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THE WALL STREET JOURNAL INTERACTIVE EDITION FRONT SECTION

July 15, 1997

Clinton Targets Penalties Big Tobacco Would Pay

By HILARY STOUT
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON -- After rejecting provisions in the proposed tobacco settlement that limit the government's ability to regulate nicotine, the Clinton administration is beginning to focus on the penalties that cigarette companies would pay if smoking by youths doesn't decline to targeted levels under the accord.

Administration officials plan to raise numerous questions about the penalties' stringency, timing and effectiveness in a meeting with tobacco-company representatives at the White House on Tuesday. Some of the key industry negotiators in the $368.5 billion settlement are expected to attend the session, including J. Phil Carlton, a North Carolina lawyer representing RJR Nabisco Holdings Corp., and Myer Koplow, an attorney for Philip Morris Cos.

Sticking Point

The penalties have been a major sticking point for public-health groups, most notably for the commission headed by David Kessler, former Food and Drug Administration commissioner, and C. Everett Koop, former surgeon general. That panel issued a highly critical assessment of the settlement last week. But administration officials have been publicly silent on the penalties issue and still are trying to formulate their position.

The accord calls for the industry to pay penalties of as much as $2 billion a year if underage smoking doesn't fall 30% in five years from its average level over the past decade, 50% in seven years and 60% in 10 years. The Kessler-Koop commission wants the companies to be held accountable sooner and suggests assessing penalties after two years if smoking among teenagers hasn't dropped 15%. It also wants the penalties to be assessed company by company, rather than industrywide.

During the meeting Tuesday, which will be convened by White House domestic policy chief Bruce Reed, Health and Human Services Secretary

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Donna Shalala, and deputy White House counsel Bruce Lindsey, administration officials are expected to object to the fact that the penalties would be tax-deductible.

Gauging Flexibility

While administration officials maintained that the meeting "is not a negotiating session," they hope to get an idea of how flexible the industry is on rewriting elements of the accord. Many aspects of the settlement need legislative approval, and support from the Republican leadership is unlikely if the industry bolts. Likewise, President Clinton's support of the accord is considered critical to providing lawmakers necessary political cover for legislative passage. But Mr. Clinton isn't likely to endorse a settlement that the public-health community loathes.

Last week, Mr. Clinton declared unacceptable a provision that required the FDA to prove that regulations to reduce or eliminate nicotine in cigarettes wouldn't result in a black market for cigarettes in the U.S., but he carefully limited his criticism to that provision. The administration is still working to craft modifications to the settlement that would make it possible for the president to back it without alienating himself from public-health groups.

As part of its outreach to interested groups, administration officials plan to meet with tobacco growers later this week, as well as go to Capitol Hill to hear concerns of Senate Democrats. In coming weeks, they plan to meet with numerous lawmakers from both parties.

Meanwhile, on Monday the Justice Department continued its court battle to preserve the FDA's right to regulate tobacco and nicotine. Justice Department lawyers filed a brief urging the U.S. Court of Appeals for the 4th Circuit to uphold a lower-court ruling earlier this year that allows the FDA to regulate tobacco. The department challenged that part of the ruling that bars the FDA from regulating advertising for tobacco products.

A coalition of tobacco-industry groups is challenging those parts of the lower-court decision that favor the FDA. Arguments in the appeals-court case are scheduled for Aug. 11.

--Eva M. Rodriguez and Laurie McGinley contributed to this article.

The New York Times
THURSDAY, JULY 17, 1997

Economic Scene | Peter Passell

A new move to cut the costs of Federal regulations.

SENATOR FRED THOMPSON, chairman of the Senate Governmental Affairs Committee, is making headlines with reports that China tried to influence the 1996 election. But when he's not searching for the Manchurian Candidate, the Tennessee Republican's first priority these days is adding a little common sense to the way regulations are analyzed. To this end, Senator Thompson and Senator Carl Levin, a Michigan Democrat, have introduced the Regulatory Improvement Act of 1997, which would require Federal regulators to calculate price tags for all major rules.

That is a lot more than some environmental groups — who see bean counters as more worrisome adversaries than their traditional enemies — are prepared to tolerate. The bill "would undermine crucially important environmental, public health and safety protections," proclaimed the Natural Resources Defense Council.

And it is a lot less than business lobbies want. "The bill is so weak, it's probably not worth passing," said Charles di Bona, president of the American Petroleum Institute.

But the support of a number of centrist Senators, including two Democrats, John D. Rockefeller 4th of West Virginia and John Glenn of Ohio, has heartened pragmatic economists who fear that Federal regulation is becoming a serious drag on economic growth. "At least cost is no longer a four-letter word," argued Robert Hahn of the American Enterprise Institute.

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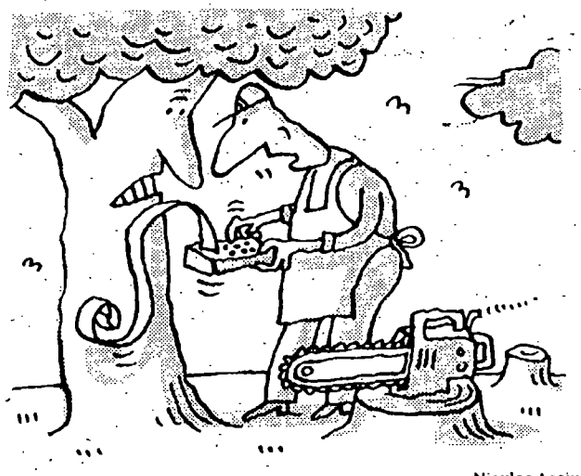
Washington has never quite made up its collective mind about what is needed to justify regulation. Every President since Gerald R. Ford has demanded that executive agencies compare costs and benefits with an eye toward efficiency. But



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Congress has formally prohibited cost considerations on the biggest-ticket health and safety laws — notably the Clean Air Act.

In the brief, heady days of the Gingrich revolution, there was much talk of creating a "supermandate" under which regulations could be challenged if costs exceeded benefits. But Congress lost its enthusiasm for regulatory reform after the Government shutdown fiasco. And while the Administration has paid lip service to curbing regulation, the White House approved the new standard for ozone exposure last month, despite estimates showing that its multibillion-dollar annual cost was grossly disproportionate. More striking, the Republicans don't seem inclined to stick their necks out in opposition.

The Levin-Thompson bill lays claim to a rational middle ground that emphasizes accountability and public disclosure. Regulators would be required to hire independent experts to compare costs and benefits in consistent ways, and to provide justifications for any rules that flunked the test. Where regulation addressed health and safety, the regulators would have to explain who was at risk and to what degree. If there are several possible means to the same end — for example, a choice of mandated technological fixes or market-based financial incentives — agencies would have to explain the alternatives and the reason for favoring one over another.

Nothing in the bill would invite the courts to toss out rules because costs exceeded benefits. Indeed, little in the bill would break new ground: except in cases of independent agencies like the Federal Communications Commission, the President already has the authority to set standards by executive order. But Robert Litan, director of economic studies at the Brookings Institution, noted that "no one's been forced to pull it all together" — that formal guidelines would help reduce uncertainty and increase consistency.

Mr. Litan and Mr. Hahn would go a step further. They note with approval that Senator Ted Stevens, Republican of Alaska, inserted an amendment into a big appropriations act last year requiring the White House to produce a detailed accounting of the costs and benefits of all Federal regulation by Sept. 30 this year. Why not make this an annual accounting, they ask, giving the public a chance to second-guess regulatory mandates?

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There are very few innocents left on the long-contested battleground of regulatory reform. While Senator Thompson insists that he has no desire to "slash and burn" regulation, most environmental groups will brook no changes in the way rules are made because they have the inside track on influencing the senior bureaucracy at the Environmental Protection Agency. By the same token, business lobbyists are at best lukewarm about the Levin-Thompson approach because they are convinced that green-friendly regulators will be inclined to cook the books to justify intervention.

That explains why this seemingly innocuous bill is a long shot, particularly in the House, where compromise on regulation is far from almost everyone's mind. But it also explains why regulatory policy may lurch from "anti-business" to "pro-business," reducing productivity without having a significant impact on health or safety.

Advertising

Is Anybody Getting The Picture?

Despite Ads, Teen-Age Smoking Is Unabated

By ANDREA ADELSON

LOS ANGELES, July 16 — At first glance, the billboard above a busy intersection here about eight miles west of downtown has all the markings of a classic cigarette advertisement. Expansive skies, mesquite-covered hills and bronzed cowboys, pausing on their horses for a trail-side chat, paint a picture of Marlboro country. Only the single line of copy surprises the unsuspecting driver: "Bob, I've got emphysema."

The ad that mockingly skewers an international tobacco icon is clearly powerful. Experts believe it and similar hard-edged ads are one of the reasons smoking rates have fallen over all in California in recent years.

What the state-run ad campaign has not done, however, is stop teen-agers from starting to smoke. Teen-age use, while lower than elsewhere in the nation, has — except for a statistically negligible decline last year — been on the rise since 1993.

To affect larger numbers of teen-agers, the negative ads must be combined with intensive educational efforts in the schools — more than California has provided, academic researchers say, citing a variety of studies.

The successes and failures of the California program, the nation's most ambitious for nearly a decade, have gained a new significance in light of the national settlement last month between tobacco companies and anti-smoking forces. The California program served as a model for the settlement.

One of the settlement's key goals is to cut teen-age smoking sharply, by 30 percent over five years

Continued on Page 6

Continued From First Business Page

and 60 percent over the next decade. And like the California program, one of its main tools is a broad "counter advertising" campaign.

Yet the settlement provides far less proportionately for school efforts than even the California program does. In California, for every dollar spent on advertising, roughly another $1 is spent on the schools. Under the settlement, however, $2.50 would be spent on advertising for every $1 going to state and local education and prevention programs, including those at schools.

The state attorneys general and opponents of smoking who negotiated the settlement express confidence that their campaign will succeed because its impact will be magnified by an array of new marketing restrictions imposed on the industry. The pact would limit the distribution and marketing of tobacco products to children, for example, including bans on animated characters.

As insurance, they say, the tobacco companies have agreed to pay financial penalties if the targeted reductions in teen-age smoking are not reached. Even so, some advocates for public health have criticized the $2 billion cap on the amount of such fines, saying that they should be unlimited.

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The industry did not question the allocation of resources under the settlement, said Lance Morgan, a tobacco spokesman. It provides for $500 million annually on media efforts and $200 million for education and prevention.

William D. Novelli, president of the nonprofit organization Campaign for Tobacco-Free Kids and a participant in the settlement negotiations, stressed that the pact could still be fine-tuned.

"The academics are right; the best way to do public education is not media alone," he said. "These numbers were laid out in the heat of battle. This money may be moved around. We don't want to have just a media program."

On a separate issue, Mr. Novelli said the settlement contains provisions that would protect the content of negative advertising from industry interference. Some critics say such interference has muted the message of the California program.

The California ads, though, often deliver a powerful punch, particularly in a $22 million billboard and television campaign that began in March, an effort that includes the cowboy scene.

In one TV spot, a woman who lost her larynx to throat cancer takes a drag through a hole in her throat, asking how cigarette makers can deny nicotine's addictiveness. Another has a toddler using blocks to spell out asthma, bronchitis and sudden infant death syndrome while an adult smokes nearby and an announcer warns of the danger from secondhand smoke. A third spot also parodies a Marlboro ad: cowboys herd children, rather than cattle, into a pen, as a voice says, "Because once they get you where they want you, they got you for good." And in a bus poster, a suave man asks, "Mind if I smoke?" His female companion replies, "Care if I die?"

This week, state officials are scheduled to introduce ads intended to reach some ethnic and racial groups, including blacks and Asian-Americans, that have been showing a rise in smoking rates. In one TV spot, camaraderie among five Asian-American men on a car trip is spoiled when one passenger lights up. The offender is pushed out, landing beside a sign for Death Valley.

Still, the advertising cornerstone of the settlement is something of a gamble when it comes to teen-age smoking, some industry experts say. For one thing, anti-smoking campaigns can sometimes go so far that they end up glamorizing smoking by making it appear as tempting as forbidden fruit. Indeed, some experts note that the more smoking comes under attack by adults, the more attractive or "cooler" it becomes to many teen-agers, who typically feel immune from the physical dangers that cigarettes pose.

There are also doubts about the value of new, larger warning labels on cigarette packs, another element of the pact.

The settlement must still be approved by Congress. A White House task force reviewing the proposed deal has already expressed misgivings about some parts of the arrangement and is certain to suggest changes. Last week, President Clinton rejected as "totally unreasonable" a major element of the pact that would impose restrictions on the Government's regulation of nicotine.

As it stands, the settlement would require cigarette companies to pay $368.5 billion over 25 years to states for the costs of treating smoking-related illness and to individual plaintiffs as well as to finance the anti-smoking campaign.

California has been a leader in the fight against cigarettes since 1988, when voters approved Proposition 99, an initiative to raise cigarette taxes, and began adopting workplace and other restrictions, such as making bars smoke-free by 1998.

Last year, the extra tax of 25 cents a pack financed a $129 million effort, which paid in roughly equal amounts for ads, school-based programs and grants to county health agencies and local community programs.

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Since the California program began, the adult smoking rate steadily dropped, to 16 percent, from 26 percent, until last year, when it bumped up to 18 percent. Some people attribute that rise to changes in survey questions, but others say it is a result of industry interference with the campaign's message. Nationwide, the adult smoking rate is 25 percent.

By contrast, teen-age smoking rates, which stayed flat during the first years of the program at about 9 percent, began rising in 1993, to 11.9 percent in 1995 before declining slightly, to 11.6 percent, last year. The nationwide rate, which is not fully comparable because of different survey procedures, has also been rising and now stands at 16 percent.

A similar program in Massachusetts did little better, making headway only with eighth graders. "When a kid makes a decision to smoke in junior high, he's pretty immune to public health intervention," said Greg Connolly, director of the state's tobacco control program.

"I'd be interested to see the magic bullet," said Kimberly Belshé, director of California's Department of Health Services, which oversees most of the state's anti-smoking effort. "We know what doesn't work," she said, acknowledging that the money that goes toward school programs is not effectively used, sometimes getting diverted to general health topics. "It's a big chunk of money spread very thin."

