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Tobacco-Settlement: Legal Issues [2]

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AMERICAN CANCER SOCIETY® GOVERNMENT RELATIONS OFFICE

September 8, 1997

Mr. Bruce Reed
Domestic Policy Council
The White House
2nd Floor, West Wing
Washington, D.C. 20500

Dear Bruce:

The attached forwards you our effort at reviewing the Constitutional issues on the proposed tobacco settlement. It is presented as a positive information piece to assure that any legislation gets crafted to assure long-term benefit. Please feel free to call Steve Lawton, from Hogan and Hartson, at (202) 637-8615, or myself at (202) 546-4011, ext. 146, if you have any questions. We would be glad to meet with you at any time.

Sincerely,

Linda Hay Crawford
National Vice President
State and Federal Government Relations

Enclosure

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CONSTITUTIONAL ISSUES IN PROPOSED TOBACCO SETTLEMENT

The proposed tobacco Settlement ("the Settlement") calls for complex and far-reaching federal legislation not only incorporating various terms of the Settlement to which the parties agreed but also addressing public health and tobacco control policies. Indeed, from its first words ("This legislation . . . "), the Settlement is written as if it were actually in the form of federal legislation. While many of the details of any such federal legislation remain unspecified, it is clear from the face of the Settlement document that any federal legislation incorporating its terms would be novel and unprecedented in many respects.

There is, of course, no constitutional impediment to novel and creative efforts to forge new approaches to vexing national issues. Nevertheless, such novel approaches must pass constitutional muster under the long-established and deeply held principles on which our Nation was founded and has flourished. The American Cancer Society is firmly committed to supporting all efforts to reduce the incidence of smoking and tobacco use in our country, but is equally firmly committed — as a matter of our collective values and of practical effectiveness — to doing so in a manner that is consistent with constitutional principles and is therefore not likely to be impeded by adverse court rulings.

To this end, we have analyzed the provisions of the Settlement with an eye toward constitutional arguments that might be raised against it. This task is made somewhat difficult by the undefined nature of many of the key provisions of the Settlement; in such uncertainty, however, there is also opportunity to draft the actual legislation in a way that completely avoids or minimizes the risks that portions of the Settlement legislation would be declared unconstitutional. We have thus considered alternative means of structuring the Settlement's provisions that, in our view, reduce or eliminate entirely the risk that the Supreme Court would find that the federal government has overstepped the bounds of its authority.

Set out below are analyses of various provisions of the Settlement in light of various constitutional provisions, including the First, Fifth, Tenth and Fourteenth Amendments. As the following discussions demonstrate, not all constitutional objections to the Settlement are frivolous, but on balance we believe that the provisions of the Settlement — in letter and in spirit — should be sustained if drafted with an eye toward avoiding constitutional problems.

EXECUTIVE SUMMARY

First Amendment

The government's compelling interest in preventing youth tobacco use justifies the imposition of restrictions on the marketing and advertising of tobacco. Because of this important objective, most of the restraints proposed by the Settlement are narrowly tailored enough to withstand judicial scrutiny. Some restrictions, however, such as the ban on advertising over the Internet, raise constitutional concerns because they may be more extensive than necessary to achieve the goal of reducing underage tobacco use. The American Cancer Society recommends that Congress grant the FDA rulemaking authority over the drafting, implementation, and oversight of the marketing and advertising restrictions, to permit interested parties an opportunity for notice and comment and to achieve the flexibility necessary to carefully craft and amend the restrictions in order to comport with the Constitution.

Tenth Amendment/Federalism

While the Settlement's proposals regarding the restructuring of tobacco-related civil proceedings, state licensing of tobacco sellers, and state "no sales to minors" laws raise potential Tenth Amendment concerns, there are many ways of structuring these provisions to avoid constitutional difficulties. With respect to the restructuring of tobacco-related civil proceedings, the American Cancer Society recommends that Congress give the States the choice of amending their laws of civil procedure to satisfy federal standards, or having their laws preempted by a federal act that creates federal jurisdiction over tobacco-related claims. Under this scheme, Congress would condition the receipt of federal funds upon the States' amendment of their laws of civil procedure, but in the event that some States choose not to amend their laws, Congress would preempt inconsistent state laws. The act creating federal jurisdiction would incorporate state substantive law as the federal rule of decision. In addition, constitutional principles permit Congress to encourage the States to enact and enforce licensing programs as well as "no sales to minors" laws by conditioning the receipt of Industry Payments upon the States' participation in these programs.

Fifth Amendment/Takings

The Settlement's cross-licensing provision, user fee for non-participants' products, and escrow requirement for non-participating companies are constitutional under the Fifth Amendment's Takings Clause. Importantly, the government's actions constitute a public use. Furthermore, there is no *per se* taking because the provisions involve monetary assessments, as opposed to restrictions on tangible property. Finally, because the Settlement does not destroy the economic value of the property at issue, there is no basis for a court to find a regulatory taking.

Due Process

Although the Settlement's limitations on civil proceedings relating to tobacco and health raise due process issues, they do not violate the Due Process Clauses of the Fifth and Fourteenth Amendments. Because there is no right to punitive damages, as well as the fact that Congress may limit liability as a means of achieving social goals, the elimination of punitive damages is consistent with both procedural and substantive due process requirements. Likewise, the annual liability caps and the prohibition on class actions and joinder of claims do not violate due process. Finally, the Settlement's creation of a three-judge panel to decide privilege and trade secrecy disputes is not inconsistent with constitutional due process requirements so long as the panel's decisions are binding only against the original parties.

Equal Protection

The Settlement clearly comports with the equal protection guarantees of the Fifth and Fourteenth Amendments. The provisions of the Settlement should be subject to the lowest level of constitutional scrutiny and, under this standard, are rationally related to legitimate government interests. In the event that some states subject the Settlement to intermediate scrutiny under their state constitutions, it would be advisable to express clearly in the legislative record the purpose and objectives of the legislation as well as the fair and substantial relationship between those objectives and the means chosen to achieve them.

FIRST AMENDMENT IMPLICATIONS OF THE MARKETING AND ADVERTISING RESTRICTIONS OF THE SETTLEMENT

The Settlement would limit the ability of tobacco manufacturers to advertise and market tobacco products. These provisions must be closely scrutinized in light of the First Amendment protection extended to commercial speech. The following provides a summary of the Settlement provisions, a general overview of relevant First Amendment jurisprudence, and an analysis of the tobacco advertising restrictions in light of recent Supreme Court rulings on commercial speech.

Summary of Settlement Provisions Implicating First Amendment Rights

The Settlement incorporates several provisions promulgated by the FDA in its 1996 final rule 1/ that limit the right of tobacco companies to advertise their products and adds several new restrictions.

The FDA's 1996 advertising rules adopted in the Settlement include:

- A ban on the use of non-tobacco brand names as brand names of tobacco products except for tobacco products in existence as of January 1, 1995;

- A requirement that tobacco product advertising be limited to black text on a white background except for advertising in adult-only facilities and in adult publications; 2/

1/ Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396 (1996) (to be codified at 21 CFR pt. 801) ("FDA Regulations"). A recent federal district court decision invalidated the FDA's restrictions on advertising and promotion of tobacco products, finding that the restrictions went beyond the agency's jurisdiction to regulate drug delivery devices. Coyne Beahm v. FDA, 966 F. Supp. 1374 (M.D.N.C. 1997) (appeal pending). The court did not consider, however, the First Amendment implications of the FDA restrictions.

2/ As defined in the FDA's 1996 rules, adult-only publications are defined as those: (1) whose readers that are 18 or older constitute 85 percent or more of the publication's total readership, or (2) that are read by two million or fewer people under age 18. FDA Format and Content Requirements for Labeling and Advertising of Cigarettes and Smokeless Tobacco, 21 C.F.R. § 897.32(a)(2). Based on current readership estimates, publications such as Rolling Stone and Sports Illustrated would be limited to text-only advertisements, whereas Time and

- A ban on sponsorships, including sponsorship of concerts and sporting events, in the name, logo or selling message of a tobacco brand;

- A ban on all non-tobacco merchandise, including caps, jackets and bags, bearing the name, logo or selling message of a tobacco brand;

- A prohibition on offers of non-tobacco items or gifts based on proof-of-purchase of tobacco products;

- A requirement that advertisements for cigarettes and smokeless tobacco products carry a statement of intended use (e.g., "nicotine delivery device").

Additional restrictions were also incorporated in the Settlement. These new restrictions include:

- A ban on *all* outdoor advertising of tobacco products as well as a ban on advertising indoors when the advertising is directed outside;

- A ban on the use of human images and cartoon characters in tobacco advertising (e.g., Joe Camel and the Marlboro Man);

- A ban on all tobacco product advertising on the Internet that is accessible from the U.S.;

- A restriction on point-of-sale advertising of tobacco products in non adult-only facilities;

- A ban on direct and indirect payments for tobacco images in movies, television programs and video games;

- A prohibition on payments to "glamorize" tobacco use in media appealing to minors, including recorded and live performances of music;

- A provision authorizing the FDA to approve the use of product descriptors such as "light" or "low tar" in advertising.

Newsweek would not be subject to the restriction. FDA Regulations, 61 Fed. Reg. at 44,514.

Overview of First Amendment Commercial Speech Jurisprudence

Commercial speech has been defined by the Supreme Court as "expression related solely to the economic interests of the speaker and its audience" and includes product advertising. Central Hudson Gas & Elec. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980). The Supreme Court rejected the traditional view that commercial speech was not entitled to protection under the First Amendment when it decided Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, Inc., 425 U.S. 748 (1976). In striking down a state statute that prohibited pharmacists from advertising prescription drug prices, the Court acknowledged that the free flow of commercial information served important societal interests, including the "proper allocation of resources in a free enterprise system." Id. at 765.

Following its Virginia Pharmacy Board decision, the Supreme Court decided Central Hudson, 447 U.S. 557 (1980), which established a four-part standard for analyzing all restrictions on commercial speech. This analysis provides an "intermediate" level of First Amendment protection for commercial speech that is less demanding than the review granted to non-commercial speech. Board of Trustees v. Fox, 492 U.S. 469, 477 (1989). Specifically, under the analysis articulated in the Central Hudson case, the government is permitted to regulate commercial speech if the following conditions are met: (1) the speech qualifies for protection in that it is neither misleading nor concerns an unlawful activity; (2) the asserted governmental interest in support of the restriction is substantial; (3) the restriction directly advances the interest; and (4) the regulation is not "more extensive than is necessary to serve that interest." Central Hudson, 447 U.S. at 566. 3/

In support of a commercial speech restriction, the government need only assert a single substantial interest under the Central Hudson test. Florida Bar, 115 S. Ct. at 2376 n.1. For purposes of First Amendment analysis, examples of government interests that might qualify as "substantial" include preserving the reputation of professions, id. at 2381, protecting the health, safety and welfare of citizens, Rubin v. Coors, 514 U.S. 476 (1995), maintaining traffic safety and the appearance of a city, Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), and protecting the physical and psychological well-being of children, New York v. Ferber, 458 U.S. 747, 756-57 (1982).

3/ The four-part test was subsequently narrowed to three parts in Florida Bar v. Went For It, Inc. 115 S. Ct. 2371, 2376 (1995). The three-part test, which is essentially the second, third and fourth prong of Central Hudson, is applied after an initial determination is made that the commercial speech concerns a lawful activity and is not misleading.

The third and fourth prongs of the Central Hudson analysis require consideration of the "fit" between the government's substantial interest and the means chosen to accomplish that objective. United States v. Edge Broadcasting Co., 509 U.S. 418, 427-28 (1993). These elements have proven to be the most difficult to satisfy. For example, in Edenfield v. Fane, 507 U.S. 761 (1993), the Supreme Court struck down a state ban against solicitation by CPAs for failing the third prong of Central Hudson. In reaching this decision, the Court noted that Florida failed to provide substantial evidence to show that the regulation directly advanced the state's purported interest. Id. at 771. Similarly, in Rubin v. Coors, the Court invalidated a federal law that prohibited beer labels from displaying alcohol content on the ground that the restriction failed materially to advance the arguably substantial government interest in preventing "strength wars" among brewers and protecting the health and welfare of its citizens. 514 U.S. at 479.

More recently, the Supreme Court has indicated a willingness to apply a more stringent standard of review to government restrictions of commercial speech. In 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1996), the Court unanimously struck down a Rhode Island statute that banned all retail price advertising for alcoholic beverages on the ground that the state failed to establish a "reasonable fit" between the restriction and the stated goal of reducing alcohol consumption. Id. at 1509-10. Specifically, the Court reasoned (1) that the state offered insufficient proof that the restriction would advance its interest, and (2) that alternative forms of regulation were available to the state to achieve its goal that would not involve a restriction on speech. Id.

The significance of the 44 Liquormart decision goes beyond the Court's holding that the Rhode Island statute violates the First Amendment. Rather, the importance of the case lies in the questioning by a majority of the Justices of the propriety of the Central Hudson test, at least where the government regulation restricts truthful and nonmisleading messages to adults. Speaking through four different opinions, the Court was divided on the issue of whether the traditional four-prong analysis for commercial speech should be abandoned, selectively applied, or preserved. Nevertheless, it is clear that a majority of the Court intends to review with increased skepticism government regulation of accurate commercial speech regarding a lawful activity. 4/ As Justice Stevens stated in 44 Liquormart, "when a

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4/ Justice Stevens, joined by Justice Kennedy and Justice Ginsberg, expressed a willingness to abolish the Central Hudson formulation in the case of government "bans that target truthful, nonmisleading commercial messages." 44 Liquormart, 116 S. Ct. at 1508. Justice Scalia's concurring opinion announced that he, too, shares a "discomfort with the Central Hudson test, which seems to me to have nothing more than policy intuition to support it." Id. at 1515. Justice Thomas' more extensive concurring opinion explained at length his view that Central Hudson should not be applied where "the government's asserted interest is to keep

State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." Id. at 1507. Conversely, commercial speech "related to" an unlawful activity is not entitled to First Amendment protection. Id. at 1505 n.7.

Two recent, parallel cases decided by the United States Court of Appeals for the Fourth Circuit provide some insight into how restrictions on commercial advertising might be handled in light of the 44 Liquormart decision. Penn Advertising v. Baltimore, 5/ and Anheuser-Busch v. Schmoke, 6/ both addressed Baltimore city ordinances regulating commercial speech: Penn Advertising involved an ordinance prohibiting cigarette advertising on billboards located in designated areas of the city, and Anheuser-Busch involved a similar ordinance prohibiting outdoor advertising of alcoholic beverages. Both ordinances included an exception permitting outdoor advertising in certain commercially and industrially zoned areas of the city. See Penn Advertising, 63 F.3d at 1321; Anheuser-Busch, 63 F.3d at 1309.

In its initial decision upholding the restriction on advertising of alcoholic beverages, the Court of Appeals applied the four-part Central Hudson test and determined that the ordinance directly and materially advanced the city's interest in promoting the welfare and temperance of minors. Anheuser-Busch, 63 F.3d at 1309. With regard to the fourth prong of the test, the court held that the relationship between the restriction and the purported government objective, while not a perfect fit, "falls well within the range tolerated by the First Amendment" for the regulation of commercial speech. Id. at 1317. The court noted that because adults could still receive advertising messages and information through other media, and because commercial and industrial zones were exempted from the billboard ban, the ordinance was not more extensive than necessary to serve the government interest. Id.

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legal users of a product or service ignorant in order to manipulate their choices in the marketplace." Id. at 1515-16. See also Glickman v. Wileman Bros. & Elliott, Inc., 117 S. Ct. 2130, 2155-56 (1997) (Thomas, J., dissenting).

5/ 63 F.3d 1318 (4th Cir. 1995), vacated, 116 S. Ct. 2575 (1996), on remand, 101 F.3d 332 (4th Cir. 1996), cert. denied, 117 S. Ct. 1569 (1997).

6/ 63 F.3d 1305 (4th Cir. 1995), vacated, 116 S. Ct. 1821 (1996), on remand 101 F.3d 325 (4th Cir. 1996), cert. denied, 117 S. Ct. 1569 (1997).

Similarly, in the initial Penn Advertising decision, the Court of Appeals held that the asserted public interest in preventing the purchase and consumption of cigarettes by minors was directly advanced by the billboard restrictions and that the advertising regulation was sufficiently narrow to survive First Amendment scrutiny. 63 F.3d at 1325-26.

The Penn Advertising and Anheuser-Busch cases were decided prior to 44 Liquormart, and both were vacated and remanded by the Supreme Court for reconsideration in light of that decision. On remand, the Fourth Circuit affirmed its decisions and held that the ordinances were merely time, place, and manner restrictions rather than the sort of the blanket ban at issue in 44 Liquormart. Anheuser-Busch, 101 F.3d at 330. The court noted that the Baltimore ordinance targeted minors, who cannot legally purchase or consume alcohol and that other advertising avenues, such as "newspaper, magazine, radio, television, direct mail, Internet, and other media" were not affected by the restriction. Id. at 329. The Supreme Court denied certiorari in both cases. Penn Advertising, 117 S. Ct. 1569 (1997); Anheuser-Busch 117 S. Ct. 1569 (1997).

The Supreme Court's recent pronouncement in Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997), also merits notice, although the case did not involve commercial speech *per se*. In Reno, the Court considered the constitutionality of the Communications Decency Act ("CDA"), a federal law aimed at protecting minors from indecent materials transmitted over the Internet. Id. at 2334. The Court struck down the CDA as a violation of the First Amendment because, among other things, "[i]n order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another." Id. at 2346. The Court held that this burden on adult speech is unacceptable "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." Id. Thus, in Reno, the Court examined the fit between the restriction and the intent of the statute to determine if "less restrictive alternatives" would be as effective in achieving the same ends. Because the government did not explain why a less restrictive provision would not be as effective as the CDA, the law was invalidated. Id. at 2348.

Analysis of the Advertising Provisions of the Settlement Proposal Under the First Amendment

Most elements of the advertising provisions of the Settlement should be upheld as constitutional. Their constitutionality is supported by the fact that, although use of tobacco is a lawful activity for adults, the purchase and consumption of tobacco products by minors is unlawful. Even if commercial messages about cigarette and tobacco products are not deceptive and concern a lawful activity, thereby qualifying for some level of First Amendment protection,

narrowly tailored restrictions on such advertising designed to protect minors is both justified and constitutional. Under recent Supreme Court precedent, however, some of the restrictions may well be found to be overbroad and unconstitutional. We, therefore, recommend that these restrictions be more narrowly tailored to create a closer nexus between the limitations and the government's interest in reducing youth smoking.

Prior to considering the constitutionality of the Settlement provisions, a reviewing court must determine whether a party attempting to bring an action has "standing." Under the Settlement, the parties have agreed to waive the right to claim that the provisions are unconstitutional. Courts have upheld a voluntary waiver of constitutional claims, including the right to free speech protected by the First Amendment, that was obtained through a settlement agreement. See, e.g., Wilkicki v. Brady, 882 F. Supp. 1227, 1232-33 (D.R.I. 1995). The Settlement's waiver, however, is unlikely to insulate it from attack by others, including most particularly the non-participating companies. The Settlement does not state specifically that the advertising restrictions will apply to non-participating tobacco companies. Based on the general applicability of the FDA rules and the common sense view that the participating companies would not have agreed to forego such marketing opportunities unless their non-participating competitors were similarly restricted, however, we assume that the restrictions apply to all manufacturers, retailers or distributors of tobacco products. In addition, new companies not party to the contractual protocols or consent decrees would likely have standing to challenge the advertising restrictions.

Consumers may challenge the Settlement provisions on the grounds that their right to receive information about tobacco products is infringed. 7/ Billboard companies and advertising and media companies may also gain standing to challenge advertising restrictions, as did Penn Advertising, the billboard company that challenged the Baltimore ordinance. While the right of these parties to bring a claim under the First Amendment is debatable, where, as with the participating companies, the speaker voluntarily agrees not to speak, 8/ they nevertheless would likely have standing to challenge the imposition of the restrictions on the non-participating companies. In short, we think it likely that some party will have standing to challenge these provisions. We therefore turn to an analysis of the constitutionality of the advertising restrictions.

7/ The First Amendment protects not only the rights of parties who want to convey a message but also the rights of potential listeners to receive the information. See, e.g., Virginia State Board of Pharmacy, 425 U.S. at 757.

8/ Tobacco Settlement Review: Hearings Before the Senate Comm. on the Judiciary, 104th Cong. 13 (1997) (testimony of Prof. Lawrence Tribe).

Does the Speech Qualify for Constitutional Protection?

A constitutional analysis of restrictions on commercial speech begins with an inquiry into whether the speech is misleading or concerns unlawful conduct. Although the use of tobacco is not unlawful for adults, advertising of cigarettes and other tobacco products does, in fact, concern unlawful conduct, at least as it relates to minors. The FDA has relied on this fact to support its restrictions on advertising, most of which are incorporated into the Settlement. FDA Regulations, 61 Fed. Reg. at 44,471. Specifically, the FDA relied on the fact that the sale of tobacco products to children under 18 is unlawful in all 50 states and that a majority of states also prohibit the purchase, possession or use of tobacco by minors. 9/ Since tobacco advertisements propose a commercial transaction (i.e., to sell cigarettes and tobacco products), an "undifferentiated offer to sell" is at least in part, an unlawful offer to sell. FDA Regulations, 61 Fed. Reg. at 44,471. Even if tobacco advertisements are not literal offers to sell to minors, they are "related to" an unlawful activity. Id. Thus, to the extent that tobacco advertising is aimed at children and adolescents, or at least contemplates underage use, the FDA argued that its restrictions on advertising and promotion of tobacco products are constitutional. Id.

Despite the unlawful aspect of tobacco consumption, courts will likely conclude that cigarette advertising qualifies for constitutional protection, since the advertising almost always reaches adults in addition to minors. 10/ The Supreme Court has explained that "the Government may not reduc[e] the adult population [to] only what is fit for children." Reno, 117 S. Ct. at 2346 (citations omitted) (internal quotations omitted). Regardless of the importance of the government's interest in protecting children, "[t]he level of discourse reaching a mailbox cannot be limited to that which would be suitable for a sandbox." Id. (citations omitted) (internal quotations omitted).

The mere fact that a statute was enacted for the purpose of protecting children from harmful messages does not foreclose an inquiry into its constitutionality. Id. It is legal to sell tobacco products to adults, and the tobacco companies have an interest in promoting their products to this audience. Furthermore, to the extent that tobacco advertisements communicate truthful,

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9/ State Laws on Tobacco Control — United States, 1995, 44 Morbidity and Mortality Wkly. Rep. ("MMWR") 16, 17 (1995).

10/ See Edward O. Correia, State and Local Regulation of Cigarette Advertising, 23 J. of Legis. 1, 27 (1997) (drawing the conclusion that tobacco advertising warrants constitutional protection because it targets and reaches adults in addition to minors).

nonmisleading messages, they are entitled to protection. 11/ Thus, courts will likely consider whether the Settlement's advertising restrictions satisfy the remaining three elements of the Central Hudson test.

Is the Asserted Government Interest Substantial?

Assuming that tobacco advertising represents speech that deserves some protection under the First Amendment, the government can readily identify a substantial interest to justify its restrictions. The preamble to the Settlement describes the purpose of the resolution and outlines its basic tenets. A primary objective of the Settlement provisions is to stem children's use of tobacco products, which is deemed a "'pediatric disease' of epic and worsening proportions." (p. 1). Public health authorities, the Federal Trade Commission, the FDA, state Attorneys General, and the President all believe that tobacco advertising and marketing contribute significantly to the early use of cigarettes and other tobacco products.

The government has a substantial, indeed a compelling, interest in protecting children from the harms associated with tobacco. The Supreme Court has repeatedly recognized that the protection of children deserves special solicitude in considering a restriction that implicates the First Amendment. New York v. Ferber, 458 U.S. 747 (1982) (protecting the physical and psychological well-being of children represents a compelling state interest). Undoubtedly, a court could find a substantial interest in protecting the well-being of children.

Do the Restrictions Advance the Government Interest "to a Material Degree"?

The third prong of the Central Hudson test, emphasized in recent Supreme Court decisions, requires the government to demonstrate that the advertising restrictions directly and materially advance its asserted substantial interest. To meet this burden, the government must show that tobacco advertising "plays a concrete role in the decision of minors to smoke" and that the restrictions will ultimately contribute to protecting the health of children. FDA Regulations, 61 Fed. Reg. at 44,474.

11/ 44 Liquormart, 116 S. Ct. at 1508. One could argue that tobacco advertisements are nontruthful and misleading because they omit important information concerning the health consequences of smoking. Under the 44 Liquormart standard, then, tobacco advertisements may be entitled to less protection than other kinds of commercial speech, such as price information, that is truthful.

The quantity and quality of evidence that courts should require in order to uphold a restriction on commercial speech is unsettled and reflects disagreement among Supreme Court justices. 12/ For example, a survey prepared by the state bar association was sufficient to support a ban on targeted direct-mail solicitation by attorneys, despite serious methodological shortcomings. Florida Bar, 115 S. Ct. at 2378. The dissent in that case would have insisted that the bar association produce a survey that was conducted in accordance with basic standards of social science research. Id. at 2384 (Kennedy, J., dissenting). In another recent decision, Burson v. Freeman, 504 U.S. 191, 211 (1992), the Court conceded that some conclusions are justified based on "simple common sense." Conversely, speaking for a plurality of the court in 44 Liquormart, 116 S. Ct. at 1509, Justice Stevens asserted that "'anecdotal evidence and educated guesses'" are insufficient to satisfy the state's burden to show that the ban on price advertising would "significantly" reduce alcohol consumption. 13/

How strong is the association between tobacco advertising and underage smoking? There is substantial evidence, both direct and indirect, linking advertising and smoking by minors. 14/ Nearly 3,000 Americans start smoking every day, and most of these new smokers are children or adolescents. 15/ Studies also show that over 90 percent of those who become long-term smokers begin smoking as children or adolescents. 16/ Moreover, a person who does *not* start smoking as a minor is unlikely to become a smoker later in life. 17/

A recent study published by the American Medical Association demonstrated that more pre-school age children can match Joe Camel to cigarettes

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12/ See Correia, supra note 10 at 13 (discussing the inconsistency in Supreme Court cases with regard to the amount and form of evidence required to support a claim that a restriction on commercial speech is effective).

13/ See Correia, supra note 10 at 13 (citing Rubin v. Coors, 514 U.S. 476 (1995) and Edenfield v. Fane, 507 U.S. 761 (1993)).

14/ See Correia, supra note 10, at 29 (providing an inventory of studies documenting the link between advertising and underage smoking).

15/ Ronald M. Davis, Reducing Youth Access to Tobacco, 266 J. Am. Med. Assoc. 3186 (1991).

16/ Health-Care Provider Advice on Tobacco Use to Persons Aged 10-22 Years, 44 MMWR 826 (1995).

17/ Peter Rheinstein & Thomas McGinnis, Children and Tobacco: The Clinton Administration Proposal, 52 Am. Family Physician 1205 (1995).

than Mickey Mouse to Walt Disney. 18/ Additionally, children who smoke are also much more likely to recognize brand-name tobacco slogans than children who do not smoke. FDA Regulations, 61 Fed. Reg. at 44,475. In fact, numerous studies illustrate that children and adolescents are aware of, respond favorably to, and are influenced by cigarette advertising. Id. These findings are not surprising. The images, color, and peripheral presentations used by the tobacco industry create particular allure for children and adolescents. Id. at 44,472. The evidence demonstrates that a strong correlation exists between cigarette advertising and cigarette consumption by minors. See id. at 44,474, 44,488.

