What Liggett Got in Return

By ACSH Staff — April 1, 1997

After the Liggett Group announced a settlement last month of the Medicare reimbursement suits brought by 22 states, a press release from the American Cancer Society reflected the near universal response of the public health community: This action "will significantly advance [our] goals for curtailing the death and disease caused by tobacco use." After all, the health advocates argued, not only was Liggett breaking ranks with the industry by admitting that cigarettes cause disease, are addictive, and are peddled to kids, but Liggett was also planning to pay compensatory damages to the states.

Have we all died and gone to smoke-free heaven? Let's get real.

First, we health advocates have a long history of declaring victory over tobacco only to wake up later to find we've been hoodwinked. Second, there's some fine print and a little known addendum to the Liggett deal that suggest there are no health gains here at all. We may, in fact, have been outflanked again. Third, it is disquieting to assume that the Liggett settlement may well represent the prototype for a coming deal involving the rest of the industry.

A Protective Label

The tobacco industry has managed to make lemonade out of every regulatory lemon we've handed them for the past 40 years. For example, the congressionally mandated health warning label considered a public health victory in 1965 has proved over the years to be an invaluable legal asset for the tobacco companies. The label protects them in lawsuits by relieving them of their responsibility to give more detailed health warnings to consumers.

The 1971 congressional ban on tobacco ads on radio and television was also celebrated in public health circles. But that ban triggered the elimination from the airwaves of government mandated anti-smoking ads, enabling the industry to divert all those freed up electronic advertising dollars into magazines, newspapers and special promotions. In the public health struggles with tobacco, we seem to win the battles but lose the wars.

Here's what Liggett gave in the deal: a public admission of cigarettes' health consequences (which came as no surprise to anyone); court access to internal industry documents (which may well prove useful); and 25% of Liggett's pretax income, fully tax deductible, for 25 years.

What did Liggett get in return? One might be excused for assuming only immunity from current and future public lawsuits related to the recouping of Medicare and Medicaid costs in those 22 states. But there's a little known link to this settlement: a decision handed down the same day by a judge in Mobile, Ala.

In his ruling on a class action suit against Liggett, Judge Braxton Kittrell exempted Liggett from all
litigation, public and private, nationwide, by barring consumers from opting out of class actions to pursue individual litigation against the company. By what authority did an Alabama judge make such a broad ruling? He utilized the Full Faith and Credit Clause of the Constitution, which requires states to respect each other's legal decisions. (There are those, including Richard Daynard, a professor at Northeastern University Law School, who term this judicial ruling "shaky.")

So it's no wonder that shares of Brooke Group, which owns Liggett, soared after the settlement: Liggett's value is enhanced by the company's having won a fresh coating of legal Teflon to repel any and all sticky litigation. After paying a modest fee, Liggett will be free to market itself for acquisition and will return to business as usual selling cigarettes. Where are the health benefits here?

The U.S. tobacco industry faces threats from proposed FDA regulation and from litigation. But the only thing that really spooks the cigarette makers is the specter of private lawsuits. The FDA has never proposed an outright ban on cigarettes, and the industry knows it can easily circumvent any regulation the FDA might enact.

Similarly, the state suits seeking to recoup the publicly financed costs of tobacco-related diseases are not of overwhelming concern to the industry. The industry will argue, perhaps successfully, that a 55 year old patient dying of cigarette related lung cancer might instead have become a 75-year old in need of 10 years in a nursing home at public expense if he hadn't been a smoker. The industry might even take the ghoulish position that the patient's premature death from cigarette smoking eliminated years of Social Security payments and so saved the government money. The state suits generally turn on these complex economic arguments, and the suits' outcomes are unpredictable partly because attempting to quantify the societal cost of smoking baffles even the most seasoned economists.

The private lawsuits are the real and immediate threat. On the day a Jacksonville, Fla, jury awarded $750,000 to a lung cancer patient in August 1996, the stock prices of Philip Morris and RJR Nabisco dropped 14% and 13%, respectively, even though the case involved neither company directly. The Florida verdict suggested that the protection afforded by the 1965 warning label legislation is starting to wear thin.

Salving Cigarette Makers

Thus, it is highly likely that the rest of the cigarette makers are salivating over the prospect of an all industry, Liggett like deal: a deal that will require disclosures and relatively modest, tax-deductible payments, but that will offer immunity from litigation, and thus assure a surge in stock values and future prosperity from continued cigarette sales.

The interests of the public health community should be in nixing such a settlement. If future juries should find cigarette companies guilty of fraud, deception, or failure to warn, the decisions could trigger a cascade of events none of which would require government regulation that could lead to a natural decline in the prevalence of smoking in America. The outcome could include higher cigarette prices (reflecting the industry's passing on its increased costs to consumers), as well as new and aggressive attempts to develop a safer cigarette and restrict advertising and sales to children two courses cigarette manufacturers would surely embrace to shield themselves from
more private litigation.