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Tobacco-Settlement: Outside Analyses

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Tobacco - outside analysts

Comments of Robert Weissman
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World Conference on Tobacco or Health
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The growing tobacco epidemic which is the subject of this conference is spread by identifiable agents: the multinational tobacco companies.

Two of the three leading global tobacco companies -- Philip Morris and R.J. Reynolds -- are based in the United States. Two thirds of their sales, and about half of their profits, come from overseas sales.

But the U.S. deal with the tobacco companies to settle existing and future lawsuits says nothing about the global operations of Philip Morris and RJR. It does nothing to restrict their overseas activities.

The deal is completely compatible with the companies' global strategy and ambitions: to maintain constant or slowly declining sales at home, while expanding massively abroad. The deal would sacrifice many of the most powerful tools to discipline the tobacco multinationals -- most importantly, litigation in U.S. courts -- without doing anything to curtail the tobacco epidemic in the companies' target regions: the Third World and Eastern Europe and the former Soviet Union.

Compounding the problem, in a series of ways the deal may actually intensify the global epidemic.

1. The deal will enable and perhaps encourage the tobacco companies to intensify their predatory behavior abroad.

The deal requires the tobacco companies to pay $368 billion over 25 years. In exchange, it grants the industry a comprehensive U.S. peace -- an end to the lawsuits and myriad hassles it now faces in the United States.

In order to pay off the $368 billion -- a sum small in comparison to the harm inflicted by the injury and what would be needed to genuinely punish the industry, but a substantial sum nonetheless -- the companies are likely to intensify their aggressive marketing, advertising, corporate acquisition and related strategies abroad. As Greg Connolly of the Massachusetts Tobacco Control Program suggests, Filipino kids may end up paying the U.S. state of Mississippi's Medicaid bills.

Whether or not international sales end up subsidizing the company's payment obligations under the deal, there is little doubt that peace at home will enable the companies to intensify their overseas market invasion. The lawsuits and growing public controversies about tobacco company behavior are a drain on company executives' time and energy, and on the resources of the companies; with that diversion eliminated if the deal is approved, expect to see them adopt a laser-like focus on overseas expansion, new corporate resources plowed into international divisions and unbounded tobacco company aggression in Third World and Eastern Europe and the former Soviet Union.

There is no question that U.S. tobacco corporate expansion means not only enlarged market share for the U.S. companies but higher smoking rates. After the Reagan/Bush threat of trade sanctions forced South Korea to open up its cigarette market to U.S. companies in 1988, smoking rates among male Korean teenagers jumped from 18.4 percent to 29.8 percent in a single year, according to the U.S. Government Accounting Office. The rate among female teens more than quintupled, from 1.6 percent to 8.7 percent. CNN reports that since foreign cigarettes entered Russia in large numbers a decade ago, smoking rates have risen from 50 to 65 percent among men, and tripled among women, skyrocketing from 10 to 30 percent.

2. The deal will effectively close off foreign tobacco victims' access to U.S. courts.

A. The deal will absolutely or effectively preclude lawsuits by non-U.S. victims in U.S. courts

The deal states that it settles *all* medical cost reimbursement and aggregated suits by governmental entities against the tobacco companies. ("Present Attorney General actions (or similar actions brought by or on behalf of any governmental entity) parens patriae and class actions are legislatively settled. No future prosecution of such actions." (Title VIII, A., 1.) On its face, this provision would block other governments from bringing suit, in U.S. courts, on the same theories as the U.S. state cases have proceeded.

Similarly, the deal's limitations on private suits appear on their face to apply to lawsuits filed in U.S. courts by non-U.S. citizens. Those provisions -- which apply equally to past and future conduct -- preclude victims from joining together through class actions or other means to sue the industry collectively. Given the economics of suing the tobacco industry, which fights each case tooth and nail, the preclusion of aggregated suits grants the industry effective immunity.

But note: while U.S. victims and the U.S. public are presumably receiving benefits in exchange for this grant of effective immunity, overseas victims and non-U.S. populations are receiving nothing.

It is true that, even absent passage of the deal, any private suit in U.S. courts by non-U.S. victims would have to overcome difficult procedural obstacles. But it is not impossible that these suits could succeed in U.S. courts, especially in the future, as the courts revise their views on the propriety of suits filed in the United States against U.S. corporations for harms those corporations perpetrate abroad.

B. The deal will interfere with foreign governments and foreign victims' efforts to collect judgments in U.S. courts.

Even if foreign governments or victims choose to sue in their home courts, the deal will still restrict their rights. In many countries, the U.S. company subsidiary may not have sufficient resources to pay the total costs of the award to the government or victims. This will especially be a problem where the subsidiary is an importer and promoter, but not a manufacturer.

If the foreign government or victims then seek to collect their money from the parent company in the United States, they are likely to run up against the liability caps in the U.S. deal. Those caps limit the overall amount the companies can be forced to pay to $5 billion annually. And they specify that individual judgments are limited to $1 million annually, unless every other judgment can first be satisfied under the overall cap.

There is nothing in the deal which suggests foreign attempts to collect judgment from the U.S. tobacco companies should be considered outside the framework of the deal.

3. The deal appears to preclude the U.S. Food and Drug Administration (FDA) from equally regulating products made for domestic consumption and for export.

The warning labels and marketing restrictions under the new deal apply only to "all tobacco products sold in the U.S. (including all its territories and possessions, as well as duty-free shops within U.S. borders)." (Title I).

Even more disturbingly, the deal defines the scope of FDA as "all product sold in U.S. commerce," specifying that it covers imports but not mentioning exports. (Title V. A.) Leading U.S. regulatory law authorities believe this provision would preclude the FDA from regulating cigarettes manufactured in the United States for export.

That would enshrine into law a double standard. Cigarettes manufactured in U.S. factories for domestic consumption would be subject to warning requirements included in the deal or tougher warning, labeling, ingredient disclosure or ingredient regulations potentially later required by the FDA. Cigarettes made in the same factories, but for export, would not be subject to these rules.

4. A bankruptcy loophole in the deal could give the tobacco companies an out to ravage the Third World and Eastern Europe and the former Soviet Union.

The deal specifies that, in the event of bankruptcy, the U.S. companies must continue to meet their payment obligations under the deal. However, it states that the "obligation for annual payments responsibility only of entities selling into domestic market" (sic). (Title VI, B.6.) In other words, in the event of bankruptcy, the U.S. company payment obligations continue, but not for the subsidiaries selling overseas.

This means that the companies' overseas earnings would go directly into shareholder pockets, without being siphoned off to the settlement payment pot.

It is easy to imagine disturbing scenarios in which the companies might exploit this provision, especially if U.S. consumption rates decline significantly in coming years.

5. The deal would effectively end the disclosure in the United States of damning internal company documents.

The proposed terms of the deal would enable the tobacco industry to continue to conceal its most important documents for years, and perhaps permanently.

The deal permits the tobacco companies to withhold from a new central depository of industry documents all of those for which they claim attorney-client, trade-secret or other privileges and protections. The industry would conduct a new review -- with no deadlines -- of all the documents for which it claims privilege or trade secrecy. After the review is concluded, public or private parties could challenge particular continuing claims of privilege or trade secrecy, but the terms of the deal mitigate against successful challenges. Those who do contest industry claims of secrecy may not be qualified or highly motivated to do so -- and could even be industry allies -- and the challenges are likely to be greeted with hostility by the panel of judges who would decide the cases.

Those tobacco control advocates outside of the United States who find industry disclosures in the United States -- such as the revelation that BAT considered making root-beer-flavored cigarettes -- helpful would be out of luck if the deal is enacted. The deal would mean those types of disclosures will come to a screeching halt.

6. The deal will end the U.S. political momentum against the industry and the U.S. media focus on tobacco.

For tobacco control movements that find their governments become interested in tobacco control when it is a hot topic in the United States, or find their national media tends to focus on tobacco when the U.S. media does, this "decompression" effect should be of concern.

Conclusion: A Plea to Non-U.S. Tobacco Control Advocates

Please do not feel inhibited to speak out against the proposed deal because it is a "U.S." issue.

The so-called "global settlement" is really a U.S. settlement -- but it has global implications.

The proponents of the deal, in my view, have not given sufficient attention to international tobacco control issues. They have not appropriately consulted with their international allies. They need to hear from you -- at this roundtable discussion and at this conference, and in the weeks ahead; in personal conversations and communications; and through a resolution adopted by this Conference clearly stating that the proposed deal is unacceptable.

Tobacco-outside analysis
SRT

STATEMENT OF INTERNATIONAL TOBACCO CONTROL ADVOCATES ON U.S. TOBACCO LITIGATION SETTLEMENT DISCUSSIONS

It is ironic that the U.S. tobacco litigation settlement discussions have been labeled talks aimed at achieving "a global settlement," since the talks have reportedly excluded consideration of the public health consequences of U.S. tobacco exports and the U.S. tobacco companies' overseas operations. It is unacceptable to discuss a comprehensive settlement of the U.S. tobacco litigation which does not include measures to control the use of U.S. tobacco products outside of the United States.

Only four percent of the world's smokers are in the United States. As horrible and monumental as the death and disease caused in the United States by tobacco is, the toll outside of the United States is much greater. Approximately 85 percent of the annual 3 million tobacco-related deaths occur outside of the United States. And while smoking and tobacco use rates are relatively flat or declining in the United States, they are rising elsewhere, especially in the developing countries. By the 2020s, the World Health Organization predicts 10 million people will die annually from tobacco related disease, 70 percent in the developing world.

Already, the major U.S. tobacco firms are selling more cigarettes abroad than domestically. Philip Morris and R.J. Reynolds sell more than two thirds of their cigarettes overseas, and the proportion is growing.

The U.S. tobacco companies are looking to markets in the Third World and Eastern Europe for future growth. And in many countries they are using slick and deceptive advertising and marketing techniques that target children, especially girls, in ways that would never be tolerated in the United States.

A settlement of the U.S. tobacco lawsuits that does not incorporate international tobacco control measures will fail to address the major tobacco-related public health problems. Even worse, a U.S. tobacco settlement in the absence of global controls may actually exacerbate public health threats in the developing world. If sales fall in the United States, or the U.S. companies are forced to pay a substantial settlement award, the tobacco multinationals can be expected to intensify their invasion of the Third World and Eastern Europe, pursuing marketing and corporate acquisition strategies with even greater determination. The drying up of information potentially associated with a settlement, and the inevitable loss of political momentum which will accompany a settlement, will also damage tobacco control efforts outside of the United States.

To avoid doing public health harm, a settlement must set a worldwide floor on U.S. tobacco company practices, and the practices of their subsidiaries and those firms over which they exercise de facto control, including trademark

licensees, without limiting the ability of countries to require companies to exceed the global minimum standard. Specifically, a settlement should be structured to:

1. Apply regulatory controls adopted as part of a settlement to all cigarettes manufactured in the United States, including those destined for export.

2. Require the tobacco companies to agree to a code of conduct embodying the regulatory provisions contained in a U.S. settlement in areas such as marketing to children, advertising and marketing, labeling and performance requirements for reduction of new children smokers. The industry must immediately agree to end practices such as cigarette giveaways, television advertising, sports, music and other similar sponsorships and clothing giveaways. This code should be developed in consultation with the World Health Organization, the International Union Against Cancer and other international tobacco control advocates.

3. Require the tobacco companies not to oppose efforts in other countries to adopt regulatory measures (for example, workplace restrictions on smoking and ingredient regulation) which are in line with World Health Organization recommendations.

4. Assure that any immunities or limits on liability granted to the tobacco companies not apply to the companies' exports or activities or investments abroad. There should be no immunities or limits on liability or annual caps covering potential litigation in either U.S. or non-U.S. courts relating to the tobacco companies' exports or activities and investments abroad. There should be no immunity or limits on liability applied to enforcement in U.S. courts of foreign judgments against the tobacco companies.

5. Ensure full public disclosure of the tobacco company documents now obtained by tobacco litigants and those sought by litigants but currently held by the tobacco companies under claim of attorney-client privilege.

6. Require full public disclosure by the tobacco companies in every country of all political donations and political lobbying efforts.

7. Entitle non-American victims to the same levels of compensation in U.S. courts as American victims, and ensure they maintain comparable legal remedies.

8. Require the U.S. tobacco companies to offer to compensate foreign government health agencies, proportional to their market share (taking into account smuggled cigarettes) and reflecting the formula used to determine their payment to the states for Medicaid reimbursement.

9. Require the tobacco companies to contribute $10 billion annually to the World Health Organization or other agreed upon international agencies for tobacco-control programs. This contribution would not preclude non-American demands for compensation for injuries caused by tobacco.

10. Contain an explicit stipulation by the tobacco companies that they will not claim in any context that settlement terms concerning their overseas sales or operations preclude other governments in any way from adopting laws and regulations more restrictive than those adopted in the United States.

