

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

**PHILIP MORRIS, INCORPORATED, BROWN &
WILLIAMSON TOBACCO CORPORATION,
LORILLARD TOBACCO COMPANY, and R.J.
REYNOLDS TOBACCO COMPANY,**

Plaintiffs,

vs.

**BRUCE BOTELHO, ATTORNEY GENERAL OF
THE STATE OF ALASKA, in his official capacity,**

Defendant.

Case No.
ABA No. 6903004

January 8, 1997

**COMPLAINT FOR
INJUNCTIVE/DECLARATORY RELIEF**

1. This action seeks a Judicial declaration, pursuant to the Federal Declaratory Judgments Act, 28 U.S.C. 2201 *et seq.*, that a lawsuit imminently threatened by Defendant against Plaintiffs purportedly to recover certain Medicaid payments made by the State of Alaska (the "Threatened Law Suit") violates Plaintiffs, right. under the United States. Constitution and Federal statutes. Plaintiffs also see injunctive relief barring Defendant from proceeding with the Threatened Lawsuit.

2. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§1331, 1343 and 1367. venue is proper in this district under 28 U.S.C. §1391(b).

PARTIES

3. Plaintiff Philip Morris Incorporated, manufacturer of cigarettes, is a Virginia corporation whose principal place of business is 120 Park Avenue, Now York, New York 10017.

4. Plaintiff R. J. Reynolds Tobacco Company" manufacturer of cigarettes, is a New Jersey corporation whose principal place of business is 4th and Main Street Winston-Salem, North Carolina 27102.

5. Plaintiff Brown & Williamson Tobacco Corporation, a manufacturer of cigarettes, is,

a Delaware corporation whose principal place of business is 1500 Brown & Williamson Tower, Louisville, Kentucky 40202.

6. Plaintiff Lorillard Tobacco Company, a manufacturer of cigarettes, is a Delaware corporation whose principal place of business is One Park Avenue, New York, New York 10016.

7. Defendant Bruce Botelho is the Attorney General of the State of Alaska.

BACKGROUND

8. Defendant is preparing to bring the Threatened Lawsuit in an attempt to exact hundreds of millions of dollars from Plaintiffs, which are cigarette manufacturing companies that are incorporated or have their principal place of business outside of Alaska. Upon information and belief, it is the theory of the Threatened Lawsuit that, under novel and unsupported theories of state law, Plaintiffs should be required -- both retroactively and prospectively -- to pay for Medicaid payments made by Alaska on behalf of certain Medicaid-eligible residents. Defendant seeks to impose *this* extraordinary liability upon Plaintiffs without regard to established principles o' law demonstrating that Plaintiffs may not be subjected to such liability. Moreover, through the Threatened Lawsuit, Defendant seeks to evade long standing principles of Federal law that establish how an when recovery of Medicaid payment. may be had from third parties.

9. On information and belief, the Threatened Lawsuit seeks to hold Plaintiffs liable to the State of Alaska for the cost of past, present, and future medical assistance provided to various people in Alaska, including Medicaid, payments, funded in part by the State of Alaska pursuant t the Federal Medicaid program established under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.* Upon information and belief, the Threatened Lawsuit will assert that the State of Alaska, in its own right, is entitled to recover payments to Medicaid recipients from Plaintiffs (I) on a retroactive basis, (ii) on a "mass", or aggregate basis independent of any purported claims that individual Medicaid recipient. might possess against Plaintiffs, (iii) without regard *to* some or all elements of proof that Medicaid recipients would be required to establish in any clad against Plaintiffs, including, without limitation, proximate causation, and (iv) in abrogation of the traditional affirmative defenses available to Plaintiffs in claims b Medicaid recipients. Through the Threatened Lawsuit Defendant purports to single out one category of out-of-state manufacturers to impose

on them an unprecedented and devastating financial burden greatly impeding the channels of interstate commerce as to an entirely lawful product.

10. On December 20, 1996, Defendant solicited selected law firms to submit proposals to represent the State in initiating the Threatened Lawsuit. A copy of Defendant's letter (obtained directly from Defendant as the final draft of the letter to be sent as the RFP) is attached as Exhibit 1 hereto. The letter states that the State, a lawsuit will be "similar to actions brought by several other states and counties to include recovery of damages for illegal conduct, state costs to treat smoking-related illnesses (States, share of Medicaid costs) and to enjoin tobacco companies from future unfair conduct and practices." Ex. 1 at 1. Defendant's letter calls for proposals to be submitted by the law firms by January 10, 1997, and indicates that the selection of the law firm to represent the State will be made by the end of January 1997. .

