

## **If You Smoke, Florida Wants to Tax You**

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### **Abstract:**

*If Florida slapped a 1% sales tax on every shirt or every bottle of milk sold in California, Californians would never put up with it. So why aren't California and the other 48 states raising the roof over the settlement between the state of Florida and the tobacco industry?*

*The Aug. 25 back-room settlement effectively imposes a national excise tax on cigarettes, with the revenues payable to the state of Florida. After \$750 million in lump-sum payments, each company's future payments under the agreement will be directly proportional to its future national sales. Whatever you want to call it, a per unit charge on national sales is a national excise tax. If Philip Morris or any other firm sells another two cartons of cigarettes in California tomorrow, it owes the state of Florida an additional 18 cents in "damages." If Exxon sells another gallon of gas in California tomorrow, it owes the federal government another 18 cents in "excise taxes." Same thing.*

### **Full Text**

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Except that citizens of California -- or of Kentucky, Tennessee, or anywhere else -- were not consulted about Florida's tobacco settlement, and do not get a share of the revenues. Not surprisingly, long-standing principles of state sovereignty prohibit states in a federal system from legislating tax policy for other states.

The way that the tax was adopted is also problematic. Taxes are a matter for a legislature to decide, not a matter to be settled between the executive branch and industry behind closed doors. If the federal government wants to impose a federal tax on tobacco, then Congress must vote on it; if Florida wants to impose a state tax on tobacco, then the Florida Legislature must vote on it.

The Florida agreement may even be unconstitutional. The Due Process Clause prohibits a state from imposing sales or excise taxes on another state's citizens who never had any contact with the state. And, even if the Supreme Court does not agree that the settlement

imposes a tax, the agreement will likely run afoul of its decision in *BMW v. Gore*. In that 1996 case, an Alabama court and jury imposed a punitive damage award on BMW based in part on BMW's conduct in other states. The Supreme Court rejected that reasoning, writing that "the economic penalties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy." Florida's settlement with the tobacco industry clearly does not meet this standard.

Finally, the agreement sets the bad precedent of allowing a state to award a "finder's fee" to private parties for successfully getting a tax imposed. Florida's team of trial lawyers is claiming that they should be paid 25% of all of the revenues collected under the tax. Are we the only ones troubled by the proposition that states can contract to share tax revenue with private parties who help to get the tax through? Although Florida Circuit Judge Harold Cohen recently blocked the lawyers' attempts to collect their fee on the grounds that they're asking for an "excessive" amount, his ruling doesn't question the propriety of the arrangement per se.

All the parties are also keeping mum about this tax increase. The state isn't saying anything because it is much better politically to claim credit for having brought Big Tobacco to its knees by forcing it to pay large damages than to claim responsibility for a tax hike (albeit largely on out-of-state smokers). The tobacco companies find it in their interests to exaggerate the settlement costs, which means they prefer saying the companies are going to pay "damages" rather than saying that smokers will be paying more taxes. And of course, the trial lawyers, in arguing for their fees, want to classify all revenues as damages to buttress their contingency fee claims.

No one wants to confront the obvious question: How can we have taxation without representation?

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