11. Contain an explicit stipulation by the tobacco companies that they will not seek assistance from the U.S. Trade Representative, the U.S. Department of Commerce, U.S. embassies or other U.S. government agencies to resist or repeal other countries' tobacco control regulations and laws.

12. Penalize companies shown to participate in or support international tobacco smuggling.

13. Ensure that international tobacco control advocates be represented on a independent panel to determine the public health consequences of any final settlement.

Signers:

Australia
Professor Simon Chapman, University of Sydney and Action on Smoking and Health
Stephen Woodward, Tobacco Control Consultant

Cameroon
Dr. Wali Muna, Tobacco Control Commission for Africa

Canada
Gar Mahood, Non-Smokers' Rights Association

France
Dr. Albert Hirsch, St. Louis Hospital, France

Hong Kong
Dr. Judith Mackay, Asian Consultancy on Tobacco Control
Dr. A.J. Hedley, Department of Community Medicine, University of Hong Kong

India
Dr. Prakash C. Gupta, Tata Institute of Fundamental Research

Tobacco - outside analyses
SJT

In a proposed tobacco deal, negotiated between state attorneys general, class action attorneys and the tobacco industry and announced in June, tobacco companies would pay $368.5 billion over the next 25 years to set up smoking cesssation and prevention programs, to compensate states for the money they have spent, to set up a pool of money from which individuals could recover and to submit to strict federal control over the way they market cigarettes. In exchange, the industry would walk away with significant protections in future lawsuits, including a safeguard from having to pay any punitive damages for past acts. For the proposed settlement to become law, it will have to be approved by Congress.

Some of the legal implications of the deal are explored in the following remarks of Public Citizen Litigation Group attorney Alan Morrison delivered at a conference at Harvard Law School on July 31.

REMARKS OF ALAN B. MORRISON, PUBLIC CITIZEN LITIGATION GROUP AT HARVARD LAW SCHOOL CONFERENCE "SHOULD TORT LAW BE ON THE TABLE?" JULY 31, 1997 See footnote 1

The proposed tobacco deal is composed of both regulatory and tort components. By regulation, I mean not just the provisions relating to the jurisdiction of the FDA, but all measures relating to the prevention of tobacco use and education efforts surrounding that, including funding proposals. It is important to examine both halves before deciding whether, on balance, the overall proposed resolution is acceptable. But before doing that, it is necessary to examine each half and each part of each half, and today I want to focus only on the tort components.

Our conference convener, Professor Jon Hanson, gave me a broad license to define torts, and so I will use it to mean any action in which a court will order relief, principally the transfer of money from one party to another. The proposed resolution includes three categories of tort actions which I will deal with in turn: the actions by state attorneys general, the addiction class actions, and individual claims.

I begin with the state attorney generals' claims for which, for purposes of this discussion, the theory of recovery is irrelevant except that it is entirely based on state law. Although there are some other aspects of relief sought in some of these complaints, the cases principally involve the recovery of money damages paid out by the state as sovereign to take care of its citizens.

To begin with, there is no question that any state could, just as Mississippi has done, settle its own claims on whatever terms it deems acceptable. The question presented by this proposed resolution is whether Congress can mandate that states settle cases on terms and conditions established by Congress. At the outset, one must ask what is the basis of congressional authority in this area, and undoubtedly the proponents will point to the commerce clause. The issue of authority of Congress in this area has significance throughout this discussion, but with respect to theseclaims, it must be noted that these are after the fact claims for which commerce clause jurisdiction seems rather problematic. Moreover, the question is not simply whether Congress can mandate a settlement, but also can it decide how a fixed pot of money is to be allocated. Thus, the cases are not all identical, some have better facts of law than others, some have better counsel, some took better discovery, and some won or lost various motions along the way. In that sense, the allocation of money, which has not been spelled out in the agreement, creates problems rather like the problem of class certification in the recently decided *Amchem* case.

There is no dispute that if the cases had already been resolved, Congress could not alter a final judgment. Most of the cases will not have been resolved by the time Congress acts, but the question must remain, does Congress have the constitutional authority to eliminate these remedies? It is probable that Congress

could do so for private causes of action, at least so long as it provides an alternative remedy. But states might be different, as the Supreme Court has recently made clear in a series of cases involving the Tenth Amendment, and thus the question is whether as a matter of constitutional law, the federal government has a legitimate interest in eliminating the rights of states to decide this question for themselves.

Aside from constitutional questions, there are strong policy reasons not to compel the states to settle if they do not wish to do so. After all, what business is it of the federal government to say that a state must settle cases and not litigate them, especially since tobacco lawsuits in particular are not just about money. Tobacco litigation has been and will continue to be performing a vital public function regarding disclosure of the activities of the industry and will continue to educate the public about what the tobacco industry has done and has not done. Moreover, in litigation, unlike other public fora, witnesses are pinned down, they are cross-examined, and parties, including the industry, cannot decline to answer hard questions.

I do not advocate forced litigation any more than I advocate forced settlement. The matter ought to left up to each state to decide for itself. If the offer is fair, most states will take it, just the way most individuals will not opt out of class actions if the settlement proposals are reasonable. But more is at stake than just freedom of choice: this is the best opportunity for the truth to come out because the states are adequately funded, they have done good discovery, and at least some of them are ready, willing, and able to take these cases to trial. Finally, for at least victims in their particular states, a court ruling in favor of the state might well have collateral estoppel effect in individual and other suits against the industry, thereby benefiting the residentsof at least that state enormously.

Accordingly, for all these reasons, the states should not be forced to settle their cases by congressional fiat.

Next, there are the private *Castano*-like class actions. Their theory of liability is that the industry knowingly addicted people, and the remedies they seek are principally smoking cessation program (paid for by the industry) other similar types of relief, as well as punitive damages and attorneys' fees. The question again is, can Congress mandatorily settle all of these cases?

Assume for the moment that Congress enacts a new law that provides for smoking cessation programs and the other kinds of non- monetary relief sought in the *Castano* complaint. Does Congress in fact have to act in order to "settle" these cases? In all likelihood, except for issues of fees and punitive damages, the cases would be moot and hence could be dismissed by the plaintiffs (or I should say plaintiffs' counsel) if they chose. Of course, the plaintiffs would have to waive punitive damages, but they would not necessarily have to waive attorneys' fees. But none of that should be a problem, especially if the case has not yet been certified as a class action. Thus, these cases may not have to be taken care of in the legislation, particularly if all theplaintiffs' lawyers are willing to go along with them. And for cases that have not yet been filed, there is a serious question as to whether there is any claim left, but that is a question that would have to be decided as a matter of state law but is unlikely to arise as a practical matter. Accordingly, for these reasons and because there is no Tenth Amendment issue involved, the private class actions based on addiction probably will be eliminated as a practical matter, assuming that the remainder of the relief provided for in the proposed resolution is enacted by Congress.

That leaves the private individual actions of which there are approximately five or six hundred, with a few attorneys having a very large percentage of these cases. There would, of course, be more, if plaintiffs start to win and/or more damaging evidence comes forward, but how many more, even without this deal, is a matter of speculation.

What then does the deal do to these cases? According to the negotiators, there is no immunity, and the

victims still get their day in court. The reality is that it will be much more difficult to win these cases under the proposed resolution, fewer lawyers will be willing to bring them, and there will be even fewer victories. The reason is a series of impediments that individually and collectively tilt the scales very much in favor of theindustry.

I begin with the proposition that all tobacco cases are difficult to win. There are well-funded defendants who have skilled counsel before skeptical juries. The defense of assumption of the risk is always present, and failure to warn claims are preempted. Defense counsel routinely tear up the lives of individual plaintiffs (the decedent), and for that and many other reasons, many individual victims are reluctant to sue. Lawyers are aware of this, and particularly of the fact that these cases have never settled in the past, and therefore they are reluctant to bring them. It is almost certain that some of these tobacco cases will be lost, and that every case involves a major investment of time and money for the plaintiffs' counsel.

The recognition of these factors could lead one to ask, "why anyone should even care about all of these restrictions if the cases are so difficult to bring in any event?" But that was not the conclusion reached by the most knowledgeable participants: the industry which obviously knows something that no one else knows. It asked for and demanded significant protection, and the proposed resolution includes many restrictions, although I have time only to discuss the most significant.

First, and most importantly, all punitive damages for conduct prior to Congress' enacting this legislation would be eliminated. The lack of availability of punitive damages will create a substantial disincentive for lawyers to bring the cases. As noted above, these cases are expensive and difficult, and the possible recovery would be modest, particularly where there are older plaintiffs who might well die of other causes within a few years in any event. But perhaps more significant than that is that, by the elimination of punitive damages, the most damaging evidence is kept from the jury. Moreover, the focus of the case is away from the defendant, which is where the plaintiff would like to have it, and on to the plaintiff and his or her personal responsibility for the injuries, which is where the industry would like the focus to be.

The elimination of punitive damages is also a terrible idea as a matter of tort policy. In essence, the federal government is saying that, although most state laws allow punitive damages in one form or another, it is the federal government's judgment that those are unwise provisions as applied to tobacco products. This assertion is made despite the fact that the products are still being sold and will still continue to kill people. The industry has never admitted wrongdoing, it hasn't disclosed the most damaging documents, it is continuing its cover-up, and it is still fighting nicotine regulation.

At this point, Congress does not even know the extent of what hasbeen done and in that sense eliminating punitive damages here is like giving former President Nixon a pardon before all the Watergate tapes had been heard. More importantly, if the tobacco industry is entitled to eliminate all punitive damages, what industry is worse and should have to pay them if tobacco doesn't? Who has lied more, covered up more, killed more than tobacco, and who is still going to continue to do most of this in the future? The negotiators say that in fact $60 billion in punitive damages is being paid as part of the agreement. Of course, if you read through the payment provisions, you will see not a word in it about punitive damages payment, but the point is really not how it is labeled, but the fact that money is money whatever it is called. If, in fact, there is $60 billion allegedly for punitive damages included in the agreement, the tobacco victims, as well as the general public, would be far better off if the $60 billion was taken out of the settlement and the punitive damages were allowed to remain in tobacco litigation. Undoubtedly, others will contend that the industry will not agree to back off on the punitive damages and will threaten to pull out of the rest of the deal. But punitive damages are too important an issue to surrender, and Congress should not agree to that form of blackmail under any circumstances.

Moreover, there are real questions about the validity of the elimination of punitive damages. As I will explain in a moment, for individuals, there are no offsetting benefits at all. Indeed,the situation is actually worse, but for now, assume that the bill did no more than eliminate punitive damages.

Again, the question is what is the federal authority for eliminating punitive damages in cases in which the conduct has already arisen? It might be argued that the benefit of eliminating punitive damages is helping others and that the commerce clause is the basis for that jurisdiction. But that assistance is entirely prospective, and the elimination of the cause of action for punitive damages might well be seen as a taking of a private claim. Undoubtedly, opponents will argue that no person has a vested right to punitive damages, but that is not precisely the question, since it is not the entity that created the punitive damages (the states) but the federal government that is eliminating them.

While I acknowledge that there is no definitive answer, I suggest the following hypothetical for your consideration. Suppose that instead of eliminating punitive damages, Congress eliminated all state fines that could be levied for wrongful conduct by the tobacco industry prior to the date of enactment of the statute. The only difference between that case and this one would be who gets the money, and under some state laws even that difference exists only in part since some of the punitive damages go to the state. Congress has no business eliminating state law claims for punitive damages, and if it attempts to do so, there may well be constitutional obstacles to achieving that goal.

Second, there are the serious impediments that will be placed in the path of plaintiffs who seek document discovery in the future. At the time the settlement was announced, there was great fanfare about all of the documents that would become public, but it turns out there is virtually nothing of benefit to the public. The one thing that is clear is that not a single new industry document will be disclosed until Congress has approved the proposed settlement, long after it is necessary to know what is in the documents in order to make sound public policy.

Even then, the document depository will contain only the documents that have been turned over to the plaintiffs in the various lawsuits for which there is no claim or privilege. The industry has insisted upon continuing to assert its highly expansive attorney client, work-product and trade secret privileges. It is almost certain to be the case that the most significant documents are those which have not yet been turned over to the Attorneys General but are, like the 250,000 documents that are being subject to review by the Special Master in the Minnesota case, still under a claim of privilege for which the industry will continue to fight.