11. In the past two years, lawsuits similar to the Threatened Lawsuit have been brought by Attorneys General of the following states (and in California by several counties): Florida, Mississippi, Minnesota, West Virginia, Massachusetts, Louisiana, Texas, Maryland, Washington, Connecticut, Michigan, Arizona, Kansas, New Jersey, Utah, Illinois and Oklahoma. In each of those lawsuits, the Attorney General has sought to impose liability retroactively in the Minnesota case, all the way back to 1977 -- and have taken the position that liability may be imposed on Plaintiffs without regard to whether any individual Medicaid recipient would have any claim against them.

12. The Threatened lawsuit contravenes the third-party recovery provisions of the Federal Medicaid program established by Federal statute, and regulation and violates basic principles of constitutional law under the United States Constitution. Plaintiffs are entitled to injunctive relief which bars the Defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit" as well as a declaration that the Threatened Lawsuit violates Plaintiffs, Federal constitutional and statutory rights.

13. Congress struck a careful balance in the Federal Cigarette Labeling and Advertising Act of 1965 and its successor, the Public Health Cigarette Smoking Act of 1969, between (i) recognizing the importance of cigarettes to our national economy and the economies of tobacco growing and manufacturing states by facilitating the sale of cigarettes in interstate commerce; (ii) providing that a warning label be

placed on each package of cigarettes; and (iii) allowing individual customers to exercise their personal freedom of choice to smoke or not to smoke. Congress mandated that warning label be placed on all cigarette packages sold in the United States, but also provided that cigarette packages so labeled could be sold in the United State, free of all state "requirements or prohibitions", based on smoking and health with respect to, *inter alia*, the promotion of cigarettes. In enacting these statutes, Congress expressly stated as one of its purposes that "commerce and the national economy . . . be protected to the maximum extent consistent with [the] declared policy" of "adequately inform[ing] [the public] that cigarette smoking may be hazardous to health." 15 U.S.C § 1331. Subsequently, the Supreme Court has expressly recognized that lawsuits seeking damages, such as the Threatened Lawsuit here, constitute "requirements or prohibitions," by the states within the meaning of these Federal statutes. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)

14. Innumerable factors may contribute to the costs of Medicaid: unhealthy foods; handguns; alcohol; automobiles; random (and often reckless) individual choices such as driving over the speed limit; inefficiency and/or corruption in the federal or state system; the pervasiveness of air pollution; and so on. Moreover, myriad business decisions and government policies that make individuals unable to rise economically above the Medicaid level contribute substantially to the costs of Medicaid -- for example, lack of jobs, low wages, plant closings, and loss of employment that leaves former employee, unable to pay their own medical bills. Defendant's attempt to impose the massive costs of the Medicaid program upon out-of-state cigarette manufacturers without regard to established tort law principles and defenses is arbitrary and violates the United States Constitution.

15. Moreover, notwithstanding the publicly articulated views of many going back a century or more that smoking tobacco is injurious to health, cigarettes have expressly been sanctioned as an article of interstate commerce; have been regulated, but not prohibited; and have been utilized as a revenue producing vehicle both by the United States Government and the individual states, including Alaska.

16. The State of Alaska itself sells or has sold cigarettes, licenses every seller of tobacco products , and collects millions of dollars in excise and other taxes from the sale of such products. Indeed, in 1995 alone, Alaska generated \$15.8 million in revenue from .state cigarette excise taxes, and

Alaska has, since 1972, generated over \$189 million in state cigarette excise taxes. Alaska's retroactive attempt to shift the burden of Medicaid costs to out-of-state manufacturers of a lawful product that the State has for many years countenanced, regulated and from which it has generated enormous revenue through taxation is unlawful.

17. The potential impact of the Threatened Lawsuit on interstate commerce is enormous and far reaching. The Threatened Lawsuit (like the other similar lawsuits in other states) seeks unlawfully to impede interstate commerce in cigarettes. While the individual states could not constitutionally legislate this result directly, these lawsuits attempt to shift retroactively the massive costs of the Medicaid program to Plaintiffs and arbitrarily to impose on Plaintiff's the massive ongoing costs associated with those programs.

18. Even if the provisions of Alaska law relied upon Defendant were construed to apply only prospectively, they would still (as otherwise interpreted by Defendant constitute an improper and illegal burden on interstate commerce by imposing the massive ongoing costs of Alaska's Medicaid programs upon the Plaintiffs. In light of the inherent mobility of the American population, the constitutional right to travel, and the ability to purchase cigarettes in other states, Plaintiffs lack any opportunity to insulate themselves from the draconian liability sought to be imposed by Defendant (or the other states in which Attorneys General have brought suit).