Nevertheless, it would be useful for the government to continue to develop the record linking advertising and underage tobacco use. Prior to the FDA's promulgation of its final rule in 1996, the FDA had already developed an extensive record documenting the link between tobacco advertising and youth smoking. In Covne Beahm v. FDA, 958 F. Supp. at 1060, however, the court held that the FDA was without authority to restrict the advertising and promotion of tobacco products. In order to permit the FDA to continue to supplement (and rely on) the extensive record it has developed to date, the proposed legislation should explicitly grant the FDA jurisdiction over tobacco advertising and promotion. Pursuant to this jurisdictional grant, the FDA should continue to develop a record documenting that advertising restrictions lead to a decline in youth smoking. The FDA's continued fact finding is essential because of the Supreme Court's recent scrutiny of the nexus between speech restrictions and the advancement of the government interest.

Furthermore, Congress should vest in the FDA the authority not only to develop a factual record but also to adopt via notice and comment rulemaking the substantive restrictions regulating tobacco advertising. Concomitant with such a grant of authority, Congress should refrain from codifying in a statute the substance of the advertising restrictions. In this way, the agency would have the flexibility to tailor the restrictions to the factual record and the requirements of the First Amendment. Likewise, the FDA would be better able than Congress to respond to future Court pronouncements and to implement necessary changes in the restrictions. So long as Congress clearly grants the agency the authority to craft advertising restrictions that reach to the fullest extent of the law, it is preferable for the agency to draft, implement, and oversee the advertising restrictions because of its responsiveness to changing circumstances.

18/ Joseph R. DiFranza et al., RJR Nabisco's Cartoon Camel Promotes Camel Cigarettes to Children, 266 J. Am. Med. Assoc. 3149, 3150 (1991).

Is There a Reasonable Fit Between the State's Regulation and the Stated Interest?

The fourth element of the Central Hudson test requires a court to examine whether a "reasonable fit" exists between the limitations placed on commercial speech and the government's substantial interest. To this end, the restrictions on speech must not be "more extensive than necessary." 44 Liquormart, 116 S. Ct. at 1510, 1521 (Stevens, J. and O'Connor, J., plurality opinions). This test requires "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." Id. at 1521 (O'Connor, J., plurality opinion) (citations omitted) (internal quotations omitted). Moreover, while the government need not employ "the least restrictive means to accomplish its goal, the fit between means and ends must be 'narrowly tailored.'" Id. (emphasis added) (citations omitted).

In applying this standard, the plurality opinions of Justice Stevens and Justice O'Connor in 44 Liquormart both concluded that the State could have used other, less restrictive, non-speech means to "promote temperance" than banning price advertisements. Id. at 1510, 1521-22. For example, the State could have accomplished its objective by establishing a minimum price, raising the sales tax, instituting educational campaigns, or placing per capita limits on purchases. 19/

In the case of reducing tobacco consumption by minors, it is important to keep in mind that less restrictive alternatives than banning speech have already been widely employed — and found wanting. All states ban the sale of cigarettes to minors, and many states have utilized other techniques, such as stings and identification checks, to reduce underage smoking. These non-speech restrictive approaches have not eliminated smoking by minors, however, justifying limitations on speech as a last resort.

19/ 44 Liquormart, 116 S. Ct. at 1510, 1521-22. The casual adoption of a "less restrictive, non-speech alternative" approach to regulations affecting commercial speech has been criticized for placing an undue burden on the government and virtually no burden on the opposing party that identifies the potential alternative. See Correia, supra note 10, at 40. As Justice Thomas acknowledged, in many cases, the non-speech restricting alternative may be more offensive and less acceptable than a policy affecting commercial speech. 44 Liquormart, 116 S. Ct. at 1518-19 (Thomas, J., concurring). Despite a passing endorsement by Justice Stevens, id. at 1510, for example, the cost of implementing a per capita limit on alcohol purchases in place of a ban on price advertising would raise formidable administrative difficulties in addition to public outcry.

Moreover, the Settlement adopts other means aimed at reducing underage tobacco use, including licensure of retail tobacco product sellers, restrictions on access to tobacco products, and the "look-back" provisions. 20/ Thus, the Settlement incorporates numerous non-speech-restrictive options in addition to commercial speech provisions in hopes that a comprehensive scheme will achieve the government's stated purpose of reducing underage tobacco use. This multifaceted approach to reducing youth tobacco use will be helpful when a court analyzes the fit between the particular speech restrictions and the goals of the legislation.

In examining the specific advertising restrictions proposed by the Settlement, several appear to be narrowly tailored to serve the government's asserted interest. For example, the requirement that tobacco product advertising be limited to black text on a white background except in adult publications and adult-only facilities and the restriction on point-of-sale advertising in non-adult-only facilities are narrowly tailored to limit exposure of children and adolescents to tobacco advertisements. These restrictions are designed specifically to limit children's exposure to commercial messages regarding a product that they cannot legally purchase and because they are so tailored would likely be upheld under the Central Hudson test.

Moreover, these restrictions are distinguishable from the outright ban that was invalidated in 44 Liquormart, because the Settlement provisions do not entirely prohibit dissemination of commercial messages about cigarettes and smokeless tobacco. Rather, the Settlement adopts carefully tailored restrictions that have virtually no effect on the core *informational function* of commercial speech as described in 44 Liquormart and Virginia Board of Pharmacy. FDA Regulations, 61 Fed. Reg. at 44,472. 21/ In other words, the Settlement provisions do not affect the ability of a tobacco manufacturer, retailer or distributor to inform the public about what they are selling, why they are selling it, or the price of their product, nor do they affect the ability to convey information about the characteristics of their products or about any other aspects of what they sell. Id.

20/ The "look-back" provisions set specific targets for the reduction in current levels of underage smoking and use of smokeless products over the next ten years. (pp. 24-25).

21/ Both 44 Liquormart and Virginia Board of Pharmacy involved restrictions on price advertisements, which serve an informational function for consumers. Colorful photos that glamorize the use of tobacco, outdoor scenes, and cartoon images do not represent useful information about the product that is advertised.

Some of the Settlement provisions affecting tobacco marketing and advertising appear to be somewhat less focused on the asserted interest. For example, the bans on tobacco logos on merchandise, tobacco sponsorship of sporting and music events, and the use of human images and cartoon characters in all tobacco advertising arguably represent more sweeping restrictions in that they completely extinguish speech when they apply. Because of the ubiquitous nature of tobacco sponsorship and images that promote tobacco, however, constructing less restrictive alternatives that still protect children from harmful messages would be difficult, if not impossible. Hence, these restrictions appear to satisfy the Reno standard, which permits the limitation of adult speech if less restrictive alternatives would not be at least as effective in achieving the government's ends.

Although the Settlement provisions described above are narrowly tailored enough to withstand judicial scrutiny, some of the proposed restrictions may warrant reconsideration. By way of example, the Settlement would prohibit direct and indirect payments for tobacco images in all movies and television programs. Although the ban on payments for tobacco images in television programs appears to be narrowly tailored because of the invasive nature of the broadcast medium and the ease with which children can view television advertising, see Reno, 117 S. Ct. at 2343, the ban seems less narrowly tailored with respect to movies, such as those with an "R" or "NC-17" rating, that are restricted to adults. Hence, the prohibition on payments for tobacco product placement in all movies may be found to be overly broad. See Reno, 117 S. Ct. at 2346.

Another more sweeping provision is the ban on all outdoor advertising. Whereas the ordinances considered in Penn Advertising and Anheuser-Busch permitted outdoor advertising in certain commercial and industrial zones of the city, the proposed restrictions would eliminate *all* outdoor advertising of tobacco products. Moreover, because the Settlement forecloses multiple avenues of speech, the Settlement's ban on outdoor advertising will likely be scrutinized more carefully than similar restrictions standing alone. 22/ If an adequate factual record is developed, however, it may be possible to demonstrate that there are no less restrictive alternatives that achieve a reduction in youth smoking. See Reno, 117 S. Ct. at 2346.

22/ See 44 Liquormart, 116 S. Ct. at 1521 (O'Connor, J., plurality opinion) ("If alternative channels permit communication of the restricted speech, the regulation is more likely to be considered reasonable."). Compare Anheuser-Busch, 101 F.3d at 329 (Court noted approvingly that Baltimore's restriction did not foreclose plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors).

Similarly, the Settlement's ban on advertising over the Internet raises significant constitutional concerns. Unlike advertisements that are posted in public places and freely visible to all, including children, advertisements on the Internet are available only to those who affirmatively seek out Internet access. Access to commercial Internet sites — like access to physical facilities — can be regulated by the age of the participant. See Reno, 117 S. Ct. at 2349. The ban on all Internet advertising is not aimed specifically at children accessing the Internet, and as such, would censor speech addressed to adults in situations where it may be possible more narrowly to tailor the restrictions to meet the objective of protecting children. Of course, Internet advertising should be subject to the same advertising restrictions as other media (i.e., no human images and cartoon characters). Moreover, because of the rapidly developing nature of this new technology, Congress should grant the FDA the authority to address the special problem of minimizing minors' exposure to tobacco advertising on the Internet.

* * *

Given the compelling nature of the government's interest in protecting children and adolescents from the dangers of smoking and the narrowly tailored approach that a majority of the advertising restrictions adopt, much of the Settlement would likely withstand judicial scrutiny under the applicable legal standard. It is important to recognize that while the Settlement sets forth proposed restrictions on tobacco marketing and advertising, the legislation itself need not be specific as to the precise constraints imposed. Rather, as discussed supra, it would be preferable for Congress to grant the FDA authority over the drafting, implementation, and oversight of such restrictions, through rulemaking. This would permit interested parties an opportunity for notice and comment as well as allow the agency the flexibility to carefully craft and amend the restrictions on advertising in order to comport with the Constitution.

TENTH AMENDMENT AND FEDERALISM ISSUES UNDER THE TOBACCO SETTLEMENT

The Tenth Amendment to the United States Constitution explicitly recognizes the balance of authority between the Federal Government and the States in providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X. This balance is implicated by the Settlement to the extent that the Settlement amends — or requires amendment of — certain state laws and court procedures in civil actions relating to tobacco and health. The Settlement also envisions State licensing of entities that sell tobacco as well as adoption and enforcement of "no sales to minors" laws. All of these provisions require scrutiny under the Tenth Amendment and related provisions of the Constitution.

This analysis concludes that while it may be constitutional for Congress to preempt State court procedural laws, the Supreme Court has not yet addressed this question directly, and recent Court pronouncements raise concerns that such a regime may be considered constitutionally infirm. In light of this possibility, it may be more effective — and certainly constitutionally safer — to create federal jurisdiction over tobacco-related claims. Alternatively, the Federal Government can use its spending powers to induce the States to amend their laws of civil procedure by conditioning the receipt of Industry Payments upon the States' enactment of these laws. A fourth option would be to give the States the choice of amending their laws of civil procedure or having conflicting State laws preempted by federal jurisdiction. Finally, Congress can also condition the receipt of federal funds upon the States' licensure of entities that sell tobacco products and their enactment and enforcement of measures restricting tobacco sales to minors.

The Constitutional Framework for Analysis of Tenth Amendment/ Federalism Issues

Under the Constitution, the specified authority of the Federal Government supersedes that of the States, but — as the Tenth Amendment dictates — the States also retain powers not delegated to the Federal Government. This federal structure is not just an end in itself; rather, the structure reflects the Founders' conviction that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." New York v. United States, 505 U.S. 144, 181 (1992) (citations omitted). A healthy balance of power between the States and the Federal Government, they believed, reduces the risk of tyranny and abuses from either front. Id.

With respect to the Federal Government's authority, the Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. As a result, "'[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,'" for "'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'" Felder v. Casey, 487 U.S. 131, 138 (1988) (citations omitted). Hence, state laws at odds with valid federal laws are said to be "preempted" by the Congressional enactments. 23/ In considering the issue of preemption, however, courts start with the assumption that State powers are not to be superseded by a federal law unless that is the clear intent of Congress. Cipollone, 505 U.S. at 516.

Although the Constitution and federal laws are the supreme Law of the Land, and they may preempt State law, the Constitution also established a system of "'dual sovereignty,'" whereby the States retained to themselves a residuary of inviolable State sovereignty. Printz v. United States, 117 S. Ct. 2365, 2376 (1997). To effectuate this dual sovereignty, the Constitution confers upon Congress only discrete, enumerated powers. U.S. Const. art. I, § 8. Concomitantly, the Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

In order to ascertain the scope of State authority, one must therefore identify the limits of the powers delegated to Congress. The powers most frequently invoked by Congress — and which presumably would underlie its enactment of the provisions of the Settlement — are those enumerated in the Commerce Clause and the Spending Clause. The Supreme Court in recent years has issued guidance on the scope and limits on these enumerated powers that must be considered when analyzing the viability of various provisions of the Settlement.

23/ Congress can manifest its intent to preempt a state law either expressly or by implication. Preemption is express where Congress explicitly defines the extent to which its enactments preempt state law. Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 299 (1988). In the absence of an express congressional command, state law is preempted if that law actually conflicts with federal law, in that it is impossible to comply with both state and federal law. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); Schneidewind, 485 U.S. at 300. Likewise, preemption may occur where federal law so thoroughly occupies a legislative field that it creates a reasonable inference that Congress left no room for the States to supplement it. Cipollone, 505 U.S. at 516. See Dalton v. Little Rock Family Planning Servs., 116 S. Ct. 1063, 1064 (1996); Schneidewind, 485 U.S. at 299-300.

Commerce Clause

The Commerce Clause delegates to Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. There are three broad categories of activity that Congress may regulate under its interstate commerce power: (1) the use of the channels of interstate commerce, (2) the instrumentalities of interstate commerce, or persons or things in interstate commerce, and (3) activities having a substantial relation to interstate commerce. United States v. Lopez, 115 S. Ct. 1624, 1629-30 (1995).

Since the 1930s, Congress' power under the Commerce Clause has been interpreted expansively, permitting federal regulation on a variety of subjects, including intrastate coal mining, intrastate extortionate credit transactions, inns and hotels catering to interstate guests, restaurants utilizing substantial interstate supplies, and production and consumption of home-grown wheat. 24/

In 1995, however, for the first time in nearly sixty years, the Supreme Court held that an act of Congress exceeded the authority granted by the Commerce Clause. Lopez, 115 S. Ct. at 1634. In Lopez, the Court invalidated the Gun-Free School Zones Act of 1990, which made it a federal offense for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone. Id. at 1626. The Court found that the law "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce." Id. Because the Act had nothing to do with "'commerce' or any sort of economic enterprise, however broadly one might define those terms," id. at 1631, the Act exceeded the authority of Congress to "regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. Lopez thus signals the Court's attempt to contain the expansion of federal Commerce Clause power and more clearly distinguish "what is truly national and what is truly local." Lopez, 115 S. Ct. at 1634.

Spending Clause

The Spending Clause provides, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." U.S. Const. art. I, § 8, cl. 1. This language gives Congress the power to tax and spend the money collected from federal taxes for the stated purposes. Incident to this power, Congress may

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24/ See respectively Hodel v. Virginia Surface Min. & Reclamation Ass'n. Inc., 452 U.S. 264 (1981); Perez v. United States, 402 U.S. 146 (1971); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

further its policy objectives by conditioning the receipt of federal monies upon state compliance with federal statutory and administrative directives. New York, 505 U.S. at 167; South Dakota v. Dole, 483 U.S. 203, 206 (1987).

Importantly, Congress' power to authorize the expenditure of public monies for public purposes is not limited by the direct grants of legislative power found in the Constitution. Dole, 483 U.S. at 207. Thus, "objectives not thought to be within Article I's 'enumerated legislative fields,' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds." Id. (citations omitted). In other words, Congress may make conditional offers of funds to the States which, if accepted, indirectly regulate the States in ways that Congress could not directly mandate.

For example, in South Dakota v. Dole, the Supreme Court held that it was permissible for Congress to pass a statute under its Spending Clause authority whereby the Secretary of Transportation was authorized to withhold a percentage of federal highway funds from States that did not restrict the sale of alcohol to persons under twenty-one years of age. 483 U.S. at 206. This was so even though the Twenty-first Amendment grants the States virtually complete control over the regulation of liquor sales and distribution. Id. at 212. Thus, the Twenty-first Amendment did not create an independent constitutional bar that prevented Congress from exercising the spending power in such a way as to indirectly achieve objectives that it was not empowered to achieve directly. Id. at 209.

Likewise, the Court has found it permissible for Congress to make compliance with federal standards a precondition to continued state regulation in an otherwise preempted field and has permitted Congress to require the States to "consider" federal standards under these circumstances. Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 765 (1982); Hodel, 452 U.S. at 288.

The spending power is not unlimited, however, and is subject to several general restrictions: (1) the exercise of the spending power must be in the pursuit of the common defense or "general welfare" of the United States, (2) if Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, (3) conditions on federal grants must be in some way related to the purpose of the federal spending, and (4) the exercise of the spending power must not run afoul of other constitutional provisions that may provide an independent bar to the conditional grant of federal funds. Dole, 505 U.S. at 207-08.

Limits of Federal Authority

Although Congress may preempt state law through its exercise of the federal authority over interstate commerce and may condition the receipt of federal

funds upon the States' compliance with certain conditions, Congress may not simply compel States to promulgate state laws that comply with federal directives or to participate in federal regulatory programs. Printz, 117 S. Ct. at 2380; New York, 505 U.S. at 161; Hodel, 452 U.S. at 288. In New York v. United States, for instance, the Supreme Court considered the propriety of the Low-Level Radioactive Waste Policy Act, which required States either to enact legislation providing for the disposal of radioactive waste generated within their borders, or to take title to and possession of that waste. 505 U.S. at 174-75.

The Court invalidated this regime as a violation of the Tenth Amendment. "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate." Id. at 178. Likewise, "an instruction to state governments to take title to waste, standing alone, would be beyond the authority of Congress." Id. at 176. Because Congress did not have the authority to instruct state governments to take title to waste or to order a state to regulate, it could not offer the States a choice between the two. Id. This constitutional infirmity could not be cured by the fact that state officials consented to the proposal. Id. at 182.

Nor can Congress circumvent the Tenth Amendment's prohibitions by conscripting the States' officers directly. Hence, in Printz v. United States, the Supreme Court invalidated portions of the Brady Act that required state law enforcement officers to conduct background checks on prospective handgun purchasers. 117 S. Ct. at 2368. The Court emphasized that under the Tenth Amendment, "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program." Id. at 2384.

Analysis of Settlement Provisions Under Tenth Amendment and Federalism Principles

The Settlement contains several provisions implicating Tenth Amendment issues, which can be divided into two broad categories: (1) those restructuring civil proceedings relating to tobacco and health and (2) state licensing of tobacco sellers and "no sales to minors" laws.

Restructuring Civil Proceedings Relating to Tobacco and Health

The Settlement makes sweeping changes to all civil liability actions relating to tobacco and health, whether under state or federal law. In particular, the Settlement eliminates punitive damages for all claims (pending and future) based upon conduct that occurred prior to the effective date of the Act. Punitive damages would still be permitted for conduct taking place after the effective date of

the Act. (p. 39).

In addition, unless defendants consent to other forms of actions, suits must take the form of individual trials only; the Settlement eliminates class actions, joinder, aggregations, consolidations, extrapolations and other devices to resolve cases other than on the basis of individual trials. State court actions in violation of the individual trial provision — and these actions only — are removable to federal court. (p. 39).

The Settlement also limits permissible parties in state and federal proceedings. Claims must be brought either by the person claiming the injury or his or her heirs. It is also permissible for third-party payors to make claims based on subrogation of individual claims and for past conduct not based on subrogation that were pending as of June 9, 1997. For claims based upon future conduct, third-party payor claims must be based on subrogation only. Actions may be maintained only against manufacturing companies, their successors and assigns, any future fraudulent transferee, and/or entity for suit designated to survive a defunct manufacturer. Moreover, the development of "reduced risk" tobacco products after the effective date of the Act is neither admissible nor discoverable in civil liability actions. (p. 40).

Finally, the Settlement creates an annual aggregate cap for judgments and settlements in the amount of 33% of the annual Industry Base Payment, including any reductions for volume decline. 25/ If the aggregate judgments and settlements for a year exceed the cap, the excess does not have to be paid that year and rolls over to the next year. 26/ Moreover, individual judgments in excess of $1 million are not paid the year they are entered unless all other judgments and settlements can be satisfied that year within the annual aggregate cap. The amounts unpaid on these judgments roll forward without interest and are paid at the rate of $1 million per year, subject to the annual cap. The first year that the annual aggregate cap is not exceeded, the remainder of the unpaid judgments is paid in full, again subject to the annual cap. In the event that the annual aggregate cap is not reached in any year, a Commission appointed by the President will

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25/ (pp. 40-41). Because the annual Industry Base Payments range from $8.5 billion to $15 billion per year, (pp. 34), the industry's annual liability cap would be $2.8 billion to $5 billion.

26/ The Settlement does not indicate whether plaintiffs with judgments that exceeded the cap have priority in the next year over new plaintiffs who had judgments entered in that year.

afoul of the admonishments in Printz and New York that the Federal Government may not compel the States to enact or enforce a federal regulatory program. Printz, 117 S. Ct. at 2384. To be sure, the Supreme Court's views on these issues are of relatively recent vintage and are shared by only a narrow majority of the Court. It is, therefore, difficult to predict whether the Court's recent determinations on the limits of federal authority would be applied (or extended) to the mechanisms proposed by the Settlement. At a minimum, however, there would seem to be a legitimate question in light of recent authority about the constitutionality of those portions of the Settlement that dictate the content of State law and the actions of State officials.

We outline below four methods whereby Congress could implement the Settlement's envisioned restructuring of civil suits relating to tobacco and health in a manner that is likely to withstand constitutional scrutiny: (1) Congress may preempt state laws of procedure that conflict with the federal law, (2) Congress may create federal jurisdiction over tobacco lawsuits, (3) Congress could condition the receipt of federal funds upon the States' amendment of their own laws of procedure, and (4) Congress may offer the States the choice of amending their laws to conform to federal standards or having State law preempted by a federal law that creates federal jurisdiction over tobacco related claims. While all of these approaches effectuate the provisions of the Settlement, each has its own legal and political advantages and disadvantages.

Preemption of State Laws of Procedure

Under the first option, Congress would pass a statute that exercises its unquestioned power to preempt state laws. To this end, Congress would outline the procedures to govern state civil suits related to tobacco and health and expressly state that these procedures preempt state laws that conflict with them. Because, under the Supremacy Clause, "the relative importance to the State of its own law is not material when there is a conflict with a valid federal law," the State law would yield to the federal law. Felder, 487 U.S. at 138 (citations omitted). In essence, the state court would be applying and enforcing federal law, as it is required to do. See Testa v. Katt, 330 U.S. 386 (1947) (States have obligation to enforce valid federal law); McKnett v. St. Louis & S.F. Ry., 292 U.S. 230 (1934) (the Constitution prohibits State courts of general jurisdiction from refusing to enforce a federal law).

This model has been adopted previously. For example, the National Childhood Vaccine Injury Act of 1986 ("CVIA"), 42 U.S.C. §§ 300aa-1 to -34, attempts to provide a no-fault mechanism for compensating victims of vaccine-related injuries and, to this end, requires claimants alleging injury after the CVIA's effective date to file petitions with the United States Court of Federal Claims,

alleging that an injury is vaccine-related. 28/ It is only after the Court of Claims makes a determination as to whether and to what extent compensation is warranted, that a complainant may file a civil action for damages. 29/ If a plaintiff chooses to file a civil action in state or federal court, the CVIA dictates certain substantive legal standards which must apply as well as rules of procedure to govern the trial and damages. 42 U.S.C. §§ 300aa-22, -23. Thus, the CVIA preempts certain procedural and substantive elements of state tort laws where civil product liability suits are brought in state court against the manufacturers of childhood vaccines. 30/

While this approach may be politically attractive because it would not bring all new tobacco-related cases into the federal courts, this route is not free from constitutional doubt. It is not settled that Congress' preemptive authority (i.e., its enumerated powers) goes so far as to permit it to preempt state procedural rules in state courts for state substantive causes of action.

Although the Supreme Court has yet to address this precise issue, the Court has stated that it is an "unassailable proposition . . . that States may

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28/ See also Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et seq. (prescribing procedures for commencing and pursuing lawsuits against foreign states which are applicable in both federal and state courts, including limitations on discovery, rules of service and the time to answer, and limited immunity from attachment and execution of property); Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 496 n.22 (1983). The constitutionality of these provisions has not yet been subject to challenge, however.

29/ Such an action may be filed in state court or in federal court if diversity jurisdiction is present. 28 U.S.C. § 1332. The CVIA does not provide an independent basis for the exercise of federal jurisdiction.

30/ On numerous occasions, courts have as a matter of legislative interpretation rejected suggestions that federal public health policies, including the CVIA, completely preempt state tort actions for vaccine related injuries. See e.g., Hurley v. Lederle Labs. Div. of Am. Cyanamid Co., 863 F.2d 1173, 1176-78 (5th Cir. 1988); Abbot v. American Cyanamid Co., 844 F.2d 1108 (4th Cir.), cert. denied, 488 U.S. 908 U.S. 908 (1988). The courts recognize, however, that the CVIA specifically preempts state laws in several respects. See Abbot, 844 F.2d at 1113 (state tort remedies available "as modified by the Acts"); Shackil v. Lederle Labs., 561 A.2d 511, 527 (N.J. 1989) (CVIA limits state tort claims to the extent that it codifies comment k of the Restatement (Second) of Torts and creates a presumption that a vaccine's warning was valid if it complied with FDA requirements). The constitutionality of the CVIA has not yet been subject to challenge.

establish the rules of procedure governing litigation in their own courts." Felder, 487 U.S. at 138. Under these circumstances, it is possible that the Court would view preemption of state procedures in state courts as an unconstitutional attempt to "commandeer" State courts to promulgate federal law — just as it is unconstitutional to conscript the States' executive, Printz, 117 S. Ct. at 2384, and legislative branches, New York, 505 U.S. at 176. See Cynthia C. Lebow, Federalism & Federal Product Liability Reform: A Warning Not Heeded, 64 Tenn. L. Rev. 665 (1997) (raising similar concerns with respect to the Common Sense Product Liability Legal Reform Act of 1996). While state courts of general jurisdiction may not refuse to entertain or enforce federal laws, Testa, 330 U.S. at 386, if it appears that the federal government is conscripting State courts as a means of effectuating federal law, preemption could be problematic.

Moreover, in Johnson v. Fankell, the Supreme Court recognized,

> When pre-emption of state law is at issue, we must respect the 'principles [that] are fundamental to a system of federalism in which the state courts share responsibility for the application and enforcement of federal law.' . . . This respect is at its apex when we confront a claim that federal law requires a State to undertake something as fundamental as restructuring the operation of its courts.

117 S. Ct. 1800, 1807 (1997) (citations omitted) (emphasis added). The "general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'" Id. at 1805 (citations omitted). See also id. at 1807 n.13 ("it is a matter for each State to decide how to structure its judicial system"). Although Johnson applied these principles as guidance on interpreting whether or not Congress had in fact intended to preempt such state laws and did not hold that the Federal Government was without the power to do so, it seems reasonably clear that the Court would subject an attempt to preempt state court procedures to rigorous scrutiny.