The magic bullet is much heavier doses of school programs, argued Cornelia Pechmann, an associate professor of marketing at the University of California at Irvine. Nearly 100 studies show that smoking rates among students fall significantly when anti-smoking advertising is combined with intensive school-based education, she said.

As for adults, Stanton A. Glantz, a professor of medicine at the University of California at San Francisco and a new member of the state's tobacco oversight panel, blames political meddling for last year's resurgence in smoking.

"The old California campaign was extremely effective," Mr. Glantz said, citing one ad that questioned the industry's integrity. The ad used excerpts from Congressional testimony by tobacco executives who said nicotine was not addictive. A narrator said: "Now they want us to believe secondhand smoke isn't bad. Do they think we're stupid?"

Mr. Glantz contends the spot was pulled because of Gov. Pete Wilson's ties to the industry. The Governor has been criticized by anti-smoking groups for hiring Craig Fuller, a former Philip Morris executive, to manage his brief bid for the 1996 Republican Presidential nomination, and for appointing Ms. Belshé, who worked in the tobacco industry's campaign against Proposition 99, to run the health department.

Ms. Belshé said the ad was pulled because one tobacco executive threatened litigation. "To continue to run the ad would raise an unacceptable legal risk," she said. As for going easy on tobacco, "the current spots make it clear the department is not backing away from its willingness to take on the industry."

Mr. Glantz cautioned that current anti-smoking sentiment is not an adequate safeguard against interference. "If the settlement goes forward, it requires continued aggressive vigilance because these campaigns cost this industry millions of dollars," he said, adding that it is not the same as taking on tuberculosis. "Tuberculosis doesn't make campaign contributions."

Political expenditures by the tobacco industry in California increased in 1994 to $24.6 million, compared with $7.6 million in 1992, according to "Undermining Popular Government," a 1995 report by the Institute of Health Policy Studies at the University of California at San Francisco. California's campaign cost the industry $2 billion in lost sales in its first five years, says the report, co-written by Mr. Glantz.

The national settlement calls for an independent oversight panel made up of marketing and public health experts. "It would not be under the thumb of Congress," said Mr. Novelli of the Campaign for Tobacco-Free Kids.

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The settlement would also require larger warning labels, covering 25 percent of the front of cigarette packs. Nine new messages would take turns on the labels.

"The first wave of warnings will receive more noticeability," said Dean M. Krugman, a prof r of advertising at the University of Georgia in Athens. "Then they're going to wear out."

For warnings to be effective, they must be meaningful to consumers, he said. But under the settlement, "there is no testing program put in place to find out which works."

The New York Times | THURSDAY, JULY 17, 1997

Richmond Times-Dispatch

Friday, July 18, 1997

Bliley says he'll wait for Clinton's review

BY PETER HARDIN
Times-Dispatch Washington Correspondent

WASHINGTON -- Rep. Thomas J. Bliley Jr., the House Commerce Committee chairman, commended the anti-youth-smoking provisions of the landmark tobacco settlement yesterday.

Bliley, a Richmond Republican, also deferred taking a stand on the $368.5 billion settlement with the tobacco industry until after the White House finishes its review.

"I think if you are interested in trying to curb youth access to tobacco products, it does a good job," Bliley said of the settlement, proposed last month by state attorneys general, trial lawyers and tobacco lawyers.

"If you are interested in prohibition (of tobacco products), it won't do the job for you," Bliley added.

He said he wants to talk personally to tobacco workers and growers. He seemed wary of taking a lead on the deal.

"It's premature to take any position until I know exactly what I'm taking a position on, because the White House has already said they're going to seek changes," Bliley said.

The White House is reviewing the settlement. Officials already say they want to strengthen provisions for Food and Drug Administration regulation of tobacco and for penalties if tobacco companies don't slash youth smoking by targeted goals.

"Until the White House endorses it, it's not going anywhere," Bliley said.

Bliley is one of the staunchest allies of the tobacco industry in Congress -- and is well-placed to affect it. His committee is one of several expected to assert jurisdiction over drafted legislation to ratify the settlement.

When the portrait of the new chairman was hung in 1995, it depicted Bliley holding a pipe in his hand, a gesture of defiance against anti-tobacco sentiment in Washington.

His 7th District is home for many workers at Philip Morris USA's large cigarette manufacturing plant in Richmond.

Bliley said he has told Geoffrey C. Bible, chairman and chief executive officer of Philip Morris Cos. Inc., that "the (tobacco) companies are going to have to decide if they can live with the

proposed changes of the White House, and then we'll take it from there."

The outlook for congressional action is uncertain.

"I don't expect anything to happen very quickly," Bliley said. There could be action this year depending on how long Congress stays in session, he said.

In exchange for health concessions and billions of dollars in payments, the settlement would give the tobacco companies immunity from class-action lawsuits and from punitive award damages for past conduct.

The settlement subjects the industry to fines if youth smoking does not drop by 30 percent in five years, 50 percent in seven years and 60 percent in 10 years.

Under the proposal the FDA could regulate nicotine as a drug but could not ban it until 2009, and then only if tough standards were met.

House Speaker Newt Gingrich criticized the settlement proposal this week, describing it to the Wall Street Journal as "some insider deal cut in a back room" that might "create a monopoly, suspend free speech, raise taxes and transfer wealth to trial lawyers."

Washington Dateline | Tobacco: Up in smoke? | Metro and Virginia Stories Index

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THE WALL STREET JOURNAL INTERACTIVE EDITION
FROM THE ARCHIVES
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The Wall Street Journal Interactive Edition -- July 21, 1997

Tobacco Companies Regroup In a Small Brazilian Town

By MATT MOFFETT
Staff Reporter of THE WALL STREET JOURNAL

SANTA CRUZ DO SUL, Brazil -- The **tobacco** industry may be reeling from an antismoking backlash in the U.S., but you wouldn't know it here. This quaint Germanic city on the rolling southern frontier of Brazil has become one of the key staging areas for Big Tobacco's push into the developing world.

Only a few blocks from the leafy beer gardens and cobbled walkways favored by tourists, multinational **tobacco** companies are investing hundreds of millions of dollars to expand what is already the continent's largest tobacco-leaf export center.

In January, B.A.T Industries PLC's Souza Cruz unit opened an $80 million processing plant with an annual capacity of 120,000 tons, greater than that of any other facility in the world, the company says. Just down the road, Philip Morris Cos. is working on its own $220 million expansion. And Universal Leaf **Tobacco** Co. is gearing up a $30 million investment program.

Big increases in per-capita **tobacco** consumption -- up more than 20% in the developing world over the past decade -- and enthusiastic political support have made nonindustrial countries a key element in the **tobacco** industry's growth strategy. "When the antitobacco movement attacks in an exaggerated way in one area, the industry naturally tends to expand someplace else," says Helio Fensterseifer, president of the local **tobacco** industry association. "Certain mutations are created."

If Santa Cruz's **tobacco** industry is growing disproportionately because of the U.S. public health wars, no one here is complaining. Thanks to **tobacco**, the city's 100,000 people boast per-capita income that's three times the national average. City fathers had few problems collecting funds for the restoration of the town's Gothic-style cathedral. And there's enough disposable income left over in Santa Cruz to support a professional basketball team that draws 7,000 fans a game. "Seventy percent of the economy is **tobacco**, and there is tremendous loyalty to the industry for having elevated us, in a sense, out of the developing

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world," says Fernando Kothe, the city's industrial-development director.

Santa Cruz is the hub of a thriving three-state **tobacco** belt, and throughout the area, quality-of-life indicators are superior to national norms in virtually every category but one: Lung cancer rates among men are extraordinarily high, says Mara Brognoli, a public health official in the neighboring state of Santa Catarina.

And there's the rub. "It is very hard for people in a poor country to refuse a bargain like that offered by rich **tobacco** companies, even though it is a bargain that might kill them," says Vera Luisa Costa e Silva, the coordinator of primary cancer prevention for Brazil's National Cancer Institute. Brazil desperately needs the tax revenue, export income and jobs provided by the **tobacco** companies.

Kathryn Mulvey, executive director of a Boston-based activist group, adds that "there is a clear challenge to put in place strong public-health regulations in countries like Brazil" where the industry has a big economic impact.

Santa Cruz reveals in microcosm how far tobacco's reach extends. The industry serves as banker and agrarian extension agent for 160,000 small farmers in the southern region, providing them with seed, fertilizer and technical assistance on credit. But tobacco's role only begins on the farm. When local government was working on the cleanup of a polluted river, the industry was tapped for its technical expertise. When the local university library needed to buy some new bibliographical files, the industry picked up the tab.

Most significantly, B.A.T's Souza Cruz, which controls 83% of Brazil's cigarette market, has teamed up with state education authorities and a local newspaper to operate ambitious programs promoting gardening and reforestation in grade schools. By providing teaching materials and vegetable and tree seeds to schools, the company is practicing good corporate citizenship and doing its part to replace the large amounts of wood consumed in **tobacco** curing ovens, says Souza Cruz executive Roberto Eisenberger.

Company officials don't deal directly with students, and **tobacco** isn't mentioned in the curriculum, he adds. "To kids, Souza Cruz means the 'Arbor Club,' not **tobacco**," agrees Jane Ellvvanger, the assistant principal of a local elementary school.

Critics say the distinctions aren't so neat. "The company talks about reforestation and healthy living,

but the educational literature includes the Souza Cruz symbol: a **tobacco** leaf," says Ms. Brognoli, the health official.

People here have been living side by side with **tobacco** ever since a wave of small farmers from Northern Europe started emigrating here back in the 1850s. Unlike the vast **tobacco** farms of the Carolinas, Brazilian **tobacco** plots tend to average only four or five acres. At the office of the local growers association, pride in ethnicity and in **tobacco** are evident in a placard featuring a smoldering cigarette and the German legend: "Mein Vergnugen, Meine Wahl." ("My Pleasure, My Choice.")

"Thanks to the immigrant culture, you see agriculture conducted on an almost artisanal level," says Guido Knies, export operations manager for Souza Cruz.

But with plenty of help from the companies, small planters like Selvino Mueller have become cogs in the global export economy. The income that Mr. Mueller and his six children earn farming about 15 acres of **tobacco** has provided him with the start-up capital to develop a sideline trucking business. "In other parts of Brazil, you see people being forced to abandon the land for the city," says Mr. Mueller, inspecting a row of **tobacco** seedlings covered with plastic to protect them from the cold. "Never in Santa Cruz."

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THE WALL STREET JOURNAL INTERACTIVE EDITION FRONT SECTION

July 22, 1997

Clinton Panel Is Likely To Bless Tobacco Deal

By JEFFREY TAYLOR and HILARY STOUT
Staff Reporters of THE WALL STREET JOURNAL

WASHINGTON -- The Clinton administration task force reviewing the landmark tobacco settlement probably will recommend that the president embrace the deal, so long as it includes tougher penalties for cigarette companies, greater government authority to regulate nicotine and several other smaller changes.

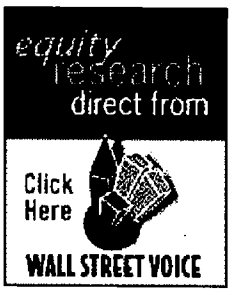
Hoping to finish their review of the proposed $368.5 billion settlement next month, officials have narrowed their demands to two major areas: beefing up provisions asserting the Food and Drug Administration's ability to regulate nicotine and strengthening the penalties tobacco companies would pay if smoking by the young doesn't fall to targeted levels. The task force also will probably offer explicit recommendations for how the money should be spent, including calling for tobacco farmers to receive some compensation for anticipated reduction in demand for their crop. Moreover, the group may push cigarette companies to turn over more documents than the current settlement requires.

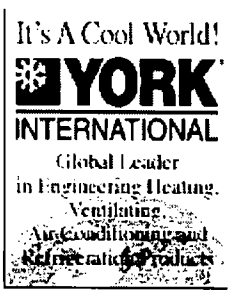
Officials cautioned that they aren't finished with their review and stressed that President Clinton will make the final decision on whether to support the settlement, which was negotiated by state attorneys general, representatives of public-health groups and Philip Morris Cos., RJR Nabisco Holdings Corp. and B.A.T Industries PLC.

The tobacco companies negotiated the deal to settle dozens of lawsuits filed by states to recover Medicaid costs for smoking-related illnesses.

Vice President Al Gore is said to be skeptical of the settlement and unsure that the tobacco industry can be trusted to hold up its end of the agreement. Nevertheless, officials said that even Mr. Gore isn't arguing that the settlement should be abandoned.

In one of the clearest signs that a deal is possible, administration officials said they probably can accept one of the tobacco industry's most important





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priorities -- a provision barring smokers' lawsuits seeking punitive damages for the industry's past behavior.

It isn't clear whether the industry will fight the changes the administration plans to seek. At a briefing with reporters last week, two tobacco-industry representatives said they were willing to consider changes in the FDA provisions, but they defended the settlement's three prerequisites for any enforced reduction of nicotine: that such an action be proved to reduce health risks, that it be technically feasible and that it not lead to a Prohibition-style black market in high-nicotine cigarettes.

President Clinton already has said that the black-market point is unacceptable. Administration officials said they plan to insist on legislation that strongly affirms the FDA's power to regulate cigarettes with a clear and explicit description of the agency's authority over nicotine.

The Teen-Smoking Campaign

The administration also is concerned about parts of the settlement that spell out penalties the industry would have to pay if smoking among teenagers isn't sharply reduced. The settlement prescribes a schedule of reductions, starting with 30% after five years and growing to 50% in seven years and 60% in 10 years. Tobacco companies would have to pay fines of as much as $2 billion a year if they fail to meet these targets but could deduct such payments from their taxes and could petition to get 75% of their money back if they prove they pursued all "reasonably available measures" to reduce youth smoking.

The administration plans a substantial reworking of the youth-smoking penalties. Officials probably will insist on eliminating the tax deduction and may prohibit or sharply restrict the industry's ability to apply for refunds. The administration also probably will require that those penalties be assessed on a company-by-company basis, as was recommended by an antismoking task force headed by former FDA commissioner David Kessler and former surgeon general C. Everett Koop. It also may change the method used to calculate the fines to be sure they are substantial.

