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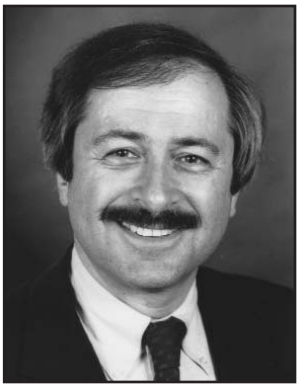
A Message from the Section Chair



Health Law Day at the 121st Annual Meeting was a resounding success. Enthusiasm characterized most of the committee meetings, as the groups planned activities for 1998. We are looking forward to a great year!

Our programs at the Annual Meeting attracted a record number of attendees. Many thanks to **Tracy Miller** and the Ethical Issues in the Provision of Health Care Committee for their excellent program **"Promoting Accountability in Managed Care: The Response by the Courts, Policy Makers and Providers."** The issues addressed by the speakers are extremely relevant, timely and important to us all. Kudos are also in order for **Sal Russo** and **Andrea Sklower** for our afternoon program. Sponsored by the Public Health Committee and the Committee on Liaison with the Health Professions, **"The Legal Implications of the Medicinal Use of Marijuana"** was a great hit. As I attended other sessions and events later in the week, I found that people were still arguing about this topic.

We also appreciated **Hank Greenberg**'s willingness to continue the tradition of addressing the luncheon meeting. While others might have sent a substitute, Hank met with us, delivered his presentation and took questions without missing a beat, all while sporting a 101-degree fever. Thanks, again Hank!

Continuing Legal Education

In keeping with a desire to keep you informed on significant health law issues, I am pleased to announce our upcoming CLE program: **"Health Care Fraud and Abuse: Legal Implications for Attorneys and Health Care Providers."** Federal and state initiatives in this area have made fraud and abuse topics about which everyone in the health care field should be knowledgeable. This program will be of interest to all attorneys who counsel hospitals and medical practices. The outline includes an overview of the problem, the statutory basis for fraud and abuse control, governmental initiatives, corporate compliance plans and many other topics. Mark your calendar for May 14, 1998 (Albany); May 20, 1998 (New York City); June 2, 1998 (Rochester); and June 5, 1998 (Great Neck). Watch your mail, as more information will be forthcoming. This will be a great program, with an outstanding group of speakers.

While on this topic, I'd like to thank CLE Chair **Robert Abrams**, Program and New York City Chair **Frank Serbaroli**, and the site Chairs (**Phil Rosenberg**, **Susan Regan** and **Mike McDermott**) for their efforts with respect to **"An Introduction to Health Care Financing and Reimbursement."** That successful program was presented in four locations and attracted more than 200 registrants.

Pro Bono

The Committee on Consumer/Patient Rights is planning a number of pro bono events this year. Please watch for details of our initiative in cooperation with Attorney General Vacco's office, aimed at resolving disputes between managed care subscribers and their HMOs. Committee Co-chair **Jeffrey Gold** will be leading this effort. The Committee will also be working with local cancer societies and other organizations, with

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the goal of empowering cancer patients so that they can address significant legal issues surrounding their illnesses. Committee Co-chair **L. Susan Slavin**, who has been very active in such activities throughout her career, will be at the helm of this project. There will be more to come from Consumer/Patient Rights as the year proceeds.

Beginning in 1997, many Health Law Section members volunteered to become panel members with the Surrogate Decisionmaking Program, sponsored by the New York State Commission on Quality of Care for the Mentally Disabled. That program, which acts on requests for consent for medical treatment of people with psychiatric/developmental disabilities, has recently been expanded to cover Westchester County. It is already active in the following counties: Albany, Bronx, Columbia, Dutchess, Fulton, Greene, Kings, Montgomery, New York, Putnam, Queens, Rensselaer, Richmond, Rockland, Saratoga, Schenectady, Schoharie, Ulster, Warren and Washington. Take a look at Article 80 of the Mental Hygiene Law. Further information about the program can be found on the Commission's Web site (www.cqc.state.ny.us/sdmc.htm). If you are interested in joining other Section members in this worthy volunteer effort, please call **Paul Stavis** at (518) 473-4065.

Speaking of Web Sites

Our Section Web site continues to attract attention. If you haven't had a chance to view it, please take a look. The Health Law home page (www.nysba.org/sections/health/index/html) includes the job bank, information about committees, Section activities and much, much more.

Elections

I am pleased to report that Section officers for the year beginning June 1, 1998, were elected at the Annual Meeting. Please welcome **Jerome T. Levy** (Chair), **Robert N. Swidler** (First Vice Chair), **Tracy E. Miller** (Second Vice Chair), **Peter J. Millock** (Secretary) and **Paul F. Stavis** (Treasurer) to their new positions. Committee Chairs will be appointed by Jerry in consultation with the Section's Executive Committee this spring.

Remember, this is your Section. If you have any suggestions, please contact me, your committee chair or a member of the Executive Committee. Our names, addresses and telephone numbers are listed in this issue of *Health Law Journal*.

Barry A. Gold

From the Editors

The proposed tobacco settlement between tobacco company representatives, state attorneys general and plaintiffs' groups captured nationwide attention when announced last summer, and more recently in the president's proposed budget. The feature article in this edition of the *Health Law Journal* contains a comprehensive overview of the proposed settlement and its implications for current and future litigants. Practitioners are offered pointers on the advantages and disadvantages of the plan and the various options open to current and potential plaintiffs.

Introduced in the last edition, "'Net Worth," a column by Margaret Murray, provides helpful information about health law research and sources on the Internet. We are also happy to present Howard Krooks's Elder Law Update and Claudia Torrey's insightful "For Your Information" column.

We welcome and encourage the submission of articles on topics of interest to the health law practitioner. We also invite letters and comments relating to articles or columns printed in the *Health Law Journal*, or suggestions on what you would like to see in the *Journal*. You can reach us at the following address:

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Editors

For Your Information

by Claudia O. Torrey

On August 5, 1997, President Clinton signed into law the Balanced Budget Act of 1997 (BBA).[1] Among the components of the BBA is a provision allowing "financial relief" to providers of emergency services to Medicare and Medicaid patients covered under a managed care plan. As of October 1, 1997,[2] the BBA requires Medicare and Medicaid managed care plans to utilize a *prudent layperson standard*[3] in determining whether a patient's emergency condition is to be paid.[4]

The PLS states that "an emergency medical condition" means a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that a prudent layperson, who possesses an average knowledge of health and medicine, could reasonably expect the absence of immediate medical attention to result in

> (i) placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy,
>
> (ii) serious impairment to bodily functions, or
>
> (iii) serious dysfunction of any bodily organ or part.

Most health care insurance plans only review the final diagnosis in determining payment. Needless to say, most prospective patients do not know their exact medical problem, but can usually explicitly express their symptoms.[5] Emergency presenting symptoms are often identical to, or parallel to, less serious conditions. Thus, before the PLS, most providers were not being paid for emergencies that turned out to be "false alarms."

As of this writing, approximately 15 states[6] have adopted some form of the PLS for commercial health care insurance plans—including New York State.[7] Approximately eight states have PLS laws pending.[8]

The New York State law covers both individual[9] and group[10] policies. In pertinent part, the law states that "an emergency condition means a medical or behavioral condition, the onset of which is sudden, that manifests itself by symptoms . . . that a prudent layperson . . . could reasonably expect the absence of immediate medical attention to result in (i) placing the health of the person afflicted with such condition in serious jeopardy, or in the case of a behavioral condition placing the health of such person or others in serious jeopardy; or (ii) serious impairment to such person's bodily functions; (iii) serious dysfunction of any bodily organ or part of such person; or (iv) serious disfigurement of such persons." Staying in the vanguard, New York State's definition of an emergency condition is very comprehensive.

Notwithstanding Washington politics, the 105th Congress is to be commended for implementing the PLS in Medicare and Medicaid managed care plans. Hopefully, this action will ease *some* of the concerns providers have regarding quality of care issues and the "bottom line" mentality of most managed care insurance plans.