Creating Federal Jurisdiction Over Tobacco Lawsuits

In light of these concerns, Congress may also consider simply creating federal jurisdiction over tobacco-related suits, so they may be brought in or removed to federal court, where Congress has unquestioned authority to dictate the procedures. See Erie R.R. Co. v. Tomkins, 304 U.S. 64 (1938). Creating federal jurisdiction over civil tobacco litigation would avoid the potential legal problems with preemption of state procedures and requiring the States to implement and enforce federal laws. We recognize, however, that to some, creation of a comprehensive federal regime may be politically unpalatable because it would allow all such cases to be brought in the federal courts. 31/

The most squarely constitutional manner to ensure universal application of the Settlement's proposed procedural and substantive requirements would be for Congress to create a comprehensive federal scheme of substantive and procedural law that displaces state law. See e.g., Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1056. Under this regime, state and federal courts would be hearing federal causes of action based on federal substantive law. Federal question jurisdiction would be created and cases could be removed to federal court in the event that the States did not adhere to federal procedural requirements.

Alternatively, if Congress does not wish to construct a comprehensive, federal substantive scheme of this nature, it could craft a federal law that contains both federal and state elements. In particular, a federal statute may confer subject matter jurisdiction on the federal courts and, simultaneously, incorporate state substantive law as the federal rule of decision. Under this scenario, tobacco-related lawsuits would also be based on federal law, again permitting cases to be filed in or removed to federal court in the event that the States did not adhere to federal procedural requirements. But rather than creating a new comprehensive federal

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31/ Congress might also confront the argument that such a scheme would clog the federal courts. The original version of the CVIA required that proceedings for compensation under the no-fault program be instituted in United States district court. The next year, Congress placed jurisdiction for the proceedings in the United States Court of Federal Claims. See Vaccine Compensation Amendments of 1987, Pub. L. No. 100-203, 101 Stat. 1330-224 to 225 (codified as amended at 42 U.S.C. §§ 300aa-11 to -23). Among the reasons for doing so were concerns expressed by the Judicial Conference of the United States and the American Bar Association that most U.S. district courts already were overburdened. See H.R. Conf. Rep. No. 100-495, at 771 (1987); Robert A. Katzman, Oddly, Congress Mistreats the Courts, N.Y. Times, Oct. 10, 1987, at A31.

scheme of substantive law, this scenario would look to state substantive law and adopt it as the federal rule of decision.

Similar regimes exist under current federal law. For example, the federal Foreign Sovereign Immunities Act ("FSIA") dictates the types of actions for which foreign sovereigns may be held liable. See 28 U.S.C. §§ 1602 et seq. Pursuant to a specific jurisdictional grant in the FSIA, 28 U.S.C. § 1330, a federal court may hear a claim against a foreign sovereign even if the claim is rooted in state law (e.g., tort or contract law), and the requirements for federal diversity jurisdiction are not satisfied. 32/ So long as certain requirements are met, a plaintiff may press its substantive state law claim against a foreign sovereign in federal court (as a violation of the FSIA) even though diversity jurisdiction may be lacking. See 28 U.S.C. § 1330; Verlinden, 461 U.S. at 496.

Similarly, the Diplomatic Relations Act of 1978 allows plaintiffs to bring suit in federal court against insurers to recover damages for injuries caused by foreign diplomats who are immune from suit. 28 U.S.C. § 1364. In these cases, the substantive tort law to be applied by federal courts is the state law of the place where the tortious act or omission occurred. 28 U.S.C. § 1364. Likewise, the Price-Anderson Act creates exclusive federal jurisdiction over public liability actions involving nuclear incidents. Pub. L. No. 85-256, 71 Stat. 576 (1957) (codified as amended in scattered sections of 42 U.S.C.); In re TMI Litigation Cases Consol. II, 940 F.2d 832, 854 (3d Cir. 1991), cert. denied, 503 U.S. 906 (1992). Notwithstanding the elimination of state causes of action, the Act provides that the federal "substantive rules for decision" are to be derived from the law of the state in which the incident occurred. 33/

The proposed regime depends on the ability to remove cases to federal court. In order to achieve such removal, however, there must be a basis for federal court jurisdiction. Congress, of course, may not expand the jurisdiction of the federal courts beyond the bounds established by the Constitution. Verlinden, 461

32/ See Verlinden, 461 U.S. at 495-96. By creating federal jurisdiction over claims against foreign sovereigns, thereby allowing these cases to be brought in or removed to federal court, Congress deliberately sought to channel these claims away from the state courts and into federal courts. Id. at 497.

33/ See TMI, 940 F.2d at 854-55. For other federal statutory schemes that permit the application of state rules of decision, see the Federal Deposit Insurance Act, 12 U.S.C. § 1819 (1950); the Bankruptcy Reform Act of 1978, 92 Stat. 2549 (1978); the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 et seq.; section 304 of the Clean Air Act, 42 U.S.C. § 7604; and the Federal Tort Claims Act, 28 U.S.C. § 1346(b).

U.S. at 491. Article III of the Constitution gives the federal courts the power to hear cases "arising under" the Constitution and federal statutes. 34/ It is important to note that the Supreme Court has rejected Congressional attempts to confer jurisdiction on the federal courts by the mere enactment of "pure jurisdictional statutes" which "seek 'to do nothing more than grant jurisdiction over a particular class of cases.'" Mesa v. California, 489 U.S. 121, 136 (1989); Verlinden, 461 U.S. at 496. There must, at all times, be a federal law under which an action arises, for Article III purposes. Pure jurisdictional statutes cannot support Article III "arising under" jurisdiction. Mesa, 489 U.S. at 136; Verlinden, 461 U.S. at 496.

Although there is no precise formula for determining what is necessary for a case to fall within the federal question jurisdiction of the federal courts, the "vast majority" of cases that come within this grant of jurisdiction are covered by Justice Holmes' statement that a "suit arises under the law that creates the cause of action." 35/ In the case of a federal law that adopts state law to provide the federal rule of decision, the suit would "arise under" the federal law, not the substantive state tort law. 36/ The creation of federal question jurisdiction may be

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34/ U.S. Const. art. III, § 2. This grant of power is not self-executing. It was not until the Judiciary Act of 1875 that Congress gave the federal courts general "federal question" jurisdiction. 28 U.S.C. § 1331; Merrell Dow Pharms., Inc. v. Thompson, 478 U.S. 804, 807 (1986). Article III also provides that judicial power extends to controversies between "a State, or the Citizens thereof, and foreign States." U.S. Const. art. III, § 2, cl. 1. Pursuant to this grant of "diversity" jurisdiction, Congress has authorized the federal courts to hear cases among diverse parties if the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. Because the Settlement covers suits which do not meet these criteria, the diversity jurisdiction of the federal courts offers an incomplete solution to the question whether Congress can ensure that tobacco-related suits brought in state courts follow specified procedures.

35/ Merrell Dow, 478 U.S. at 808 (citations omitted). Although the Supreme Court has also recognized that a case may arise under federal law "where the vindication of a right under the state law necessarily turned on some construction of federal law," Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 9 (1983) (citing Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921)), this holding was limited by Merrell Dow, where the Court viewed the absence of a private federal cause of action under the Food, Drug, and Cosmetic Act as evidence that there was no federal question jurisdiction. Merrell Dow, 478 U.S. at 810-813.

36/ In practical terms, this would mean that a plaintiff would plead his or her cause of action under the federal legislation, as opposed to under a cause of action based on negligence, fraud, or the like.

preferable to simply permitting the removal of cases which violate the terms of the Settlement because if federal jurisdiction exists, federal courts would be required to apply federal procedures to all such issues.

The Settlement does not expressly create federal jurisdiction over tobacco and health related lawsuits. It does, however, contemplate the exercise of federal jurisdiction in a limited context by authorizing the removal to federal court of actions which are not "individual trials" — class actions, joined actions, and the like. (p. 39). By permitting defendants to remove such actions to federal court, the settlement would appear not to require amendment or alteration of state procedures with respect to aggregation and consolidation. Instead, a federal court could apply federal procedural law — as outlined in the Act — to these cases.

As drafted, however, this provision is severely limited. Because the Settlement does not confer general federal question jurisdiction on the federal courts, removal of cases would be permissible only where federal jurisdiction was otherwise present — where there was diversity of citizenship and the amount in controversy exceeded $75,000. 28 U.S.C. § 1332. Hence, cases that did not satisfy these requirements would remain in state courts. Furthermore, the Settlement only permits removal of suits that violate the "individual trials" provision. The concerns raised by the alteration of state laws respecting punitive damages, proper parties, evidence, or the enforcement of judgments are not addressed by this limited removal provision.

Conditioning the Receipt of Federal Funds Upon the States' Amendment of Their Own Laws of Procedure

Congress may also follow a third option and condition the receipt of federal funds upon the States' amendment of their own laws of procedure for tobacco related cases. While recent Court pronouncements have made it clear that the federal government may not compel the States to enact or administer federal programs, Printz, 117 S. Ct. at 2380; New York, 505 U.S. at 188, Congress still has the authority to condition the receipt of federal funds upon compliance with the federal directives, in accordance with its power under the Spending Clause. See Dole, 483 U.S. at 207.

Because the Settlement envisions the disbursement of funds to the States, Congress may condition the receipt of Industry Payments — or other federal monies — upon the States' amendment of their laws of civil procedure to comply with the standards set forth in the Settlement. Thus, the Industry Payments would act as an incentive to the States to comply with federal directives.

Importantly, this option would not require the creation of federal jurisdiction, nor would this scheme seek to preempt State laws of procedure. Hence, this option is one of the simplest and most squarely constitutional approaches. One must recognize, however, that some States may choose not to alter their laws, foregoing their portion of the Industry Payments as a result. Although the funds at stake are substantial, the fact that some of the States did not endorse the Settlement suggests that they may choose to retain the freedom to determine their own civil procedures without federal interference. The potential for State nonparticipation in this regime could be a significant drawback of this approach because the success of the Settlement likely depends on having all States amend their laws and follow the same procedures.

Preferred Approach: Giving States the Choice of Amending Their Laws or Having State Law Preempted by a Federal Law that Creates Federal Jurisdiction

Alternatively, Congress could give the States the choice of amending their laws of procedure to satisfy federal standards, or having their State laws preempted by a federal act that creates federal jurisdiction over tobacco-related claims. Where Congress has the authority to regulate activity under the Commerce Clause, the Supreme Court has recognized Congress' power "to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." New York, 505 U.S. at 167.

This regime is a variation on the second option, in that Congress would still be required to enact a law creating federal jurisdiction over tobacco-related claims. Under this option, however, the federal law would only preempt state laws which do not comply with the federal standards. Furthermore, this scheme should incorporate elements of the third option, by conditioning the receipt of federal funds upon the States' amendment of their laws of civil procedure. Thus, Congress would provide a financial incentive for the States to amend their laws to conform to federal standards, and if the States did not do so, federal law would preempt the conflicting State laws.

The Supreme Court has endorsed this system of "cooperative federalism" on several occasions. Hodel, 452 U.S. at 289. For example, in Hodel v. Virginia Surface Mining and Reclamation Association, the Court considered the propriety of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), which permitted the States to enact programs that met federal standards; alternatively, in States that chose not to submit programs or in States whose programs did not meet federal standards, the federal program would govern. 452 U.S. at 264. The Court upheld this regime against a Tenth Amendment challenge, finding that "[t]o object to this scheme, . . . appellees must assume that the Tenth

Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce. This assumption is incorrect." Id. at 289-90. Because the States were not compelled to amend their laws, expend State resources, or participate in the federal program in any way, SMCRA did not "commandeer" the State legislative process. Id. at 288. If a State did not comply with the federal standards, the regulatory burden was borne by the federal government. Id.

Likewise, in Federal Energy Regulatory Commission v. Mississippi, the Supreme Court considered the propriety of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), which directed state utility regulatory commissions to either "consider" the adoption and implementation of certain federal standards or abandon regulation of the field altogether. 456 U.S. at 746, 766. Because the States were not required to entertain the federal proposals, and the commerce power permitted Congress to preempt the States entirely, PURPA did not violate the Tenth Amendment. Id. at 764. Thus, although it was unlikely that the States would or easily could abandon their regulation of public utilities to avoid PURPA's requirements, PURPA was constitutional. Id. at 766-67. Numerous other federal statutory schemes also give States the option of adapting their laws to meet federal standards or having their laws preempted by federal law. 37/

This option has the advantage of encouraging the States to amend their own laws, in the first instance, before a federal solution is imposed. As with the third option, forty states have already endorsed the Settlement, and the financial incentives attached to the Act may persuade the other states to amend their laws voluntarily. This approach is not without flaws, however. Because the federal law would preempt State law only in those States which did not amend their laws of civil procedure, this approach would probably create a patchwork of federal jurisdiction, in which plaintiffs in some states would have access to the federal courts via federal question jurisdiction, while plaintiffs in other states could not bring their claims in federal court unless diversity jurisdiction were present. Nevertheless, we believe that this scheme offers the best solution because the incentive structure preserves State autonomy, while the creation of federal jurisdiction provides uniform procedures, in the event that some States do not amend their own laws.

37/ See, e.g., the Clean Air Act section 110, 42 U.S.C. § 7410; the Clean Water Act, 86 Stat. 816 (codified as amended at 33 U.S.C. § 1251 et seq.); the Occupational Safety and Health Act of 1970, 84 Stat. 1590 (codified as amended at 29 U.S.C. § 651 et seq.); the Alaska National Interest Lands Conservation Act, 94 Stat. 2374 (codified as amended at 16 U.S.C. § 3101 et seq.). See also New York, 505 U.S. at 167-68; Virginia v. EPA, 108 F.3d 1397, 1406-07, decision modified, 116 F.3d 499 (D.C. Cir. 1997) (describing the Clean Air Act).

State Licensing of Tobacco Sellers and "No Sales to Minors" Laws

The Settlement envisions the creation of a State retail licensing program whereby any entity that sells tobacco products directly to consumers — whether a manufacturer, wholesaler, importer, distributor, or retailer — would require a license to sell such products. The licensing program would conform with minimum federal standards and mandate compliance with the Act as a condition of obtaining and holding a license. The States would enact penalties for violations substantially similar to minimum federal standards set forth in Appendix II of the Settlement. In addition, State and local authorities would enforce the program through funding provided by the Industry Payments. (pp. 12-13, 45).

The Settlement also requires State enactment and enforcement of restrictions on tobacco sales to minors to decrease the incidence of youth smoking. Each state must have in effect — as they all already do — a "no sales to minors" law, providing that it is unlawful for any manufacturer, retailer, or distributor of tobacco products to sell or distribute any such products to persons under the age of eighteen. 38/ In addition, state officers would be required to conduct random, unannounced inspections to ensure compliance with the "no sales to minors" law, maintaining specific levels of enforcement at the risk of losing a significant portion of the health care program funds otherwise payable to the State under the Act. No State would be held responsible for sales to underage consumers outside that State's jurisdiction. These enforcement obligations would be funded by Industry Payments. (pp. 25, 58). 39/

As with the civil liability provisions, the Settlement does not specify the mechanism whereby the States would be required to implement the licensing

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38/ Such a requirement would, presumably, prohibit the States from repealing the laws already enacted and prevent them from amending the statutes if, after amendment, they would fail to meet the federal standards set forth in the Settlement.

39/ The Settlement also contemplates the existence of a "Protocol" which would extend certain benefits of the Settlement to States which had not filed lawsuits against the tobacco industry. (pp. 26-27). It is unclear from the Settlement whether these States would be required to become signatories to the Protocol or whether — as the Settlement states — "the industry . . . will enter into a binding and enforceable national tobacco control Protocol embodying certain terms of the proposed resolution." (pp. 26-27) (emphasis added). If the States are required to become parties to the Protocol, the following analysis would apply to this provision, as well.

and "no sales to minors" provisions. It merely states that "[t]he proposed Act requires the several States to undertake significant enforcement steps," and that "[e]ach state must enact a statutory or regulatory enforcement scheme that provides substantially similar penalties to the minimum federal standards for a retail licensing program." (pp. 25, 45) (emphasis added). Unless these provisions are properly crafted, however, they too risk offending the maxim that "'[t]he Federal Government' . . . 'may not compel the States to enact or administer a federal regulatory program.'" Printz, 117 S. Ct. at 2380 (citing New York, 505 U.S. at 188).

Of course, as with the third option outlined above, Congress may condition the receipt of federal funds upon compliance with the Act's directives, in accordance with its power under the Spending Clause. See Dole, 483 U.S. at 207. This appears to be the most effective manner to effectuate the licensing and enforcement provisions of the Settlement. As explained above, however, some States may choose not to adopt the standards, thereby foregoing their portion of the Industry Payments.

Finally, to the extent that the Act preempts state licensing and "no sales to minors" laws, it is imperative that the Act's language clarify that such preemption would not prevent states and localities from enacting more stringent standards than those included in the Act. The American Cancer Society believes that the Act must not set a ceiling on state and local tobacco control — it need only set a floor.

* * *

In conclusion, although certain portions of the Settlement raise concerns under the Tenth Amendment, it is possible to draft the Act in such a way as to avoid constitutional infirmities. With respect to the restructuring of civil proceedings relating to tobacco and health, it may be possible to expressly preempt state laws of civil procedure, damages, evidence, and judgments through Congress' authority under the Commerce Clause. Alternatively, to avoid constitutional issues, Congress may wish to create federal jurisdiction over claims affected by the Settlement to permit federal courts to apply their own procedural laws to these actions. A third option is to have Congress condition the receipt of federal funds upon the States' amendment of their own rules of civil procedure to conform with the Settlement. Additionally, Congress could give States the choice of amending their own laws of procedure or having their State laws preempted by a federal law that creates federal jurisdiction over tobacco-related claims. Finally, Congress may encourage the States to enact and enforce licensing programs as well as "no sales to minors" laws by conditioning the receipt of Industry Payments upon their participation in these regimes.

THE SETTLEMENT AND THE FIFTH AMENDMENT'S REQUIREMENT OF JUST COMPENSATION FOR THE TAKING OF PRIVATE PROPERTY FOR PUBLIC USE

On the assumption that participating companies are voluntarily surrendering any Fifth Amendment objections they might have to the Settlement, the question whether any of the provisions of the Settlement might be said to involve an unconstitutional taking — or at least a government action for which "just compensation" must be provided — arises only in the context of non-participating tobacco companies. As explained below, none of the Settlement provisions presents these non-participants with valid *per se* or regulatory takings claims.

Summary of Settlement Provisions Affecting Private Property

The provisions of the Settlement that arguably present potential Fifth Amendment issues include the following:

- All companies, including non-participating companies, would be required, *for a commercially reasonable fee*, to cross license (to other tobacco companies only) any risk-reducing technology that they develop or acquire. Such technology must also be reported to FDA, although the agency will provide manufacturers with confidentiality protection during the product development process.

- Non-participants' products would be subject to a user fee equal to the portion of participating company payments that go to fund public health programs and the enforcement of access restrictions.

- Non-participating manufacturers must escrow a reserve to satisfy future civil liability. Contributions to this escrow will equal 150% of the non-participants' "share" of the annual payment required of participating manufacturers. To the extent they are not used to satisfy liability, funds remaining in escrow may be reclaimed after 35 years, with interest.

Overview of Fifth Amendment Takings Jurisprudence

The Fifth Amendment provides that private property may not "be taken for public use, without just compensation." U.S. Const. amend. V. "As its language indicates, . . . this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking."

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987) (emphasis in original) (citations omitted). Thus, the government is permitted under the terms of the Fifth Amendment to take private property so long as the taking is (1) for a public use and (2) accompanied by just compensation.

As an initial matter, we note that the contemplated government actions meet the Supreme Court's standard for public use. Under Supreme Court precedents, the scope of the government's latitude to define public purpose is quite broad, and has been described as "coterminous with the scope of a sovereign's police powers." Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 230 (1984). See also Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). To be considered a *public* purpose, the challenged state action must simply have a "conceivable public character." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1014 (1984). The public purpose of the Settlement's user fee is clear (public health and law enforcement). The public purpose behind the required disclosure of new technology to FDA has been upheld in analogous contexts. Id. (upholding enforced disclosure of manufacturer's product development data to EPA). While the public purpose of the liability escrow is less clearly established, because the direct benefits flow to a potentially small group of individual private litigants, it seems likely under the applicable standard that a court will readily find a public purpose in this provision as well. Cf. Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223 (1986) ("Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another.").

Having satisfied the constitutional prerequisite of "public use," provisions of the Settlement alleged to constitute a taking will be analyzed, under the Supreme Court's takings jurisprudence, as either so-called "*per se* takings" or "regulatory takings." The term *per se* taking generally refers to those government actions — such as physical occupation of property — that are determined to be takings based solely on the nature of the government action without application of a balancing test considering various factors. See, e.g., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). See also Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (describing actions "compensable without case-specific inquiry into the public interest advanced in support of the restraint"). In other circumstances, however, where a regulatory imposition is alleged to have caused a taking because of its severe impact on the value of property rights, the Supreme Court considers whether the land use regulation "'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (citations

omitted). We turn below to an analysis of the possible takings claims under these legal tests. 40/

Analysis of Settlement's Provisions Affecting Private Property Under Fifth Amendment Takings Clause

Per Se Takings Claim

To the extent that the proposed government actions involve monetary assessments rather than appropriation of or restrictions upon tangible property, a claim of a *per se* taking would be extremely difficult to sustain. As one court recently observed in an analogous context, "analyzing [a monetary] assessment under the principles of takings law is awkward," because such a claim asks the court to draw "the curious conclusion that the government may take the . . . money as long as it pays the money back." Branch v. United States, 69 F.3d 1571, 1576 (Fed. Cir. 1995), cert. denied, 117 S. Ct. 55 (1996).

In essence, then, a claim alleging that money has been taken by the government "amounts to a contention that the Constitution forbids the government" from making the assessment at issue. Id. Courts have regularly declined to overturn monetary assessments on the ground that such actions are forbidden as *per se* takings. See id. ("even though taxes or special municipal assessments indisputably 'take' money from individuals or businesses, assessments of that kind are not treated as per se takings under the Fifth Amendment"). Thus, the "taking" of property that is worked by taxation "requires no other compensation than the tax-payer receives in being protected by the government to the support of which he contributes." Cole v. City of La Grange, 113 U.S. 1, 8 (1885). Similarly, the Supreme Court observed in a case challenging as a taking a deduction from an award by the Iran-United States Claims Tribunal that:

> [i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. No special constitutional importance attaches to the fact that the Government deducted its charge directly from the

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40/ We note that non-participating manufacturers would not have a takings claim based upon the mere fact that the Settlement authorizes FDA jurisdiction over non-participant tobacco manufacturers. Congress has unquestioned authority to confer upon regulatory agencies jurisdiction over commodities that affect interstate commerce. Under this authority Congress may establish FDA's jurisdiction over all tobacco manufacturers, including those who decline to participate in the Settlement.

> award rather than requiring Sperry to pay it separately. If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance. Such a rule would be an extravagant extension of Loretto.

United States v. Sperry Corp., 493 U.S. 52, 62 n.9 (1989). Under these authorities, the Settlement's user fees and escrow payments are quite unlikely to be found to be a *per se* taking of the money that non-participating companies would be required to surrender.

Nor is the cross-licensing provision likely to be considered a *per se* taking. While that provision does involve a recognized property interest in a trade secret, Ruckelshaus v. Monsanto Co., 467 U.S. at 986, the Supreme Court has evaluated takings claims in analogous contexts not as *per se* takings but rather under the three-part regulatory takings test. See id. at 1005.

Regulatory Takings

Under a regulatory takings analysis, the key issue is the point at which a regulation "goes too far," triggering a compensation requirement. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Outside the context of real property (where Supreme Court scrutiny of government regulation has become more exacting 41/), government actions affecting economic interests — particularly purely monetary interests — can go so far as to severely impair or destroy the entire economic value of an interest without constituting a taking. Connolly, 475 U.S. at 225 (no taking despite the fact that "the Act completely deprives an employer of whatever amount of money it is obligated to pay" as a result of the Act). In the context of the Settlement, the required payments to the government should not be deemed a regulatory taking. Rather, a reviewing court would view these payments as assessments serving the purpose of "adjusting the benefits and burdens of economic life to promote the common good." Penn Central, 438 U.S. at 124.

The Settlement's compelled disclosure and licensing of new technology is the provision that is likely to trigger the closest scrutiny. The non-participants may argue, as the complainants did in Ruckelshaus, that compelled disclosure and cross-licensing significantly decrease the commercial value of the new technology and unreasonably interfere with the expectations that lead a company to invest in

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41/ See Dolan, 512 U.S. at 374; Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

the development of less harmful products. As in Ruckelshaus, however, the government action satisfies the applicable test. The character of the government action is not severe, but merely in the nature of regulation in the interest of substantial public health concerns. Nor will the proposed regulation interfere with reasonable investment-backed expectations, because future investment decisions and expectations will be formed with full awareness of the legislation's disclosure and cross-licensing requirements. Finally, the economic impact of provisions is minimal, because the cross-licensing manufacturer is compensated at a commercially reasonable rate and may in fact benefit from the right to purchase new technology that otherwise would have been held by competitors as a trade secret.

For the same reason, the non-participating manufacturers will be unable to establish that the subject provisions, even if they could be considered a taking, do not provide for "just compensation" of what is being taken. Thus, those forced to cross-license will be compensated for their technology at market rates. The liability escrow payments will, to the extent not used to satisfy judgments, eventually be returned with interest, thus providing full economic compensation. To be sure, the 35-year postponement of compensation may give the non-participants an argument that compensation is so long deferred as to be unjust. It is conceivable that, in some extreme circumstances, a court might find promises of long-deferred compensation to be constitutionally insufficient — such as, for example, where an individual landowner is promised compensation for condemned land at today's market rate plus interest 200 years hence. In this case, however, the government would be promising full economic compensation to longstanding entities that are likely to remain in existence and to enjoy the benefits of whatever remains in the escrow, plus interest, at the end of the mandated period.

THE DUE PROCESS IMPLICATIONS OF THE SETTLEMENT'S LIMITATIONS ON CIVIL LIABILITY

The Due Process clauses of the United States Constitution are contained in the Fifth and Fourteenth Amendments. The Fifth Amendment, which applies to the federal government, provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Fourteenth Amendment imposes this obligation of due process upon state governments as well. U.S. Const. amend XIV, § 1. As applied to both the state and the federal governments, due process is generally thought to consist of "substantive" and "procedural" components. See, e.g., Zinermon v. Burch, 494 U.S. 113, 125 (1990). Under "substantive due process," certain human rights are held to be so important or fundamental as to prohibit governments from interfering with them unless such interference is necessary to achieve compelling objectives. In contrast, "procedural due process" prohibits governments from depriving citizens of life, liberty or property, as created and defined by some legal source such as a statute, except through constitutionally adequate and fair procedures. 42/

Summary of Settlement Provisions Implicating Due Process

The Settlement would severely limit the civil liability of tobacco companies for past and future tort claims. The civil liability provisions that may raise due process concerns include the following:

- *Elimination of Punitive Damages.* Punitive damages are barred as a remedy in all individual tort actions arising from tobacco companies' conduct prior to the effective date of the Settlement. Individual plaintiffs would retain any rights available under state laws to seek punitive damages for future conduct of tobacco companies.

