing to negotiate, I had the support of the media. All the leadership and editorial boards seemed to favor litigation in this matter, but they also understood the practical realities that drove my decision not to sue. In this sense, then, I could have it both ways.¹¹

Politically, tobacco was not much of an issue in my state. In Minnesota and Massachusetts it was. Shortly after bringing billions of dollars into their states, the people who had taken on tobacco did not do well at the polls. That, to me, is significant.

Two final issues. No one from the tobacco industry, to show appreciation for my decision not to sue, offered me a campaign

contribution. I do not, as a rule, accept PAC funds, but I do not think this was known by the industry. Practically speaking, my decision not to sue wasn't seen as a major issue.

Finally, it's interesting to hear people distinguish tobacco litigation from other lawsuits. Certainly, there has been a long-term public health campaign waged against tobacco. Certainly, the tobacco industry has made inconsistent statements and clear misrepresentations. The legal environment and the political environment both insured that these lawsuits would be successful. It seems possible, however, that these factors will reoccur. There could easily be another instance of long-term beating up on an industry, based on legitimate or illegitimate criticism. Public opinion could turn against another business. We are already seeing the phenomenon of cities bringing litigation instead of states. A danger clearly exists: tobacco is not as unique as it has been represented.

MR. SCRUGGS: I will stick by my guns on the uniqueness of tobacco. I've had this debate many times, General Brady, and you made the case as well as it can be made. Tobacco is unique. It is, again, the only legal product sold in this country that kills when used as intended. You cannot say that about alcohol. The industry does not recommend that its consumers drink and drive. You can not say that about guns. The industry does not say point at someone and pull the trigger. The tobacco industry says, "put our product in your mouth and smoke a carton a day; there is nothing harmful about our product." It maintained that lie for many, many years.

There is a popular argument, usually made by the tobacco industry, that legal products should be immune against civil prosecution. This simply isn't true. The question is not whether tobacco or any other product is legal. The question is whether a product is defective. This is what the civil law takes into consideration. Lead paint, of course, was legal, but it was deadly and defective. Asbestos was also legal, but it caused long-term injuries to many thousands of people.

The industries that sell defective products to the public—tobacco, asbestos, lead paint—are, essentially, externalizing the costs of their products. It's no different from an oil refinery dumping its byproducts into rivers, streams or oceans. This is simply passing on the costs of doing business to society as a whole. This is why tobacco is so enormously profitable: the industry, until recently, did not pay for damages it incurred.

Every product, I admit, has some external component. Every business externalizes some of its costs. The civil law, thankfully, provides a great safety net in the form of *parens patriae* lawsuits and tort litigation. When an industry behaves outrageously—when it knows what its products are doing and these facts are concealed from the public—the tort system does its thing. That's when guys like me engage in concerted action. We are part of the ecological system: we act when there is imbalance in one area.

I would like to respond to the comments made about attorneys' fees and contingency fee contracts. In the state of Mississippi, there was no contingency fee contract. There was no lawyers' arrangement. There was, instead, an understanding: if the litigation proved successful, we would ask the court to extract an attorneys' fee from the losing party, the tobacco industry. None of the money that went to lawyers in Mississippi—or in any other state—came out of the states' recovery. The multi-state settlement agreement created a strategic litigation fund. The fact, for example, that General Brady hired no outside counsel and took no role in the case deprived Delaware of money that was available for other states.

The attorneys' fees issue is really a non-issue. Whether it's a contingency fee arrangement or not, the states aren't being asked to pay. Charges are billed to the tobacco industry. No state is going to make more money because they didn't hire outside counsel; in fact, some were making less.

As for the argument that the tobacco litigation resulted in cruel taxes for consumers, I think it is correct. The tobacco industry is indeed passing the costs of these settlements on to the consumer.

They're passing them on to the smokers, and that's who ought to be paying them, not the three-quarters of the American population who do not smoke. Smokers should pay for their risky behavior. They should not be asking non-smokers to pay their hospital bills through higher Medicaid taxes. They should not have the right to strain the states' health delivery systems.

As a further benefit, high prices make it tougher for kids to buy tobacco. Children are much more price-sensitive than adults. Price increases will reduce underage smoking if given enough time and consistency. California reduced their overall smoking rate by approximately a third, from 25 percent—which is about the national average—to 15 or 16 percent. This followed a determined effort aimed at kids and smoking.

PROFESSOR JOHN LANGBEIN: I will pick up with Mr. Scuggs' remarkable claim that attorneys' fees are a non-issue. For me, they are an issue. Let me give you some numbers. The lawyers representing Texas, Florida, Mississippi, and Minnesota have been awarded a total of 8.6 billion dollars. The industry has settled with lawyers representing eight other states for a total of \$221 million. Fees already allocated to these white knights for their services in twelve states amounts to, in round numbers, nine billion dollars. This is an average of 16.5 percent of what the states expect to receive.

If this nine billion dollar figure were to hold nationwide, the total recovery would be a little over \$40 billion. To put this figure in perspective, a company with revenue of \$40 billion in fiscal 1998 was Sears Roebuck. It ranked 16th on the Fortune 500 list. It earned its \$41 billion through the efforts of 324,000 employees, as opposed to 250 to 400 tort lawyers who are going to share the attorneys' fees. The enormity of these payments is without example in legal history. Mr. Scuggs is a historic figure. His picture is going to go in the legal history books, along with Justinian and Lord Coke. He's going to be there for having had the unbelievable nerve to demand billions upon billions of dollars and then to actually to get it, or at least come very close.

The idea of charging this kind of money in connection with a legal system is unheard of, not only in our own legal tradition, but anywhere else. When Europeans hear these numbers, their jaws hit their desks. No well-run polity needs to pay \$8 billion or \$40 billion to facilitate the ordinary functions of government. To pay this kind of money to private entrepreneurs for what is basically a public function is extraordinary, unprecedented, and deeply unprincipled.

General Spitzer and Mr. Scruggs have referred to these fees as free money. “This is being paid for by the tobacco companies,” they say, “what are you guys complaining about?” This is book-keeping, not legal or economic analysis. It’s very clear where this money is coming from. The tobacco companies are simply a conduit. Those fees are proceeds that would otherwise have come into the hands of the public if this had been done as a tax, which, in fact, is what it really is.

Lester Brickman is not alone in noting that this arrangement, purporting to be a lawsuit and a settlement, is, in fact, an off-budget tax that the legislature didn’t have to pass. Jeremy Bulow and Paul Klemperer have a paper published by Brookings Institute that makes this point.¹² Marc Galanter raised this issue in *The American Lawyer*.¹³ Judge Williams of the D.C. Circuit argued this point at the American Law Institute’s 1998 annual meeting.¹⁴

These tax increases were dressed up as lawsuits-cum-settlements, and this was marvelously attractive for many people. On the one hand, the legislators did not have to do the dirty deed of a tax increase. This protected them from the wrath of the 20 to 30 percent of their constituency who smoke and would be subjected to new taxes. The legislature, however, still was able to appropriate the funds from the settlement, except for the 25 percent that went to the friendly tort lawyers. This is taxation without responsibility. It conceals the mechanism from the public. No wonder no attorney general was defeated as a result of this process--nobody knows what happened. This was an absolutely brilliant scheme.

Mr. Scruggs has noted how terrible the tobacco industry is. I think we can agree that they have not been particularly well behaved. The point is, however, that this deal *included* the tobacco industry. There is a reason why, when this settlement was announced, tobacco stocks went up. Wall Street knows how to count. The tobacco industry was not seriously hurt; this was an arrangement designed to keep people smoking. Future revenue will come from future smokers. Those are the terms of the deal.

One of the most worrisome things about this transaction is what the tort lawyers are going to do with their billions. They already have their yachts and their condos. They will use their money, in all likelihood, to corrupt the state bench. Consider who presides over tort litigation in this country. It is state court judges at the trial and appellate level. Tobacco money will be funneled into the ever increasingly expensive process of running for judicial office. Needless to say, there are exactly two types of people who contribute to judicial candidates: mothers and those who have an interest in the outcome of litigation.

A few comments about the attorneys general and their intentions. There should be serious concern about having large amounts of money flow through their offices. In Kansas, the attorney general selected several law firms to prosecute tobacco, one of which turned out to be her former law firm. This was done without competitive bidding. There was some kind of legislative budget committee that reviewed, and then approved, her decision; she told them, "I don't think the low bid is the way to choose your lawyers." Translation: I get to pick my friends. In Texas, before the distinguished current attorney general, there were some interesting machinations. Members of the five law firms who were awarded \$3.3 billion for representing Texas were long-time donors to the Morales campaign and the Texas Democratic Party. In 1998, for example, members of those firms gave \$1.8 million to the Texas Democratic Party, about one-third of the political funds raised by the organization that year. You think you're going to get tort reform after you put this kind of money in the hands of these people?

I would like to return to an earlier comment about the essentially public character of these claims. Attorneys general cutting deals with Mr. Scruggs and his ilk ignore everything we've learned about how to deal with public goods. Bringing public claims at a contingent fee price tag takes liberties with public property. This money is every bit as much public property as the Washington Monument or any other public asset. We have a very extensive tradition in this country of insisting upon open bidding, competitive bidding, or open contracting when government deals with the private sector. This process, in the hands of many attorneys general, has been ignored. There is a kickback danger here which is very real.

The problem with tobacco is complex and long-term: how do we get youngsters not to smoke? What are the necessary steps? Can you imagine a concerned governor going to the legislature and saying, "I've decided that what is needed is a lump-sum appropriation to deal with this for the next 25 to 40 years. I know what it's going to cost; I know everything that's going to happen." He wouldn't be taken seriously. What you do, if you go about reform sensibly, is to try a little of one thing, a little of another, see what works, and then do some more. Compare this to the practice of paying tort lawyers up front. They collect, before the reform process begins, lump sum or liquidated damages. Whenever tort lawyers are involved in any social problem, it injects a tremendous bias for the wrong kind of remedy.

