



Suing Your Way to Fiscal Fitness

by Amy K. Frantz

To deal with economic downturns and budget crunches, many states have turned to what they see as easy targets to increase revenue. Rather than take the unpopular route of raising taxes, states have chosen “Taxation Through Litigation,” says Robert A. Levy in his chapter of *POLITICS, TAXATION, AND THE RULE OF LAW*, a new book available from Public Interest Institute.

When faced with increasing Medicaid costs, three dozen states decided that targeting the tobacco industry would be a politically painless way to increase revenue. Elected officials found that suing an unpopular industry was much easier than increasing cigarette or other taxes or cutting back on benefits. The only problem was that, up to that point, the individuals who had sued the tobacco companies had been generally unsuccessful. Tobacco companies prevailed in lawsuits by disputing that tobacco was the cause of the individual’s health problems and showing that users of tobacco knew about and accepted the risk of smoking, thus were responsible for their own actions and the resulting consequences.

The states, however, had the advantage over individuals, in that states could simply change the laws that apply to such lawsuits. The state of Florida was the first state to follow this course, amending the Medicaid Third-Party Liability Act to go after the tobacco industry. Florida made two important changes in the law, tipping the scales against tobacco companies. First, the law was amended to allow causation to be proven using statistical analysis. In other words, the state did not have to provide the names of Medicaid recipients, whether the recipients actually smoked, or demonstrate that their illnesses were a result of smoking. They only had to disclose aggregate statistics for Florida Medicaid recipients as a whole.

Second, the Florida law was changed to remove any personal responsibility on the part of those Medicare recipients who did smoke. In the previous cases by individuals against tobacco companies, the industry defended itself by demonstrating that individuals who smoked knew about the risks and decided to use the product anyway. The state not only changed the law to eliminate this defense, it ensured it applied retroactively to illnesses caused by cigarettes sold decades earlier. Florida also persuaded a judge in the case to relieve it of any culpability in smokers’ illnesses. One tobacco company tried to show that the state shared in any responsibility for such illnesses by demonstrating that the Florida prison system had manufactured unfiltered cigarettes in the 1970s, providing them at no charge to inmates and selling them to local governments to raise revenue. The judge, however, ruled this evidence as inadmissible. With its hands so tied, it is no wonder that the tobacco industry settled with the states.

The states’ success against the tobacco companies spurred a search for new industries to target, with one of the most popular being the gun industry. This time, lawsuits asked not only for

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monetary damages, but for industry changes such as improved safety features and distribution of the products. Not only were governments pushing for taxation through litigation, they had now moved into legislating through litigation. If elected officials believe a majority of their constituents support tough gun laws, why not just pass them instead of filing lawsuits against gun manufacturers?

Lawsuits against the gun industry followed the litigation formula used successfully against the tobacco companies. Elected officials chose to use the courts to promote their goals of raising revenue and pushing industry change. Contingency-fee attorneys were employed to carry out these suits, many of whom are major donors to the elected officials behind the lawsuits. And lawsuits were filed in numerous jurisdictions, increasing the cost to the industry in hopes of forcing a settlement. The Clinton Administration's Department of Housing and Urban Development even joined the cause against the gun industry, threatening to file claims on behalf of more than 3,000 public housing authorities asking the gun industry to help defray the cost of security guards and other measures to restrain violence in public housing.

The five claims against the gun industry that have reached final judgment have all been fully or partially dismissed. But Levy predicts that eventually a sympathetic judge will put personal policy preferences before the law, opening a potential floodgate of lawsuits against various industries, holding manufacturers responsible for the criminal actions of their customers.

Levy warns that if nothing is done to curb baseless, state-sponsored lawsuits against industries such as tobacco, gun manufacturers, lead-based paint, and others, they will continue to be the act of choice by government officials, choosing to use the courts to avoid the political risk of passing unpopular taxes or Legislation. If unchecked, our tort system will become a tool for extortion, and will "profane the rule of law and debase personal freedom," concludes Levy.

This Institute Brief is one in a series on the chapters of a recently-published book, POLITICS, TAXATION, AND THE RULE OF LAW, edited by Dr. Don Racheter, President of Public Interest Institute, and Dr. Richard Wagner, Economics Professor at George Mason University and Chairman of the Institute's Academic Advisory Board. POLITICS, TAXATION, AND THE RULE OF LAW looks at the balance between providing government with the power to operate while preserving and protecting our rights of person and property.

The author of this chapter of POLITICS, TAXATION, AND THE RULE OF LAW is Robert A. Levy of Cato Institute in Washington, D.C.

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