- *Annual Liability Caps.* The Settlement places two types of caps on the tobacco industry's total liability for punitive and compensatory damages in a given year: 1) aggregate annual payments for individual

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42/ See, e.g., Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that that secure certain benefits and that support claims of entitlement to those benefits.").

judgments and Settlements are limited to $5 billion or less, 43/ and any excess is payable in subsequent years; and 2) payments to individual plaintiffs in satisfaction of judgments in a single year are capped at $1 million, and any excess is payable in later years.

- *Prohibition on Class Actions and Joinder of Claims.* The Settlement would require plaintiffs to pursue their claims by individual suits only, thereby prohibiting all class action suits and joinder of claims.

- *Creation of a Three-Judge Panel.* The Settlement also proposes to create a new panel of three federal judges under Article III of the U.S. Constitution. This panel would decide all attorney-client privilege and trade secrecy disputes that arise regarding tobacco industry documents. The panel's decisions would be "binding upon all federal and state courts in all litigation in the United States."

Analysis of Due Process Issues

Although each of these civil liability provisions raises due process concerns, none of these provisions is very likely to be held unconstitutional on due process grounds. The Settlement's proposal to eliminate punitive damages for past conduct by the tobacco industry contains the greatest potential for constitutional difficulty under the Due Process Clause, and this provision is therefore analyzed in the greatest detail. The remaining liability provisions are analyzed only briefly because they create less concern and because much of the analysis with respect to punitive damages also applies to these provisions.

Elimination of Punitive Damages

Litigants have raised due process challenges to punitive damages, and to the statutes regulating them, from two separate perspectives. First, *defendants* in tort suits have challenged punitive damages on the grounds that such awards are grossly excessive and are arbitrarily imposed upon defendants without adequate notice. See, e.g., BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996). 44/

43/ The Settlement caps the industry's annual aggregate liability at 33% of the "annual industry base payment" as defined in Title VI of the Settlement. Because the annual industry base payments range between $8.5 and $15 billion per year, the industry's annual liability cap would range between $2.8 and $5 billion.

44/ See also Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Resources Co., 509 U.S. 443 (1993); Pacific Mut. Ins. v. Haslip, 499 U.S. 1 (1991).

Second, *plaintiffs* have challenged statutes that limit or deny punitive damages on the grounds that such statutes deprive them of a property right without adequate due process. See, e.g., Gordon v. State, 608 So. 2d 800 (Fla. 1992), cert. denied, 507 U.S. 1005 (1993). Because the Settlement would prohibit plaintiffs from seeking punitive damages against tobacco companies for past conduct, the Settlement implicates due process claims from the plaintiff's perspective.

Punitive damages generally are not intended to compensate a plaintiff for injuries caused by a defendant's actions. Rather, they are awarded in addition to compensatory damages to punish the defendant and to deter similar harmful behavior in the future. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989); W. Page Keeton et al, Prosser and Keeton on the Law of Torts § 2, at 9 (5th ed. 1984). Given this deterrence justification, punitive damages are thought to be "quasi-criminal" in nature, and they are paid to plaintiffs rather than to the state only as a matter of "expediency." See E. Jeffrey Grube, Punitive Damages: A Misplaced Remedy, 66 S. Cal. L. Rev. 839, 843 (1993). As such, punitive damages are considered to be a "windfall" for plaintiffs, rather than property plaintiffs have any inherent right to receive.

Given this conception of punitive damages, legal commentators and courts broadly agree that plaintiffs have no *substantive* due process right to the availability of punitive damages under state tort law. 45/ That is, the Due Process Clause does not require states to authorize punitive damage awards as an available remedy. Consequently, state legislatures appear to have broad discretion severely to restrict the award of punitive damages, and indeed many states have done so. 46/ At least six states entirely prohibit punitive damages except in very limited circumstances. 47/ Short of prohibiting punitive damages altogether, many states

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45/ See, e.g., Janet V. Hallahan, Social Interests Versus Plaintiffs' Rights: The Constitutional Battle Over Statutory Limitations on Punitive Damages, 26 Loy. U. Chi. L.J. 405, 434-37 (1995) ("the general consensus of state courts and lower federal courts finding no general constitutional or common-law right to punitive damages comports with two long-standing United States Supreme Court decisions"); Malcolm E. Wheeler, The Constitutional Case for Reforming Punitive Damages Procedures, 69 Va. L. Rev. 269, 292 (1983) ("As courts have uniformly held, no plaintiff has a right to punitive damages: the purpose of punitive damages is to vindicate the public interest, not that of a particular plaintiff.").

46/ See Richard Blatt et al., Punitive Damages: A State by State Guide to Law and Practice (West 1991 and 1996 Supp.).

47/ Massachusetts, Michigan, New Hampshire, and Washington prohibit punitive damages in all cases, unless explicitly authorized by statute. N.H. Rev.

have adopted flat caps upon the amount of punitive damages that can be assessed against defendants, 48/ while others have limited the amount of punitive damages plaintiffs can receive by diverting a certain percentage of the awards into state funds. 49/

With few exceptions, state and federal courts have upheld such state restrictions on the award of punitive damages. In Wackenhut Applied Tech. Ctr., Inc. v. Sygnetron Protection Sys., Inc., 979 F.2d 980 (4th Cir. 1992), for example, the federal Fourth Circuit Court of Appeals upheld against state and federal due process challenges a Virginia statute placing a flat $350,000 cap on punitive damages awards. Similarly, in Gordon v. State, 608 So. 2d 800 (Fla. 1992), cert. denied, 507 U.S. 1005 (1993), the Florida Supreme Court upheld the constitutionality of a Florida statute requiring plaintiffs to remit sixty percent of punitive damages awards to state funds. Quoting the opinion of the court below, the Florida Supreme Court explained that "it is clear that the very existence of an inchoate claim for punitive damages is subject to the plenary authority of the ultimate policymaker under our system, the legislature. In the exercise of that discretion, it may place conditions upon such recovery or even abolish it altogether." Id. at 801 (quoting Gordon v. State, 585 So. 2d 1033, 1035-36 (Fla. 3d Dist. Ct. App. 1991)).

Although one federal district court has held that plaintiffs have a constitutionally protected property interest in punitive damages, McBride v. General Motors Corp., 737 F. Supp. 1563 (M.D. Ga. 1990), this holding is of little precedential authority today. Based upon its own interpretation of Georgia law, the McBride court concluded that a Georgia statute requiring plaintiffs to remit 75% of

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Stat. Ann. § 507:16 (Supp. 1994); Santana v. Registrars of Voters of Worcester, 502 N.E.2d 132 (Mass. 1986); Peisner v. Detroit Free Press, Inc., 304 N.W.2d 814 (Mich. Ct. App. 1981), aff'd. as modified, 564 N.W.2d 600 (Mich. 1984); Spokane Truck Drav Company v. Hoefer, 2 Wash 45 (1891). Louisiana prohibits punitive damages in all cases unless they are authorized by the laws of other states applicable to the case. La Civ. Code Ann. art. 3546 (West 1997). Furthermore, the Supreme Court of Nebraska has interpreted the Nebraska Constitution to prohibit the award of punitive damages. Miller v. Kingslev, 230 N.W.2d 472 (Neb. 1975).

48/ See, e.g., Va. Code Ann. § 8.01-38.1 (Michie 1997) (limiting punitive damages awards to $350,000); Tex. Civ. Prac. & Rem. § 41.008 (West Supp. 1997) (limiting punitive damages to $350,000).

49/ See, e.g., Fla. Stat. Ann. § 768.73 (West 1997) (requiring 35% of punitive damages awards to be remitted to state funds); Ga. Code Ann. § 51-12-5.1 (1997) (requiring 75% of punitive damages awards to be paid to the state treasury).

punitive awards to the state treasury violated the Due Process Clauses of the state and federal constitutions. Id. at 1572-74. In two subsequent challenges to the same law, however, the Georgia Supreme Court disagreed with the McBride court's conclusion and upheld the law on the grounds that plaintiffs have no state-created (and therefore no constitutionally protected) property interest in punitive damages. Mack Trucks, Inc. v. Conkle, 436 S.E.2d 635 (Ga. 1993); State v. Mosley, 436 S.E.2d 632 (Ga. 1993), cert. denied, 511 U.S. 1107 (1994). Because the holding in McBride was dependent upon the federal court's reading of Georgia case law, these subsequent Georgia Supreme Court cases have rendered McBride effectively moot. 50/

More recently, a series of United States Supreme Court cases culminating with the 1996 decision BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996), arguably reinforced the constitutionality of limiting a plaintiff's right to punitive damages. 51/ Although all of the cases in this series addressed defendants' due process challenges to excessive punitive damages, each implicitly suggests that plaintiffs do not have an absolute substantive right to receive such damages, even after they have been awarded by a jury. See Janet V. Hallahan, Social Interests Versus Plaintiffs' Rights: The Constitutional Battle over Statutory Limitations on Punitive Damages, 26 Loy. U. Chi. L.J. 405, 435-36 (1995). For example, in Honda Motor Co. v. Oberg, 512 U.S. at 415, the Supreme Court held that under the Due Process Clause, states must permit defendants to seek judicial review of the size of punitive damage awards. Id. at 430-32. Building upon that decision, the Supreme Court held in BMW that a $2 million punitive damages

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50/ In the only other case to strike down a statutory limit on punitive damages awards under the Due Process Clause, Kirk v. Denver Publishing, Co., 818 P.2d 262 (Colo. 1991), the Colorado Supreme Court held that a Colorado statute requiring plaintiffs to remit one-third of punitive damages to a state fund violated due process under both state and federal constitutions. Although this holding remains binding authority in Colorado, it has little precedential or persuasive value in other jurisdictions. Indeed, at least seven subsequent courts have upheld the constitutionality of similar statutes. See Hallahan, Social Interests Versus Plaintiffs' Rights, 26 Loy. U. Chi. L.J. at 423-28. Furthermore, both McBride and Kirk involved statutes that not only limited punitive damages but that actually diverted such awards to state funds. Because it was this appropriation of punitive awards by the states that created due process concerns in both cases, neither of these cases seriously call into question the authority of states to simply limit or even prohibit punitive damages awards.

51/ See also Honda Motor Co., 512 U.S. at 415; TXO Prod. Corp., 509 U.S. at 443; Pacific Mut. Ins., 499 U.S. at 1.

award was grossly excessive on the facts of the case and remanded for a more appropriate assessment of damages.

These cases are significant because they suggest that plaintiffs' substantive due process rights to punitive damages are limited even after they have been awarded. Presumably, a plaintiff's right to receive such damages prior to an actual jury verdict is even less compelling. Thus, it remains clear that plaintiffs have no substantive due process right to receive punitive damages.

Even if there is no general substantive right to the availability of punitive damages, however, state laws authorizing plaintiffs to seek punitive damages may create a property interest in the availability of that remedy. If so, *procedural* due process may prohibit states and the federal government from interfering with that state-created right except through adequate process. Although the United States Supreme Court has not directly ruled on this issue with respect to punitive damages, two Supreme Court decisions provide significant insight into the question whether the Settlement offers or contemplates constitutionally adequate procedures.

First, the Supreme Court has long recognized that legislative processes generally provide constitutionally sufficient procedural safeguards for individual rights. In Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915), for example, the Court noted that

> [w]here a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption. . . . General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Id. at 445. See also Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271, 283 (1984) (the Due Process Clause does not grant to members of the public generally a right to be heard by public bodies making decisions of policy). Thus, it is clear that the traditional components of procedural due process that are constitutionally required in the judicial and administrative context, such as notice and the opportunity to be heard, do not apply in the legislative context. As long as legislatures follow legitimate legislative processes and do not infringe upon substantive rights, the laws they enact are not subject to procedural due process challenges. The legislative process leading to the enactment of the Settlement's

proposed limitations on punitive damages, therefore, should satisfy the constitutional requirements of procedural due process.

Second, the Supreme Court's decision in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), provides perhaps the most direct support for the above conclusions, although it does not expressly identify whether it was decided under substantive or procedural due process. In Duke Power, the Supreme Court considered the constitutionality of the federal Price-Anderson Act, which limited the aggregate liability of federally licensed nuclear power plants to approximately $560 million per accident. This liability limitation applied not only to punitive damages, but to compensatory damages as well. The plaintiffs, citizens living near the site of a proposed plant, challenged the Act on the grounds that, among other things, the liability limitations violated their due process rights to seek damages under the common law or existing state laws. Id. at 82. More specifically, the plaintiffs argued that the statute violated due process on three grounds: 1) that the $560 million liability limit was an arbitrary figure that bore no rational relationship to potential losses; 2) that the liability limitation encouraged irresponsibility on the part of the builders and owners of nuclear power plants; and 3) that the liability limitation failed to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common-law rights of recovery that the Act abrogated. Id. at 82-89.

In considering these due process claims, the Court first stated that "in general, limiting liability is an acceptable method for Congress to utilize in encouraging the private development of electric energy." Id. at 85-86. With respect to the plaintiffs' arbitrariness claim, the Court concluded that the limit was not so arbitrary as to be unconstitutional, noting that any ceiling on liability would, of necessity, be arbitrary in the sense that it would be based on "imponderables" and inexact information. The Court then easily dismissed the plaintiffs' claim that the liability limitation would encourage irresponsibility, arguing that the process of federal regulation and licensing of power companies would adequately ensure public safety. Id. at 87. Finally, the Court rejected the plaintiffs' third claim because, in the Court's view, the Act provided "a reasonably just substitute for the common-law or state tort law remedies" it replaced. Id. at 88. This substitute was in the form of federal programs that would provide, if needed, additional relief to victims of a nuclear disaster.

Perhaps most importantly, however, the Court was unconvinced that such a substitute remedy was even constitutionally required. The Court reasoned that "[i]nitially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." Id. at 88. The Court further noted that "[o]ur cases have clearly established that '[a] person has no

property, no vested interest, in any rule of the common law.' . . . Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." Id. at 88 & n.32. Thus, the Supreme Court's decision in Duke Power indicated that Congress' limitations on plaintiffs' state-created rights to seek punitive damages violated neither substantive nor procedural due process.

This holding has many important implications for the constitutionality of the Settlement. First, just as limiting liability was an acceptable policy for encouraging nuclear power development, limiting liability should be an acceptable means of encouraging tobacco companies to participate in a national effort to reduce smoking and improve public health. Second, if Congress can constitutionally limit plaintiffs' state law rights to seek compensatory damages as it did in the Price-Anderson Act, surely it can, as a matter of due process, limit or even eliminate plaintiffs' state law rights to seek punitive damages. Finally, while Duke Power suggests that it may not even be necessary to compensate plaintiffs for the loss of the right to seek damages generally, the Settlement arguably does so through the funding for public health programs and medical services, and the Settlement clearly preserves the right to seek compensatory damages.

Thus, based on the above analysis, the Settlement's prohibition on punitive damages does not appear to violate plaintiffs' substantive or procedural due process rights.

Annual Liability Caps

In addition to prohibiting punitive damages in cases based on the industry's past conduct, the Settlement also proposes to place annual caps on the tobacco industry's general liability. Specifically, the Settlement would cap the industry's aggregate annual liability, and it would cap the amount payable to an individual plaintiff in a given year. These caps would apply to all compensatory damage awards as well as to any punitive damages awarded in future conduct cases. Notably, however, any damage awards that are in excess of either cap "roll over" and are payable in the following year. Thus, the caps would function, if at all, only to delay payment to plaintiffs for a period of time, rather than to deny payment altogether. 52/

These caps appear to pose little constitutional difficulty. Most importantly, the Supreme Court's holding in Duke Power clearly endorses the constitutionality of such liability caps. For the same reasons that the prohibition of punitive damages would be constitutional under Duke Power, these liability caps likely would be constitutional as well. Just as the Supreme Court upheld the Price-Anderson Act's limits on general damages, the Court probably would uphold these provisions of the Settlement as permissible economic regulation. Furthermore, unlike the Price-Anderson Act, which placed permanent limits on liability, the Settlement's caps are only annual limitations, and any excess is due in subsequent years. In this sense, the Settlement's annual caps are even less burdensome on plaintiffs than the liability limitations that were held constitutional in Duke Power. Thus, these provisions do not raise significant due process concerns.

Prohibition on Class Actions and Joinder of Claims

The Settlement also requires plaintiffs to pursue their claims against tobacco companies only through "individual trials" by prohibiting class actions, joinder, aggregations, consolidations, extrapolations and other devices to consolidate suits. Actions brought in state courts in violation of this individual trial requirement, and only those actions, are removable to federal court.

Although imposition of the individual trial requirement on state courts may raise concerns under other constitutional provisions, such as the Tenth Amendment, this provision is unlikely to raise significant due process difficulties.

52/ Notably, however, the Settlement does not require tobacco companies to pay interest on delayed awards. Consequently, this roll-over provision may serve to reduce the real value of delayed awards. In order to ensure full compensation, it would be necessary to require the payment of interest on delayed awards.

As an historical matter, the general right to prosecute civil cases as class action suits or to join in suit with other plaintiffs in federal courts is grounded in federal procedural law, not constitutional law. 53/ Thus, no court has ever held that plaintiffs have a substantive due process right to consolidate or aggregate their claims. See Legal Aid Soc'y of Haw. v. Legal Servs. Corp., 961 F. Supp. 1402, 1411 n.10 (D. Haw. 1997) (no due process right to bring class actions). As for procedural due process concerns, even if plaintiffs have a property interest in these state-created civil procedures, the legislative processes leading to their elimination should be sufficient to satisfy the requirements of procedural due process. See Bi-Metallic Investment, 239 U.S. at 441. Arguably, this provision would raise due process concerns only if it would prohibit the further prosecution of class actions or joint suits that are already in progress at the time the Settlement becomes effective.

Creation of Three Judge Panel

Finally, the tobacco settlement also proposes to create a new panel of three federal judges under Article III of the U.S. Constitution (see Appendix VIII of the Settlement). This panel would decide all attorney-client privilege and trade secrecy disputes that arise regarding tobacco industry documents. The panel's decisions would be "binding upon all federal and state courts in all litigation in the United States."

The creation of the judicial panel itself is not problematic because Congress clearly has the authority to establish lower federal courts under Article III of the U.S. Constitution. However, the Constitution does place several limitations on the extent of the jurisdiction and authority that Congress may grant to these lower federal courts. 54/ Among other things, the Due Process Clause requires that

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53/ Class suits originally became a part of American jurisprudence in the federal courts during the mid-1800s under the rules of equity. See, e.g., Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921); Smith v. Swormstedt, 57 U.S. 288 (1853); 7A Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 1751 (2d ed. 1987). In 1938, class suits were officially incorporated into the Federal Rules of Civil Procedure under Rule 23. See 7A Wright and Miller at § 1752. Under the Judiciary Act of 1789, Congress holds the authority to regulate and prescribe the procedures of the lower federal courts.

54/ For example, Article III of the Constitution limits the jurisdiction of federal courts to actual "[c]ases" and "[c]ontroversies." Consequently, federal courts are prohibited from issuing "advisory opinions" that would only apply in future disputes. Similarly, the Supreme Court has held that Article III limits the jurisdiction of the federal courts to those cases in which the plaintiff is able to demonstrate that he has suffered a concrete "injury in fact." See Lujan v. Defenders

parties to litigation be given certain procedural safeguards such as "notice" of the claims being litigating and an "opportunity to be heard." See, e.g., Richards v. Jefferson County, Ala., 116 S. Ct. 1761 (1996). Consequently, an individual may not be bound by a judgment in a case in which he was not designated as a party or made a party through the service of process. Id. at 1765-66. 55/

In light of these limitations on the authority and jurisdiction of federal courts, the Settlement's statement that the panel's decisions shall be "binding upon all federal and state courts in all litigation in the United States" raises due process concerns. Suppose, for example, that the panel issues a decision in favor of a tobacco company finding that a particular document is privileged. If the Settlement is interpreted to mean that the holding would be binding upon other plaintiffs who were not parties to the original case, the provision would arguably infringe upon a plaintiff's right to be heard. More likely, however, this provision was only intended to mean that the panel's decisions would be binding upon all other courts, but only against the original parties. In this case, the provision probably would not violate the Due Process Clause. In order to insure that the provision is constitutional, the statute should make this meaning explicit. As a practical matter, however, unless a party to a later dispute is able to raise significant new issues that were not considered in the original suit, the panel's decisions will frequently hold sufficient

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of Wildlife, 504 U.S. 555 (1992). While some have questioned whether the Settlement's provisions on reviewing privilege claims may exceed these limits on the jurisdiction of federal courts because they may authorize advisory opinions outside of litigation, Testimony of Laurence H. Tribe on the Global Tobacco Settlement before the Senate Judiciary Committee, July 16, 1997, we do not believe the Settlement envisions giving the panel such extensive jurisdiction. Rather, we read the terms of the Settlement as limiting the panel's authority to the litigation context.

55/ Increasingly, American courts are recognizing the constitutionality of the doctrine of "non-mutual collateral estoppel," under which an individual who was not a party to a previous judgment may, under certain circumstances, rely upon the previous judgment in a later suit. See E. H. Schopler, Mutuality of Estoppel as Prerequisite of Availability of Doctrine of Collateral Estoppel to a Stranger to the Judgment, 31 A.L.R.3d 1044 (1971 and 1996 Supp.). Whether asserted "offensively" or "defensively," however, this doctrine may only be used against someone who was a party to the previous suit; it may not be asserted against someone who was not an original party. See, e.g., Richards, 116 S. Ct. at 1765-69 (holding that plaintiffs who received neither notice of, nor sufficient representation in, a prior suit may not be bound by the judgment nor barred by it from challenging an allegedly unconstitutional deprivation of their property).

precedential value to preclude multiple suits regarding the status of the same document.

THE EQUAL PROTECTION IMPLICATIONS OF THE SETTLEMENT'S CIVIL LIABILITY LIMITATIONS

The general principle of equal protection requires that the government treat similarly situated people similarly but permits different treatment of those not similarly situated. See, e.g., Plyler v. Doe, 457 U.S. 202, 216 (1982). The Equal Protection Clause of the Fourteenth Amendment applies the principle directly to the States, while the federal government is compelled to provide equal protection by the Due Process Clause of the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The Supreme Court has always interpreted Fifth Amendment and Fourteenth Amendment equal protection claims in the same manner. Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975). Because the Settlement envisions both federal and state legislative components, its provisions must comport with the equal protection guarantees of the Fifth and Fourteenth Amendments.

Summary of Settlement Provisions Raising Equal Protection Issues

As noted earlier, the Settlement places limitations on the civil liability of tobacco companies for personal injury and damage claims arising from their past and future actions. There are at least three limitations that arguably raise equal protection concerns.

- First, the Settlement's annual cap on the tobacco industry's aggregate annual liability may result in different treatment of plaintiffs who receive judgments at different times. Plaintiffs who receive judgments earlier in any given year would receive full compensation, whereas those whose judgments are entered later in the year may receive no money or only a portion of the payment. In addition, plaintiffs suing tobacco companies for smoking-related injuries would be treated differently from similarly situated plaintiffs who are injured by other causes and, therefore, are not limited by these provisions.

- Second, the Settlement's treatment of individual judgments in excess of $1 million raises a potential equal protection issue because those persons with severe injuries may receive less than their full compensatory damage or settlement award or experience significant delays in payment, whereas those persons with less severe injuries could receive the entire damage or settlement award.

- Third, the Settlement's ban on punitive damages for injury caused by past conduct means that plaintiffs suing for damages from tobacco-related injuries are treated differently from plaintiffs suffering from other injuries.

Analysis of Equal Protection Issues

In reviewing the validity of legislation, the Supreme Court applies different levels of scrutiny depending upon whether the legislation classifies persons based on particular criteria or affects certain rights. Government action that employs a suspect classification (such as race) or implicates a fundamental right is subject to "strict scrutiny." 56/ In most other cases, the Court will apply a rational basis test, which gives great deference to legislative determinations. Finally, in some instances, an intermediate level of scrutiny is applied. Because the Settlement employs no suspect classification and implicates no fundamental right, the Settlement should be subject only to rational basis scrutiny and will be upheld as constitutional.

Rational Basis Scrutiny

When legislation does not target a suspect class or burden a fundamental right, and when intermediate scrutiny is not appropriate, courts will uphold it against equal protection challenges "so long as it bears a rational relation to some legitimate end." Romer v. Evans, 116 S. Ct. 1620, 1627 (1996). In scrutinizing the relationship between the law's stated purpose and the means chosen to achieve that end, courts will grant extreme deference to legislative determinations. Since laws reviewed under rational basis analysis are given a "strong presumption of validity," Heller v. Doe, 509 U.S. 312, 319 (1993), they are only set aside if the "classification rests on grounds wholly irrelevant to the achievement of the State's objective." McGowan v. Maryland, 366 U.S. 420, 425 (1961). In the absence of a classification on the basis of a suspect class or the burdening of a fundamental right, the legislature, and not the judiciary, is the appropriate body to make economic and social welfare decisions. See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985). Statutes reviewed under this low level of scrutiny are generally upheld.

The civil liability provisions of the Settlement should be reviewed — and upheld — using rational basis scrutiny. In general, "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." Duke Power, 438 U.S. at 88 n.32. See also Hoffman v. United States, 767 F.2d 1431, 1437 (9th Cir. 1985); Fein v. Permanente Med. Group, 695 P.2d 665, 683-84 (Cal. 1985); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 601 (Ind. 1980). Thus, for example, in Duke Power, the Supreme Court upheld against an equal protection challenge a liability limitation for accidents resulting from the operation

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56/ Under strict scrutiny, there is a "very heavy burden of justification," and legislation is upheld only if the classification is necessary to promote a compelling government interest. Loving v. Virginia, 388 U.S. 1, 11 (1967).

of federally licensed private nuclear power plants. 438 U.S. at 93. The important purpose of encouraging private investment and participation in nuclear energy was held to be "ample justification" for the difference in treatment between those injured in nuclear accidents and those injured by other causes. Id. at 92-93.

Similarly, a court would readily find a legitimate government purpose for imposing damage limitations in cases involving tobacco-related injuries. The Settlement contemplates a global legislative program to address many aspects of tobacco use, including tobacco regulation, sale, advertising, marketing, and liability. The limitations on tort damages are just one component of this balanced, comprehensive scheme. A court would be hesitant to overturn Congress' thoughtful determination that the liability caps are an integral aspect of the legislation. Hence, a court will defer to the Congressional determination that the liability limitations are rationally related to the legitimate government purposes advanced by the Act. The damages caps should, therefore, be upheld under rational basis scrutiny.

Intermediate Level Scrutiny

There is no basis in federal law for applying intermediate scrutiny to the Settlement provisions. 57/ Intermediate scrutiny has been used, however, by some state courts to review tort limitation statutes on the basis of equal protection guarantees contained in state constitutions. Although the right to recover in tort for personal injuries is not fundamental, these state courts have considered it important enough to justify a higher level of scrutiny than rational basis. See, e.g., Carson, 424 A.2d at 836. In these cases, courts have required that the classification have a "fair and substantial relation to the object of the legislation" in order to meet state equal protection guarantees. Jones, 555 P.2d at 407; Arneson v. Olson, 270 N.W.2d 125, 135 (N.D. 1978) (damage limitation unfair because the burden was borne solely by those individuals most severely injured and in need of compensation).