THE FEDERAL MEDICAID PROGRAM

19. By virtue of the Threatened Lawsuit, Defendant seeks to recover from Plaintiffs payments made by Alaska under the program established under Title XIX of the Social Security Act, commonly known as the Medicaid Act, 42 U.S.C. §1396 *et seq.* Under the Medicaid Act, participating states receive financial assistance for administering a medical treatment program in accordance with the requirements of a comprehensive federal scheme set forth in the Medicaid Act and regulations promulgated thereunder.

20. Under the Medicaid Act, no state is obligated to participate in the Medicaid program. However, states that choose to participate in the Medicaid program, and thus who seek to become eligible for federal funding, must develop a state plan that conforms with the comprehensive federal requirement.. The state plan must be approved by the United States Department of Health and Human

Services. 42 U.S.C. §§ 1396 (a), 1396(c) Alaska has chosen to participate in the federal Medicaid program.

21. Because the United States government provides the major source of funding for the Medicaid program, the Medicaid Act and the regulation. promulgated thereunder establish a detailed and comprehensive system for obtaining reimbursement of monies paid out under the Medicaid program from their parties liable for their payment. These statutory and regulatory provisions apply to, and limit, any effort by the State of Alaska to obtain reimbursement from third parties of monies paid out under the Medicaid program.

22. Under the Medicaid Act and the regulations thereunder, a state Medicaid plan must ensure that each recipient assigns to the duly designated state Medicaid agency his or her rights to payment for medical care from any third party. *See* 42 U.S.C. §§ 1396(a)(45), 1396 (k); 42 C.F.R. §§ 433.145-148. The designated state agency, as the assignee of those rights, is then obligated to take reasonable measures to determine the legal liability of third parties to pay for services furnished under the Medicaid program to such recipient, and to fulfill the requirements of the Medicaid Act and regulation. with regard to obtaining reimbursement from third parties liable to pay for such services. *See* 42 U.S.C. §1396(a)(25); 42 C.F.R. §§ 433.135-148.

23. These Medicaid provisions authorize a state to seek reimbursement for Medicaid payments from third parties only on the basis of rights obtained from an individual Medicaid recipient through the assignment/subrogation process require. by the Act and accompanying regulations, subject to all. traditional elements of proof and affirmative defenses. For example, in addition to the assignment/subrogation provision described above, the Act and regulations impose an express duty upon Medicaid recipients to assist the State in the prosecution of third party claims, including releasing the medical records to the State and appearing in court as witnesses if needed, and establish detailed provision's regarding the determination of paternity obligations and recovery against out-of-wedlock fathers. *E.g.*, 42 C.F.R. §433.1247. The Act and regulations also provide that, should the state obtain reimbursement from a liable third party, this recovery must be shared with the federal government under specified terms and that all amount, recovered in excess of the actual Medicaid expenditures on behalf of the recipient be remitted to the recipient. *E.g.*, 42 C.F.R. §433.154.

24. It is plain from the face of the

Medicaid Act and applicable regulations -- and is confirmed by the actions of the state and federal agencies for over 30 years in administering this Act -- that reimbursement for Medicaid expenditures can be made only through suit. to recover such expenditures from insurers or other third parties who are liable to individual Medicaid recipients. Nothing in the comprehensive federal scheme established by the Act and regulations authorizes mass lawsuits against an industry on any theory, much less a lawsuit like the Threatened Lawsuit whereby the State seeks to impose liability without proof of: any elements of an individual Medicaid recipient's legal claim and without being subject to some or all of the defenses applicable to an individual recipient's legal claim; nor has any such suit been authorized by the United States Department of Health and Human Services, the federal agency responsible for administering the Medicaid Act and regulations.

25. Under the Medicaid regulations, "[i]f the agency, learns of the existence of a liable third party after a claim is paid . . . the agency must seek recovery of reimbursement within 60 days after the end of the month it learns of the existence of the liable third party." 42 C. F. R §433.139(d)(2). Reimbursement by the state agency "must be sought unless the agency determines that recovery would not be cost effective. 42 C.F.R. § 433.139(d)(3).

26. If the pertinent agency of the state fails to fulfill these or any of the other requirements with regard to establishing liability and seeking reimbursement from third parties , the state will lose its right to federal financial participation in Medicaid payments. 42 C F.R. §433.140{a}(1). Yet, despite this severe consequence for failing promptly to seek reimbursement from a third party, and despite widespread and long-standing public allegations that smoking leads to increased health care costs, the State of Alaska has never before sought to recover a single Medicaid payment from a cigarette manufacturer, or to bring any lawsuit similar to the Threatened Lawsuit against any other third party purporting to sue in a capacity "independent" of the rights of actual Medicaid recipients.

