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## THE MAKING OF A LAWSUIT: A HEALTH PLAN PERSPECTIVE†

Andrew P. Czajkowski††

It is a pleasure to be here this morning to provide some background regarding our lawsuit and how we decided to take on the tobacco industry. I also will offer some thoughts about what this country's tobacco policy should be and will share with you our plans for the proceeds from the tobacco litigation.

We made a commitment to the people of Minnesota four years ago. We promised that any proceeds from the litigation would be used for the benefit of all Minnesotans. The initiatives we are proposing to the Minnesota Department of Commerce fulfill that commitment. I believe our proposal will make Minnesota a healthier place to live and work.

As I think back, I am surprised that it has been over four-and-a-half years since Attorney General Humphrey,<sup>1</sup> Mike Ciresi<sup>2</sup> and I stood before a group of reporters in St. Paul and spoke about our intention to sue the tobacco industry. I thought the reporters were a little more skeptical than usual that day. There were not many people talking in 1994 about suing the tobacco industry and unlocking its secrets.

In 1994, the tobacco industry had a lot of clout. It had an invincible record in the courtroom. Up to that point it really had not

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† This essay is based on a speech Andrew Czajkowski gave at William Mitchell College of Law's Center for Health Law & Policy symposium titled, "Tobacco Regulation: The Convergence of Law, Medicine & Public Health."

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1. Hubert H. "Skip" Humphrey was the attorney general for the state of Minnesota during the tobacco trial. See Hubert H. "Skip" Humphrey, III, *The Decision to Reject the June, 1997 National Settlement Proposal and Proceed to Trial*, 25 WM. MITCHELL L. REV. 397 (1999).

2. See Michael V. Ciresi, *An Account of the Legal Strategies that Ended an Era of Tobacco Industry Immunity*, 25 WM. MITCHELL L. REV. 439 (1999).

lost any suits.<sup>3</sup> We certainly did not make this decision lightly, but I can say in all honesty that we remained committed to the original goals of the litigation as it unfolded.

Probably our strongest assets were the partnerships we formed with the Office of the Attorney General and with the law firm of Robins, Kaplan, Miller & Ciresi. Over the years people have speculated as to how we happened to come together as a group. The simple truth is that each of us had been thinking independently about ways that we could hold the tobacco industry accountable. As we explored the environment for litigation, we discovered our mutual interests.

Blue Cross had a unique legislative charter<sup>4</sup> that directed us not only to protect the health of our members, but also to advance the public health for all Minnesotans.<sup>5</sup> The decision to file suit was a direct response to that charter. We felt strongly that, as the state's largest health plan, we had a responsibility to lead on this issue.

We knew, being the first plan to sue the tobacco industry on these issues, it would be controversial. We knew some would portray the lawsuit as an attack on smokers. Others would accuse us of undermining personal responsibility. Some even would accuse us of political correctness. We knew that some of our policyholders would raise objections, wondering if this was going to add to the cost of their premiums—of course, litigation costs were eventually absorbed by the tobacco industry.<sup>6</sup> We also knew that there would

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3. See Benjamin Weiser, *Tobacco Trials; Cigarette Makers Once Were So Hard to Beat in Court that Many Top Lawyers Refused to Take Them On*, WASH. POST, Dec. 8, 1996, at W15 ("For nearly half a century, despite hundreds of thousands of American deaths each year due to smoking, the tobacco industry has been nearly invulnerable in the U.S. courts."); see also Michael V. Ciresi et al., *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV. 477, 480-87 (1999) (detailing 40 years of successful tobacco industry litigation strategies).

4. See Minn. Stat. §§ 62C.01-23 (1998). These sections are referred to as the "Nonprofit Health Service Plan Corporations Act." Minn. Stat. § 62C.01, subd. 1.

5. See Minn. Stat. § 62C.01, subd. 2 (providing that the purpose of nonprofit health service corporations such as Blue Cross is "to promote a wider, more economical and timely availability of . . . health services for the people of Minnesota . . . and thereby advance public health . . .").

