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Making Tobacco Companies Pay: The Florida Medicaid Third-Party Liability Act

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MAKING TOBACCO COMPANIES PAY:
THE FLORIDA MEDICAID THIRD-PARTY
LIABILITY ACT

Christa Sarafa*

INTRODUCTION

At present, the tobacco industry is confronting more than a half-dozen lawsuits unfurled by strutting state governors or attorneys general without even a curtsey toward evenhandedness. When crusaders capture the catbird's seat, especially when they trumpet moral righteousness like the anti-tobacco missionaries, courts should be vigilant to protect justice from their maws.¹

Less than two years ago, it was possible to count on one hand the number of lawsuits pending against the tobacco industry. Today, however, at least forty-one states have filed complaints against the various tobacco companies seeking reimbursement of Medicaid expenditures for cigarette-related illnesses.² State governments have concluded the public should not pay for the medical expenses resulting from a patient's past practice of smoking tobacco. Yet, forgotten somehow in all this litigation is concern for the physical health of the American people. The various state complaints seem to ignore the fact that regardless of who pays the medical bills, smokers will continue to smoke. Unfortunately, these governments

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have done little to alleviate this problem. Instead of focusing on bettering the current state of public health through education and awareness of various health risks accompanying smoking, state officials have launched a steady effort to punish and recover funds from those corporate entities that may have had a causal role in producing various diseases present in today's society. As a result, and due to current notions that smoking is no longer an acceptable habit, cigarette manufacturers have become the victims of relentless state attacks on their purported third-party liability for Medicaid payments made on behalf of recipients who have cigarette-related illnesses.\(^3\)

While the majority of states have based their claims on common law principles of equity, Florida proceeded with a unique tactic. With passage of the 1994 Medicaid Third-Party Liability Act, the state of Florida created an independent cause of action against third parties who may have caused the injuries of Medicaid recipients.\(^4\) Under this statute, potentially liable third-parties are prohibited from invoking traditional affirmative defenses, otherwise provided by Florida law.\(^5\) Although the statute applies to any entity that may be liable for causing Medicaid recipients' illnesses, the state has only used it as a basis for its recent claim against the tobacco industry.\(^6\)

Because of the ramifications this statute may have on the Florida business climate, Associated Industries of Florida, which represents a variety of businesses throughout the state, brought an action seeking to have the statute held unconstitutional.\(^7\) The Florida Supreme Court,


\(^5\)Id. at 409.910(6)(B).

\(^6\)Florida Complaint, supra note 3.

\(^7\)Associated Ind. of Fla. v. Fla. Agency for Health Care Admin., No. 94-3128 (Leon Cty. Cir. Ct. filed June 30, 1995), available in LEXIS.
however, disagreed with Associated Industries declaring the statute facially constitutional. Although the denial of defenses seems to violate the norms of the American judicial system, the Supreme Court of the United States denied Associated Industries' petition for writ of certiorari. In doing so, the High Court endorsed a statute that appears to guarantee an imbalance in the Florida courts in litigation brought in relation to third-party Medicaid claims. At the same time, the Court's decision permits continuance of an unfair attack on one industry, while allowing other parties that may be at fault, including smokers and the government itself, to remain free of liability.

This comment analyzes the current state of tobacco litigation in light of the Florida decision by first presenting a background of the history of tobacco litigation, as well as the legislative events leading up to the case. This comment then provides an overview of the opinion of the Florida Supreme Court, including its vigorous dissent. An analysis of the implications of the statute and the case follows, arguing that the dissenting opinion is better reasoned than the majority opinion, and that the end result of the majority opinion imposes an unfair disadvantage upon the tobacco industry. The impact of this case will then be discussed, along with a brief account of problems that have already occurred.

BACKGROUND

The History of Tobacco Litigation
Tobacco has been used and enjoyed by millions of people for over 400 years. Tobacco originated as an important agricultural crop that aided the development of the American economy, and the industry continues to be the source of many economic benefits such as employment, taxes, and

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8 Agency for Health Care Admin. v. Associated Ind. of Fla., 678 So. 2d 1239 (Fla. 1996).
consumer spending.11 Currently, tobacco is one of the nation's leading agricultural exports and provides for twenty percent of the world's tobacco.12

As the practice of smoking cigarettes became more and more popular throughout the years, it came to be regarded as providing certain personal benefits as well. For instance, smoking cigarettes has a calming effect that is useful to many people for relieving stress.13 Cigarettes also have the ability to stimulate a smoker who is in a state of low arousal.14 The practice has also been known to help control weight.15 In any event, smoking is enjoyed by many for the simple reason that it provides pleasure.16 In many instances, the actual risk or "thrill" of smoking is precisely what attracts many consumers.17

Although cigarettes have undoubtedly provided numerous economic and mental health benefits to many people, these products have also been the apparent source of a variety of serious and/or fatal illnesses.18 Questions about the adverse health effects of smoking cigarettes began in the 17th century and have continued to pervade modern scientific research which has since established a connection between tobacco use and health


12 Jacobsen, supra note 11, at 1027.


14Id.

15Id.


17Id.

18 According to the Surgeon General of the United States, cigarette smoking has been linked to coronary heart disease, peripheral arterial occlusive disease, cerebrovascular disease, lung cancer, cancer of the larynx, oral cancer, cancer of the esophagus, cancer of the bladder, cancer of the pancreas, chronic obstructive lung disease, emphysema, gastrointestinal disease, premature births, and various oral disease including periodontal disease and tooth loss. Jacobsen, supra note 11, at 1028. Cigarette smoking is also a probable cause of infertility, peptic ulcer disease, and cancer of the kidney, cervix and stomach. See Frohlich supra note 13, at 446. According to the Centers for Disease Control, approximately 400,000 deaths each year can be attributed to smoking. See Torts - Products Liability Florida Enacts Market Share Liability For Smoking-Related Medicaid Expenditures - Medicaid Third-Party Liability Act of 1994, 108 HARV. L. REV. 525, 529 n. 1 (1994).
problems.\textsuperscript{19} This debate led to a long series of unsuccessful lawsuits against cigarette manufacturers that continues to persist today.

Since 1954, cigarette smokers have been attempting to recover damages from tobacco manufacturers for cigarette-related illnesses.\textsuperscript{23} Because the manufacturers have previously been able to use affirmative defenses such as assumption of risk, contributory negligence, and federal preemption of common law tort liability, they have almost never been held liable.\textsuperscript{21} Until recently, these cases have been classified into two "waves" of tobacco litigation.\textsuperscript{22}

The first wave of cases occurred during the 1950s and 1960s and revolved around theories of negligence, implied warranty, deceit, and express warranty.\textsuperscript{23} Only ten cases were reported during this first wave of litigation. Of these ten cases, four were voluntarily dropped by the plaintiffs.\textsuperscript{24} It is apparent from these cases that the plaintiffs lacked the enthusiasm and resources to participate in prolonged litigation.\textsuperscript{25} Three of the cases resulted in jury verdicts in favor of the defendants because the juries found that the cigarette manufacturers could not have foreseen the exact consequences of smoking.\textsuperscript{26} This same reasoning led to entries of summary judgment for the defendants in the last three cases that fall under this "first wave" of litigation.\textsuperscript{27}

\textsuperscript{19} Jacobson, supra note 11, at 1027.