While tobacco companies won't necessarily agree with all these changes, the two industry representatives said last week that they are open to discussing different ways to structure the penalties.

The industry delegates seemed convinced that they

were entitled to deduct from taxes the $368.5 billion that they would pay under other parts of the settlement, arguing that all existing legal precedents support allowing such a deduction as an ordinary business expense. The Clinton administration appears likely to leave this deduction intact but to argue that the youth-smoking penalties are different and can't be deducted.

The administration also may seek to force the industry to release thousands of pages of documents that officials believe might help in the effort to understand how to reduce the dangers of smoking. Members of the Senate Judiciary Committee, including Democrat Patrick Leahy of Vermont, and Minnesota Attorney General Hubert Humphrey III argue that cigarette companies shouldn't be given immunity from civil liability for punitive damages until they have released any incriminating documents.

The tobacco industry's representatives said last week that they are willing to establish procedures for the disclosure of many documents but stated that they see no way to do so without immunity from punitive damages for past misconduct.

The administration will suggest clarifications in parts of the agreement it regards as vague, such as how the money for a $25 billion "research fund" will be spent. The administration also will propose changes to some "technical" aspects of the settlement, including those that spell out the sweeping advertising and marketing restrictions that would eliminate characters such as the Marlboro Man, prohibit placement of cigarette brands in movies and require such boldface warnings on cigarette packs as "Smoking Can Kill You."

The settlement calls for tobacco companies to sign a separate "protocol" that spells out these restrictions, but the administration wants to change the protocol's wording to eliminate any potential loopholes.

Separately, Democratic Sen. Frank Lautenberg of New Jersey complained that the Senate Appropriations Committee didn't provide $34 million that the Clinton administration requested to enforce an FDA rule to prevent teens from buying cigarettes. The panel instead provided $4.9 million as part of an agricultural appropriations bill it approved last week; the committee leadership said that it needed the rest of the money for a food-safety initiative and that the proposed settlement would yield enough money for tobacco enforcement.

--David Rogers contributed to this article.

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Saturday, July 19, 1997

At White House, Red Carpet for Tobacco Whistle-Blowers

By HENRY WEINSTEIN, Times Legal Affairs Writer

WASHINGTON--In another sign that President Clinton will push for a toughened tobacco settlement, administration officials on Friday met with four tobacco industry whistle-blowers, introduced them to the media as "American heroes" and said they had listened carefully to their warnings that cigarette makers have not disclosed everything they know about smoking's health hazards.

"I think the major message of today . . . was that we need a lot of document disclosure" by the tobacco industry and that provisions of the pending settlement on this subject must be reviewed "very carefully," Health and Human Services Secretary Donna Shalala said.

Bruce Reed, the president's domestic policy advisor, stressed that the session taught Clinton officials "a great deal about nicotine and what the industry may or may not know about developing reduced-risk cigarettes."

A Senate aide said he thought Friday's event with the whistle-blowers "means that the administration is starting to develop a message that in certain key respects, the settlement is inadequate."

For their part, all four of the whistle-blowers--three of whom formerly worked for Philip Morris Cos. and one who worked for Brown & Williamson Tobacco Corp.--said they view as especially troublesome the settlement provisions that restrict the ability of the Food and Drug Administration to reduce the nicotine content of cigarettes.

The three former Philip Morris scientists--Victor DeNoble, Paul C. Mele and Ian Uydess--all asserted that the industry still held massive amounts of undisclosed scientific data about the hazards of smoking and the impact of nicotine.

"If this industry is going to reinvent itself in a more acceptable fashion," the cigarette companies have to disclose all that information, said Mele, who now is chief officer of research and technology applications at the Walter Reed Army Institute of Research.

"There are so many years of research hidden by the industry," said DeNoble, who added that research into a safer cigarette that he and Mele were working on had been cut short by Philip Morris in the early 1980s.

Uydess, who was an associate senior scientist when he left Philip Morris in 1989 after 11 years at the company, said he

had urged administration officials--including Vice President Al Gore, who attended Friday's meeting--to form a partnership with former industry employees to learn what they need to know to assess the settlement.

"Otherwise, they'll be at the mercy of the industry," Uydess said.

In March 1996, Uydess submitted a sworn affidavit to the FDA that took issue with the 1994 congressional testimony of William Campbell, Philip Morris' then-president, that the company "does not manipulate nor independently control the level of nicotine in our cigarettes."

In his affidavit, Uydess said Philip Morris "routinely targeted and adjusted" the levels of nicotine, the chemical component of cigarettes that leads to addiction, according to scientific studies.

Uydess said he considered the intent of the settlement good. But he cautioned, "we need to be careful not to let the industry control the details."

Jeffrey Wigand, the former research director of Brown & Williamson, is the highest-ranking former cigarette-company employee to turn against the industry. He was fired by the company in 1993 under disputed circumstances.

In a pretrial deposition in 1995, he testified in a lawsuit Mississippi filed against the tobacco companies that Brown & Williamson's chief executive had opposed work on safer cigarettes to avoid the possibility of legal liability on conventional smokes--a charge the company denied.

He was sued by the company, accused of violating confidentiality agreements by talking to the CBS TV news program "60 Minutes," leaking documents to other news organizations and offering himself as an expert witness to anti-tobacco lawyers.

But at the insistence of state attorneys general during the final hours of talks that led to the recent settlement, the company agreed to drop the suit.

The accord--reached with 39 state attorneys general and private lawyers--calls on the industry to pay $368.5 billion over 25 years to settle lawsuits by the states and 17 private class-action suits. The industry also agreed to accept severe restrictions on advertising and marketing, place stark new warning labels on packages and incur up to $2 billion a year in penalties if smoking by minors does not drop dramatically within five years. In return, class-action suits against the industry would be barred, as would punitive damages for prior misconduct.

Before introducing the whistle-blowers at a news conference outside the White House, Reed said that administration officials not only learned a lot of technical information at the 90-minute meeting but also "heard moving stories about how difficult it had been for these four brave men."

Uydess, who broke with his closest friend over turning on Philip Morris, said he was pleased at how seriously the administration officials, particularly Gore, approached the issues they raised.

"It just has to help to have the vice president understand how a cigarette is designed," said another participant in the meeting, speaking on condition of anonymity.

In a related development, Senate Majority Leader Trent Lott

(R-Miss.) said he would recuse himself from any consideration of or vote on the tobacco settlement in Congress because his brother-in-law, Richard Scruggs, a Pascagoula, Miss., attorney who is serving as special counsel to 20 states suing the industry, has played such a key role in the deal.

Times staff writer Janet Hook contributed to this report.

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THE PROMISE OF THE TOBACCO DEAL

The proposed tobacco settlement has been taking a beating. The White House has called for tougher provisions to ensure that the Food and Drug Administration can control nicotine and for harsher penalties for tobacco companies if teenage smoking isn't reduced.

Last week, Republican congressional leaders criticized the deal as one cut secretly in backrooms. Congress, they said, would need months to review the details and make revisions.

It shouldn't be surprising that Congress won't rush to rubber-stamp a proposal to do something it should have done long ago: deal with America's most controversial industry. But the barrage of criticism doesn't mean that three months of negotiations between state attorneys general, tobacco companies, public-health advocates and trial lawyers were for naught.

Despite the deal's flaws, the White House and longtime foes of Big Tobacco like former FDA Commissioner David Kessler view the settlement as a historic event that presents an extraordinary opportunity to change the way the nation deals with cigarettes.

For their parts, the tobacco companies want certainty about their future liability, the states want to be compensated for the cost of caring for indigent smokers and trial lawyers want their fees.

What needs to be done is build on the settlement's strengths and fix its flaws so that it maximizes public-health protection while giving the tobacco industry some of the certainty that it craves.

In the accord, the tobacco companies agreed to pay $368.5 billion over 25 years, submit to FDA regulation and accept restrictions on advertising. In return, their liability against future lawsuits would be limited, although not as much as they had hoped. Class-action lawsuits and those by the states would be barred, but individual smokers still would be free to sue.

The public-health benefits are not hard to discern. To make their payments, the tobacco companies will have to raise cigarette prices by as much as 40 percent, which will reduce smoking by a projected 15 percent in two years.

They'll also be required to drive down teenage smoking rates, meeting targets that climb to a 60 percent cut within 10 years, or face stiff penalties. The states are guaranteed billions for public health and enforcement.

But many of the gains won't be realized if the agreement is full of escape clauses. Thus, the White House is right to insist that the goals for reducing teenage smoking be stringently enforced, if not toughened, and that the FDA's authority to regulate nicotine not be easily circumvented. On the other hand, the pact's unwise, unnecessary assault on the 1st Amendment rights of the tobacco companies should be excised.

Congress often cuts deals behind closed doors that are imperfect. After debate and compromise, sensible legislation and public policy can emerge. There's a chance here to achieve a sane tobacco policy, if all the parties keep focused on the essential ends of the settlement.

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The Wall Street Journal Interactive Edition -- July 23, 1997

Pro-Tobacco Groups Step Up Attacks on a Longtime Foe

By BILL RICHARDS
Staff Reporter of THE WALL STREET JOURNAL

The **tobacco** industry may be preparing to settle its biggest liability lawsuits, but it's playing hardball with its longtime foe Stanton Glantz.

Stan Glantz

This month a new citizens group funded primarily by the **tobacco** industry filed a suit charging that Dr. Glantz committed scientific misconduct in an influential study that has caused an uproar among cigarette makers. The study, funded by the state of California, concluded that smoking bans in 15 communities produced no adverse economic impact on restaurants.

The group, Californians for Scientific Integrity, is accusing Dr. Glantz, a statistician and professor of medicine at the University of California San Francisco, of skewing data in the 1994 study. Its suit contends that public funds were misused in supporting the study and names the University of California and California's departments of health and education as defendants. A hearing on the suit is scheduled Wednesday in state superior court in Sacramento.

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Dr. Glantz's study has been seized on by antismoking advocates to help push through smoking restrictions in New York, San Francisco and dozens of other cities.

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Historically, the **tobacco** industry and its supporters have aggressively opposed any efforts to curb smoking.

Dr. Glantz rocked the cigarette industry when he published some 4,000 leaked Brown & Williamson Corp. documents three years ago. They have been cited in suits charging that **tobacco** companies have ignored decades of evidence that cigarettes are harmful. He has also provided testimony to the Occupational Safety and Health Administration and others that smoking contributes to cardiovascular disease.

Two years ago, the **tobacco** industry's congressional supporters tried unsuccessfully to force the National Cancer Institute to cancel its funding of Dr. Glantz's **tobacco** research.

Pro-smoking forces unleashed their latest attack in March, when a group called the National Smokers Alliance released a critique by Northwestern University economist Michael Evans challenging Dr. Glantz's findings on the economic impact of smoking bans. In it, Dr. Evans charged that Dr. Glantz manipulated some data and ignored other information that would have showed that smoking bans were driving customers away from restaurants.

Last month, the Smokers Alliance, which is mainly funded by the **tobacco** industry, petitioned OSHA to cancel its consulting contract with Dr. Glantz. The group cited Dr. Evans's critique as evidence that Dr. Glantz misrepresented the data in his smoking-ban study and called for an investigation into Dr. Glantz's work for the agency.

An attorney for the Washington-based Alliance also sent a letter to the American Journal of Public Health, which published Dr. Glantz's report on the impact of smoking bans, demanding that the publication disavow the study and turn over its files on Dr. Glantz's research.

"It's really remarkable. I've never seen anything like this kind of attack before," says Christopher Patti, the University of California's chief counsel.

Gary Auxier, the National Smokers Alliance's senior vice president, says his group commissioned its critique of Dr. Glantz's research last year after questions were raised about the accuracy of the findings. He said some cities cited by Dr. Glantz as having total bans on smoking in restaurants did allow customers to smoke in restricted areas. That undercut Dr. Glantz's thesis that no-smoking bans didn't affect restaurant use, Mr. Auxier contends. "We feel [Dr. Glantz's] study is wrong and shouldn't be used to make public policy," Mr. Auxier says.

"This is the latest piece of a pattern," adds a spokesman for the **Tobacco** Institute, the industry's trade association. He accuses Dr. Glantz of using imprecise research to support smoking opponents' "issue du jour." Dr. Glantz denies that the existence of special smoking areas would have a significant impact on his findings.

Last month, in response to the lawsuit, Richard Atkinson, the president of the University of California, ordered his Scientific Advisory Committee to review Dr. Glantz's work. "As far as we know at this point," says Mr. Patti, the university counsel, "Dr. Glantz's work is good research."

Both OSHA and the American Journal of Public Health say they are standing by Dr. Glantz's findings. An OSHA official says the agency's preliminary studies support Dr. Glantz's research. A broader agency study is expected to be completed sometime next year, the official says.

Mervin Susser, editor of the American Journal of Public Health, says he rejected a demand by a Smokers Alliance attorney for peer-review data on Dr. Glantz's article. The demand, Dr. Susser says, is the first of its kind his magazine has received in the more than five years he has been editor.

Dr. Susser says he asked Kenneth Warner, an economist at the University of Michigan's school of public health, to prepare an internal review of Dr. Evans's critique. In an interview, Dr. Warner, who was one of the original peer reviewers of Dr. Glantz's study, called Dr. Evans's critique "slanted" and "much ado about nothing."

"This seems like a two-sided strategy by the **tobacco** industry," Dr. Warner adds. "They're playing good guys in the settlement negotiations with the government, and they're playing the game harder than ever with Dr. Glantz."

Dr. Glantz calls the Alliance's attack on his work "harassment" and says Dr. Evans's critique failed to discredit his findings. "They're trying to tie me down and make me an untouchable," Dr. Glantz says. "They're saying to health departments around the country, 'If you quote Stan Glantz we'll make your life miserable.' "

Mr. Auxier denies that his group is out to silence Dr. Glantz. "We want the record corrected," he says. "We think everybody ought to take a very hard look at how Glantz played with this study."

The Smokers Alliance went public this spring with Dr.

Evans's critique, rather than submitting it to a scientific journal, because Dr. Glantz's study has been cited with increasing frequency in cities considering smoking bans, Mr. Auxier says.

Scientific journals like Dr. Susser's often take months submitting proposed articles to peer review, he adds. "We don't have time to wait." But Mr. Auxier says his group did submit Dr. Evans's critique for publication in Cornell University's Hotel and Restaurant Administration Quarterly.