6. See Settlement Agreement and Stipulation for Entry of Consent Judgment at 22-23, State *ex rel.* Humphrey v. Philip Morris Inc., No. C1-94-8565, 1998 WL 394331, at \*11 (Minn. Dist. Ct. May 8, 1998). The agreement provides:

Settling Defendants and the Law Firm of Robins, Kaplan, Miller & Ciresi L.L.P. ("RKM & C") have reached a separate agreement for the payment of the State's costs and attorney's fees. In consideration for said agree-

be concerns in the business community. There were those who perceived this suit as just another attack on industry. It is gratifying to know that the vast majority of our customers supported this litigation and urged us to move forward.

The tobacco industry fed these illogical fears and suggested that this was going to pave the way for more lawsuits against other businesses. There was no basis for those allegations.

We sued the tobacco companies for one reason, and one reason only: because we believed that they were violating Minnesota law. The lawsuit was not about money. It was not about political correctness or retribution. It was about accountability. Tobacco is an adult choice. It is a legal product. We did not argue that. We did argue, however, that an industry that sells legal products illegally must be held accountable.

No industry had disregarded the law like the tobacco industry. In doing so, they created the leading health epidemic of our time. Some have asked, "What industry will be next?" or, "Who will be the target of the next lawsuits?" The answer is simple: there is no other industry because the tobacco industry is the only industry selling legal products illegally.

We gave careful and thoughtful consideration to the impact of the lawsuit on the public, our policyholders, and the business community. We were not sure how Minnesotans would respond and a question of greater concern was how the tobacco industry would react. We knew that the industry would take an aggressive, adversarial position, as it always had when it came to political and legal issues. Unlike other industries, the tobacco industry has never been restrained by fear of public disclosure or embarrassment in its public and political relations.

We also realized that the industry would engage in whatever guerilla tactics were necessary to keep us on the defensive. We had to consider not only the direct attacks on Blue Cross but the more subversive, covert assaults. Finally, we anticipated what has turned out to be all too true: that the tobacco industry does have powerful friends in Congress. We knew that legislative relief was possible; nonetheless, looking at how Congress has dealt with this issue over

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ment, RKM & C has released the State from its obligation to pay costs and attorneys fees under the Special Attorney Appointment dated May 23, 1994.

*Id.*

the past several months,<sup>7</sup> I think their power certainly has not waned in Washington.

We had three critical goals when we started this lawsuit. The first goal was to hold the industry accountable for its conduct. The tobacco industry should bear the financial burden it imposed on society by its illegal conduct. Our second goal was to expose the industry's decades-long campaign of deception by revealing the industry's secret research in smoking and health, addiction, and nicotine manipulation. I do not believe that we can regulate or legislate smoking out of existence. Instead, we must change our culture and society that accepts and supports smoking. We need an engaged public, but public awareness must precede public action. Our third goal was and continues to be to prevent a new generation of tobacco users. The industry should no longer prey on our nation's youth, and adults who want to quit should be given the opportunity to give up their addiction.

The question for Blue Cross and the state of Minnesota is whether the settlement that we reached will permit us to build on these goals. Without question, the settlement presents the opportunity for us to move forward in a very aggressive way.

Money is only part of the settlement; we also won knowledge. Blue Cross and the state refused to settle until the industry revealed the details of its forty-year campaign to create false controversies about tobacco use and addiction. Why is this information important? Certainly it will have great value to the medical community and the legal community. Doctors and lawyers now have access to an enormous amount of information about the research that the industry has conducted on the effects of tobacco.

The trial also exposed the industry's cynicism. I am quoting from some of their own documents here: "Very few consumers are aware of the effects of nicotine, i.e., its addictive nature and that nicotine is a poison."<sup>8</sup> According to another memorandum, industry officials recognized that "high profits . . . associated with the tobacco industry are directly related to the fact that the customer is

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7. See, e.g., *Though His Bill is Dead, McCain May Be Enlivened*, N.Y. TIMES, June 18, 1998, at A1 (relating Arizona Senator John McCain's disappointment at the "death of tobacco legislation in the Senate"; McCain asserted on the Senate floor that the proposed legislation was not about taxes, as some Republicans had claimed, but rather "whether we're going to allow the death march of 418,000 Americans a year who die early from tobacco-related disease and do nothing").

8. B&W 665043966.

dependent upon the product.”<sup>9</sup> These documents contradict what we saw in 1994 when tobacco industry executives testified before Congress that they did not believe tobacco was addictive.<sup>10</sup>

Ultimately, I think the settlement will be judged not by the dollar amount, but by its impact on the health of Minnesotans. The issue is whether the people of our state seize this opportunity to invest in a healthier Minnesota. I am pleased to say that so far we are on track to pursue that larger agenda.