THE ALASKA MEDICAID PLAN AND THE APPLICABLE STATUTORY PROVISIONS

27. Pursuant to the Alaska Medical Assistance Act, Alaska Stat. §§ 47.07.010 to 900, Alaska has chosen to participate in the federal Medicaid program. By accepting Medicaid funds, Alaska voluntarily assumed an obligation to comply with all federal requirements associated with the federal Medicaid program. Alaska statutory law

acknowledges the State's obligation to comply with the federal requirements *See* Alaska Stat. §§ 47.07.040, 47.07.050.

28. The state agency in Alaska responsible for administration of the Medicaid programs is the Department of Health and Social Services (the "Department"). Alaska Stat 47.07.010.

29. The Alaska statutory provisions governing third party liability with regard to Medicaid payments are, on their face, fully consistent with the federal statutory scheme described above. In particular:

(a) When medical assistance is provided to an individual under the Alaska Medicaid program, the Department is automatically deemed to be the assignee or subrogee of any rights of recovery that the recipient may possess against third parties. *See* Alaska Stat. § 47.07.025(a). This assignment takes place immediately upon the determination that a Medicaid applicant is eligible for Medicaid assistance. Alaska Statutes, § 47.05.070(b) provides:

If the department provides or pays for medical assistance for injury or illness under this title, the department is subrogated to the rights of the recipient of that medical assistance for any claim arising from the injury or illness and to the proceeds of an insurance policy covering the injury or illness to the extent of the value of the medical assistance provided.

This provision is consistent with, and implements, the federally mandated scheme set forth in 42 U.S.C. §§ 1396(a)(45), 1396(k), and 42 C.F.R. §§ 433.145-.148, whereby each Medicaid recipient is required to assign his or her rights against potentially liable third parties to the single designated state Medicaid agency, and this state agency is required to act a. assignee of those rights to seek third-party reimbursement. *See* 42 C.F.R. §' 433.138-140.

(b) Nothing in the Alaska Medicaid program permits the State to maintain an "independent cause of action" such as the Threatened Lawsuit. Rather, the Alaska program, like federal Medicaid law, provides only for the

duly designated state Medicaid agency to seek reimbursement from third parties via the assignment/subrogation mechanism mandated by federal Medicaid law.

30. Other provisions of Alaska law similarly contemplate that the State is obligated to seek reimbursement of Medicaid payments from third parties only via the assignment/subrogation scheme mandated by federal law. For example, the Department is authorized to garnish the "wages, salary, or other employment income of a person who (i) is required by a medical support order under Alaska Stat. § 25.27.063 to provide coverage of the costs of medical care to a child who is eligible for medical assistance under this chapter, (ii) has received payment from third party for the costs of the services, and (iii) has not used the payments to reimburse, as appropriate, the other parent or custodian of the child, the provider of the service or the department. *See also* Alaska Stat. § 47.07.0 (providing for recovery of medical assistance payments from the estate of an individual who received medical assistance payments).

31. The State Medicaid Plan that Alaska has submitted to, and that has been approved by, the United States Department of Health likewise is fully consistent with the federal scheme of obtaining Medicaid reimbursement described above. Nothing in the approved Medicaid Plan authorizes a lawsuit by the State "independent" of any right or cause of action assigned to it by an individual Medicaid recipient.

NEED FOR DECLARATORY AND INJUNCTIVE RELIEF

32. An actual controversy exists between Plaintiffs and Defendant with respect to the purported rights that Defendant seeks to assert in the Threatened Lawsuit. The Threatened Lawsuit and the provisions of Alaska law on which Defendant relies, as interpreted by Defendant, place into question Plaintiffs liability for past, present and future sales of their products in interstate commerce and (if held constitutional) necessarily affect Plaintiffs' business on a going-forward basis. Plaintiffs believe that the Threatened Lawsuit and the provisions of Alaska law on which Defendant is expected to rely are preempted by the federal Medicaid Act and regulations and are plainly unconstitutional if so applied. Plaintiffs are entitled to a declaration on this issue so that Plaintiffs' legal rights and any questions about their possible liability for past, present and future sales are resolved; and so that they may determine the effect that the claims in the Threatened Lawsuit and the provisions of Alaska law on which defendant relies

may have on their business and, if necessary take appropriate actions. In addition, the Threatened Lawsuit and the provisions of Alaska law on which Defendant relies, as interpreted by Defendant, raise the specter of massive and unprecedented liability. Plaintiffs are entitled to injunctive relief barring Defendant from bringing the Threatened Lawsuit.