\textsuperscript{20} Id. at 14.


\textsuperscript{22} See Mark Z. Edell, Cigarette Litigation: The Second Wave, 22 TORT & INS. L.J. 90 (1986).

\textsuperscript{23} Id.


\textsuperscript{25} Edell, supra note 22, at 91.

\textsuperscript{26} See Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962), question certified on reh'g, 154 So.2d 169 (Fla. 1962), rev'd, 325 F.2d 673 (5th Cir. 1963), rev'd 391 F.2d 97 (5th Cir. 1968), rev'd per curiam, 409 F.2d 1166 (5th Cir. 1969) (en banc), cert. dcnmd, 416 U.S. 951 (1970); Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5th Cir. 1963), cert. dcnmd, 375 U.S. 865 (1963); Ross v. Philip Morris & Co., 328 F.2d 3 (5th Cir. 1964).

After enjoying somewhat of a hiatus from litigation during the 1970s, a second wave of lawsuits began in the 1980s. These lawsuits revolved around changes in products liability law, new scientific and medical research about the relationship between cigarettes and disease, evolving public opinion on smoking, and coordination among plaintiffs' attorneys. Because cigarette companies could not be held strictly liable and assumption of risk was still an effective defense for the tobacco industry, this second wave of cases also failed.

Significantly, in *Roysdon v. R.J. Reynolds*, the court explicitly held that tobacco companies could not be strictly liable for diseases acquired by smokers because common knowledge of the adverse effects of smoking precluded a finding that cigarettes are defective or unreasonably dangerous. The *Roysdon* court based its decision on comment (i) to the *RESTATEMENT (SECOND) OF TORTS* which uses tobacco as an example of a product that is not considered unreasonably dangerous to consumers. The court found that the characteristics of smoking had been fully explored and that its harmful effects were so widespread that it could be considered common knowledge. Thus, cigarette companies could not be strictly liable for the production of cigarettes.

**The Federal Cigarette Labeling and Advertising Act**

The succession of legal victories for the tobacco industry was further reinforced by the defense of preemption which was created by the Federal Cigarette Labeling and Advertising Act. This 1965 Act mandated the now familiar warnings regarding the risks of smoking be placed on each individual package of cigarettes, as well as on all cigarette

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29 Id.
32 *RESTATEMENT (SECOND) OF TORTS* § 402A, comment i ("Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful ...").
advertisements. Responding to the growing awareness of the health hazards of cigarette smoking, Congress declared that the purpose of the Act was to inform the public of the hazards of smoking, protect commerce and the national economy, and promote uniformity in advertising.

The preemption defense, based on the Supremacy Clause of Article VI of the United States Constitution, provides that federal law supersedes state law when both attempt to control the same subject matter. This defense was used to absolve various cigarette manufacturers of countless legal disputes because compliance with the Act prevents any further liability based on the failure to warn. Thus, when faced with litigation, the cigarette companies have rightly asserted they are not compelled to provide any additional information regarding the health risks of smoking other than that mandated by the federal government through the Cigarette Labeling and Advertising Act.

The Cigarette Labeling and Advertising Act also contains a provision regarding mandatory reports to Congress by the Secretary of Health and Human Services and the Federal Trade Commission. This provision instructs the Secretary to submit annual reports concerning current information on the health consequences of smoking, as well as recommendations for appropriate legislation. The Commission is instructed to submit annual reports and recommendations regarding current practices and methods of cigarette advertising and promotions. According to the statute, the annual submission of these reports began on January 1, 1971. Essentially, these provisions require the Secretary and the Commission to conduct a yearly inquiry into the status of cigarettes and their relationship to human health.

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35 Id. Currently, all cigarette labels and advertisements must carry one of the following four warnings: Surgeon General's Warning: Smoking Causes Lung Cancer, Heart Disease, Emphysema, and May Complicate Pregnancy; Surgeon General's Warning: Quitting Smoking Now Greatly Reduces Serious Risks to Your Health; Surgeon General's Warning: Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight; Surgeon General's Warning: Cigarette Smoke Contains Carbon Monoxide. Jacobson, supra note 11, at n.46
37 U.S. CONST. Art. VI, cl. 2.
39 See Meade, supra note 30, at 123.
40 Id.
41 Id.
42 Id.
43 Id.
The Supreme Court considered the preemption issue in *Cipollone v. Liggett Group* affirming the Cigarette Labeling Act preempts claims that cigarette manufacturers failed to warn consumers of the dangers of smoking.\(^4\) The Court's holding applied to warnings in general, which includes all cigarette advertisements and promotions.\(^4\) Presumably, this holding did not include failure to warn claims in other contexts such as fraudulent misrepresentation, conspiracy to conceal material facts about the hazards of smoking, breach of express warranty, and defective design.\(^4\)

A recent case in the Fifth Circuit, however, proved the Cigarette Labeling and Advertising Act can be used to preempt attacks upon the cigarette industry that go beyond the scope of a general warning. *Allgood v. R.J. Reynolds* was based on claims of fraudulent misrepresentation regarding the company's efforts to research the consequences of cigarette smoking, as well as fraudulent concealment of the health risks of smoking.\(^4\) The court specifically stated, "To the extent that plaintiffs' claims are based on fraudulent concealment ... they are preempted by the Federal Cigarette Labeling and Advertising Act."\(^4\) Alternatively, the court reiterated the common knowledge theory of *Roysdon* by comparing the dangers of cigarette smoking to the dangers of alcohol consumption. According to the court, it has long been undisputed among society that both alcohol and cigarettes pose a danger to society.\(^4\) Thus, the court affirmed summary judgment in favor of the defendants and held that the tobacco company had no duty to warn the plaintiff of the dangers of cigarette smoking.\(^4\)

**Recent Litigation**

Despite the immunity from suit provided by the preemption defense, some cases have been able to proceed to trial. Recently, in *Carter v. Brown & Williamson*, a Florida jury found the tobacco company liable to a sixty-six year-old man with lung cancer for negligently failing to warn consumers

\(^{4}\) *Id.* at 524.
\(^{4}\) *Id.* at 528-30 (holding that claims must be based on a duty based on smoking and health).
\(^{4}\) *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168 (5th Cir. 1996).
\(^{4}\) *Id.* at 171.
\(^{4}\) *Id.* at 172.
\(^{5}\) *Id.*
that Lucky Strike cigarettes were unreasonably dangerous and defective.\textsuperscript{51} The \textit{Carter} jury was the first since \textit{Cipollone} to hold a cigarette company liable.\textsuperscript{52} This unexpected verdict was a shock to the tobacco industry; nevertheless, \textit{Carter} did not represent a sudden shift in cigarette product-liability lawsuits favoring plaintiffs. This was evidenced approximately two weeks after \textit{Carter}, when an Indiana jury refused to find R.J. Reynolds liable for the death of a long-time smoker with lung cancer.\textsuperscript{53}