Glenn Withiam, the Quarterly's executive editor, says he received the critique but didn't realize the Smokers Alliance wanted it published. "We thought they were sending it to us just for information purposes," Mr. Withiam said. In any case, he adds, "This falls outside our ballpark." The Quarterly doesn't publish critiques of studies originally published elsewhere.

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July 28, 1997

Minnesota Official Invites Congressional Scrutiny of Tobacco Industry

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By BARRY MEIER

MINNEAPOLIS -- Earlier this month, trucks pulled up to a warehouse here already swollen with cigarette company records and unloaded more than 200,000 documents that may represent the tobacco industry's best-kept secrets and its biggest vulnerability.

The new documents have been seen by only a handful of people who are legally barred from speaking about them. But lawyers for the state of Minnesota, which is suing the tobacco industry, claim that the documents, which have only been disclosed to them in summary form, contain evidence of a decades-long conspiracy by cigarette makers and their lawyers to suppress evidence and deceive the public about the dangers of smoking.

In the wave of smoking-related lawsuits filed by states in recent years, Minnesota can claim two distinctions. In the talks leading to last month's $368.5 billion tobacco settlement proposal, its attorney general, Hubert H. Humphrey III, emerged as the plan's principal opponent. After losing that round, Humphrey seized on a unique aspect of Minnesota's case -- no other state has plumbed the padlocked files of the tobacco companies with such intensity and single-mindedness.

Two weeks ago, Humphrey, in an effort to influence the congressional debate over the proposal, urged the Senate Judiciary Committee to subpoena key records from his state's case so that Congress could review them as it considers turning the proposal into legislation.

"I want Congress to know the facts to the greatest extent possible before a bargain is made with the American people," Humphrey said in an interview.

Critics of Humphrey, who is running for governor, see his proposal as little more than political grandstanding and a continuation of the obstructionist role that he played during settlement talks. But his suggestion has not fallen on deaf ears.

Sen. Orrin Hatch of Utah, the Judiciary Committee's ranking Republican, and Sen. Patrick Leahy of Vermont, its ranking Democrat, have said they want to see the most important Minnesota documents. And even those involved in crafting the plan, like Stanley Chesley, a class-action plaintiffs' lawyer, have recently scrambled to provide some 200 selected industry documents to committee members.

Under the proposed settlement, cigarette companies would be required to disclose health-related documents except those which they claim involve trade secrets or are protected by attorney-client privilege. But the comments of Humphrey have broadened the debate from criticisms of the records-disclosure provision to larger questions about which industry documents Congress should have as it weighs the monetary value and public health benefits of the agreement.

Recently, for example, Leahy said he could not back a settlement that provided cigarette producers with immunity against punitive damages and class-action lawsuits, as the proposed settlement would, unless they reveal everything they know about their products' dangers.

"I offer one simple and direct principle to guide us," Leahy said at a recent Judiciary Committee hearing. "No immunity without full disclosure."

Industry officials and others involved in the accord said demands for document disclosure are unrealistic. Tobacco companies, they said, must shield some documents because of future lawsuits. And one industry lawyer said new documents suggesting deceptive activity by tobacco companies would not produce revelations but would only reinforce existing public opinion.

"The bad stuff about the industry is already out there," said the lawyer, who spoke on the condition of anonymity.

Whatever the case, the breadth of industry documents collected by lawyers for Robins, Kaplan, Miller and Ciresi, a firm here that represents the state and Blue Cross and Blue Shield of Minnesota, is unrivaled in the history of tobacco litigation. For example, in all previous smoking-related lawsuits, Brown & Williamson Tobacco Corp., a subsidiary of BAT Industries PLC, produced about 5,000 records, said David Bernick, a company lawyer. But since the start of the Minnesota case in 1994, the cigarette maker has disclosed four million pages of documents.

After reviewing some 30 million pages of documents produced by all major tobacco companies, lawyers for the state eventually chose about 2 percent of those records to form the basis of their lawsuit, which seeks to recover billions

of dollars in Medicaid money spent treating smoking-related illnesses. The document collection also was used as part of the underpinning of similar Medicaid-related lawsuits filed by other states.

Because of a court order in Minnesota affecting the confidentiality of the industry documents, few of the records have been made public. Last year, lawyers for the state filed a now-publicized document written in the early 1970s by researchers for R.J. Reynolds Tobacco Co., which is owned by RJR Nabisco Holdings Corp. It suggested that the popularity of the Philip Morris Cos.' Marlboro brand was attributable to the company's manipulation of nicotine levels.

Peggy Carter, a spokesman for R.J. Reynolds, said the researchers were simply speculating on the reasons for Marlboro's popularity, not concluding that Philip Morris was manipulating nicotine. A spokesman for Philip Morris, which has denied that it manipulated nicotine levels, had no comment on the document.

Lawyers in the Minnesota case have established another document repository in England to house records collected in Europe. They also have uncovered evidence that tobacco companies shifted records to operations abroad or destroyed potentially incriminating documents. And several months ago, Justice Department officials, who are conducting a criminal investigation into possible fraud and nicotine manipulation by tobacco companies, came here to review lawsuit documents.

But the latest battle in the Minnesota case has focused on documents that involve exchanges between tobacco industry executives and their lawyers. Normally, such communications are shielded from disclosure, but the attorney-client privilege is lost if the plaintiffs in a case can show that lawyers aided in the commission of a crime or fraud.

In May, a state judge here found that Minnesota lawyers had produced initial evidence of such conduct and ordered cigarette makers to turn over the documents for court inspection and possible release. That decision has been appealed. Industry lawyers maintain that the documents, which cover such areas as health research and youth marketing, do not contain dire secrets.

"Since the day this lawsuit has been filed there have been allegations about industry secrecy about hazards," said Bernick, the Brown & Williamson lawyer. "But the state has still been unable to tell us what we concealed about the dangers of cigarettes."

Michael Ciresi, a lawyer for the firm that represents the state, said the documents will speak for themselves when the state's case goes to trial in January. Though other state courts have also initially found that industry executives and lawyers engaged in fraud, none of the pertinent documents has been made public.

"When this information comes out it will create legal exposure for both companies and individuals that they do not want to face," Ciresi said.

Just where reality lies between such legal swordplay is anyone's guess because most of the key Minnesota documents have not been seen. And despite Hatch's recent comments that he might seek to subpoena some of the Minnesota documents, it is not clear how many his panel will be able to obtain.

An order in the Minnesota case permits government agencies to review confidential industry documents so long as the records are not publicly disclosed. But one industry lawyer said cigarette companies would resist subpoenas for documents that they claim are protected by the attorney-client privilege.

If Humphrey and cigarette company officials represent opposite poles on the document disclosure issue, there are those who think that a middle ground should be reached before a tobacco settlement is approved by Congress.

Tom Miller, the Iowa attorney general, said that he believes that the settlement provisions that provide individuals with a legal mechanism to challenge industry claims of document confidentiality are too cumbersome, costly and time-consuming.

"The cigarette companies have a tremendous history of fighting any document release, so who would have the incentive to invest the resources to go through this process?" Miller asked.

But Miller, who has given his qualified support to the proposal, said Congress should take up the document issue cautiously, so that in seeking to expand its knowledge it does not get distracted from the larger goals of the proposal.

"There could be some good that comes out of this," he said, referring to calls for greater document release "so long as its does not divert attention from the broader settlement."

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July 29, 1997

Documents Could Stall Florida Tobacco Accord

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By BARRY MEIER

On the eve of a major smoking-related lawsuit against the tobacco industry, a legal confrontation is looming between Florida officials and cigarette company lawyers over the disclosure of documents.

Robert Butterworth, the Florida state attorney general, said on Monday that he would not settle the state's Medicaid-related lawsuit against tobacco producers unless they drop their efforts to prevent the release of eight sensitive Liggett Group documents.

"Unless they show good faith and let these documents go there is no way they're going to see me at a bargaining table," Butterworth said.

The Liggett documents, which cover strategy talks among tobacco industry lawyers, were divulged by the cigarette producer as part of a separate settlement agreement it reached earlier this year with state attorneys. But since then, other tobacco companies, which reached their own $368.5 billion settlement proposal last month with state officials, have gone to court to block release of the papers, claiming they are covered by the attorney-client privilege.

While the proposal is pending, states that have sued the industry can pursue those lawsuits or settle them. Jury selection in Florida's lawsuit is set to begin Friday in West Palm Beach. The state is seeking to recover billions of dollars in Medicaid expenses for treating smoking-related illnesses.

Normally, exchanges between lawyers representing different clients are protected from disclosure unless the plaintiffs can show that the lawyers were involved in a crime or fraud. So far, several judges in Florida have ruled the documents produced by Liggett contain evidence that industry lawyers were involved in such conduct.

Cigarette companies have appealed those decisions, and one industry official said they would continue to do so despite Butterworth's stance.

The differing positions of Butterworth, who helped negotiate the tobacco proposal, and cigarette company executives raise the possibility that Florida's Medicaid case could go forward despite efforts in recent weeks to negotiate a settlement. A lengthy trial could complicate congressional approval of the tobacco accord.

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July 29, 1997

Hard-Core Smokers, Last-Ditch Remedies

By GINA KOLATA

ROCHESTER, Minn. -- They stay in a small unit at the end of the hall on the 10th floor of Methodist Hospital here -- the incorrigible cigarette smokers. Five men and three women, all at the end of their rope, each having paid $3,000 to spend eight days living in a bland hospital room of the Mayo Clinic, and each fervently hoping that an intense residential program will make it possible to quit.

There is Russell Spence, a lanky trial lawyer from Spring Valley, Wisc., who has been smoking for 47 years, since he was 13, who watched his cigarette-addicted father develop lung cancer when he was 50 and die of a heart attack at the age of 51, his cigarette-addicted brother die of emphysema and his father-in-law die of lung cancer. Spence has had two heart attacks. Yet still he smokes.

There is vivacious Melissa Phillips from Richmond, 35, the youngest of the group, a smoker since she was 16, with a sensuous relationship with tobacco.

"Cigarettes were my lover," Ms. Phillips said. "They embraced me when I needed to be embraced. They laughed with me when I was happy. They gave me a feeling of control when all else was out of control. There was no time when they were not enjoyed by me."

Although her mother is a smoker with chronic obstructive pulmonary disease and although Ms. Phillips has developed asthma and her chest hurt from smoking, she could not stop.

There is a 68-year-old retired military man from Maitland, Fla., who insisted on anonymity. He said he had started smoking as a joke. When he was 12, he recalled, he and his brother and a few friends climbed to the top of a beech tree and lit up, and a neighbor thought the tree was on fire and called the fire department. Now, 56 years later, he is desperate to quit, so short of breath that it is hard to walk up a flight of stairs or reel in a fish.

The program's patients are enthusiastic, insisting that this time they really will break their smoking habit. But the odds are not with them. Although the doctors and counselors directing the Mayo Clinic's nicotine dependence clinic use every method that has ever shown success -- nicotine patches and sprays, a drug that acts on the chemical pathway stimulated by nicotine, counseling and

group dynamics -- only 43 percent of the patients who go through the program stop. Yet it is one of a handful of in-patient programs for nicotine addition in the United States, and its results are among the best, addiction experts says.

These days, in the United States, many who could stop smoking already have.

"The sense of our counselors is that almost on a year-by-year basis, the patients are harder to treat," said Dr. Richard Hurt, an ex-smoker who directs the Mayo Clinic's nicotine dependence program. "They have more co-morbidity, more alcoholism, more psychiatric problems, more medical problems. Back in the 1960s, over half of all adult men were smokers. Now it's 27 percent; everyone else has stopped smoking or died."

On average, Hurt said, the program's patients have tried to stop at least eight times and almost 80 percent have health problems directly related to their smoking. Some were on waiting lists for transplants but were taken off because they could not stop smoking. Emphysema patients have come to the clinic wheeling their oxygen canisters.

This raises the question, why is it so hard for some people to stop smoking? Is this stubborn addiction what decades of inhaling nicotine-laden cigarette smoke does to people? Or are these intransigent people the outliers, the extreme edge of the bell curve? In a society in which so many adults have tried cigarettes, why did some embrace smoking and others shun it?

The first surprise, to researchers at least, is how variable cigarette addiction can be. Few were prepared when a recent study found that some people can smoke regularly, even daily, and never become addicted.

"It kind of violates what someone has labeled the exposure model of drug abuse: as long as you have a certain amount of exposure, you're going to get addicted," said the study's author, Dr. Saul Shiffman, a psychologist at the University of Pittsburgh.

The 65 nonaddicted smokers he studied had each smoked more than 50,000 cigarettes.

"We didn't study people who just smoked on weekends," Shiffman said. "We deliberately chose people who smoked pretty regularly.'

No one knows what share of smokers can take cigarettes or leave them, suffering no withdrawal symptoms when they abstain. But many researchers say they believe that the nonaddicted smokers are the exception. Most who start smoking become addicted but can quit. And at the other extreme are smokers like those at the Mayo Clinic.

Ms. Phillips smoked though a recent bout with pneumonia.

"I literally was gasping for breath," she said. "You feel like you're intelligent, you have an MBA, you've turned companies around." But she said, "Addiction is not rational."

In 1986, less than six months after Spence had his first heart attack, he had another. He was working with a chain saw -- and smoking a Marlboro. He had a triple bypass.

"When I got back to my private room, I took my pole and all my equipment and went to the lounge," he said. There he picked a cigarette butt out of an ashtray

and lit it. A nurse saw him and looked away.

He was back at the hospital a few months later when his bypass graft closed, tended by the same nurse. Spence said she looked at him and said, "I want you to know how sad I felt seeing you take cigarette butts out of the ashtray. He added, "We both cried."

Clearly, most smokers are not that desperate, leaving the crucial question of why cigarettes are so alluring to people like Spence.

Now to scientists' surprise, their hypotheses about addicted smokers turn out to have been wrong. The prevailing notion had been that many of those who become addicted found cigarettes irresistible from the start, that they knew from the first time they lit up that cigarettes were the drug for them.