FIRST CLAIM FOR RELIEF (Supremacy Clause; Medicaid Preemption)

33. Plaintiffs repeat and reallege paragraphs 1 through 32 hereof.

34. The Threatened Lawsuit contemplated by Defendant rests on provisions of state law, as interpreted by Defendant that purportedly entitle the State of Alaska to bring an action for reimbursement of Medicaid expenditures directly against Plaintiffs, not based upon the rights of affected Medicaid recipients but rather upon an alleged "independent cause of action" in favor of the State. According to Defendant, the purported provisions of State law also allow the Threatened Lawsuit to dispense with the traditional elements of proof affirmative defenses to which the rights of individual Medicaid recipients are subject, and to impose upon Plaintiffs unprecedented and retroactive liability for the State's own public obligations under the Medicaid program. Because the purported provisions of state law are not consistent with the comprehensive scheme of third-party recovery established by the federal Medicaid Act and regulations, which are intended to be and are, the exclusive means by which a state may obtain reimbursement for Medicaid expenditures, such state law provisions are preempted by federal law.

35. The asserted provisions of Alaska law on which Defendant bases the Threatened Lawsuit, moreover, conflict with the Medicaid Act and regulations in numerous specific respects including, but not limited to: (i) in allowing the State to sue in a capacity "independent" of the rights of individual Medicaid recipients, rather than pursuant to the assignment/subrogation procedures mandated by federal law; (ii) in allowing the State to bring a mass or aggregate lawsuit rather than a suit seeking reimbursement with respect to specific Medicaid recipients; (iii) in allowing the State to bring a mass or aggregate lawsuit against only those companies in a particular industry; (iv) in allowing the State to sue beyond the 60-day limitations period mandated by 42 C.F. § 433.139(d)(2); (v) in allowing the State to bring a lawsuit not authorized by the Alaska Medicaid Plan approved by the United States Department of Health and Human Services; and (vi) in permitting the

Attorney General to bring a lawsuit to recover Medicaid expenditures in violation of the "single State agency" requirement of federal law. These express conflicts provide a further basis establishing that the purport provisions of Alaska law on which Defendant relies are preempted.

36. Because the purported provisions of Alaska Law underlying the Threatened Lawsuit are inconsistent with and preempted by the Medicaid Act and regulations thereunder Defendant's attempt to enforce these provisions through the Threatened Lawsuit violates the Supremacy Clause of the United States Constitution, U.S. Const. Art. VI, cl. 2.

**SECOND CLAIM FOR RELIEF
(Supremacy Clause; Preemption Under the Public Health Cigarette Smoking Act of 1969)**

37. Plaintiffs repeat and reallege paragraphs 1 through 36 hereof.

38. In enacting the Federal Cigarette Labeling and Advertising Act of 1965 and its successor, the Public Health smoking Act of 1969, Congress struck a careful balance between (i) recognizing the importance of cigarettes to our national economy and the economics of tobacco growing and manufacturing states by facilitating the sale of cigarettes in interstate commerce; (ii) providing that a warning label be placed on each package of cigarettes; and (iii) allowing individual customers to exercise their personal freedom of choice to smoke or not to smoke. Congress required that the statement "WARNING: THE SURGEON GENERAL HAS DETERMINED THAT CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH" (or a variation thereof) be printed in a prominent place on all packages of cigarettes sold in the United States. In addition, Section 5(b) of the Public Health Cigarette Smoking Act of 1969 provided that "No requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes the package. of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334.

39. Congress expressly stated that one of its purposes for providing for uniform warnings and in preempting any other state law "requirements or prohibitions" as aforesaid was that "commerce and the national economy . . . be protected to the maximum extent consistent with [the] declared policy" of adequately inform[ing] [the public] that cigarette smoking may be hazardous to health." 15 U.S.C. § 1331. The Supreme Court has held that lawsuits seeking damage. constitute "requirement[s] or

prohibition[s]" by the states within the meaning of these federal statutes. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

40. The Threatened Lawsuit and the provisions of Alaska law upon which Defendant relies, as interpreted by Defendant, impose a "requirement or prohibition", based on smoking and health with respect to the promotion and advertising of cigarettes. As a result, the Threatened Lawsuit and the purported provisions of Alaska law underlying it are preempted by the Public Health Cigarette Smoking Act of 1969 and violate the Supremacy Clause of the United States Constitution.

**THIRD CLAIM FOR RELIEF
(Due Process)**

41. Plaintiffs repeat and reallege paragraph 1 through 40 hereof.

42. As interpreted by Defendant, the provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit entitle the State of Alaska to recover Medicaid payments from Plaintiffs without regard to some or all of the elements proof that any actual Medicaid recipient would be required establish to. recover medical costs from Plaintiffs, and some all of the defenses that Plaintiffs would have against any actual Medicaid recipient. Defendant seeks to impose this liability on Plaintiffs retroactively, based upon past conduct that the State has for many years countenanced and regulated and from which it has generated enormous revenue through taxation. In seeking to impose this massive and radical departure from established principles of law, Defendant has arbitrarily singled out the tobacco industry to the exclusion of numerous other products and activities that may contribute to the costs of Medicaid.