While it is unlikely that federal courts would follow suit and apply intermediate scrutiny under the U.S. Constitution, it would be advisable to express clearly in the legislative record the purpose and objectives of the legislation and the relation between those objectives and the means chosen to achieve them. This would improve the likelihood of overcoming intermediate scrutiny in states that adopt this test under their state constitutions. At least in federal courts, however, it is more likely that the legislation will be viewed simply as an adjustment of

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57/ Under federal law, intermediate scrutiny has been applied to laws employing "quasi-suspect classifications" such as gender and illegitimacy. See Craig v. Boren, 429 U.S. 190, 197 (1976); Levy v. Louisiana, 391 U.S. 68, 71 (1967).

economic benefits and burdens in a manner that is well within the rational discretion of the legislature.

Tobacco - title - legal issues and notes + memos

Liability and Other Legal Issues

In the event that Congress passes legislation meeting all of the Administration's demands for punishing and regulating tobacco companies -- including a payment of more than $20 billion [?] in punitive damages payable to the public -- the Administration will accept provisions barring class actions and punitive damages for past misconduct and imposing yearly limits of $5 billion on certain civil damages. The legislation itself will both exact penalties for past behavior and regulate future behavior, while a significant pool of money (especially given the historic failure of smokers to collect any damages) will be available to compensate injured plaintiffs.

The Administration will oppose -- and will not accept legislation including -- any limits on punitive damages for future misconduct. These damages shall not count toward or be subject to yearly limits; tobacco companies shall pay the full amount of such damages over and above all other payment obligations. The continued potential for unrestricted punitive damages will support the regulatory aspects of the legislation in deterring willful misconduct and otherwise changing corporate behavior.

Also in the context of broader legislation, the Administration will support a provision that gives tobacco companies an exemption from the antitrust laws, so long as that exemption is no broader than necessary to accomplish its purpose -- reducing youth consumption of tobacco products. The Administration will review the language of the exemption carefully to ensure that it does not protect such activities as price-fixing, mergers to monopoly, predatory pricing, and agreements not to produce reduced-risk products.

The Administration respects recent efforts by states and localities to regulate tobacco products, and it will oppose any changes in preemption law that would frustrate these efforts. In the absence of a strong justification, legislation therefore shall not affect the FDA's existing authority to allow states and localities to impose requirements on tobacco products; nor shall legislation preempt state-law tort suits or state and local requirements that are more stringent than their federal counterparts.

Internal notes:

The liability provisions are, of course, what the tobacco companies get out of the proposed settlement. As written, they eliminate the possibility of a cataclysmic hit by limiting total liability to $5 billion each year; and they diminish the likelihood of any successful lawsuits by prohibiting class action and other joinder devices. The above statement takes a bit of the sting out of these provisions by making clear that any punitive damages for future misconduct will not be subject to the damages cap. (The statement is also silent about whether we would accept the prohibition not only of class actions, but also of other joinder devices; the Justice Department has some doubts about whether we should.) But there is little doubt about the value of the provisions -- arising from the certainty they offer -- to the tobacco companies.

On the other hand, it is not at all clear that these provisions harm public health interests. Instituting a comprehensive regulatory scheme, while keeping in place the possibility of capped compensatory damages and uncapped punitive damages, should influence future corporate behavior at least as well as the litigation system usually manages to do. Moreover, making the companies pay a punitive damage award for past misconduct to the public (for use in health research, etc.) makes far more sense from a public health perspective than allowing such funds to go as windfalls to individual plaintiffs. Of course, these provisions do decrease the likelihood of bankrupting the tobacco companies. But as long as Americans are addicted to tobacco products, it is very unclear that this result would serve the public health; indeed, the exact opposite argument is at least equally plausible.

The FTC and antitrust division of the Justice Department are both concerned about the breadth of the antitrust exemption contained in the proposed settlement agreement. They have not come to closure on appropriate language, but agree that an exemption should allow collusion to reduce youth smoking while prohibiting collusion for other purposes. The statement above serves as a placeholder, indicating that the Administration will take a serious interest in the drafting of this provision.

The preemption provisions of the proposed settlement are among its most baffling aspects -- muddled, internally contradictory, and seemingly senseless. The statement above essentially favors a status quo approach (which the FDA favors): in circumstances where existing law requires states to petition the FDA to regulate tobacco, states would remain under that obligation; in circumstances where existing law allows states to regulate tobacco on their own, states could impose any regulations more stringent than the new federal standards. It is very difficult to know how much (if at all) this scheme deviates from what the drafters of the settlement intended.

Tobacco-settlement-legal issues cc: Bruce R/Bruce L

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September 10, 1997

VIA FACSIMILE
(202) 456-2878

Ms. Elena Kagan
Deputy Assistant to the President for Domestic Policy
Old Executive Office Building, Room 218
Washington, D.C. 20501

RE: Class Action Developments

Dear Ms. Kagan:

This letter is intended to update you about the status of the plaintiffs' success in lawsuits against tobacco companies in being certified as class actions. Since out briefing, the plaintiffs in the Pennsylvania case dropped the claims related to paying for treatment for smoking related diseases and restricted them to requiring the injunctive relief of just medical monitoring so that the federal court has now tentatively certified this action as a class action. (See attached article.)

In our earlier briefing we reported that a Pennsylvania federal district court had denied a requested class action. Arch v. American Tobacco Co., 1997 WL 312112 (E.D. Pa. 1997).

- In Barnes v. American Tobacco Co., 1997 U.S. Dist. LEXIS 12814 (E.D. Pa. 8/22/97), the district court granted a motion to certify a narrower class of smokers than the proposed class in Arch (although the case caption has changed, Barnes and Arch are the same civil actions). This is the first time that a federal district court has certified a class of smokers against the tobacco industry.

- The Barnes plaintiffs have dropped all the previous claims against the tobacco companies except for a claim for medical monitoring. The counts for negligence, intentional exposure to a hazardous substance, and strict products liability were excluded from the latest complaint. In light of these changes, the district court certified a class of all current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania.

- Experts for the plaintiffs estimated that the proposed medical monitoring program would cost between $4 and $5 billion annually. Approximately two million smokers would be entitled to medical testing.

- If the plaintiffs establish the defendants' liability, they will be entitled to an order creating a court-supervised program, to be funded by the defendants, through which class members would undergo periodical medical examinations in order to promote the early detection of diseases caused by smoking. Barnes, 1997 U.S. Dist. LEXIS 12814 at * 6. The class is not seeking treatment under this program. Thus, the plaintiffs are not predominantly claiming compensatory damages which would still have to be determined on an individual basis.

- The district court noted that if individual issues subsequently predominate (e.g. because of the affirmative defenses raised by the defendants) then it may de-certify the class.

- This latest development indicates that a narrowly crafted class of smokers which only seeks injunctive relief may qualify for class certification even after the Supreme Court's decision in Amchem Products, Inc. v. Windsor, et al., ____ S. Ct. ____, 1997 WL 345149 (6/25/97). However, to guarantee class status, the plaintiffs may have to forego the lion's share of potential compensatory damages (these would still have to litigated on a case-by-case basis). If the global settlement was enacted into law as it currently stands, class actions such as this case would presumably be precluded.

Sincerely,

George J. Phillips

Enclosure
cc: Lisa Brown
Frank W. Hunger

The Inquirer Page One

Tuesday, August 26, 1997

Pa. smokers' suit OKd as class action

It demands that the tobacco industry pay for lifelong medical monitoring for smokers.

By Joseph A. Slobodzian
INQUIRER STAFF WRITER

A federal judge yesterday approved the crucial first step toward trial for a lawsuit seeking to force the tobacco industry to fund lifelong medical monitoring for more than two million Pennsylvania smokers.

Legal experts said the ruling by U.S. District Judge Clarence C. Newcomer was significant because it made the suit the first certified federal class-action lawsuit in the nation asking to have the tobacco industry pay for the health monitoring of smokers.

Medical experts for the plaintiffs have estimated that such monitoring -- just for Pennsylvania smokers -- could cost the cigarette manufacturers as much as $4 billion to $5 billion annually.

If the lawsuit prevails, the two million smokers would be entitled to annual medical testing designed to detect as early as possible any illness or disease related to tobacco. The suit, however, would not provide for medical treatment of smoking-related illnesses.

``If the tobacco industry is really acting in good faith, this Pennsylvania program could be the initial test vehicle,'' said plaintiffs' attorney Stephen A. Sheller, referring to the recent settlements between tobacco companies and two states that sued to recoup public Medicaid funds used to treat sick smokers.

The Pennsylvania suit, however, is not related to -- or affected by -- lawsuits filed by 40 states seeking reimbursement of public Medicaid funds spent to cure sick smokers.

Yesterday, Florida Gov. Lawton Chiles announced the signing of an $11.3 billion settlement of his state's lawsuit accusing cigarette makers of decades of fraud and racketeering for hiding the health hazards of smoked tobacco.

``They [ the tobacco industry ] have a decision to make,'' added Sheller, referring to the Pennsylvania lawsuit. ``They can be responsible and do the right thing . . . or they can appeal and further try to delay this.''

Of the four tobacco manufacturers reached yesterday, only one chose to comment. Philip Morris Inc. attorney Robert C. Heim cautioned anti-smoking forces against too optimistic a reading of Judge Newcomer's ruling.

Heim noted that the penultimate paragraph of Newcomer's 33-page opinion calls the decision ``a close question'' and says the judge might later reverse the ruling ``if it becomes obvious after resolution of the parties' dispositive motions that too many individual issues are implicated by the facts of this case.''

Heim said Philip Morris yesterday filed with Newcomer six motions for summary judgment -- requests to dismiss the suit and enter judgment in favor of the tobacco companies -- and reiterated that the smokers' individual interests were too diverse for even a medical monitoring program to address.

The proposed monitoring program would include up to seven annual tests: an electrocardiogram, which measures heart function; an assessment of heart and circulatory disease risk based on the individual's personal and family history and history of smoking; a chest X-ray; exercise stress test; a physical exam

personal and family history and history of smoking; a chest X-ray; exercise stress test; a physical exam including blood pressure, blood lipids and cholesterol; a pulmonary function test to measure lung capacity; and an analysis of sputum.

The number of tests administered would depend on age and smoking history.

Plaintiffs' attorney Dianne M. Nast said the cost of the monitoring program would likely be $1,300 to $3,600 per smoker.

Newcomer has set Oct. 14 for the start of the trial.

Anti-smoking activists called Newcomer's ruling a crucial step forward in their battle against the tobacco companies, one they believe will ultimately lead to tobacco industry compensation for medical treatment of smoking-related illnesses.

Robert Sklaroff, an internist specializing in oncology and hemotology and the president of the Pennsylvania Society of Internal Medicine, said he believed the Pennsylvania suit was significant because it would establish court-mandated and reviewed medical monitoring.

``We're going to be able to establish a very important fact -- judicially," Sklaroff added. ``We're going to be able to establish the fact that people can be addicted to nicotine."

The ruling by Newcomer came just two months after the judge refused to certify as a class action an earlier version of the lawsuit. In that first complaint, the plaintiffs' attorneys had sought compensatory and punitive damages against the tobacco industry for negligence and intentionally exposing consumers to nicotine and other hazardous substances.

Newcomer, in refusing to certify that version, wrote that the personal histories and characteristics of Pennsylvania's estimated 2.2 million smokers were too individualized and diverse to be served by the sweeping remedies provided by a class-action lawsuit.

Faced with trying to pursue the lawsuit in the Pennsylvania state court system, or filing individual actions on behalf of smokers, the plaintiffs' lawyers regrouped and amended the lawsuit. The new filing dropped all requests for damages -- plaintiffs' lawyers had estimated that monetary damages might be as much as $700,000 per class member -- and focused instead on forcing tobacco companies to fund medical monitoring.

Along with the new complaint, the legal team also changed the official caption of the lawsuit. Steven Arch, the 43-year-old Philadelphia police lieutenant whose name originally led the list of plaintiffs, dropped out of the suit because of the litigation's demands on his family. Arch's name was replaced by that of William Barnes, 50, a city police corporal. Among the five other named plaintiffs in the class action are two employees of Philadelphia Newspapers Inc.: Ciaran McNally, 26, an editorial assistant for The Inquirer; and Edward Slivak, 54, a clerk in The Inquirer's vehicle maintenance department.

The class certified by Newcomer would include all Pennsylvania residents who were ``cigarette smokers as of Dec. 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania."

Although that definition would exclude from monitoring any smoker who began smoking while living in another state, Nast said the class would still cover more than two million Pennsylvanians.

The other defendants are: the American Tobacco Co., R.J. Reynolds Tobacco Co., RJR Nabisco Inc., Brown & Williamson Tobacco Corp., B.A.T. Industries P.L.C., Lorillard Tobacco Co. Inc., Loews Corp., United States Tobacco Co., the Tobacco Institute Inc., the Council for Tobacco Research-U.S.A. Inc., Liggett Group Inc., Liggett & Myers Inc., Brooke Group Ltd., and British American Tobacco Co.

Yesterday's ruling is the latest phase in the evolution of anti-smoking litigation since the U.S. Court of Appeals for the Fifth Circuit, headquartered in New Orleans, last year invalidated a proposed national federal class-action suit. The Fifth Circuit judges said that the differences in state laws and the facts of

individual cases were too great for nationwide class treatment.

The Fifth Circuit suggested that such suits would be better filed in state courts, triggering 15 class actions in federal and state courts around the country, including the lawsuit before Judge Newcomer.

But in June, Newcomer ruled that even Pennsylvania was too diverse for a class action representing the interests of smokers. Nast said yesterday that only one other lawsuit had focused on a claim for medical monitoring, a lawsuit to benefit Louisianans, filed in the state courts in New Orleans.

Meanwhile, state attorneys general continue negotiating with the tobacco industry to try to settle their lawsuits seeking to recoup Medicaid funds spent on smoking-related illnesses.

In addition to yesterday's industry settlement with Florida, Mississippi, the first state to take the industry to court, settled its lawsuit July 3 for nearly $3.6 billion, or 1 percent of a proposed $368 billion national settlement of Medicaid suits involving 40 states.

The proposed national settlement is being reviewed by Congress and President Clinton. A trial on a lawsuit by Texas is scheduled to open Sept. 29 in federal court in Texarkana.

Bruce R/Bruce L/
Elizabeth/Terry

Seems like a
good idea.
Elena

U.S. Department of Justice

Office of the Associate Attorney General

Washington, D.C. 20530

tobacco - settlement-liabilities

FACSIMILE TRANSMITTAL COVER SHEET

DATE: 8/4/97

TO: Elena Kagan

FACSIMILE NO:

TELEPHONE NO: 456-5584

FROM: John C. Dwyer

FACSIMILE NO: (202) 514-0238

TELEPHONE NO: (202) 514-9500

NO. OF PAGES: 4 (w/cover)

COMMENTS: FYI

U. S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

July 31, 1997

Jonathan Z. Cannon
General Counsel
U.S. Environmental Protection
Agency
401 M Street S.W.
Washington, D.C. 20460

Re: Tobacco Settlement and Secondhand Smoke Litigation

Dear Mr. Cannon:

Associate Attorney General Dwyer has asked me to respond to Mr. Dreher's July 17, 1997 letter concerning the proposed tobacco settlement.

The Environment Division concurs that it would be desirable to include dismissal of Flue-Cured Tobacco Cooperative Stabilization Corp., et al. v. EPA, Civ. Action No. 6:93CV370 (M.D.N.C.), in which the tobacco companies have challenged EPA's risk assessment of secondhand smoke, as part of any overall settlement with the tobacco industry.

Sincerely,

Lois Schiffer
Assistant Attorney General

cc: John Dwyer
Bob Dreher

cc: JD TS orig to E.S.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 17 1997

OFFICE OF
GENERAL COUNSEL

John C. Dwyer
Associate Attorney General
Department of Justice
10th & Constitution Ave., N.W., Rm. 5214
Washington, D.C. 20530

Re: Dismissal of tobacco industry litigation regarding EPA report on the health effects of passive smoking as part of overall tobacco settlement

Dear Mr. Dwyer:

As you know, the White House Domestic Policy Council is coordinating an interagency review of the proposed tobacco settlement. This letter is to call to your attention pending litigation between the tobacco industry and EPA over the health effects of passive smoking, and to ask your assistance in ensuring that dismissal of this meritless litigation be included as an element in any global tobacco settlement.

Acting under the authority of the Radon Gas and Indoor Air Quality Research Act of 1986, Pub. L. No. 99-499, 100 Stat. 1758-60 (1986), EPA issued a report on the health effects of environmental tobacco smoke, Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders, EPA/600/6-90/006F, in January 1993. Based on an exhaustive and peer-reviewed analysis of the large body of available data concerning the health effects of second hand smoke, EPA concluded in its report that environmental tobacco smoke causes lung cancer in adult nonsmokers and impairs the respiratory health of children.

In June 1993, EPA was sued in the U.S. District Court for the Western District of North Carolina by a number of tobacco industry parties, including Philip Morris Inc. and R.J. Reynolds Tobacco Co., over the agency's issuance of the report. Flue-Cured Tobacco Cooperative Stabilization Corp., et al. v. U.S. Environmental Protection Agency, Civ. Action No. 6:93CV370 (M.D. N.C.). The tobacco industry parties allege that EPA's issuance of the report exceeded its authority and violated the procedures required under the Radon Act, that EPA's conclusion that environmental tobacco smoke is a Class A carcinogen was arbitrary and capricious, and that EPA failed to follow its guidelines for carcinogen risk assessment. The district court denied EPA's motion to dismiss the case on the grounds that its action was not

final agency action subject to review under the Administrative Procedure Act. The parties have now briefed cross-motions for summary judgment, which are pending before the district court.

EPA believes that the tobacco industry's suit regarding its report on environmental tobacco smoke is entirely without merit, and expects to prevail on its motion for summary judgment. The industry's continued maintenance of this case, however, and particularly its challenge to EPA's finding that second-hand smoke is a human carcinogen, seems indefensible in the face of the industry's acknowledgements to the contrary in the proposed tobacco settlement. EPA asks, therefore, that the Justice Department include dismissal of this meritless litigation as a term of any overall settlement with the tobacco industry.

Please call me at 360-8040, or have your staff call Greg Foote, Assistant General Counsel, at 260-7619, if you need additional information on this matter. The case is being defended by the Environment and Natural Resources Division; the Justice Department attorney responsible for the matter is Alice L. Mattice.

Sincerely,

Robert G. Dreher
Deputy General Counsel

cc: Elena Kagan
Deputy Assistant to the President
for Domestic Policy

Lois Schiffer
Assistant Attorney General
for Environment and Natural Resources

tobacco - settlement - Legal issues

Federalism / 10A issues

1. Licensing — See Treasury
2. Fed power to ~~regs~~ Law rules in all pub facilities (Tribe)
3. Ban on multiparty litigation in St Ct - impose fed proc rules on St Ct
4. Removal jurisdiction (Tribe) (Is this a fallback? or an addition?

2. ETS - covers many private homes / churches, etc. / schools
commerce power
rule of statutory - put in juris element - bus engages in interstate commerce, etc. // make findings
OR define bldgs as instrs of commerce.
Must the effects
→ Need a reviewability exception.

3/4 - Very uncertain area.
(a) Litig only in indiv trials - no CAs, joinder, etc.
b. St cl/a can be removed if i) St Ct rules joint parties
ii) motion to join parties

fallback in (a) is uncert.

Cty almost never imposes proc reqs for St Court of action.
can't commandeer St officials.
Subst risk of uncert.
Need to be clear abt being severable (product liab bill - same problems)

(b) Removal question - Art III probs - basis of fed Ct jurisdiction
Grave risks again in doing fed Ct. juris.
Again, make severable -

3 poss fixes –

a) state can't fix – Novel
create substantive federal rule for recovery – who can recover/when/ in what order etc. OK
fed prevez "can't recover unless proven damns in an individual actn"
↓ rests on some assump that such an ordering mechanism would be radical.
"all st causing actn that wouldn't gen. by are preempted."

b) Recovery scheme gives rearm for removal.
All claims go to fed ct. Then – in fed ct – no CA.
2 through establishing federal s.
OR – only class actns

c) Removal through diversity
do minimal diversity – any 2 adverse claimants

d) Federal adoptn of State law – e.g. in Indn reservatns

Safest approach is diversity approach.

Tobacco - settlement - legal issues

Legal 7-2-97

1. Policy piece - [illegible]/liab.

2. a. How cannot decree take out of 1A
   b. If 1A applies ... what are probs/sols
   c. Catch-all - Regs /10A

Preemption
Penalties
↑
Tomorrow
WED - Legal

For mtg after next: Options memo - DOJ
Privileges
Mechanisms.

Next mtg

p r e on liab/dmgs

OCC piece - at least (a)

Regulation -
Budget
Litigation -
~~Corporate [illegible]~~

Liquor info?
↓
State efforts?
cost-effective?
feasible?

good idea of licensing sch?
rel. of fed jur / states
licensing - left to retailer
or up chain.
↓
policy options

Tobacco - settlement - legal issues

Moore - Fed govt getting nothing?

Legal 7/8/97

OCC Questions

1. Takings - Trade Secret Claims

Ways to mitigate - a) take most tobacco-friendly t.s. std.

Effect if what further mitigation??

b) take t.s. claims out of this mechanism altogether

c) require registration of tob. prods - condition this on agreement to doc. disclosure provisions

Rabi: Does it make a diff. if there's not public disclosure?

Privileged claims not subj. to group VTS.

(Have to make sure FDA ~~analysis~~ authority is not infringed.)

2. Consent Decree - content of IA.

Subst risk of including IA prohibs in statute FCC v CWV.

Same if req'd entry into settlement decree

Minimal precedent.

What is straight settlement eg?

Same cts: knowing/intell/vol waiver.

Other cts: agree govt int is legitimate + related to underlying litigation - nexus analysis to claim.

Fairly good nexus here - doesn't seem like overreaching (as much as some cases) (will reduce amt of $ have to pay out Medicaid)
But - waiver for all time + of extraord. breadth.

Q: Harm to do provision by provision??

Fed statute possibly could condition

Tobacco-settlement - legal issues

Bruce R/Bruce L/ Eliz D/Terry M

U.S. Department of Justice

Office of the Assistant Attorney General
Civil Division

George Jordan Phillips
Counselor to the Assistant Attorney General

950 Pennsylvania Ave., N.W., Room 3143
Washington, D.C. 20530
(202) 514-5713 Fax (202) 514-8071

July 29, 1997

VIA FACSIMILE
(202) 456-2878

Ms. Elena Kagan
Deputy Assistant to the President for Domestic Policy
Old Executive Office Building, Room 218
Washington, D.C. 20501

RE: Review of Proposed Tobacco Settlement

Dear Ms. Kagan:

Enclosed are two memorandums we prepared for tomorrow's meeting. The first gives an overview of the status of the class action lawsuits and the second attempts to address the effects of the proposed settlement on the pending private lawsuits. Joe Kaster of our Torts Branch will attend tomorrow to give an overview of the class action lawsuits. Gene Thirolf, Joe and I will be prepared to talk about the second topic. Given the subjective nature of the second memorandum, I would request that it not be distributed. I will bring you a notebook with copies of all the cited articles for you tomorrow.

Sincerely,

George J. Phillips

Enclosures
cc: Elizabeth Drye

Impact Of the Global Settlement On Individual Claims

This memorandum responds to an inquiry from the White House regarding how the Resolution could affect claims by individual plaintiffs. The inquiry focused on whether civil liability provisions, specifically the elimination of class actions and punitive damages for past behavior, constitute unreasonable concessions that would seriously undermine the ability of private individuals to pursue their claims against the industry. In particular, the apparent concern is that individual plaintiffs and their attorneys could be on the verge of turning the corner in holding the cigarette companies liable for smoking-related diseases and that the proposed Resolution will make it impossible for them to win, or that it will reduce the economic incentives for plaintiffs' attorneys so dramatically that they will stop bringing these suits. Two questions ensue: Have private litigants turned the corner against big tobacco? And, if they have, are they likely to obtain results more favorable for plaintiffs than the Resolution provides?

Lack of information regarding the contents of documents the tobacco manufacturers may be forced to turn over, coupled with new and untested litigation strategies that are now in place, makes it impossible to answer the first of these questions. Even plaintiffs' attorneys cannot agree on whether to support or attack the Resolution.[1/] In this memorandum we simply try to lay out the relevant factors that could affect these issues.

Discussion

The Current Status of Smokers' Claims: Whether The Momentum Has Really Shifted

- As an initial matter, the premise that private litigants are on the verge of turning the corner is highly questionable. The fact is that plaintiffs have rarely obtained judgments against the tobacco companies. The tobacco industry has won almost every case brought by injured smokers. The industry has suffered only two trial defeats (Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Carter v. Brown & Williamson, Civ. No. 96-4831 (Fla. Cir. Ct. 8/9/96)). The Cipollone decision was reversed. The Carter case is currently on appeal.

- However, in the past several years, the tide of public opinion has dramatically turned against the industry. There is widespread public support for access and advertising restrictions directed at deterring underage smoking. But this is a two edged sword. While "heavy majorities of American adults believe that smoking is addictive (95 percent, according to a Harris poll taken in late

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1/ Norwood "Woody" Wilner, who won the Carter case discussed infra, opposes the agreement, saying, "Nobody knows [whether the Resolution will make it easier for individuals to collect monetary damages for smoking-related illnesses]." *Dallas Morning News*, July 16, 1997. John Coale, a Washington, D.C. lawyer, supports the Resolution: "There's only about $3 billion a year paid in all torts [civil damage suits] in the U.S., so I don't think the $5 billion cap is a legitimate issue. It should be enough." Id. The Association of Trial Lawyers will take up the advisability of supporting the Resolution at its August convention.

March), that it causes cancer (90 percent), and that tobacco companies know it causes cancer even if they do not admit it (92 percent), and that some tobacco companies market their products deliberately to young people (90 percent)" (Sack, Kevin, New York Times, "For The Nation's Politicians, Big Tobacco No Longer Bites," April 22, 1997, pg. A1.), these same perceptions may make smoking plaintiffs less sympathetic to juries who view them as having knowingly become involved with cigarettes.

- To date, evidence showing that the tobacco companies knew the health dangers of tobacco products, knew such products were addictive, did not warn their customers and, in fact, misled their customers, has not been enough to overcome an assumption of risk defense. This defense is based on the apparently widely accepted proposition that people understand that cigarettes are dangerous and addictive, and that those who choose to smoke are responsible for their own actions and the health consequences.

  It is therefore unclear whether the public sentiment favoring access and advertising restrictions will translate into favorable jury verdicts for smokers. As recently as May 5, 1997, a Florida jury rejected a plaintiff's claim against R.J. Reynolds in a wrongful death case where the decedent allegedly died of lung cancer from smoking. See Jean Connor v. R.J. Reynolds Tobacco Co., No. 95-01820-CA (Fla. Cir. Ct. 5/5/97). Published reports of juror interviews indicated that the jury understood the prejudicial evidence against the defendant, but viewed the plaintiff as nevertheless unworthy of compensation due to the obvious and well-known health dangers of smoking.

- Juries might hold a company accountable if it could be proven through new documents or insider testimony that the companies knowingly designed tobacco products to ensure addiction. With such evidence, such lawsuits could be brought as intentional torts and could overcome the assumption of risk defense. But jurors who quit smoking could view such a theory skeptically.

Untested litigation strategies discussed below under "Class Actions" involving second-hand smoke and state A.G. cases may avoid the "assumed the risk" pitfall. However, the novelty of these theories, coupled with the fact that they are not available to every potential smoker as a source of liability, prevents drawing the conclusion that such theories will ultimately lead to destruction of the tobacco firms.