The use of the contingency fee in this context is, in itself, deeply dubious. Remember where the contingent fee came from: it was to allow the tort lawyer to serve the little guy who couldn't pay for counsel. Does that sound like the state of Minnesota? The single largest concentration of resources anywhere is in the hands of the state. To transfer the contingent fee idea to this setting is a deeply suspicious step when alternatives are available—namely, the attorney general can bring in-house litigation. If resources are scarce, go to the legislature and get the budget. If outside service providers are needed, then hire them on a fee basis. The idea of using contingent fees, even if they were reasonable as opposed to shocking, is suspect on its face.

If the legal system can't figure out a way to shut these things down, then Professor Brickman is right: we should propose an excess profits tax on the newly enriched lawyers.

In conclusion, I want to emphasize the point that General Cornyn made about these suits being too big to litigate. They are not real lawsuits. They are taxes on industries by well-coordinated groups of predators. This one happened to be on tobacco; the one before that was directed at breast implants. We are witnessing utter voodoo science, utter witchcraft, manufactured by a cabal of tort lawyers.

DISCUSSION

MR. JIM WOOTTON: I would like the panel to respond to a few points that Mr. Scruggs raised. Can an analogy be made between harm caused by the tobacco industry and an oil refinery's pollution? Is litigation the most efficient way to address the problem of pollution or other kinds of social costs imposed by irresponsible industry behavior?

MR. SCRUGGS: I don't think litigation is the appropriate method if there is another method available. Litigation should be considered a last resort. It only works, in my judgment, when the normal institutions of government fail or are frustrated by an industry that has the power to ignore the will of the people. Litigation is only appropriate when an industry uses its own money and power to externalize its costs.

The litigation against the gun industry, for example, is not going to accomplish what the litigation against the tobacco industry did. The gun industry should be held accountable, but I don't think it can be held accountable by litigation. Gun proliferation is an immense political and social problem, and it needs to be dealt with by political institutions, not in the courtroom. But when it gets to the point where hundreds of thousands of Americans are dying every year as a result of industry misbehavior and nobody is doing anything about it, the tort system *should* take over.

GENERAL BRADY: Many of the public health advocates, after the tobacco settlement, were very critical of the result. Many attorneys general were confused and saddened when these people turned against them; they felt they had done a great thing by bringing a previously unaccountable industry to its knees. Attorneys general recovered unprecedented amounts of money for good reasons—to help with health care issues—and they were criticized by the people they thought were their greatest advocates.

QUESTIONS

AUDIENCE MEMBER (to Mr. Scruggs): There is an attorneys' fees finalization process occurring in many states. Panels reviewing fee agreements have reduced the amount of money requested by attorneys in approximately forty states. Does that reduction flow back to the states or does that go to the tobacco companies?

MR. SCRUGGS: More than half of the total fees that will be awarded to lawyers have already been awarded. I say that with some disappointment because that's coming out of my pocket. States that have not arbitrated their fees got involved in this litigation later in the game. Their lawyers took less risk, so they will receive less money.

AUDIENCE MEMBER (follow-up, to Mr. Scruggs): In those instances in the later cases where the fee amounts are reduced, who will be the beneficiary? The tobacco companies or the states?

MR. SCRUGGS: The tobacco industry. We're not competing with our clients for money.

AUDIENCE MEMBER (to Mr. Scruggs): I did not quite follow one of your arguments. You said that tobacco companies externalized their costs. By that, I assume you mean that they made people sick and weren't paying for it. This implies that what makes people sick are tobacco companies, not their own behavior. You also said that the effect of the settlement is to

impose the cost of smoking on future smokers. I'm not sure how that internalizes a cost that you previously said had been wrongfully externalized.

MR. SCRUGGS: I consider the smoker to be the unwitting accomplice of the tobacco industry. When I refer to externalization, I'm including the smoker. Smokers are paying for the tobacco litigation. They should—not the people who don't smoke and who have, in the past, paid their bills. I'll acknowledge, again, that almost every business has external costs that they do not pay. Tobacco is unique in degree. Health delivery systems in most states—and indeed, at the national level—are being strained to take care of smokers.

I look at the tobacco industry pretty much as an enabler. Dramshop liability laws hold a bartender accountable if he over-serves a customer who then runs over someone in his car. The tobacco industry is like the bartender, and the state taxpayers are like the person who got run down by the drunk. The tobacco industry encourages, aids and abets the smoker in consuming cigarettes. It encourages them to buy more, encourages teenagers to buy their product and get hooked on it before they know what they're doing, and yet they don't have to pay for their actions. Somebody else does.

AUDIENCE MEMBER (follow-up, to Mr. Scruggs): So smokers will pay more to get their cigarettes. But are settlement funds earmarked for the future care of these smokers?

MR. SCRUGGS: I am concerned by one of the things Attorney General Brady mentioned in her remarks. In some ways, the states are now getting into partnerships with the tobacco industry to create an alternative revenue source. I don't think that's healthy. This is not why my partner or I undertook tobacco litigation in 1993. We took tobacco on because it was a public health matter. We did not take this case for fees, nor did we intend to raise taxes or put the states in partnership with tobacco. There is a danger that this is happening, though, and I'm not sure how to stop it.

GENERAL CORNYN: I would like to return to the point that we shouldn't be worried about attorneys' fees because the tobacco industry is paying for them. I do not think it is acceptable for a lawyer to negotiate a deal for a client and then cut a deal with the defendant for his fees. Tobacco lawyers claim, after the fact, that the combined pool of money offered by tobacco would not have been made available in the original settlement. This is a clear conflict of interest between the lawyers' duty to the client and the lawyers' self-interest.

My concern arises out of the class action context. A few years ago, on the Texas Supreme Court, there was a lawsuit involving a pickup truck that was brought against General Motors. The attorneys negotiated, for themselves, \$10 million in fees. They negotiated, for their clients, coupons that were redeemable on the purchase of new pickup trucks. There is, of course, a conflict of interest when lawyers secure cash for themselves and coupons for their clients. Common sense dictates that the duty of the lawyer is to maximize the client's recovery.

What concerns me the most about the tobacco arrangement is that previously, as far as I know, no lawyer could cut a deal for the client and then cut a deal for himself. It defies logic to say that you must view those payments as an aggregate sum.

MR. SCRUGGS: The lawyers did not negotiate their fee arrangements. After extracting the maximum they could for their states, the attorneys general then told the tobacco industry to pay the lawyers. Lawyers did not take the lead in this area or encourage this type of action. General Cornyn was not there when all this happened. I was in the middle of it.

SPEAKER (audience member): I'm wondering if it's fair to tax smokers for the health care costs that they impose. It was argued, when tobacco litigation began, that there were actually *no* net costs incurred by smokers because they die younger than other people. That argument wasn't particularly gracious for the tobacco companies to make—we kill them so fast that it makes up for

making them sick—but is it an argument worth considering. Professor Brickman, have you considered what the real health care costs of smokers are?

PROFESSOR BRICKMAN: I haven't done my own independent studies, but there is some very carefully done research in this area. The literature suggests that society derives a net benefit from cigarette smokers if they are viewed in crass commercial terms. Of course, this is exactly the way the lawyers describe consumers in order to defend litigation.

PROFESSOR LANGBEIN: Consider states' costs for emphysema and other tobacco-related diseases on one hand, and the other diseases they would have to pay for if these people had normal life expectancies on the other. Add in the social security that does not get paid when people die at a young age. It turns out, in crass economic terms, that people are doing the states a marvelous favor by smoking themselves to death. This is obviously not the kind of thing that anybody wants to be saying, but it is there as a factor when one inquires into the cost of real damages. This is another way of considering a previously discussed point: what you're really looking at here is a tax on tobacco manufacturers. This tax may be perfectly justifiable. I certainly would support an even larger one. But it's got nothing to do with real damages.

GENERAL BRADY (to Mr. Scruggs): I would like to respond to your comments about the uniqueness of tobacco. You mentioned the legality of a product versus its defectiveness, using the examples of lead paint and asbestos as products that are legal but defective. We've made great progress as a society. We recognize problems now in products that we didn't previously know existed. Our views as a society can dramatically change.

The alcohol industry came to the last National Association of Attorneys General meeting. They explained to us, at great length, all of the things that they had done, unlike the tobacco industry, to encourage the responsible use of their product. The alcohol industry, obviously, does not want to be our next target.

Using your perspective, though, they could easily be characterized as encouraging dangerous behavior. They could be seen as encouraging people to drink much as the tobacco industry encourages people to smoke—they do, after all, want the public to consume their products.

After listening to your comments, I'm concerned that your perspective could convince some people that the tobacco industry is *not* unique. Many opportunities are presented by the trial lawyers' perspective.

GOVERNOR THORNBURGH: Before this session ends, a confession and recommendation. It is not unreasonable for state attorneys general to seek outside assistance in specialized areas. With the exception of the five or ten largest states, there is probably no attorney general's office that can handle every type of complex litigation. Using outside counsel is an entirely proper response in a highly technical situation.

If reasonable thinking had guided tobacco litigation, there would be no turnout for this sort of conference. I suggest what we should be concerned with is the size and the basis of contingency fee arrangements, not the fact that attorneys general go outside their departments to engage private counsel.

Panel Three

Government-Sponsored Litigation— What’s Next?