Endnotes

1. Public Law § 105-33. (BBA can also be found at 11 Statutes 251.)
2. *E.g.* § 4710(a) of the BBA.
3. This standard shall be referred to as the "PLS."
4. See § 1852(d)(3)(B) of the Social Security Act, as stated in § 4001 of the BBA; *See also* § 4704(b)(2)(C) of the BBA.
5. Such expression is commonly referred to as the ("PLS").
6. This information was received from Mr. Ken King, director of Chapter and State Relations of the American College of Emergency Physicians.
7. The Managed Care Reform Act was signed by the governor on October 9, 1996.
8. *Supra* note 6.
9. Insurance Law § 3216(i)(9) eff. April 1, 1997.
10. Insurance Law § 3221(k)(4)(B) eff. April 1, 1997.

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Summer and Smoke: The Tobacco Settlement of 1997

by Norman B. Lichtenstein*

On June 20, 1997, a group of state attorneys general, a group of plaintiffs' lawyers, and tobacco company representatives concluded an unprecedented agreement settling a number of public and private lawsuits with a series of complex terms that would dramatically change the landscape for tobacco sales, litigation and regulation in this country.[1] Implementation of this agreement will require a congressional enactment and presidential approval.[2] Thus, there is a long way to go before the agreement is effectuated, if at all. Significant criticism of the agreement has quickly developed from many quarters on a number of grounds including that it is weighted in favor of the tobacco industry, has serious enforcement problems and leaves open numerous questions about how the settlement money will be divided among the interested parties.[3] In July a Senate committee, chaired by Senator Orrin Hatch, began taking testimony on the settlement.[4] As the legislative review of the settlement plays out we can expect that proposals for significant change in some of its current provisions will be made.

Former Surgeon General C. Everett Koop has described tobacco usage as the number one health problem in America.[5] More than 1,000 people a day die from tobacco-related illnesses in this country.[6] The annual total exceeds 400,000 per year.[7] There are more than three million teenage smokers; more than 3,000 new underage children begin to smoke everyday.[8] It is now clear that nicotine is an addictive drug.[9] Evidence that the large tobacco companies knew for years that nicotine was addictive and suppressed this information as well as clear evidence they had concerning the carcinogenic properties of tobacco has spawned waves of lawsuits.[10] These include private actions, both individual and on behalf of a designated class, and actions brought by 40 state attorneys general to recover Medicaid outlays for cigarette-related diseases.[11] The settlement, which is now the subject of so much national attention, was an effort to resolve the issues raised in the pending litigation and a host of other tobacco-related issues which affect the health and welfare of millions of Americans.

The settlement is a complex document, incorporating limitations on tobacco advertising, restrictions on access by youth, defining parameters for Food and Drug Administration (FDA) regulation, providing funding for health care costs and for a major campaign to reduce underage smoking, as well as the settlement of civil claims and certain limitations on future claims.[12] It is unfeasible to discuss each provision in a newsletter of this length. Rather, the article will focus on the issues of civil liability for private litigants that are of interest to the health law practitioner.

In broad scope, the settlement provides that 40 lawsuits filed by state attorneys general would be terminated and private class actions for past conduct will be prohibited.[13] As a result, some 20 class action lawsuits filed by private plaintiffs would not continue and could not be brought in the future.[14] The settlement seeks to bind both parties represented and those not represented in the negotiations.[15] Individual plaintiffs would be allowed to proceed with lawsuits against the tobacco companies, subject to an aggregate annual cap of $5 billion and a $1 million annual payment limitation for each litigant.[16] Further, all punitive damages for past conduct are barred.[17] In exchange, the tobacco companies will be required to make an initial lump sum payment of $10 billion into a fund for damage claims and further annual payments which range from $8.5 billion to $15 billion in perpetuity.[18] The fund will also be shared by states and private health groups to provide care for ill smokers and to compensate the states for Medicaid payments for tobacco-related illnesses.[19] Payments over the base 25-year period will reach $368.5 billion.[20]

The settlement raises significant legal and policy issues, both as to its impact on the public interest and on private claimants who have active litigation, and on those who may wish to bring claims in the future. At the threshold there is a basic question as to constitutionality of the proposed limitations on litigants' rights to proceed in the courts.

This article will first discuss in Part I whether there is a constitutional basis upon which Congress can act to implement the overall settlement proposal. In Part II, the article will discuss the impact of the settlement on current and future litigants and the options available to those who may have claims against the tobacco industry. In Part III, it will conclude with some thoughts about the benefits and detriments of the settlement for the private litigants and the larger public interest.

I. Constitutional Considerations

It is perhaps a misnomer to refer to the agreement reached between the tobacco companies and the public and private litigants as a settlement since it did not "settle" anything in the plain meaning of the term. Rather, the parties have concluded a joint proposal to be presented to Congress which, if enacted, would terminate numerous actions by state attorneys general, terminate all pending private class actions and create a framework for the continuation of private individual legal actions.[21] It provides further for the payment of several billions of dollars by the tobacco companies into funds for public health purposes and for the benefit of private individual litigants.[22] Regardless of the merits of this plan, it cannot go forward unless Congress has the constitutional authority to enact legislation which would give the force of law to the terms of the settlement. Simply put, the question is whether the powers of Congress extend this far or whether such action would represent an unconstitutional intrusion into the purview of the courts.

There is precedent for congressional action which limits civil liability for the conduct of a particular industry. A prime

example is the Price Anderson Act (the "Act"), which placed a $560 million cap on liability for accidents at federally licensed, privately owned nuclear power plants.[23] The authority of Congress to impose such a limitation consistent with the requirements of due process was reviewed by the United States Supreme Court in *Duke Power Co. v. Carolina Environmental Study Group*.[24] In *Duke*, the Supreme Court held that Congress could constitutionally override common law and state law tort remedies and legislatively substitute monetary limits on recovery, requiring at the same time that a strict liability standard be applied in all suits seeking damages for nuclear power plant accidents.[25] The Court held that since the purpose of the Act was to encourage the development of nuclear power while, at the same time, making provision to provide recompense for the public in the event of a nuclear accident, it would be scrutinized under a rational basis test.[26] In that light, the Act was found to be an appropriate exercise of congressional powers, since the public purpose to be served was not "demonstrably arbitrary or irrational."[27] It was, indeed, the only workable means to promote the governmental interest involved and provide an adequate remedy for potential nuclear accidents.[28] The Court stressed that state tort law was "unsettled" in this area,[29] a comment that is clearly applicable to tort law respecting the liability of the tobacco companies for the effects of their products.

In testimony before the Senate Committee Judiciary Committee on July 16, 1997, Professor Laurence H. Tribe expressed his view that "the bulk of the settlement fits squarely within Congress' powers under existing Supreme Court precedent."[30] In so doing, he placed great reliance on *Duke*.[31] Yet there are troubling differences between the nuclear power enactment and the proposed tobacco resolution. The government in the case of the settlement cannot point to a similar public interest in preserving the continued manufacture and development of tobacco products, at least insofar as concern for the public health is a factor. Arguably, the government has an economic interest in the preservation of jobs that could be lost if the tobacco industry collapses under the weight of numerous successful lawsuits. Yet, there is a paucity of evidence to support the probability of such a negative economic impact. The better rationale for the government to impose a settlement is that it will result in the development of a large fund to pay for some of the public health care costs of tobacco use and which will also be used to promote the reduction of teenage smoking. This justification would likely suffice to meet the intermediate scrutiny test applied by the Court in *Duke*. The Court found that an act designed to "structure and accommodate the 'burdens and benefits of economic life,'" was entitled to a "presumption of constitutionality," which can only be overcome by evidence that Congress has acted arbitrarily and unreasonably.[32] The public objectives of the tobacco settlement suggest that it could pass this due process test.