Another recent case demonstrates the attitude that the tobacco industry should not have to pay for injuries that stem from the manufacture and use of cigarettes. In \textit{Raulerson v. R.J. Reynolds Tobacco Corp.}, a different Florida jury found R.J. Reynolds was not negligent and Winston and Salem cigarettes were not unreasonably dangerous.\textsuperscript{54} The jury also said cigarettes did not contribute to the 1993 death of Raulerson's sister, who was a long-time smoker.\textsuperscript{55} This case was decided in the midst of strong efforts by the anti-smoking industry to influence public opinion, proving that even under external conditions most favorable to plaintiffs, a reasonable jury can find for the tobacco industry.\textsuperscript{56}

Although plaintiffs have traditionally been unsuccessful in bringing claims against the tobacco industry, a new class of plaintiffs, the individual states, has surfaced. The number of state complaints against the tobacco industry is steadily increasing. Most states are confined to traditional theories of subrogation, assignment, or lien, which puts the state in the same position as a Medicaid recipient would be in had they brought the claim on their own behalf. Traditionally, a state has no legal basis to claim relief as an individual plaintiff, and must act on behalf of its Medicaid recipients. Florida passed legislation creating an independent cause of action for the state and requiring the judiciary to conduct the


\textsuperscript{52}Id.

\textsuperscript{53}Hundreds Sue Tobacco Makers, Sellers in Florida in Wake of $750,000 Verdict, \textit{4 Health Care Pol'y Rep. (BNA)} No. 36, at D-53 (Sep. 9, 1996) (citing Rogers, R.J. Reynolds Tobacco Co.)


\textsuperscript{55}Id.

\textsuperscript{56}Id.
resulting trial in a way that seriously limits the tobacco industry's ability to defend itself.  

**Medicaid And Third-Party Liability**

Medicaid is a medical assistance program established by title XIX of the Social Security Act. Under this program, state governments cooperate with the federal government to provide medical services to eligible individuals and families. The federal government shares the costs of Medicaid with the states that elect to participate in this program. The states, in turn, must comply with the requirements of the Act.

One such requirement is that state plans for medical assistance must provide that the administering agency will "take all reasonable measures to ascertain the legal liability of third parties ... to pay for care and service available under the plan." These measures include collecting information in order to enable the state to pursue claims against third parties. In addition, after an inquiry into potential liability, the state is obligated to seek reimbursement from all third parties where legal liability has been found to exist.

Currently, the system of Medicaid is failing financially. In fact, it is in danger of becoming completely insolvent within the next ten years. A strong policy of health care reform has yet to bring Medicaid back to a stable position. Consequently, state governments have launched to recover some of that money paid out by bringing litigation against potentially liable third parties. Although the states have had an ongoing duty to ascertain third-party liability since Medicaid's enactment in 1968, they have just now begun to focus on holding third parties, namely the

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60 Id.
62 Id.
65 Id.
66 Id.
tobacco industry, liable. In order to facilitate this recovery, Florida passed a statute that takes away potentially liable parties' right to adequately defend themselves.

The Florida Medicaid Third-Party Liability Act
The State of Florida, like every other state, has been authorized through federal law to seek reimbursement of Medicaid payments since the government program was enacted in 1968. In 1978, however, the Florida legislature enacted a state statute which explicitly allowed for recovery of Medicaid expenditures from third parties. This statute granted Florida a traditional subrogation action which allowed the state to pursue third-party benefits as if it were in the same position of a Medicaid recipient. Subrogation is a legal device by which one person (the subrogee) has paid money to another (the subrogor), and this payment should have been made by a third person. In such a situation, the payor does not have his own right to bring a cause of action. Rather, the payor brings a cause of action to recover funds as if he were the payee. Thus, the 1978 subrogation right enacted by Florida allowed the state to bring an action against third parties as if it were the Medicaid recipient.

In 1990, the statute was again modified in order to strengthen the state's ability to recover Medicaid costs. Under these amendments, subrogation was still the primary method of recovery. However, in 1994 the statute was modified much more significantly. These

681978 FLA. LAWS ch. 78-433, § 1.
69FLA. STAT. ch. 409.266(3) (Supp. 1978) ("A public assistance applicant or recipient shall inform the department of any rights he has to third-party payments for medical services. The department shall automatically be subrogated to any such rights the recipient has to third-party payments and shall recover to the fullest extent possible the amount of all medical assistance payments made on behalf of the recipient.")
70Pearson, supra note 16, at 611 (citing ROBERT E. KEETON & ALAN I. WIDDIS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES 219 (1988)).
71Id.
72Id. (It is said that the subrogee "stands in the shoes" of the subrogor, and enforces the subrogor's right to payment.)
73FLA. STAT. ch. 5409.2665 (Supp. 1990); see also Agency for Health Care Admin. v. Associated Ind. of Fla., 678 So. 2d 1239, 1244 (1996).
74Id.
751994 FLA. LAWS ch. 94-251 § 4.
amendments have caused much dispute amongst the legislature, the parties involved, and the citizens of Florida. A major criticism of the Act is that third parties who may be liable for Medicaid costs may no longer use comparative negligence, assumption of risk, and “all other affirmative defenses normally available to a liable third party.” The Act also creates a new, independent cause of action in which the state can sue third parties on its own terms without regard to the interests or rights of an individual Medicaid recipient. Under this legislation, the state can make claims for Medicaid reimbursement without having to occupy the position of a Medicaid recipient. Essentially, the state becomes a victim in its own right.

Additionally, the 1994 amendments allow the state to recover from third parties, in a single proceeding, Medicaid payments made to multiple recipients without having to identify each recipient individually. The statute demands the judiciary to liberally construe the evidence code when determining issues of causation and damages, and allows for proof of these issues via statistical analysis. The amendments also allow for theories of market-share liability and joint and several liability to be used simultaneously as long as the products in question are “substantially interchangeable among brands.” This provision eliminates the burden of proving which manufacturer caused a specific injury. The defense of

76 Agency, 678 So. 2d at 1244.
77 FLA. STAT. ch. 409.910(I) (Supp. 1994) (“Principles of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party, are to be abrogated to the extent necessary to ensure full recovery by Medicaid from third-party resources.”)
78 Id. ch. 409.910(6)(A) (“The agency has a cause of action against a liable third party to recover the full amount of medical assistance provided by Medicaid, and such cause of action is independent of any rights or causes of action of the recipient.”)
79 Id. ch. 409.910(9) (“The agency may bring an action to recover sums paid to all such recipients in one proceeding .... The agency shall not be required to identify the individual recipients for which payment has been made, but rather can proceed to seek recovery based upon payments made on behalf of an entire class of recipients.”).
80 Id. (“In any action brought under this subsection, the evidence code shall be liberally construed regarding the issues of causation and of aggregate damages.”).
81 Id. ch. 409.910(9)(b) (“The agency shall be allowed to proceed under a market share theory, provided that the products involved are substantially interchangeable among brands, and that substantially similar factual or legal issue would be involved in seeking recovery against each liable third party individually.”); Id. ch. 409.910(l) (“The concept of joint and several liability applies to any recovery on the part of the agency.”)
the statute of repose is also eliminated by these amendments. Thus, the Act essentially weakens all possible defenses while easing the burden of the state in proving causation. The Act does, however, specify that Florida is limited to recovery of Medicaid funds paid out in the last five years.

