SENATE RECORD VOTE ANALYSIS

105th Congress | May 19, 1998, 5:02 pm
2nd Session | **Vote No. 142** | Page S-5114 Temp. Record

TOBACCO BILL/Lawyer Fees

SUBJECT: **National Tobacco Policy and Youth Smoking Reduction Act . . . S. 1415. Hollings motion to table the Faircloth amendment No. 2421 to the modified Commerce Committee substitute amendment No. 2420.**

ACTION: MOTION TO TABLE AGREED TO, 58-39

SYNOPSIS: The "Commerce-2" committee substitute amendment (see NOTE below) to S. 1415, the National Tobacco Policy and Youth Smoking Reduction Act, will raise up to $265.0 billion over 10 years and up to $885.6 billion over 25 years from tobacco company "payments" (assessments) and from "look-back" penalties that will be imposed on tobacco companies if they fail to reduce underage use of tobacco products. Most of the money will come from the required payments ($755.67 billion over 25 years). Additional sums will be raised from other fines and penalties on tobacco companies, and the required payments will be higher if volume reduction targets on tobacco use are not met. The tobacco companies will be required to pass on the entire cost of the payments to their consumers, who are primarily low-income Americans. By Joint Tax Committee (JTC) estimates, the price of a pack of cigarettes that costs $1.98 now will rise to $4.84 by 2007. The amendment will require the "net" amount raised, as estimated by the Treasury Department, to be placed in a new tobacco trust fund. (The net amount will be equal to the total amount collected minus any reductions in other Federal revenue collections that will occur as a result of increasing tobacco prices. For instance, income tax collections will decline because there will be less taxable income in the economy). The JTC estimates that the amendment will raise up to $232.4 billion over 9 years, but only $131.8 billion net. Extending the JTC's assumptions through 25 years, a total of $514.2 billion net will be collected. The amendment will require all of that money to be spent; 56 percent of it will be direct (mandatory) spending. The Federal Government will give States 40 percent of the funds and will spend 60 percent. Medicare will not get any of the funding in the first 10 years unless actual revenues are higher than estimated in this amendment (in contrast, the Senate-passed budget resolution required any Federal share of funds from tobacco legislation to be used to strengthen Medicare; see vote No. 84).

The Faircloth amendment would restrict lawyers to being paid no more than $250 per hour for their work on tobacco litigation related to this bill. The restriction would apply both to attorneys for plaintiffs and for defendants. No attorneys' fees would be paid

(See other side)

YEAS (58)

Republicans (15 or 28%)	Democrats (43 or 98%)	
Bennett	Akaka	Kennedy
Cochran	Baucus	Kerrey
Collins	Biden	Kerry
D'Amato	Bingaman	Kohl
DeWine	Breaux	Landrieu
Domenici	Bryan	Lautenberg
Gorton	Bumpers	Leahy
Hatch	Cleland	Levin
Jeffords	Conrad	Lieberman
Roth	Daschle	Mikulski
Shelby	Dodd	Moseley-Braun
Smith, Gordon	Dorgan	Moynihan
Specter	Durbin	Murray
Stevens	Feingold	Reed
Thompson	Feinstein	Reid
	Ford	Robb
	Glenn	Rockefeller
	Graham	Sarbanes
	Harkin	Torricelli
	Hollings	Wellstone
	Inouye	Wyden
	Johnson	

NAYS (39)

Republicans (38 or 72%)		Democrats (1 or 2%)
Abraham	Helms	Byrd
Allard	Hutchinson	
Ashcroft	Hutchison	
Bond	Inhofe	
Brownback	Kempthorne	
Burns	Kyl	
Campbell	Lugar	
Chafee	Mack	
Coats	McCain	
Coverdell	McConnell	
Craig	Murkowski	
Enzi	Nickles	
Faircloth	Roberts	
Frist	Santorum	
Gramm	Sessions	
Grams	Snowe	
Grassley	Thomas	
Gregg	Thurmond	
Hagel	Warner	

NOT VOTING (1)

Republicans (1)	Democrats (0)
Smith, Bob--[2]	

VOTING PRESENT(2)

Lott Boxer

EXPLANATION OF ABSENCE:
1—Official Business
2—Necessarily Absent
3—Illness
4—Other

SYMBOLS:
AY—Announced Yea
AN—Announced Nay
PY—Paired Yea
PN—Paired Nay

until the attorneys involved had provided to Congress and the public a detailed time accounting with respect to the work they had done, and any fee arrangements they had entered into for that work. Legal work related to government tobacco suits related to Medicaid, past and present, and legal work related to class-action tobacco lawsuits would be covered.

Debate was limited by unanimous consent. After debate, Senator Hollings moved to table the Faircloth amendment. Generally, those favoring the motion to table opposed the amendment; those opposing the motion to table favored the amendment.