Panelists:

Professor Kelly Brownell

Yale University, School of Public Health, Editor, Eating Disorders & Obesity: A Comprehensive Handbook

Mr. John Coale

Castano Group, Litigator for the Plaintiff

Professor Richard Epstein

University of Chicago Law School, James Parker Hall Distinguished Service Professor of Law

Ms. Anne Giddings Kimball

Wildman, Harrold Allen & Dixon, Litigator for the Defense

Mr. Jacob Sullum

Author, For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health

Mr. Dan Webb

Winston & Strawn, Litigator for the Defense

Mr. Walter Olson

*Manhattan Institute, Author, The Litigation Explosion
(Discussion Leader)*

MR. WALTER OLSON: Our topic for the last panel of the day is “where do we go from here?” What industries other than tobacco might be hit? How well would the litigation against them do? Can any of us predict where future litigation is headed?

MR. DAN WEBB: I will say something that others may disagree with: we’re not going to see much more government-sponsored action based on mass tort litigation. First, tobacco is a unique product. Second, this sort of litigation is extremely risky. It has

major legal problems. You are likely to lose when a case of this sort goes to jury trial.

I should say, at the outset, that I'm familiar with the tobacco wars. I represented Philip Morris. I've been deeply involved in the Texas case and the Seattle case that went to trial last year. I can, however, objectively state that tobacco litigation is unique. Government has had a love-hate relationship with tobacco for as long as we've been a nation. The states legalized the product, taxed the devil out of it, earned billions, and wrestled with its harmful implications. Because tobacco is such a distinctive product, government officials do not always consider the law and the facts as they make litigation decisions. It does not surprise me that attorneys general went after tobacco as opposed to other consumer products.

Now that the states' claims have been settled by a global settlement, those cases, for good or bad, are over. The federal government has shown an interest in filing a similar lawsuit against the tobacco companies. I certainly don't want to predict the outcome of this effort, but it is interesting to note that the Department of Justice is having problems finding a legal theory. It is difficult to find a legal basis for this case that does not require legislative action.

Aggregated claims in mass tort strategies are risky. I don't believe that state attorneys general will go after other major industries like they went after tobacco. There is a legal rule called the remoteness doctrine, which is quite relevant in this context. It has been used, in this country, for 150 years. The remoteness doctrine says that indirect injury claims are not supported by the law. There is no relief for derivative claims. The case against tobacco has been hampered by this doctrine from the very beginning. The trial courts, though aware of this weakness, were reluctant to throw attorneys general out on their ears. State supreme courts, however, used the doctrine to knock out all common law claims against the tobacco industry. Left standing were only statutory claims—RICO, antitrust, and consumer fraud.

Only two cases ever went to trial—one in Seattle and one in Minneapolis. Both were settled to avoid a jury verdict. Jurors were interviewed by both sides after those two cases; their answers suggest they never would have agreed to extract substantial sums from the tobacco industry.

Aggregated claims in mass tort cases are extremely difficult to win. The difficulty, in the future, will be even greater: the Second Circuit recently issued an opinion that absolutely applies the remoteness doctrine to these types of cases. Attorneys general understand this. I do not see them going after Colonel Sanders because he sells chicken that clogs arteries and causes heart disease.

MR. JOHN COALE: To corporate America, every lawsuit is frivolous. To trial lawyers, all corporations are evil. Neither, of course, is true. Both sides are guilty in part, but neither is completely wrongheaded. What is wrongheaded is fighting instead of working toward common solutions. The bottom line: we need to figure out ways to address certain social problems. Maybe we should change our views as to what it means to win. Maybe we should measure victory by terms other than utter destruction of our opponents.

Many people say that social problems should not be addressed in litigation. I would agree if social problems were being solved and not simply being ignored. The day politicians step forward and do the right thing is the day lawyers will be put out of the social reform business. Politicians have failed us and continue to do so. Politicians answer to the constituency that makes the most noise. Noise is made by campaign contributions.

This said, I defend using law to make America better. Perhaps instead of seeing litigation as a declaration of war, it should be viewed as an invitation to start a discourse about social problems. Let me give you an example. For decades, politicians knew that tobacco was dangerous. For an equally long time, the tobacco industry specifically targeted teenagers because it was plain that if a teenager got hooked, he or she would probably continue smoking into adulthood. No one in the political arena really tried to solve this

problem. In fact, tobacco money poured into campaign funds and, as a result, the government subsidized tobacco growing.

Enter the lawyers. They came in and changed the scene. Out went the advertising campaigns, out went Joe Camel, out went the fancy Marlboro jackets that make it cool to be a smoker. In short, because of lawyer-instigated litigation, many lives have been saved. Some lawyers made a fortune. They earned it. Like CEO's who make hundreds of millions of dollars when they produce a beneficial product, lawyers who fought tobacco earned their fees by serving the public good.

MS. ANNE GIDDINGS KIMBALL: Since the panel was asked “what’s next,” I want to tell you what I’m doing now and what I’ve been doing for the last few months. I’ve been defending handgun companies against suits filed by municipalities. Under the guise of bringing routine product liability cases, cities from Miami to San Francisco have filed suits against the major firearms manufacturers of this country as well as importers and trade associations. These are no more routine product liability cases than they are antitrust cases. They are wrong on both a factual and legal basis.

In these cases, the cities have sued all the major firearms manufacturers, including manufacturers of firearms that supply their own police departments. For instance, New Orleans just purchased Beretta firearms for its police department. It is now suing Beretta.

What is at issue in these suits? Every aspect of commercial manufacture, design, and sale. The entire distribution process is being challenged, including advertising and promotion. Who are the gun users these suits are concerned with? Not the 99 percent of Americans who use firearms responsibly. These cases involve children, the mentally ill, people on drugs, and felons; in other words, they involve the tiny percentage of people who use firearms illegally. Further, these are not cases about the normal use of weapons. These are cases about criminal activity, such as drive-by shootings and gang warfare. These are cases about intentional suicides and accidental shootings.

For me, however, the most extraordinary aspect of these lawsuits is in the context of relief. Cities are asking for compensatory and punitive damages, and, of course, attorneys' fees. They're asking for reimbursement for the costs of the police and fire departments of the cities that are suing. They are also asking for reimbursement for the costs of the law departments who prosecute firearms possession violations. As everyone knows, this is what those departments are supposed to be doing. They are also asking for an extraordinary kind of injunctive relief. They want to enjoin the manufacturers from distributing handguns without safety devices. They are asking the manufacturers to implement distribution standards, both for themselves and for dealers.

It is important to consider, in this context, the role of the Bureau of Alcohol, Tobacco and Firearms. The distribution of firearms in this country is highly regulated at the federal level. Every sale of a firearm—from manufacturer to distributor to dealer to consumer—is highly regulated and documented. Municipalities are now asking gun manufacturers, on their own, to implement a wholly new system. They are also asking manufacturers to eliminate or reduce the secondary gun market. Since, by conservative estimates, there are 220 million long guns and handguns among the population, this is quite a formidable assignment. I'm not sure how this will be achieved through a mandatory injunction. One municipality has recently asked for a constructive trust to be put on all manufacturers' assets. The fear, of course, is that there won't be enough money to go around as this process continues.

These suits against gun manufacturers are like suing the auto industry because cars are used by criminals, drug abusers, and children. It would be like suing automobile makers because cars move too fast or because toddlers, in the absence of safety devices, can crawl from the backseat. It doesn't make any sense.

The gun suits are not product liability cases. They have no basis in law or fact. These cases are not suitable for judicial resolution and there are many judges, over the last 20 years, who have reached this exact conclusion. The attacks on gun manufacturers in the past

have been typically brought by individuals. Litigants have made many claims: the risks of firearms outweigh their utility, gun warnings are not sufficient, the use of firearms is an ultra-hazardous activity. All of these have been thrown out by the courts. Judges have said, clearly, that this is a legislative issue.

PROFESSOR KELLY BROWNELL: I was invited to this conference to discuss the relevance of food in this conversation. Although I am unpopular for some of the stances I've taken, I have never proposed that we sue the food companies. But food does fit in this context. There is an interesting link between attorney general litigation and what the food companies are about to face.

There has been a profound change in the social and psychological climate of the United States. The American public has decided that the death and destruction caused by tobacco is so great that all normal bets are off. New rules are needed to control smoking; polite play is suspended. This attitude allows us to do things that were unimaginable two decades ago such as banning smoking in public places, eliminating advertising icons, and enacting prohibitive taxes. The new attitude has also created an environment where states can sue tobacco companies. Some may argue that these methods are inappropriate, or that the penalties are irrational. There is a social climate, nonetheless, that has made these things possible.

The question about where we go next is quite interesting. Can and should the social climate change similarly with respect to food? Let me put diet in context. It is claimed that 500,000 people die prematurely every year from tobacco-related illnesses. The number of fatalities from poor diet and physical inactivity is 300,000. This dwarfs the number of people that die from traffic fatalities or handgun injuries. Diabetes and obesity are out of control in the United States. Adult onset diabetes is no longer restricted to adults—a record number of children have this disorder due to poor diet and physical inactivity. If we extrapolate what the public health will be like fifty years from now, given the current state of our children, we face a frightening prospect.

I have called the food environment in the United States toxic. I shall try to defend that characterization. The average American child sees 10,000 food advertisements each year. Ninety-five percent of those are for sugared cereals, soft drinks, candy, and fast food. In comparison, there is a trivial amount of money spent on nutrition education. These advertisements come from an ad world that describes cereals that are half their weight in sugar as part of a nutritious breakfast. This industry has taught us that pork is the other white meat, one of the most successful ad campaigns in history.