The Florida statute is also controversial because of the unconventional method used to pass this legislation. The amendments are scattered throughout a previously existing Medicaid Act entitled "An Act Relating to Medicaid Provider Fraud." The tobacco companies allege the bill was passed unanimously in both the House and the Senate without a single debate. Ironically, however, within a year of passage, both houses voted to repeal the amendments. This time, however, Florida's Governor Lawton Chiles, a proponent of the enabling legislation, vetoed the repeal.

The statute ultimately became effective July 1, 1994 and targets the tobacco industry. Although the Act refers to any third-party entity that may be liable for Medicaid costs, Governor Chiles specifically "ordered the relevant executive branch officials to pursue the recovery of Medicaid expenditures from only the tobacco industry." Thus, the clear purpose of the Act is to allow the state to obtain reimbursement for Medicaid expenses that may be attributed to cigarette smoking. This contention is strengthened by the fact the Florida legislature has rejuvenated its efforts to repeal the law now that the suit against the tobacco industry has been settled. Specifically, a spokeswoman for Florida's House Speaker

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82 Id. ch. 409.910(12)(h) (Supp. 1994) ("The defense of statute of repose shall not apply to any action brought under this section by the agency.")
83 Id. ("Actions to enforce the rights of the department under this section shall be commenced within five years after the date a cause of action accrues.")
84 1994 FLA. LAWS ch. 94-251.
85 Associated Ind. of Fla. v. Agency for Health Care Admin., No. 94-3128 (Leon Cty. Cir. Ct., Complaint For Declaratory Relief, filed June 30, 1995), available in LEXIS.
87 Id.
88 Meade, supra note 30, at 127.
89 Agency for Health Care Admin. v. Associated Ind. of Fla., , 678 So.2d 1239, 1246 (Fla. 1996).
90 Pearson, supra note 16, at 610.
stated: "Certainly, the main causation for folks was jeopardizing the tobacco settlement. With the settlement made and signed, I think there's great interest in repealing the law altogether."92

The Act itself, however, refers to any third-party, and the governor's executive order is not viewed as binding law.93 In 1995, a Florida Circuit Court judge ruled the application of the statute would not be limited to the tobacco industry.94 He ruled the governor lacked the authority to limit application of state statutes.95 This power is specifically reserved for the legislature.96 This means that, unless there is an override of the governor's veto, Florida courts will construe this law as applicable to all third parties, businesses and individual citizens alike. Because it is viewed as detrimental to Floridians, a 1996 poll showed widespread public support for an override, but the Governor remains adamant that the law will stand.97

Florida's initiative is being followed in other areas of the country as well. Massachusetts has enacted legislation quite similar to the Florida statute.98 California, Maine, and New York have also considered such legislation.99 Even Congress has addressed proposed legislation regarding this issue.100 Many states have gone as far as filing complaints against the tobacco industry that follow the format of Florida's independent cause of action, even though their legislatures have not passed the requisite statutory authority.101

Basing its claim on the newly enacted Medicaid Third-Party Liability Act, the state of Florida filed suit against the tobacco industry on February 21, 1995.102 The complaint allege the cigarette industry as a whole was

92 Id.
93 Associated Industries Repeats Call For Repeal of Medicaid Third-Party Liability Law, PR News Wire, May 25, 1995, available in LEXIS.
94 Id.
95 Id.
96 Id.
98 Meade, supra note 30, at 127.
99 Id.
100 Id.
101 Pearson, supra note 16, at 610.
102 Florida Complaint, supra note 3.
responsible for the current health crisis pervading Florida. The state claimed this crisis occurred because the tobacco industry ignored and suppressed the truth about the hazards of cigarette smoking. As a result, a proliferation of Medicaid recipients contracted a multitude of cigarette-related diseases. The state also claimed the cigarette industry should bear the burden of paying for the medical expenses of these recipients, rather than allowing government funds to be depleted. The complaint further alleged that unless the tobacco industry is held responsible for these expenses, cuts in state spending or tax increases would be necessary to cover the costs of providing medical care to these Medicaid recipients.

The state of Florida is sought recovery on counts including unjust enrichment negligence, fraud, and intentional misrepresentation. These counts were founded allegedly on conduct by the tobacco industry dating back to 1953 when the first definitive link between cigarette smoking and cancer was published. This study created a "health scare" regarding the dangers of cigarette smoking. The complaint claimed the tobacco industry responded by counter-acting the potentially damaging information with an offensive, pro-cigarette public relations ploy to confuse the public and neutralize the anti-smoking advertisements that followed from the scare.

The complaint conceded, however, that a vast body of evidence existed identifying smoking as one of the leading causes of lung cancer and that this information is "uncontroverted and longstanding."

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103 *Id. at ¶ 1.*
104 *Id.*
105 *Id.*
106 *Id.*
107 Florida Complaint, *supra* note 3, at ¶ 140.
108 *Id.* at ¶ 140-208. Other counts include indemnity, strict liability for a defective and unreasonably dangerous product, breach of express warranty, breach of implied warranty, negligent performance of a voluntary undertaking, conspiracy, concert of action, aiding and abetting liability, and injunctive relief.
109 *Id. at ¶ 59.*
110 *Id.*
111 *Id. at ¶ 67.*
112 Florida Complaint, *supra* note 3, at ¶ 68.
association between smoking and disease. The state claimed the tobacco industry has spent billions of dollars on promoting the myth that this causal connection is not true. The state also claimed that, due to the industry's active concealment of the effects of smoking, they have only recently discovered the defendants may be liable for Medicaid expenses.

In retaliation, the tobacco industry presented documents to the Circuit Court of Palm Beach County showing that Florida itself was at one time a manufacturer of cigarettes. The documents showed that Florida had made and distributed cigarettes to prison inmates, state hospitals, and local governments during the 1970s, with full knowledge of the health risks of smoking. In 1977, the state cigarette sales totaled $174,373. The judge ruled these documents did not constitute a defense.

