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<James_Ho@Judiciary.senate.gov> [UNKNOWN])
Bcc: Brett M. Kavanaugh (CN=Brett M. Kavanaugh/OU=WHO/O=EOP [WHO])
Subject: : Dear Colleague Letter on ISCRAA
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Thought you would find this of interest.

James C. Ho

Chief Counsel

U.S. Senate Subcommittee on the Constitution, Civil Rights & Property
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U.S. Senator John Cornyn, Chairman

<mailto:James_Ho@judiciary.senate.gov> James_Ho@judiciary.senate.gov
<mailto:James_Ho@judiciary.senate.gov>

(202) 224-9614 (direct line)

(202) 224-2934 (general office number)

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James C. Ho

Chief Counsel

U.S. Senate Subcommittee on the Constitution, Civil Rights & Property Rights

U.S. Senator John Cornyn, Chairman

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(202) 224-2934 (general office number)

P6/b6

United States Senate

WASHINGTON, DC 20510

May 14, 2003

Re: The Kyl-Cornyn Tobacco Fees Amendment to The Economic Growth Package

Dear Colleague:

We have introduced an amendment to the tax bill that would provide billions of extra dollars to the states, while correcting what recently has been described as “one of the greatest heists in modern American history.” Our amendment – based on an Administration proposal – would use an existing provision of the tax code to apply basic fiduciary standards to the grossly excessive and unethical attorneys fees being charged to the states in the recent tobacco-litigation settlement.

The states’ private tobacco lawyers currently are set to receive almost \$15 billion from the state settlement. These fees are being paid at a rate of \$500 million a year, in this year and every year at least until 2028 – and possibly forever, if the lawyers win their argument for an inflation adjustment. Some attorneys are receiving fees that amount to \$150,000 an hour for copycat lawsuits suits that involved no original legal work and no real risk. By forcing these attorneys to return the clearly unethical portion of these fees to the states, our amendment would allow the states to securitize fee income with a present value of about \$9 billion. A chart detailing how much each state can expect to receive is attached.

The tobacco-settlement attorneys fees were not awarded pursuant to a contract. Nor were they awarded by a court. Instead, after the tobacco companies’ initial offer to settle the litigation for \$368 billion failed, and Congress rejected a legislative settlement, the tobacco companies and lawyers agreed to a \$246 billion settlement – with a special provision for attorneys fees. That provision included an unusual agreement by the tobacco companies to pay the fees of lawyers who represented their opponents, the states. Fees were set by a panel of three arbitrators, two of whom effectively were chosen by the lawyers. One of these arbitrators served despite having a clear conflict of interest – he is the father of a lawyer whose law firm was awarded almost \$3 billion. The tobacco companies and lawyers agreed to immunize all fee awards from judicial review, and all proceedings were concealed from the public. A description of the arbitrators’ highly questionable decisionmaking, published in last December’s *THE AMERICAN LAWYER*, is attached. The portion of Senator Cornyn’s speech describing the political favoritism that determined how lawyers were chosen in numerous states also is attached.

Some of these lawyers now argue that the states “paid nothing” for the \$15 billion in fees because the tobacco companies agreed to pay the states’ lawyers. This, too, is a fraud that numerous commentators have seen through. The courts specifically have warned against lawyers’ “incentives for collusion – the temptation for lawyers to agree to a less than optimal settlement in exchange for red-carpet treatment for fees.” This is exactly what has happened in the tobacco settlement. As the

newsmagazine THE ECONOMIST notes, the tobacco-settlement "arbitration is a mere figleaf. The money going to the lawyers was clearly part of the overall amount that the tobacco companies were willing to pay to settle the case. Whatever the lawyers get, the states do not."

Our amendment (same as a bill that we introduced last month, ISCRAA – S. 887) acts on the Administration's directive in its first budget blueprint to provide "additional public health resources for the States from the President's proposal to extend fiduciary responsibilities to the representatives of States in tobacco lawsuits." This proposal is based on the Intermediate Sanction Tax, an existing provision of the tax code that applies a punitive tax to the excessive portion of a fiduciary's fee. The tax effectively forces the fiduciary to restore the excessive portion of the fee to the client. Our amendment applies the same tax formula to excessive attorneys fees in megalawsuits – those that, like the tobacco settlement, result in judgments greater than \$100 million. According to an academic expert who has reviewed our bill (*see attached letter*), only 15-20 litigations a year would even meet this threshold. And, as explained below, few if any of those cases result in fees that would be reduced by this bill – except for the tobacco settlement.

Before the trial lawyers and their allies tell you that our amendment is Republican lawyer-bashing, keep this in mind: the fee formula that we use, which allows attorneys to receive up to 500% of reasonable hourly rates, is at least as generous as the most plaintiff-friendly state courts in the country – in fact, it is the same standard that is used by the Florida Supreme Court. And it is considerably more generous than what federal courts would have allowed had they been charged with supervising the tobacco fees: federal courts virtually never allow fee multipliers greater than 300% in \$100 million cases. (*See In re Cendant Corp. PRIDES Litig.*, 243 F.3d 722, 737 (3d Cir. 2001).) In fact, we have even added a special provision to our amendment for the tobacco lawyers: because their fee awards were made in the past (though some were made just last year), our amendment only will apply to tobacco fees received after the enactment of this Act, and only to the extent that those fees exceed \$2,000 per hour. (And the lawyers can still receive more under the fee formula.)

The attorney ethics rules of all 50 states bar lawyers from accepting excessive or unreasonable fees. As one state's supreme court has noted, "a fee agreement between lawyer and client is not an ordinary business contract. The profession has both an obligation of public service and duties to clients which transcend ordinary business relationships and prohibit the lawyer from taking advantage of the client." This is especially important when attorneys are representing states.

Our amendment does not change these substantive ethical standards. It simply makes them enforceable – in a tiny category of cases where there have been serious abuses – by applying the most liberal fee-formula that is available. We hope that you will join us in voting to correct the gross ethical breaches of the tobacco settlement, and return billions of dollars to the states.


JON KYL


JOHN CORNYN