Few were prepared for findings by Dr. Ovid Pomerleau, director of the behavioral medicine program at the University of Michigan. Pomerleau found that people who become addicted to cigarettes almost always feel sick, nauseated and dizzy when they first try to smoke.

"It turned upside down what I thought was the case," Pomerleau said. "I thought that if you get sick behind grandpa's barn, that's the best way to guarantee that you won't become nicotine-dependent. Now it looks like getting sick behind grandpa's barn is not going to do it."

On the other hand, Pomerleau and others are finding, there are some features that characterize addicted smokers. They are likely to be depressed, they are likely to be current or former alcoholics, they often have attention deficit disorder, they are likely to be uneducated and poor. Even the teen-agers who smoke fall into predictable categories.

Dr. Michael C. Fiore, the director of the Center for Tobacco Research and Intervention at the University of Wisconsin in Madison's medical school, said that about 13 percent of college graduates smoke but that about 40 percent of people with only high school degrees smoke.

Dr. Lloyd Johnston, the program director of the Institute for Social Research at the University of Michigan, said, "For some time, it's been the case that cigarette smoking has been directly correlated with educational achievement." This means, he said, that "the people who were going on to get more education weren't smoking as kids."

In his 1996 national survey of 18,000 eighth graders, Dr. Johnston found that 39.2 percent of eighth-graders who did not expect to graduate from a four-year college had smoked in the last 30 days. But 18.2 percent of those who expected to get a college degree had smoked.

The social-class effect, with smokers concentrated in the lower classes, may have a great deal to do with attitudes toward smoking but may also be related to some of the same factors that increase the risk of becoming addicted -- depression, attention deficit disorder, alcoholism.

"There may be a downward social mobility associated with these factors," Pomerleau said, adding, "We are talking about serious conditions" that could handicap people in many lines of work.

Hurt said that about 40 percent of his clinic's cigarette-addicted patients were alcoholics. Yet these smokers were not typical -- they had to take eight days

away from work and pay $3,000 out of their own pockets to come to the clinic, factors that preclude most poor people.

Although no one knows exactly why some smokers become so addicted, it is thought to involve spikes of nicotine hitting pleasure centers in the brain that use dopamine, a neurotransmitter. Studies have shown that tools like counseling, along with nicotine patches, gum, and inhalers and nasal sprays, can help smokers quit. So can buproprion, an antidepressant drug that increases dopamine levels.

Yet treatments are far from ideal.

"We're kind of where we were 50 years ago when we only had penicillin and sulfa drugs to fight infections," Hurt said. "The devices we have are kind of crude."

On Wednesday afternoon, Hurt met with the eight people who were trying to quit smoking. One man asked whether he would ever be able to take a puff of a cigarette again.

Hurt responded: "The overpowering urge to smoke is not behavioral. It is not a habit. It is probably a biochemical urge."

The urge gradually diminishes as smokers abstain, but once a formerly hopelessly addicted smoker takes a single puff, the urge to smoke roars back, stronger than ever.

"I would say to each of you in this room that it is probably not possible to have just one, not ever," Hurt said. "I wouldn't want to try it, even after 25 years of abstinence. It's just not worth it."

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July 30, 1997

Scrapping of Tobacco Accord Is Urged by Kessler and Koop

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By SHERYL GAY STOLBERG

WASHINGTON -- Two of the nation's most respected public health experts urged Congress on Tuesday to forgo the $368.5 billion legal settlement with the tobacco industry and instead draft legislation that would focus solely on cutting smoking rates, without giving cigarette manufacturers any concessions.

"You can do better than the settlement," Dr. David Kessler, former commissioner of food and drugs, said in testimony before the Senate Commerce, Science and Transportation Committee.

Kessler was joined by former Surgeon General C. Everett Koop, who told the lawmakers that rather than tinker with the pact, they should "face the scourge of tobacco for what it is and legislate a tobacco policy that holds the industry accountable."

Both Kessler and Koop had been critical of the tobacco accord before, most recently as co-chairmen of a panel of public health experts that in June issued a detailed critique of the settlement, calling for it to be strengthened in seven areas. But the criticism on Tuesday was their harshest to date, and provoked a strong backlash from some of the state attorneys general who helped negotiate the agreement.

"This shows that they progressively are going more and more into fairy-tale land," Grant Woods, the attorney general of Arizona, complained in an interview after he himself testified before the committee on Tuesday. "They are contemplating prohibition, and that's just not going to happen in this country."

The complex tobacco agreement, reached this spring after 12 weeks of painstaking negotiations, would settle lawsuits filed by 39 states, and 17 class-action suits, in exchange for billions of dollars in payments by the cigarette industry over the next 25 years. The industry would win immunity from future class actions; in exchange, it would pay for public health and smoking cessation programs and submit to regulation by the Food and Drug Administration, as well as to strict limits on cigarette advertising.

For the pact to take effect, Congress must codify it in federal legislation. But Kessler suggested on Tuesday that there was no need for lawmakers to consider immunity. He advised the committee to reorient the debate by putting public health priorities ahead of the manufacturers' desire for financial stability.

"You don't need the industry's permission; you don't need the industry's money," he told the committee. At another point, he said, "All you need is the nation's collective courage."

But several senators were openly skeptical of the two doctors' testimony. And when pressed, Koop allowed that the settlement, if strengthened in the fashion suggested by the public health panel, would be preferable to no public health improvement at all.

"We have to deal with the art of the possible," said Sen. John Breaux, D-La., "and not dwell in the world of the impossible."

Though the political climate surrounding tobacco has been changing amid disclosures that the industry has known for years smoking was addictive, the tobacco industry still holds strong sway in Congress. As Sen. Olympia Snowe, R-Maine, noted in an interview, lawmakers just this week rejected President Clinton's proposal to raise the federal tobacco tax by 20 cents a pack, to 44 cents, and instead settled on a compromise to increase it by 10 cents in 2000 and 5 cents more in 2002.

"They're offering an interesting question, whether we should just move ahead and address the health issues," Ms. Snowe said of Kessler and Koop. "The question is what is feasible, what is realistic."

The hearing on Tuesday was just one of what is expected to be a long series of proceedings to enable lawmakers to scrutinize the tobacco pact; another hearing, before the Senate Judiciary Committee, is scheduled for Wednesday.

If the disparate views of the Commerce Committee are an indication, agreement on any settlement may be difficult to reach.

Sen. Wendell Ford, D-Ky., a tobacco-growing state, argued that rather than weakening the FDA's hand, as most experts believe, the accord actually grants the agency more power than it could have achieved through regulation. "To get a little," he argued, "the industry gave a lot."

Sen. Bill Frist, R-Tenn., another tobacco state, complained that farmers had not been represented at the negotiating table, prompting Kessler to propose that the industry be required to set aside economic redevelopment money for farmers who would have to adjust to a decline in demand.

And Sen. Ron Wyden, D-Ore., vowed to fight for restrictions on the tobacco companies' ability to market to children overseas.

"This settlement is called a global settlement," Wyden said. "But as far as I can tell, the only thing global about it is it gives U.S. tobacco companies the chance to hook millions of kids around the world."

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To Anti-Tobacco Advocates, Issue Is Anything but Settled

Koop, Kessler Propose Control Plan; Senate Skeptical

By John Schwartz
Washington Post Staff Writer
Wednesday, July 30, 1997; Page A04
The Washington Post

Two of the nation's most prominent anti-tobacco advocates, in their strongest condemnation yet of the proposed national settlement with the cigarette industry, yesterday urged lawmakers to reject the plan and instead implement an aggressive tobacco control program.

"The settlement gives the tobacco industry virtually everything it wants, but shortchanges the public health," former surgeon general C. Everett Koop told the Senate Commerce, Science and Transportation Committee. It was the latest in a series of congressional hearings on the proposed deal.

Koop and former Food and Drug Administration commissioner David A. Kessler urged senators to fashion a new tobacco control policy along the lines of recommendations from a panel they led.

That six-point tobacco control plan would give the FDA explicit authority to regulate nicotine, prohibit tobacco marketing to children, impose severe financial penalties if targets for reducing youth smoking are not met, ban smoking in all public places, and create extensive public education programs and help for addicted smokers and tobacco farmers.

The testimony was met with strong skepticism by several members of the committee. Sen. Wendell H. Ford (D-Ky.) said that the blueprint offered by Koop and Kessler constituted "nothing more than a back-door prohibition" on tobacco and would make it "pretty hard to buy a tobacco product at all." Ford argued that the public smoking restrictions recommended were so strict that "I submit that your own backyard could be off limits."

Several senators chided Kessler and Koop for making recommendations that they called unrealistic. "If you put

all of the antis on this package, it's going to fall of its own weight," Ford warned. Sen. John Breaux (D-La.) said, "Fortunately or unfortunately, we have to deal with the art of the possible -- not the world of the impossible."

Under the proposal announced in June, the 40 states suing the tobacco industry to recover tobacco-related health care costs would agree to end their suits in return for an estimated $368 billion over 25 years. The deal, if passed by Congress, would give the industry protection from all but individual lawsuits and would prohibit punitive damages against the companies for past acts. In return, the industry agreed to comprehensive restrictions on advertising and marketing and to fund tobacco education and smoking-cessation programs.

Kessler, now dean of the Yale University School of Medicine, challenged members of the committee to go beyond the settlement proposal. That deal would "keep the industry booming and profitable," Kessler said.

"If this is the best you can do, do it" -- but "history will not look lightly on your timidness," Kessler said.

Kessler also urged lawmakers to examine some of the internal industry documents gathered by Minnesota in its lawsuit against the tobacco industry. He noted that R.J. Reynolds, after agreeing to withdraw the Joe Camel advertising campaign, has initiated a new campaign that he said appeared to target the 18- to 24-year-old market. Holding up a copy of Spin magazine containing the new ads, he asked "Where is the moral outrage?"

Attorneys General Michael Moore of Mississippi, Christine Gregoire of Washington state and Grant Woods of Arizona defended the proposal, which they hammered out in three grueling months of negotiations with the industry. They warned that tobacco company support was key to passage of any proposal.

Committee Chairman John McCain (R-Ariz.), however, said that what once seemed impossible in Congress might now be possible. "The whole terrain has changed dramatically," McCain said.

Kessler raised the hackles of trial lawyers observing the hearings when he said that he would rather see money from any settlement directed to helping tobacco farmers than to paying attorneys fees. Washington lawyer John P. Coale, sitting at the back of the hearing room, said the comment was "outrageous. . . . When the lawyers filed the suits and supplied the documents they were unable to get for 50 years, we were their great friends. Now they take gratuitous shots at the lawyers for short-term political benefit."

@CAPTION: C. Everett Koop, left, and former FDA commissioner David A. Kessler urge senators to shape

new tobacco control policy.

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THE WALL STREET JOURNAL INTERACTIVE EDITION
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July 30, 1997

Kessler and Koop Urge Clinton To Review Tobacco Documents

By JEFFREY TAYLOR
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON -- The two public-health officials most strongly identified with the antitobacco movement urged the Clinton administration to review industry documents before endorsing the proposed tobacco settlement.

"It would be a major mistake for anyone to sign onto a settlement without knowing the facts," former Food and Drug Administration Commissioner David Kessler said. In a wide-ranging interview, he and fellow tobacco foe C. Everett Koop, a former U.S. surgeon general, urged the administration to insist on a thorough review, possibly by the Justice Department, of industry documents now sealed under attorney-client privilege.

David Kessler

The tobacco industry has resisted the efforts of state attorneys general and others to force disclosure of millions of pages of sensitive documents; in the proposed settlement, it is seeking immunity from liability for punitive damages based on past misconduct. A growing body of critics, including Drs. Kessler and Koop, want to deny such immunity until after the industry has divulged its secrets.

The Clinton administration is expected to endorse the proposed $368.5 billion settlement while urging changes to some of its more controversial provisions, including those governing the FDA's authority to regulate nicotine and the penalties tobacco companies would pay if youth smoking doesn't decline. But administration officials have said they can accept the tenet the tobacco industry regards as most indispensable: immunity from punitive damages in civil lawsuits.

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C. Everett Koop

Drs. Koop and Kessler said they don't regard the immunity provision as a "deal breaker" and wouldn't lobby Congress to scrap the settlement if the administration doesn't agree to a review of the sealed industry documents. Nonetheless, they said, they have grave reservations about the immunity provision: "The tobacco industry has always been able to get around or hurdle over measures we set up to try to stop them ... to make victories of steps we thought would set them back," Dr. Koop said. "We don't want that to happen again here."

Earlier Tuesday, Drs. Kessler and Koop testified before the Senate Commerce Committee, the second congressional panel to hold hearings on the proposed settlement. The two asked lawmakers to start from scratch in considering any tobacco-related legislation. They urged Congress to write fresh bills pursuing public-health goals and incorporating their task force's findings.

Senators from tobacco states mounted a vigorous defense of tobacco farmers, who they said had been left out of the negotiations that led to the settlement.

Democrat Wendell Ford of Kentucky and Republican Bill Frist of Tennessee argued that the pact would lead to diminished demand for U.S. tobacco and unfairly penalize farmers.

"Those who negotiated this agreement simply ignored the tens of thousands of farmers and thousands of farm communities throughout the South that economically depend on tobacco," Sen. Ford said.

The findings of the Koop-Kessler task force, he said, contain "extreme proposals that would undo the delicate balance achieved in the settlement negotiations."

Dr. Kessler said he doesn't oppose proposals to compensate farmers for settlement-related losses. "I would much rather see money going to them than to lawyers" for smokers who have sued tobacco companies, he said.

Few on Capitol Hill expect Congress to approve the tobacco settlement this year. As many as seven congressional committees can claim jurisdiction

over it and are expected to hold hearings on various aspects throughout the fall.

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DUMP TOBACCO DEAL, CRUSADERS URGE SENATORS

'PACT SHORTCHANGES NATION'S HEALTH,' SAYS EX-SURGEON GENERAL

By Pat Widder, Washington Bureau. Tribune news services contributed to this report
Web-posted Wednesday, July 30, 1997; 6:13 a.m. CDT

Dateline: WASHINGTON

Two of America's top public health advocates who have spent years waging their own tobacco wars, urged Congress Tuesday essentially to scrap the landmark $368.5 billion tobacco settlement and start over.

"This pact shortchanges the nation's health," said former U.S. Surgeon General C. Everett Koop.