On August 25, 1997, after two and a half years of litigation, the tobacco industry settled with Florida for $11.3 billion over the next twenty-five years. In response, the Governor of Florida said taxpayers would finally be repaid for the $300 million Florida has spent annually on cigarette-related Medicaid expenses.

*AGENCY FOR HEALTH CARE ADMINISTRATION v. ASSOCIATED INDUSTRIES OF FLORIDA*

The Majority opinion
Approximately one year after the Florida Medicaid Third-Party Liability Act went into effect, Associated Industries of Florida filed a complaint for declaratory relief alleging that Florida's method of recovering Medicaid expenditures violated the Florida Constitution. The Supreme Court of Florida accepted jurisdiction of this case after an assertion by the First District Court of Appeals that this matter was of great public importance and needed to be resolved immediately. The court began its opinion by

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113 Id.
114 Id. at ¶ 94.
115 Id. at ¶ 122.
117 Id.
118 Id.
119 Id.
120 Agency for Health Care Admin. v. Associated Ind. of Fla., 678 So.2d 1239, 1246 (Fla. 1996).
121 Id. at 1243.
noting that, due to the limited options involved in the appropriation of public welfare funding, extreme caution is required when evaluating legislative policy decisions.\(^\text{122}\) Although it struck a few minor provisions that would have made it more difficult for cigarette manufacturers to defend themselves, the court found the Act is, on its face, constitutional.\(^\text{123}\)

The court began by agreeing with Associated Industries' assertion that the 1994 amendments gave Florida a new, independent cause of action that abrogated affirmative defenses traditionally available to third parties.\(^\text{124}\) Before this, the State was confined to theories of subrogation, assignment, and lien, under which the State was subject to the same treatment that a Medicaid recipient would have encountered had they pursued a claim.\(^\text{125}\) The amended statute's stated intent was to ensure that Medicaid payments are a last resort, to be used only when all alternative methods of payment have been exhausted.\(^\text{126}\) The court conceded that this new cause of action not only moved Florida "to the front of the line vis-a-vis other innocent parties," but also gave the State "an expanded right to take priority over innocent parties in claiming 'a pot of money once obtained.'"\(^\text{127}\)

The court outlined six modifications to the statute showing the State's intention to create a cause of action to which traditional affirmative defenses did not apply.\(^\text{128}\) First, the Act stated all affirmative defenses were to be abrogated to the extent necessary in order to ensure the State's recovery.\(^\text{129}\) Second, the State was no longer required to identify individual Medicaid recipients in their complaint.\(^\text{130}\) Third, the statute of repose defense was specifically abrogated in any action that falls under the Act.\(^\text{131}\) Fourth, the State was authorized to file multiple claims in a single proceeding.\(^\text{132}\) Fifth, the State was authorized to simultaneously utilize theories of market share and joint and several liability.\(^\text{133}\) Sixth, the State
was authorized to use statistical analysis to prove causation and damages. These six modifications were precisely what Associated Industries challenged in this action.

The court addressed each of the modifications individually. The court held that, on its face, the general abrogation of defenses did not violate either the federal or state constitutions. The court emphasized that due process requires, and the United States Supreme Court expressly recognizes, that states confront new legal dilemmas with new tort remedies. The court noted Florida case law demonstrates that a blanket prohibition against eliminating certain affirmative defenses has never existed in the state. The court cited examples from prior cases including the elimination of contributory negligence and the adoption of comparative negligence. The court also mentioned the abolition of the defense of interspousal immunity. Additionally the court mentioned Florida’s adoption of strict liability which did not allow for the defenses of either contributory or comparative negligence. Although it found the provision to be facially constitutional, the court repeatedly reiterated the fact that such a provision would not necessarily survive future constitutional attacks.

In terms of the second modification, the court determined the failure to identify individual recipients would violate the due process guarantees of the Florida Constitution. The court found the defendants would be precluded from challenging improper payments made to individual recipients which may have resulted in fraud, misdiagnosis of the patient's condition, or unnecessary treatments. Also, this provision would prevent defendants from proving a particular product was never even used.

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134 Id. at 1250.
135 Agency, 678 So.2d at 1250.
136 Id. at 1255-56.
137 Id. at 1250.
138 Id. at 1250-53.
139 Id. at 1251.
140 Agency, 678 So.2d at 1250-52.
141 Id.
142 Id.
143 Id.
144 Id. at 1253-54.
145 Agency, 678 So.2d at 1254.
by a particular recipient.\textsuperscript{146} Thus, the court struck this provision from the 1994 amendments.\textsuperscript{147}

The court also held the abolishment of the defense of the statute of repose was unconstitutional and struck the third modification to the 1994 amendments.\textsuperscript{148} The court noted the Florida judiciary has always held Congress cannot create legislation that revives time-barred claims.\textsuperscript{149}

In terms of the modification allowing for the joinder of claims, the trial court had found this provision was an infringement on the judiciary's power to establish practice and procedure.\textsuperscript{150} The Florida Supreme Court disagreed and held this provision created no constitutional infirmity.\textsuperscript{151}

The court then addressed the issues of market-share liability and joint and several liability.\textsuperscript{152} The court found either theory could be used independently in a claim by the state to recover Medicaid expenses.\textsuperscript{153} However, the court found these theories could not be used simultaneously, because they are fundamentally incompatible.\textsuperscript{154} Finally, the court found the statute's allowance of the use of statistical analysis to prove causation and damages was within the constraints of Florida's rules of practice and procedure.\textsuperscript{155} The court found the state still retains the burden of proving its case, whether or not statistics are used.\textsuperscript{156}

\textbf{The Dissenting Opinion}

The dissent took issue with several of the provisions outlined by the majority. Most significantly, the dissent found the abrogation of defenses to be unconstitutional.\textsuperscript{157} The dissent pointed to case law that stated an affirmative defense cannot be taken away unless (1) a reasonable alternative is provided by the legislature; or (2) there is an overpowering necessity for the abolition of the right, and no alternative method of
meeting that necessity exists. The statute did not meet the first test, because affirmative defenses are abrogated altogether with no alternative. The dissent maintained the second test also fails because traditional remedies of subrogation and assignment are a sufficient remedy for the state to recoup Medicaid expenses. Additionally, the dissent mentioned reasonable alternatives, such as levying additional taxes upon the sale of tobacco in an amount sufficient to reimburse the State for the amount of money it spends.