Not only will the documents not be available, but private litigants will no longer be able to do battle in their own court using their own law and their own judicial system. Instead, every fight over every document will now be before a three-judge federalCourt of Privilege which will have exclusive jurisdiction over the matters. Individuals who want documents will have no control over the timing of when this Court gets to them even if they are scheduled to go to trial and the documents directly relate to an issue in their case. Leaving aside the rather interesting question of whether there is any Article III jurisdiction over a case or controversy under these circumstances, it appears to be that this new Court will decide privilege claims once and for all, unless some future plaintiff can persuade the Court to reconsider its ruling, a highly unlikely scenario. Under current practice, if one plaintiff fails to persuade a judge that the document is not privileged, others can try in the future, but that will no longer be true. This is particularly important since the availability of documents may well depend upon events taking place elsewhere, including evidence that may enable the requesting party to overcome a claim of attorney-client privilege through the use of the crime- fraud exception.

Moreover, there are serious questions as to who will be the plaintiff seeking the documents, since there

appears to be no requirement other than whoever is first in line gets the job. There will be no determination of adequacy of representation, and yet the decision will probably foreclose any future claimant from obtaining the documents, raising serious due process questions.
Furthermore, it is worth asking what kind of a judge will want this assignment or be given it? To say that these determinations areboring vastly understates the problem. Moreover, the questions presented will not help in the resolution of any case before these judges, and they may well take the path of least resistance of simply saying it appears to be privileged and that's the end of it. Once again there is a substantial question of congressional power to, in essence, remove a discovery phase of a case pending in state court and transfer that and that alone into the federal court since that is what is being done here. In short, quite apart from the problem of settling first and then disclosing, the resolution of the document questions under the proposed settlement will make it much more difficult for individual plaintiffs to litigate their cases, especially in the short run, and there is no beneficial offset, such as assuring that more information will become available later.

Third, there are substantial procedural barriers that have been erected that will prevent the efficient litigation of claims. The proposed deal would eliminate all class actions and all efforts at consolidation. For class actions, one could argue that these cases will never be certified, and that is almost certainly the case in terms of nationwide classes, but it is not at all clear that would apply to every case in state court. Indeed, if the argument is that the cases will never be certified, why does the industry insist upon eliminating all class actions? The answer is that cases might well be certified for second-hand smoke, or for smokers, at least on some issues, with individual trials left onothers. The question is not whether those cases can be certified, but whether Congress has any business telling all the courts in the United States not to do so, just for tobacco cases.

At least as significant is the prohibition on consolidation. For example, if both the husband and wife smoke, they would have to have a separate trials. If insurance companies wish to bring claims for having paid out money for their insureds (unless the case was filed before June 9, 1997), each claim would have to be tried separately, as would the claims brought by the 2,000 health and welfare plans around the country. Under this proposed resolution, even common questions cannot be tried together. Furthermore, cases against non-settling defendants must be tried separately, which further complicates matters, particularly in cases where asbestos is also claimed to be a cause of the injury. Of course, a defendant could consent if it chose, but that is unlikely to occur since running up the cost and delaying matters are the principal reasons why defendants never favor efficiency. Finally, the lack of consolidation may make it more difficult to bring cases using epidemiological evidence which is an area in which the strength of plaintiffs' cases increases significantly.

These rules apply not simply to the federal courts, but to the state courts as well. Not only do these restrictions purport to apply in state courts, but if any plaintiff attempts to do anything in violation of them, or if a state court purports to authorizeanything in contravention of these restrictions, the defendant is entitled to remove the case to federal court. Leaving aside the question of what the basis for federal subject matter jurisdiction would be in such a case, the much more important point is that these restrictions are a substantial affront to the power of state courts to conduct cases before them involving state law on their own terms and conditions. There is, in my view, a very serious question as to what the legitimate basis of federal power is to tell state courts how they are to try cases.

Again, a hypothetical illustrates the kind of interference that is at stake here. Assume that the issue were not class actions or consolidations, but the right to trial by jury which Congress purported to eliminate in tobacco cases involving state law causes of action. Again, there is the question of what is the federal interest or federal basis for legislating in the area, aside from a highly attenuated commerce clause allegation. The impropriety of imposing these rules on state courts is clear if, instead of class action and

consolidation, Congress eliminated the right to trial by jury in state court for state law claims where the product at issue is tobacco. Aside from a highly attenuated federal commerce clause basis, it is hard to know by what authority the federal government could intervene in state court procedures in that way. More importantly, the Supreme Court has recently made clear that the Tenth Amendment retains substantial vitality and that the principles of federalism enunciated in it will be enforced by theCourt when the federal government overreaches, as it is doing in this instance.

These so-called procedural rules should be renamed and referred to as the "mandatory inefficiency clauses" or the "unjust federal intrusion provisions." They are bad as a matter of constitutional law, and they are bad as a matter of policy, especially when combined with all of the other deficiencies in the proposed resolution.

Fourth, should tort victims actually bring lawsuits and succeed, the industry has inserted a provision that will make them into involuntary federal bankers. Thus, if final judgments, after exhausting all appeals, amount to more than $5 billion total in a year, the industry stops paying money at that point and carries over future judgments to the next year, when it will pay the judgments, assuming the cap is not exceeded again, but without paying any interest to the victim. In addition, if any victim recovers more than $1 million in a year, there is a cap for that person unless all the remaining victims do not reach the $5 billion mark for that year. There are also complex inflation and volume adjustment factors, but the principle remains the same: the industry has decided that $5 billion is enough and it does not want to pay any more.

It is difficult again to know what federal interest is involvedhere. This is, after all, not a bankruptcy proceeding under Chapter 11, and there is no indication that $5 billion is all that the companies can afford and still pay their creditors. In fact, they will be able to continue to pay dividends to their stockholders throughout this time so long as they make the $5 billion total payment. That figure, save only for possible adjustments for inflation and volume adjustments, is constant, no matter how much it is exceeded in any given year or over a period of time because there are no changes to be made based on experience learned. In addition to tort victims, the American Bankers Association ought to be protesting against unfair competition, since they will be denied the opportunity to make the loans they otherwise would have made in the ordinary course of business since victims will be forced to lend more to the industry at 0% interest and no collateral.

Fifth, although tobacco companies can still be defendants, they have included provisions eliminating lawsuits against their lawyers, their advertising agencies, and their PR firms. What is the justification for that provision? It is surely not because none of these groups were involved in any way in the wrongdoing. Indeed, all three have been asserted to be part of the major cover- up and the misuse of various privileges, including the attorney/client privilege and the possible crime fraud exceptions to it.

The immunity for these other persons is not significant because they would provide large sources of funding to pay judgments: the industry has more than enough money to do that. Rather, by eliminating them as defendants, it reduces their incentive to decide that the time has come to come clear and to tell all they know to the plaintiffs and the government in order to avoid judgments against them which might wipe out their law firm or the other entities, in the same way that Liggett decided to make a fundamental change in its approach in 1996.

Finally, there is nothing on the other side of the ledger for the victims. No affirmative defense, such as assumption of the risk, is eliminated, and preemption continues for failure to warn claims. Victims must still prove whose product it was, and satisfy all the existing statutes of limitations. Nothing has been altered regarding proof of causation, and all of the other scientific and other disputes are still alive and well and ready to be used against all plaintiffs. Thus, the proposed resolution is truly a one-way street for

victims.

Looking at all three types of tort actions, the result is a very good one for the tobacco companies, but not very good for the victims. Viewed from the perspective of the twin goals of compensation and deterrence, the mandatory aspects of this deal fail both miserably. The attorney generals might get enough money for their own states, but that is up to each one of them. The dealdoes nothing about Medicare and other federal payments, doesn't take care of insurance companies and welfare plans, and leaves many others who have had to pay costs out in the cold. The class action plaintiffs might get reasonable smoking cessation programs, but the individual plaintiffs and victims of second-hand smoke surely will not get adequate compensation. And on the deterrence side, the message is clear: if you fight long enough and are willing to give up a little, you can prevent the worst from occurring and continue to sell your product, especially when you have most of your victims addicted and you are selling in an oligopolistic market.

Some people might conclude that, despite these very serious weaknesses, the remainder of the deal is so good that, on balance, Congress should accept the proposal as a whole. But if one is prepared to make that judgment, which I am not, at the very least the proponents would have to admit that there is nothing on the tort side for the victims, except for those who are willing to settle anyway. In short, the federal government has no basis in law or policy for cramming down this resolution on the millions of unwilling victims who will be forced to abide by it.

Footnote: 1 These remarks are a somewhat expanded version of those given by Mr. Morrison at the Harvard Law School Conference.

Tobacco - outside analysis
Sent

Public Citizen

Buyers Up • Congress Watch • Critical Mass • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

July 10, 1997

The Honorable William J. Clinton
The President
The White House
Washington, DC 20500

Dear Mr. President:

On behalf of Public Citizen, a national consumer organization with over 125,000 members nationwide, I am writing to express our appreciation for your decision to reject provisions in the recently proposed tobacco settlement that would restrict FDA authority. We share your concerns over this provision. Public Citizen has long been in the vanguard in advocating stricter controls on the regulation, sale and promotion of tobacco products generally, and we have fought hard to force the tobacco industry to cease its cynical efforts to hook children on their products.

However, having carefully reviewed the settlement document, we are extremely troubled by many other provisions as well. I recognize that both you and Congress will review the proposal thoroughly and that both Houses will hold hearings to explore the merits and the pitfalls of the proposal. But I want to take a moment to highlight the core problems with the proposal so that you may have the benefit of our analysis as you further consider the deal.

In reviewing the proposal, it is important to keep in mind certain key questions: Will it advance the public health? Will it preserve the FDA's ability to regulate both nicotine and harmful additives? Will it force the tobacco companies to make public the research, including research on health effects, safer products, and marketing to minors, that they have undertaken and concealed over the years? Will it leave current and future victims of tobacco--including those exposed to second-hand smoke--with meaningful redress in the courts? Unfortunately, in our view, the answer to each of these questions is "no." Let me point out the key deficiencies of the settlement.

FDA Jurisdiction: In announcing the settlement, the negotiators claimed that the settlement preserved the FDA's authority to regulate nicotine, and to regulate, if need be, other additives to cigarettes and smokeless tobacco products. That claim is wrong.

In the first place, the settlement divests the FDA of its current authority to regulate the nicotine in tobacco products as a drug, an authority upheld by the North Carolina court in the tobacco companies' litigation against the FDA.

Equally troubling, the settlement sets up two insuperable hurdles to the FDA exercising its authority to regulate the nicotine in tobacco products through its authority over medical devices: *First*, the agency must use "formal rulemaking." Unlike "notice and comment" rulemaking, which can be concluded within a year or so, formal rulemaking requires a full-scale evidentiary proceeding that can take many years to conclude. *Second*, in addition to the procedural obstacles, the settlement erects a substantive hurdle to FDA action by requiring the agency to prove that lowering nicotine levels will not create a black-market demand for tobacco products with higher nicotine yields. Proving that negative will be impossible for the agency since addicted cigarette smokers will very likely want access to products that better maintain their addiction.

Moreover, even if the FDA could actually overcome these hurdles -- and former FDA Commissioner David Kessler has stated publicly that the agency cannot -- the deal forbids the FDA from acting to eliminate nicotine from tobacco products for the first twelve years following the settlement -- it can only propose reductions in nicotine levels. Although the settlement theoretically permits the FDA to consider nicotine elimination after the year 2009, as a practical matter, even then it would not be able to do so because it still could not surmount either the formal rulemaking hurdle or prove that there will be no significant demand for high-nicotine products.

As to the additives in cigarettes, the companies would have *five years* to submit to the FDA a safety assessment for each additive. The FDA would then have only 90 days to review industry claims that the additives posed no risk. If the agency missed the 90 day deadline, the additive would be deemed approved. It is intolerable that the FDA should be given so short a time to review the massive submissions that the tobacco industry would file.

Ingredient Disclosure: For years, public health advocates have argued that the public--and especially users of tobacco products--have a right to know what additives the companies put in tobacco products. The agreement does nothing to rectify this problem; indeed, it ratifies the tobacco companies' position. The agreement provides that the industry will disclose ingredients to the FDA, but allow it to designate any ingredient as a confidential trade secret--a designation the FDA would have to accept.

Document Disclosure: Congress should not enact any broad-based legislation addressing tobacco issues before it has had an opportunity to review the industry documents regarding prior research and marketing. Such review is imperative in order to knowledgeably assess the merits of any proposal regarding tobacco issues. In the areas of liability, regulation, and advertising, *no* concessions should be made to the industry until it has disclosed *all* relevant information regarding its past practices.

The proposed deal does not require the industry to disclose a single document that it has not already released in litigation. To the contrary, the deal allows the industry to continue to press the same overblown privilege and confidentiality arguments that it has used to stonewall discovery in litigation. The agreement provides that industry lawyers will conduct a document-by-document review of the records withheld as privileged in litigation to reconsider whether they should be released. Although the agreement would not place any time deadline on the industry review, only after the review is completed would any independent assessment of the validity of privilege claims be allowed to take place.