43. The provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant, are invalid under the Fourteenth Amendment to the United States Constitution in that, on their face and in the manner in which they are sought to be applied, these purported provisions deprive Plaintiffs of property without due process of law.

**FOURTH CLAIM FOR RELIEF
(Taking of Property)**

44. Plaintiff. repeat and reallege paragraphs 1 through 13 hereof.

45. The Threatened Lawsuit and the provisions of Alaska Law upon which Defendant

relies, as interpreted by Defendant by seeking to extract from cigarette manufacturers Medicaid payments retroactively and prospectively without regard to established legal principles and irrespective of any rights and defenses cigarette manufacturers would have against any actual Medicaid recipient, would have a potentially devastating economic impact upon Plaintiffs and greatly interfere with Plaintiffs' settled investment-backed expectations.

46. In bringing the Threatened Lawsuit, in reliance upon the provisions of Alaska law as interpreted by Defendant, the State, in essence, seeks to effectuate a confiscation of Plaintiffs' property.

47. The provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant, violate Plaintiffs' rights under the Taking of Property Clause of the Fifth Amendment to the United States Constitution which is made applicable to the states under the Fourteenth Amendment to the United States Constitution.

**FIFTH CLAIM FOR RELIEF
(First Amendment)**

48. Plaintiffs repeat and reallege paragraphs 1 through 47 hereof.

49. Despite the United States Surgeon General's conclusion in 1964 that smoking cigarettes is not an "addiction," Defendant will claim in the Threatened Lawsuit that Plaintiffs violated state Law by contesting the highly publicized assertions going back at least to the 1960s by certain government officials (including the Surgeon General in 1988), anti-tobacco groups, and others that nicotine, a substance found naturally in tobacco, is "addictive."

50. Plaintiffs have the right under the First Amendment to the United States Constitution to express their views on this public issue. State laws or action. may not constitutionally be used to stifle debate on controverted public issues so as to enshrine the government's side of a disputed issue as official orthodoxy, with any dissent being proscribed as "fraud." Nor may the state impose massive confiscatory penalties for Plaintiffs, expression of disagreement with the views of government. officials on this issue, with the monies extracted by the state being used to reinforce the state's views on this issue through anti-smoking programs and campaigns that are contrary to the views held by such manufacturers, who would thus be compelled to pay for speech with which they disagree.

51. The provisions of Alaska law upon

which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant would deprive Plaintiffs of their rights under the First and Fourteenth Amendments to the United State. Constitution.

**SIXTH CLAIM FOR RELIEF
(Commerce Clause)**

52. Plaintiffs repeat and reallege paragraphs 1 through 51 hereof.

53. The Threatened Lawsuit and the provisions of Alaska law upon which Defendant relies, as interpreted by Defendant, seek to impose an unprecedented and unconstitutional burden on interstate commerce by shifting to Plaintiffs a massive part of the State's own public obligations under the Medicaid program. Due to the massive ongoing costs that the Threatened Lawsuit and these purported provisions of Alaska law would impose upon Plaintiffs, Defendant's conduct in proceeding with the Threatened Lawsuit threatens severely and adversely to impact interstate commerce in the sale of cigarettes. Alaska, moreover, has sought to impose these massive costs on cigarettes -- a product manufactured outside the State of Alaska -- to the exclusion of numerous other products and activities that may contribute to the costs of Medicaid. In light of the inherent mobility of the American population, the Constitutional right to travel, and the ability to purchase cigarettes in neighboring states, Plaintiffs lack any opportunity to insulate themselves from the draconian liability sought to be imposed by Defendant.

54. The purported State law principles relied upon by Defendant as the basis for the Threatened Lawsuit constitute an improper interference by Alaska in interstate commerce : violation of the Commerce Clause of the United States Constitution, U.S. Const. Art. I, § 9, cl. 3.

**SEVENTH CLAIM FOR RELIEF
(Equal Protection)**

55. Plaintiffs repeat and reallege paragraphs 1 through 54 hereof.

56. Notwithstanding that there are myriad factors that may contribute to the costs of Medicaid, the provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant, arbitrarily seek to impose massive costs upon cigarette manufacturers retroactive: and prospectively without regard to established legal principles and irrespective of any rights and defenses cigarette manufacturers would

have against any actual Medicaid recipient.

57. The provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant, violate Plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

EIGHTH CLAIM FOR RELIEF
(Ex Post Facto and Bill of Attainder Clauses)

58. Plaintiffs repeat and reallege paragraphs 1 through 57 hereof.

59. The Threatened Lawsuit will seek to punish Plaintiff for past conduct that was totally lawful when undertaken. The constitutional prohibition against *Ex Post Facto* laws prevents the use of the political legislative process to punish past lawful conduct of private citizens.