The dissent also claimed the abrogation of affirmative defenses provision was unconstitutional because the state gained an unfair litigation advantage compared to the rest of society. The dissent noted the success or failure of cases involving medical bills would depend on whether the injured party was on Medicaid. This would apply to products liability cases, as well as car accidents. If the injured party was on Medicaid, the defendant would lose all of his affirmative defenses. However, if the injured party paid his own medical bills, the defendant would be able to raise the defenses of assumption of the risk or comparative negligence. Therefore, the dissent argued this provision violated due process and equal protection. The dissent also agreed with the trial court in terms of the joinder of claims issue. The dissent argued that any statute that involved practice and procedure should be stricken, even if the same practice and procedure was already authorized by judicial rules. Thus, this invasion on the power of the courts should be considered unconstitutional.
Petition for Writ of Certiorari
A few months after the Florida Supreme Court held most of the amendments constitutional, Associated Industries and Philip Morris, Inc. asked the United States Supreme Court to review the opinion. The petitioners contended that the law violates their due process rights by removing all of their common law defenses. They maintained the effect of the statute was an obligation of the Florida courts to follow the legislature's mandate to ignore established rules of common law. They also argued the statute is arbitrary, irrational, and conflicts with prior Supreme Court decisions. On March 17, 1997, the Supreme Court of the United States denied the petition.

ANALYSIS

The majority opinion of the Supreme Court of Florida declaring Florida's Medicaid Third-Party Liability Act constitutional gives the state an overwhelming advantage over the tobacco industry in any legal dispute. The state's burden of proving its case is significantly diminished while the tobacco industry, left with virtually no defense mechanism, has no legal protection against excessive or arbitrary liability. The consequence of the decision of the Florida Supreme Court, along with the United States Supreme Court's denial of certiorari, is unfair and arbitrary.

First, the complete abrogation of affirmative defenses violates the due process clauses of the United States and Florida Constitutions, which provide that "no person shall be deprived of life, liberty, or property without due process of law." As the dissent noted, the right to defend oneself in a court of law is embodied in the Constitution, as well as the common law. As such, all affirmative defenses cannot be taken away

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172 Id.
173 Id.
174 Id.
177 Agency for Health Care Admin. V. Associated Ind. of Fla., 678 So. 2d 1239, 1258 (Fla. 1996) (citing Kluger v. White, 281 So.2d 1 (Fla. 1873)).
without the provision of a reasonable alternative.\textsuperscript{178} The only exception is when there is proof of an "overpowering public necessity."\textsuperscript{179}

In abolishing the rights of potentially liable third parties, the legislature failed to provide a reasonable alternative. In fact, the legislature did not provide third parties with any alternatives. Any third party that may be potentially liable is left with no recourse, because the statute says defendants will be unable to assert defenses. Moreover, the state has not shown an overpowering interest in this legislation. The Florida legislature voted to repeal the amendments within one year. If a majority of the Florida Congress could vote against the measure almost immediately after passage, the state interest cannot be that compelling.

The Florida statute also denies the tobacco industry, and any other third party who may ultimately be afflicted, equal protection of the laws. The United States Constitution provides, "No state shall make or enforce any law which shall ... deny to any person within its jurisdiction equal protection of the laws."\textsuperscript{180} The Florida statute defies this Constitutional provision by allowing the state to bring a cause of action without facing defenses that any other plaintiff bringing a claim in their individual capacity must face. The statute precludes a potentially liable third party from using defenses in a dispute with the state. But if a private party, including the Medicaid recipient in question, brings the action, the third party will be allowed to use traditional defenses. For example, assume John Doe accidentally drives into Mary Dee. In a suit by Mary against John, John would be able to defend himself if, for instance, Mary was also negligent by running a red light. This would be the case even if Mary were a Medicaid recipient. However, if the state of Florida wanted to seek reimbursement from John (the potentially liable third party), John would be unable to claim contributory negligence, and would automatically lose. The tobacco industry has proven through recent decisions such as \textit{Raulerson} and \textit{Rogers} that these traditional defenses still can work toward clearing the industry of liability. The abrogation of these defenses works to unfairly handicap third parties in a court of law.

The Supreme Court has specifically stated that selective law enforcement is prohibited in our judicial system. In \textit{Yick Wo v. Hopkins}, the Court stated:

\textsuperscript{178}Id.
\textsuperscript{179}Id.
\textsuperscript{180}U.S. CONST. amend. XIV.
Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.\(^8\)

The Florida statute was passed through the legislature without full and open discussion, and it is obvious the Act is being administered with "an evil eye" toward the tobacco industry. This is even further shown by the Florida Governor’s proclamation that only the tobacco industry would be implicated by this legislation. Also, it is unfair for the courts to allow restrictions on legal defenses in some circumstances (when Medicaid is involved) and not others (when Medicaid is not involved). For instance, in the case between John Doe and Mary Dee, if Mary is not a Medicaid recipient, the state is unable to step in as plaintiff and take away all of John’s affirmative defenses. Regardless of how the state feels about the tobacco industry, it should be forced to adhere to the same laws that apply to the general public. It should not be able to change long-standing law to suit its current needs.

Not only does the Florida statute arguably contravene the constitution, common sense dictates that it is completely unfair for the judiciary to permit the state to retain the powerful legal weapon of precluding available defenses to a defendant. The tobacco industry is being denied one of the most basic rights common to all Americans — that is, the right to properly defend oneself in a court of law.\(^182\) Theories such as assumption of risk and contributory negligence allowed the industry success after success in legal battles against individual plaintiffs for over forty years. The final decision in *Cipollone* was written in 1992.\(^183\) At the trial level, the jury found Rose Cipollone to be 80 percent contributory negligent.\(^184\) The jurors believed the choice to smoke was her own.\(^185\)

Although Liggett was found liable to Mr. Cipollone for $400,000, Rose

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\(^{181}\) Yick Wo v. Hopkins, 118 U.S. 356 (1886).
Cipollone herself was not awarded any damages. Now, in a claim filed by Florida, a jury is no longer able to decide who is primarily responsible for a smoker's health problems. The tobacco industry would automatically be considered 100 percent liable because the Medicaid Third-Party Liability Act prohibits a jury from considering defenses that could serve to offset a claim of liability.

Although the FDA has recently declared that nicotine is addictive, this does not mean, as the state claims, that smokers do not make their own choices to smoke. Florida claims the tobacco industry has consciously attempted to induce the general public into the belief that there is nothing wrong with smoking cigarettes and that they are not addictive. However, the industry as a whole has faithfully complied with the Cigarette Labeling Act by ensuring every cigarette container and advertisement states the product is dangerous. Even without this safeguard against deceiving people, it is common knowledge that smoking is hazardous to health. As one commentator put it, "It is unlikely that there are many in the general population of smokers who now believe, or ever believed, that smoking cigarettes is harmless." Additionally, the Cigarette Labeling Act gave an affirmative duty to the Secretary of Health and Human Services to annually follow-up on the health consequences of smoking. Thus, regardless of who knew or did not know about the hazards of smoking, it is the job of the government, not the tobacco industry, to investigate the matter and ensure that these hazards do minimal damage to the health of the American people.