For example, the tobacco industry will still be able to claim privilege for documents relating to the effect of nicotine and whether lower levels produce less addiction and less harm to users. Yet Congress is being asked to enact highly favorable protections for industry regarding nicotine, and FDA is burdened with special requirements for regulating it, all based on a wholly incomplete record, which was prepared entirely by the industry. Similar concerns arise for other additives in cigarettes and smokeless products and for the effects of secondhand smoke.

Further, the settlement creates an elaborate and almost certainly unworkable system for having a three-judge federal court review the documents one by one, in response to challenges raised by people who will have reviewed only an industry-generated index. As described in the agreement, the process would be heavily stacked in the industry's favor.

Payments: The multi-billion dollar payment proposed in the settlement is better for the industry than for tobacco users. First, the agreement specifies that all payments pursuant to the settlement would be tax-deductible. Given the 40 percent marginal tax rate paid by RJR (and presumably by the other tobacco companies), the tax deduction would mean that the American people would underwrite about $150 billion of the settlement. Second, nothing in the settlement forbids the industry from raising prices to offset the payments. Thus, consumers--not the industry--would pay for the settlement. Although higher prices may have the benefit of reducing teen smoking, no one should fool themselves

that the payments set forth in the agreement would harm the industry financially.

Civil Liability: The settlement agreement deals a body blow to our nation's system of civil justice. For one thing, it provides that "no punitive damages [may be imposed] in individual tort actions." The rationale for this provision is that some portion of the settlement money has been "designated" as punitive damages; but punitive damages are not tax deductible, whereas all the payments required under the settlement would be. Thus, contrary to the claims of the settlement's proponents, the agreement does not require the payment of any punitive damages, let alone any payment that serves the same deterrent and punitive function. In fact, the agreement insulates the industry from paying any penalty for its past wrongdoing. Yet if any industry ever deserved to be liable for punishment through punitive damages, surely it is the tobacco industry.

The settlement agreement also strips away the right of plaintiffs to band together to bring class action cases. Many cases, however, are not economically feasible as individual actions. The agreement would therefore eliminate an important tool for victims to seek redress in the courts and allow tobacco victims fewer rights than people injured by other consumer products.

The settlement also places strict caps on the amount of damages a tobacco company would have to pay in a given year and on the amount an individual could recover in one year. We oppose any cap or limitation on the actual damages any individual can recover within a year, or any tobacco company would have to pay. Bending the civil justice system to benefit a corporate wrongdoer is unjustified, and sets a dangerous precedent that every irresponsible corporation will want to follow. Setting a precedent here would be particularly unwise, in light of the sordid history of corporate abuse by the tobacco industry and the fact that neither the Congress nor the public has been fully informed as to the extent of the tobacco's industry's past wrongdoing.

Attorneys' Fees: The payment of fees to the numerous lawyers who represent the states and the plaintiffs in proposed class actions is not addressed in the agreement. We have heard that attorneys' fees are or will be subject to a separate agreement that will be kept confidential. That would be intolerable. The American people have a right to know just how much the lawyers are seeking in payment. And any settlement of fees for the class action lawyers should be subject to public judicial review, as required in any class action settlement. Public Citizen has used this authority to reduce fees in a number of cases. This settlement was negotiated on behalf of the American people, and the

lawyers who assumed this responsibility should not be permitted to cut a secret deal on the critical issue of attorneys' fees.

International Consequences: The tobacco industry talks about "global peace," yet the deal completely ignores its practices abroad. The Fifth Commandment does not say "thou shalt not kill Americans." There is no moral basis for anyone truly concerned about public health to close their eyes to American tobacco companies' promotion around the world of death through tobacco use while making some concessions to limit the carnage in this country.

The tobacco industry has made this agreement only in the U.S. in order to avoid the citizen-based judgments of our U.S. civil justice system. But the rest of the world will continue to pay the consequences.

* * *

This list of problems with the settlement is not intended to be exhaustive. The settlement document is nearly 70 pages long and quite complex. Although many parts of the agreement are not clear, it is clear that the deal is fraught with problems and dangers. We urge that you and your staff consider these points as you deliberate on the merits of the settlement.

We look forward to working with you as this proposal is considered in Congress.

Sincerely,

Joan Claybrook
President, Public Citizen

Tobacco - settlement - public health related outside analyses

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TOBACCO PROPOSAL--PRELIMINARY ANALYSIS

July 18, 1997

This memorandum is a preliminary analysis of the issues raised by the proposed tobacco "settlement." The focus here is on the legal issues, but we have attempted to include major policy concerns where appropriate. The first section concentrates on the civil liability and disclosure issues, while the following sections analyze the regulatory provisions and the payment obligations built into the proposal.

I.
CIVIL LIABILITY PROVISIONS

Although many of these provisions do not come up until Title VIII of the June 20 proposal, clearly the primary consideration for the tobacco industry is the protection they would receive from liability, both from present lawsuits and from possible future claims.

A. KEY ELEMENTS OF THE PROPOSAL.

1. Termination of existing lawsuits.

Many existing lawsuits would simply be terminated, or, for all practical purposes, dismissed with prejudice by act of Congress:

- All present attorney general actions, all similar government actions (e.g., lawsuits brought by San Francisco and New York City), and all parens patriae actions;

- All present private class action lawsuits, including the post-Castano nicotine addiction cases.

The states and the private plaintiff classes, the groups who were at the negotiating table, would receive favorable financial treatment in the proposed legislation. Not faring as well in the proposed legislation are two other groups of pending lawsuits, who were not represented:

•Any third-party claims brought as class actions, whether based on subrogation or not.

•All other present "addiction"/dependence claims, which presumably includes individual claims using addiction evidence to avoid assumption of risk defenses.

Those cases will be terminated, and the state statutes and common law which permits them to proceed would be preempted, but it is not clear if they will share substantially in the financial package.

2. Restrictions on remaining present lawsuits.

The only existing lawsuits that would be permitted to continue would be claims of individuals brought by person claiming injury or heirs, not based on "addiction" or dependence;[1] third-party party (and similar) claims not based on subrogation pending as of June 9, 1997, and third-party payor (and similar) claims based on subrogation[2], but only of individual claims, not aggregates. [That is, a health insurer who paid the medical bills for an individual could file a subrogation claim against a tobacco manufacturer for that person, but could not do so for two or more individuals at the same time.]

Even those few remaining lawsuits, however, will be subject to serious restrictions:

•No punitive damages, ever, under any circumstances, based on past conduct.

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[1] Presumably, this means that plaintiffs could not assert "addiction" or dependence in their pleadings and proof, nor could they allege facts or introduce evidence of "addiction" or dependence as a response to an industry argument that the individual plaintiff assumed the risk. In effect, this would be a new federal exclusionary rule, applied to any litigation involving tobacco and health.

[2] This is of course a critical distinction for the tobacco industry. In subrogation cases, a "third party payor," typically an insurer who has paid a claim to an insured, is "subrogated" to the claims that insured individual might have against others for his injury or illness. For example, if Joe gets lung cancer from smoking, and Blue Cross pays his medical bills, Blue Cross might be able to assert a subrogation claim against the tobacco manufacturer, but then must "stand in the shoes" of Joe, which means that the tobacco company can argue, for example, that Joe assumed the risk. Third-party payor claims not based on subrogation, however, but instead based on fraud, antitrust violations, or intentional tortious conduct, like BCBSM's current case, do not face those same hurdles in court, and therefore are a much greater threat to the industry.

•No class actions, joinder, aggregations, consolidations, extrapolations, or "other devices to resolve cases other than on the basis of individual trials," without defendants' consent.

That means the courts would be unable to use many of the devices besides class action settlements they have used to help resolve "mass tort" cases, e.g. nonbinding "mini-trials," using hypothetical verdicts to induce settlements; judicial identification of "representative" plaintiffs that go to trial first, and set settlement or resolution pattern; statistical or sampling adjudication, where claimants agree to accept "averages" based on series of sample trials; or "science-only" trials to establish liability and general causation, often with epidemiological evidence, to be followed by individual adjudications (currently in progress in the silicone breast implant litigation). All of those innovations would be barred. If state courts refused to comply, the proposal calls for automatic removal to federal court, a new expansion of the jurisdiction of the federal judiciary.

•All industry defenses are preserved, including cigarette labeling act preemption defenses. There are no industry concessions on liability, causation, assumption of risk, or any other issue. There is likewise no limit on the availability of new preemption defenses based on greater FDA regulation.

•Any evidence of the development of "reduced risk" tobacco product after the effective date is neither admissible nor discoverable, another new exclusionary rule. [Note: The new Restatement on Products Liability emphasizes evidence of an ability to reduce risk not taken as the basis of liability.]

•All claims against wholesalers, distributors, retailers, advertisers, attorneys, or anyone other than tobacco manufacturing companies, their successors and assigns, future fraudulent transferees, or "entities for suit designated to survive defunct manufacturer[s]," such as liquidating trusts, are dismissed and barred. The agreement specifically refers to "tobacco manufacturing companies," so arguably the non-tobacco assets of these companies are shielded from liability. All state law, whether statutory or common-law, creating those causes of action would be preempted by the new federal statute.

•All claims against insurers (not brought by tobacco manufacturers) are barred. State law causes of action would be preempted.

•All individual claims and all pre-June 9 third-party payor claims not based on subrogation (e.g. Blue Cross-Blue Shield of Minnesota's claim, some of the Taft-Hartley health and welfare fund claims) are subject to a $1 million annual payment cap, "unless

every other judgment/settlement can be satisfied within the annual aggregate cap." For example, if BCBSM were to get a $100 million judgment against the manufacturers, it might wait 100 years for payment, or possibly longer, because of the "global" liability cap.

•The industry would be covered by a global liability cap ranging from $2 billion in year one to $5 billion in years nine and later, adjusted by the Consumer Price Index (CPI) or 3% annually, whichever is greater, and adjusted downward or upward based on domestic sales volume (downward adjustment to be reduced by 25% of any increase in overall industry profits based on domestic tobacco sales). Individuals or third-party payors who secure judgments will have to wait in line for payment, if the cap amounts are reached in any particular year.

•All successful claims against any of five negotiating companies would be paid pursuant to a "joint sharing agreement for civil liability," to limit competitive impact. Any manufacturer with a judgment or settlement to pay would obtain an 80 cents-on-the-dollar credit against other required annual payments, which effectively pools the liability industry-wide.

•The five "protocol" manufacturers would be protected from joint and several liability based on non-protocol manufacturer liability, and would be entitled to severance from any case involving non-protocol manufacturer. For example, then, the surviving spouse of a Chesterfield and Winston smoker could not proceed jointly against Liggett and RJR Nabisco, but would have to proceed separately against each, with each defendant free to try to shift the blame to the other. Moreover, if Liggett were out of business or otherwise judgment-proof, RJR could not be held responsible anything more than its share of liability, no matter what the state law on joint and several liability might be.

3. Restrictions on future litigation.

Unlike present state and private class action plaintiffs, future claimants get no financial benefit from the proposed settlement[3], but their rights are severely restricted. They are subject to all of the restrictions listed above for the present lawsuits which survive--no punitives for past conduct, no class actions or "extrapolation," no claims against anyone except "tobacco

[3] Some of the private class action lawsuits may include future claimants within their proposed class definitions, and so the impact on future claims may be uncertain. Likewise, most future claimants would likely assert fraud or damage occurring prior to the date of the "settlement".

manufacturing companies," no "addiction"/dependence claims, no evidence of "reduced risk" products, no joint actions with non-participating manufacturers, annual individual case caps, and annual global liability caps. With the exception of the ban on punitive damages, all of these restriction extend to future claims, even if they are based on future conduct of the industry. In addition, there are other restrictions:

- No future prosecution of attorney general, parens patriae, or class actions, of any kind, ever, relating to tobacco and health.

- No third-party payor (or similar) claims not based on subrogation, of any kind, whether based on past, present, or future conduct of the industry. For example, all of the health and welfare fund cases filed in the last few weeks would be barred.[4]

- No aggregation of third-party subrogation cases. Any subrogation cases must proceed based on one individual at a time.

B. ANALYSIS OF PROPOSAL.

The civil justice system has four basic purposes: the disclosure of product hazards and corporate misconduct, fair compensation for victims, punishment, and deterrence from future misconduct. If this proposal is enacted, none of those purposes will be served. The full truth about what the tobacco industry knew and when they knew it will stay under wraps, most victims (except those whose lawyers negotiated the deal) will go uncompensated or face insurmountable hurdles to asserting their claims; the industry will escape financial punishment for past misconduct; and what is likely the only truly effective incentive for the industry to take greater account of the public health--the prospect of unlimited, unknowable liability--will be lost, all of this in perpetuity. In addition, the proposal makes considerable changes in the relationship between the states and the federal government, and raises a number of significant constitutional issues.