A further due process issue addressed by the Court was whether the limitation of liability imposed by the Act provided a fair exchange for the abrogation of "common-law rights of recovery."[33] The Court noted that "[i]t is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy."[34] The Court did not decide this issue, but found that the nuclear accident compensation scheme was in fact a "reasonably just substitute for the common-law or state tort law remedies it replaces."[35] Given the uncertainties of recovery in both the public and private litigation which has ensued against the tobacco industry the scheme proposed in the settlement agreement could be viewed in the same sense as a "just" substitute for existing remedies. It can be argued that this is particularly true since, until December of 1997, no litigant had ever recovered any damages by way of judgment against a tobacco company.[36]

However, the viability of the settlement framework for vindication of private claims is questionable in other ways. Without the possibility of aggregating claims in class actions and of recovering punitive damages, the filing of suits against the tobacco companies is unlikely to be attractive to lawyers who might otherwise be interested in tobacco litigation. The problem is that the expenses of such litigation are substantial and few individual plaintiffs may be able to afford to proceed to vindicate their claims. In this sense, the proposed tobacco settlement is not parallel to the Price Anderson Act and, in fact, places significant burdens on individual claimants.[37]

A further facet of the settlement is that it attempts to settle all pending class actions by legislative fiat. Title VIII (A)(1.) of the settlement provides, in pertinent part: "Present Attorney General actions (or similar actions brought by or on behalf of any governmental entity *parens patriae*) and class actions are legislatively settled. No further prosecution of such actions. All 'addiction/dependence' claims are settled and all other personal injury claims are reserved. As to signatory states, pending Congressional enactment, no stay applications will be made in pending actions, based on the fact of this resolution, without mutual consent of the parties."[38] This provision would not, of course, apply to class actions reduced to final judgment prior to the enactment of legislation putting the settlement into effect. Individual claimants who wished to opt out of an existing class action would be free to pursue their claims in a future action, but with the limitation of the annual cap and a bar on punitive damages imposed.[39] There are potential due process problems with this arrangement. It is questionable that the interests of current litigants were adequately protected in the negotiations with respect to their present claims or that adequate notice will be provided to individuals who may wish to opt out of the pending litigation.[40]

Although the proposed settlement is unique, it proposes a resolution which is comparable to that provided by the class action provisions of the Federal Rules of Civil Procedure, set out in Rule 23.[41] It treats the affected private plaintiffs as though they were members of a massive nationwide class settling their disparate class actions in a single stroke. Here, instead of a judicial decree, settlement is to be had by legislative enactment. Applying the principles of Rule 23 to the settlement would require, under 23(a)(4), at the least that the interests of the affected nationwide group be "fairly and adequately" protected by the "representative parties"[42] and, pursuant to 23(b)(3), "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual mem-

bers."[43] Further, the opportunity to opt out of the settlement would, under 23(c)(2), have to be provided by "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."[44] Further, 23(e) requires that class actions not be dismissed without the permission of the court and without notice to all class members in a manner directed by the court. Since the settlement proposes to take the matter out of the hands of the courts and terminate pending class actions by legislative mandate, the question is whether the kind of procedural protection found in Rule 23, as well as fundamental due process, is provided by the settlement. A 1997 Supreme Court decision reviewing a proposed mass class action settlement in an asbestos litigation may be instructive in this regard.

In *Amchem Products v. Windsor*,[45] the Supreme Court considered a proposed class action certification for the purposes of a global settlement of a mass of asbestos-related claims. It held that the proposed settlement must be rejected because it did not adequately protect the diverse interests of the varied class of persons whose rights were concluded by the settlement.[46] The disparate experiences among members of the class from those who had varying levels of exposure and were currently ill to those who were not even aware of their exposure and who might become ill later were highly significant.[47] Further, the group consisted of people with very different "medical expenses, smoking histories, and family situations."[48] Thus, the Court did not find that the class was "sufficiently cohesive" to warrant approval of the settlement.[49] It wrote further: "The settling parties, in sum, achieved a global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected."[50] However, the Court also observed that "[t]he benefits asbestos-exposed persons might gain from the establishment of a grand-scale compensation scheme is a matter fit for legislative consideration."[51]

The class of persons impacted by the tobacco settlement have very similar characteristics to those in the asbestos case. Some are now ill and others may become ill from the effects of smoking. There are many different levels of exposure to the harm created by smoking depending on the frequency of smoking, the chemical content of the particular brand smoked and the length of time. Thus, the same kind of Rule 23 problems are present.[52] In the tobacco litigation, however, the proposed remedy is congressional action that the court in *Amchem* supports as a basis for settlement of mass tort litigation. Writing for the majority, Justice Ginsburg observed, "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution."[53] While the Court's approval of a legislative solution for mass tort litigation is somewhat encouraging for the proposed tobacco settlement, it is far from clear that any congressional concoction will necessarily meet the requirements of due process and pass muster in a subsequent judicial review. The proposed settlement in its scope and complexity is different from anything our legal system has experienced in the past. *Amchem* suggests that a legislative resolution may work, but in the parlance of basketball talk it is hardly a "slam dunk."

There are other potential constitutional problems with the settlement. A very significant issue arises with regard to the provisions of Title VIII (B)(2.), which provides that if attempts are made to file class actions or to aggregate claims in state courts, the actions are removable to the federal courts upon the application of the defendants.[54] In his testimony before the Senate Judiciary Committee, Professor Tribe noted: "For Congress directly to regulate the procedures used by state courts in adjudicating state-law tort claims—to forbid them, for example, from applying their generally applicable class action procedures in cases involving tobacco suits—would raise serious questions under the Tenth Amendment and principles of federalism."[55] It seems clear that if there is no independent jurisdictional basis, diversity or a federal question, for removal of a tobacco action to federal court, it cannot be removed simply to satisfy the requirements of the settlement.[56] Congress cannot in this way enlarge the Article III jurisdiction of the federal courts, and such a provision would likely be struck down upon review.

One claim likely to be made in any challenge to congressional action is that the settlement deprives those whose class action claims have been extinguished of the right to trial by jury guaranteed by the Seventh Amendment. It should be noted that the Seventh Amendment impacts only the federal courts.[57] Moreover, under the terms of the settlement, juries can award compensatory damages in individual lawsuits and there is no limit on the amount of recovery other than the time and manner of payment.[58] The Supreme Court wrote in *Colgrove v. Battin*[59] that, with respect to the Seventh Amendment right to trial by jury, "[o]nly those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of the legislature,"[60] a stance it later reiterated in *Tull v. United States*.[61] It does not appear that the Seventh Amendment is an obstacle to the approval of the settlement.

In sum there is support for the assumption that underlies the settlement that Congress has the authority to enact its terms into law. Yet the uniqueness and scope of the tobacco agreement suggest that there may be some potential difficulties in the road ahead. Of particular concern are the practical problems that the bar on class actions and punitive damages creates for prospective individual litigants in the future. It can be argued that, while in theory the right to sue is preserved, in actuality new tobacco litigation will be so unattractive to plaintiff's counsel that the right preserved is not truly meaningful. It is already clear that if the proposed settlement is passed by Congress, it will be challenged as an unconstitutional abridgment of the rights of anti-tobacco litigants.

II. Settlement Impact on Current and Future Litigants

An issue of concern for current and potential future litigants is the posture which the settlement leaves them in with respect to the actions which they have filed or may file in the future. It is

important to note again that until and unless the global settlement is enacted into law by Congress it has no effect whatsoever on the conduct of present or future tobacco litigation. Only if Congress acts to enact the settlement into law, with the resulting legislation signed by the president, will there be any legal effect from the agreement. What course of conduct should current and potential litigants adopt in contemplation of the possibility that Congress may act favorably on the settlement?

Current tobacco litigants can either choose to continue to litigate pending class actions or seek a delay awaiting congressional action. Given the uncertainty involved in congressional consideration of the settlement proposal, it may be advisable to push ahead without waiting for a legislative act which may never come. However, there are both advantages and disadvantages to either proceeding or seeking delay. The danger in proceeding is that if a relatively swift congressional passage occurs, litigants will have expended dollars and energy only to have their pending class action extinguished by an act of Congress. Of course if congressional action is delayed for any length of time, some pending class actions may have reached trial and judgment having avoided the ban on aggregation of claims and punitive damages.[62] It may be in the best interest of current class action plaintiffs to proceed and to seek a congressional exemption from the settlement ban for all class actions which were filed and in progress prior to the date of the settlement. An argument in support of such a request is that ordinarily federal class actions cannot be settled or dismissed without court approval pursuant to Rule 23(e), and that Congress should be wary of overriding the federal rules with respect to persons who commenced class actions with the expectation that they would apply.[63] The same reasoning would apply to pending state court class actions where court approval is required before dismissal or compromise.

An issue of significance is the dilemma faced by those who contemplate filing tobacco class actions subsequent to the settlement and while the proposal is before Congress. Those who are considering suing on an individual basis do not face the extinguishment of their actions if they sue now since the settlement does not bar individual lawsuits. If Congress acts, they do face the barring of any claims for punitive damages. It is possible that Congress could be persuaded not to impact pending litigation, and this would mitigate in favor of individual plaintiffs moving ahead with their actions. However, since the bar on punitive damages was made in exchange for large, multi-billion-dollar payments by the tobacco companies to be used for health expenses and reduction of teenage smoking it may not be likely that Congress will waive this provision for existing actions. Strategically, class action plaintiffs will have to weigh the benefits of quickly moving to have their actions placed before the courts against the disadvantage of not knowing if they will be able to obtain punitive damages and of incurring expenses for what may prove to be a less valuable lawsuit.