The food companies and their advertisers are, in fact, luring our children into deadly behavioral patterns. There are 5,000 American schools that contain fast food franchises. The school district of Colorado Springs, for example, signed a contract with the Coca-Cola Bottling Company awarding the school district \$11 million over a ten-year period. In exchange, Coca-Cola would be the exclusive bottling company for the Colorado Springs district. Part of this contract said that the school district would sell 70,000 cases of Coca-Cola in one of the first three years of the contract. After great effort, after year one, 21,000 cases were sold. The school district began to panic. Letters went out from the superintendent's office to the principals mandating that the Coke machines be moved to the highest traffic areas of the school. The ban on the Coke machines an hour before and after lunch was halved. A letter went out suggesting to the teachers that it might be acceptable for children to consume Coca-Cola in the classrooms.

If you were a foreign agent and your task was to make the American child as unhealthy as possible, could you do better than introducing fast food franchises into the school cafeteria? Could you do better than contracts with soda pop companies that encourage soda drinking in the classroom?

The status quo is obviously not working. We have the highest prevalence of obesity in the world and it's getting worse by the day. Diabetes is following right in its track. We can continue to encourage personal responsibility and promote nutrition information.

We've been doing this for many years, however, and it simply isn't working. When do we declare failure? When do we stop the polite play and instead do something heroic? Have we crossed the threshold? Are 300,000 deaths each year enough? Will we be better off when 100 percent of people in America recognize the word "super-size" as a verb?

So what can we do? Here is the link, I think, to the discussions today. The food companies can anticipate that the social climate, sooner or later, will turn against them. What the tobacco companies faced will face them. Food companies can accept this, preempt it like the alcohol companies have started to do, and do things to help consumers make intelligent choices. Of course, the food industry is not a convenient target for litigation. It is not an industry where there is one product and a few big players, so it doesn't really fit the bill. It does, however, fit the bill in the sense that damage is being caused to the population. Sooner or later, the food companies will be considered in the same way we regard the tobacco industry.

MR. JACOB SULLUM: It is argued that the courts should promote health and serve the public interest. Commentators call suing the tobacco companies a "cancer control strategy", an example of "litigating for the public's health." As a policy goal, promoting public health has approximately the same status as protecting children and preserving the family. Last year, when the tobacco companies said they would no longer cooperate with the effort to pass an anti-smoking bill, the Clinton Administration said it didn't really matter. "We will get bipartisan legislation this year," Secretary of Health and Human Services Donna Shalala told NBC. "There is no question about it, because it is about public health."

As it turned out, Secretary Shalala was a bit overconfident, but her prediction was certainly plausible given the way politicians usually behave when the term "public health" is bandied about. The incantation of that phrase is supposed to preempt all questions and erase all doubts. It tells us to turn off our brains and trust the experts to think for us.

Given that expectation, it may seem rude to ask *why* smoking is a matter of public health. It is certainly a matter of *private* health, since it tends to shorten one's life. But lung cancer, heart disease, and emphysema are not contagious, and smoking itself is a pattern of behavior, not an illness. It is something that people choose to do, not something that happens to them against their will.

If smoking is a matter of public health, and therefore subject to government control, then so is any behavior that might lead to disease or injury. In fact, public health officials nowadays do target a wide range of risky habits, including drinking, overeating, failing to exercise, owning a gun, and riding a bicycle without a helmet. Even gambling, which has no obvious connection to morbidity and mortality, is a matter of interest to public health researchers. In short, there is no end to the interventions that could be justified in the name of public health as that concept is currently understood.

Although this sweeping approach is a relatively recent development, we can find intimations of it in the public health rhetoric of the 19th Century. In the introduction to the first major American book on public health, U.S. Army Surgeon John S. Billings explains the field's concerns: "Whatever can cause or help to cause discomfort, pain, sickness, death, vice or crime, and whatever has a tendency to avert, destroy or diminish such causes, are matters of interest to the sanitarian."

Despite this ambitious mandate and the book's impressive length, the treatise had little to say about the issues that occupy today's public health professionals. There were no sections on smoking, alcoholism, drug abuse, obesity, vehicular accidents, mental illness, suicide, homicide, domestic violence, or unwanted pregnancy. Published in 1879, the book was concerned with things like compiling vital statistics, preventing the spread of disease, abating public nuisances, and assuring wholesome food, clean drinking water, and sanitary living conditions.

A century later, public health textbooks discuss the control of communicable diseases mainly as history. The field's present and future lie elsewhere. For example, *Principles of Community Health* explains that “the entire spectrum of ‘social ailments’, such as drug abuse, venereal disease, mental illness, suicide, and accidents, are problems appropriate to public health activity.” Similarly, *Introduction to Public Health* notes that the field, which once “had much narrower interests,” now “includes the social and behavioral aspects of life endangered by contemporary stresses, addictive diseases, and emotional instability.”

In the past, public health officials could argue that they were protecting people from external threats, such as carriers of contagious diseases or fumes from a local glue factory. By contrast, the new enemies of public health come from within. The aim is to protect people from themselves rather than from each other.

In 1975, Dan Beauchamp, who was then an assistant professor of public health at the University of North Carolina, presented a paper to the American Public Health Association. He argued, I think correctly, that the “radical individualism inherent in the market model” is the biggest obstacle to improving public health. “The historic dream of public health, that preventable death and disability ought to be minimized, is a dream of social justice,” Beauchamp said. “We are far from recognizing the principle that death and disability are collective problems and that all persons are entitled to health protection.” Beauchamp called upon public health practitioners to challenge market justice. Public health, in other words, is inconsistent with the right to be left alone. Of all the risk factors for a disease or injury, it seems, freedom is the most pernicious.

PROFESSOR RICHARD EPSTEIN: To follow up on Jacob's comments, what is the justification for government action in controlling the tobacco industry? Forget, for a moment, the question of whether we pursue a particular end through judicial or legislative means. The justification for government action is, in fact, the concept of externality. The reason we think externalities are appropriate to regulate is because of the fundamental imbalance

between their costs and benefits. An externality works as follows: you bear the cost and I keep the benefits. If individuals who are making these particular judgments are self-interested, you inevitably get too many costs. The issue is, at that level, one in which there is perfect agreement. The hard question is how we define externalities.

Let us suppose for the sake of argument that we do have something which counts as an externality. Then the question is, how do we deal with it? Are we going to allow state attorneys general, or private plaintiffs, or the legislature decide when and how to act? According to the traditional view, where there is an isolated, discrete, large industry that harms a single person, this is the fellow who is able to sue. The state has nothing to do with it. If claims are broad and diffuse, and nobody has a large enough stake to sue, then the state can bring an action under *parens patriae*. This is not a modern theory; it is very clearly expressed in the distinction between general and special damages as early as 1535. It may have been used even earlier in the English cases.

In modern cases, to the extent that you are talking about anticipatory relief in the service of public health—controlling guns, controlling tobacco—these issues are, first, subjects for legislative bodies. I think this is a pretty conventional view. The next question, after assigning these things to the legislatures, is determining what they are supposed to do.

At this point, a profound choice must be made between two theories of democratic process. Over and over again it is said, in effect, that the democratic process fails because it does not supply sufficient relief against particular threats to public safety. It seems to me that that is the wrong definition of democratic failure. It may well be that the democratic process comes up with outcomes that neither you or I like, but to the extent that these are elected officials that were chosen in proper fashion, these outcomes are properly binding. The whole theory of democracy is process oriented: if the inputs are chosen through the proper forms of election, then the outcomes reached are legitimate.

The modern theory of deliberation, however, is quite different. If the legislature is prepared to move against guns, or to provide greater regulation of cigarettes, this is thought of as its proper function. If it decides not to pass these laws, alternatively, it is argued that there was lack of democratic process. The second stage of the argument begins: you must resort to individual litigation in order to pick up the slack. This is an extremely dangerous theory about the way government ought to proceed. What you have done, in effect, is to introduce a very powerful one way ratchet into these situations. So-called public health positions are always going to get at least two bites at the apple. They, in effect, have to win only one war; industries in defensive positions are going to have to fight their battles over and over again.

In classical theory, individual litigation and collective litigation were clearly differentiated. Definitions were based upon the concentration of harm and the size of the stakes; there was only one forum for each case. You did not run into the problem of unfair and continual advantage. This tendency is exacerbated in our federal system, as state attorneys general can try their cases first in states where the legal climate is favorable. Precedents are established here before moving on to more challenging venues. A fundamental asymmetry is perpetuated: the advocates of public health only have to win once, and they have multiple forums to do so.

In reference to future predictions, if what I have said is correct, then Dan Webb is mistaken. Future odds are not against this type of litigation. Defendants, facing fundamental asymmetry in the political and legal systems, are going to find it very hard to succeed. There are, however, other things to consider. Dan may not be necessarily wrong in his prediction, for there are several factors that cloud the legal horizon.

First, there is a generation-effect that exists. This is extremely important in litigation. The first time you try a case, the plaintiffs are coherent. They have planned things in advance. Defendants are caught off guard; they are casting about to get lawyers. This explains why, in the product liability cases dealing with things like

crashworthiness in the late '60s and early '70s, the defendants were slaughtered. Once defense lawyers become educated, however, they start to do considerably better. This process is going to happen in this litigation as well. Somebody is going to learn from the mistakes of the tobacco industry.

Further supporting Dan's prediction is the fact that lawyers and prosecutors always go after the low hanging fruit first. Tobacco was on the ground, ready to be picked up. Once we are done with tobacco and cigarettes and whatever follows, we will move on to fast foods. This presents a much more complicated situation. As Kelly said, when you have multiple suppliers of multiple products, as opposed to a few suppliers of generic products, it is much harder to win in litigation. This reality will transform future litigation efforts.

Of course, you never know what it takes to win. If you look at the breast implant cases, the factual record on which the plaintiffs got \$6 billion is a disgrace. The same is true for the factual record in the cigarette cases. There is a wild card at play in this type of litigation. When lawsuits become massed they also become unprincipled, and nobody really knows what the outcome will be.