People who smoke clearly take a risk that their health will be in danger. It is irrelevant whether the risk taken entails that the product is addictive and that it will be difficult to stop the habit, or that health problems in general will occur at some point in life. It is a risk taken nonetheless. The Medicaid Third-Party Liability Act eliminates assumption of the risk, a previously valid defense, from the repertoire of the tobacco companies. Since juries in the first and second waves of tobacco litigation consistently found smokers to assume the risk of the

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185 Id.
187 Florida Complaint, supra note 103, at ¶ 77.
188 Id.
189 Id.
190 Pearson, supra note 16, at 617.
dangers of smoking, there is no reason to believe a jury could not arrive at a similar conclusion in a case against the state. It is unfair for the industry to be considered inherently responsible for resulting medical problems, while being denied the opportunity to allot responsibility to those who may be equally responsible. The state should not be allowed to set legal standards that place it in a better position than individual smokers who otherwise might bring suit against tobacco companies on their own behalf.

It is argued that even though the state's claim is based on the provision of medical care for the health problems of Medicaid recipients who smoke, the state, as an individual plaintiff, did not assume the risk of anything. Since the state did not do the smoking, it could not be blamed for contributing to any health problems. If this is true, the state does not need the elimination of assumption of the risk as a safety net and it should be stricken from the act. If a trial between the state and the tobacco industry never touched upon the contributory negligence of Medicaid recipients who smoke, then assumption of the risk as a defense should never have been taken away to begin with.

Alternatively, it can be said that the state did assume a risk, and thus, tobacco companies should be allowed to utilize this defense. It is clear from Florida's complaint that the state has known for decades that tobacco is linked to a variety of illnesses and health problems. Despite this knowledge, the state continued to insure the health of millions of Medicaid recipients who smoke. Although the state did not do the smoking, it knowingly assumed the risk of paying for the medical expenses of those who do smoke. Medicaid has always required the states to ascertain the legal liability of third parties since its 1968 enactment, and the state never bothered to hold third parties liable until recently, when Medicaid began to fail.

As the dissent in Associated Industries correctly points out, there is a huge difference between not being allowed to utilize a particular defense, and having no defenses at all. Without defenses, the tobacco industry is being held strictly liable for manufacturing and selling a perfectly legal product. If, as the state's complaint alleged, the evidence

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1 Florida Complaint, supra note 3, at ¶ 68 ("The vast body of evidence that identifies smoking as a leading cause of lung cancer is uncontroverted and of long standing.")

against the industry was mounting, the industry should be allowed to refute such evidence within the constraints of a fair trial. Strict liability has never been held to be a viable theory against the tobacco industry, and there is no reason to begin such a trend. This contention is strongly emphasized by the RESTATEMENT'S explanation that cigarettes are not considered to be an unreasonably dangerous product for purposes of strict liability. It would be completely unfair to suddenly hold an entire industry strictly liable for the sale of a product that has always been societally acceptable. Significantly, Illinois Attorney General Jim Ryan stated to the media that the state of Illinois had no intent or desire to shut down a legal industry. assuming other states, such as Florida, share this notion, the abrogation of affirmative defenses allows a theory of strict liability to enter the courtroom that would seriously undermine any state's desire to keep the industry intact.

The Florida legislation is unfair, because the provision allowing for a market-share theory of liability allows responsibility to be placed on tobacco companies based on the percentage of each companies' control over the market. Under this theory, liability can be easily misplaced. According to the statute, the product involved must be substantially interchangeable among brands. Although a jury of ordinary consumers may not be able to differentiate between brands of cigarettes, all cigarettes are by no means designed identically. If they were, tobacco companies would not bother manufacturing many different brands of cigarettes. Cigarettes vary greatly in size, type of filter, and quantity of tar and nicotine. According to the state, cigarettes also contain a variety of toxins and harmful chemicals. Any one of these materials may contribute more significantly than others to smoking's harmful effects on health. Thus, a particular company's share of the cigarette market may be very different from the percentage of liability that should fairly be attributed to it.

The market-share theory of liability also allows for unfair distribution of liability, because Medicaid recipients may not be representative of the entire market. Medicaid recipients receive government aid for their health

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194 Fla. Stat. ch. 409.910(9) (b) (West 1997).
195 Pearson, supra note 16, at 630.
196 Florida Complaint, supra note 3.
problems because they fall below the poverty line. This means that they may purchase the cheapest cigarettes available. Since the consumption of cigarettes among low-income Floridians may significantly differ from that of the state-wide market, cigarette companies should not be held liable for their share of the market.  

Additionally, each company's share of the market may change over time, for the entire class of consumers, as well as individual groups. Combined with the fact that cigarette-related illnesses do not typically surface immediately, it would be extremely difficult to decipher exactly which market is determinative of liability. These factors all contribute to an unfair distribution of responsibility for Medicaid expenditures. In order to avoid the array of problems that will arise upon application of this theory, the Florida Supreme Court should have struck the entire market-share provision from the 1994 amendments. Furthermore, the United States Supreme Court should have reviewed this case in order to prevent such unfair litigation from infiltrating the courts.  

The provision in the Act's 1994 amendments allowing for the use of statistical evidence is also an unfair element in the determination of liability. According to the majority opinion, the new, independent cause of action that the state has created for itself requires it to prove three things:

1) negligence or a defective product;
2) causation; and
3) damages.  

Two of these elements, causation and damages, can be proven by statistical analysis according to the statute. Since statistical analysis is not, and never will be, an exact showing of causation or damages, the Florida court should not allow it to define which entity is responsible for damages. Tobacco companies should be liable only for damages that they actually incurred. Statistics tend to be misleading, and a jury's verdict

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197Studies have shown that different groups of people prefer different brands of cigarettes. One report showed that the three best-selling brands among minors accounted for 86 percent of the adolescent market, whereas the three best-selling brands for adults account for only 35 percent of the total market. See supra note 18.
198Agency for Health Care Admin. v. Associated Ind. of Fla., 678 So.2d 1239, 1250 (Fla. 1996).
199FLA. STAT. ch. 409.910 (West 1997).
may be quite different from what it would be if the jury was only allowed to view evidence regarding each recipient, as opposed to a statistical analysis on the general population of smokers. Although the state's overall injury might be independent of the individual elements surrounding each case, the industry's liability for damages is not and proximate cause should be determined in every case in order to place liability where it should truly be.

Another reason why the decision of the Florida Supreme Court is problematic is because ensuring that the tobacco industry is held fully responsible for the medical expenses of Medicaid recipients who smoke is an ineffective method of curing the current health crisis. The reasoning behind the Florida legislature's drafting of the Medicaid Third-Party Liability Act is to shift the burden of paying for the enormous medical expenses of Medicaid recipients with cigarette-related diseases to those entities that should rightly pay, as well as to fix the unfortunate state of Americans' health. Florida's Act does not help either goal.