Given the heavy expenses and difficulties of tobacco litigation, it is most practical for plaintiffs to aggregate claims and proceed as a class. Filing class actions which are ripe for litigation now may be advantageous in a number of ways. First, class action plaintiffs may be in a better position to challenge the constitutionality of the settlement ban if they have instituted suit and have actions pending. In support of this view, a class action was commenced in the Circuit Court of Cook County in Illinois on July 7, 1997, shortly after the settlement was concluded, on behalf of a class of three million residents of Illinois who had allegedly suffered serious illness and death due to the deleterious effects of tobacco.[64] The action seeks damages against the major tobacco companies both for those injured by smoking and those impacted by the effects of second-hand smoke. This litigation, styled the "Daley Class Action," was filed with the avowed purpose of challenging the constitutionality of the settlement.[65] Kenneth Moll, counsel for the plaintiffs, argues that the settlement "would undermine the legal system, denying plaintiffs their constitutional right to due process, while setting a dangerous precedent which could be applied to other industries that manufacture and sell unreasonably dangerous products."[66]

Other plaintiffs have declined to wait for congressional action on the settlement. In July, a group of labor union health plans filed a number of class action lawsuits claiming that their some 30 million clients had not been provided for in the settlement agreement.[67] They asked for compensation for the health care costs of their members who had become ill from the effects of smoking.[68] Post-settlement class action filers evidently believe that they are entitled to proceed and that the settlement cannot deprive them of their right to litigate. Certainly an action in being is likely to have greater status as a challenge to an enacted settlement than one which is filed subsequent to legislative action.

There is no precise calculus to determine the best choice for prospective plaintiffs. Lawyers consulted by persons seeking to recover damages for tobacco-related injury need to carefully evaluate the strength of the particular claims being asserted. If the claims are strong, it may be advisable to proceed now with a class action and establish the suit as a pending, viable claim before Congress has acted. If the settlement is in fact passed into law, there are some theories which could be advanced to challenge the termination of pending suits.

One possible argument is that extinguishing the rights of tobacco litigants to bring suit as a class and barring punitive damages effectively denies them any remedy for their injuries. Earlier in this paper I noted the burden which these limitations impose upon the tobacco litigants.[69] A statute that dissolves pending class actions and requires that the litigants resort to individual actions provides an illusory remedy. In *Duke*, the Supreme Court left undecided the issue of whether the nuclear accident legislative "compensation scheme" must provide a "duplicate" or even a "reasonably just substitute for the common law remedies it replaces."[70] It determined that the Price Anderson Act in fact provided such a remedy.[71] If there is no real remedy in the tobacco settlement for most injured parties, it may fail any test of due process. Perhaps a reviewing court would be satisfied that an individual right to sue has been preserved, but the constriction of that right presents issues which, I think, are viable and worth raising.

Another point to be made is that the settlement was designed to provide a series of benefits that go beyond the economic inter-

ests of the litigants such as restrictions on advertising, restrictions on access to cigarettes by minors and a general campaign to reduce underage smoking. It could be argued that those who were active class action litigants prior to an enactment by Congress will be deprived of due process by a settlement which compromises their interests on the basis of considerations which, in significant part, provide no direct financial benefit to them. The question is whether Congress can vitiate the rights of these plaintiffs to sue as a class for a greater non-economic public good when the same objectives could, in theory, be attained by congressional action outside the bounds of any settlement.

An interesting aspect of the settlement is that it purports to settle "actions for civil liability related to tobacco and health" and in the section describing the legislative settlement of pending class actions it refers to "personal injury" claims.[72] Query—are actions filed against the tobacco companies for damages based on fraud necessarily covered by the settlement as it is presently written? Just such a case, *Hoskins v. R.J. Reynolds Tobacco*, was filed recently in the Supreme Court of New York County.[73] In *Hoskins*, a large class of plaintiffs sued the major tobacco companies seeking to recoup moneys they claim they were fraudulently induced to spend on the purchase of cigarettes.[74] They claim misrepresentation of material facts about the contents and addictive properties of the cigarettes they bought and further allege the manipulation of nicotine content.[75] In certifying the class, the court made clear that the issue in this action is the alleged deceptive practices of the defendant companies and not the "health consequences of smoking" which are "irrelevant to proving defendants' liability."[76] If the settlement is enacted preserving the current "tobacco and health" and "personal injury" focus, class action plaintiffs in *Hoskins*-type fraud cases can argue that their actions are not covered by the settlement and thus can continue unabated.

Despite the absence of clear guideposts, I suggest that prospective class action litigants with viable claims ought to proceed as rapidly as possible to file and proceed with their actions. There are clear risks in this strategy, specifically with regard to litigation expenses, but in the uncharted waters in which they are moving, the greater risk may be in doing nothing.

III. Benefits and Detriments of the Settlement

The great tobacco settlement of 1997 has been touted as a major step forward in the fight against the ravages of smoking. Its defenders argue that this is the best that can be done. They assert that since litigation against the tobacco companies has been substantially unsuccessful it is wise to accept the terms of the settlement, which provides significant dollars for health costs, Medicaid reimbursement and smoking-prevention programs while preserving the rights of individual plaintiffs to sue. This may seem to be a heady brew. Yet it is my view that the interests of the public and those who have sued or may wish to sue would be best served if Congress rejects the proposed settlement and allows the flow of litigation and the regulatory activities of federal, state and local authorities to proceed unimpeded.[77]

The imposition of a complex set of provisions on the tort system will burden the process with conditions that may be difficult to manage. The settlement provides for oversight of some of its non-litigation provisions by the FDA, but does not include a provision for management of the civil liability conditions by any particular court.[78] It does provide for the establishment of a special three-judge, Article III federal court to supervise terms related to disclosure of tobacco company documents.[79] Oddly, this provision is not extended to the liability and litigation framework. Thus it is unclear how this responsibility would be met. Individual state and federal courts in which tobacco litigation is pending will, of course, be expected to implement the terms of the settlement as they apply to the case at hand. But what court or entity will ensure that the required moneys are paid into the agreed-upon funds by the tobacco industry? What court or entity will ensure that the funds are used as the settlement provides? How and by what court or entity will the overall caps and payment limitations be enforced? How and by what court or entity will the obligations of the tobacco companies with respect to the other terms of the agreement—advertising limitations and the campaign to reduce underage smoking, for example—be enforced? There has now been some movement on these issues in Congress. Senator Hatch has introduced legislation which seeks to implement the settlement and which provides enforcement mechanisms that are not included in the terms of the agreement.[80] Under the Hatch Bill, the Attorney General of the United States is empowered to bring actions to enforce the provisions of what the bill calls the "protocol" in the United States District Court for the District of Columbia or in any district court in the district where the alleged breach occurred.[81] In addition, state attorneys general may bring enforcement actions in the courts of their own states with respect to alleged breaches which occurred in that state.[82] Tobacco company signatories are also provided the right to bring actions to declare their "rights and obligations" under the protocol and to bring enforcement actions where one or more states are not acting diligently.[83] Further, the proposed bill provides for the states, the companies and a representative of a nationwide class of plaintiffs to enter into a consent decree in order to be eligible to receive any of the benefits of the act.[84] Enforcement of the provisions of the decree is left to state attorneys general. Nowhere is provision made for an individual litigant to seek enforcement of the monetary provisions that may affect him or her.[85] It is noteworthy that the Hatch bill requires that the parties agree to waive any constitutional claims, either federal or state, which the parties may have.[86] This appears to be a recognition on the part of the drafters that there may be potential constitutional problems with the enacted settlement.[87]

While the Hatch bill provides a plan for the enforcement of the provisions of the settlement it does not place responsibility for managing the complex plan in any one court. The interplay among federal and state courts and federal, state and private actors seeking to enforce or have rights declared under the settlement may be difficult to control in any kind of orderly fashion. It has the potential to produce significant confusion and difficulty in the resolution of disputes. However it is done, it will require continuing, long-term supervision of the civil liability provisions

with the potential for lengthy and complex adjudication involving myriad parties, both public and private.