Emerging Internal Evidence from the Manufacturers

There has been speculation that the documents in the Minnesota Attorney General's case may provide what is needed to prove that the Manufacturers purposefully engineered their products to addict their customers. One document that was made public revealed that researchers from R. J. Reynolds Tobacco contended that the success of Marlboro may have been the result of Philip Morris' manipulation of its nicotine content. Opinions on whether there is smoking gun evidence to be revealed vary depending on who is making the assessment.[2/] Nevertheless, the fact that the manufacturers came to the table,

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2/ For example, one document made public revealed that researchers from R.J. Reynolds Tobacco

insisted on a ban on punitive damages, and established a liability regime suggests that the documents will be quite powerful.

To date, no jury has awarded punitive damages against the tobacco companies. If documents of the type described above were to surface, it is conceivable that juries might award punitive damages which could destroy the companies involved. What this would accomplish is not clear. Presumably new firms, without such documents in their closet, would emerge to sell cigarettes to Americans, and the Resolution's liability program would not be in effect to compensate anyone. While some may suggest that settling without knowing what documents exist is tantamount to "buying a pig in the poke", it is not clear what public health purpose would be served by exposing those documents.

- The risk of signing onto the agreement without knowing the universe of documents is that absent the proposed agreement, the companies might destroy them before they surface.
- But the outcome of having the companies being destroyed by having private litigants recover punitive damages may not be the optimal public policy outcome.
  - A black market not subject to any government regulation might emerge. Other benefits of the Resolution would be lost.
  - The FDA might be deprived of the opportunity of developing strategies that it could impose on the regulated industry to effectively reduce the incidence of smoking.
  - The public health communities would be deprived of resources that could be used to reduce smoking.

Class Actions

The Resolution would bar class action lawsuits, but the viability of class actions against tobacco firms is doubtful.

- While the states' attorneys general have created a new type of lawsuit to pursue the industry, individual smokers have yet to succeed on any novel theory of recovery. The attempt to create a national class action for addiction claims (as opposed to personal injury claims) was rejected by

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Company suggested that the popularity of Marlboro cigarettes may have been the result of Philip Morris's manipulation of the brand's nicotine content Spokesmen for R.J. Reynolds, however, said "the researchers were simply speculating on the reasons for Marlboro's popularity, not concluding that Philip Morris manipulated nicotine. Philip Morris denies that it manipulated nicotine levels." (Meir, Barry, New York Times,"Minnesota Official Invites Congressional Scrutiny of Tobacco Industry Files," July 28, 1997, pg. A10).

the Fifth Circuit. Castano, et al. v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996). Since then, each attempt to certify a statewide class action has been also rejected by the federal courts. See Class Action Memo, attached. In general, attempts to maintain class actions for mass torts lately have been ill-fated.

- There is currently a class action lawsuit being tried in Florida in which airline flight attendants have sued several tobacco companies. These plaintiffs allege that they were injured by second-hand smoke. Such plaintiff's may escape juror's feeling that smokers assumed the risk of their addiction.

- The use of large-scale class actions for mass torts has incurred judicial disfavor recently. See Amchem Products, Inc., et al. v. George Windsor, et al., ___ U.S. ___, (1997); Castano, et al. v. American Tobacco Co., 84 F.3D 734 (5th Cir.1996); Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir.), cert. denied, ___ U.S. ___, 116 S. Ct. 184 (1995); Arch v. American Tobacco Co., 1997 WL 312112 (E.D. Pa. 1997). In Amchem, the Supreme Court upheld a Third Circuit ruling that a group of persons exposed to asbestos failed to share the requisite commonality of issues so as to warrant a class certification. Similarly, it can be questioned whether large-scale groups of tobacco plaintiffs could be granted class status in federal court.

The Potential Number of Smoker Claims Affected
--Potential Impact on the Court System--

Any assessment of the impact of the resolution on smokers' claims should include an estimate of the number of claims potentially affected. Quantifying the number of claims affected, though, is speculative at best. But such speculation suggests that the court system may be overwhelmed by lawsuits alleging smoking-related claims. The following factors should be considered.

- According to HHS, there are 48 million smokers in the United States today.

- Each year 400,000 individuals die from smoking. (It would be useful to have the CDC provide us with its most up to date numbers.)

- Currently there are approximately 600 lawsuits by individuals against the tobacco industry.

- According to one newspaper report, there are 800,000 civil liability suits pending in federal and state courts. The article estimates that as many as 750,000 new smoker lawsuits could be filed within the next three years.[3/]

- Since the announcement of the proposed tobacco settlement several attorneys have announced they plan to file lawsuits on behalf of injured smokers.

3/ Curriden, Mark, "Smokers May Rush to Court to Cash in on Settlement," Dallas Morning News, 7/16/97.

- If any of these suits are successful, such success will likely inspire new filings. The ongoing stewardesses class action lawsuit in Florida, if successful, could spawn a new generation of cases for damages caused by second-hand smoke.[4/]

The Limits On Damages

- The Resolution proposes to set an annual limit on the amount of compensatory damages paid by the industry, and to bar punitive damages for past conduct by the industry.

- One question regarding individual claims is whether the size of the compensation fund is sufficient.

  - A comparison to the size of awards from analogous mass tort cases (e.g., asbestos litigation) may provide some basis for estimating the average amount of a future tobacco award. Then, by multiplying the average anticipated award by the number of annual expected claims, one could provide a rough guess of whether the $5 billion settlement fund is sufficient to cover all the potential claims.

  - A plaintiff's attorney who negotiated the settlement opined that the annual aggregate amount of all tort judgments nationally is $3 billion. Thus, he argued that $5 billion for the tobacco industry should be more than sufficient.

  - The resolution calls for 80% of any adverse award to be paid by the fund and 20% to be paid by the responsible company. It is unknown whether in practice this will encourage settlements or not. For example, if a company decides that a payment of 20% of its adverse awards is cheaper than the litigation expenses for handling these cases, it may settle more often.

- The resolution has been reported as creating a "compensation fund." This description is a misnomer, for the resolution proposes, in essence, a statutory cap on damages. To recover, individual smokers would still need to prove a basis of liability, causation, and damages.

  - The publicity surrounding the creation of a "fund" may encourage more suits to be filed. Similarly, some potential jurors may view the creation of the "fund" (or the resolution as a whole) as an admission of liability by the tobacco industry. Therefore, by agreeing to the

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4/ "'This is not even the first wave, this is the leading edge of the first wave,' says Richard Daynard, president of the Tobacco Resource Center, Inc., and a professor at Northeastern University School of Law in Boston. Groups ranging from waitresses and bartenders to 'a large number of groups of employees in all kinds of industries' are likely to come forward to file suit against tobacco companies, he says: 'People who are exposed to the smoke are innocent victims.'" (ABCNews.com, "The Tobacco Industry Faces A Difficult Day", July 15, 1997).

present resolution, the industry may end up facing more adverse awards.

- ▸ Some anecdotal evidence indicates that the resolution may prompt more litigation against the industry. In the wake of the settlement, a new class action by smokers has been filed in Chicago. In addition, a District of Columbia attorney has stated his intention to bring approximately 150 new lawsuits on behalf of individuals in the hopes of obtaining favorable awards before any legislation is passed by Congress.[5/]

- ▸ The settlement has also received a hostile reaction from some members of the public health community. John Banzhaf, a law professor and head of the Action on Smoking and Health, has stated that he plans to file a suit to challenge the constitutionality of the resolution become it deprives just compensation to injured smokers. If the Department publicly approves of the civil liability provisions now, it could be seen as having taken sides in future litigation.

- Regarding punitive damages, smokers can only sue for punitive damages based on future conduct by the industry.

  - ▸ Smokers may attempt to certify a class under state law. The success of this approach would vary from state to state. This illustrates a more fundamental question presented by the resolution: whether federal law should overwrite state procedural and tort law.

- Punitive damages are limited in some states already. However, the Resolution's provisions grant the tobacco industry some measure of tort reform that they might otherwise have not obtained on a state by state basis.

- It is possible that aspects of the industry's past conduct, which would warrant punitive damages, have not yet come to light. Under the resolution, if other incriminating documents are uncovered, they seemingly could not be used as a basis for seeking punitive damages against the industry.

- Some attorneys may be less likely to bring lawsuits against the industry if punitive damages or class actions are unavailable.

  - ▸ Conversely, the settlement itself, along with any admissions by the industry or disclosures of incriminating information, may incite the public and the plaintiff's bar into a more

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5/ University of Wisconsin law professor Marc Galanter stated: "The potential is there for a huge domino effect if this settlement is approved. Of course, since no smoker has ever gotten anything from a tobacco company, it obviously can't make it any harder to win. But not nearly enough study has been given to its impact on the courts or on people's rights to sue. The truth is, most of these questions will not be answered until the cases are actually played out in court." Curriden, Mark, "Smokers May Rush to Court to Cash in on Settlement," Dallas Morning News, 7/16/97.

vigorous legal attack on the industry.

Recommendations

- Any judgment as to how the tobacco resolution will affect individual claims is inevitably conjectural. Because the settlement was reached relatively recently (June 20, 1997), most interested groups (e.g., the plaintiff's bar) have not yet had the opportunity to assess its impact.

- There is insufficient data to conclude that the momentum has substantially shifted to individuals bringing suits against the industry. Prior to making our final assessment of how the settlement affects individual claims, we may want to gather additional information.

  - For example, (1) the American Bar Association and the American Association of Trial Lawyers are planning to address the Resolution at their annual meetings this summer; (2) Mealy's Litigation Reporter and Harvard Law School have scheduled symposiums to address the impact of the settlement.

  - We may improve our judgment somewhat by obtaining more information from the lawyers who actually negotiated the settlement.

  - We should decide if the Department of Justice wants to take the lead on this issue by stating publicly its assessment of the resolution prior to the inevitable hearings and investigation by Congress.

- The most provident course of action would be to gather additional information before venturing a prediction as to how the terms of this Resolution will generally affect individual claims.

- Even if some of the civil liability provisions are detrimental to individual claims, the ultimate question remains whether, from a public policy standpoint, other beneficial features of the settlement warrant support of the resolution as a whole.

U.S. Department of Justice

Civil Division

Washington, D.C. 20530

July 29, 1997

TO: George J. Phillips
Counselor to the Assistant
Attorney General

FROM: Jeffrey Axelrad
Director, Torts Branch
Civil Division

RE: Class Actions And The Global Tobacco Settlement

This memorandum supercedes our memo on the same subject of July 28, 1997. We have added additional comments to the discussion of the Castano-type class actions and provided an updated chart summarizing these cases.

An Analogous Situation to the Tobacco Litigation: The Asbestos Class Action

- The Supreme Court has recently considered the propriety of a class action for a mass tort situation. Interpreting Federal Rule of Civil Procedure 23, the Amchem decision provides binding law on the federal courts and non-binding guidance to the state courts. Any evaluation of the class action provisions in the global tobacco settlement should consider the impact of this case.

  - The mass tort experience with asbestos products is analogous to the current tobacco litigation. The dangers of asbestos products were allegedly known to its manufacturers in the 1930s. Nonetheless, millions of individuals were exposed to asbestos-containing products during the subsequent decades. Numerous asbestos-related injuries began surfacing during the 1960s, and a floodgate of lawsuits emerged in the 1970s.

  - Similarly, anti-tobacco proponents argue that the tobacco industry knew of the ill-health effects of their products several decades ago. Despite this knowledge, the industry allegedly embarked on a campaign of misleading advertising practices and denials.

There are millions of current and past smokers who are, or may become, ill from usage of tobacco products.[1/]

- In Amchem Products, Inc. v. Windsor, et al., ___ S. Ct. ____, 1997 WL 345149 (6/25/97), the Supreme Court affirmed the Third Circuit's decertification of a class that sought to settle current and future asbestos-related claims. The proposed class encompassed hundreds of thousands, perhaps millions, of individuals who were, or could be, adversely affected by past exposure to asbestos products. There were no further subclasses.

- The settlement attempted to resolve all pending claims against the settling manufacturers, as well as precluding future lawsuits. The settlement proposed an administrative mechanism to compensate the class members.

  - The asbestos settlement outlined a schedule of payments to compensate the class members who met the defined asbestos-exposure and medical requirements. It set caps to the potential recoveries of the class members.

- Under the Federal Rules of Civil Procedure, a group of individuals will be certified as a class only if *inter alia* there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). In Amchem the Court held that the class members' shared experience of exposure to asbestos and their desire in receiving a fair, speedy, and just compensation for their claims did not satisfy the commonality requirement of Rule 23.

  - Citing with approval the Third Circuit's analysis, the Court noted that the class members were exposed to different asbestos-containing products at different times, in different periods, and in different ways. Each member had a different medical history and contracted different diseases. Amchem, 1997 WL 345149 at * 19.

- The asbestos class was also defective because the named parties did not adequately protect the interests of the class. Parties with diverse medical conditions acted on behalf of a single giant class, rather than on behalf of discrete subclasses.

- Any potential class action by smokers in federal court would have to avoid the objections raised by the Supreme Court in Amchem to the asbestos class. Smokers, like asbestos victims, have multifarious exposure histories and injuries. Any large-scale class of smokers would probably be subject to an attack similar to the one which defeated the asbestos class in

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1/ Warning labels on cigarette packages appeared in the 1960s. Thus, the tobacco industry has always contended that insofar as smoking may be a health risk factor for any disease, individual smokers have assumed that risk. The same cannot be said for the millions of persons exposed to asbestos.

Amchem.

Summary of the Castano Class Actions

- In May 1996, the Fifth Circuit reversed a district court's certification of a nationwide class for all nicotine-dependent persons. Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996). In the wake of this decision, the Castano plaintiffs' attorneys have filed similar actions on a state-by-state basis.
  - The most recent class action filed by the Castano attorneys is Clay v. American Tobacco Co., Inc., No. 97-4167-JPG (S.D. Ill., filed May 22, 1997). Attempting to create a class for those persons not involved in the other class actions, this lawsuit was apparently filed in part to avoid a statute of limitations problem (one year has passed since the Fifth Circuit's decision).
- The accompanying chart summarizes the Castano-type class actions that have been attempted since the Fifth Circuit's decision. Attempts to certify classes have been made in both federal and state court.
  - The plaintiffs' steering committee for Castano has apparently been responsible for the filing of 18 class actions after the decertification of the national class. The chart lists those cases and other class actions brought against the tobacco industry which raise similar claims.
  - Three federal courts have denied certification. In at least five other federal lawsuits, certification is currently pending. In contrast, state courts have *granted* classes in two cases, while several other certifications are pending.
  - There have been no decisions regarding certification of these classes since the Amchem decision.
- Subsequent to the Castano decision, two federal courts have concluded that similar class actions against the tobacco industry would not be certified.
  - In Arch v. American Tobacco Co., 1997 WL 312112 (E.D. Pa. 1997), a district court denied a plaintiffs' motion for certification of a class comprising all residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and began smoking before the age of 19 while residents of Pennsylvania. The size of this group was estimated at 1 million persons.
  - The district court in Arch concluded *inter alia* that the individual issues of the putative class vastly outnumbered the common issues. Even though the class was alleging an addiction injury, which could be construed as precluding an assumption of

the risk defense by the industry, the court still determined that "the assessment of addiction is an inherently individual inquiry." Arch, 1997 WL 312112 at * 16.

- The court further stated that to succeed on their products liability and negligence claims, the plaintiffs would need to show causation, "which the Court finds is not capable of determination on a class-wide basis in this case." Arch, 1997 WL 312112 at 16. An item of damage sought, the creation of a medical monitoring program, would also require an individualistic determination, varying with a person's amount and duration of smoking.

- In Smith v. Brown & Williamson Tobacco Corp., 1997 WL 381264, No. 96-0459-CV-W-3 (W.D. Mo., 5/22/97), another attempt at a class action was defeated by the industry. In Smith, the proposed class consisted of all persons in the state of Missouri who suffered personal injury as a result of smoking cigarettes made by the Brown & Williamson Corporation.

  - Based on the responses from notices in various state-wide newspapers, the plaintiffs estimated that the size of the class might be in excess of 2000 persons. Despite this relatively low number of smokers comprising the class, the district court still denied certification.

  - The district court held *inter alia* that simply limiting the class to Missouri residents did not resolve the potential problem of multiple state laws being applicable.

  - The court also concluded that the common issues were "common" only in the general sense and did not warrant a class certification. For example, the court found that: "Liability will not turn on whether cigarettes are generally capable of causing disease: liability will depend upon whether cigarettes caused a particular plaintiff's disease." Smith, 1997 WL 381264 at * 5.

- Based on these federal decisions, it can hardly be said that the plaintiffs' bar has turned the corner as far as succeeding with class actions in federal court. They have had some success in state court (e.g. Engle v. R.J. Reynolds Tobacco Co., 672 So.2d 39 (Fla. App. 1996)) and would probably pursue, to the extent possible, any future class actions in state venues.

CASTANO-TYPE CLASS ACTIONS IN FEDERAL COURT

NUMBER	NAME	CERTIFICATION STATUS
1.	Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996)	Denied
2.	Hansen v. American Tobacco Co., Inc., No. LR-C-96-881, (E.D. Ark.)	Pending
3.	Arch v. American Tobacco Co., 1997 WL 312112 (E.D. Pa. June 3, 1997)	Denied
4.	Smith v. Brown & Williamson Tobacco Corp., 1997 WL 381264 (W.D. Mo. May 22, 1997)	Denied. Motion to reconsider pending.
5.	Barreras Ruiz v. American Tobacco Co., No. 96-2300 (D.P.R.) (filed Oct. 23, 1996)	Pending
6.	Emig v. American Tobacco Co., No. 97-1121-MLB (D. Kan.) (complaint filed Feb. 2, 1997)	Pending (removed from state court)
7.	Clay v. American Tobacco Co., Inc., No. 97-4167-JPG (S.D. Ill.) (complaint filed May 22, 1997)	Pending
8.	Walker v. Liggett Group Inc., No. 2:97-0102, (S.D. W.Va.) (complaint filed Feb. 3, 1997)	Pending
9.	Richardson v. Philip Morris Inc., No CCB-96-1963 (D. Md.) (complaint filed May 24, 1996)	Unknown (note: removed to federal court, and subsequently remanded back to state court)

10.	McCune v. The American Tobacco Co., No. 97-C-204 (S.D. W. Va.) (action removed Feb. 1997)	Unknown (note: removed from state court)
11.	Chamberlain v. The American Tobacco Co. Inc., No. 1:96CV2005 (N.D. Ohio) (complaint filed Aug. 1996)	Unknown (note: removed from state court)
12.	Masepohl v. American Tobacco Co., Inc., No. CO 96-8786 (D. Minn) (complaint filed Sept. 3, 1996)	Unknown (note: removed from state court; motion to remand pending)
13.	Peterson v. The American Tobacco Co., No. 97-233 (D. Haw.) (complaint filed Feb. 3, 1997)	Unknown (note: removed from state court, No. 97-0490-02 (Hawaii Cir. Ct.)

CASTANO-TYPE CLASS ACTIONS IN STATE COURT

NUMBER	NAME	CERTIFICATION STATUS
1.	Daley v. American Brands, Inc., No. 97L07963, (Ill. Cir., Cook Co. July 7, 1997)	Pending
2.	Knowles v. American Tobacco Co., No. 97-11517 (La. Civ Dist., Orleans Parish June 30, 1996)	Pending
3.	Engle v. R.J. Reynolds Tobacco Co., 672 So.2d 39 (Fla. App. 1996) rev. denied No.88-235 (Fla. 1997)	Granted (Original action involved both Florida and non-Florida plaintiffs. Court limited class to Florida residents only.)
4.	Scott v. American Tobacco Co., No. 96-8461 (La. Dist., Orleans Parish Apr. 16, 1997)	Granted
5.	Lyons v. Brown & Williamson, No. E59346 (Ga. Supr., Fulton Co.) (complaint filed May 27, 1997)	Pending
6.	Geiger v. American Tobacco Co., No. 010687/97 (N.Y. Sup., Queens Co.) (complaint filed May 1, 1997)	Pending
7.	Stewart-Lomanitz v. Brown & Williamson Tobacco Corp., No. 96/110953 (N.Y. Sup.) (complaint filed June 19, 1996)	Pending
8.	Frosina v. Philip Morris Inc., No. 110950/96 (N.Y. Sup.) (complaint filed June 19, 1996)	Unknown

9.	Hoskins v. R.J. Reynolds Tobacco Co., No. 110951/96 (N.Y. Sup.)(complaint filed June 19, 1996)	Unknown
10.	Norton v. RJR Nabisco Holdings Corp., No. 48D01-9605 (Ind. Super., Madison Co.)	Unknown (note: removed to federal court (No. IP-96-0798, S.D. Ind.), and subsequently remanded to state ct.)
11.	Finelli v. Philip Morris Inc., No. 91348-96 (D.C. Super.)	Unknown
12.	Lyons v. The American Tobacco Co., (Ala. Cir., Mobil Co.) (complaint filed Aug. 9, 1996)	Unknown
13.	Walls v. American Tobacco Co., No. CJ-97-5 (Okla. Dist., Creek Co.) (complaint filed Feb. 3, 1997)	Unknown
14.	Zito v. The American Tobacco Co., No. 110952/06 (N.Y Sup.) (complaint filed June 19, 1996)	Unknown
15.	Mroczkowski v. Lorillard Tobacco Co. Inc., No. 110949/96 (N.Y. Sup.) (Complaint filed June 19, 1996)	Unknown
16.	Walters v. Brown & Williamson Tobacco Co., (Fla. Cir., 4th Jud.. Cir.) (complaint filed Aug. 30, 1996)	Unknown
17.	Connor v. TheAmerican Tobacco Co. Inc., No. CV-96C5497 (N.M. Dist., 2nd Jud. Dist., Bernalillo Co.) (complaint filed May 30, 1996)	Unknown

18.	Brammer v. R.J. Reynolds Tobacco Co., No. 73061 (Iowa Dist., Polk Co.) (complaint filed June 20, 1997)	Pending
19.	Ingle v. Philip Morris Inc., No. 97-C-21-5 (W. Va. Cir., McDowell Co.) (complaint filed Mar. 1997)	Pending

7-30-97 Tobacco settlement - legal issues

federalism
antitrust
preempt - doc discls
litigation

1. Tobacco litigation - effects of settlement
   a. Class actions - approx 17 CAs at time of settlement
"Castano" 1994 - Pls steering entire business - to rep. classes of nic-dependent people - damages to cessation programs.
1st decision - 5th cir - ordered that class be decertified.
Then - decision to go on st-by-st basis - some in fed ct, some in st ct.
Last one - in Chicago - everyone else.
Attachment to memo - includes Castano cl. actions and any others.
ED Pa / ND Mo - also have refused to certify.
Better luck in st ct - FL / LA certified.
3Cir decision on asbestos last mo - good arg that tobacco is fair analogue.

Phillips: I read dist ct decisions - all PA smokers - only for injunc relief (so arg: no need to get into indivs). Ct said: even addiction is individualistic - ct to look into whether each cl. mbr is addicted.

This theory argued to get away from indiv cases - damages / causation / arguish.

Mo: only 1 Δ. Reasoning of ct - some Pls didn't grow smoke in MO - too many diff st laws would apply.

Allegra: Mt want to try to treat CAs differently from other kinds of consolidation - to achieve some kinds of economy of litigation - e.g. discovery.

MDL-type consolidation – not be viable.

statute has certain limits – can't do fed/st, e.g.

lots of proposals to expand statute

helps in discov issues

but this isn't what lawyers are bringing CA suits – they're doing it for settlement leverage

If CAs go, incentives go to attys

Some Π attys don't think you can't do this time on CA basis – need indiv claimants.

ATLA/~~ABA~~ – this summer

↳ have to oppose, given views on liti limits generally.

Phillips – Juror in Conn suit – totally convinced that co. was bad actor

Bus – Agg R defense inevitably perceived.

If co of purported addiction – intentional tort –

then no Agg R.

So – if in file of docs – can show purported addiction –

Then not turn the corner.

Wolin – Industry prices this certainly (or at least must does) in a big way.

Tobacco settlement –
legal issues

Legal Issues 7/18/97

| Federalism issues in restrictions on st ct class actions.

1. First Amendment – as direct restrictions (in statute)

should be put in a statute

a. In FDA regs – good chance of prevailing. But a risk. most vulnerable?

b. Those that go beyond – Probably lose
not narrowly tailored to protect kids.
If interest is in protecting pub health generally, then poss to craft an argument.
Probs w/ arg – SCt – 44 Liquor Mart.
But USD – not be able to do if broad int in pub health.
Mt. undermine defense of regs – ??
~~have to look into~~

2. If in consent decree –

a. Condition a statute – gives you benefits in statute on cond. of entering into decree.
same as direct statute

b. Terms in state ct consent decree.

i) ~~[illegible]~~ nationwide? st has int. in restricting out-of-state actions? Dubious / anyhow questionable
Fixes: bring in US as pty – (make that it's a st ct)
tailor decree to state boundaries (40 states own)
congressional waiver? (1A problem)
(Interstate compact)

ii) non-parties:
vendor restrictions (e.g. pt of sale ~~[illegible]~~ restrictions)
poss fix: won't sell to X vendor. (not a speech restriction)

Cts more likely to uphold than if direct restrictions
But really why did Thun uncmit could case?
states bringing claims here

Structure your agreement w/ exploting terms - so if you lose some w what you're getting, you make sure not to give so much

(or)

put
Keep FDR regs in statute??

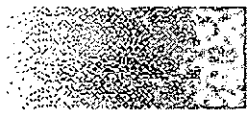
carve/narrow the speech restrictions -
and put them in statute
~~be applicate to parties~~

Standing? Hard to know if 3rd pty could bring suit.

3 uncertainties
standing // inconsistency // contract mechanism

II. Takings claims

Tobacco - settlement - Legal issues



Jerold R. Mande

06/26/97 01:08:09 PM

Record Type: Record

To: Bruce N. Reed/OPD/EOP

cc: Elena Kagan/OPD/EOP, Elizabeth Drye/OPD/EOP
Subject: Re: punitives

The judge did. But as you will see in the attached story (that I highlighted), a strength of Florida's suit is that it was brought under a 1994 law that on the one hand makes it more likely Florida will win, but it appears on the other hand does not allow punitives. I couldn't tell from several stories I read yesterday or today if the judge's ruling was a surprise or how significant. I will work on that.

Judge's ruling restricts Florida's punitive damages in tobacco lawsuit

Sun-Sentinel (Ft Lauderdale FL)
Wednesday, June 25, 1997
By SCOTT GOLD Staff Writer

A Palm Beach County judge on Tuesday limited punitive damages the state could be awarded in its lawsuit against the tobacco industry, even if the state proves to a jury that cigarette makers are negligent and sell a dangerous product.

Members of the state's trial team downplayed the significance of the ruling, calling it legal jockeying and window dressing.

Tobacco's team called it a victory.

"It will have a major effect on their case, and they were extremely distraught by the ruling," said Justus Reid, a tobacco industry attorney in West Palm Beach. "In my opinion, they are not going to win the case anyway. This just provides one more impediment to them."

The ruling came as tobacco attorneys attempt to whittle the state's lawsuit seeking to recover millions of dollars in health-care costs and billions of dollars more in penalties.

Florida's 1994 Medicaid Third Party Liability law strips cigarette makers of most legal defenses, including the key provision that smokers knew the risk of lighting up.