This analysis focuses on the following general subject areas:

--Background
--Settlement of present class actions

[4] The Presidential Commission appointed to allocate unused amounts under the caps is permitted to consider applications for compensation from third-party payors making nonsubrogation claims.

--Prospective prohibition of class actions and aggregation of claims
--Bar on punitive damages
--Liability caps
--Disclosure
--Constitutional issues

1. Background.

To understand the problems with the proposed legislation, it might be helpful to have a brief background on some of the developments in the law that have brought the tobacco industry to the bargaining table and have shaped this "settlement."

First of all are the changes in state products liability law that have tended to favor plaintiffs in the past twenty-five years: the expansion of strict liability (no proof of fault required), the recognition of new categories of compensable harms (e.g. compensation for fear of future injury), the increase in the level of compensatory damages, and the relaxation of standards for awarding punitive damages.[5] Closely related to that is the greater willingness of the courts to entertain claims brought by those suffering more indirect damages, including government and private third-party payors of health care costs.

Second has been the development of techniques for bringing groups of similar cases together, i.e. the development of "mass tort" litigation--asbestos, DES, Agent Orange, Dalkon Shield, Bendectin, silicone breast implants, nuclear testing, repetitive strain disorders, and so on. Before the 1980's, class action "mass tort" litigation was relatively rare. The Advisory Committee that drafted Fed. R. Civ. P. 23 [the federal class action rule] declared in the Rule Comments that a "'mass accident' . . . is ordinarily not appropriate for a class action" because of the presence of issues like causation and affirmative defenses like assumption of the risk that affect individual class members differently, and until the mid-1980's, the courts largely adhered

[5] Although there has been some judicial and legislative retrenchment of this trend, on other fronts, the trend continues. For example, the Restatement of Torts § 402A, which imposes liability on the manufacturers of "unreasonably dangerous" products used to contain comment i, which said that it only applied to articles "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics," with the primary example being tobacco. The current committee working on the third version of the Restatement has, however, now voted to delete the "tobacco exception," and that could be expected to have its influence on the courts.

to that position. In 1986, however, the Fifth Circuit affirmed class certification in an asbestos case, Jenkins v. Raymark Industries, 782 F.2d 468 (5th Cir. 1986), and then the courts around the country began to reverse themselves--in the Agent Orange cases, In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987), cert. denied, 484 U.S. 1004 (1988), and then in the Dalkon Shield cases, In re A.H. Robins Co., 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989).[6] What changed the courts' minds on the mass tort class action was the sheer volume of cases filed, and the perceived need to aggregate the claims somehow to achieve some measure of "rough justice" for the claimants.

Out of that has come a predictable mass tort evolutionary cycle. In the early cases, defendants have the strategic, financial, and information advantage, and tend to win. As information comes out, however, the balance often begins to shift decisively to the plaintiffs.

At that point, particular "mass torts," e.g. asbestos, become recognized lawyer specializations, and the plaintiffs' attorneys who have invested time and money in becoming experts become highly motivated to search nationwide for new claimants to represent. The cases become highly interconnected, and a success in one case on, for example, causation, or avoiding assumption of the risk, affects similar cases across the country, and increases their settlement value. At that point, the number of claimants willing to sue can begin to increase exponentially. For example, "worst case" scenarios for the number of asbestos claimants were around 100,000 in the early 1980's, but had increased to 500,000 or 600,000 by the early 1990's. The defendant manufacturers turn to mass tort defense specialists and try to coordinate their efforts, e.g. the Center for Claims Resolution (CCR), the 21 nonbankrupt asbestos manufacturers with single counsel, to match the coordinated plaintiffs' bar. Once the courts see an avalanche of cases coming, they get consolidated, the responsible judges become "managerial," and they begin to explore aggregate techniques for getting at least the common issues of liability and causation (and sometimes punitive damages) resolved on a class basis.

Third has been the growing availability of statutory causes of action, enforceable either by state government or by "private attorneys general," for violations of antitrust and consumer fraud laws, and the increasing possibility of recovering substantial penalties and damages under

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[6] Some have suggested that the U.S. Supreme Court's recent decision in Amchem Products v. Windsor [Georgine], 65 U.S.L.W. 4635, 1997 WL 345149 (U.S., June 25, 1997) will significantly limit the availability of the "mass tort" class action. To the contrary, what the Court did in Amchem is reject "futures only" class settlements, where future claims are sacrificed for present claims, and direct the courts to use subclasses to avoid single law firms representing different groups with directly conflicting interests.

those statutes. In Minnesota, for example, the legislature has eliminated the "indirect purchaser" and "pass through" defenses to antitrust;[7] and has granted broad private standing to enforce the unfair discrimination and competition, deceptive trade practices, and false statement in advertising statutes. Moreover, the Minnesota courts have very broadly construed these provisions to enhance consumer protection, expanding the connection between conduct and injury necessary to permit suit, rejecting efforts to elevate the standard of proof, and ordering a wide range of remedies, including restitution, disgorgement of unjust enrichment, multiple civil penalties[8], and attorney fees. See State v. Alpine Air Products, Inc., 500 N.W.2d 788 (Minn. 1993); see also State ex rel. Humphrey v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996)(Court upholding availability of these theories and remedies to both public and private plaintiffs in tobacco case).

Fourth has been the production of industry documents through discovery that show an arguably unprecedented pattern of unlawful conduct. In the Minnesota case, the industry has produced some 33 million pages of documents, held in storage depositories in Minneapolis and London, and in early May 1997, the judge ruled that Minnesota had made a threshold showing that it was entitled to see nearly 250,000 documents and over one million pages under the exception to the attorney-client privilege applicable when a crime or fraud may have been committed. Those documents are currently under in camera review by a special master, with rulings expected later this year. As that information comes forward, in Minnesota's litigation and then across the country, the informational advantage favoring the industry will have shifted considerably.

All of these trends have done a great deal to shift the balance of power from defendants to plaintiffs in these cases, at least in certain states. Unfortunately, some of these developments--particularly the development of the mass tort settlement class action have also created the circumstances for collusion--"repeat players," all with an incentive to settle early[9]; often a single

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[7] 1984 Minn. Laws, sec. 458, sec. 1 (response to Illinois Brick Co. v. Illinois, 431 U.S. 720, 97 S.Ct. 2061 (1977)).

[8] Minnesota authorizes $25,000 civil penalties per violation of the consumer fraud laws, and $50,000 per violation of the antitrust laws, and the courts have construed "violation" to allow for the multiplication of penalties for patterns of illegal conduct.

[9] For plaintiffs' counsel, early settlement can mean early, and substantial fees, with less investment of time and resources. For defendants, early settlement can preclude tipping of the balance of power to plaintiffs, can avoid the perils of bankruptcy, and can provide all of the spinoff benefits of greater certainty about liability. For courts, early settlement is a way to clear the docket, and to avoid a mind-numbing series of near-identical trials on the same subject.

forum with a judge eager to get a "global" settlement; and passive future claimants whose rights can be affected without their knowing it.[10] As a result, the courts have had to confront (and have sometimes embraced) inventory settlements, where plaintiffs' counsel get present clients and themselves favorable terms, in exchange for "global" settlement of all future claims on terms favorable to defendants; double-dipping, where plaintiffs' counsel get class attorney fees, plus later fees for representing individuals in negotiated claims resolution process; front-loading claim funds, so present claimants and fees are taken care of early, at expense of future claimants, eligibility restrictions and illusory benefits.[11]

The ultimate result is the Georgine process:[12] defendants facing uncertain and potentially devastating liability contact certain plaintiffs' class counsel (who they have likely worked with before, and who they know have a strong incentive to settle early) before lawsuits are filed, reach "global" agreement favorable to current clients but unfavorable to future claimants, and then file a complaint, motion for class certification, and settlement with a receptive court, all on the same day.

With the U.S. Supreme Court's decision in Georgine the last week of this past Term, fewer federal courts will approve mass tort settlement class actions, and no court could or would approve the kind of settlement negotiated by the attorneys general and the private class counsel--

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[10] Many commentators have written about this topic. E.g. Coffee, Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1344 (1995). A letter signed by 144 law professors to the Judicial Conference's Rules Committee, opposing Rule 23 amendments which would expressly sanction settlement class actions, in a section called "Inviting Collusion," says that the rule change would "license[] a regime under which plaintiffs' lawyers are encouraged to compete to sell out the claims of people in order to gain the defendant's acquiescence to a ... class." Their view was cited in Justice Ginsburg's opinion for the Court in Amchem Products v. Windsor [Georgine], 65 U.S.L.W. 4635, 1997 WL 345149 (U.S., June 25, 1997).

[11] Prof. Carrington has identified what he calls "significant wealth transfers" inherent in settlement class actions--the shift in the burden of the transactions costs of evaluating individual claims from the defendants to the claimants, the transfer of wealth from those with stronger cases to those with weaker ones, and the transfer of wealth to leading class action lawyers "who amass large fortunes in short periods at the bar" from lawyers who would otherwise present the claims of individual clients. See letter of Paul D. Carrington to Judicial Conference Rules Committee, cited in Amchem, at ____.

[12] Georgine is the asbestos settlement which the U.S. Supreme Court recently rejected in Amchem Products, Inc. v. Windsor.

paying off present claimants in exchange for limiting the rights of future claimants.[13] Hence, the issue goes to Congress, which may have greater power to adjust the rights of different classes of individuals on this kind of macro level[14], but which must also face the fundamental due process and equal protection issues that were not directly addressed in Georgine.

2. Settlement of present class actions.

The proposal calls for all present class action lawsuits involving tobacco and health to be "legislatively settled," without any further discussion. At present, there are somewhere between 15 and 20 Castano-like class actions pending in state courts around the country, there is the Florida secondhand smoke lawsuit on behalf of a class of flight attendants, where the trial is now underway, and there are a number of third-party payor actions filed before the June 9 cutoff which are proceeding on at least a purported class basis.

Although the public information about this is limited, the idea of a legislatively-imposed settlement of the present class actions raises a number of obvious concerns and questions:

- How many people are included in the purported classes? Do the post-Castano class action lawsuits include most or all of the smokers that were in the original federal court class definition? Do they include potential future claimants as well as present claimants? Will even the limited rights to sue supposedly preserved in the "settlement" be extinguished or limited further by these "side agreements"?

- Is it intended that this be a "no opt out" settlement for class members (as in the Ahearn asbestos settlement negotiated by many of these same lawyers)?[15] If class members can opt out, are they governed by all other restrictions on future claimants?

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[13] Indeed, Congress recognized this issue in 1994, when it adopted amendments to the Bankruptcy Code to allow bankruptcy courts to consider and preclude future tort claims against the bankrupt entity. Congress insisted that any such resolution must meet two standards--future claimants must be treated in a manner similar to present claimants, and there must be assurance that there are funds available to pay their claims. 11 U.S.C. § 524(g), (h) (1994), as amended by section 111, Bankruptcy Reform Act of 1994.

[14] Still open is the question of whether the federal courts can exercise jurisdiction over future claimants, who may not have standing sufficient to satisfy Article III justiciability requirements.

[15] See In re Asbestos Litigation: Flanagan v. Ahearn, 90 F.3d 963 (5th Cir. 1996). The approval of that "futures only" class settlement is now highly questionable after Georgine.

•Is it intended that the attorneys will negotiate some kind of administrative compensation scheme for present claimants? If so, how will different kinds of claims (e.g. serious lung cancer now vs. pre-cancer indicators vs. fear of cancer and so on) be decided, and by whom? Will any new compensation system be available to future claimants? If so, what assurances are there that the fund will be adequate to pay those claims as well?

•If future claims have been sacrificed to benefit present claimants, do negotiators have a conflict of interest that raises ethical concerns? Obviously, those losing otherwise viable claims were not consulted by the negotiators.

•What are the proposed class attorney fee arrangements, and are they appropriate?

We will not be able to provide answers to these questions until we have more detail about these "side" agreements, but these are good questions to at least start the inquiry.

3. Impact of prohibition on class actions or other aggregation of claims.

Under current rules, in order to proceed as a class action, several criteria must be met: numerosity, commonality, typicality, and adequate representation, Fed. R. Civ. P. 23(a), and the court must be able to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action if superior to other available methods for the fair and efficient adjudication of the controversy." Id., 23(b)(3). To make that determination, judges are to consider: (1) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

Therefore, what the proposal recommends is that, even for cases where there are too many claimants to join them all, where the questions of law or fact in common predominate over the individual issues, where the representative claims are typical, where the representation is adequate, where the individual interest in controlling claims is limited, the litigation history suggests class treatment, it is desirable to concentrate the cases in one forum, and the class action is manageable, even under all those circumstances, the class action device will be barred anyway, even if only used for particular issues. Moreover, all of the other techniques for aggregating claims will be barred as well.

