Legal Backgrounder

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GOVERNMENT "REGULATION BY LITIGATION" MUST BE TERMINATED

by

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Among the many successes of Ronald Reagan's presidency, perhaps the most significant and enduring for our economic and political systems were his consistent emphasis of limited, accountable government and respect for the rule of law. These basic principles, along with his belief in judicial restraint, changed the perceptions people had of their government and the way their leaders at least publicly claimed to utilize the vast powers our Constitution accorded to them. It was, after all, President Bill Clinton who once announced that "The era of big government is over."

Ironically, these successes of the Reagan Revolution have spawned a movement by some activists in and outside of government to seek a return to judicial activism and a new era of taxation and regulation by litigation. Unsatisfied with a democratic process which has rejected their statist agendas, so-called "public interest" activists, elite trial lawyers, and opportunistic public officials have turned instead to unaccountable courts. As former Labor Secretary Robert Reich said two years ago, "The era of big government may be over, but the era of regulation through litigation has just begun." Robert Reich, *Regulation Is Out, Litigation Is In*, USA TODAY, Feb. 11, 1999, at 15A. This LEGAL BACKGROUNDER will discuss these dangerous developments and explain why government-sponsored litigation is today's greatest threat to the rule of law.

Seeking a Revival of Judicial Activism. Even during the Reagan era, legal activists and their allies in government, primarily in state attorneys general offices, railed against a framework that stressed legislative action over policy making by regulation and enforcement. Especially in the area of antitrust, state officials, at first alone and later in conjunction with the Clinton administration, looked for opportunities, such as various legal actions against Microsoft and challenges to mergers, to reactivate the courts as creators of public policy. The revival of judicial activism through antitrust litigation was to be expected in the post-Reagan era. That revival, however, set the stage for a much more dangerous and direct attack on the rule of law.

In May 1994, the Attorney General of Mississippi filed a lawsuit against the tobacco industry seeking recovery of Medicaid costs for treating sick smokers.[1] Four years later, forty-six states and a few territories entered a multistate settlement agreement with the tobacco industry that requires the industry to pay the state and territorial governments hundreds of billions of dollars. The settlement also obligated the industry to pay a half a billion dollars a year to private, contingency-fee trial lawyers who represented many of the states. What began as multistate litigation against the tobacco industry soon mushroomed into suits by other local governments, such as Los Angeles County and the City of San Francisco, and ultimately a suit by the federal

[1]For an extensive analysis of the tobacco litigation, see *Report of the Task Force on Tobacco Litigation Submitted to Governor James and Attorney General Sessions*, 27 CUMB. L. REV. 577 (1997) (hereinafter *Task Force Report*).

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government against the tobacco industry.

The tobacco litigation and especially its multibillion dollar settlement inspired mayors of large cities — represented by private, personal-injury lawyers, working on a contingent-fee basis — to file recoupment suits against the firearms industry for the costs incurred by the cities for the criminal justice system, police departments, and medical services to persons injured in firearms-related incidents. New York Attorney General Eliot Spitzer filed a similar lawsuit, and the Attorney General of Connecticut, Richard Blumenthal, has spoken in favor of this form of litigation. Not surprisingly, the Clinton administration in 1999 announced that it was considering a firearms lawsuit on behalf of victims of gun violence in public housing projects. This threat led to a settlement agreement between several of the plaintiff governments and Smith & Wesson, which so far has not been replicated with any other firearms manufacturer.[2]

It is reassuring that gun manufacturers have recently won significant victories in Louisiana and New York. In early April, the Louisiana Supreme Court held that a law passed by the state legislature to retroactively block the lawsuit was a proper exercise of state powers, and dismissed the city's claim. Richard B. Schmitt, *Handgun Lawsuit Gets Thrown Out by Louisiana Court*, WALL ST. J., Apr. 4, 2001, at B7. In late April, the New York Court of Appeals called into question that state's gun suit and others pending across the country when it ruled that under the facts of the private plaintiffs' lawsuit before them, manufacturers could not be held liable for the illegal use of their product once it is into the distribution chain. The unanimous decision in *Hamilton v. Beretta USA Corp.* upheld the time-honored tort theory of "remoteness," which dictates that there must be a direct, not remote, link between the alleged injury and the defendant's actions. John Caher, *New York Rules Gun Manufacturer Not Liable for Injuries*, N.Y. LAW J., Apr. 27, 2001 (obtained from www.law.com).