DISCUSSION

MR. OLSON: My clues to predicting what comes next in litigation largely come from Ralph Nader's *Public Citizen*. *Public Citizen* has an exemplary track record of denouncing people who then wind up getting sued. The magazine put out a press release this spring attacking four "killer industries."¹⁵ Tobacco and guns were, predictably, two of them. The other two were gambling and liquor. My other favorite source on these issues is an out-of-print book published in 1976 called *Verdicts on Lawyers*, edited by Mr. Nader and Mark Green.¹⁶ This collection has an article on class actions which lays out, step by step, everything that has happened since. It proposes using statistical proof of injury without individualization. It proposes getting rid of old-fashioned legal doctrines, such as contributory negligence, in order to do what is socially

beneficial. It winds up proposing class action suits against twenty-four different industries. My sentimental favorite on this list is the auto industry—auto companies, it is suggested, should not only be sued for crashes but also for noise and congestion. I've had that same impulse myself.

To facilitate our discussion, I would like the panelists to think about this question: what differences in principle might there be between past and future public interest litigation?

MR. COALE: The future has everything to do with something Professor Brownell discussed, that is, the threshold issue. Tobacco reached a threshold when it became so unpopular that the country was willing to have just about anybody, including us, do something to discourage its use. Guns are almost at that point; it will be interesting to see what happens. If, tragically, there are more school shootings, I think they will certainly pass that threshold.

I do not think, at the moment, that there is much else out there to target, although I do get suggestions every day. Yesterday a man flew in from London who is the head of an organization that is against land mines; he pointed out to me that 47 American corporations manufacture this product. I receive many calls about Ritalin and other psychotropic drugs that are given to children. I have stacks of letters to remind me that most of the kids who have engaged in school shootings were on Ritalin or one of its cousins. What has happened is that the legislatures—and this is part of the threshold theory—have failed. They failed to regulate tobacco and they failed regarding guns. The polling data is overwhelming: Congress is not doing its job. As I suggested in my previous comments, lawyers are taking up the slack.

To follow up on Anne Kimball's comments, I have never met a defense lawyer who says that the case against her has merit. I think there is merit in this particular litigation. 1,500 accidental shootings a year is not something to be taken lightly. Accidental shootings that involve children or the mentally disturbed are prevalent enough to warrant lawsuits.

PROFESSOR EPSTEIN: The gun issue is enormously emotional, but at least two things should be done to put it into perspective. First, ask how many accidental deaths come from sources other than guns, and then ask if these numbers provoke similar desires to litigate. It turns out that the number of people who take medications irresponsibly and die as a result far exceeds the number of accidental gun fatalities. Should the entire medical and pharmaceutical industry be put under siege by virtue of that statistic? I think Mr. Coale would probably back off of that particular assertion. The reason he would do so, he would argue, is that the benefits associated with the use of the pharmaceuticals is great. He cannot see those benefits with respect to guns.

Are there, in fact, any benefits from the accessibility of guns? There is a large body of literature that suggests different answers. I find it remarkable that the benefit side of the equation, such as the use of guns for defensive purposes, is regarded as irrelevant by advocates of gun litigation. I am quite willing to believe that, in a society where you have no guns in private hands, the addition of the first gun is a terrible thing. I am not prepared to say that when you have 200 million odd guns out there, sold legally, that banning the sale of the next one is going to reduce the level of crime.

John R. Lott, formerly of the University of Chicago, has written extensively on this subject. He may not be right in all of his conclusions, but the level of vituperation he provokes suggests that he must have something unique to say—the usual answers to the gun-benefit question are completely non-responsive.¹⁷

I would want to know, before supporting gun litigation, whether the benefit side is wholly chimerical or not.

MR. WEBB: I would like to respond to the argument that government failed to deal with tobacco and, therefore, we turned to the courts. The statistics show that from 1975 to 1993, the policies aimed at discouraging children from smoking led to a 40 percent per capita reduction. This campaign emphasized personal responsibility. After 1993, it was decided that something new and

different was needed: lawsuits filed by attorneys general. We now have had an increase in teenage smoking in the United States. I mention this because I truly wonder if these lawsuits were filed because of some failure of government agencies. Even if this were true—which I do not think it is—it is interesting that teenage smoking started to climb when we decided that personal responsibility was no longer worth emphasizing. All of a sudden, people could not stop smoking because nicotine is in tobacco and advertising entices people to smoke. Once personal responsibility was replaced with blaming the tobacco companies, smoking increased in this country.

It was earlier suggested that sometimes, because of cultural bias, we suspend our legal rules. This was certainly the case with tobacco. The remoteness doctrine is well established in law—you cannot file a lawsuit for an indirect injury because it opens the floodgates to speculative lawsuits. Tobacco suits tried to get around this rule. Now that the tobacco suits, at least at the state level, are over, the remoteness doctrine is again being challenged. This time it is over less controversial topics, such as labor funds. The fact is, suspending the rule of law to satisfy a social bias is a mistake. The higher courts in this country seem to be coming to that conclusion. They reached that conclusion with tobacco suits, and I suspect they will reach it again—quickly—in the context of guns or food products.

MR. SULLUM: If you look at the trends in smoking, there has been a more or less steady decline beginning in the mid 1960's, a little bit of up and down in the early 1970's, then a steady decline up until the last few years, when we hit a plateau. In the initial campaign against smoking, education and persuasion were emphasized. The facts about smoking were not only publicized, they were hammered into the public. This strategy was successful. It is hard to isolate the effects of public service announcements, but things like Yul Brynner talking about his lung cancer on television definitely had an impact. These announcements were combined with tremendous press coverage, government reports, curriculum in school, and so on. Messages came from many sources explaining

that smoking is unhealthy. This effort brought a significant decline in smoking over the past few decades.

Our current plateau can, I think, be explained by the fact that there is a core group of people for whom health concerns are not of primary importance. Some smokers may attach greater importance to short-term benefits than to long-term risks, and these people are difficult to reach through “public education” efforts. Currently, the government is experimenting with different approaches to reach this population. The informative approach has been replaced by spots that demonize the industry; the gross-out shock tactic is also a new favorite. There is very little evidence that these tactics work. There is very little evidence that they don’t work. It is hard to isolate the effects of negative media campaigns.

Statistics show, since 1992, that teenage smoking has increased. Interestingly, during the same time, marijuana smoking has also increased. Parallel trends—one product is legal, one is illegal. One is advertised, one is not advertised. Both products have been the focus of intense, government sponsored campaigns supplemented by the private sector. This generation has been more propagandized than any other against both tobacco and marijuana, and they are smoking more of both. This suggests a backlash effect, although I can’t prove it.

MS. KIMBALL: It was argued today that, when you want to solve a social problem, you appeal to the legislature first. If the legislature doesn’t do exactly what you want it to do, at the pace that you want it done, then you file suit. I am troubled by this argument. It is not what our Constitution says. The separation of powers in this country is very clear: the legislature, not the judiciary, sets public policy. Legislatures are equipped for debate; they are also designed to make compromises. These are not functions of judges or juries.

MR. COALE (to Ms. Kimball): I would expect that attitude from the gun industry. The NRA has tied up any legislation—everywhere—that has a meaningful effect on guns. According to your

thinking, there would be no civil rights movement. Recall that legislatures had a dismal history with civil rights before issues were brought before courts. The courts are there for a purpose. Citizens have a right, whether they are individuals or in groups, to use the courts to redress wrongs.

PROFESSOR BROWNELL: Some people say that new paths in law are necessary to create new standards, and some people that say the rules are so important that they need to be protected. While this philosophical debate is important, so is the practical outcome. Comments made about individual responsibility and the lowered rate of smoking suggest, at least in part, that the job of reform is done. The job, however, is not done. A horrible public health problem still exists, and something additional is necessary. If people are frightened that the legal process is being corrupted by excessive lawsuits, maybe there should be more attention paid to the legislative process.

PROFESSOR EPSTEIN: Let me comment on what John Coale said about the civil rights movement, because I think that shows a fundamental confusion about these issues. The first thing to note is that the defendant in the civil rights cases—at least in the glory days when it actually made some sense—was the government itself. Under those circumstances, what was said, for example, is that people have been excluded from the right to vote. Citizens have been subject to arbitrary and excessive police power. Legal claims were designed to break that kind of stranglehold. As best I can see in these cases that we are discussing, there are no government defendants.

The second point follows from the first. The civil rights litigation that was significant was done on constitutional grounds. The equal protection clause, for example, was there to show that what the states were doing was inappropriate. There was a built-in, structural limitation on democratic politics in the form of the Constitution. As someone who has worked a lot with the takings and contracts clause, I applaud those limitations. Mr. Coale, do you think it is unconstitutional for the state *not* to act

in these particular areas? If so, then you do have a parallel to the civil rights movement. If not, you don't.

MR. COALE (to Professor Epstein): My point was simply this. Before the civil rights movement, the legislatures did nothing. It was court action that produced civil rights victories, and then later, in 1964, produced the Civil Rights Act.

PROFESSOR EPSTEIN (to Mr. Coale): To say the legislature did nothing before 1964 is a false statement. It did all sorts of terrible things that should have been overturned. Under those circumstances, constitutional government trumped. When you move to the civil rights movement after 1964, the great tragedy is, of course, that in the effort to limit the power of the states, reformers chased after private employers. I have written extensively on this subject, and I think there is no greater infringement of individual choice than, in effect, the Civil Rights Act of 1964 insofar as it applies to private employers and competitive industries.

MR. COALE (to Mr. Epstein): You are in a minority with that view.

PROFESSOR EPSTEIN (to Mr. Coale): I certainly am, but I am willing to defend it.