That law is the foundation of the state's lawsuit, and the reason that many analysts consider Florida among the strongest of the 40

states seeking to recover health-care costs from tobacco.

The law is the basis for two of the eight counts in the state's complaint. First, the state alleges that tobacco is negligent because it fails to use reasonable care. Second, the state accuses tobacco of manufacturing a defective and unreasonably dangerous product.

Palm Beach County Circuit Court Judge Harold Cohen did not limit the state's ability to win money awarded to compensate for actual loss, from those two counts. The state hopes to win $1 billion to cover past health-care costs for treating smoking-related diseases as well as $16 billion to cover future costs.

But Cohen did rule that the state Legislature, when it created the 1994 law, did not include provisions for collecting punitive damages, or money awarded to punish the industry. That could limit the amount of money the state could win through the lawsuit.

The state's trial team pointed out that it still had plenty of avenues for collecting enormous amounts of money from the tobacco industry. For example, if the state can prove that the industry violated state racketeering laws, it can triple the amount of money it wins. Also, the state could be awarded a slice of the industry's profits since 1977.

"This does not effect the bottom line," said William C. Gentry, a Jacksonville attorney and a member of the state's team. "But it gives them an opportunity to spin a tale that they had some big victory in Florida."

The tobacco industry is in the middle of settlement talks with the federal government and several states that could force the cigarette makers to pay $368.5 billion over 25 years and submit to advertising and marketing limits.

Tobacco - settlement - legal issues

Notes for Litis Legal Mtg

Enforcement
- Penalties + enforcement
- Consent decrees — incl. waiver of const claims (state action)
- Non-participating companies — incl. const issues (unconst condition)

Liability
- Punitive damages — incl. const. issues — (tkgs claims)
- Prohib. on class actions — €
- Payment scheme
- Any other liability provisions?

Document disclosure
- Extent of protection — [General scc comments - e.g. Indians]
- Procedure for determining claims

Corp culture

analysis would w/out settlement

26-27 protocol

profits

- enters to tax base

Tobacco - settlement - legal issues

Legal rules - 2nd mtg

1. Liability

a. Elim of punitives

Not likely to be subst const concerns.

- fed min age of purchase
- 7.62 - limits on stay/inj relief

b. Class actions

Ditto.

Policy: (HHS) - Pecked to death aspect goes away.

But - huge lien payment. Didn't get off free.

DOJ issue getting document

Future misconduct - subj to cap - so not so much "lighting-strike" deterrence.

Certif of CAs - how stingy is can? How much are we giving up? Recent SCt suprik: won't go forward / not giving up by much.

Precedent-setting? Shultz? DOJ? one unique experience?

Pig in a poke - who knows how much misconduct out there.

II. First Amendment issues -

Many 1A issues

Signatories v. non-parties

Unilateral action??

(Can is there any way to deal?)

(If challenge on const grounds + win, then every thing's off.)

FTC

III. Documents

Failure to disclose all docs a deal breaker?

How to keep depos. honest?

Docs now at FDA – in response to info requests, etc – are they public?

Terms aren't defined – often contradictory / formulations vary.

– p. 182 + p. 64 "from the files of..." – what does that mean?

– no ref to docs in TIs actions – presumed

– no ref to cleaning tobacco

– p. 65, bullet 3 – admits claim?

– fn 2 – makes assumptions – will this ever happen?

3-judge panel – how does this work – good/terrible mechanism?

Not rubberstamp either. Not acceptable.

What happens to cases where discov still in flux?

Fee-shifting ?–

Standing? pp. 4

(N) If we could get them docs, what more would we make?

National protocol?

49-state?

(1) amend

how / under settlement

do we want more aggr.

(2) Doc disclo list of issues – prioritize –

pros + cons

on liability

Analysis

How to do.

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POTENTIAL TAKINGS OF TOBACCO COMPANIES' TRADE SECRETS AND PATENTS

The federal legislation that is outlined in the proposed resolution could devalue trade secrets and patents owned by tobacco product manufacturers in a manner that could give rise to just compensation claims under the Takings Clause of the Fifth Amendment. Tobacco company trade secrets could be devalued by legislation implementing the proposed resolution's general document disclosure provisions (see Prop. Res. § I.D.7 at 18-19) and its provisions respecting the disclosure of information on non-tobacco ingredients (see id. at I.F at 19-20). Tobacco company patents as well as trade secrets could be devalued by legislation implementing the proposed resolution's provisions pertaining to the disclosure and use of new technology for reducing the health risks of tobacco products. See id. I.E.4 at 14-15. In each of these areas, the proposed resolution appears to envision new federal statutory provisions that would apply to all manufacturers of tobacco products, non-settlers and settlers alike. See id. § III.A at 28-29 (non-settling manufacturers subject "to the access restrictions and regulatory controls set forth above"). This memorandum describes and analyzes the takings implications of each of these intended provisions in turn.

We emphasize at the outset that the takings issues addressed here do not implicate the constitutionality of the contemplated federal legislation. Successful takings claims by tobacco companies would increase the cost of the proposed legislation to the United States. However, unless Congress unambiguously withdrew the Tucker Act remedy, there would be no taking without just compensation and, therefore, no basis for a judgment invalidating any part of the statute as violative of the Fifth Amendment.[1] In this respect, the risk of successful takings claims differs in kind from the risks posed by other constitutional claims that might be elicited by the contemplated federal legislation.

A. Potential Takings Claims Based on Disclosures of Trade Secrets under the General Document Disclosure Scheme

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[1] See Ruckleshaus v. Monsanto, 467 U.S. 986, 1016-19 (1984) (refusing to enjoin EPA disclosure of pesticide trade secrets where the Tucker Act provided compensation for any taking of trade secrets); accord, e.g., Preseault v. ICC, 494 U.S. 1, 8 (1990). But cf. Student Loan Marketing Assoc. v. Riley, 104 F.3d 397, 402 (D.C. Cir. 1997) (where federal legislation requires a cash payment to the United States, courts may assume "either that Tucker Act jurisdiction has been withdrawn or at least that any continued availability does not wipe out equitable jurisdiction").

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1. Relevant terms of the proposed resolution. The federal legislation envisioned by the proposed resolution would provide a single federal forum for the resolution of future disputes over the validity of tobacco companies' claims to trade secret protections for documents sought administratively and in litigation. The body of the proposed resolution speaks broadly of ensuring "that previously non-public or confidential documents from the files of the tobacco industry . . . are disclosed to FDA, private litigants, and the public." Id. § I.E.7 at 18-19. However, the relevant appendix, which outlines the intended document disclosure process, clarifies that tobacco companies do not intend to waive trade secret protections, or attorney-client and work product privileges. Id. App. VIII at 64, 68. Since courts have not treated attorney-client and work product privileges as sources of constitutionally protected property rights, we focus here on the proposed treatment of trade secrets.[2]

The proposed resolution calls for establishment of a federal tribunal to provide "binding, streamlined, and accelerated judicial determinations with nationwide effect" of tobacco companies' trade secret claims. Id. App. VIII at 66. The tribunal would operate in large part as a referee of discovery disputes involving trade secret and privilege claims arising in future federal and state court litigation against tobacco companies. Although trade secrets are generally subject to discovery, owners can apply for protective orders to block disclosure or dissemination.[3] Under the proposed resolution,

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[2] Attorney-client and work product privileges are generally described as judge-made doctrines for the protection of the adjudicative process, rather than as property rights. See, e.g., Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (purpose of the attorney-client privilege is to "promote broader public interests in the observance of law and administration of justice"); Hickman v. Taylor, 329 U.S. 495, 510-11 (1947) (similar account of the work product privilege). Litigants have occasionally claimed property rights based on the work product privilege. See, e.g., In re Berry, 521 F.2d 179, 183-84 (10th Cir. 1975) (rejecting contention that lawyer who had been forced to testify was deprived of property without due process); United States v. IBM, 62 F.R.D. 530, 534 n.5 (S.D.N.Y. 1974) (reciting law firm's assertion that the work product privilege defines a property right sufficient to support intervention). However, we are not aware of any case in which either the work product or attorney-client privilege has been treated as giving rise to a property right.

[3] See, e.g., Fed. R. Civ. P. 26(c)(7) (federal district courts may issue protective orders providing that "trade secret[s] . . . may not be disclosed or be disclosed only in a

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disputes over the protection of trade secrets, unless "already . . . determined by other federal or state courts" would be resolved by a panel of three Article III judges, applying "the Uniform Trade Secrets Act [UTSA] with respect to trade secrecy." Id. at 66.[4] However, access to the panel would not be restricted to litigants. The panel would also resolve disputes over trade secret protections raised by "any public or private person or entity," including "health officials and [members of] the public."[5] Parties challenging a claim of trade secret protection before the federal panel would not be required to make "a prima facie showing of any kind as a prerequisite to in camera inspection." Id. at 67.

The proposed resolution provides for two deviations from this general scheme. First, statutory requirements pertaining to non-tobacco ingredients in tobacco products would require

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designated way"); see also, e.g., American Standard Inc. v. Pfizer Inc., 828 F.2d 734 (Fed. Cir. 1987) (granting protective orders to preserve the secrecy of bone implant devices and technology). Federal district courts resolve these disputes over the disclosure of trade secrets in litigation by "balanc[ing] the [discovering party's] need for the trade secrets against the claim of injury resulting from disclosure." Centurion Indus., Inc. v. Warren Steurer and Assocs., 665 F.2d 323, 325 (10th Cir. 1981) (footnote omitted).

[4] In his July 16th testimony before the Senate Judiciary Committee concerning constitutional issues posed by the proposed resolution, Professor Tribe pointed out that Congress could not properly instruct the disclosure tribunal to apply the UTSA unless the proposed legislation adopted the UTSA as federal law. We assume that this is the approach that was envisioned by the negotiators of the proposed resolution.

[5] Legislation authorizing "any public or private person or entity" to seek a ruling on the status of particular tobacco company documents could call upon the Article III judges of the proposed federal tribunal to review issues that are not Article III cases or controversies. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (litigants before Article III courts must satisfy Article III standing requirements); United States v. Fruehauf, 365 U.S. 153, 157 (1961) (Article III courts only decide cases and controversies). Alternatively, if the tribunal were treated as something other than an Article III court, this provision would raise separation of powers questions concerning the assignment of non-Article III work to Article III judges. See, e.g., Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792). We assume, for purposes of the takings analysis, only that some form of federal tribunal would make trade secret determinations under a uniform federal standard.

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manufacturers to disclose to the FDA "the ingredients and the amounts thereof in each brand." Id. § I.F. at 19. The FDA, in addition to reviewing the safety of non-tobacco ingredients, would establish rules for public disclosure of information concerning these ingredients, analogous to current rules concerning the disclosure of processed food ingredients. Id. The FDA would treat company-submitted information on non-tobacco ingredients as "trade secrets under federal law," unless that information was subject to disclosure under the new regulations or other applicable law. Id. at 20. A second departure from the general disclosure regime would apply to new technologies for the production of reduced risk tobacco products. The statute would require full disclosure of new risk reducing technologies and authorize the federal government to mandate the production or licensing of any promising technologies. These provisions could apply to patents as well as to trade secrets. Section B of this memorandum identifies some of the implications of these special disclosure provisions for the general takings analysis.

2. The risk of federal liability for takings of trade secrets through operation of the general document disclosure scheme. Public disclosure of tobacco company documents under the general disclosure process outlined in the proposed resolution could give rise to takings claims against the United States. The Supreme Court has instructed that property interests qualifying for protection under the Takings Clause are not created by the Constitution; instead, they "are created and their dimensions . . . defined by existing rules and understandings that stem from an independent source such as state law." Ruckleshaus v. Monsanto, 467 U.S. 986, 1001 (1984) (internal quotations omitted); accord, e.g., Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1030 (1992). Trade secrets, according to Ruckleshaus, are among the "intangible property rights created by state law [that] are deserving of the protection of the Taking Clause." 467 U.S. at 1003. Accordingly, if the proposed federal tribunal ordered a tobacco company to disclose information that would have been protected from disclosure under otherwise applicable state trade secret law, the company could claim a federal infringement of property rights within the scope of the Takings Clause.

To establish that the federal tribunal's rejection of a claim to trade secret protection resulted in a taking, a tobacco company would have to make a two-part showing. The company would be required to establish first that the tribunal's decision overrode otherwise applicable state law and second that the resulting federal infringement on state-defined property rights rose to the level of a taking. With respect to the first element of this inquiry, we lack sufficient information to produce a firm estimate of how often the proposed federal tribunal, applying the UTSA to trade secret disputes brought before it, might issue disclosure orders that could be seen as a displacing otherwise

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applicable trade secret protections. The basic UTSA framework has been adopted by most states -- forty-two according to one recent survey[6] -- which should tend to minimize the gaps between the new federal-law regime for tobacco industry trade secrets and the state-law regimes that it would supersede. However, some states' versions of the uniform act incorporate significant modifications.[7] Moreover, even identical federal and state rules could be interpreted differently by the federal tribunal and state courts.

Choice-of-law issues could weaken some tobacco company claims that particular documents would have been protected from disclosure if not for the federal disclosure scheme. In the absence of a uniform disclosure scheme, multiple trial courts, adjudicating multiple claims against a single tobacco company, would continue to rule separately on the availability of trade secret protection for a particular company document. Those trial courts would continue to apply different choice-of-law principles to identify the controlling body of trade secret law. We would expect these courts, in some cases, to decide trade secret claim respecting a particular document under different bodies of state law. To the extent that this pattern prevails under the existing system, tobacco companies will find it difficult to establish, in the course of prosecuting a takings claim against the United States, that a disclosure order from the new federal tribunal displaced otherwise applicable state-law protections.

Based on our preliminary analysis of these two factors, we believe that tobacco companies would rarely be able to establish that decisions of the federal tribunal mandating disclosure had overridden state-law trade secret protections. The companies should find it difficult to establish that any particular body of state trade secret law would have been more protective than the uniform federal standard or that other, less protective state-law rules would not ultimately have been applied to require disclosure. In spite of these difficulties, we would expect tobacco companies, given the considerable value of some of the trade secrets at issue, to pursue claims that orders issued by

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[6] See Roger M. Milgrim, Milgrim on Trade Secrets § 1.02 n. (1997) (citing 1995 survey finding that 42 states and the District of Columbia through 1995).

[7] For example, North Carolina's Trade Secrets Act, N.C. Gen. Stat. §§ 66-152 to -157, although broadly patterned on the UTSA, extends the protections afforded by the Uniform Act in several important respects. See Bryan K. Johnson, The Uniform Trade Secrets Act: The State Response, 24 Creighton L. Rev. 49, 52, 59, 67 (1990) (discussing various provisions of the North Carolina legislation).

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the new federal tribunal resulted in the disclosure of otherwise protected documents.

Once a tobacco company established that the federal tribunal had ordered disclosure of a state-law trade secret, the United States would have significant grounds for arguing that the resulting devaluation of tobacco company property rights did not require compensation under the Takings Clause. In Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984), Monsanto sued the Environmental Protection Agency (EPA) for the Agency's use and disclosure of health, safety, and environmental data that the company had submitted in order to register its products for sale within the United States as required by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Court found that Monsanto was entitled to compensation for EPA's use and disclosure of information that the company had submitted between 1972 to 1978, when FIFRA contained an explicit assurance that data registration data would be kept confidential. Id. at 1011. On the other hand, the Court rejected Monsanto's claim to compensation for EPA use and disclosure of registration data that the company had submitted before 1972 and after 1978, periods during which FIFRA contained no such assurance.

The Court began its analysis in Ruckleshaus by recounting that regulatory taking claims call for an "ad hoc, factual inquiry" -- that no "set formula" can determine whether "justice and fairness" require compensation in a particular case. Id. at 1005, citing Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1977). The Court recited three factors, which it first articulated in Penn Central, to provide some structure for this ad hoc inquiry: "the character of the government action, its economic impact, and its interference with reasonable investment-backed expectations." Id. (internal quotations omitted); accord, e.g., Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 641-43 (1993). While Ruckleshaus focused primarily on the third factor, which was found to be dispositive of Monsanto's claim, the Court's observations respecting all three factors are relevant to our current assessment of the tobacco companies potential claims.

The Court rejected EPA's argument that the nature of the federal undertaking in FIFRA, creation of a comprehensive regulatory scheme for the registration of hazardous chemicals, allowed EPA to use and disclosure registration data without compensating registrants, regardless of any state-law rights to confidentiality. In defending the uncompensated disclosure of data submitted during the 1972 through 1978 period, EPA argued that Congress, in amending FIFRA in 1978 to provide uniform use and disclosure rules for all registrant data, had effectively "pre-empted" contrary state trade secret law (as well as repudiating earlier federal assurances of confidential treatment) in the interest of establishing a comprehensive registration

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scheme. Id. at 1012. The Court ruled that the uncompensated use and disclosure of state-law trade secrets could not be justified on these grounds, stating that if Congress could "'pre-empt state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality." Id. at 1012.

The Court also rejected EPA's argument that the economic loss to Monsanto resulting from the Agency's use and disclosure of its registration data, in relation to the total value of those data, was too small to support a taking claim. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change."). The affected property interest, as Ruckleshaus analyzed the issue, was not the data that Monsanto had submitted to EPA, which retained substantial value to the company despite its disclosure, but the "competitive advantage over others that Monsanto enjoy[ed] by virtue of its exclusive access to the data." 467 U.S. at 1012. Disclosure, by "destroy[ing] that competitive edge," eliminated essentially all of the value of the relevant property. Id. The highly particularized nature of the property right protected by trade secret doctrine, under the Ruckleshaus analysis, appears to foreclose any argument by the United States that disclosure of tobacco company trade secrets did not diminish the value of the relevant property to such an extent as to require compensation under the Fifth Amendment.

The third Penn Central factor, whether the disputed government action interfered with the property owner's reasonable investment-backed expectations, provided EPA with a partial defense to Monsanto's claim. The Court determined that an explicit statutory assurance of confidentiality, contained in FIFRA from 1972 to 1978, "formed the basis for a reasonable investment backed expectation" that its registration data would not be disclosed. Id. at 1011. However, with respect to data that Monsanto had submitted before 1972 and after 1978, during periods when FIFRA contained no such assurance, the Court found that Monsanto had no reasonable expectation of confidentiality. These data, the Court found, were freely submitted in return for the registration needed to sell the relevant pesticides within the United States. See id. at 1007.

The Court specifically rejected Monsanto's argument that FIFRA's imposition of a data-disclosure requirement as a precondition to the registration of pesticides for sale within the United States, represented an unconstitutional condition on access to a valuable government benefit:

> [A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data in exchange for the

economic benefit of registration can hardly be called a taking.

467 U.S. at 1007; see Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 584-85 (1985); see also Westinghouse Electric Corp. v. United States Nuclear Regulatory Commission, 555 F.2d 82, 95 (3d Cir. 1977) ("voluntary submission of information by an applicant seeking the economic advantage of a license can hardly be a taking"). Although Congress could not unilaterally redefine Monsanto's state-law rights to the confidentiality of its registration data, Congress could make Monsanto's assent to EPA use and disclosure of those data the price of a critical federal benefit -- legally registration to sell pesticides within the domestic market. See 467 U.S. at 1007.

In subsequent decisions, the Court has declined to extend Ruckleshaus' seemingly permissive approach to the conditioning of government benefits on property rights concessions. In Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987), the Court ruled that California could not, without compensation, require beachfront property owners, as a condition of a building permit, to cede a public easement across their beachfront. Id. at 831-42; accord Dolan v. City of Tigard, 114 S. Ct. 2309, 2319 (1994). Justice Scalia, writing for the Nollan majority, distinguished Ruckleshaus, finding that EPA's establishment of a condition on the receipt of a "valuable government benefit" -- pesticide registration -- could not be equated to California's imposition of a burden on an essential property right -- the "right to build on one's own property." 483 U.S. at 834 n.2.

Nollan and Dolan announced and elaborated a regulatory exaction doctrine, which limits governments' ability to require landowners, without compensation, to open their property to the public in order to obtain desired land-use permits. These decisions, taken together, hold that permit conditions of this nature may be validly imposed only if (1) denial of the permit would be a valid exercise of the police power and not a taking; and (2) the permitting authority can demonstrate a "'reasonable relationship' between the required dedication and the impact of the proposed development." Dolan, 114 S. Ct. at 2317-19; see Nollan, 483 U.S. at 836. While the Court has not applied this doctrine outside the context of land use permitting, application of some type of reasonable relationship test to so-called "regulatory exactions" would not be a surprising development.[8]

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[8] The lower courts have thus far declined to extend the Nollan and Dolan regulatory exaction doctrine to other contexts. See Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 (10th Cir. 1996) (Nollan and Dolan "limited to the context of development exactions where there is a physical taking or its equivalent"); Harris v. City of Wichita, 862 F. Supp. 287, 293 (D. Kan. 1994)

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Indeed, it would be more surprising to be told that the Constitution places no limit on regulatory exactions outside the real property sphere, since without some such limit, the power to regulate -- through imposition of a registration requirement, for example -- would carry with it the power to extract all manner of uncompensated property rights concessions.

Ruckleshaus while limiting the defenses that the United States could realistically hope to prevail upon in a tobacco company suit alleging a taking through federal disclosure of trade secrets, provides substantial grounds for a defense based on consent to disclosure as a condition on market access. Ruckleshaus essentially forecloses arguments that the nature of the contemplated disclosure requirement -- its status as one component of a comprehensive scheme to control widely recognized health risks -- excuses the alleged infringement. Similarly, Ruckleshaus' highly particularized conception of the property right protected by trade secret doctrine appears to preclude any argument that federally compelled disclosure did not eliminate a sufficient proportion of the value of the relevant property to require compensation. However, Ruckleshaus suggests that Congress could make document disclosure in accordance with the regime described in the proposed resolution a condition on receipt of a valuable federal benefit -- continued authorization to market tobacco products within the United States. Following the enactment of federal legislation making these terms clear, any tobacco company that continued to sell its products within the United States would be treated as having accepted the federal disclosure regime. A tobacco company that objected to disclosure as a precondition to lawful sale, like a pesticide company that objected to data use and disclosure under FIFRA (see 467 U.S. at 1007 n.11), could bypass the domestic market and elect to sell only overseas.

3. Possible modifications of the settling parties' legislative proposal to reduce the risk of federal liability in takings litigation. One approach to reducing the takings risk associated with establishment of the proposed tobacco document disclosure scheme focuses on achieving a close correspondence between the FIFRA data disclosure provisions at issue in Ruckleshaus and the tobacco document disclosure provisions in the legislation contemplated by the proposed resolution. Ruckleshaus, as we have seen, upheld the uncompensated use and disclosure of state-law trade secrets owned by a pesticide manufacturers where the pesticide manufacturer submitted those trade secrets to EPA without any assurance of confidentiality.

While Ruckleshaus remains good law, the Court has since established an unconstitutional conditions doctrine for takings

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(same effect).

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of easements across real property. The Court's evident concern in Nollan and Dolan with the misuse of regulatory authority to exact property rights concessions suggests that Ruckleshaus may not sustain particularly aggressive deployments of regulatory to extract property rights concessions outside the real property context. Accordingly, the odds of mounting a successful takings defense based on Ruckleshaus should improve as disparities narrow between the bargain that Congress offers the tobacco companies under the document disclosure provisions of the contemplated tobacco legislation and the bargain that Congress offered pesticide companies in FIFRA (in its pre-1972 and post-1972 forms). Congress, following the FIFRA model, could ban sales of unregistered tobacco products and make formal consent to a federal document disclosure scheme a condition of registration. The practical effect of a product registration requirement might differ little from the effect of a bare requirement that tobacco companies submit to the new document disclosure regime. However, registration would strengthen federal arguments that the companies had clear notice of the requirements.

The document disclosure provisions of the contemplated tobacco legislation might also look more like the data disclosure requirements that did not give rise to an obligation to compensate in Ruckleshaus if tobacco companies were permitted to make independent choices concerning trade secrets pertaining to separate products. Under a product registration system, a tobacco company could decide that trade secrets peculiar to a particular product were more valuable than the ability to market that product in the United States.[9]

Tobacco legislation that permitted this choice, in addition to achieving a better fit with the favorable portions of Ruckleshaus, would also fare better under the "reasonable relationship" test that Nollan and Dolan have established for exactions of easements in the real property context. Adapted to the current setting, the critical question posed by Nollan and Dolan would be whether the federally required dedication of tobacco company property -- that is, disclosure of certain state-law trade secrets -- is reasonably related to the federal government's legitimate interest in controlling the social costs of tobacco. The relationship here is self-evident. Fuller disclosure of tobacco company documents can be expected to improve the efficacy of numerous government and private efforts to address tobacco-related health problems. Indeed, a strong argument could be made that the required relationship would exist even if access to the American market for sales of a single tobacco product were conditioned on tobacco companies' acceptance

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[9] Compare Ruckleshaus, 467 U.S. 1007 n.11 (noting that "Monsanto could decide to forgo registration in the United States and sell a pesticide only in foreign markets").

of the federal document disclosure regime for all company documents. Nonetheless, existence of the reasonable relationship required by Nollan and Dolan would be far clearer if documents pertaining to products that a company has chosen to sell only overseas were not subject to the federal disclosure system.

A second general approach to reducing the United States' exposure to potential takings claims arising out of the proposed document disclosure process would involve changes to the operation of the disclosure review panel. Short of eliminating the panel in its entirety, Congress could minimize the potential for just compensation awards by stripping the panel of authority to rule on trade secret claims. The panel could still improve the speed and consistency of decisions resolving disputes over attorney-client and work product privileges, where recognized property rights of the tobacco companies are not implicated. The document review process would become less useful to the adversaries of tobacco companies, but also less risky to the federal fisc. Alternatively, Congress could establish a more protective federal standard for review of trade secret claims. By aligning the uniform federal disclosure standard with the most protective state standards, Congress could retain the benefits of a streamlined, nationally uniform disclosure regime, while minimizing the potential for state-law protections. Again, the reduction in takings risk would come at the price of a reduction in usefulness to advocates of full disclosure.

A third and final approach to reducing the United States' exposure to tobacco company takings claims would only address potential claims by settling tobacco companies. The proposed resolution calls for a uniform document disclosure regime applicable to settling and non-settling tobacco companies alike. The contemplated federal statute, in other words, would offer the entire industry the same basic bargain: continued access to the American market in exchange for a partial waiver of state-law trade secret rights. Settling tobacco companies, however, would obtain additional benefits under the statute, most notably immunity from punitive damages and multi-plaintiff lawsuits. See Prop. Res. §§ VII.B-VII.C. If this benefit to settling parties, like the generally applicable benefit of continued market access, were conditioned on a waiver of state-law trade secret protections, the United States would obtain a second line of defense against takings claims by those settling defendants.

This condition could be imposed on settling defendants through both through the consent decrees and the statute. The decrees would recite that the settling companies waived any state-law trade secret rights or, alternatively, that the companies accepted the settlements as full compensation for those rights. The federal statute could also incorporate this condition by requiring tobacco companies to enter into consent

decrees containing such recitations in order to qualify for the statutory liability protections.