60. The Threatened Lawsuit's goal would violate the *Ex Post Facto* Clause applicable to the states under Article I, Section 10 of the United States Constitution.

61. The Threatened Lawsuit would operate to punish single specific group of easily ascertainable members, *i.e.* cigarette manufacturers.

62. The Threatened Lawsuit would violate the Bill of Attainder Clause applicable to the states under Article I, Section 10 of the United States Constitution.

NINTH CLAIM FOR RELIEF
(Deprivation of Plaintiffs' Constitutional and Federal Law Rights under Color of State Law)

63. Plaintiffs repeat and reallege paragraphs 1 through 62 hereof.

64. Defendant has been acting in concert and with encouragement and substantial assistance of certain tobacco activists, Attorneys General in certain other states and others in preparing the Threatened Lawsuit and in seek to foster similar lawsuits by other like-minded Attorneys General as part of an effort that would, if successful, deprive Plaintiffs of rights secured by the Constitution and laws the United States as alleges above.

65. The provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant would deprive Plaintiffs of rights secured by the Constitution and laws of the United States under color of state law violation of 42

U.S.C. § 1983.

WHEREFORE, Plaintiffs respectfully demand judgment as follows:

1. On their First Claim for Relief, declaring that provisions of Alaska law upon which Defendant relies in Threatened Lawsuit, as interpreted by Defendant, are preempted by the Medicaid Act and the regulation promulgated thereunder and permanently enjoining the Defendant from prosecuting imposing or enforcing liability pursuant to the Threatened Lawsuit.

2. On their Second Claim for Relief, declaring that provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant, are preempted by the Public Health Cigarette Smoking Act of 1969, and permanently enjoining the Defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

3. On their Third Claim for Relief, declaring that provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant, are invalid and unconstitutional as applied to Plaintiffs, under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and permanently enjoining the Defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

4. On their Fourth Claim for Relief, declaring that the provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant, violate the Taking of Property Clause of the Fifth Amendment to the United States Constitution, which is made applicable to the states under the Fourteenth Amendment to the United States Constitution, and permanently enjoining the Defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

5. On their Fifth Claim for Relief, declaring that the provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant, violate the First and Fourteenth Amendments to the United States Constitution, and permanently enjoining the Defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

6. On their Sixth Claim for Relief, declaring that the provision of Alaska law upon which Defendant relies in the Threatened Lawsuit, as

interpreted by Defendant, violate the Commerce Clause of the United States Constitution, and permanently enjoining the Defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

7. On their Seventh Claim for Relief, declaring that the provisions of Alaska law upon which Defendant relies in Threatened Lawsuit, as interpreted by Defendant, violate Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and permanently enjoining the Defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

8. On their Eighth Claim for Relief, declaring that the provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant, violate the constitutional prohibition against *Ex Post Facto* laws and Bill of Attainder and permanently enjoining the Defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit

9. On their Ninth Claim for Relief, declaring that the provisions of Alaska law upon which Defendant relies in the Threatened Lawsuit, as interpreted by Defendant, would deprive Plaintiffs of rights secured by the Constitution and Laws of the United States under color of state law, in violation of 42 U.S.C. §1983, and permanently enjoining the Defendant from prosecuting, imposing or enforcing liability pursuant to the Threatened Lawsuit.

10. Awarding Plaintiffs their costs and disbursements, including reasonable attorney's fees, incurred in connection with this action.

11. Awarding Plaintiffs such other and further relief as to the Court may deem just and proper.

DATED at Anchorage, Alaska this 8th day of January, 1997.

CLAPP PETERSON & STOWERS
Attorneys for Plaintiffs Philip Morris, Incorporated,
Brown & Williamson Tobacco Corporation, R.J.
Reynolds Tobacco Company.

By: Marcus R. Clapp

LANE POWELL SPEARS LUBERSKY
Attorneys for Lorillard Tobacco Company.

By: James B. Stoetzer

Exhibit 1

December 19, 1996

(Name)
(Title)
(Company)
(Address)
(City)

Re: A solicitation of proposals: Alaska
Attorney General's Office

Dear (Last):

The Alaska Attorney General's Office (AGO) is considering initiating litigation against various tobacco companies on a variety of legal theories. Such action may be similar to actions brought by several other states and counties to include recovery of damages for illegal conduct, state costs to treat smoking-related illnesses (states' share of Medicaid costs) and to enjoin tobacco companies from future unfair conduct and practices, including those practices that involve marketing of tobacco products to minors.¹ The Attorney General may assemble a litigation team to represent the State of Alaska in this lawsuit. The office would assign Assistant Attorney General staff to the litigation effort if a decision is made to proceed with the action. Pursuant to Alaska law, the AGO is soliciting proposals to consider the appointment of a private firm with complex litigation experience to provide assistance to, or be part of this team. It is expected that the law firm(s) would serve in a co-counsel role with the AGO, with this office managing the overall litigation effort.

