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HIGH MORAL GROUND IN LAWSUITS
AGAINST TOBACCO COMPANIES?**

by

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The defining question in many civil and criminal legal actions is “What did he/she/they know and when did they know it?” In the current litigation between the several states and tobacco companies, the question is “What did the tobacco (cigarette) manufacturers know about cigarette smoking as a health hazard and when did they know it?”

The same question(s), however, could be asked of the individual smoker and the responsible state health bureaucracy. In cases where individuals sue tobacco companies for alleged health problems due to smoking, the courts have generally held the individual responsible on the grounds that he/she was aware or should have been aware of the health risks involved. In this regard, The U.S. Surgeon General in 1964 warned that cigarette smoking was a cause of cancer in men and possibly in women. In 1965, Congress required labels on cigarette packs -Caution: Cigarette smoking may be hazardous to your health. And in 1967, a Surgeon General report concluded that smoking was a principal cause of lung cancer.

In 1970, cigarette advertising was banned on radio and TV while a stronger health warning was required on cigarette packages. In 1990 smoking was banned on U.S. domestic airline flights. And in 1991 the federal cigarette excise tax was increased to 20 cents/pack and two years later further increased to 24 cents/pack.

With respect to the tobacco companies, the relevant question is again what did they know about the relationship between smoking and health and when did they know it? But could not the same question be asked of the several states, including the State of South Carolina? If individuals are held to be aware of the risks of smoking, is it not fair to point out that responsible state officials should also have been aware of the hazards involved? (A more recent issue is whether cigarette smoking is addictive and if so should it be considered a controlled substance?)

At last count, some 22 states, including South Carolina, had filed or were considering filing lawsuits against the major tobacco companies seeking to recoup the millions of dollars spent for smoker’s Medicaid bills. But are these states on the high moral ground? Did they not have a paramount interest in determining the validity of, and acting upon, the Surgeon General’s warnings? Unlike individuals, the states not only had a duty but more important, the resources to investigate the issue. There is a saying as old as the common law itself, “When one seeks equity, come before the court with clean hands.” In this respect, it is no defense to argue that South Carolina and other states

were fulfilling their responsibility by deferring action to the federal government. In many instances, states have gone beyond federal requirements and warnings about safety and health issues. For example, a number of states have stricter air pollution and water quality standards than those mandated by Washington.

As to possible reasons why South Carolina was unwilling to independently pursue the relationship between smoking and health, two are suggested here. First, South Carolina is a tobacco growing state. A sustained investigation to determine the relationship between smoking and health would hardly be a vote getter among a large part of the agricultural community. Second, South Carolina was and does collect taxes on tobacco products, principally cigarettes. In FY 1963-64, South Carolina collected over \$12 million in tobacco taxes. In 1987-88, the highest tobacco tax revenue year, the take was \$30.6 million. Between 1962-63 and 1995-96, the state received approximately \$795 million in tobacco tax revenues. While South Carolina's tax on cigarettes (2.4 mills per cigarette in 1964 and 3.5 mills in 1998) is modest in comparison to some jurisdictions (Washington, D.C. has a \$6.50 per carton cigarette tax, the state of Washington a 82.5 cents per pack tax) it is nonetheless revenue from a tainted source as inferred in the briefs filed against tobacco companies. Put another way, South Carolina and other states are seeking punitive damages caused in part by their own misconduct and/or negligence.

It is hardly becoming a state that prizes state's rights and individual and local government responsibility, to assert that it is an exclusive federal function to determine what is or is not a health risk to the citizens of South Carolina. In football, piling on after a play is dead is disciplined by the referee. In the case cited here, the only restraint is that South Carolinians are better people than that.

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