In addition to cigarettes and firearms, two other industries have been hit with copy-cat government-sponsored litigation. In 1999, Rhode Island Attorney General Sheldon Whitehouse filed suit against the paint industry for costs attributable to injuries from lead paint, which has not been manufactured in the United States since the 1950s and has been banned by federal law for more than twenty years. The city of Milwaukee recently joined the attack, suing a lead paint manufacturer and a distributor under state "nuisance" law. To date, the paint manufacturers have followed the lead of the bulk of the firearms industry by refusing to buckle in the face of this legal assault, thus forcing the activist government officials and their private plaintiffs' lawyers to prepare to try to prove in court that their cases have merit. In an April ruling on a motion to dismiss the Rhode Island case, a state judge permitted the Attorney General's novel public nuisance theory to proceed, but threw out the product liability claim and request for special education funding. Milo Geylin, *Rhode Island Gains Ruling for Its Suit Over Lead Pigment*, WALL ST. J., Apr. 3, 2001, at B5.

In 2000, the state of Connecticut sued eight health maintenance organizations (HMOs), alleging the companies violated fiduciary duty, disclosure, and notice obligations imposed by the federal Employee Retirement Income Security Act (ERISA). The complaint asks the court for injunctive relief, but in a variation on the tobacco playbook, does not expressly ask for billions of dollars in compensation — although it does request "such other and further relief as the Court may deem necessary and proper." Whatever else one may say about the state of Connecticut's desire to restructure the health care industry in a courtroom, it should be noted that the state's ERISA-based theories of liability appear to be foreclosed by the U.S. Supreme Court's decision in *Pegram v. Herdrich*, 120 S. Ct. 2143 (2000), announced three months before the Connecticut case was filed.

In a broader sense, government reimbursement suits should be dismissed under a basic legal theory declared by the U.S. Supreme Court over fifty years ago. In *United States v. Standard Oil Co.*, 332 U.S. 301 (1947), the Court rejected the notion that the government has a common-law or equitable right to recover health care or other costs incurred by the government from a third-party, in the absence of legislation. That

[2]The HUD press release announcing the Smith & Wesson settlement includes a brief explanation of its terms. It is available on line at {http://www.hud.gov/library/bookshelf18/pressrel/pr00-56.html}.

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case involved an accident in which a Standard Oil truck hit and injured a soldier who was hospitalized at government expense. *Id*. at 302. When the government sued Standard Oil for the costs of the soldier's medical care, the Supreme Court dismissed the suit, reasoning, "Whatever the merits of the policy, its conversion into law is a proper subject for congressional action, not for any creative power of ours." *Id*. at 315. Such a strong statement against judicial activism is directly applicable to today's string of activist recoupment suits.

Taxation Through Litigation. With higher prices passed on to consumers at a cost of billions of dollars each year, the settlement of the tobacco litigation represents one of the largest and most regressive increases in government revenues in history. This disguised tax increase through litigation bypassed the traditional processes that tend to limit government. No vote of the people or their elected representatives took place. Instead, the proponents of the tobacco litigation asserted that the increased revenues was really the recovery of compensatory damages. They wanted the public to overlook the fact that the new tobacco revenues are based solely on current Medicaid costs and tobacco sales, and those revenues continue for as long as the industry is in business. What was touted as a lawsuit "to bring the tobacco industry to its knees," Milo Geyelin & Suein L. Hwang, *Liggett to Settle 22 States' Tobacco Suits*, WALL ST. J., Mar. 21, 1997, at A3 (quotation of Mississippi Attorney General Michael Moore), became, in reality, a closer partnership between state governments and the tobacco companies.

Taxation through litigation is a thinly veiled scheme to expand government's control over our personal choices. If the courts reject individual responsibility for misuse of dangerous products and eliminate the traditional tort defense of the assumption of the risks of use, we will see the opening of the floodgates of corporate liability to underwrite the welfare state. After tobacco, one could see government litigation taxes imposed to control our purchasing and consumption of automobiles, fatty foods, and alcoholic beverages.

Regulation Through Litigation. An important feature of the Reagan Revolution was to accelerate the deregulation of businesses that began slowly during the Carter administration with the airline and trucking industries. The proponents of recoupment suits, on the other hand, have revived economic regulation as an end unto itself. They assert that the "failure of the political system" necessitates their litigation. Their perspective has its origin in the pro-regulatory philosophy of the so-called consumer advocate, Ralph Nader, in whose heyday, in the 1960s and 1970s, "costs to business were secondary, if not irrelevant." ROWLAND EVANS AND ROBERT NOVAK, THE REAGAN REVOLUTION 140 (1981).