One of the predicates of the settlement is the lack of success which tobacco litigants have experienced in the courts in the past. Now that pattern has begun to change with the settlement of major state lawsuits against the industry and the recovery for the first time of damages in a private lawsuit.[88] Further, there are thousands of documents which are about to be released in pending litigation that may provide the basis for new theories that can be alleged by persons injured by the effects of smoking.[89] It may be too soon to say that the dam has burst, but it is leaking badly. The potential for future litigation against the tobacco industry, unimpeded by the settlement, is brighter than at any previous time.[90] The willingness of the tobacco industry to settle now in spite of its previous history of success in the courts, I think, reflects this new reality.

Conclusion

The tobacco settlement of the summer of 1997 represents an attempt to resolve issues of major significance involving private litigation and public health. Significant doubts have been expressed about its viability, and it faces formidable hurdles to favorable action by Congress. The proposal has its merits, but its signatories may have tried to do too much. By incorporating a complex web of conditions which are intended to significantly alter the regulation, operation and litigation posture of the tobacco industry, they have created a scheme which, I think, is largely unworkable and unduly burdens the ability of injured persons to recover for the harm done to them.

A grand scheme to resolve the major public health issue of our time may seem appealing at first blush, but our nation would be better served by allowing the processes of the courts, the regulatory agencies and state and local governments to move ahead unimpeded by a "global" settlement which is seriously flawed.

Endnotes

1. *Proposed Tobacco Industry Settlement*, available in 12.3 TOBACCO PROD. LIT. REP. 3.203, (1997) (hereinafter *Settlement*).
2. *See Settlement*, preamble at 3.203.
3. John M. Broder, *Tobacco Critics Begin Heavy Attack on Settlement, Calling It Soft on Cigarette Makers,* N.Y. TIMES, June 23, 1997.
4. *Review of the Global Tobacco Settlement: Hearings Before the Senate Judiciary Comm. 105th Cong. (1997)* (hereinafter *Hearings).*
5. *See* RICHARD KLUGER, ASHES TO ASHES 537-38 (1996).
6. *See* S. GLANTZ, J. SLADE, L. BERO, P. HANAUER, D. BARNES, THE CIGARETTE PAPERS 436-38 (1996).
7. GLANTZ, *supra* at 436-37.
8. *See Hearings, supra* note 5 (Statement of Richard Blumenthal, Attorney General, State of Connecticut). For a discussion of the problem of children and smoking see PHILIP J. HILTS, SMOKESCREEN 63-101 (1996).
9. GLANTZ, *supra* at 58-60.
10. *See* HILTS, *supra* at 144-74, GLANTZ, *supra* at xiii–xix, 1-57. The facts developed in these recent texts reflect what is now widespread knowledge about the conduct of the cigarette industry. The Glantz text includes charts comparing numerous extracts from various Surgeons General reports with statements made by tobacco industry spokespersons over a period of time. See also *Settlement* at 3.204.
11. *See Settlement* at 3.204.
12. *See Settlement* 3.203-3.233
13. *See Settlement*, Title VIII at 3.221-3.222
14. *Id.*
15. *Id.*
16. *Id.* at par. B.9.
17. *Id.*. at par. B. 1.-6.
18. *Id.* at Title VI.
19. *Id.* at Title VII.
20. *Id.* at Title VI.
21. *See Settlement*, *supra* note 1.
22. *Id.*
23. 42 U.S.C. § 2210.
24. 438 U.S. 59 (1978). Congress has acted with respect to other industries to abrogate or limit private rights of action in favor of a statutory plan for compensation, and these acts have been upheld as valid exercises of congressional power consistent with the constrains of due process. *See, e.g., Connell v. United States*, 737 F. Supp. 61 (S.D. Iowa 1990) (Federal Employees Liability Reform and Tort Compensation Act), *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986) (Federal Tort Claims Act), *Sparks v. Wyeth Laboratories*, 431 F. Supp. 411 (W.D. Okla. 1977) (Swine Flu Act), *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) (Coal Mine Health and Safety Act of 1969).
25. *Id.* at 84-93.
26. *Id.* at 83-84.
27. *Id.* at 84.
28. Although not discussed in *Duke*, the fundamental basis for the exercise of congressional power in this kind of enactment is the commerce clause—U.S. CONST., Art. I. § 8, cl. 3—authorizing Congress to regulate commerce "among the several states." The impact on interstate commerce of a settlement agreement which so fundamentally affects the conduct of business by large national and multi-national corporations is, in my view, quite clear.
29. *Id.* at 89.
30. *See Hearings, supra* note 5.
31. *See id.*
32. *Duke*, 438 U.S. at 83 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)).
33. *Duke*, 438 U.S. at 88
34. *Id.*
35. *Id.*
36. The often-repeated statement that there has never been an actual recovery as a result of a judgment against the tobacco industry changed in December of 1997 when the estate of Milton Horowitz collected $1.5 million of a $2 million verdict against Lorillard awarded by a San Francisco jury in September of 1995. *See* Chiang, *A First, Tobacco Firm Pays Judgment,* SAN FRANCISCO CHRONICLE, Jan. 1, 1998, at A3, col. 2.
37. For an excellent discussion of the practical burdens of filing suit under the settlement and other problems with its implementation see Letter from Ralph Nader to Michael Myers, National Center for Tobacco Free Kids, George Dessert, American Cancer Society, David A. Ness American Heart Association, Lonnie Bristow, American Medical Association (June 19, 1997) (on file with the author and available at http://ash.org/).
38. *Settlement*, *supra* note 1, at Title VIII (A)(1.).
39. *Settlement*, *id.* at Title VIII (B)(2.).
40. There were a number of unrepresented groups whose claims were foreclosed by the terms of the settlement. These are described in an excellent analysis of the impact of the Settlement on the civil justice system by Professor Richard Daynard of Northeastern University, School of Law. *See* Richard Daynard & John Rumpler, CHANGES TO THE CIVIL JUSTICE SYSTEM UNDER THE PRPOSED TOBACCO SETTLEMENT (Working Paper #4 on Legal Issues in the Proposed Tobacco Settlement) (1997) (hereinafter Working

Paper). Daynard notes that: "Many categories of tobacco victims were not present at the table, and will get nothing from the Proposed settlement (other than the public health benefits, such as they are, which they would share with all other citizens). These victims include dying smokers, families of sick, dying or dead smokers, non-smokers afflicted with ETS-caused diseases, smokers or non-smokers burned in cigarette-caused fires, local governments, union health and welfare funds, and doubtless many more." See Working Paper at p. 10.