On balance, the prohibition on class actions and claim aggregation will likely have the following effects:

•It will discourage most potential victims from filing suit, and few law firms will choose to make the financial and human capital investment necessary to become expert in bringing these cases and going out and getting an inventory of plaintiffs. The costs of litigation against the tobacco industry are high, the evidentiary burden is substantial (for example, epidemiological evidence is much more likely to be admitted in class or representative cases than in individual cases, even though it can be highly probative on issues of causation), and realistically, those costs can only be borne by lawyers who might be able to share in class damages awards. Even a plaintiff with $1 million in damages would have difficulty getting an attorney, since few lawyers, under normal contingency fee arrangements, could make such a case pay with the kind of aggressive defense typical of the tobacco industry.

•If the history of other "mass tort" litigation is a guide, most claimants do not come forward until the liability picture has tipped decisively toward plaintiffs, which is much less likely if class or consolidated litigation is precluded.

•Even, however, if the number of individual tobacco cases remains high, and even if, with new evidence and successful trial strategies, the balance shifts toward plaintiffs, and the avalanche of cases the industry fears comes to pass, the prohibition on class and aggregative procedures simply guarantees that the courts would not be able to manage the caseload except on defendants' terms, either by dismissing cases, delaying their prosecution, or forcing settlements favorable to defendants. Consolidation in single forums, representative cases, consolidated liability, causation, or punitive trials, statistical sampling, "reversed bifurcation," and other innovative techniques would be unavailable to the judiciary. Therefore, even if the cases continue, the likelihood of fair results is very low, and would only get worse as future claimants come into the picture.

4. Bar on punitive damages.

An absolute bar on punitives for past conduct, no matter how egregious the conduct, preempting all applicable state law on the issue, would be an extraordinary decision on the part of Congress.[16] Particularly with class and consolidated actions prohibited, punitive damages attached to individual claims may be the only way to attract attorneys to these cases, and the threat of punitives certainly would be the only way the civil justice system could still serve its deterrent purpose.

[16] In comparison, the products liability reform bill vetoed by the President last year would have imposed a $250,000 punitives cap (or twice the economic damages) in an individual case.

There is, of course, a case to be made against unlimited punitive damages, particularly the prospect of repeated punitive awards in whole series of similar cases that end up killing rather than just stinging the offending companies. Some judges have therefore used class actions to resolve punitive damages claims together, and, conceptually, a single or a series of aggregated punitive damages award against the tobacco industry could be justified.

Of course, such an award would actually have to punish the industry, that is, be high enough to affect shareholder equity significantly, and with restrictions to make it less likely that the punitive liability could be laid off on either consumers, insurers, or taxpayers. Clearly, the figures contained in the proposed settlement and the requirement that those payments be passed through to consumers through a per-pack charge do not meet those criteria, on any level.

5. Liability caps.

With the restrictions on the kind of litigation the industry may face, the liability caps may well be largely immaterial. Nevertheless, there are concerns to be raised:

- Precedent: No other industry has a global liability cap, not even those with per-case caps like the vaccine manufacturers. If Congress is prepared to offer that to tobacco, they can expect other industries with liability concerns to seek similar or better treatment.

- By definition, of course, all global liability or "case flow" caps discourage and discriminate against future claimants in favor of present ones, because of the prospect of payment delay.

- With liability caps and industry liability pooling arrangements in place, any adverse liability experience for any particular company is unlikely to have any competitive impact, so the threat of competitive consequences for misconduct or set of incentives is removed.

- The value to the industry of certainty about liability, even at very high figures, would be difficult to underestimate: increases in shareholder value, reallocation of management focus, removal of "fraudulent conveyance" barriers to tobacco "spin-offs," greater or more secure access to long-term financing, and so on.

- If Congress were to remove the limits on class or consolidated actions, or eliminate or modify the punitive damages bar, the $2-5 billion annual payments would likely be low. It would initially be less than 2% of what CDC estimates the total annual harm to be, and could easily be consumed by only a handful of judgments, e.g. the Florida flight attendants' secondhand smoke case, or a single union health and welfare fund case. Prior "mass tort" settlement funds have invariably proven to be inadequately funded, and become insolvent quickly once the liability picture shifts toward plaintiffs. If the fund

becomes insolvent, the possibility of successful constitutional challenges to the abrogation of common-law rights becomes greater.

•The payment levels contemplated by the proposal are, of course, much less than what the industry can afford, particularly with the appreciation in stock prices (20% during the negotiations alone), continued growth in international sales and the revenue-raising elements built right into the proposal:

- ♦Mandatory pass-through of costs to consumers through price increases
- ♦Tax deductibility of all costs, whether punitive in nature or not
- ♦Reduction in advertising expenses [current level: $6 billion annually]
- ♦Reduction in legal expenses.

Several analyses have concluded that the industry could increase prices by $2 a pack or more without sacrificing any significant profitability from decreased demand. Such a figure would generate at least $32 billion a year, again without affecting either shareholder equity or industry profitability.

6. Disclosure.

The proposal establishes a new centralized document depository in Washington, D.C., which will contain the documents produced so far in the Minnesota litigation.[17] Those documents will be available to Congress, state and federal agencies, and the public under certain conditions.

The industry, however, would be permitted to withhold any document for which it asserts attorney-client privilege, work product, or trade secret protection.[18] They would be permitted to conduct a new document-by-document review of everything previously withheld on grounds of privilege (hundreds of thousands of documents, over 1 million pages), and then create new privilege logs for that data.

At that undetermined future date, when the new industry review is completed, anyone who wishes to challenge the industry's continued assertion of privilege or trade secret must file a claim with a new three-judge panel of Article III judges appointed by the Judicial Conference. The decision will be binding on all state and federal courts in all litigation in the United States,

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[17] Or in any other case, although the Minnesota discovery effort has been the most comprehensive.

[18] Compare the present situation in Minnesota, where the judge and a special master are conducting an in camera review of those documents under the "crime/fraud" exception to the attorney-client privilege.

under the well-pleaded complaint rule and therefore come within the federal courts' Article III, section 2 authority is not completely clear.

State courts of course have to comply with federal law, but Congress directing them how and under what circumstances to adjudicate state-law cases might be a qualitatively different assertion of federal power, and raise significant Tenth Amendment and constitutional federalism concerns. Of course, even if the courts did not strike the statute down, the proper scope of federal preemption of state legislation, state court rules, and state causes of action, both statutory and common-law, and the precedent of that policy decision, are certainly topics Congress should consider.

(b.) Due process/equal protection: The proposal would substantially restrict citizen access to the courts, and would eliminate or curtail a number of both pending and prospective state court claims. In particular, at least two elements of the proposal raise substantive due process concerns--the elimination of entire causes of action and the granting of immunity without substitute avenues of redress, and the possibility of claimants being bound by legislatively imposed "settlements" without an effective opportunity to opt out. Likewise, distinctions in the treatment of claimants based solely on the time of filing (present vs. future) may raise equal protection issues, particularly when it involves quasi-fundamental rights such as access to courts.

The Supreme Court has noted that "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts," Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 88 n. 32, 98 S.Ct. 2620, 2638 n. 32 (1978), and that the "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object." Id. (upholding nuclear industry liability limits in Price-Anderson Act); see also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530-31, 112 S.Ct. 2608, 2625 (1992) (allowing preemption of state failure-to-warn claims).

There are limits, however. The Court has expressed its hostility to the idea of Congress setting aside final judgments, on the grounds that the "Constitution's separation of legislative and judicial powers denies it the authority to do so." Plaut v. Spendthrift Farm, Inc., 115 S.Ct. 1447, 1463 (1995). Moreover, the Court has at least left open the question of whether the due process clause requires some reasonably just substitute for common-law rights replaced by a new federal statute. Duke Power, 438 U.S. at 93, 98 S.Ct. at 2640-41. As Justice White noted in a dissent from dismissal of an appeal in 1985, "[w]hether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be, appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States." Fein v. Permanente Medical Group, 474 U.S. 892, 894-95, 106 S.Ct. 214, 216 (1985)(White, J.); see also Pruneyard Shopping Center v. Robins, 447 U.S. 74, 94, 100 S.Ct. 2035, 2047 (1980)(Marshall, J., concurring); Cipollone, 505 U.S. at 541, 112 S.Ct. at 2630 (1992) (Blackmun, J., concurring in part and dissenting in part, joined by Souter, J. and Kennedy, J.) Depending on the

and may be reviewed only by a certiorari petition to the U.S. Supreme Court under 28 U.S.C. § 1254. The only exception would be for disputes that have already been "resolved" by other state or federal courts prior to the time the three-judge panel has had the opportunity to review privilege claims.[19]

The panel will review claims of privilege or trade secret protection, not according to applicable state law, but rather under the ABA/ALI Model Rules and/or federal common law with respect to privilege, and the Uniform Trade Secrets Act with respect to trade secrecy. The panel may appoint tobacco industry-funded special masters, and, if the decision is to order disclosure, the panel can consider awarding costs, fees or other sanctions.

The likely result of these provisions is that the discovery process nearing completion in Minnesota would be short-circuited, and jurisdiction wrested from our state court system to the new three-judge federal panel. Meanwhile, any surviving or prospective litigation would presumably have to continue while litigation in the new federal forum over document production takes place. If one of the central goals of the civil justice system is to force disclosure of product hazards and industry misconduct, this proposal is a significant step backward.

7. Constitutional issues.

Our research is still quite preliminary on these issues, and we have reached no conclusions, but some of the major constitutional questions presented by this proposal should be relatively obvious:

(a.) Tenth Amendment [or more precisely, the Constitution's system of "dual sovereignty"]: The source of authority for Congress to take these actions would presumably be the Commerce Clause, and obviously the authority of Congress to regulate commerce among the states and, under the Supremacy Clause, to preempt conflicting state laws, remains substantial. The Supreme Court has, however, now made it clear that, despite that authority, the federal government may not commandeer the states to accomplish federal purposes. Printz v. United States, No. 95-1478 (U.S., June 27, 1997)(Brady Act); New York v. United States, 505 U.S. 144 (1992)(Low-Level Radioactive Waste Policy Amendments). The proposal would have Congress directing the 50 state court systems to, in effect, change their rules of civil procedure and their rules of evidence governing state-law claims. If state courts refuse to comply, the consequence then is that the federal courts take jurisdiction through removal[20], although how these state law claims would, absent diversity, become claims arising under the "laws of the United States"

[19] "Resolved" is undefined, but presumably that means appeals have been exhausted.

[20] We presume this is intended to fit this provision within the exception contained in New York, allowing the federal government to order states to implement regulatory programs, if states can opt out and a federal agency steps in to take the enforcement responsibility.

circumstances governing present and future claimants, that issue may be tested if this proposal is enacted into law.

(c.) Right to a jury trial: The Seventh Amendment provides that "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This would apply only to actions in federal court, but again there is the question of whether Congress can direct states to eliminate their own right to a jury trial in state-law cases. In the federal court cases, the Supreme Court has held that Congress cannot take away that right if the cause of action is legal and if it involves a matter of "private right." Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S.Ct. 2782 (1989); see also Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 97 S.Ct. 1261 (1977). Of course, the courts have been divided on whether damages limitations violate the Seventh Amendment, and particularly when the limits extend to compensatory and out-of-pocket damages, some courts might be more likely to find an infringement of the right to a jury trial. If the proposed private class action "legislative settlements" include mandatory, "cram down," "no opt out" arrangements, that may also raise significant Seventh Amendment issues.

(d.) First Amendment: Obviously, the advertising and marketing restrictions raise "commercial speech" issues. See generally 44 Liquormart, Inc. v. Rhode Island, 116 S.Ct. 1495 (1996); Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557 (1980). The proponents of the "settlement" claim that by incorporating the manufacturers' waiver of First Amendment rights in consent decrees that they can insulate the new rules from First Amendment review. Given the relatively relaxed nature of First Amendment standing, however, and the number of different, non-tobacco parties who have an interest in challenging content-based marketing restrictions, it seems likely that the First Amendment issues will be resolved judicially, no matter how hard the parties try to keep those questions away from the courts.

II.
FDA

A. FDA PRODUCT SAFETY STANDARDS.

The FDA has asserted jurisdiction to regulate nicotine as a "drug" and tobacco products as drug delivery "devices," and Judge Osteen in North Carolina ruled that the courts should defer to that judgment. Coyne Beahm, Inc. v. FDA, Civ. No. 95CV00591 (M.D.N.C. April 25, 1997). Under the proposal, however, unlike any other "drug" or "device," the FDA would not have authority to ban, 21 USC § 360f, deem as misbranded, 21 USC § 352(j), or recall, 21 USC § 360h(e), tobacco products under current statutory health standards. Likewise, FDA would be able to promulgate performance standards to regulate the contents of the product, as they can with any drug, but only subject to the following special restrictions:

•No elimination, and no non-"gradual" reduction of nicotine yields for no fewer than twelve years;

•No reduction in nicotine, and no elimination of "other constituents or other harmful components" unless FDA can find the modification: (a) will result in a significant reduction of the health risks associated with such products to consumers thereof [cf. current standard--to provide reasonable assurance of safe and effective performance]; (b) is technologically feasible; and (c) will not result in the creation of a significant demand for contraband or other tobacco products that do not meet the product safety standard.