The voices of Koop and David Kessler, former head of the Food and Drug Administration, have a clarion ring because their battlefield credentials in this war are impeccable.

Their dissatisfaction with the proposed deal, negotiated between tobacco companies and 40 states suing them to recover health-care costs of treating sick smokers, by no means dooms it on Capitol Hill, where lawmakers are just starting to grapple with the issues in the settlement, which requires congressional approval.

But it does raise the ante. Koop and Kessler are saying, in effect, that the choices aren't limited to rejecting the agreement or simply improving it at the margins.

Congress should start by considering what is best for the public health of the nation, Kessler told the Senate Commerce, Science and Transportation Committee in its first public hearing on the settlement reached June 20. At least a half-dozen other congressional committees have begun to scrutinize the deal or plan to do so this fall.

Kessler cited five principles that should guide the nation's tobacco policy: Let the FDA regulate nicotine; keep the industry

from marketing its products to children; impose penalties if it continues to target children; ban smoking in public places; and pass an excise tax to fund education and cessation programs.

"You don't need the industry's money. You don't need the industry's permission," Kessler said. "You can accept the settlement, tinker with it. That will make some difference but will keep the industry booming and profitable. Or you can do it right without ceding an inch to those forces that have lied and killed for years."

Sen. Wendell Ford (D-Ky.) characterized the Koop-Kessler views as "nothing more than back-door Prohibition. I submit your own back yard could be off-limits (for smoking)."

Ford, who represents a state with numerous tobacco farms, added, "These extreme views have the potential to undo the delicate balance" of the settlement.

The settlement--$368.5 billion over 25 years--requires the industry to fund the states' costs for treating ill smokers, smoking cessation and education programs. The industry also will submit to FDA regulation. The agreement sets targets for reduction in teen smoking levels and imposes penalties if those targets aren't met.

In exchange, current class action litigation against tobacco companies is resolved; future class action suits and punitive damages in individual suits will be banned. Some of those provisions require acts of Congress.

As part of the settlement, the states and tobacco companies have entered into consent decrees that sharply restrict the advertising and marketing of tobacco products to youths, agreements that sidestep possible constitutional free-speech challenges.

Kessler first proposed regulating nicotine as a drug three years ago, and Koop waged a campaign against smoking while surgeon general in the 1980s. Together, they headed the 23-member group commissioned by Congress to deliver a public health blueprint for waging the battle against smoking.

Koop and Kessler on Tuesday backed Minnesota Atty. Gen. Hubert Humphrey III's quest for more secret industry documents as he prepares for that state's trial against tobacco companies, due to begin Jan. 19.

"We have to know more about what's hidden in those secret documents," Koop said.

Humphrey, who also testified Tuesday, is urging Congress to unleash its subpoena powers to get at some of those documents that, he says, will determine what tobacco executives knew and when they knew it about the dangers of smoking.

Humphrey is opposed in this by the other attorneys general, who contend the information contained in the confidential documents isn't worth the time--and uncertain outcome--of those efforts.

Mississippi Atty. Gen. Michael Moore, who also testified Tuesday, said, "The best way to get hold of those documents--now and not five years from now"--is through the settlement mechanism.

Regarding Kessler's five points, Moore said, "You've been debating this issue for 40 years. If you can pass those five, pass 'em. But if you can't," the settlement is the best opportunity to accomplish those public health goals.

"I want to put something together that works," said Ford, who is well aware his state's own tobacco farmers would be hurt by the deal. "If you go too far, it won't work."

"The question is the price you pay," responded Kessler.

Another tobacco-state senator, Bill Frist (R-Tenn.), complained that farmers had not been represented in negotiations.

Kessler suggested the industry set aside economic redevelopment money to help farmers adjust.

"We have to deal in the real world here," Arizona Atty. Gen. Grant Woods said. He noted that the settlement restricts tobacco advertising and marketing in a way that could never be imposed by the FDA, Congress or the courts.

Sen. John Breaux (D-La.) reminded fellow senators, "We're all here today not because of any effort in Congress but as the result of private negotiations. They've done something no one in Congress has been able to put together."

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Senators urge more money in tobacco deal

Proposal affects industry too little, witness says

07/31/97

By George Rodrigue / The Dallas Morning News

WASHINGTON - Key senators said Wednesday that tobacco firms may have to offer significantly more money if they want Congress to approve a deal that would give them immunity from potentially ruinous legal damages.

The senators spoke after an expert witness testified that the $368 billion tobacco litigation settlement now awaiting federal approval isn't as rich as it appears and probably would cover less than half the government's true cost of providing health care for ailing smokers.

Also, cigarette makers could fully cover their outlays by boosting prices 62 cents per pack - an amount that would still leave their products relatively favorably priced, the expert said.

"The amount of compensation to be paid. . .is far too low compared to the health damage that cigarettes cause," said Sen. Edward M. Kennedy, D-Mass.

Judiciary Committee Chairman Orrin Hatch, R-Utah, predicted bipartisan support for requiring more money from the industry.

Mr. Hatch, who has taken a leading role in the Senate's review of the tobacco deal, also predicted that Congress would insist on removing the settlement's limits on the Food and Drug Administration's ability to regulate nicotine, the addictive substance in tobacco.

President Clinton has made a similar demand for unfettered FDA authority, and White House aides have said the settlement's financial terms may be too kind to the industry.

Industry lawyers have said they might be willing to accept some changes on the nicotine issue. Financially, however, tobacco firms are taking a harder line.

"There is not a whole lot of give there," said an industry representative who spoke on condition of anonymity.

The debate has confronted politicians with a dilemma: whether to take what the tobacco firms offer or push for an ideal solution that, owing to tobacco's political clout, might never become reality.

Many public health leaders have called the current agreement, struck between industry leaders and a consortium of state and private attorneys, a sweetheart deal.

Tobacco firms would get shelter from potentially ruinous punitive damage lawsuits and an annual ceiling on damages in conventional suits. In return, they would accept greater federal regulation and tighter advertising restrictions. And they would pay billions of dollars annually for public health and anti-tobacco programs.

Even critics say the package is a great improvement over the status quo because the industry has a long record of fending off regulation and has never paid any damages in a smoking lawsuit. But they also say it is weaker than steps taken by many other nations and far less than what the U.S. government owes its citizens.

"This settlement gives the tobacco industry practically everything it wants but does short-change the public health. And you as members of Congress must not let this happen," former Surgeon General C. Everett Koop told the Senate Commerce Committee on Tuesday.

Many politicians, however, have signaled a desire not to fight the politically generous industry, whose leaders were the top donors to the Republican Party in the 1996 election cycle.

"Fortunately or unfortunately, we have to deal with the world of the possible," Sen. John Breaux, D-La., said Tuesday.

"If this is the best you can do, do it," former FDA Commissioner David Kessler replied. "But I believe that history will not look kindly on your timidness."

The tobacco firms have offered to pay $368.5 billion. Those funds are to be disbursed over 25 years, however, and would be tax-deductible.

After adjusting for taxes and inflation, the value of the package is only $195 billion in current dollars, said Jeffrey Harris, a physician who also teaches economics at the Massachusetts Institute of Technology.

He said that roughly equals projected state Medicaid expenses in the next 25 years for treating smokers suffering from cancer, heart disease and other tobacco-related illnesses.

But, Mr. Harris added, the federally funded Medicare program will spend almost the same sum, and the deal provides nothing to cover those costs. Nor does it compensate state or federal governments for the past costs of tobacco-related illnesses.

To pay the $368 billion, Mr. Harris said, tobacco firms would need to hike their prices 62 cents per pack.

The higher prices would discourage some demand, especially among children. But an additional increase of $1.50 per pack would be needed if price hikes alone are to help government and industry meet the settlement's goal of reducing the share of under-age smokers from 18 percent to 11 percent in five years, Mr. Harris testified.

Even a $2 price hike would leave American cigarette prices well below those of many other industrialized nations. Mr. Harris told the Senate panel that he believed the firms could afford such a levy.

Mr. Hatch said Wednesday that the changes Washington demands must be "reasonable," lest they kill the entire deal - a fairly common sentiment on the Republican side of the aisle.

"This is a great list of things we would all like to see, I'm sure," Sen. Mike DeWine, R-Ohio., told a critic from the American Cancer Society. "I'm not sure that if every one of these was insisted upon that you would get an agreement at all."

Mr. Kessler has argued that Congress should simply enact the best possible law to reduce the death toll from tobacco, currently estimated at 400,000 Americans annually.

It, for instance, could raise taxes instead of seeking a voluntary settlement with the industry.

"You don't need the industry's money. You don't need the industry's permission. You don't have to give the industry [legal] immunity," Mr. Kessler told the Senate Commerce Committee on Tuesday.

Officials who favor the deal, however, say the industry's clout on Capitol Hill indicates that a consensus measure is the only kind likely to become law.

Mr. Kennedy complained Wednesday that in the past few weeks tobacco firms successfully lobbied to almost halve the tobacco tax hike that Congress and the White House plan to impose over the next five years to fund children's health programs.

That, Mr. Kennedy said, was an argument for the toughest possible government oversight of the industry.

But the lobbying triumph is also an argument for

accepting the settlement instead of waiting fruitlessly for Congress to pass the perfect deal, said Mississippi Attorney General Mike Moore.

Mr. Moore filed the pioneering lawsuit that encouraged tobacco firms to seek a once-and-for-all settlement of their major legal and regulatory issues.

"People say we should pass a tougher law. I say, 'Pass it,' " Mr. Moore said. "They say tobacco executives should be prosecuted. I say, 'Indict them.' "

But Congress has done very little to rein in tobacco firms in the past 40 years, Mr. Moore noted.

Meanwhile, 3,000 children a day are lured into tobacco smoking, and 1,000 of them will die prematurely as a result.

If the industry scores a big win in any of several pending court cases, Mr. Moore said, it may lose interest in a negotiated settlement.

That struck a chord with Mr. Hatch.

"Can we afford to fritter away the huge opportunity to stop 3,000 kids a day from smoking?" he asked, adjourning with a vow to take up the issue again in September.

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THE WALL STREET JOURNAL INTERACTIVE EDITION — FRONT SECTION

July 31, 1997

Deal May Not Reach Goal For Curbing Teen Smoking

By JEFFREY TAYLOR
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON -- The proposed tobacco settlement won't raise cigarette prices enough to meet its goals for reducing youth smoking, a health-care economics expert told a Senate hearing on the pact.

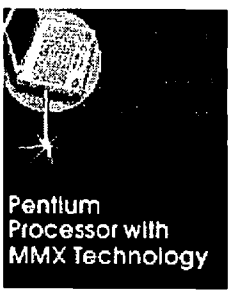
Jeffrey Harris, a doctor at Massachusetts General Hospital and professor at Massachusetts Institute of Technology, told the Senate Judiciary Committee that the $368.5 billion settlement would raise cigarette prices about 62 cents a pack within five years. Such an increase, he said, wouldn't reduce smoking among 13- to 17-year-olds enough to conform to the settlement's five-year target.

"To reach the target teenage smoking rate," Dr. Harris said, "I calculate that the price of a pack of cigarettes would have to rise by an additional $1.50." He also contended that the penalties tobacco companies would pay if youth smoking doesn't meet the targets aren't enough of an incentive for them to reduce underage smoking.

Dr. Harris's testimony supported critics' contentions that tobacco companies wouldn't pay enough in exchange for aspects of the settlement that would benefit them, such as immunity from punitive damages in civil lawsuits that allege past misconduct. The pact is built on the assumption, based on some academic studies, that youth smoking is especially price-sensitive and would drop sharply if prices rose.

The committee's chairman, Republican Orrin Hatch of Utah, said he believed that despite continuing criticism, a "consensus" was developing in Congress in favor of the settlement, with some minor modifications. Mr. Hatch told reporters later that he thought the deal could still be approved by Congress this year, although the Republican leadership on the House side has thus far displayed little enthusiasm for it.

Other members of the Judiciary Committee, such as Edward Kennedy, aren't as confident about the



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settlement's prospects this year. "Clearly, whether the goal is fair compensation or reducing youth smoking, the current settlement is inadequate," the Massachusetts Democrat said.

At Wednesday's hearing, the last of three before the committee, the managing trustee of a fund set up to pay claims from victims of asbestos-related health problems contended that a portion of the $368.5 billion should be set aside to pay smokers who also suffer from asbestos illnesses. The trustee, Robert Falise, said the risk of death from lung cancer is much higher for workers exposed to asbestos who also smoked than for nonsmoking asbestos workers. Representatives of advertising and convenience-store groups, meanwhile, argued that the settlement's restrictions on cigarette marketing would hurt their businesses.

An array of committees in both houses of Congress have jurisdiction over the proposed settlement, and each is expected to hold hearings on it before beginning any formal action on the pact. The Senate Labor and Human Resources Committee, for instance, has scheduled hearings after Congress's August recess. The committees also are expected to contend with dueling versions of legislation based on the settlement, some drafted by tobacco industry lawyers and others by tobacco foes both in and outside of Congress.

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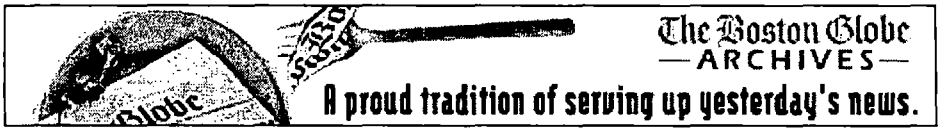

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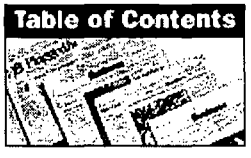

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Tobacco deal cited as boon for CEOs

Study says taxpayers lose with settlement

By Bob Hohler, Globe Staff, 07/31/97

WASHINGTON - While taxpayers and some industries could take a beating under the $368.5 billion tobacco settlement plan, leaders of the largest cigarette companies would stand to gain more than $200 million in stock profits, according to Senate testimony and a new study released yesterday.

If Congress and President Clinton approve the landmark tobacco pact, the industry's top 15 executives will make an extra $206 million, if their stocks increased the 46 percent that some Wall Street analysts have predicted, a report by the Institute for Policy Studies found.