MR. SULLUM: Professor Brownell suggested that “the job” of reducing smoking isn't getting done, so we need to look for a different forum. We obviously disagree about what “the job” should be. I do not think it is a legitimate function of government to be concerned about whether people smoke or not. I think the only legitimate function in this area has to do with limiting cigarette access by minors. I do not even support the campaign of persuasion, insofar as it was coercively funded with our tax dollars. If the American Cancer Society wants to pay for the TV time, fine.

Over the years, the anti-smoking movement has gotten more and more coercive. It can be traced back to the underlying

assumption that this is an issue of public health and, therefore, a legitimate area for government involvement. If people are still smoking, the job isn't done. If people are still fat, the job isn't done. We have a fundamental disagreement here that shouldn't be overlooked.

MR. COALE: I agree with Jacob that government shouldn't have a role in certain things. In the context of tobacco, however, you have a payroll tax and a Medicaid/Medicare tax; non-smokers are paying great sums of money to treat people with smoking related illnesses. Individual responsibility is one thing. There is corporate responsibility here, too—cigarette companies caused or they participated in causing harms that the rest of us have to pay for.

MR. SULLUM (to Mr. Coale): There are a couple of responses to that. First, the problem is not risky behavior. The problem is the program itself. If you create a program where taxpayers are forced to subsidize other people's health care, that inevitably means you are going to subsidize risky behavior. This applies not to just smoking but to a long list of other things that we have been discussing, some of which may actually impose a greater net cost. For example, I suspect that people dying from obesity-related illnesses tend to die earlier than smokers. I am sure that people who die in motorcycle accidents die earlier as well.

Second, if you take a long view of the financial effects smokers have on society, it appears that they do not impose a net cost at all. The latest research, including a study in the *New England Journal of Medicine* that was published a couple of years ago, suggests that medical costs would actually go up if everybody stopped smoking.

PROFESSOR COALE: Well, then, we should have the plague back. We would save a fortune.

MR. SULLUM: I am not advocating this argument. Anti-smoking people claim we need lawsuits to raise the price of

cigarettes because smokers are imposing costs on taxpayers. I am simply asking, are they, in fact, imposing a cost? It turns out they are not.

The fundamental point to keep in mind is that this rationale is completely open-ended. Anything that we do that is risky could lead to disease or injury that is treated at taxpayer expense. This logically leads to totalitarianism. I don't use that term lightly. I think that this is the fundamental logic at work here, and what stops us from reaching that point is practical political concerns. It is easy to target smoking because one in four people smoke. Most of us drink, so alcohol is harder to go after. All of us eat, so the fast food industry is going to be a harder nut to crack. These differences are not based on principle, or on legal or moral reasons. They are simply a matter of politics.

PROFESSOR EPSTEIN: The Medicaid problem could be stated differently. It is a mistaken and misguided public program, and one of the reasons why is because it doesn't run like an insurance system. There is no rating that is based upon perceived risk. The right way to handle this question is not to lash out at tobacco companies; the right way to is to charge the same kind of differential premiums for Medicaid that you would charge for any other program if you wished it to continue.

Medicaid already has a solution to the cigarette question. It has detailed subrogation privileges which say that, in the event that we pay money out to anybody who was injured by a third party, we demand a subrogation claim. The genius of the tobacco lawsuits is that they skirted the subrogation claim issue. They created an imaginary independent cause of action, one that is technically incorrect. There has never been such an action before or after these cases, and there will never be one again.

The problem is that we have a special set of rules with respect to Medicaid and tobacco. These rules have not been replicated anywhere else. Once deviations occur, though, the things that Dan Webb said about the rule of law are vindicated.

QUESTIONS

AUDIENCE MEMBER: A question for John Coale. Anne Kimball said that the suits against gun manufacturers are not meritorious. Putting aside the social issues and the question of legislatures not doing what they should, do the gun cases have legal merit? Are they different from anything tried in product liability cases before?

MR. COALE: The only thing that is novel about the gun cases is that cities, like New Orleans, are bringing them to recoup the money they have spent because of gun violence. Other than that, they are standard product liability cases.

AUDIENCE MEMBER (follow up, to Mr. Coale): Could you speak to some of the actual allegations?

MR. COALE: In New Orleans, accidental shootings are a main element of the suit. At issue are child safety locks and guns that go off when you drop them. In Chicago, there is what we call the dumping issue: guns are sold at high volume to dealers who sell to straw purchasers. We believe that the gun industry shuts its eyes at the warehouse door and tolerates this sort of behavior.

AUDIENCE MEMBER (to Mr. Coale): In your campaign against gun violence, are you going to take into account the effects of violence displayed in entertainment? Are you going to go after the entertainment industry?

MR. COALE: This is not an either/or situation. It is not just guns, or video games, or movies, or violence, or the shortcomings of your mother. There are many reasons why gun violence happens. The gun side of this equation happens to be what I am working on, but it is only part of the problem.

MR. OLSON: In fact, in the Kentucky school shooting case, one of the plaintiff's families is suing video game makers. So this is already happening.

AUDIENCE MEMBER (to Mr. Coale): You say, in describing the gun suits, that there is nothing novel about them except for their sought-after damages. You know, however, that the normal principle in law is that criminal conduct cuts off the chain of causation. Why do you try to misrepresent your cause of action? If it is really a meritorious cause, why don't you tell the truth about its uniqueness?

PROFESSOR EPSTEIN (to Mr. Coale): In the Chicago complaint, is it alleged that sales are illegal in the places of actual purchase, that is, in the suburbs or in nearby states?

MR. COALE (to Professor Epstein): Initial purchases are usually legal in the places they are made. In the gun shops—and these are the places that Chicago is interested in—they are illegally sold to straw men.

PROFESSOR EPSTEIN (to Mr. Coale): Under Chicago law, or under the law of the other jurisdiction?

MR. COALE (to Professor Epstein): Under Chicago law.

PROFESSOR EPSTEIN (to Mr. Coale): These cases are difficult because of the question of territoriality. If the sale to a straw man in Dupage County is legal, can it become illegal by virtue of the fact that Chicago is prepared to prosecute?

MR. COALE: Let me explain the Chicago situation. In Chicago, there are miles of videotape showing gun shop transactions. In these videos, Joe Blow comes into the gun shop. He is legal; he carries a license. Standing next to him are his buddies who obviously shouldn't be buying. They buy from the dealer, and this is the basis of our suit.

MS. KIMBALL: Straw purchases are illegal under federal law. If there was a crime committed, somebody should be arrested. The straw purchaser should be arrested, and so should whoever knowingly sold the gun to the straw purchaser.

This, however, is not a basis for suing manufacturers thousands of miles away.

MR. COALE (to Ms. Kimball): One, the salesmen were arrested, and two, I believe it *is* a basis for suing gun manufacturers. This is what we will fight out in court.

MR. OLSON: To follow up on Richard's point about territoriality, I did a column a few months ago in *Reason* on the trend of applying one state's law to another state in order to find liability. In the Brooklyn gun litigation, the lawyers tell me, Judge Jack Weinstein applied New York law to the sale of guns in South Carolina and other southern states. The structure of choice of law, as it is called in law school, has collapsed over the last generation. Prior to this collapse, such an argument would have been laughed at.

MS. KIMBALL: There is a real commerce clause issue in the municipal firearms litigation. These cities are not only trying to set up standards for themselves, they are trying to impose standards on the rest of the country. This is clearly not contemplated by the Constitution.

MR. SULLUM: One of the arguments used in the gun lawsuits is that the weapons are being oversupplied in one jurisdiction, with the knowledge that they will go to a second one where the laws are stricter. This is called negligent marketing. It seems that there are potential parallels with alcohol and food. Since a certain percentage of their output is consumed by alcoholics, it can be said that liquor manufacturers are knowingly overproducing liquor.

MR. OLSON: In fact, there are particular brands of cheap wine of which this can be said with great confidence.

MR. SULLUM: You don't have to get that specific. In one gun case, the plaintiff alleged a general pattern of negligent marketing. There was no need to identify the particular gun models that were used in crimes. The argument could be made, according to this logic, that the whole liquor industry promotes overconsumption.

Or take the fast food industry. There is no way that all of those Big Macs could possibly be consumed without the help of many fat people. Lawyers could argue that you make people fat by overproducing food, by producing more than can be consumed in a healthy way by the population.

PROFESSOR EPSTEIN: There is a nice twist in that argument. Even if you found out what the normalized quantity is, there would be no way to ensure that the people who crave Big Macs are not going to buy over that amount. The only way to avoid the sale of the excess is to avoid the sale of the product. This is why the argument is bizarre.

Anne's point deserves mentioning in this context: there are fundamental differences, at least under classical law, between the obligations of retailers and manufacturers. One of the errors in modern product liability law is to assume the dominance of the manufacturer and the irrelevance of the retailer. This is true with respect to manufacturing defects, almost by definition. It is not true with respect to selling patterns. Under these circumstances, what the manufacturer is asked to do is supervise the retailer, even though there are direct legal rules that are supposed to do just that.

If the question is choice of remedy, the appropriate remedy is the one which is applied to the individual. The individual has no excuse whatsoever. Manufacturers, on the other hand, have many reasons to sell through distributors, and the cost of enforcement against them would be far greater than direct enforcement against perpetrators. Plaintiffs have been able to persuade courts that for every wrong, there are multiple defendants. If the obvious defendant is insolvent, we will take non-obvious defendants and extend the liability. In low profile cases, there may be a resistance to this extension, but in high profile tort cases, these arguments have greater success.

AUDIENCE MEMBER: This might be more of a political question than this panel would like to address, but I am curious if state legislatures feel threatened by attorney general led suits. Are they

likely to preempt these efforts? I know, in a few states, that legislatures have said that cities can't sue. Do you think there is underlying tension between the courts and the state lawmakers?