As you may know, last week a Dakota County district court dismissed class action lawsuits seeking to dictate how Blue Cross and Blue Shield uses the proceeds.<sup>11</sup> The judge’s order to dismiss confirms our belief that those lawsuits were without merit and allows us to concentrate our efforts on a plan to use the proceeds in ways that will benefit our subscribers and all Minnesotans.

We believe the settlement is an historic opportunity to improve the health of all Minnesotans. For the first time, significant funding is available for a comprehensive effort to reduce tobacco use. The resources now exist in Minnesota to research and develop more effective programs to help tobacco users break their addiction and prevent future generations from starting to smoke. Reducing the use of tobacco is vital to our proposal.

We are also proposing aggressive initiatives to improve the public health in other areas and reduce the increase in health care spending. So our plan will benefit all Minnesotans.

Specifically, we are proposing to use the proceeds, which have a present value of \$434 million, on four general purposes. First, \$109 million will be committed to providing coverage for smoking cessation programs to all Blue Cross subscribers at no premium cost. The cessation benefit is part of a comprehensive tobacco reduction initiative. We estimate that the cessation benefit, complemented by counseling, education, and other programs, will reduce

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9. BAT 109872508.

10. See John Schwartz, *Tobacco Executives Deny Spiking Cigarettes*, WASH. POST, Apr. 15, 1994, at A1 (noting that seven top executives of the nation’s largest tobacco companies appeared before the House Energy and Commerce Committee’s subcommittee on Health and the Environment and “flatly denied” under oath that tobacco is addictive).

11. See Maura Lerner, *Lawsuits Seeking Part of Blue Cross’ Tobacco Settlement are Dismissed*, STAR TRIB. (Minneapolis-St. Paul), Sept. 15, 1998, at B3. The district judge “dismissed a group of class-action lawsuits by policyholders who were seeking a part of the \$469 million tobacco settlement that was awarded to Blue Cross and Blue Shield of Minnesota.” *Id.* The judge ruled that use of the funds fell under the jurisdiction of Minnesota’s Commerce Commissioner. See *id.*

smoking among Blue Cross members by thirty percent over the next ten years. This will result in substantial savings in health care costs.

Second, we will invest \$179 million in health initiatives targeted at tobacco use and health risk behaviors. We will support research and programs to develop and promote more effective ways to improve the health of individuals and their communities. Why are we doing this? Because we know that people who wear seatbelts, who follow a proper diet, who exercise, who receive preventive care—people who make healthy choices—are healthier and more productive people. We also know that the investment to promote healthier decisions will be returned many times over in lower health care costs. In fact, we believe our initiatives will generate \$2.3 million in savings to our members over the next twenty years. We are committed to passing these savings on to our members to offset future health care cost increases.

Third, we are earmarking twenty-one million dollars to the Blue Cross Foundation. Over the last decade the foundation has contributed close to seven million dollars to support innovative health care initiatives in Minnesota. For example, the foundation was the driving force behind Minnesota Decides, a unique program that engages Minnesota communities in identifying and implementing local solutions to tobacco reduction. In addition, the foundation helps people with chronic illnesses and unique cultural needs to navigate the health system. It promotes fitness, nutrition, and healthier lifestyles among Minnesotans and expands preventive care by increasing the availability of early childhood immunizations. We believe the resources from the tobacco settlement will make the foundation an even stronger leader in promoting the health of Minnesotans and engaging them in solutions that will make the state healthier.

Last, but certainly not least, a share of the proceeds is due the state and the federal government in taxes. We will be taxed at an effective rate of forty-one percent on the proceeds. That's an estimated \$124 million.

Four years ago we promised we would use the proceeds from this lawsuit to invest in a healthier Minnesota. The plan that I have just outlined is the opportunity to deliver on that promise. What we won in our historic settlement with the tobacco industry was not just the opportunity, but the obligation, to invest in a healthier Minnesota. The true nature of our victory was not written May 8,

1998, when we signed the settlement agreement. The true measure will be felt five, ten, and twenty years from now when we can celebrate a healthier Minnesota, including our first generation of smoke-free children.

