

Robbing Smokers to Pay Lawyers

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Abstract:

The bill, passed by the committee on April Fools' Day, provides that if you receive a dollar from a tobacco company as the result of a lawsuit, the payment will be matched by four dollars from a fund supported by a \$1.10-a-pack increase in the federal tax on cigarettes. (There is a cap on lawsuit payouts, limiting the companies' direct liability to \$1.3 billion a year and the tax-financed litigation subsidy to \$5.2 billion annually.) What this means is that suits against the tobacco companies will really be only 20% against Big Tobacco and 80% against the governmental and public health agencies that will divvy up the revenue from the tax increase.

Full Text

Think there aren't enough lawsuits in this country? Then you'll be glad to hear about the \$5.2 billion a year that the Senate Commerce Committee is setting aside to subsidize class-action and punitive claims against tobacco companies.

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Why do senators want to use our adversarial civil litigation system to distribute this \$6.5-billion-a-year pot, despite the system's notorious inefficiency? The usual case for civil litigation is twofold. First, it establishes justice by making wrongdoers responsible for their actions. Second, the system provides a forum for discovering the truth, since each side has an incentive to present facts and arguments in its favor.

Neither of these rationales applies here. The "settlement" proposed by the Senate has nothing to do with punishing wrongdoers for past harms. Over the past 30 years, RJR Nabisco has sold considerably more tobacco -- and thus more tar and nicotine -- than Philip Morris. Yet the proposal on the table requires Philip Morris to pay 10 times as much up front as RJR, because it has deeper pockets. And because fully four-fifths of the damage payments for tobacco suits in this proposal will come from a publicly financed fund for which no single individual or organization has responsibility, no one will have a strong incentive to defend these suits against plaintiffs' claims.

The Senate bill amounts to a full-employment act for lawyers. The original deals between the tobacco industry and the state attorneys general would have eliminated all punitive damage claims and class-action suits. While a similar subsidy program was created for any remaining individual lawsuits, the likely payoffs -- for plaintiffs and their lawyers --

would have been much smaller. The Senate bill is costly enough that tobacco companies will fight it vigorously, throwing the passage of any legislation into doubt.

We believe the appropriate policy on tobacco would be to adopt what we call a modified European plan: Give the companies immunity from all class-action and punitive damage claims based on past actions. Eliminate the provision that the companies pay \$10 billion up front. And if the public policy goal is to curtail smoking sharply, raise the tax by \$1.50 a pack or more.

If something more drastic seems in order, probably the best thing to do is turn over all cigarette sales to an organization known for deglamorizing its product and making it as unappealing as possible. Simply require that all cigarettes be sold at the post office.

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