NOTE: The bill was reported by the Commerce Committee on May 1, 1998, with a substitute amendment. On May 13, the bill was sequentially referred to the Finance Committee, which reported it with amendments to the substitute amendment on May 14. On May 18, the Commerce Committee polled its Members to modify the substitute amendment to incorporate the Finance Committee amendments (a majority of a committee's members must agree before such modifications are made). Under the Senate "poof" precedent, if any underlying amendment is modified to incorporate a pending amendment, the pending amendment becomes moot. The Commerce Committee then polled its members to further modify the Committee substitute, including by striking some of the language added by the Finance Committee amendments and by making major substantive revisions to the original substitute. Though committee substitute amendments are not ordinarily assigned numbers, the resulting version of the Commerce Committee substitute amendment, "Commerce-2," was then assigned an amendment number (2420) for the sake of clarity.

Those favoring the motion to table contended:

If it were not for the trial lawyers whom are colleagues are so intent on taking money away from, there would not be any tobacco settlements. It is very difficult and costly to take on rich corporations in court and win. Contingency fee arrangements, on a class-action basis, are the only cost-effective way that such cases can be pursued. Law firms often have to spend tens of millions of dollars and years in court to win. Their clients do not have enough money to pay them in the interim, and cannot risk losing money if they lose. These cases can only be pursued by rich, experienced firms. If they take a quarter, or a third, or more of any multi-billion dollar settlement, in accordance with a contract they have negotiated ahead of time with their clients, we say that they have earned every penny and more. Yes, many of the lawyers hired by the States will likely become billionaires, but they will deserve to become billionaires, just as many businessmen in the United States have become billionaires through their brilliance in running their corporations. We note also that we are talking about private contracts negotiated between States and lawyers and private citizens and lawyers. Senators, especially conservative Senators, should not rewrite the terms of payment, even if they are rewriting other parts of the terms of those contracts that were negotiated. The States and the tobacco companies asked us to pass a global settlement of all of the litigation along certain lines, but they wanted to have the tobacco companies directly pay the lawyers in a separate side agreement. We should stick by that original deal. We therefore urge our colleagues to oppose the Faircloth amendment.

Those opposing the motion to table contended:

We know our colleagues would rather spend more time thinking up new ways to increase taxes on low-income Americans who smoke so that they can spend even more money, but there are other matters in this bill that need to be addressed. One of the most important issues is what chunk of the money is Congress going to let lawyers snatch. If Congress does not act, they will get, by conservative estimates, $4 billion per year for the next 25 years. Those payoffs to lawyers will be the final part of a sleazy political deal between politicians, lawyers, and tobacco companies that will be made possible by the misuse of contingency fees.

Historically, contingency fees have not been favored by the law. They have been scrutinized. Lawyers ethically were supposed to take fees on a paying basis unless their clients could not afford to hire them. Only when a contingency fee is the sole practical legal recourse for a client has it been considered ethical to use that type of bounty arrangement. The ideal would be for all people to be able to afford to bring suit when they believe they have been injured, but because some people do not have the means it is better to allow contingency-fee representation than no representation at all. Lawyers in such cases end up taking much higher payments than they would have if they had been hired on an hourly basis because they assume all of the risks of failure. If they do not win a judgment, they do not get paid anything. It is not uncommon for lawyers to take a third or more of the settlement amount. In recent decades, a new twist on contingency fees has become prominent--the so-called "class action" lawsuit. Lawyers get hired by a few plaintiffs who do not have the resources to file suit against a company for damages, and the lawyers then represent those plaintiffs and similarly situated people who have allegedly the same injury. These suits, when they represent enough people, can win billions of dollars in judgments, and make the lawyers who win extremely wealthy when they take their giant cuts.

Over the years, numerous class-action lawsuits were attempted against the tobacco companies, but they failed because juries reasoned that people who chose to smoke understood that it was not a healthy practice. A new twist was then tried--the States began to sue to recover their Medicaid costs that were related to smoking. (No one has ever bothered to see if there really is a net cost to the States. Everyone dies, including all poor people. The unanswered question is whether Medicaid costs would be higher or lower if no one smoked. If a smoker is treated under Medicaid for a year and dies at age 50, will that cost be more or less than if that person had not smoked and had lived for another 50 years, during which time he or she received Medicaid treatment for a variety

of common old-age illnesses?) The logic of having the States file suit was that it would be much easier to win judgments because they could not be blamed by juries for people choosing to smoke. When the States filed suit, they used rich private lawyers who had experience in pursuing large class-action lawsuits instead of lawyers who were State employees. States are not poor--they have tens of thousands of people on their payrolls, and they each can afford to hire a few more lawyers. However, instead of hiring those private lawyers, the States promised them contingency fees. In most cases, they kept the terms of those fees secret. These arrangements were and are extremely unethical for three main reasons. First, the States were not watching out for the public purse by agreeing to contingency fees. They could afford to hire lawyers, so they did not have to promise to give up large portions of any judgments for their citizens as the only means of securing representation. Second, they kept the terms secret. The citizens of a State are supposedly the employers of those lawyers--they had a right to know how much was being promised. Third, the lawyers that were hired tended to be very well-connected individuals who made large political donations, principally to liberal Democrats. In other words, these lawyers regularly paid to get Democrats elected, and then these same Democrats turned around and hired them to take huge parts of the money they were trying to win from tobacco companies, money that they were supposedly trying to get to provide medical care for poor, primarily elderly Americans.

