"Lawsuits are a lousy way to make public policy," says James Tierney, here at his command post in rural Maine. Nonetheless, change may be on the way via the lawsuit he helped 12 states fashion.

Fighting Smoke With Fire

By John Schwartz
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LISBON FALLS, MAINE

For James E. Tierney, self-appointed field general in America's tobacco wars, yesterday was a moment of victory. Attorneys general for 12 states announced that they had agreed to settle their cases against the industry with a deal that could serve as a model for the 34 additional states that have not already settled such suits. If all 46 states sign on, the total value of the pact could reach $206 billion—the largest legal settlement in history.

Tierney, 51, a former Maine attorney general, gets an evangelical tone as he proclaims that whatever happens in Congress or in state litigation, "one thing that does not change from place to place is what the tobacco industry did": the industry's attempts to conceal the health consequences of smoking, and the alleged efforts to recruit new generations of smokers to replace dying customers.

"The public will rise up again," Tierney predicts.

If that happens, no small amount of the credit will go to Tierney, a Zelig-like figure who now neither holds office nor files his own lawsuits. While tobacco industry lobbyists swarm on Capitol Hill, he works from a 200-year-old farmhouse where he and

See TIERNEY, B8, Col. 1
Now that state attorneys general are suing Microsoft, Tierney is again getting quoted often—though, as always, most of his briefings for reporters are delivered by background, a deal in which he cannot be identified. Nonetheless, he is rich with zingers aimed at his opponents.

Some attorneys general rankle at the notion that Tierney gets more press than they do when they are the ones taking the political risks. Asked about Tierney’s role in assisting them, one snapped, “There’s no question that he has a knack for being quoted,” but added that “I am not sure how substantive his role has been. Even on tobacco.”

Others, however, say they are happy to see Tierney quoted as saying the things that they cannot. “He’s able sometimes to speak more openly and fully since he’s not a direct party to litigation, and not bound by those restraints,” Blumenthal says.

Tobacco Meets Its Match

Tierney, who got his law degree from the University of Maine, got his political education in the Reagan years.

Attorneys general had been banding together in lawsuits since the 1970s, but the pace picked up when Republicans won the White House in 1980. The federal government wasn’t all that interested in issues like consumer protection or antitrust, and across the country state AGs found themselves looking at nationwide problems—exorbitant insurance charges, say, in the rental car business—and seeing no relief on the way from Washington.

“We had to learn how to do it,” Tierney recalls. “If we didn’t think about those things, nothing happened.”

But in 1990, Tierney, restless, decided to get out as Maine attorney general. “I had the sense that I had done what I was going to do in Maine,” he says. He’d already served in his state house of representatives, having been majority leader at age 29, so he set his sights on Washington.

“I knew I’d made a mistake as soon as I announced” for a seat in the U.S. House of Representatives, he says. “It didn’t feel right.”

After the attorney general’s relatively simple world of legal or illegal, honest or dishonest, the return to arm-twisting and horse-trading, the need to play to narrow interest groups, was disheartening. Then the voters decided the issue for him. He was beaten soundly in the 1990 election.

So Tierney, unemployed and facing college tuition payments for his kids, decided to fashion a new gig, working with former colleagues.

“I had this theory that maybe I could make a living if I kept my overhead low enough—and that means zero.” He hung out a shingle offering to help attorneys general nationwide run big cases and train staff, as well as to dispense a blend of managerial and political advice to newcomers to the job, Democrat and Republican alike.

His first client was Grant Woods, a newly elected Republican in Arizona and a man who had inherited no end of problems. The governor, J. Fife Symington III, was under constant legal scrutiny (and would eventually be convicted of savings and loan fraud); the office was in disarray. Tierney offered to come out and help shape things up. Woods hired him. At once, Woods recalled, he realized that he was not dealing with a slick management consultant. Tierney asked if he could crash at Woods’s home—and wound up sleeping in the bed of his 7-year-old.

Gradually, Tierney’s plain-spoken style won over more and more state officials. Tierney proved especially adept in the role of honest broker in the middle of discussions about launching collective litigation, and in connecting staffers who were wrangling with the same problems.

And then the biggest suit of all came along: tobacco. Just four years ago, Mississippi became the first state to sue the cigarette industry for reimbursement of smoking-related health costs; Minnesota followed soon after. At the same time, the Food and Drug Administration was considering declaring nicotine in tobacco products a drug that could be regulated by the agency. In addition, a group of trial lawyers was readying a series of class action cases on behalf of smokers.

But after an initial flurry of litigation, the number of state lawsuits stalled at four. Mississippi Attorney General Mike Moore was crisscrossing the country trying to garner new recruits, but hadn’t been able to get more to take the leap.

Tierney helped jump-start the process by contacting Richard Daynard, head of the Tobacco Products Liability Project at Northeastern University in Boston. Daynard has long served as a resource for attorneys suing the industry. Tierney became his liaison with the attorneys general.
They organized a pivotal November 1996 conference of attorneys general in Boston, where trial lawyers and public health groups laid out their case against the tobacco companies. The assembled state officials, Tierney says, began to see "just what a huge lawbreaker the tobacco industry was."

He says the attorneys general began asking themselves, "How can I go after driveway pavers and telemarketers and not go after tobacco?" Within a year and a half, the number of suits had climbed from four to 41.

The industry decided that it was time to cut a deal. In June 1997 the attorneys general, many of the private attorneys suing the industry and the tobacco companies reached a $368 billion proposed settlement. It would have granted the industry a measure of protection from lawsuits in return for public health concessions and broad advertising restrictions.

A bill based on the agreement, however, foundered in Congress after the industry declared that its terms were too restrictive and too expensive.

Activists are already denouncing yesterday's deal by the states as a sellout to Big Tobacco. The deal, which does not require congressional approval, does include the creation of a national tobacco education and research foundation, reduction but not elimination of tobacco advertising and sponsorships, and other modest public health gains. The opponents say that, at a minimum, any such deal should include an agreement for the industry to be regulated by the FDA, and stiff penalties if, after the deal is struck, underage smoking does not decline.

Still, he's not shy about making sure he gets paid. In the Microsoft case, the bills are being covered by one of the many players that feel squashed by the software giant: Sabre Group, the pioneering online travel agency. Microsoft has unveiled its own online travel services. "They've been treated by Microsoft the way Microsoft has treated just about everybody," Tierney says.

Although some of what he does on behalf of Sabre sounds an awful lot like old-fashioned, Washington-style lobbying, Tierney argues he has not compromised his principles.

"I'm loyal to the institution," he says. "... I won't represent a private party who will criticize an attorney general." Instead, he tries to find clients who are going the same way as his attorney general buddies, and then tries to get the client to pay the freight. That hasn't created a conflict of interest yet, said Jeffrey Modisett, Indiana's Democratic attorney general. "He's not going to give you advice that helps Jim Tierney and hurts you," Modisett said.

But when Tierney does get rolling—as in the Microsoft case—watch out.

"They're not cases, they're jihads," Tierney explains. "I don't like monopolies. I think they breed inefficiencies in the economic system, but they also breed arrogance."

So how would Tierney describe his role in these cases?

"When I was a young legislator," he recalls, "my predecessor in this office said, 'You know, you should always give people something when you see them.'"

"What can I give them?" I thought. So I got road maps," which the state highway department made available to the citizenry free. "I put them in the back of my Volkswagen Bug. Every Saturday, I'd go out and visit people and hand them maps. They didn't need a map—they always went to the same places."

But they still loved getting something for nothing from their scrawny representative, and re-elected him consistently.

"I'm still giving road maps," Tierney says.