If your law firm is interested in serving in this capacity, please send the AGO a concise statement of interest and qualifications, including the following elements:

* Your firm's specific experience in complex litigation, including the area of class action suits and matters involving technical or scientific issues. Describe which parties your firm usually represents.

¹ States that have filed include Mississippi, Florida, Louisiana, West Virginia, Massachusetts, Minnesota, Texas, Washington, Maryland, New Jersey, Utah, Illinois, Kansas, Oklahoma, Michigan, and Connecticut. Possible tobacco company defendants include: Philip Morris Inc.; R.J. Reynolds Tobacco Company; Brown and Williamson Tobacco Corp.; the American Tobacco Co.; B.A.T. Industries; Liggett Group; Lorillard Tobacco Co.; Unites States Tobacco Co.; The Council for Tobacco Research; and perhaps other related organizations.

* Name the attorney or attorneys who would be providing support to the litigation team and their relevant experience over the last five to seven years.

* Provide a list of clients for whom similar services have been provided within the past three to five years. The AGO is especially interested in experience in complex tort litigation, class action litigation, or other complex and protracted high-damage value litigation.

* Describe the working arrangement or agreement you would enter into with the AGO and other firms, should other firms also be selected to be part of the state team or be jointly presenting claims on behalf of additional plaintiffs.

* Propose a fee arrangement and the manner in which the firm would bear the cost of this litigation. No public monies are available for private counsel for this litigation. The firm should describe its ability to bear costs over a protracted period of litigation.

* Provide a comprehensive conflicts disclosure regarding the potential defendants.

The minimum requirements for a firm proposing to be considered for this appointment are as follows:

1. Persons assigned to work under this appointment as attorneys must be admitted to practice and in good standing in the state in which the person's principal office is located and if outside the State of Alaska, be eligible for admission to practice *pro hac vice*.

2. The senior attorneys assigned to work under this appointment must have a minimum of seven years trial experience.

Proposals by firms that do not meet these minimum requirements will not be considered. In addition, consideration will be given to proposers who or which:

1. Demonstrate knowledge of or have experience with state antitrust and consumer protection laws.

2. Demonstrate knowledge of and experience with medical tort actions or major tort litigation.

3. Demonstrate knowledge of pending claims against the tobacco industry and awareness of studies, documents, and other information available and relevant to the state's possible litigation.

4. Demonstrate knowledge of or experiences with computerized document management.

5. Demonstrate experience working jointly with other firms.

6. Have the capacity to deliver legal advice on complex corporate matters, including mergers and acquisitions.

7. Have knowledge of or experience in public law.

The AGO may appoint one or more firms for this effort. Work would be assigned to each of the firms selected after analysis of the scope of claims to be brought and the capacity of the firms to provide legal services in various areas. It is anticipated that the appointment(s) would be for the duration of the litigation. Additional appointments may be required on a consulting basis for aspects of the litigation.

The AGO plans to conduct telephone interviews with attorneys being considered for this assignment after a review of the proposals submitted. The AGO may request that a limited number of firms participate in face-to-face interviews in either Juneau or Anchorage. The decision as to which firm or firms to interview, at each stage of the process, will be made based upon our evaluation of the proposals received and any preceding interviews. We are tentatively planning on conducting telephone interviews and, if necessary face-to-face interviews in Juneau or Anchorage during the remainder of January. Please indicate the schedule availabilities of the principal attorneys you are proposing for this assignment for each of those weeks, and whether or not you are willing to travel to either Anchorage or Juneau for any finalist interviews.

Consultation on the matters addressed by this request shall be considered confidential privileged. If this firm cannot make such a commitment, disclosure must be made prior to any discussions or interviews with the Attorney General's office, and the AGO reserves the right to refuse to consider the proposal further. In addition, the AGO recognizes that there is a possibility this letter of solicitation may trigger preemptive litigation by the tobacco industry against the State of Alaska similar to the litigation initiated by the industry in other states. If the industry initiates

preemptive litigation against the State of Alaska, the AGO reserves the right to suspend taking further action on this letter of solicitation pending resolution of that litigation.

The proposal must be received at the address listed below by 5p.m., local time, on January 10, 1997. No proposals will be accepted after that time.

Proposals should be submitted to:

Bruce M. Botelho
Attorney General
P.O. Box 110300
Juneau, AK 99811-0300

Telephone: (907) 465-3600
FAX: (907) 465-2075