41. FED. R. CIV. P. 23.
42. FED. R. CIV. P. 23 (a)(4).
43. FED. R. CIV. P. 23 (b)(3).
44. FED. R. CIV. P. 23 (c)(2).
45. 117 S. Ct. 2231 (1997).
46. *Id.* at 2236, 2252.
47. *Id.* at 2235-37, 2252.
48. *Id.* at 2252.
49. *Id.* at 2249.
50. *Id.* at 2251
51. *Id.* at 2249.
52. One concern in the wake of *Amchem* is whether class action certification is possible in tobacco litigation at all. It must be noted that *Amchem* involved a nationwide class and the Court suggested that creation of appropriate sub-classes with "adequate representation" could meet the requirements of Rule 23. See *id.* at 2251-52.
53. *Id.* at 2252.
54. *See Settlement*, *supra* note 1 at Title VIII (B)(2).
55. *Hearings*, *supra* note 5, Testimony of Laurence H. Tribe.
56. *See* 28 U.S.C. §§ 1331–1332, 1441, which set out the bases for federal court jurisdiction and removal of an action from state to federal court. The presence of a federal question or diversity of citizenship in cases involving more than $75,000 in controversy are candidates for removal under Title 28.
57. U.S. CONST. amend. VII
58. *Settlement*, *supra* note 1 at Title VIII (B)(2), (9), (10).
59. 413 U.S. 149 (1973).
60. *Id.* at 426.
61. 481 U.S. 412, 426 (1987).
62. A number of congressional leaders have indicated serious reservations about many aspects of the settlement and have made clear that they will time their time in considering its provisions and that swift action is unlikely. *See* Jerry Gray, *The Tobacco Agreement: The Lawmakers: Lawmakers Vow Close Scrutiny of Tobacco Pact,* N.Y. TIMES, June 21, 1997, at sec. 1, p. 1, col. 3., John Broder, *Congressional Leaders Do Not Intend to Act Quickly on Tobacco,* N.Y. TIMES, Sept. 4, 1997.
63. It may be argued that persons who filed class actions subsequent to the date of the agreement should not have the same expectation as those with pending actions on June 20, 1997, and that only the latter claims should be preserved. However, I suggest that until and unless the proposal is actually enacted, litigants ought to be able to rely on the law as it then exists. Whether such an equitable argument will move Congress is another story. The tobacco companies wanted relief from both pending and future class actions. Whether they or their supporters in Congress would settle for a ban on class actions filed after the date of an enactment is questionable.
64. *Daley v. American Brands Inc. et al.* (naming 32 defendants) Action on Smoking and Health, , (July 8, 1997).
65. *Id.* at 1.
66. *Id.* at 2.
67. Scott Shane, *Labor Unions Sue Cigarette Manufacturers: Health Plan Coalition Says Settlement Excludes Clients,* BALTIMORE SUN, July 12, 1997, at A3.
68. *Id.*
69. See *supra,* discussion accompanying notes 31-35.
70. *See supra* notes 31-33.
71. *See supra* note 33.
72. *See Settlement*, *supra* note 1 Title VIII
73. *See* 218 N.Y.L.J 86 at p. 30 col. 5. (Oct. 31, 1997)
74. *Id.*
75. *Id.*
76. *Id.*
77. It is beyond the scope of this paper to discuss and evaluate the provisions of the settlement other than those dealing with the issues of civil liability. However, I do not believe that any case has been made for limiting the authority of the FDA to regulate tobacco products or for vesting the tobacco companies with the responsibility to run a campaign to reduce underage smoking. Limitations on tobacco advertising have First Amendment problems. For a searching critique of some of these public policy issues see Letter from Ralph Nader to Michael Myers et. al. *supra* note 35.
78. See *Settlement*, *supra* note 1 at app. V, VI.
79. *Id.* at app. VIII.
80. S. 1530, 105th Congress (1997).
81. *Id.* at § 231.
82. *Id.* at § 232
83. *Id.* at § 233
84. *Id.* at § 241
85. *Id.* at § 242. The class representative is to come from the members of the class sought to be certified in *Castano v. American Tobacco Co*. It is not explained how such class representative would be selected or the basis upon which he or she could bind an entire nationwide class of plaintiffs from that litigation.
86. *Id* at § 241(b)(3).
87. This provision may be aimed at the First Amendment issues raised by the restrictions on cigarette advertising in the act. However, it is not so limited by its terms. It cannot, of course, bind non-signatories who have brought or may bring class actions from challenging the constitutionality of any provisions of the act. See *supra* note 66.
88. In July of 1997 Mississippi concluded a settlement of its action for Medicaid reimbursement in the amount of $3.4 billion. Florida followed in August with an $11.3 billion settlement and most recently Texas concluded a $14.5 billion settlement. Barry Meir, *Tobacco Concerns Settle Case for $14 Billion,* N.Y. TIMES, Jan. 16, 1998 at A1, A22. See *supra* note 34 respecting the payment of a judgment in *Horowitz v. Lorillard, Inc.*
89. A large number of new documents (150,000) have been ordered released by a judge in Minnesota in litigation filed against the tobacco companies by the state of Minnesota. See Letter From Hubert H. Humphrey III to his Colleague Attorneys General. (May 27, 1997).
90. It is noteworthy that Senator Kent Conrad of North Dakota is drafting a bill which requires much stiffer financial contributions from the tobacco companies and which would allow private citizens' actions and ban only suits by the states and other governmental entities. This suggests a view that such suits now have the potential to be successful. *See* David E. Rosenbaum, *Democrats Rally Behind Tough Anti-Smoking Bill in Congress,* N.Y. TIMES, Feb. 12, 1998, at 23.

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'NET WORTH

by Margaret Moreland Murray

Government agencies generally have a mandate to provide some level of information to the public. A growing number are doing this with Internet sites. While many only provide basic information about the organization and its functions, others contain full-text documents and publications, statistics and other data that may be difficult to find elsewhere. Remember, we're talking about being able to access information while at your desk, not at an agency office in New York City, Washington, D.C., or Geneva.

INTERNATIONAL

World Health Organization **http://www.who.ch/** In addition to basic information about WHO and its programs, this site contains statistics, a number of full-text publications and information about outbreaks, diseases and vaccination requirements for travelers. WHOSIS, the WHO Statisticals Information System, includes selected WHO databases as well as other health-related statistical sources, and is searchable by keyword using general concepts or disease names. The WHO library contains the full text of the WHO constitution, procedural documents and numerous policy documents—such as resolutions and decisions of the Executive Board and World Health Assembly back to 1948, and the Official Records of the Executive Board and World Health Assembly back to 1992. Also in full text are several periodicals (the Executive Summaries of *World Health Report* back to 1995, *Weekly Epidemiological Record* back to June 1996, *Essential Drug Monitor* back to 1994 and *International Programme on Chemical Safety News* back to 1993), press releases back to 1994 and nearly a hundred fact sheets. The current tables of contents of other WHO publications, such as *International Digest of Health Legislation*, are also included; some are archived and some include abstracts. All in all, this is a very comprehensive site.

NATIONAL

U.S. House of Representatives Internet Law Library: Health and Safety Law **http://law.house.gov/ 103.htm** This site is an eclectic collection of materials, including many federal, state and foreign statutes, some federal regulations and policy documents, a couple of United Nations resolutions, several newsletters, selected cases, the full text of Consumer Information Center publications on food and nutrition and health, and over 50 articles on wide-ranging topics from privileged communications to negative myths of managed care to euthanasia. There is almost no organization here beyond a broad alphabetical arrangement. So, unless you know the first word of what you're looking for, you have to be willing to browse through about four pages. This could become annoying as the list of materials grows longer.

Centers for Disease Control and Prevention **http://www.cdc.gov/** At this site you will find a great deal of information about the CDC and its activities, including up-to-date travel information, instructions on obtaining vital records from states and U.S. territories, and data on diseases, health risks, prevention guidelines and strategies. In addition, there is full-text access to publications such as health alerts and public health advisories from the Agency for Toxic Substances and Disease Registry. CDC's HazDat database and CDC WONDER, which contain public health reports, guidelines and numeric databases, may also be searched here. *Morbidity and Mortality Weekly Report* is also searchable back to 1993, and the results are available in full text. The National Center for Health Statistics lists their published reports, articles authored by CDC staff members and working papers back to 1993, and many of these can be downloaded directly. Alternatively, much NCHS data, including published and unpublished statistical tables, can be accessed directly at **http://www.cdc.gov/nchswww/nchshome.htm**—click on "Data Warehouse." NCHS also has a link to FEDSTAT, which includes statistics from over 70 public agencies.

National Institutes of Health **http://www.nih.gov/** This site is primarily focused on the Institute and its programs; however, it does contain several good medical research tools. Under "Health Information" there are links to the MEDLINE database and to the CANCERLIT database (citations and some abstracts only). NIH's Agency for Health Care Policy and Research has also created a full-text database of decision-making documents, such as clinical practice guidelines, quick-reference guides for clinicians, evidence reports, technology assessments, research and treatment protocols, and consumer brochures. Under "Institutes and Offices" there is a link to the ***National Library of Medicine*** (direct access at **http://nlm.nih.gov/**). The databases named above are also linked here, as well as other databases of the National Cancer Institute and the National Center for Biotechnology Information.

Food and Drug Administration **http://www.fda.gov/** Under "Human Drugs," the FDA provides a comprehensive set of "Regulatory Guidelines" in full-text format, including a compilation of the laws enforced by the FDA and related statutes, Title 21 of the Code of Federal Regulations (additional titles of the CFR can be accessed and searched by keyword, as well as by citation, at **http://www.access.gpo.gov/nara/cfr/index.html**), a link to the Federal Register for 1994-1997, the FDA Modernization Act of 1997, and guidelines (9/97) for obtaining a Certificate of Pharmaceutical Product. Under "Medical Devices" there are recent Federal Register notices from the Center for Devices and Radiological Health. Finally, "Children and Tobacco" contains the final rule on restricting the sale and distribution of tobacco products to minors, the FDA jurisdictional analysis in this area and sever-

al *Beahm* documents, including the FDA's brief in opposition to the motion for summary judgment and the April 1997 District Court opinion.