From this point matters only got worse. Tobacco companies, fearful that they would lose in court on Medicaid claims by States, began to negotiate with those lawyers on a global settlement of suits. They reached an agreement on June 20, 1997. The participating tobacco companies agreed to make large payments--$368.5 billion over 25 years--to reimburse States for tobacco-related Medicaid costs and to pay for tobacco control programs to reduce teen tobacco use. In return, they would receive limited liability protection from class-action suits for past actions. As the agreement was negotiated, it required Congress to enact the liability protection and numerous other legislative provisions in order to put it into effect. Also, they agreed in a separate side agreement that they would pay the plaintiffs' lawyers an undisclosed sum. We ask our colleagues, how would they feel if a lawyer they had hired had negotiated in this manner? Would they want their lawyer to go to the person who had caused them injury and work out a settlement, and at the same time have that person be responsible for paying their lawyer, and have the amount paid be a secret, negotiated amount? The conflict of interest is huge and inexcusable, both because it raises questions about the integrity of the lawyers (did they give in on key points in return for higher secret payments?), and because it attempts to hide from the public the costs of hiring lawyers. It pretends that there are two pots of money--one for damages and one for lawyers. Of course, the financial result would be exactly the same if the tobacco companies just made one huge payoff and the lawyers took their cut out of that. The political result would be a lot different, though, if the public saw the lawyers making off with a tenth, quarter, third, or more of the money.

When the agreement was reached, 41 States and Puerto Rico were pursuing court cases. (The junior Senator from Alabama, before he had come to the Senate, had started one of those cases. He did not hire private lawyers on a contingency fee--he defended the interests of his State by using State lawyers. Private trial lawyers tried to get him to hire them, but he refused. Amazingly, they even tried to get him to go along by suggesting that he cut some of his own lawyer friends in on the deal.) The agreement was intended to settle those 42 lawsuits. When the States were acting on their own, they could proceed ethically as they did in Alabama or unethically as they did elsewhere, and it was not Congress' business to question them. However, as soon as they asked Congress to enact a global settlement, they made it Congress' business to look at the terms. Certainly the Commerce-2 substitute does not hesitate in many areas to change the basic terms of that settlement. For instance, it nearly triples the amount of money that will be collected from smokers (the tobacco companies will not be allowed to reduce their profits; they will have to pass on every penny of the taxes to smokers by raising their prices), and it greatly weakens the liability limits that were agreed to. We realize that some of our colleagues genuinely believe that Congress should not change the fee arrangements, but they are being genuinely inconsistent in saying that Congress can change every other part of the agreement but the fees. In our view, we have a responsibility to consider every part of the agreement if it is going to be put into effect by Federal legislation. Tobacco companies and trial lawyers do not write legislation--Members do.

Since the global agreement has been reached, the tobacco companies have reached individual settlements with 4 States--Florida, Minnesota, Texas, and Mississippi. Those settlements amply illustrate the windfall that lawyers are going to get from this bill if we do not limit their payments. In Minnesota, where the lawyers working on that case actually put in a lot of work, the payoff will be $450 million. If we assume that 50 lawyers put in 100,000 hours of work, then each lawyer will get $9 million on average, or $4,500 per hour. Not a bad job if you can get it. However, as far as these lawyers go, $4,500 per hour is chump change. In Texas, far fewer lawyers were involved over a much shorter length of time, yet a judge has already approved the legal fee arrangement that will give them $2.2 billion, which comes out to a wage rate of $88,000 per hour. In Florida, trial lawyers are still fighting for $2.8 billion that they say that they are due in Medicaid money. One of these shysters is suing for $750 million just for himself.

Under the Constitution, Congress is empowered to regulate. It sets a minimum wage; it limits legal fees under the Criminal Justice Act to $75 per hour; it limits fees under the Equal Access to Justice Act to $125 per hour. It is not limited in its ability to enact measures that may abrogate private contracts. If it were, the result would be that private contracts could be entered in anticipation of legislation in order to prevent actions. Would our colleagues say that Congress cannot raise the minimum wage because it would interfere with private contracts to pay less? In this case, the States and the lawyers are getting a lot of benefits out of this bill. Congress will settle their cases and send them money. In some cases, States have done little more than agree to join the

global settlement. Many of the lawyers, too, have done little or no work. For instance, Hugh Rodham, the President's brother-in-law, was retained to work on the global agreement. He was hired despite what the Knoxville News-Sentinel, called, "his complete lack of experience in these types of cases." Of course, as the Washington Post reported, he was not really asked to do a lot--he "spent the last hours of the June 20th settlement talks in a corner reading a paperback by Jack Higgins, ’Drink with the Devil.’"

The Faircloth amendment would limit all lawyers who are involved in tobacco litigation, whether for plaintiffs or defendants, to $250 per hour. Frankly, we think most Americans would be very happy to be paid that much for even a day. If we do not agree to this amendment, those lawyers will instead be paid an hourly wage of $4,500, or $88,000, or more for their efforts. We urge our colleagues to support the Faircloth amendment to stop this gross injustice.