•New procedural requirements: formal rulemaking under APA[21] (trial-type hearings, right to introduce direct and rebuttal evidence through oral testimony, right to cross-examination, agency decision based on "substantial evidence" developed at the hearing), burden of proof on FDA for all findings, cf. 21 CFR § 12.86, full judicial review under less deferential standard (not "arbitrary and capricious" but "deference to extent to which matter at issue is within Agency's field of expertise"), and Congressional "regulatory reform" review.

•Other new requirements after 12 years, when FDA could eliminate nicotine or other harmful ingredients: same new substantive standards, "preponderance of evidence" burden, rather than "substantial evidence," manufacturer [apparently, each and every single manufacturer] can select rulemaking process, judicial review of original decision and all subsequent petitions to amend, minimum two-year phase-in [cf. current one-year or earlier], and Congressional review.

These restrictions, of course, apply to no other "drug" or "device," and they impose a virtually impossible burden for FDA to overcome, both the substantive standards and the procedural requirements. They are also directly contrary to the negotiators' publicly stated goals and what the Koop-Kessler Commission recommends: full and unfettered FDA authority to do whatever is necessary under current statutory authority to solve the problems of tobacco and the public health.

B. MARKETING AND ADVERTISING RESTRICTIONS.

[21] The proposal refers to the Administrative Procedures Act, presumably 5 USC §§ 556, 557, although the FDA has its own "Part 12" hearing process, 21 CFR pt. 12, which is also quite formal but perhaps less so than the formal process described in the APA. Under current law, however, FDA uses notice-and-comment rulemaking, 5 USC § 553, to promulgate performance standards, which allows them to incorporate their expertise and what they have learned from all sources to craft the rule, rather than serving as the impartial arbiter at a trial-type hearing.

The proposal incorporates existing FDA regulations, and adds prohibitions on the use of human images and cartoon characters, extends the advertising ban to stadia and ads directed outside from retail locations, further restricts point of sale ads, bans movie and TV product placement payments, and the direct or indirect "glamorization" of tobacco use in media appeals to minors.

The effectiveness and significance of advertising and marketing restrictions remains controversial, but the following additional issues should be noted:

- The proposed regulations go beyond current FDA regulation, but they do not necessarily expand the FDA's current authority to regulate.

- No penalties are provided for violations--no civil penalties, no actual damages, no attorney fees, no private enforcement standing.

- Some of the restrictions may be illusory. For example, the point-of-sale advertising restrictions would permit outlets such as convenience stores to display ten 2' x 2' signs--40 square feet of point-of-sale advertising messages.

- FDA would be prohibited except under "extraordinary circumstances" to alter the restrictions for five years. With the burden of proof on the agency, and the opportunity for litigation that presents, that might limit their ability to regulate, for example, direct mail, which appears to be the tobacco industry's next advertising frontier.

- The proposal would continue to permit brand logo advertising on the package, with teens being particularly brand sensitive.

- Finally, no matter what is included in consent decrees, nonparties to the agreements cannot be bound by them, and will be able to raise any applicable First Amendment arguments.

C. WARNINGS, LABELING, AND PACKAGING.

The proposal provides new, rotating warning on cigarettes and smokeless packages. The warnings would occupy 25% of the front package panel [smaller on certain flip-top boxes]. The FDA would be required to promulgate rules governing the testing, reporting and disclosure of tobacco smoke constituents.

Again, as with advertising and marketing restrictions, the issue of whether warning labels deter smoking is controversial. There are other critical points, however:

- The preemption language in the Federal Cigarette Labeling and Advertising Act would not be repealed.

- The rulemaking proceeding provides another opportunity to dispute, litigate, delay, and possibly dilute the proposed standards.

- The new warnings may well strengthen the industry's assumption of risk defense in individual cases, and may therefore benefit the industry more than consumers.

D. LICENSING OF RETAIL TOBACCO PRODUCT SELLERS.

The proposal would mandate minimum federal standards for licensing, to be enforced by federal, state, and local authorities and funded by the industry payments. Anyone selling tobacco products directly to consumers would need a license, and the penalties for violations are set forth in appendix II.

The primary problem with this provision is preemption. The penalty scheme would expressly preempt more stringent state and local sanctions, such as the ones recently signed into law in Minnesota. Moreover, the substantive law here may not be adequate; arguably, it is only a return to programs like Philip Morris's "retailer sanctions" program, which was notably ineffective.

E. NON-TOBACCO INGREDIENTS.

Under the proposal, manufacturers would disclose ingredient information to the public "under regulations comparable to what current federal law requires for food products." They would also provide confidential lists of added ingredients, substances and compounds to FDA, by quantity in each brand. Manufacturers would have five years, for each ingredient, to provide a safety assessment, consistent with new regulations to be promulgated. The FDA then has 90 days to approve or disapprove; the failure to disapprove constitutes approval. Not all ingredients would have to be publicly disclosed under the food laws, and nondisclosable information would be kept confidential. Companies would be required to adopt procedures for the selection, testing, and use of ingredients.

Although this would give FDA clearer statutory authority, the proposal imposes significant obstacles, which would make effective regulation nearly impossible:

- Five years for the industry to analyze what they likely already know, and then 90 days for the FDA to digest and review the mountain of documentation that would likely be produced is unbalanced. A much shorter time frame should be imposed on the industry, with FDA given the authority to act without restriction as reliable information becomes available.

•There is ambiguity about whether the ingredient disclosure requirements refer to the components of tobacco, or the components of tobacco smoke. Some non-tobacco ingredients are perfectly safe if eaten, but harmful if burned and inhaled.

•There is a five-year preemption of state content disclosure laws, such as those enacted in Massachusetts and Minnesota. [The preemption language is in Title V.]

III.
COMPLIANCE AND CORPORATE CULTURE

The proposal would require the industry to create annually reviewed compliance plans to identify ways to reduce youth consumption, and provide incentives for the development of reduced risk products, to protect whistleblowers as permitted by current federal law, to promulgate corporate principles, designate compliance officers, and report to shareholders on progress, to inform lobbyists about the new requirements and limit their activities except as expressly authorized by the manufacturers, and to subject individual companies to fines and "scarlet letter" advertising for breach of their obligations.

The substantive change in this section is the requirement that the Tobacco Institute and the Council for Tobacco Research be disbanded, a remedy that is consistent with antitrust practice in similar cases. The regulations to prevent re-formation of these groups may be inadequate, however:

•No requirement that records be turned over to receiver (or FDA), who would in turn disclose evidence of misconduct;

•No regulatory or public interest representation on any new group's board; and

•No open records and visitation rights for DOJ, FTC, or states.

IV.
"LOOK BACK" PROVISIONS AND STATE ENFORCEMENT INCENTIVES

A. CONTENTS OF PROPOSAL.

Title II of the proposal contains three provisions intended to reduce youth smoking:

•Targets for the reduction of underage tobacco use, with separate criteria for cigarettes and smokeless tobacco. The targets are based on a "base percentage" of underage smokers age 13 and up who smoke (in the case of cigarettes) on a daily basis.

•Sanctions, in the form of "mandatory" FDA-imposed surcharges for failure to meet the targets. The sanctions are subject to rebates for good-faith attempt to comply.

•A state enforcement scheme, including funding for enforcement, but also significant sanctions for states where the tobacco industry fails to meet youth access reduction targets.

The tobacco use reduction targets are:

	Year 5	Year 7	Year 10
Cigarettes	30%	50%	60%
Smokeless	25%	35%	45%

Reduction will be measured from estimated levels over the last decade.

B. ANALYSIS.

Although the stated purpose is "to achieve dramatic and immediate reductions in the number of underage consumers," the targeted reductions are neither dramatic nor immediate.

•The target reduction levels are too low. The baseline percentage--those children age 13-17 who smoke every day--is artificially low, compared to the data collected by the CDC's Youth Risk Behavior Surveillance System (YRBSS), which indicate that 35% of students in grades 9 through 12 have smoked at least once in the last thirty days, and that 16% have smoked on 20 or more of the last 30 days. The YRBBS does not have a category for daily users under 18.

Moreover, even if a different base percentage were used, the targets are low. We have supported the following goals--20% reduction after two years, with annual 20% reductions thereafter until the sixth year, when the final 10% target would be achieved.

Penalties would be $1 per pack for the first violation, rising an extra dollar for consecutive years' violations, with the revenue targeted to tobacco enforcement and education.

•The first "look back" measurement is late. For the same five years when FDA regulations would be frozen and state content disclosure laws preempted, there would be no incentive for reducing youth smoking.

•The permissible FDA surcharge would not discourage the tobacco industry from marketing to children. The combination of the following factors make the "look back" penalties inadequate:

- The $2 billion yearly cap on penalties;
- The full tax deductibility of the penalty amounts;
- The "joint and several liability" of the manufacturers, payable in proportion to market share, which eliminates individual brand or manufacturer accountability and even creates an incentive for some of the companies to gain a disproportionate share of the youth market.
- The availability of abatements of the surcharge if the industry has "acted in good faith and in full compliance with" applicable law, and "pursued all reasonably available measures" to meet the target. Litigation over any abatement petition delays the distribution of the money to state and local public health agencies.

•The state enforcement incentives would penalize the states for tobacco industry misconduct. Under Appendix VI, states must conduct a youth access enforcement campaign which includes a no-sales-to-minors act; random, unannounced inspections of retailers at least monthly; at least 250 such inspections per year for each million of population; annual reports to the FDA; and designation of a "single state agency" accountable for results.

That is all appropriate, but the proposal also provides for a reduction in grant money to the states if the tobacco industry does not meet the targeted goals. Since the sanctions will leave ample incentive for the industry to continue to sell to kids, subjecting state enforcement mechanisms to reduced funding precisely where the industry's marketing to kids is most effective does not seem to be sound policy.

V.
PENALTIES AND ENFORCEMENT

The legislation would be enforceable by the states and the federal government (and FDA could contract authority to the states). States could proceed under consumer protection "or

similar statute[s]" but could not "impose obligations or requirements beyond those imposed by the legislation (except where it does not specifically preempt additional state-law obligations), and would be limited to" penalties provided. Moreover, state enforcement proceedings under the Act or "predicated on conduct violating the Act" would be removable to federal court.

Certain terms would also be included in consent decrees--marketing restrictions, trade association dissolution, lobbying restrictions, tobacco smoke constituent and ingredient disclosure, money payment obligations for the states' "reasonable shares" and similar terms. Excluded are product design and testing, manufacturing standards, and the "look back" provisions. The states, however, would only be entitled to seek injunctive relief for violations

Difficulties with this provision include the following:

•Preemption: This is unclear, but it appears that state consumer protection enforcement would go to federal court, be limited in its breadth and interpretation by the substance of the new federal act, and be limited by the penalties of the Act.

•Federalism: The removal provisions are an unwarranted infringement on state sovereignty and expansion of federal court jurisdiction.

•Limits on remedies: The injunctive-relief-only provision discourages state enforcement, and removes the deterrent effect of civil penalties, damages, and possible fee and cost recovery.

VI.
ENVIRONMENTAL TOBACCO SMOKE

The proposal would establish minimum federal standards for smoking in public places and workplaces, without preempting stricter state or local standards. A "public place" is any building "regularly entered by ten or more individuals at least one day per week." Smoking would only be allowed in areas with a direct outside exhaust, maintained at negative pressure compared to surrounding areas, and with no recirculation of air.

No employee would be required to enter a smoking area while smoking is occurring. Bars and restaurants, except fast food establishments, are exempt. OSHA would be required to issue and enforce standards, with enforcement funded from industry payments.

These provisions retreat from the indoor air quality (IAQ) standard OSHA noticed in April 1994 in the following ways:

•The OSHA standard would cover restaurants, bars and hotels; the settlement would exempt them [except for "fast food restaurants" catering largely to minors].

•The OSHA standard would require enclosed ventilated areas under negative pressure, i.e. separate rooms for smoking. The settlement does not require the smoking areas to be separately enclosed.

•The OSHA standard would require posted signs stating that smoking is restricted to designated areas; the settlement does not.

•The OSHA standard would apply to "all indoor nonindustrial work environments"; the settlement would only apply to "public places."

In addition, the costs of enforcement would come out of the total settlement fund, which would reduce the amount available for victims.

