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April 12, 1995

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FEDERAL EXPRESS

Robert T. Farley, Esq.
Deputy Attorney General
State of New York
Department of Law
The Capitol, Room 218C
Albany, New York 12224

Dear Bob:

Sharon Portnoy forwarded to me the correspondence Attorney General Vacco recently received from Richard Daynard and Graham Kelder of the Tobacco Product Liability Project urging the Attorney General to undertake litigation against the tobacco industry to obtain payment of health care costs. As you know, I represent Philip Morris and other tobacco companies with respect to tort and product liability matters, and have closely followed health care liability litigation and legislation since the issue first arose last year. Sharon asked that I write and respond to a few points raised in the Daynard/Kelder letter, in order to supplement the information I provided several weeks ago to you and Attorney General Vacco. (For your convenience, a copy of my earlier letter is enclosed.)

The gist of the Daynard/Kelder letter is that a Mississippi court has handed down a landmark decision that should give encouragement to other states considering a lawsuit against the tobacco industry like that which the Mississippi Attorney General is pursuing. This simply is not correct, and in fact the Mississippi litigation instead points out all of the problems with a lawsuit of this kind.

When Mississippi Attorney General Moore filed his lawsuit, he did so without the advance knowledge or approval of Governor Kirk Fordice. He hired a band of contingency fee personal injury lawyers, and suggested that the suit would cost Mississippi nothing, because the state's fortunes in the lawsuit had been turned over completely to these bounty hunters, who would bear the costs of the litigation. He also filed suit in a state chancery court, rather than a more appropriate court of law.

Among the first actions of the defendants was the filing of motions to transfer the case to a state circuit court and for judgment on the pleadings. Both of these issues had been raised by the defendants as affirmative defenses in their answers to the complaint. Governor Fordice filed an amicus brief in support of the latter motion, because of his strong feeling that this lawsuit was misguided and could only harm Mississippi's economy, by sending a message to the business community that the state would seek to fund governmental programs through far-fetched litigation against companies that provide goods and services to Mississippians.

The February 21, 1995 decision referred to in the Daynard/Kelder letter provided the court's ruling on the defendants' motions, though without any explanation of the court's reasoning. The court ruled against the defendants, and at the time granted the state's motion to strike the affirmative defenses "disposed of by the ruling" on the defendants' two motions. In other words, the court struck the defendants' affirmative defenses that the chancery court lacked jurisdiction and that the complaint failed to state a claim.

That is all the court did. It said nothing about the numerous other affirmative defenses raised by the defendants, including defenses such as assumption of risk, comparative fault, and others. The viability of these defenses has not been briefed or argued, and these matters are not presently before the court.

The Mississippi lawsuit rests upon a collection of legal theories that the Attorney General seeks to apply in a novel manner. The first decision of the chancery court on early motions provides scant guidance for anyone. But the lawsuit itself should send a strong message to other states to avoid cases of this kind.

First, the option of a chancery court exists only in Mississippi -- all other states have done away with the law/equity distinction. Other states should not expect judges who are more constrained by legal precedent to rule -- entirely without explanation -- in the same way the court in Mississippi did on these preliminary issues.

Second, these cases are becoming disturbingly political. They are not about justice, righting wrongs, or consumer protection. Rather, they are the brainchild of a group of plaintiff's lawyers who have worked their way through other industries, exhausting them and depleting their resources while providing little to the "victims" and fortunes to themselves. Now they have turned their focus on tobacco, today's unpopular target. These lawyers have succeeded in persuading four attorneys general of the political party they generally have supported to let them chase after a new pot of gold, even though the states will get little or nothing from the litigation.

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Take Mississippi. Seventy-nine percent of any recovery must go to the Federal government, and the state must pay at least half of any contingency fee out of its remaining 21%. It also must cover the inevitable costs of state agencies that support the state's case, costs Attorney General Moore ignores, dismisses, or says the contingency fee lawyers will pay. But this claim is absurd. Where will the data to support the state's claim of injury come from if not from the state health agency? And what is the quality of the available data? In other states it has been suggested that the state will spend tens of millions of dollars developing the information necessary to support a claim like Mississippi's.

All of this suggests that Mississippi may lose money on its lawsuit, even if it "wins." And this says nothing of the concern raised by Governor Fordice, which is too easily dismissed by proponents of this kind of lawsuit or of legislation of the kind passed by Florida. I have personally spent a great deal of time this spring dealing with Florida-style legislation in other states. So far not one state has followed Florida, and the Florida Senate Commerce Committee approved legislation two weeks ago that would repeal the bill passed last year. In every state where the issue has arisen, a united business community has opposed these bills, even when they apply only to tobacco. If these lawsuits work against tobacco, tomorrow the theories they use could be turned on makers of alcohol, automobiles (on the theory that cars pollute), power companies (either because their lines emit radiation or their power plants cloud the atmosphere), and so on. Governor Fordice is correct – Mississippi-style suits and Florida-style legislation send a bad message to business, and business plainly is getting that message.

I have gone on too long. My basic point is that Mr. Daynard and Mr. Kelder place far too much meaning on an early decision in a case that is not at all analogous to one that most other states might bring. They are staunch advocates of using litigation to put the tobacco industry out of business, and they are not troubled with the implications with any legal theory, so long as it hurts tobacco companies. Such a narrow view is one, happily, which most attorneys general avoid.

Please let me know if I can provide additional information.

Sincerely yours,

Keith Teel/RMR

Keith A. Teel

KAT/rmr

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