Not even constitutional objections can deter the proponents of regulation through litigation. The national tobacco settlement, for example, prohibits the tobacco industry from sponsoring most entertainment events, using cartoon characters in advertising, and even engaging in some forms of lobbying. These restrictions could not have been achieved through legislation or administrative regulation without violating the free speech clause of the first amendment. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (holding that a statutory prohibition of price advertising for alcoholic beverages violated the First Amendment).

Another example is the campaign of the Clinton administration and the Attorney General of New York to reward Smith & Wesson — for agreeing to new marketing and manufacturing restrictions — by encouraging mayors to favor Smith & Wesson in the procurement of firearms for police departments. In many instances, that kind of preference would violate state constitutional prohibitions of exclusive grants and franchises and competitive bid laws. Violating these legal restrictions could compromise the safety of officers and citizens who depend on the procurement of quality firearms at reasonable prices.

Government Recoupment Litigation Undermines Federalism and Separation of Powers. The purpose of the tobacco litigation, which a few dozen cities hope to duplicate in the gun litigation, was to establish through the action of several states a national policy that is properly reserved first to each state legislature and then to Congress in the exercise of its enumerated powers. The national tobacco settlement was structured so that any state that did not enter the agreement, because that state wanted either a more stringent

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or more liberal policy toward the tobacco industry, would suffer the burdens of the agreement, in the form of higher tobacco prices, without the benefits of higher revenues to the state government. The settlement, therefore, turned on its head the principle of federalism, which allows each state to choose its own policies.

Aside from undermining the separation of powers through judicial activism, this new species of government litigation raises objections that are similar to those expressed by Justice Scalia in relation to the independent counsel law. By hiring private trial lawyers on a contingency-fee basis, the proponents of these novel government lawsuits have created what one of those trial lawyers calls a "fourth branch of government."[3] That branch is free from the ordinary restraints of prosecutorial abuse, such as legislative oversight and appropriation and the duty to perform multiple tasks in the enforcement of the laws with limited resources. The hiring of contingency-fee lawyers by governments is what former Attorney General Meese said about the independent counsel law: "an effort to rule outside the normal framework of our constitutional system, beyond the limits of accountability."

Limiting Government Regulation. Using President Reagan's approach to creating a limited and accountable government as a guide, one could propose two ways of limiting multigovernment litigation to end its abuses. First, Congress and state legislatures could ban government suits against manufacturers for indirect harm, except for the traditional remedy of subrogation. This would restore legislative bodies to their position of supremacy within the framework described by the Supreme Court in its 1947 *Standard Oil* case and end taxation and regulation through litigation. If a government sues an industry for harm primarily suffered by citizens, such as smokers or victims of gun violence, then the industry should be able to assert well-established defenses of contributory negligence, assumption of risk, and statutes of limitations. The government should not have a right to sue that is superior to the rights of the citizens on whose behalf the lawsuit is filed by the government.

Second, Congress and state legislatures should consider either banning contingent-fee contracts for government attorneys or enacting tough regulations of these contracts. For a long time, contingent-fee contracts were considered unethical, but that view gave way to 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 also control access to the courts. The use of contingent-fee contracts allows government lawyers to avoid the appropriation process; it creates the illusion that the 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. If these contracts are not banned, then there should at least be legislative requirements for competitive bidding, limits on total fees, and public disclosure of the contracts. In 1999, the Texas and North Dakota legislatures enacted this kind of legislation, and in 2000, the Kansas legislature did so as well.

Conclusion. In American political thought, we have a rich tradition of limiting the power of government. The profound debate that produced our Constitution and Bill of Rights revolved around this problem. President Ronald Reagan reinvigorated that perspective. In the last eight years, the proponents of novel government litigation have undermined that perspective through judicial activism. We should turn them back and restore Reagan's perspective of judicial restraint, lower taxes, deregulation, federalism, and the separation of powers.

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[3]*See* Douglas McCollam, *Long Shot at Gun Tort Dollars*, AM. LAW., June 1, 1999 (describing "Gauthier's notion of the plaintiffs bar as a de facto fourth branch of government, one that achieved regulation through litigation where legislation failed"). For more recent confirmation of this trial lawyer hubris, see Adam Cohen, *Are Lawyers Running America?*, TIME, July 17, 2000 ("Ask [Richard] Scruggs if trial lawyers are trying to run America, and he doesn't bother to deny it. 'Somebody's got to do it,' he says, laughing.").

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