PROFESSOR EPSTEIN: Given what we know about legislative inertia, the ability to go outside the process to change the starting point is of enormous value to some. In many cases where an issue is sharply divided, the guy who is in the position of opposing the law will win. It is clear that if you had no such suits allowed by the city, you couldn't get the legislature to authorize them. Once these suits exist, however, you can't get the legislature to stop them. This inertia problem is a well-known feature of democratic politics and it transcends this particular dispute.

MR. COALE: Several legislatures, as noted, have outlawed city suits. Florida attempted this, I believe, but it was rescinded after the Littleton shootings. Louisiana, Texas, and Georgia have laws to this effect, as do several other states. We always assumed that a third of the states would ban these lawsuits.

MS. KIMBALL: It is the common law in many states that this is not a proper activity for cities. Certainly, the remoteness doctrine that Dan referred to is a reason to oppose municipal lawsuits. More generally, they are, in many instances, improper. Cities are not set up to be bill collectors for the ordinary services they render. They do not have the right to sue Detroit for every car accident that is cleaned up. Cities are supposed to conduct everyday business; now, they are asking to be reimbursed because there is a controversial product. This seems totally inappropriate.

MR. COALE: This comes back to Professor Brownell's point about thresholds. This product has, apparently, reached the threshold he referred to. Whether you agree or not with the suits, it is the reality.

PROFESSOR EPSTEIN: This explanation is a bit mystifying. There was an effort to push major gun legislation, which the President was behind, and it failed just last week. I think the attitude on guns is rather divided; we have not reached anything close to

unanimity on this particular point. These lawsuits, instead, are an effort to circumvent an unreliable process. They are an attempt to find a more hospitable forum.

Plaintiffs in these cases have enormous advantages: they get to choose the city, they get to choose the forum, they get to choose the judge. This selection bias means that you can pick the most favorable segment of the population to appeal to. In a legislature, of course, people from different counties have votes, and many of them have competing sentiments and interests. There is a strong anti-democratic bias to this defense of litigation. This is something I particularly dislike when there are no constitutional defects in legislation. This is why I reject the civil rights analogy.

AUDIENCE MEMBER: Tort lawyers claim that the legislatures are unwilling to carry out the will of the people. There is a mechanism for solving that and it is called an election. A tort lawyer, on the other hand, can not be removed from office. He is a free spirit, willing and able to do anything he can.

Mr. Scruggs observed that tobacco is the only product on the market that is marketed by people know its dangerous repercussions. I disagree. If your doctor prescribes drugs, your pharmacist will warn you of the dangers. Drugs are being marketed with known repercussions. Why not take his arguments and go after the prescription drug industry?

MR. COALE: There is always a question of what will happen next. I do not think there will be a next. If there is a next, though, there is a simple solution: beat the case in court. If you think the gun cases are no good, beat us in court. If you think the tobacco cases are no good, beat us in court. Set the precedents and finish us off, but we have a right to go litigate.

PROFESSOR EPSTEIN (to Mr. Coale): There are many of us who say that the reason why we can't win in court is because the judicial rules are no good. But I respect your argument, Mr. Coale, and if I were in court, that would be the only thing I could do.

What I haven’t heard from you, however, is why the rules you defend are correct.

For example, is Anne is wrong when she says if retailers violate federal law, sanctions should be imposed against them? Why should manufacturers be responsible for retailers’ misconduct?

MR. COALE (to Professor Epstein): There are tort laws. Just because something has a criminal penalty doesn’t mean it lacks a civil penalty.

PROFESSOR EPSTEIN (to Mr. Coale): I’m not making that argument. What I asked is, why is it better, under these circumstances, to have manufacturer liability? Will we be in a better social position with that particular arrangement? “Beat us in court” is not a sufficient answer. We are not asking what the law is in the sense that you may be able to win. We are asking why it is right. If you had to go before a panel of angels and justify this particular rule, would you be able to persuade them that you are, in fact, the vicar of light?

MR. COALE: I would trust that none of these angels are here, especially on the panel.

PROFESSOR EPSTEIN (to Mr. Coale): Look, I am not an angel, but at least I try to make an argument. I haven’t heard you make one.

MR. COALE (to Professor Epstein): Your arguments are very nice, but, in the real world, it is very difficult to change the landscape through legislation. Consider tort reform, a cause you are in support of. Trial lawyers come along and kill your tort reform every year. We are faced with the same problem. The lobbies for guns and tobacco kill every piece of legislation out there that is worthwhile, so we are going to alternative methods. Maybe you should try this strategy.

PROFESSOR EPSTEIN (to Mr. Coale): But what do you have to say on the merits? If I could just hear an argument as to how it is you are going to improve the level of accidents through litigation, I would be happy.

MR. COALE (to Professor Epstein): Why are industries morally responsible? Is that your question?

PROFESSOR EPSTEIN (to Mr. Coale): You could start with that.

MR. COALE: Let's talk tobacco. You do not have the right to sell a product that you have known for years causes serious diseases. You do not have the right to cover up this knowledge or to target your product to children.

All children are not hooked to tobacco because of these efforts. Most people quit. But there are many who don't. There was a concerted effort by the industry, over the decades, to make sure that they had enough hooked every year to replace the people who died. This is the moral reason for these suits.

As for guns, you have manufacturers who want to turn their back on the details of distribution. They want to close their eyes at the warehouse door, which most industries are not allowed to do. Of course, the criminal who pulls the trigger has responsibility. Of course, the smoker who can't quit has responsibility. The industries, however, have responsibilities too.

MS. KIMBALL: Let me respond to John's remark that the legislature isn't doing anything. If you look at firearms legislation passed from 1968 to the present, it is remarkable. The legislature is alive and well in reference to this issue at both the federal and state level. The Brady Bill has made enormous changes in the way firearms can be sold in this country. You can't sell a new handgun to anybody today without the FBI giving its seal of approval. This is a huge change from even five years ago. The changes in the form the purchaser has to sign when he

buys a handgun have also been enormous in the past eight to ten years. Many people are now excluded from handgun ownership. The claim that the reforms are stymied in the legislature is simply not correct.

MR. SULLUM: As for the “moral responsibility” of the tobacco industry, it seems to me that every industry has to replace customers who die. The real question here is whether the tobacco industry is locking young consumers into a pattern of behavior.

If we were speaking of intentions, I have no doubt that the tobacco industry would love to persuade every teenager in America to smoke. It is quite clear that there is targeting of teenagers in advertising, even though the industry denied it. But would there be significantly fewer smokers in the absence of those advertisements? Is this mainly an issue of brand selection as opposed to smoking itself?

We are starting to see dramatic restrictions on cigarette advertising and promotion. Suddenly, anti-smokers aren't so sure that this is going to make a difference. Hubert Humphrey, who insisted on these kinds of restrictions when he negotiated a separate deal with the tobacco companies, had an op-ed piece in the *New York Times* last fall. He noted that in countries where cigarette advertising is banned, teenagers still smoke in droves.

The first uncertainty, then, is whether there is a causal relationship between targeting and the decision to smoke. The next uncertainty has to do with how “locked in” teenagers are. If you decide to start smoking as an adolescent, does that mean that you can't stop later on? This is refuted by everyday experience and by the data on smokers who have quit. There are about as many former smokers in this country as there are smokers, and most of them quit on their own, cold turkey. You look at people who haven't quit and say they can't. I look at them and say they haven't. They haven't quit smoking because the costs of the habit have not risen high enough to persuade them to quit.

As the anti-smoking movement becomes more coercive, it is trying to raise these costs. When you raise the price of a pack, some people quit. When you restrict the places where smoking is allowed, some people quit. This proves, to me, that smokers do have some control over their behavior. You have to raise the cost high enough. It is not a foregone conclusion, then, that if you start smoking as a teenager, you will smoke for the rest of your life.

MR. WEBB: I agree with John in his defense of this litigation. If a tort lawyer has a valid, legal basis to file a lawsuit, if there are demonstrable injuries and damages that can be sustained, that tort lawyer has the right to go into court and grieve on behalf of a client. Legislative action or inaction is largely irrelevant in my judgment.

In terms of what is next, this is where John and I respectfully disagree. If the rules were bent in the tobacco suits because of cultural, moral, or social issues, that has real implications. Bent rules encourage attorneys general—and municipalities—to go after other industries. We may be faced with a continuing issue. But I dare say, five years from now, you will see that the Colonel is not fighting off a lawsuit in any court, or being pursued by any attorney general. The attorneys general will ultimately recognize that lawsuits against tobacco were legally defective. The supreme courts essentially said this. Cases that went to trial were losers, but, to John and his colleagues' credit, the tobacco industry settled with huge sums of money. We ought not to, however, bend the rule of law because of social or cultural trends.

MR. COALE (to Mr. Webb): I agree with most of what you said. The arena to fight this out is the courtroom, although that is not what happens. I would only add that both sides of these issues are trying to bend the rules, and whether that is right or wrong, it is a reality.

PROFESSOR EPSTEIN: I want to talk about John's moral case. Jacob suggested some of its problems, but there are others. There have been two basic kinds of tobacco cases: one is brought by

named plaintiffs who have various ailments, and the other is brought by the Medicaid authorities on their own behalf.

If there were a place in which you could present the addiction issue and all its components, it would be in those individually brought suits. Every single one of those suits, however, has essentially been beaten. They are beaten with lifestyle depositions which suggest that the choice metaphor is more powerful than the addiction metaphor. That was true in *Cipollone*¹⁸ and it was true in the cases that followed.