In terms of allocating financial responsibility to the tobacco industry, the Act fails in that funds are still likely to come from Florida's taxpayers. In order to save their industry, tobacco companies would have to do something to raise the money that it would owe to Florida. One resource would be raising the prices of cigarettes. If, as the state claims, smokers are addicted to nicotine to the point that they have no control over the habit,200 most smokers can be expected to continue to purchase cigarettes regardless of the price. Therefore, the cost of medical expenses for Medicaid recipients would be put back into the hands of consumers and smokers of all financial backgrounds would pay for the government's ploy to assure that the tobacco industry loses in court. Additionally, others who have contributed to the demise of American health due to tobacco, including the government and smokers themselves, will be allowed to escape responsibility. The state of Florida, in particular, will never be held responsible for its personal status as a one-time manufacturer of cigarettes.

The Act would also fail in its attempt to cure the health crisis that the tobacco industry has allegedly created through its sale of a hazardous product. Florida's complaint demands that the tobacco industry pay for

200Florida Complaint, supra note 3.
cigarette-related diseases because they have been receiving a "windfall." The complaint also asks for injunctive relief so that the industry must demote their products through public education of the connection between smoking and poor health. However, the state does not demand the industry change its product. Thus, the vicious circle would continue indefinitely. Cigarettes will still pervade the consumer market: people will buy cigarettes, people will become addicted, these same people will eventually acquire cigarette-related illnesses, the tobacco industry will be charged with responsibility for their medical expenses, and the taxpayers will end up paying for it. This cycle will not help people to become healthier. Thus, Florida's Act will fail in its supposed attempt to help the finances and health of its citizens.

**IMPACT**

The Florida statute is not about who should and should not be liable. The state claims that it is about the health of Florida citizens. But when all the facts are reviewed, it becomes clear that the statute is really about money. This statute does not make tobacco illegal. Thus, people will continue to smoke as they always have. Additionally, states will continue to capitalize off of the economic benefits of the tobacco industry. Governor Chiles himself recently proposed a tax increase of ten cents per box of cigarettes. He reasoned that Florida would make an extra $121 million a year. If the governor had any intention of improving the citizens' health by reducing smoking, he certainly would not be expecting such a large financial outcome from such a proposal. Thus, the governor anticipates continuing to capitalize off of an industry that he also wishes to penalize. At the same time, he will be reimbursed for past smoking-related Medicaid expenses, essentially re-routing the financial windfall to the State as opposed to a legitimate industry.

Although Florida's enabling legislation may help them to win a legal battle against the tobacco industry, the battle will still not be smooth sailing. The state will have to spend a significant amount of government

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231*Id.* at ¶ 46.
232*Id.* at ¶ 79.
234*Id.*
money on legal fees. Although the state has clearly obtained a legal advantage, the industry will continue to utilize as many procedural tactics as it did in past cases against individual smokers. These tactics date back to 1954, when the first wave of tobacco litigation began. The industry as a whole paid damages in only two cases during a forty year period. Although some commentators say that individual states and their resources may be able to finally break the industry's chain of legal success, states can hardly be said to be on equal financial footing with the multi-million dollar tobacco industry. If states are complaining that they are having trouble paying for the medical bills of Medicaid recipients, enormous legal fees will make it even harder for states to keep their finances afloat.

Since Florida's legislation is the most enabling of state actions throughout the country, the fact that it has survived constitutional attacks is likely to be significant for pending litigation in the other states. By refusing to review this case, the United States Supreme Court has essentially condoned one-sided litigation as well as punishment of a legal industry. This may set a trend of enormous state settlements similar to the one Florida was able to obtain. Even the states without enabling legislation that have modeled their complaints after the cause of action outlined in Florida's Act may prevail in court. Passage of acts like Florida's will create a landscape of hostility toward the tobacco industry and could effect decisions of juries. This landscape has already been demonstrated by the proliferation of lawsuits filed by states against the industry. Success of these lawsuits may also lead to a new wave of litigation between individual plaintiffs and the industry. This time the plaintiffs may be the ones to enjoy successful lawsuits.

The hostile landscape this legislation is likely to produce will also create interstate, as well as intrastate controversy among state officials. One example is the current legal dispute between Mississippi Attorney General Mike Moore and Mississippi Governor Kirk Fordice, government officials who are on opposite ends of the battle. Also, if the various states prevail, the industry has the potential to file for bankruptcy. This will create a commercial handicap for those agriculturally-oriented states which still produce tobacco.

205 Fordice v. Moore, Petition for Writ of Mandamus and Prohibition and for Declaratory Judgment (Miss Sup. Ct. Filed Feb. 16, 1996) available in LEXIS.
Legislation like Florida's also paves the way for other industries to face liability for reasons beyond health problems caused by a particular product. If a legal battle between a state and an entire industry can make it through the trial stage, any corporation may be prime for attack. As one Philip Morris attorney eloquently stated, "Tobacco is the politically incorrect product today. Once you extend the law this far ... who's to say what you'd do at a later date with the next politically incorrect product."\textsuperscript{206} Although Governor Chiles declared that the tobacco industry is the only entity that would be attacked through the Medicaid Act, the language of the statute is not set up that way. The legislation refers to any third party, which means all corporations are subject to future attack.\textsuperscript{207} Legislation such as this will elicit concern among all large corporations across the country.

In general, the legislation appears to be an unfair attempt to punish the tobacco companies. However, cigarettes have been around for over 400 years and are legal around the world. If there is to be a change, it needs to start with Congress. Tobacco companies should not be punished for selling a perfectly legal product. If the Surgeon General feels strongly enough that nicotine is addictive, and not merely habitual, then action should be taken at the federal level. Tobacco companies should not be the only entities responsible for researching the adverse health effects of cigarettes. Additionally, they should only be responsible for disseminating as much information as is required of them by the legislature. It is ridiculous to expect an industry to tell the public NOT to buy their product.

Essentially, states could have started their campaign to save money on cigarette-related Medicaid expenses a long time ago by advertising against cigarette smoking themselves. They also could have spent their time and money more wisely by making it illegal to smoke in all public places. Much of society smokes on a social basis and this would cut smokers' habit fairly fast. A change in federal legislation, as opposed to an aid for states in fighting legal battles, will represent the country as a whole, without wasting the states' resources and saving the tobacco companies from having to litigate for an indefinite number of years.

\textsuperscript{206}State AG Asks Court to Sanction Tobacco Firms for "Frivolous" Suit, 4 Health Care Pol'y Rep. (BNA) No. 21, at D-39 (May 20, 1996).
\textsuperscript{207}205 FLA. STAT. ch. 409-910 (West 1997).
CONCLUSION

Florida's Medicaid Third Party Liability Act is unfair, ineffective, and has many Constitutional deficiencies. The Florida Supreme Court should not have allowed the Act to pass judicial scrutiny as legally sound. Although the court did acknowledge that it anticipated many constitutional issues upon application, a declaration of facial constitutionality severely injures the tobacco industry. The state is practically guaranteed success in court. Had the United States Supreme Court agreed to review this case, it could have prevented Florida, and the rest of the country, from gaining reimbursement for medical expenses which the nation continues to support by purchasing its products.