Health Care Financing Administration **http://www.hcfa.gov/** Most of the legal materials provided by this agency are found under "Laws & Regs." These include summaries of Medicare, Medicaid and State Insurance Program provisions of the Balanced Budget Act of 1997; information on the Health Insurance Portability and Accountability Act of 1996 (the Conference Committee report on this Act is available at **http://www.gpo.ucop.edu:80/search/crfld.html**—search for 104-736 and choose Report on H.R. 3103 from the results); full text of the Medicare & Medicaid Fraud, Abuse & Waste Prevention proposed amendments of 1997; the health title of the president's proposed 1998 budget; HCFA rulings 95.1, 96.1, 96.2, 96.3, 97.1 and 97.2; and documents relating to the Physicians Incentive Plan Regulation.

Department of Health & Human Services **www.hhs.gov/** Relevant items at this site are found under "Research, Policy and Administration." There is a summary of 1996 welfare reform legislation, the HHS FY1998 budget, bill reports on legislation pending before Congress, congressional testimony on pending legislation, recently passed laws and executive orders impacting on the department. Also, under "News and Public Affairs," there is a link to a congressional testimony database which has testimony by HHS representatives from 1992 to the present.

NEW YORK STATE

NYS Department of Health **http://www.health.state.ny.us/** Law-related data at this site is scattered among various headings. "Vital Records" provides applications and information on obtaining vital records and on the Adoption Information Registry. "Information for Providers" has a sub-heading, "Professional Misconduct & Physician Discipline," where you can search by name for doctors who have been the subject of state disciplinary action. Each entry includes the action taken and a brief description of the charge. Here you can also access the Professional Medical Conduct Complaint Form, as well as relevant sections from the New York State Public Health Law and Education Law. The subheading on "Biomedical Ethics and Legal Issues" includes several full-text documents from the New York State Task Force on Life and Law. There is also a page dealing with Certificate of Need Applications. "Information for Researchers" is mainly a collection of health-related statistics. Finally, "Public Health Forum" includes a page where you can search the New York State Health Rules and Regulations (10 NYCRR) by keyword.

NYS Education Department, Office of the Professions **http://www.nysed.gov/prof/ profhome.htm** At this site, there is a section for on-line verification of professional licenses—including physicians, physician assistants and specialist assistants—searchable by name or by license number. There is also a database of licensees, searchable by name, who have been subject to disciplinary action by the Board of Regents. (This database does not include physicians, physician assistants or specialist assistants who are listed in the DOH database.) Summaries are similar to those provided by the DOH.

ELDER LAW UPDATE

by Howard S. Krooks*

The Elder Law Update column is designed to provide members of the Health Law Section with information regarding recent legislative changes and case law in the field of elder law. In this edition, I discuss a recent case in the area of Medicaid eligibility involving the execution of a waiver of the right of election by a spouse who subsequently applied for nursing home Medicaid benefits. In *Estate of Jeannette Dionisio v. Westchester County Department of Social Services*, the Appellate Division, Second Department, held that the Westchester County Department of Social Services correctly calculated and imposed a penalty period as a result of the execution of a waiver of the right of election in connection with a surviving spouse's application for Medicaid nursing home benefits. Also, I have included an update regarding section 217 of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which was repealed and replaced by section 4734 of the Balanced Budget Act of 1997.[1] This new provision, which became effective on August 5, 1997, shifts liability from those who transfer assets to those who counsel or assist such individuals for a fee to transfer assets to become eligible for Medicaid.

The Execution of a Waiver of the Right of Election Is Held to Constitute a Transfer of Assets Resulting in a Penalty Period for Medicaid Eligibility Purposes

In *Estate of Jeannette Dionisio v. Westchester County Department of Social Services*,[2] the Appellate Division, Second Department, affirmed the fair hearing decision of the New York State Department of Social Services to impose a penalty period on the execution of a waiver of the right of election by a surviving spouse who subsequently applied for Medicaid. Jeannette Dionisio was married to Thomas P. Dionisio while both were in their late 70s. Each had children from previous marriages but they had no children together. On February 10, 1992, Mrs. Dionisio and her husband signed mutual waivers of the right of election,[3] effectively waiving their respective statutory rights to receive any property or assets from the estate of the deceased spouse upon his or her death, as the case may be. Mrs. Dionisio was admitted to a skilled nursing facility on February 24, 1992, at which time she had approximately $128,000 worth of assets, and Mr. Dionisio had approximately $470,000. Mr. Dionisio died on June 10, 1992. Mrs. Dionisio spent down her entire estate on the cost of her care at the nursing home from February 24, 1992 through October 3, 1993. Once her assets were depleted, Mrs. Dionisio applied for Medicaid to cover the cost of her care provided by the nursing home, effective October 4, 1993. Mrs. Dionisio resided at the nursing home until her death on June 13, 1995.

Although she satisfied Medicaid's financial eligibility guidelines (having spent all of her assets on the cost of her care), Mrs. Dionisio's Medicaid application was denied by the Westchester County Department of Social Services. The denial was based upon Mrs. Dionisio's alleged failure to pursue all potential income and resources that may be available (i.e., to pursue the assets in her husband's estate to pay for the cost of her care prior to seeking Medicaid benefits). Mr. Dionisio died testate on June 10, 1992, leaving an estate valued at approximately $470,000 to his children and disinheriting his wife. The Westchester County Department of Social Services took the position that Mrs. Dionisio's execution of her waiver of the right of election constituted an uncompensated transfer of resources resulting in a penalty period during which she could not qualify for Medicaid nursing home benefits.[4] The penalty period was calculated based upon the amount to which Mrs. Dionisio would have been entitled had she exercised her right of election against the estate of her husband, or about $156,000 (one-third of $470,000). The Estate of Jeannette Dionisio (the "Estate") appealed the decision of the Westchester County Department of Social Services, requesting a fair hearing before an administrative law judge of the New York State Department of Social Services.[5] In a fair hearing decision dated January 17, 1996, the New York State Department of Social Services upheld the position of the Westchester County Department of Social Services and directed the Westchester County Department of Social Services to grant eligibility to Mrs. Dionisio only after the expiration of the applicable penalty period, which in this case was 30 months after the death of Mr. Dionisio on June 10, 1992, or December 1, 1994.

The Estate appealed the decision of the New York State Department of Social Services (in a proceeding commenced under Article 78 of the Civil Practice Law & Rules (CPLR)) to the Appellate Division, Second Department. In its appeal, the Estate argued that even if Mrs. Dionisio's execution of her waiver resulted in a transfer for Medicaid purposes, it was an exempt transfer to her spouse under applicable Medicaid regulations and, accordingly, should not have resulted in the imposition of a period of ineligibility.[6] Furthermore, the department of social services may not impose a penalty period where assets are transferred exclusively for a purpose other than to qualify for Medicaid.[7] The Estate argued that Mr. and Mrs. Dionisio executed their waivers for the sole purpose of estate planning, not to qualify Mrs. Dionisio for Medicaid benefits, and that the execution of mutual waivers of the right of election is a common estate planning technique utilized by people who enter into second marriages and wish to allow each other to direct the disposition of their respective estates. If Mrs. Dionisio truly contemplated Medicaid eligibility in February 1992 when she executed the waiver, she could have legally transferred her entire estate to Mr. Dionisio, with no resulting

period of ineligibility, and immediately qualified for Medicaid. Not only did Mrs. Dionisio not pursue such planning to secure Medicaid eligibility, she also spent her entire estate on the cost of her care during the ensuing 18 months. Finally, even if it is determined that a penalty period should be imposed on Mrs. Dionisio's execution of the waiver of the right of election, it should have commenced on February 10, 1992, the date the waivers were signed, and not June 10, 1992, the date of Mr. Dionisio's death. Suppose the non-applying spouse (in this case, Mr. Dionisio) is alive when the Medicaid application is submitted. Can the department of social services impose a penalty period in that case and, if so, from what date will the penalty period run? Thus, by adopting the position of the Westchester County Department of Social Services and the New York State Department of Social Services in *Dionisio*, otherwise similar cases where mutual waivers have been executed will be treated differently, depending upon whether the Medicaid applicant's spouse is still alive at the time of application.