The cases that win are headless cases, the cases brought by Medicaid. A peculiar disjunction exists: we talk about children as the source of the suits, but the successful cases involve older people and rather different theories of action. As a lawyer, I am awed by the audacity of the plaintiffs; they actually pulled this off. As a normative matter, though, these cases are stunningly weak. The rule should be that Medicaid can only win if the individual plaintiffs it sues on behalf of could win standing alone. As I mentioned, individuals in these cases do not win. If you actually look at the merits of this case, whatever its success in court, it clearly should have failed.

MR. COALE (to Mr. Sullum): If the tobacco industry had pushed their product without manipulating nicotine levels, perhaps they wouldn't have ended up in hot water. They got themselves into trouble because of deceptive research practices.

As for the individual cases, they fell because they were mainly cancer cases. There has never been an individual case tried on the addiction issue alone; the damages are very low and it would be economically impossible. Addiction was a class action issue. The individual cases didn't fall because the jury didn't buy the addiction claim. They fell for a lot of different reasons.

MR. OLSON: I would like to revisit one of the guiding questions for this panel. What is the legal and political environment going to look like in five years? Who ought to be worried who is not currently concerned? It occurs to me that neither the tobacco nor the

gun industry is going to be in a state of repose any time soon, no matter what deals are cut by anyone in this room. Indeed, a tobacco deal was cut and the industry is still facing foreign government lawsuits, various union and pension fund lawsuits, a possible federal lawsuit, and other threatening prospects. Other defendants, such as retailers, could soon be litigation targets. Similarly, if cities settle the gun cases, there is nothing to keep the gun companies from being sued, in another round, by other cities or plaintiffs. How, if at all, do defendants ever get repose? Or does it go on forever?

PROFESSOR EPSTEIN: The answer is that there is no repose. There is an irony here about the whole problem of *res judicata*. One of the great problems in law is the issue of mutuality in ordinary tort suits, so that the plaintiff is bound and the defendant is bound. It turns out that two plaintiffs can have parallel claims and one goes into the Valley of Death and loses, and then the second one follows afterwards until he wins. This is the fundamental asymmetry that I referred to in my earlier comments.

The only way to stop this process is to make the litigation stakes very high. The “you bet your company” game, where all plaintiffs are brought in against their will, and the truth is the defendants don’t want that because they can’t handle the volatility of the potential outcomes, or in the alternative, you go on this way and hope that you get some benefit out of precedent.

MR. SULLUM: Mr. Coale asked why the tobacco industry settled out of court if the cases against them were so weak. This is an important question. The industry had almost fifty cases pending against them, and just a few losses with big punitive damages could have been their end. Many people could take a crack at tobacco, and even if the law was on their side, they were in an extremely vulnerable position.

I am not sure whether this decision to settle was the right one for tobacco. From a wider perspective, there is an externality associated with settling, that is, a political precedent for this sort of

strategy. If the gun industry caves, that will be more encouragement for future lawsuits. If it fights its cases through and wins them, it may give trial attorneys some pause.

My point is this: industries, looking after their own interests, will logically settle. This has dramatic consequences for other industries, not just with respect to lawsuits, but with respect to things like censorship of advertising. Even though censorship was self-imposed in the tobacco case, people will undoubtedly argue that the cigarette industry showed some restraint, so the fast food industry should do the same. Can't they stop pushing their unhealthy food on television during family hour?

PROFESSOR EPSTEIN: You are neglecting a fundamental difference. One of the reasons the tobacco industry settled is because it secured restraints on new entry by other outside suppliers. As a result, the guys selling today are the guys who are going to be selling tomorrow, which is something like a monopoly position. I think that, with other industries, the opportunity to arrange these sorts of entry prohibitions will not exist. This is true in Anne's gun industry—there are simply too many suppliers. Settlement, under these conditions, will be considerably more difficult.

MR. COALE: I consider the current tobacco situation a failure. It didn't have to be. On June 20th, a settlement agreement went to Congress. It was a compromise; everybody won. Money collected by state attorneys general was actually targeted to things that had to do with tobacco. The industry received protections, and knew what to expect in the future.

Tobacco did not kill this agreement. It was the C. Everett Koops and David Kesslers of the world who did. It is almost impossible to work with the advocacy groups. Our June 20th settlement gave Koop, Kessler and his boys 30 times what they had ever dreamed of. We even, in front of Congress, had boards with their statements from three years ago. It wasn't enough. If we gave them \$100, they wanted \$105.

Notes

¹ “The Law is at Risk in Tobacco Suits,” *Wall Street Journal*, April 7, 1999. A variation of this article appeared on the op-ed page of *The New York Times*, April 27, 1997. Both versions appear on General Pryor’s web site: www.ago.state.al.us/.

² *Morrison v. Olson*, 487 U.S. 654 (1988).

³ See, for example, “Cigarette Taxation and the Social Consequences of Smoking,” NBER Working Paper No. W4891 (October, 1994).

⁴ *Kirk Fordice, as Governor of the state of Mississippi, Petitioner, v. Mike Moore, as Attorney General of the state of Mississippi, Respondent*, February 16, 1996.

⁵ *O’Keefe v. The Loewen Group Inc.*, 91-67-423 (Cir. Ct., Hinds Co., Miss.) As explained by the *National Law Journal*: “The primary plaintiff in the case, brought against a Canadian-based funeral home company, was Jeremiah J. O’Keefe, the former mayor of Biloxi, Miss., who owned two insurance companies and eight funeral homes in Mississippi. From 1975 through 1990, Mr. O’Keefe and his Gulf National Insurance Co. had an exclusive contract to provide burial insurance and services to Jackson-based Wright & Ferguson Funeral Homes. In 1990, noted plaintiffs’ counsel Michael F. Cavanaugh, Wright & Ferguson was purchased by The Loewen Group Inc., one of the largest owners of funeral homes in North America. “Loewen breached this contract with O’Keefe and in 1991 O’Keefe sued Loewen,” Mr. Cavanaugh reported. In August 1991, he added, “a settlement agreement was reached where we would buy an insurance company from them and they would buy our funeral homes.” The sale never went through. “Loewen refused to close,” said Mr. Cavanaugh, and as a result, Mr. O’Keefe had to sell off four of the funeral homes. The plaintiffs, who included Mr. O’Keefe’s businesses and his family, amended the initial breach-of-contract suit, adding charges of fraud, tortious interference,

breach of good faith and willful and malicious monopoly...Loewen denied the charges, but on Nov. 1, 1995, a Jackson jury awarded the plaintiffs \$100 million in compensatories and \$400 million in punitives. Plaintiffs' attorneys claimed the Loewen verdict was 10 times higher than the highest previous Mississippi jury award."

⁶ *In re Kirk Fordice, as Governor of the State of Mississippi* (NO. 96-M-00114-SCT), March, 1997. Petition for writ of mandamus and prohibition and supplemental petition for writ of mandamus and prohibition and declaratory judgment dismissed.

⁷ *Parens patriae*, literally "parent of the country", is derived from English common law. This doctrine is held by the states as "a concept of standing utilized to protect those quasi sovereign interests such as health, comfort, and welfare of the people". State attorney generals may also, in certain instances, utilize this doctrine to bring actions and recover on behalf of state residents, for instance in anti-trust cases. Black's Law Dictionary, 6th edition.

⁸ See "Guns, Tobacco, Big Macs—and the Courts." *Commentary* (Vol. 107 No. 6).

⁹ A Texas arbitration panel formed in 1998 by Mr. Murr and Mr. Morales directed the state to pay Mr. Murr \$260 million for his work on the case. A separate national arbitration board said he should receive \$1 million in compensation, to be paid by tobacco companies over the next 30 years. In May, 1999, Mr. Murr's attorney, Mark Minton, told U.S. District Judge David Folsom that his client would no longer pursue the \$260 million in state funds but still expected the \$1 million from the national panel. Within the month, Murr waived his claim to this amount as well.

¹⁰ As described by Texans for Lawsuit Reform, "The state legislature wisely passed SB 178 to prevent future abuses of State contingent fee legal contracts thanks in large measure to Representative Rob Junell and Senators Ratliff, Fraser, and Armbrister. In the future, the state agency or governor must sign such contracts, in addition to the attorney general. The Legislative Budget Board

must verify the need for a contingent fee contract in advance. The amount of the contingent fee payable is capped at four times a reasonable hourly rate, which is itself capped at \$1,000 per hour. The lawyers must keep time and expense records, which are subject to independent verification and public disclosure.” (<http://www.tortreform.com/1999c.html>)

¹¹ Delaware was not one of the original 11 states to sue tobacco. The tobacco agreement, however, stipulated that all states would eventually file suit; Delaware filed shortly after the agreement was negotiated. Under the terms of the agreement, the tobacco industry will pay Delaware an initial amount of \$9.5 million. Each year thereafter, Delaware will receive a payment between \$25.4 and \$33.1 million.

¹² “The Tobacco Deal,” published in Brainard, Perry, ed., *Brookings Papers on Economic Activity*, 1999 (Washington, D.C.).

¹³ “Big Tobacco: Winning by Losing.” *American Lawyer*, January/February 1999: 55-56.

¹⁴ Judge Williams incorporated his comments into an article: “The More Law, the Less Rule of Law,” *The Green Bag*, Summer 1999 (Vol. 2, No. 4): 406-9.

¹⁵ For an earlier identification of this foursome, see *Public Citizen News*, “Family Values, Killer Industries,” December 23, 1998. (Available on the Public Citizen website: <http://www.citizen.org/>.)

¹⁶ New York: Thomas Crowell.

¹⁷ Professor Lott considers the benefits of gun ownership in “Gun Control Advocates Purvey Deadly Myths,” *Wall Street Journal*, November 11, 1998: A22. For a book length treatment of the subject, see *More Guns, Less Crime: Understanding Crime and Gun-Control Laws* (Chicago: University of Chicago Press): 1998.

¹⁸ *Cipollone v. Liggett Group*, 505 U.S. 504 (1992).



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