A Florida judge deals a blow to tobacco companies fighting a billion-dollar Medicaid lawsuit. A5.

The biggest winner would be Geoffrey C. Bible, the CEO of Philip Morris, whose stock options would rise nearly $73 million.

``With this in mind, members of Congress should use caution in evaluating the tobacco settlement to ensure that the tobacco executives are not using smoke and mirrors to obtain a deal that favors their own personal interests above those of public health," the report concluded.

The study was released as a Senate panel convened to examine other potential winners, and losers, under the settlement agreement that the tobacco industry reached last month with 40 state attorneys general and trial lawyers.

Notable among the potential losers were federal taxpayers who, witnesses said, would continue to bear billions of dollars in health care costs for smoking-related diseases.

Under the agreement, the tobacco industry would cover the smoking-related expenses of state-run Medicaid programs. But the pact did not provide for the costs incurred by federal programs such as Medicare and the Veterans Administration.

Dr. Jeffrey E. Harris, a physician at Massachusetts General Hospital who teaches economics at the Massachusetts Institute of Technology, told the Senate Judiciary Committee that Medicare costs alone for smoking-related illnesses amount to an estimated $9.3 billion a year, or $192 billion over the next 25 years.

``That number vividly demonstrates the inadequacy of the dollar amount of the current settlement," said Senator Edward M. Kennedy.

Massachusetts Attorney General Scott Harshbarger, who helped broker the settlement, defended the proposal.

Responding to the study on the executives' stock options, Harshbarger spokesman Ed Cafasso said: ``If Congress were to approve this settlement today, the taxpayers of Massachusetts would receive up to $500 million a year from big tobacco every year forever. That's not a stock option. It's like a tax cut for every person in the state forever."

The Senate panel also heard from the advertising and convenience store industries, whose spokesmen said they would suffer under the settlement.

Advertisers said the industry does more than $3 billion a year in tobacco business, much of which would be eliminated under restrictions required by the settlement.

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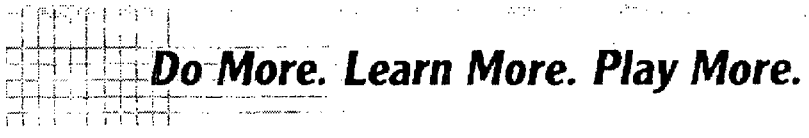

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LATEST NEWS

Florida ruling strips major defense from tobacco case

By Reuters, 07/31/97

WEST PALM BEACH, Fla. - A Florida judge ruled yesterday that tobacco companies cannot use public knowledge of the dangers of smoking as a defense, stripping cigarette makers of a key defense two days before the trial of Florida's billion-dollar Medicaid lawsuit.

Lawyers for both sides said the ruling, issued by Palm Beach Circuit Judge Harold Cohen, would significantly impair the industry's ability to defend itself against the lawsuit, which seeks to recover the costs of treating smoking-related illnesses.

``It means they have no defenses,'' said W. C. Gentry, a lawyer representing the state.

``By this ruling the only thing they can try to prove is that cigarettes don't cause disease, the product wasn't defective, that they couldn't make a safer cigarette,'' he said.

Jury selection in the widely watched lawsuit was scheduled to begin tomorrow, with testimony expected to start in early September.

Philip Morris attorney Peter Bleakley said Cohen's ruling could be grounds for reversible error should the case go to an appeals court.

Cohen himself called the ruling one of the most important he had made in the case.

Earlier in a day of hearings meant to determine what evidence the jury will be allowed to consider, Cohen made other rulings detrimental to the industry's defenses.

He said the companies would not be allowed to argue the so-called ``premature death benefit'' - that Florida saved money in its Medicaid program because smokers die earlier than nonsmokers - to mitigate potential damages.

``If smokers cost less than non-smokers, then the jury should hear about it,'' argued Murray Garnick, an attorney for Philip Morris.

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August 1, 1997

Producers of Tobacco Get Windfall in Tax Deal

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- For Tobacco Companies, Budget News Is Mixed (July 30, 1997)
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By BARRY MEIER

In a potential windfall for cigarette producers, new taxes paid by smokers will save the tobacco industry billions of dollars by reducing the amount of money companies would owe if the proposed tobacco settlement plan became law.

Under a last-minute addition to the new budget deal, revenues generated by the added tobacco taxes will be counted as credits toward payments by cigarette companies if the $368.5 billion plan reached in June between tobacco producers and state attorneys general takes effect.

It was known that industry lobbyists had been aggressively seeking such a provision, but several lawmakers expressed anger Thursday on seeing its exact language. In a final effort to derail it, Sen. Richard Durbin, D-Ill., introduced language to strike the provision, but fellow lawmakers voted 78-22 to defeat the motion.

"They are going to make $50 billion," Durbin said, "and it is a very smooth move on their part."

The senator and others said the settlement's price tag would probably have to be increased to reflect the effect of the new tax on the company's payments.

Under the budget agreement, Federal taxes on a pack of cigarettes, which currently stand at 24 cents, would rise 10 cents in the year 2000 and 5 cents more in 2002. That would produce $5.2 billion in new revenue over five years and $16.7 billion over the next 10 years, which is currently scheduled to be used to pay for health coverage for uninsured children.

Durbin said his $50 billion figure represented the amount of revenue generated by the added taxes over the first 25 years of the tobacco settlement proposal.

Cigarette industry officials had initially fought an increase in cigarette taxes but

then supported the tax rise so long as the money was used as a credit against payments they would make under the settlement plan. The industry's ability to get the revenue proposal enacted into law had been viewed as a crucial test of its political strength.

Industry lobbyists had argued privately that any new cigarette taxes should offset additional contributions they should have made to federal healthcare programs like Medicare. But if the proposal's $365.8 billion pricetag is not increased to reflect the new budget provision, it will likely save the companies billions of dollars.

Susan Irby, a spokeswoman for Sen. Trent Lott, the majority leader, said Clinton administration officials had been involved in discussions about the provision.

"To describe this as something that was done in the dead of night is poppycock," Ms. Irby said.

Barry Toiv, a White House spokesman, acknowledged that the provision had been discussed by Clinton administration officials during budget talks. But Toiv added that the provision was not considered meaningful for the moment because the amount of money the industry would pay has not been set.

"I don't think that the administration is going to be inclined to let this provision reduce the industry's contribution in any way," Toiv said.

Separately, jury selection was scheduled to begin Friday in the state of Florida's lawsuit against the tobacco industry. The state is seeking to recover billions of dollars in Medicaid costs spent treating smoking-related illnesses. Jury selection, which is taking place in Palm Beach, is expected to take at least a month.

Last month, Mississippi, the first state scheduled to go trial against producers, settled its case for over $3 billion. But while negotiators for the Florida and the tobacco industry have been in talks to settle that case they have run into stumbling blocks. Along with money, Florida is demanding that the industry make certain public health concessions and release confidential documents.

In a ruling on Wednesday, Judge Harold Cohen of Palm Beach Circuit Court removed a crucial industry position by holding that tobacco companies could not use a smoker's knowledge about the product's dangers as a defense. Tobacco company lawyers said they would appeal the ruling.

Though tobacco companies and state attorneys general reached an agreement in June on a tentative settlement plan, states can choose to press their lawsuits while Congress considers turning the proposal into legislation.

Under the proposal, tobacco producers agreed to pay billions of dollars to settle claims by states and smokers, agreed to marketing restrictions and agreed to pay fines if youth smoking does not drop. In return, they would receive protection against lawsuits and punitive damages.

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THE WALL STREET JOURNAL INTERACTIVE EDITION
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August 1, 1997

Grass-Roots Activists Attempt To Derail Tobacco Settlement

By LAURIE MCGINLEY and JOHN HARWOOD
Staff Reporters of THE WALL STREET JOURNAL

WASHINGTON -- For most grass-roots antismoking activists, Big Tobacco is a greedy and murderous cross between Timothy McVeigh and Pol Pot -- an ideal enemy. And they want to keep it that way.

That's why Anne Donley, an activist from the Richmond, Va., area, is scurrying through the halls of Congress, urging lawmakers to reject the proposed $368.5 billion tobacco settlement. "They'll pay the money, and end up being the good guys," she warns an aide to Virginia Democrat James Moran. "People will think the tobacco problem is solved."

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Florida to Begin Tobacco Suit After Shortening Long-Shot Odds

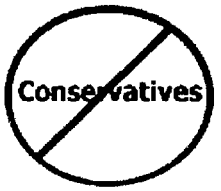
Full text of The Wall Street Journal/NBC News poll.

For tobacco-industry officials, the proposed settlement offers a measure of respectability and financial predictability -- outcomes unthinkable for the activists. "The cigarette companies don't deserve peace," says Julia Carol, who is co-director of Americans for Nonsmokers' Rights, a grass-roots group that's based in Berkeley, Calif.

The upshot is that while some big public-health groups such as the American Heart Association and the American Cancer Society have sent mixed messages about the settlement, the grass-roots tobacco-control groups have been clear: Don't fix it, deep-six it.

Fragile Consensus

The opening exists to do just that, despite the fragile consensus for the settlement among the industry, state attorneys general and antitobacco plaintiffs' lawyers. A new Wall Street Journal/NBC News poll shows decidedly mixed feelings over the deal: 37%



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of Americans are in favor while 34% are opposed, leaving a large chunk of undecided Americans to be influenced by public-relations appeals as Congress prepares to grapple with the proposed settlement. At the same time, it's far from clear that those undecided Americans will warm to the activists' argument that the settlement is too soft. Some 53% of those surveyed, for example, describe the agreement as either "about right" or "too tough" on the industry. Nearly four in 10 Americans say smoking should remain an individual choice without government interference, while just one in seven Americans says the government should take every step possible, including an outright ban, to discourage smoking.

The poll shows clear support for some antitobacco steps envisioned in the agreement, particularly reinforcing the Food and Drug Administration's power to regulate nicotine as a drug. Still, "Americans take a much more libertarian stance toward smoking than might be expected from hearing the ranting of antismoking groups," say Democratic pollster Peter Hart and Republican Robert Teeter, who conducted the survey.

Chamberlain and Hitler?

That sentiment doesn't deter the activists trying to stop the settlement. It isn't clear who they are madder at: the tobacco industry or national health organizations that haven't adopted their hard-line stand. The big heart and cancer groups, complains Bill Godshall of SmokeFree Pennsylvania, "have been flip-flopping for the past three to four months" on the settlement issue. Some activists have even compared Matthew Myers, the executive at the National Center for Tobacco-Free Kids who helped negotiate the deal, to Neville Chamberlain, the British prime minister marked by history as the man who appeased Adolf Hitler at Munich, Germany.

Behind the grass-roots effort -- a blur of electronic-mail traffic, protest rallies, and low-budget public-relations initiatives -- there's a network of local tobacco-control activists like Ms. Donley. With only the American Lung Association and Ralph Nader's Public Citizen as national allies, they struggle to make headway through such provocatively named groups as the Group to Alleviate Smoking in Public (GASP) of Virginia, Californians Against Death by Tobacco, and Georgians Against Smoking Pollution. Many of these activists, who have scored notable victories on some issues, are blunt about their ultimate goal: the destruction of the tobacco industry. They say the settlement would grant the industry financial predictability by shielding it from future class-action

suits and punitive damages. They also contend that they are winning the war against tobacco, and that it isn't time to settle. Finally, they want to make tobacco use socially unacceptable for all ages, not just kids. "You want smoking to go the way of the spittoon," says Ms. Carol of Americans for Nonsmokers' Rights. "You accomplish that by sweeping cultural change, not by passing a law."

Public Is Skeptical

On some of these counts, the activists appear to be in tune with public opinion. In the Journal/NBC poll, a 44% plurality says the tobacco industry would benefit the most from the deal because of the limits on its legal liability, compared with 32% who say the public would benefit the most through decreased smoking and lower health-care costs. In addition, Americans express deep skepticism that the deal will reduce smoking; just one in five says it is "very" or "fairly" likely to do so.

The White House remains inclined to support the deal, with some modifications. And despite flak from zealous local crusaders, administration officials are confident they'll ultimately win the backing of large, influential national groups such as the American Heart Association and the American Cancer Society, which are currently expressing qualms. Smarting from the activists' criticism, Mr. Myers of the National Center for Tobacco-Free Kids warns that killing the settlement might destroy a historic opportunity to reduce teen smoking and smoking-related disease, since tobacco companies might go on to win or settle some of the lawsuits that forced them to the negotiating table.

"It's an odd position to be in," adds spokesman Rich Hamburg of the heart association, which has taken on the tobacco industry for years. But he notes, "The grass-roots groups are more ideologically focused, and they haven't done that much on the federal level."

While the mainstream groups such as the heart association and the cancer society have enumerated several proposed changes to stiffen the settlement, the grass-roots activists fear the groups will ultimately settle for far less. Relations between the two camps, never entirely harmonious, have been particularly strained since the disclosure this spring that Mr. Myers was participating in settlement talks with the industry.

For Ms. Donley, the life of a grass-roots activist isn't easy. One recent day, after rising before dawn to take the train north to Washington, she stands outside a Senate tobacco hearing because there are

no seats inside. On another, she can't make much headway in a meeting with home-state Rep. Virgil Goode Jr. About the only thing they can agree on is that the pact doesn't help the tobacco farmers in the first-term Democrat's largely agricultural district. Rep. Goode, she concludes, "has nicotine flowing in his veins."

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August 1, 1997

White House Irked by Tobacco Wins

A.P. INDEXES: TOP STORIES | NEWS | BUSINESS | SPORTS | ENTERTAINMENT

Filed at 7:36 p.m. EDT

By The Associated Press

WASHINGTON (AP) -- Top Clinton administration officials were irked Friday at what they viewed as tobacco industry successes in the budget and tax packages passed by Congress this week and in still pending appropriations bills.

A last-minute revision to the tax bill that Congress passed this week directed that revenue from a 15-cent-per-pack increase in cigarette taxes be credited to the industry's costs in whatever overall tobacco settlement comes out of Congress instead of for expanding child health programs.

``If they wanted to send us a message that they haven't changed their stripes, they certainly did that,'' Health and Human Services Secretary Donna Shalala said Friday.

Shalala and Bruce Reed, President Clinton's top domestic policy adviser, wrapped up three weeks of consultations with outside groups on the proposed $368 billion settlement between tobacco companies and a handful of state attorneys general.