Notwithstanding the foregoing arguments, the New York State Appellate Division, Second Department, affirmed the holding of the New York State Department of Social Services, concluding that the Estate failed to rebut the presumption that Mrs. Dionisio signed her waiver for a purpose other than qualifying for Medicaid benefits. The court failed to address in its decision the Estate's argument that even if Mrs. Dionisio signed her waiver for the purpose of qualifying for Medicaid benefits, it should not have resulted in the imposition of a period of ineligibility because it constituted an exempt spousal transfer under applicable Medicaid regulations. A motion for leave to appeal to the New York State Court of Appeals has been filed by the Estate. I will keep the Health Law Section apprised of future developments in this case.

The Repeal of Section 217 of the Health Insurance Portability and Accountability Act of 1996 and Update on Section 4734 of the Balanced Budget Act of 1997

In the Spring 1997 issue of the *Health Law Journal*, I discussed the recently enacted section 217 of the Health Insurance Portability and Accountability Act of 1996. As a result of that legislation, certain transfers of assets made on or after January 1, 1997, for the purpose of qualifying for Medicaid benefits and which resulted in a period of ineligibility (see above discussion of penalty period and "transfer of asset" rules) triggered federal criminal liability punishable by up to one year in prison and/or a fine of up to $10,000. In the Summer 1997 issue of the *Health Law Journal*, I reported in this column that two separate bills had been introduced in the Senate and in the House which, if enacted into law, would shift the risk of criminal liability for senior citizens (the individual who transfers assets and subsequently applies for Medicaid) to attorneys and other professionals who counsel clients in this area. On August 5, 1997, President Clinton signed into law section 4734 of the Balanced Budget Act of 1997 (the "Act"), which repealed the prior section 217 of HIPAA. Thus, as of August 5, 1997, no criminal liability applies to an individual who transfers assets to qualify for Medicaid. Section 4734 replaces section 217 and makes it a misdemeanor for a paid advisor to knowingly and willfully counsel or assist another to dispose of assets for the purpose of obtaining Medicaid, if the disposition results in the imposition of a penalty period.

Specifically, Section 4734 amends section 1128B(a) of the Social Security Act and 42 U.S.C. section 1320a-7b(a) to provide, in pertinent part, as follows:

> Whoever . . .
>
> for a fee knowingly and willfully counsels or assists an individual to dispose of assets (including by any transfer in trust) in order for the individual to become eligible for medical assistance under a State plan under title XIX, if disposing of the assets results in the imposition of a penalty of a period of ineligibility for such assistance under section 1917(c)
>
> shall . . . (ii) in the case of such a . . . provision of counsel or assistance under section 1917(c) by any other person, be guilty of a misdemeanor and upon conviction thereof fined not more than $10,000 or imprisoned for not more than one year, or both.

Section 4734 has been described as amounting to a "punitive attack on the legal profession" delineating "bad public policy."[8] Section 4734 is effectively an "attorney gag rule" that denies attorneys their First Amendment right to free speech. Furthermore, this provision violates the ethical obligation that an attorney has to competently and zealously represent and advise his or her clients. It also restricts senior citizens' access to legal advice, an especially disheartening aspect of section 4734 since it criminalizes the dispensing of advice by attorneys regarding an activity that is otherwise legal and permitted under Medicaid regulations.

The New York State Bar Association Elder Law Section has called for the repeal of section 4734[9] and, short of a repeal, has suggested that Congress should target instead the counseling or assisting in the withholding of relevant information regarding the disposition of assets. Specifically, absent repeal, the New York State Bar Association has suggested that the language of section 4734 be amended as follows (additions are underlined and deletions are indicated by [ ]):

> (6) for a fee knowingly and willfully counsels or assists an individual [to dispose] *not to disclose the disposition* of assets.

The suggested language, if enacted, would target conduct involving the counseling or assisting in the withholding of important information regarding the disposition of assets. Until further legislation is passed in this area either modifying or repealing section 4734, this provision is on the books.

Unfortunately, it has created a climate of fear and ignorance among senior citizens regarding Medicaid eligibility and, in some cases, damaged the attorney-client relationship.

As was the case when section 217 was enacted, efforts to repeal or modify section 4734 of the Act are ongoing and should be monitored. In that regard, the New York State Bar Association, in an unprecedented action, adopted a resolution on November 1, 1997, authorizing the commencement of an action to enjoin the enforcement of section 4734 and to declare the provision unconstitutional. The law firm of Nixon Hargrave Devans and Doyle, LLP, has agreed to represent the New York State Bar Association in this matter. A complaint challenging the constitutionality of section 4734 was filed on December 4, 1997, in the United States District Court, Northern District of New York. As of the time of the preparation of this article there is no further update on this matter. I will keep members of the Health Law Section informed with respect to section 4734 in future issues of the *Health Law Journal*.

Endnotes

1. 47 U.S.C. § 1320a-7b(a).
2. 665 N.Y.S.2d 904 (2d Dep't 1997).
3. Estates, Powers & Trusts Law 5-1.1-A(a)(1)(A) (hereinafter EPTL) provides that the surviving spouse of a decedent is entitled to take a share of the decedent's estate in the amount of $50,000 or one-third of the net estate, whichever is greater. Further, pursuant to EPTL 5-1.1-A(e), a spouse may elect to waive or release his or her right of election.
4. The Westchester County Department of Social Services cited *Molloy v. Bane,* 214 A.D.2d 171 (2d Dep't 1995), in support of its position that while a Medicaid applicant may waive her right of election in her spouse's estate, such a waiver will constitute an uncompensated transfer of assets (as discussed below, an uncompensated transfer of assets or a "gift" will result in a period of ineligibility during which the individual who transferred the assets will not qualify for nursing home Medicaid benefits). In *Molloy*, the appellant renounced her interest in a wrongful death award to the estate of her daughter, who died in an automobile accident. The court in *Molloy* held that the renunciation of a potentially available asset is equivalent to the transfer of that asset to the other family members who would then take the asset under the EPTL.

   The "transfer of asset" rules—under Medicaid regulations, any asset transfer that is made for less than fair market value, or "uncompensated," within or after the 36-month period immediately preceding the date on which the person becomes institutionalized or applies for Medical Assistance (whichever is later), will render the transferor ineligible for nursing home Medicaid benefits (unless certain exempt transfer provisions apply) for a certain period of time calculated in accordance with a formula set forth in the Medicaid regulations. 18 N.Y. Comp. Codes R. & Regs. § 360-4.4(c)(1)(iii)(a)(2) (hereinafter N.Y.C.R.R.).
5. An applicant for Medical Assistance may appeal the denial of benefits by a local department of social services by requesting a fair hearing under 18 N.Y.C.R.R. § 358-3.1.
6. 18 N.Y.C.R.R. § 360-4.4(c)(1)(ii)(c)(2)(i).
7. 18 N.Y.C.R.R. § 360-4.4(c)(1)(ii)(d)(ii).
8. Letter dated July 2, 1997 from Joshua Pruzansky, president of the New York State Bar Association, to President Clinton.
9. The following resolution was adopted by the House of Delegates of the New York State Bar Association on November 1, 1997, based on a report submitted to the House of Delegates by the Elder Law Section:

   > The New York State Bar Association supports the immediate repeal of § 4734 of the Balanced Budget Act of 1997, amending § 217 of the Health Insurance Portability and Accountability Act of 1996.

***Howard S. Krooks is a partner in the law firm of Littman Krooks Roth & Ball P.C., with offices in New York City and White Plains. His areas of practice focus on issues within the fields of Elder Law and Trusts & Estates, including representing elderly clients and their families in connection with hospital discharge and nursing home admission issues, preservation of assets, Medicaid, Guardianship and related elder law matters. Mr. Krooks is a member of the Medicaid Committee of the Elder Law Section of the New York State Bar Association and a Co-editor of the Fair Hearing Corner column of the *Elder Law Attorney*. Christine Murphy, an associate with the firm, contributed to the preparation of this article.**

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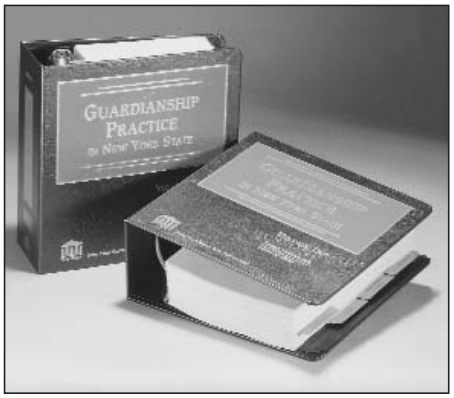

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