Although this proposal represents a novel conditioning of government benefits on property rights concessions, we believe that both the consent decree and statutory provisions would provide additional support for federal takings defenses against settling tobacco companies. Under the Ruckleshaus analysis, the settling tobacco companies, having knowingly forfeited those rights as part of the price for both continued access to the American market and significant liability protection, could not plausibly claim a reasonable investment-backed expectation in state-law trade secret protections. The regulatory exaction analysis of Nollan and Dolan, even if extended to this context, should not produce a different result. Both the states, as signatories to the consent decrees, and the federal government, as the source of the statutory conditions, would be advancing legitimate interests in promoting effective control of tobacco through fuller disclosure. Moreover, although the caselaw applying Dolan's reasonable relationship test is sparse (and confined thus far to real property dedications), we think that a strong argument could be made that the required dedication of settling companies' trade secret would be reasonably related to the those legitimate state and federal interests.

B. Potential Takings Claims Arising Out of Compulsory Disclosure of Non-Tobacco Ingredients and Compulsory Disclosure and Licensing of Risk-Reducing Technology

1. Relevant terms of the proposed resolution. The legislation outlined in the proposed resolution would include specific disclosure mandates for two particular types of proprietary information held by tobacco companies -- information on ingredients and information on risk reducing technology. Section I.F of the proposed resolution calls for the enactment of specific statutory provisions governing public disclosure of the ingredients in tobacco products. Under current federal law, tobacco manufacturers are only required to submit ingredient data to the FDA in aggregated form -- without any indication of which companies or products use particular ingredients.[10] The contemplated federal legislation would require tobacco companies to inform the FDA of "the ingredients and the amounts thereof in each brand." The FDA would use this information, "on a confidential basis," to establish safety regulations for non-tobacco ingredients. Prop. Res. § I.F. The Agency would also be charged with establishing rules requiring partial disclosure of tobacco product ingredients, "comparable to what current federal

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[10] See 15 U.S.C. § 1335a (1994). The FDA is generally required to treat these ingredients submissions "as trade secret and confidential information." Id. § 1335a(2)(A).

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law requires for food products, reflecting the intended conditions of use." Id. § I.F at 19; see 21 U.S.C. 343 (1994) (food ingredient disclosure under the Federal Food, Drug and Cosmetic Act). The FDA would treat information on non-tobacco ingredients submitted under this provision as "trade secrets under federal law," unless that information were subject to public disclosure under the newly authorized ingredient regulations or other applicable law. Id. at 20.

The contemplated legislation would also contain specific provisions requiring disclosure and licensing of risk reducing technology. Section I.E.4 of the proposed resolution outlines statutory provisions that would require manufacturers to notify the FDA when they develop or acquire any technology that could reduce the health risks of tobacco products. The notifying company would also be required, in return "for a commercially reasonable fee," to cross license such technology to other companies, although technology reported to the FDA at an early stage of development would be "provided confidentiality protection during the development process." Id. To provide further support for the testing and marketing of reduced risk products, the proposed resolution would also allow FDA to mandate production of reduced risk products. The contemplated legislation would authorize the FDA to require, by rule, that a manufacturer in possession of new technology that could lead to the production of "less hazardous tobacco products" either to manufacture such products or to license the technology in question to another manufacturer that is willing to do so "at commercially reasonable rate." Id. at 15. If an FDA rule did not lead to the introduction of a desired, technologically feasible product "within a reasonable time frame," the U.S. Public Health Service could produce the product or provide for its production through a licensing arrangement. Id. The proposed resolution makes no mention of payments to technology developers from the Public Health Service of its licensees.

2. Potential takings claims arising out of the mandatory disclosure and licensing provisions. Our review of the proposed resolution's provisions concerning tobacco product ingredients and reduced risk technology is less developed than our review of the general document disclosure scheme. It appears, however, that a proper analysis of takings litigation risk would follow the same basic outlines in all three areas. Because trade secrets are "intangible property rights . . . deserving of the protection of the Taking Clause," Ruckleshaus, 467 U.S. at 1003, federal disclosure requirements could give rise to takings suits. To collect just compensation in the areas at issue here, tobacco companies would have to show that federal disclosure mandates overrode otherwise applicable state-law protections. In addition, companies would have to show that they had not accepted disclosure as a condition on lawful access to the American market, in a bargain governed by the conditional benefit doctrine

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set forth in Ruckleshaus. It appears, again, that the most promising means of reducing the takings litigation risk lies in achieving a close fit with the conditional registration analysis that allowed disclosure without compensation for two of the periods at issue in Ruckleshaus. Any federal disclosure schemes should highlight a clear choice on the part of tobacco companies to submit to new disclosure requirements in exchange for a valuable benefit -- continued access to the American market.

While our assessments of the takings implications of the ingredient disclosure and reduced risk technology provisions is not yet complete, two points that appear to hold some potential significance warrant brief mention here. On the subject of ingredients disclosure, the Supreme Court, on two occasions, has emphatically rejected claims that state ingredient-disclosure requirements deprived manufacturing companies of property without due process. In the lead case, Corn Products Ref. Co. v. Eddy, 249 U.S. 427 (1919), the Court held that the "right of a manufacturer to maintain secrecy as to his compounds and processes must be held subject to the right of the state, in the exercise of the police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth." Id. at 431-32; accord National Fertilizer Ass'n v. Bradley, 301 U.S. 178 (1937) (reaffirming Corn Products in decision upholding a state law requiring ingredients labelling on fertilizer bags). These cases may support an argument that background principles of fair disclosure, analogous to background nuisance principles in the real property context, bar any taking claim for federally mandated disclosure of certain reasonable ingredients information.[11]

Turning to the proposed resolution's provisions concerning reduced risk technology, it should be noted that patents as well as trade secrets could be affected in this area. Property rights of patentees, which are creatures of federal law (see U.S. Const. Art. I, § 8; 35 U.S.C. §§ 101-261 (1994)), vest with the issuance

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[11] It is also worth noting that Massachusetts recently enacted a an ingredient disclosure law for tobacco companies. See Mass. Gen. L. ch. 94, § 307B (1996). Four major tobacco companies have sued to block implementation of the law, arguing federal preemption under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331, et seq. (1994), and a series of federal constitutional claims, including a claim of an uncompensated taking. See Philip Morris Inc. v. Harshbarger, 957 F. Supp. 327, 328 n.2 (D. Mass. March 10, 1997) (ruling against the companies' preemption claim and certifying partial summary judgment for interlocutory appeal). If the Massachusetts law took effect in advance of any federal requirement, ingredients disclosures under Massachusetts law could reduce the losses that tobacco companies would be able to blame on the federal mandate.

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of the patent. Thus, Congress could probably alter the package of rights conferred by future patents for risk reducing tobacco products without paying just compensation. Patents for risk reducing tobacco technology could be made subject, for example, to mandatory licensing at less than fair market value if this limitation was inherent in the rights that vested upon issuance of the patent. Abrogation of existing patents, on the other hand, would give rise to compensation claims.[12] While the federal government, unlike private parties, cannot be enjoined from infringing a patent, it can be made to pay compensation under 28 U.S.C. § 1498 (1994). See, e.g., Motorola, Inc. v. United States, 729 F.2d 765, 768 (Fed. Cir. 1984) (Section 1498 allows patentee to sue for compensation based on unauthorized federal use of a patent).

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[12] See Jacobs Wind Elec. v. Florida Dep't of Trans., 919 F.2d 726 (Fed. Cir. 19__) (dictum) (noting that state infringements of patents would takings actionable under the Fifth and Fourteenth Amendments).

Tobacco - settlement - legal issues

JUDICIAL FEDERALISM AND S. 1530

Working Paper #5 in a Series on Legal Issues in the Proposed Tobacco Settlement

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Judicial Federalism and S. 1530

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In November 1997 Senator Hatch filed S. 1530, the "Placing Restraints on Tobacco's Endangerment of Children and Teens Act" ("PROTECT"), in order to implement the provisions of last summer's proposed settlement between state attorneys general and tobacco manufacturers ("the proposal"). In rough form, the civil immunity and liability provisions of S. 1530 follow the outline set forth in the proposal. Upon closer inspection, however, the civil liability and immunity provisions of S. 1530 go even further than did the proposal in rearranging the relationship between state and federal courts.[1] These provisions would create significant and troubling federal limitations upon and intrusions into the operations of state courts.

Following the settlement proposal, S. 1530 purports to terminate pending liability actions by state and local governments against tobacco manufacturers and prohibit future actions brought by federal, state, or local governments for all "health related claims arising from the use of a tobacco product." Sec. 256. The bill would also terminate or bar all pending and future actions "based on addiction to or dependence on a tobacco product." Sec. 256. However, the bill claims to preserve "All personal injury claims arising from the use of a tobacco product." Sec. 256 (c). As the Act does not explicitly create any federal right to recover for such damages, the implication is that pre-existing state law actions are preserved.

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[1] Like the proposed settlement, S. 1530 also appears to permit tobacco manufactures to remove to federal court enforcement actions brought by states to enforce the terms of the settlement. In contrast to the proposed settlement, however, the language in S. 1530 more clearly states that the removed actions would be actions to enforce the terms of PROTECT itself and thus, presumably, within the scope of Article III. However, this removal provision still raises the Eleventh Amendment problem that was identified in the prior *Working Paper* on judicial federalism, with respect to the ability of individuals to force states to enforce the law in federal court. *See* Wendy E. Parmet, *Judicial Federalism and the Proposed Tobacco*

Yet, while the bill purports to preserve state tort actions, it places numerous obstacles in the path of any claimant who actually seeks to bring and collect upon such a claim in a state court. These hurdles, which are discussed more fully below, will pose difficulties not only for individual plaintiffs, but also for state courts.

Section 257: Limitations on Class Actions and Joined Claims

S. 1530 follows the proposal in barring punitive damages as well as class action suits, joinder of parties, and aggregation of claims. Secs. 257 & 258. If a state court violates the latter procedural bar, the action may be removed by the defendant to "an appropriate Federal court." Secs. 257 & 258.

The limitation on class actions and joint trials follows the proposal in marking a significant intrusion on state court procedures. *See Working Paper # 3.* Given the Supreme Court's recent decisions limiting federal commandeering of states, these prohibitions, were they to stand alone, would raise serious constitutional questions which are more fully explored in the previous *Working Paper.*

S. 1530, however, appears to attempt to answer some of those constitutional questions by placing federal authority for the regulation of state court procedures under the spending clause. Section 261 of the bill states that in order "to be eligible to receive funds under subtitle A of title V" ("Payments to States and Public Health Programs") states must enact laws in conformity with the provisions of the Act's civil liability provisions. By thus linking the regulation of state court procedures to state legislation that will be enacted in exchange for the receipt of federal money, the bill attempts to rely upon the spending clause for the federal authority to regulate state court procedures.

Generally, the Supreme Court has permitted Congress to commandeer states via the spending clause. Thus when it acts under the spending clause, Congress can go further than it can under the commerce clause in placing demands upon states. *See New York v. United States*, 504 U.S. 144 (1944). Nevertheless, there are still limits to how far

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Settlement: Working Paper # 3 in a Series of Legal Issues in the Proposed Tobacco Settlement (Aug. 6, 1997) (hereinafter "Working Paper #3") at 3-4.

Congress can go under the spending clause. When Congress acts under the spending clause it must make its demands upon states explicitly. *See Pennhurst State School v. Haldeman*, 451 U.S. 1 (1981). Moreover, the conditions imposed upon states in return for federal money must be related to the federal interest in the particular national projects or programs financed by the federal purse. *See South Dakota v. Dole*, 483 U.S. 203 (1987). It is questionable whether S. 1530 satisfies that latter requirement. The bill does link its demand that states limit procedures in state tobacco cases to receipt of federal money supporting tobacco prevention. Since the availability of the money supporting tobacco prevention is in some sense part of the "settlement" which limits liability actions, there may be a sufficient nexus. On the other hand, the linkage is quite remote. The grants to states under PROTECT are not directed specifically at litigation; nor would they in any way necessarily serve to offset the increased costs state courts would have to bear if they were forced to litigate tobacco litigation without the economic advantages gained by joining trials and permitting class actions.

Even if the spending clause does authorize the federal commandeering of state court procedures, the constitutionality of the removal provision requires further analysis. In order for a case to be removed to federal court, it must fall within the scope of Article III. A case may fall within the scope of that Article if the case raises a federal issue. Presumably, if a state has elected to accept federal money under PROTECT, and if the constitution then permits Congress to require the state to limit joint and class actions in state court as a condition for receipt of the federal funds, the state's failure to abide by those limitations in a particular case would raise a federal issue that would bring the case within the scope of Article III. *See Osborne v. Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Hence, the removal provision would likely survive a constitutional challenge.

The constitutionality of the procedural limitations and removal provisions, however, does not determine their soundness. The prohibition of joint actions and class actions in state courts violates the maxim that "federal law takes the state courts as it finds them." Henry Hart, *The Relations Between State and Federal Law,* 54 COLUM. L.REV. 489, 504 (1954). As Professor Hart noted, this rule is "bottomed deeply in belief

in the importance of state control of state judicial procedure . . ." *Id.* Respect for the states in general, and for state courts in particular, cautions against deviating from the general practice absent compelling justifications. No such compelling justifications appear to exist here.

In addition, as formulated, the removal provision would likely cause far greater disruption of state court procedures than is typically the case with removal. Under S. 1530 removal is permissible in "an action that involves a violation of this subsection [pertaining to limitations on joint and class actions]." Sec. 257. This suggests that removal would serve, in effect, as a form of interlocutory review of state court decisions by federal district courts. While perhaps not unconstitutional, such a scheme would significantly disrupt the normal operations of state courts, and would violate the assumption that state appellate courts should normally serve as the first forum for reviewing errors by lower state courts. Indeed, there is no explanation in either S. 1530 or the settlement as to why the drafters believe that state appellate courts cannot be counted on to review and reverse (even in an interlocutory nature, if necessary) errors committed by state trial courts. Placing the federal district courts in a position to sit as interlocutory reviewers of state courts would radically alter the relationship between the state and federal trial court systems. Such a significant alteration of institutional norms should be undertaken only when necessary to protect important federal interests. Again, no such justifications appear here.

Section 261: Prohibition of State Actions and "Deeming" Federal Issues

There remains an issue as to what would happen if any state chooses not to accept the federal money, and is thereby not compelled under the spending clause to limit the procedures available in federal court. Perhaps recognizing the constitutional difficulties inherent in compelling such states to adopt federal procedures, subsection (c) of Section 261 simply bars state courts in states that "do not comply" with Section 261(a) from entertaining tobacco claims. Exactly what that means is rather unclear. Since Section 261(a) appears to give states a choice of whether or not to accept federal money and

follow federal rules, it is unclear as to whether a state that chooses not to accept federal money would be one that does not "comply" with the section. If such a state is not one that is out of compliance within the meaning of Section 261(a), the state would appear to be free to continue to entertain cases raising tobacco claims. Under those circumstances it remains unclear how Congress can limit Section 257 court procedures.

If Section 261(c) does apply to states that refuse federal money, the section appears to avoid the problem of federalizing state court procedures because it simply divests the state court of jurisdiction altogether. While this preemption is likely constitutional as falling within congressional commerce authority, it certainly would significantly erode the traditional police power of a state. It also casts doubt on any pretense that the bill maintains individual state law actions.

In addition to barring state court actions in noncomplying states, Sec. 261(c)(2) goes further, adding that:

> Any tobacco claim that is otherwise maintainable under this chapter that is asserted under the law of, or in the courts of, such State shall be deemed to arise under this section and shall be subject to the provisions of this chapter, and the substantive rules of decision for such claim shall otherwise be derived from the law of the State that would have been applicable but for the operation of this subsection.

Presumably, this section is intended to clarify that in non-compliant states, tobacco claims "arise under" federal law and therefore may be brought in federal district court pursuant to 28 U.S.C. § 1331 and Article III.

It nevertheless remains unclear as to whether federal jurisdiction really could exist. If a state accepts federal tobacco money but violates the procedural limitations that are attached to receiving such money, then presumably the state's non-compliance creates a concrete federal issue that would serve as the basis for a finding that the action falls within Section 261(c)(2) and thereby for asserting federal jurisdiction. *E.g., Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480 (1983). However, if a non-compliant state has simply asserted *its* constitutional right to forgo federal money and federal procedural limitations, it would be questionable as to whether there really would be a federal

question sufficient to satisfy Article III's "arising under" jurisdiction. Perhaps the barring of state actions would suffice, but the bill's attempt to simply "deem" state actions that apply only substantive principles of state law as federal actions is disingenuous, if not unconstitutional. It must be remembered that the cases which would be "deemed" to be federal actions would for all intents and purposes remain state law claims. Of course, federal courts assert jurisdiction over state law actions every day under the diversity grant of jurisdiction, 28 U.S.C. § 1333, but in diversity cases, the federal courts look to, and indeed must look to, state court decisions to determine what constitutes the substantive law of the state. Because Section 261 would in effect place jurisdiction for all tobacco claims in non-compliant states in federal court, it remains mysterious as to what state law the federal courts could look to, for the state courts would lose their opportunity to interpret and revise state common law applicable to tobacco. In effect, state law would be frozen in time, as the only courts that have the constitutional authority to actually "make" state law are robbed of any ability to do so.

Section 262: Removal by Parties

Section 262 of the bill includes another removal provision that is significantly broader than any found in the proposal. Under this section, Title 28 of the United States Code would be amended to permit the removal of all civil actions pertaining to tobacco "if all plaintiffs and all defendants consent in writing to such removal." Of course, it goes without saying that parties cannot waive defects to the subject matter jurisdiction of the federal courts. Thus the consent of the parties cannot substitute for a lack of federal jurisdiction. In a state that is presumably complying with the federal demands, the basis for the assertion that every tobacco claim "arises under" federal law is uncertain. Under the PROTECT Act there is always remains the possibility that a potential federal defense will emerge. But the presence of a federal issue in many cases will only be hypothetical -- and the maintenance of jurisdiction here clearly rests on the outer bounds of federal subject matter jurisdiction. *See Textile Workers Union v. Lincoln Mills,* 353 U.S. 448,

473-475 (1957) (Frankfurter, J., dissenting) (arguing that the federal courts lack protective jurisdiction).

Moreover, Section 262 permits removal with consent of the parties "at any time prior to judgment." While this may not be unconstitutional, it certainly is extraordinarily disruptive. Imagine if the parties decided to remove a case to federal court mid-way through a jury trial! Certainly the burden on the state court would be enormous. No explanation is given as to why tobacco claims, of all potential judicial actions, warrant this unique and highly disruptive procedure.

Subsection (b)(2) of Section 262 goes further and permits removal whenever a defendant "reasonably contends" that the case is "being conducted in a manner inconsistent with the terms of chapter 1 of subtitle C. . . ." Further, subsection (e) clarifies that in such a case, the district court shall determine whether the trial was being conducted in a manner inconsistent with PROTECT. If such a finding is made, the action shall either be dismissed without prejudice or the district court shall issue orders to place the action in conformity with PROTECT. If the court finds that the state court was acting consistently with the Act, the federal court may still retain jurisdiction as long as the defendant "had a reasonable basis to seek removal," and it is "necessary to serve the interests of justice and the requirements of the PROTECT Act," or if the court finds that the defendant had no reasonable basis, the district court shall remand the case.

If the district court either dismisses the cases or retains jurisdiction under these circumstances, Article III jurisdiction is likely established, because the defendant's "reasonable contention" probably constitutes a federal issue. The disruption created by the potential mid-trial removal and review of state court actions by the district court, however, cannot be minimized. As discussed above, the idea of allowing federal judges to effectively grant interlocutory reviews of state courts is most extraordinary. Generally the presumption is that state courts are bound to apply federal law and are as capable of doing so as federal courts. If state courts commit federal errors, relief is available under 28 U.S.C. § 1257. To permit one single class of defendants, tobacco manufacturers, to bypass that arrangement, and to stop state trials mid-way and require federal district courts to sit as appellate reviewers of state courts would mark an incredible reversal of the

established ordering of our court systems. While this may not be unconstitutional *per se*, it certainly goes very much against the grain of our constitutional structure and history, and should not be undertaken lightly.

Problems with Attorney General's Review of Judgments

S. 1530 deviates significantly from the proposal in creating a unique procedural requirement for the collection of all tobacco-related judgments. Under Section 257(i) "A participating manufacturer shall not make, or be required to make, any monetary payment with respect to any judgment or settlement to which this section applies" unless the Attorney General certifies whether "payment of such claim is permitted under this section," which relates to limitations on damages and the aggregate annual cap. Section 257(j). In order to comply with this section, an individual must file a claim of any final judgment to the Attorney General. Section 257(i).

Two major difficulties arise with respect to this section. First, the provision appears to provide for no form of judicial review should the Attorney General deny certification. If judicial review is denied, an individual could in effect lose the ability to collect upon a valid state judgment merely based upon the unreviewable decision of an executive official. This in itself may raise procedural due process as well as separation of powers problems. *E.g., Gutierrez de Martinez v. Lampagno*, 115 S.Ct. 227 (1995) (suggesting that denying review of an Attorney General's action to remove a case under the Westfall Act would raise constitutional difficulties).

Equally problematic is the potentially broad authority given to the Attorney General. The language of Section 257 is ambiguous as to what the Attorney General is actually authorized to review. The bill states that the Attorney General shall determine if "such claim is payable under this section . . ." Sec. 257(i)(3). This leaves open the possibility that the Attorney General will be able to review not only whether a claim is payable as within the aggregate annual cap established by Section 257(j), but more broadly, whether a claim is payable because the underlying judgment is not in accordance with "this section," *i.e.*, Section 257. In other words, it is possible that the Attorney

General could claim the authority to review the validity of judgments issued against tobacco manufacturers under Section 257. In that case, the Attorney General would, in effect, be acting as the Supreme Court of the United States, sitting in review of judgments rendered and presumably affirmed on appeal by the state's appellate court. Indeed, it is possible that the Attorney General could refuse to certify a judgment that was actually affirmed by the United States Supreme Court, leaving the executive branch in the clearly unconstitutional position of passing judgment upon the final judgments of the Supreme Court. Obviously grave federalism and separation of powers problems are implicated by this procedure.

Section 260: Payment of Judgments and Settlements

S. 1530 imposes an additional significant hurdle to plaintiffs attempting to collect upon state court judgments. Section 260 of the bill enables a tobacco manufacturer to commence an action in federal district court to enjoin "any State court proceeding to enforce or execute any judgment or settlement that is unenforceable under this chapter." Such an action is again one that will be "deemed" to be an action arising under the laws of the United States. Moreover, this provision specifically precludes reliance upon 28 U.S.C. "sections 1257, 1738 and 2283 . . . or any doctrine of abstention or principle of *res judicata* or collateral estoppel . . ."

This is a most remarkable provision. It would appear to allow any tobacco manufacturer who has lost a claim in state court and against whom a judgment has been issued, to go to federal district court and seek to enjoin the enforcement of the state court judgment and essentially relitigate defenses lost before the state court. By specifically discarding abstention doctrines as well as Sections 1257 (Supreme Court review); 1738 (full faith and credit), and 2283 (the anti-injunction act), the Section appears to have abandoned most critical legal doctrines that would stand in the way of the procedure contemplated by the section. And, since the defendant would be raising a federal issue, Article III jurisdiction would appear to exist.

Still, the question arises as to why so many doctrines, so long grounded in our judicial history, are so lightly discarded by S. 1530. These myriad doctrines and statutes reflect the fundamental principle that federal courts should respect the judgments of the states and that litigants should not normally get "two bites at the apple." Generally, our system assumes that state courts are fully capable of litigating federal claims, and that if errors arise, they may be corrected by the Supreme Court under Section 1257. By discarding Section 1257, full faith and credit, and the various bar and abstention doctrines, Section 260 radically challenges these traditional understandings. Moreover, Section 260 does so without insisting upon any showing of the inadequacy of state procedures.

In contrast, when an individual whose constitutional rights have been violated asks a federal court to enjoin or disregard a state court proceeding, that individual must show either that there was "no adequate remedy" provided by the state courts, *see Gerstein v. Pugh,* 420 U.S. 103 (1975), or that the state court denied the individual a "full and fair" trial, *e.g., Allen v. McCurry,* 449 U.S. 90 (1980). This is so even though the constitutional claims are made, in essence, against the state, and the federal claims are being brought pursuant to 42 U.S.C. § 1983, a statute which the Supreme Court has noted was enacted precisely because of the Reconstruction Congress' distrust of the willingness or ability of state courts to enforce certain constitutional rights. *Monroe v. Pape,* 365 U.S. 167 (1961). In contrast, S. 1530 appears to allow any tobacco manufacturer with any colorable argument that a state court erred to enjoin a state court proceeding without making any showing of procedural inadequacy on the part of the state, even though there is absolutely no reason to believe that state courts are a priori incapable of fully and fairly adjudicating claims between individuals and tobacco manufacturers. Why tobacco manufacturers should have this right denied to individuals with constitutional claims, and why the normal assumptions of state court legitimacy should be tossed aside for tobacco manufacturers, are questions that warrant serious discussion.

Section 702: Dispute Resolution Panel

Section 702(d) of S. 1530 follows Appendix VIII of the proposal in calling for the creation of a panel of three federal Article III judges to hear and decide all disputes over claims of privilege or trade secrets with respect to any documents required to be deposited into the National Tobacco Document Depository created by the section. In contrast to the proposal, however, Section 702 does not mandate that the jurisdiction of the panel is "exclusive." However, as in the proposal, the panel's judgment would be "final and binding upon all Federal and State courts." Under Section 702 the panel must issue its decisions based upon ABA/ALI Model Rules; "principles of Federal law with respect to attorney-client or work product privilege;" and the Uniform Trade Secrets Act.

For reasons described in the *Working Paper #3*, the constitutionality of this provision is questionable. First, as was true with respect to the proposal, it remains unclear whether Section 702 envisions that the panel will actually operate as an Article III court. If that is the case, then the standard justiciability and subject matter requirements pertaining to Article III jurisdiction must apply. But Section 702 remains very vague, and does not necessarily contemplate that the panel will only hear controversies within the scope of Article III. If the panel is intended to operate as something other than an Article III court, the basis for its issuing "final" decisions that are binding upon state and federal courts remains mysterious.

More importantly, Section 702, like the civil liability provisions discussed above, threaten to disrupt on-going state procedures. Here, the procedure seems to contemplate that an on-going state procedure may be halted or suspended while a manufacturer goes to the federal panel to obtain an evidentiary ruling about a privilege claim made in a state tort action. Furthermore, as noted above, this violates the traditional assumption that state courts are as competent as federal courts to resolve claims. It also places a federal panel in the unseemly position of reviewing, again in an interlocutory manner, a state court proceeding. Moreover, as with the civil liability provisions, the panel could disrupt the state court proceeding without the manufacturer having to make any showing to suggest that the state court would be incapable of fairly resolving the privilege issue. All of this would add enormous costs and delays to state trials for reasons which have not been articulated.

Conclusion

In attempting to implement the proposal reached last summer, S. 1530 appears to attempt to craft a compromise whereby individual state law claims pertaining to tobacco are maintained, but severely curtailed. In putting the proposal into legislative language, S. 1530 potentially corrects some of the proposal's constitutional infirmities. However, by expanding the scope of federal removal, by giving the Attorney General the authority to certify state judgments, and by enabling the federal courts to effectively engage in interlocutory review of state court proceedings, S. 1530 potentially goes even further than did the proposal in violating basic principles of federalism. As drafted, S. 1530 would enable federal courts to play a new and unprecedented role in monitoring, reviewing, and enjoining, ongoing state common law cases. The result would be a dramatic, unprecedented, and deeply troubling shift of power from the state courts to the federal courts.