VII.
SCOPE AND EFFECT

Title V of the proposal contains two major difficulties:

•It limits the proposal to "all product sold in U.S. commerce," which means that, despite Congress's constitutional authority under the Foreign Commerce Clause, international marketing is left unregulated.

•It purports to preserve state and local authority, but it in fact preempts state and local authority in several respects:

- It preempts more restrictive state and local youth access and retailer licensing laws, and preempts harsher state and local penalties;
- It preserves FDCA preemption of state advertising restrictions.
- It curtails state ability to set manufacturing performance standards.
- It freezes state content disclosure laws for five years after its effective date (achieving in Congress what the industry has not been able to achieve in some state legislatures and in the courts).

VIII.
INDUSTRY PAYMENTS

The cash value of the "settlement" has been advertised as $368.5 billion over 25 years, which is an arbitrary number because the payments and the limitations on the civil justice system and state law continue in perpetuity. The basic elements of the proposal are as follows:

•When the President signs the bill, the industry makes a $10 billion lump sum cash payment, which appears to go to the states [allocation to be determined later].

•On December 31, 1998[22], $8.5 billion--a $6 billion "base amount" and $2.5 billion for a new public health trust.

•After that, the payment schedule looks like this:

Year	2	3	4	5	6	7	8	9	10+
Base	$7B	8	10	10	12.5	12.5	12.5	15	15
Trust	$2.5B	3.5	4	5	2.5	2.5	2.5	-	-
Total	$9.5B	11.5	14	15	15	15	15	15	15

Payments will increase by 3% or CPI each year, whichever is greater, applied to the previous year's payment. If the volume of sales decreases from 1996 levels, then payments are reduced, with the possibility of an increase back if profitability increases despite the volume decline. Payments would also have priority in bankruptcy, and the industry could not reject its payment obligations in a bankruptcy reorganization.

Two other salient points:

•The legislation would "provide" that all industry payments "be reflected in the prices manufacturers charge for tobacco products," which means passed through to tobacco consumers. This is essentially a new antitrust exemption for tobacco pricing.

•None of the payments will be deemed fines or penalties, and all payments (including expressly the youth lookback penalties) are deemed to be ordinary and necessary business expenses and therefore tax deductible. With the projected reductions in advertising expenses and legal costs, most of the payment amounts will either come out of new industry savings or from taxpayers, with the balance passed through to consumers. The risk to manufacturer assets and equity appears to be virtually zero.

Likewise, as described above in the civil liability discussion, the sharing of the liability on a participating industry basis (plus the credit against scheduled payment amounts) removes any competitive consequences from adverse litigation outcomes, and reduces substantially any incentive to change industry practices.

[22] This would be the date if the legislation passed in 1997; if not, the date would be December 31, 1999.

In addition, also as described above, given the ability of the industry to pay and to pass through the costs of any new payment obligation, the amount of the payment obligations is quite low. Again, the relevant comparison figure would be the $32 billion a year that a $2 a pack increase would generate, plus an any assessment based on assets and outstanding capitalization.

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Tobacco settlement –
~~public health threat~~
outside analyses

TESTIMONY OF HUBERT H. HUMPHREY III
MINNESOTA ATTORNEY GENERAL
SENATE JUDICIARY COMMITTEE
JULY 16, 1997

Thank you, Senator Hatch and members of the Committee for convening these important hearings. Through your deliberations, and through the historic, ongoing litigation across the country, we have a once-in-a-lifetime opportunity to re-define America's love-hate relationship with the most deadly product in history.

We cannot squander this opportunity. I regret to say that this settlement proposal could become another sad chapter in the tobacco industry's long history of deception. For all its good intentions, the proposed settlement is a Trojan camel.

Wall Street has figured out who would benefit. Tobacco stocks soared 20% during the negotiations. Investment analysts say if you pass the deal, tobacco stocks will soar another 20. On top of that, they say the CEO of Philip Morris will personally make fifty million dollars on stock options if the deal goes through!

So, for forty years of lies, fraud, and conspiracy, the reward is a 40% increase in stock value, and millions of dollars for the CEOs. If that's punishment, I want some!

Three years ago, when I filed the second of the state tobacco lawsuits, I said this industry must change its ways forever. It must obey the laws that all other businesses obey. It must tell the truth. It must pay damages commensurate with the harm it has caused. It must answer for what it has done.

On May 2nd of this year, three weeks after the secret negotiations began, I wrote my attorney general colleagues a letter, setting out 14 searching questions I believe must be addressed in any proposed resolution -- beginning with the need for unfettered FDA jurisdiction over nicotine. Regrettably, the proposal fails to answer many of those questions.

Instead, I believe the settlement proposal is inherently flawed because it answers the wrong question. In essence, the negotiators asked themselves "How much regulation will this industry accept?" Mister Chairman, with the greatest respect to my good friend, Dick Blumenthal, and to my other colleagues, that may be an appropriate question to ask when you're settling lawsuits. But it's the wrong question to ask if you're establishing national health policy.

The question for the Congress is not "What is acceptable to the tobacco industry?", but rather, "What is best for America?"

Fortunately, we now have an alternative that helps us answer the right question. That alternative is the blueprint proposed by the distinguished panel convened by Doctors Koop and Kessler, which offers a template for a comprehensive tobacco policy for this country.

Here is a foundation from which to build a comprehensive national policy -- a policy that will give America what the public needs, not just what the tobacco companies want.

I suggest today that the bottom line for an effective and enduring national solution should be what I call "Koop-Kessler Plus."

I specifically want to call your attention to four of the Koop-Kessler Committee's most important recommendations -- recommendations which document clearly how the proposed settlement falls short. Plus, I urge you to insist that these companies pay far more money -- enough that they feel some pain for the outrageous wrongs they have committed.

1. FDA Authority

First, I agree with the Koop-Kessler Committee that there should be no giveback of the FDA's existing authority to regulate tobacco products as drug delivery devices, or its power over nicotine.

2. Civil and Criminal Liability

Second, I agree that "all currently available avenues of litigation, both civil and criminal, must be fully reserved (Koop-Kessler Report, page 16), with "no special rules of any kind, substantive or procedural" (Koop-Kessler Report, page E-3). The proposed settlement -- which eliminates class action suits, bars claims based on addiction, ends suits by insurance companies and union benefit plans, and bars punitive damages -- obviously fails that test.

3. Documents

Third, "all internal tobacco company documents that bear upon the public health must be disclosed " (Koop-Kessler Report, page 16), including a waiver of any claims of attorney-client privilege or work-product privilege (page E-3). This is crucial. In practical terms, the proposed settlement would let these companies conceal forever their smoking guns -- a million pages of top secret, and devastating, documents they have hidden for decades behind claims of attorney-client privilege.

4. State Preemption

Fourth, preemption of states' rights. I agree with the Koop-Kessler Committee that any legislation must include unambiguous non-preemption provisions, expressly protecting the power of states and cities to go beyond the federal standards (Koop-Kessler Report, page 16). Again, the proposed settlement falls far short and, in my view, would severely curtail the existing powers of states and cities.

5. The Money

Fifth, the "Plus" in my call for a "Koop-Kessler Plus" approach.

This industry must feel some financial pain. In contrast to this goal, the proposed settlement would guarantee them pain-free penalties: the companies would pass the penalties through to smokers in price increases and would even get to deduct them from their taxes!

The settlement also includes so-called "lookback" penalties, designed to "punish" the industry if it fails to reduce teen smoking rates. But even if the industry were to increase its illegal sales to kids, these penalties would amount to only about eight cents on a pack of cigarettes, an amount they will simply absorb as a cost of doing business. One CEO has already told the press he has no expectation of meeting the targeted reductions.

I believe it's an affront to justice to cut a deal that lets the tobacco cartel pass all of the pain through to its customers and to taxpayers. To achieve justice, the companies themselves and their shareholders must pay.

And, it ought to hurt!

These cases are not about money. But they are about justice -- justice for victims and their families, justice for taxpayers, justice for the public, and, yes, justice for the tobacco companies and their executives. That means the tobacco cartel must feel the sting of penalties for 40 years of lawbreaking.

Three hundred and sixty-eight billion dollars is a lot of money. It might even be called intoxicating. But sober investigation will show that, in fact, it is far short of what is needed to serve justice.

In putting a price-tag on the proposed settlement, my colleagues had only seen the tip of the iceberg of this industry's deceit. In Minnesota, we have collected two warehouses full of secret industry documents that my colleagues have not had a chance to examine. I believe that if the Congress examines those documents and understands the persuasiveness of the fraud, you will agree that the price must go up.

The proposed settlement would cost about fifty cents per pack of cigarettes. Other countries collect far more. The Koop-Kessler Committee calls for a two-dollar per pack increase, citing evidence this would cut teen smoking in half (Koop-Kessler Report, page B-7). A leading economic expert, Professor Jeffrey Harris of M.I.T., tells us the price could in fact be increased by $2 per pack, generating $800 billion over 25 years. Coupled with savings from reduced litigation and advertising expenses, this amount would be generated with minimal impact on the industry's overall profitability.

The bottom line: Congress should not settle for a mere 15 billion dollars per year, when justice demands and the industry can afford to pay a great deal more.

Finally, Senator Hatch, today I would like to propose a very specific, concrete step the Congress should take before you design a national tobacco policy that may stand as the law of our land for many years.

It is absolutely vital that you have the facts. This area is too important for the Congress to buy a pig-in-a-poke. Today I urge the Congress to subpoena the treasure trove of millions of secret industry documents that we have compiled in our Minnesota litigation.

Minnesota's lawsuit is unique. We have actually succeeded in compelling this industry to disgorge the documents it has long hidden from the public. Unlike any other case, public or private, we have forced the industry to create, under court supervision, two document warehouses into which we have forced them to deposit some 33 million pages of industry documents.

At the industry's insistence, the court has sealed those documents until we go to trial 180 days from today. Our team has been through them and, as our counsel likes to say, many of the things we have found aren't just smoking guns -- they're smoking howitzers! I cannot discuss the sealed documents, but I can give you an inkling by citing one document which was recently unsealed in connection with our ongoing motion practice.

This is a document from 1958. That's nineteen fifty-eight. It's a secret report by scientists who were sent to America by the British American Tobacco Company to study the scientific evidence about smoking and lung cancer. Here's what they knew six years before the first Surgeon General's Report:

> "Although there remains some doubt as to the proportion of the total lung cancer mortality which can fairly be attributed to smoking, scientific opinion in the U.S.A. does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship."

(Report on Visit to U.S.A. and Canada, H.R. Bentley, D.G.I. Felton and W.W. Reid, June 11, 1958, page 8.)

That's what they knew in 1958. Six years later, when the Surgeon General first alleged a link to cancer, they were publicly outraged, -- outraged! -- at the very idea! Just three years ago, thirty-six years after they knew the truth, they were still coming before the House of Representatives and telling then-Congressman Wyden, under oath, -- under oath -- that smoking does not cause cancer.

That's one example out of 33 million pages.

This month we're closing in on the crown jewels of the conspiracy: more than one million pages of documents that have never left their secret vaults. Mr. Scruggs hasn't seen them. General Blumenthal doesn't have them. The Department of Justice doesn't have them.

Congress doesn't have them. These documents have been sheltered behind false claims of attorney-client privilege.

In our judgment, this is where the bodies are buried.

In recent weeks, we made history when we persuaded our judge that there is sufficient prima facie evidence of possible industry fraud and crime for the court to appoint a Special Master to review these secret documents in camera, to decide how many of them must be made public. That process is on a fast track. The Special Master is holding a hearing even as we speak today, and hopes to complete his review by mid-autumn.

But, the industry hopes desperately that you will act first, without seeing these documents. They want you to adopt the proposed settlement, which would terminate our lawsuit and squelch our efforts to get these documents. The proposed settlement, which purports to disclose the truth, would substitute a charade the industry tried to unsuccessfully foist on our court: a page-by-page, document-by-document mini-trial review that lets them stall disclosure for decades.

Mister Chairman, I believe you need these documents. You need to know what the industry knows about how to make cigarettes less hazardous -- and they know plenty. You need to know what the industry knows about manipulating nicotine, manipulating kids, and manipulating public policy. And they know plenty. You need to know whether they have intentionally lied to the Congress over the years. Only then will you be in a position to make good policy. Only then will you be in a position to decide what penalties are appropriate and whether they should be allowed to pass them on to their customers or deduct them on their taxes.

So, I ask the Committee to subpoena the key documents from our document depositories. Join us in prying loose the treasure trove of documents hidden behind false claims of privilege. We will be happy to work with you in going before Judge Fitzpatrick in St. Paul, to work within the framework of his protective orders, or to seek modifications if need be. We want to ensure that Congress can fashion effective national policy, so that this time we find real solutions and don't become victims of a Trojan camel.

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