``The tobacco companies did not indicate good faith in what they did on the tax side of the bill,'' Shalala told reporters outside the White House. ``And that is something that we will remember as we advise the president, advise Congress as to what our position is.''

She said the tax provision, on top of House and Senate action to shrink funds the adminsitration requested to enforce tobacco regulations, demonstrates that the industry cannot be trusted.

The administration asked Congress for $34 million in fiscal 1998 for Food and Drug Administration enforcement of tobacco rules. The Senate has voted for just $5 million, the House for about $24 million in appropriations bills still awaiting final congressional action.

``Our inability to get the money we need in FDA enforcement is a sure sign that they were playing behind the scenes,'' Shalala said. ``...Their addition to the tax bill is another sign that these (settlement) negotiations, if the president decides to participate in them, will be very tough negotiations.''

If the tax provision stands, the administration would ask Congress to add another 15-cent-per-pack increase in cigarette taxes to legislation codifying any tobacco settlement, Reed said.

``I want to be crystal clear on this point: The 15 cents that we won for children's health this week will be on top of any settlement,'' he said.

In Friday's meetings with retailers and advertising industry leaders, Shalala and Reed agreed to consider voluntary restrictions on cigarette ads as an alternative to a proposed legislative ban, which critics say may be unconstitutional.

``We certainly see a voluntary agreement by the companies to stop advertising as a potential strength,'' said Reed. He also said the administration was inclined to ``add to the companies' cost'' by strengthening penalties for failing to meet youth smoking-reduction targets.

Reed said a 50-person team of agency analysts would next finalize a recommendation for the president. They hoped to have it to him before he starts a three-week vacation Aug. 17.

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Dow Jones Newswires -- August 1, 1997

Admin.'s Reed:Tobacco Settlement Will Offset Any Tax Credit

Dow Jones Newswires

WASHINGTON -- The White House Friday vowed that any **tobacco** settlement it will consider will have to be boosted enough to offset any credits **tobacco** companies might receive because of a higher tax placed on **cigarettes**.

In addition, the White House said it has wrapped up its process of hearing public comments on the proposed **tobacco** settlement and will now start the work of formulating its own proposals.

As the GOP wrapped up its tax bill this week, it slipped in a provision that will allow revenues raised by a new 15-cent-per-pack tax on **cigarettes** to be credited against the overall amount of money paid by the **tobacco** companies in a liability settlement.

'We are going to make certain that this provision will not reduce the **tobacco** company's liability,' said Bruce Reed, Clinton's domestic policy adviser and one of his chief advisers on **tobacco**.

Asked if his comments meant that the proposed settlement amount of $368 billion could be boosted by as much as $50 billion, or the expected credit the **tobacco** companies will receive, Reed said, 'That's one way of looking at it.'

Reed made his comments after two meetings at the White House with ad industry representatives and public health advocates.

Reed said the two meetings mark the end of the process under which he and Health and Human Services Secretary Donna Shalala met with a number of groups affected by the **tobacco** settlement to get their input on any proposed deal.

However, Reed said he had no forecast of when he and Shalala will be ready to forward their report to President Clinton.

'We hope it will be weeks rather than months,' he said.

Both Reed and Shalala dismissed the news that Mississippi Attorney General Michael Moore was interested in reopening the **tobacco** talks with the **tobacco** industry.

'We are not involved in any negotiations right now. We are not interested in re-opening negotiations,' Reed said.

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Friday August 1 7:01 PM EDT

White House Targets Tobacco Tax Provision

By Randall Mikkelsen

WASHINGTON (Reuter) - Clinton administration officials said Friday the value of any settlement with the tobacco industry may have to be increased to reflect a concession to the industry in new tax-cut legislation.

They said the industry did not act in good faith in winning passage of the provision in tax-cut legislation passed by Congress Thursday and sent to the president.

The provision would give the tobacco industry credit for a 15-cent-per-pack increase in the cigarette tax, also passed in the bill. The credit would be applied to any settlement to resolve state and class-action lawsuits against the industry.

The overall cost to be paid by tobacco companies in the proposed settlement is now pegged at $368 billion over 25 years -- although President Clinton has yet to agree to the deal. The current federal cigarette tax is 24 cents per pack.

"If the provision in the tax bill remains and we come to the conclusion that $368 (billion) was the right number to start with, then, sure, we'd add the 15 cents on top of that," said White House Domestic Policy Adviser Bruce Reed, co-leader of an admistration task force on the tobacco settlement.

"The 15 cents that we won for children's health this week will be on top of any settlement," Reed told reporters after meetings with tobacco retailers, advertisers and public health representatives.

"They (the tobacco industry) knew going into this that they were going to have to pay a tax on top of any settlement, and that's our position," he said.

Money from the cigarette tax increase is intended to help cover children with no health insurance.

Health and Human Services Secretary Donna Shalala said inclusion of the break for tobacco companies in the tax bill was a violation of good faith by the industry.

"In my judgment, the tobacco companies did not indicate good faith in what they did on the tax side of the bill and that is something that we will remember as we advise the president, advise Congress as to what our position is," Shalala said.

"If they wanted to send us a message that they haven't changed their stripes, they certainly did that," she said.

White House spokesman Mike McCurry said earlier Friday that "our view is that the net liability that the

companies will face as a result of the settlement is not likely going to be reduced by this provision."

McCurry said he did not believe the provision would be subject to new line-item veto authority granted Clinton over certain tax and spending measures.

Congress after its August recess is expected to begin hearings on the proposed tobacco settlement, which would settle 40 state lawsuits and a slew of class actions against the industry. The settlement would have to be enacted by Congress and signed by Clinton to take effect.

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Sunday, August 3, 1997

Big Tobacco Threatened by New Disclosures

By HENRY WEINSTEIN, Times Legal Affairs Writer

WASHINGTON--The nation's major cigarette companies are waging a ferocious rear-guard action in courts around the country to keep yet another wave of potentially damning internal documents from coming to light while Congress and the White House are considering the proposed $368.5-billion tobacco settlement.

Judges in five states have called for the release of industry documents, with jurists in three states saying the papers show evidence of crime or fraud by tobacco companies and their use of attorneys in a 40-year effort to suppress information about the hazards of smoking.

If the industry fails in what has become an all-out effort to reverse these rulings, the disclosure of documents described by one official as "smoking howitzers" could damage the industry's prospects in tobacco litigation in all 50 states and lead to stiffer terms against the industry in the pending nationwide settlement.

"If truly outrageous documents come out, it will make the price of the settlement higher--in dollars and in other ways," said professor Richard Daynard, director of the Tobacco Products Liability Project at Northeastern University in Boston.

Daynard predicted that recent rulings in Florida, Kansas, Minnesota, Mississippi and New York will pave the way for significant revelations about the role played by some company lawyers in the industry's decades-long legal battles.

That issue is a matter of concern to federal grand juries in Washington and New York that are investigating possible criminal charges against cigarette companies. Helmut Wakeham, the former research director of Philip Morris Inc., said in a brief interview that he was questioned extensively about the relationship of industry lawyers to scientists when he testified before the New York grand jury last year.

Several judges who have reviewed some of the internal documents in chambers have said they show evidence of serious misdeeds. Four of the five decisions involve what have come to be known as "the Liggett documents"--material that was turned over to judges in 20 states after the cigarette-maker Liggett Group reached a settlement with those states in March.

* * *

The cases all involve allegations that the industry in 1954 hatched a conspiracy to deceive the public about the hazards of

smoking and, as a key element of this effort, created a nonprofit research arm, the Council for Tobacco Research, that served as a "front" group.

A 160-page log of the Liggett documents, obtained by The Times, shows that it includes letters, memos and notes made by Liggett attorneys during meetings of the Committee of Counsel, a lawyers' group that played a key role in formulating legal strategy for the industry.

The recent rulings being fought by tobacco forces:

* Five judges in Florida have issued three separate rulings in recent months that eight industry documents should be made public because they contain evidence that the tobacco companies "utilized attorneys in carrying out and planning fraudulent activities and undertook to misuse the attorney-client relationship to keep secret research . . . related to the true dangers of smoking." Those rulings came in Florida's suit seeking $2.7 billion to compensate the state for expenses incurred in treating sick smokers.

* A federal judge in Uniondale, N.Y., ruled earlier this year that 305 previously withheld documents dealing with "special projects" of the Council for Tobacco Research--scientific studies conducted under the supervision of lawyers "solely to further the economic interests of the industry," in the judge's words--have to be made public. That decision came in a personal-injury case filed by former Lucky Strike model Janet Sackman, who developed throat cancer.

* In St. Paul, the judge in Minnesota's massive suit against the industry has made several rulings that the state has shown sufficient probable cause that industry documents contain evidence of a crime or fraud and should be turned over to the plaintiffs. The judge said the cigarette companies should not be allowed to conceal scientific research that they have touted in advertising campaigns but now want to keep secret.

* In Laurel, Miss., a judge said 10 of the Liggett documents he reviewed showed signs of fraudulent activity. In that suit, the widow of a barber who did not smoke is claiming that her husband's 1994 death from lung cancer was caused by exposure to smoke from his customers' cigarettes.

* In a suit in Kansas City, Kan., by David Burton, who suffers from vascular disease, a federal magistrate in February ordered R.J. Reynolds Tobacco Co. to turn over 32 "special projects" documents. Company lawyers contended that all the documents are privileged because they contain confidential attorney-client communications. But the judge ruled that none of the documents was entitled to such protection, and he noted that three of them "may contain evidence that RJR knew during the relevant time period that nicotine was addictive."

Every ruling is being appealed by the industry, virtually all on grounds that judges have incorrectly interpreted prior cases on the protections accorded by the attorney-client privilege, or related doctrines that normally confer confidentiality on materials revealing an attorney's thought process or documents dealing with strategy among joint defendants.

"There have been indications in tobacco cases" that those well-rooted privileges are being eroded, "which has not occurred in other types of litigation," said Daniel W. Donahue, R.J. Reynolds' senior vice president and deputy general counsel. "It is a matter that ought to be of significant concern to

the legal community as a whole because we have this erosion occurring in the context of litigation that has a lot of political and social overtones."

* * *

But plaintiffs' lawyers who have engaged in protracted legal battles to get the documents unearthed see it differently.

Usually, said Roberta Walburn, a Minnesota special counsel, the plaintiffs learn of the existence of the documents from sketchy "privilege logs." These lists of material that the companies want to keep confidential are generally produced in response to a court order during the pretrial discovery process. Such logs normally provide a bare-bones description of the subject of the document, as well as its date, author and recipient.

Kenneth B. McClain, an Independence, Mo., attorney who got the favorable ruling in New York after an 18-month battle, said the documents in his case "are at the heart of the whole issue as to whether the Council for Tobacco Research was set up to be a 'front organization' " to protect the industry's interests rather than do independent scientific research.

* * *

"These documents should have been produced a long time ago," McClain said.

Judges in several other states, including California, Connecticut, Illinois and Texas, will be asked to rule on the Liggett documents in coming months.

Though numerous sensational documents showing the tobacco industry's awareness of the hazards of smoking have already come to light, some plaintiffs' lawyers believe that they are nowhere near the bottom of the iceberg.

For example, Minnesota already has obtained 33 million pages of industry documents in its case, but the vast majority have not become public because of judicial protective orders.

Minnesota Atty. Gen. Hubert H. Humphrey III, a vocal critic of the proposed nationwide settlement, says some of these documents are "smoking howitzers" and has urged members of Congress and the White House not to make a final decision on the settlement without reviewing at least some of them. Humphrey has urged two Senate committees to subpoena the key Minnesota documents--about 500,000 pages--and has told the senators that his attorneys could provide a road map to the key documents.

In response, Senate Judiciary Committee Chairman Orrin G. Hatch (R-Utah) said it is common knowledge that the tobacco industry has withheld damaging information and that it was infeasible for the committee to review 33 million pages of documents. He is considering Humphrey's proposal.

Several Democratic senators, while acknowledging that they could not plow through millions of pages, have embraced the thrust of Humphrey's position.

"Right now, we don't have nearly enough knowledge" to diligently evaluate the settlement, said Sen. Patrick J. Leahy of Vermont. "To the extent the tobacco companies are unwilling to share information, my suspicions are aroused."

It's not just the industry that is concerned about Humphrey's proposal. The state attorneys general and private lawyers who are advocates of the $368.5-billion settlement are worried that if Congress gets bogged down in reviewing documents, it could

further delay legislative approval of the accord.

Mississippi Atty. Gen. Michael Moore has told a score of senators that they will not find anything more disturbing in still-secret documents than they already know. Moore noted that the settlement would create a panel of judges to review future industry claims of confidentiality. Such a procedure, says Charleston, S.C., attorney Ronald L. Motley, a veteran of many document battles with the industry, would provide "a means to quickly and freely gain access to tobacco industry documents."

To buttress this point, the Castano group of 65 plaintiffs' lawyers--who also favor quick approval of the settlement--have assembled for members of Congress a thick dossier of key internal industry documents meant to illustrate that enough negative evidence about the industry is already available.

But those documents contain such previously undisclosed items as a 1956 memo by Alan Rodgman, an R.J. Reynolds chemist, which indicates recognition that smoking causes cancer--something the companies continue to deny in court.

"Since it is now well-established that cigarette smoke does contain several polycyclic aromatic hydrocarbons and, considering the potential and actual carcinogenic activity of a number of these compounds, a method of either complete removal or almost complete removal of these compounds from cigarette smoke is required," Rodgman wrote 41 years ago.

"We keep being surprised as we go along . . . so we keep digging," said Philadelphia attorney Stephen A. Sheller, one of the plaintiffs' lawyers who recently conducted a deposition of Rodgman.

The recent adverse rulings against the industry are the latest stage of a process that began a decade ago when lawyer Marc Edell, representing the heirs of dead smoker Rose Cipollone, made the first significant breakthroughs by a plaintiff's lawyer in obtaining industry documents.

Since that time, reams of damaging internal documents have been unearthed. But more than 1,000 of the potentially most incriminating ones have not seen the light of day.

In 1992, after reviewing in chambers a selected sample of 1,500 confidential memos of the Council for Tobacco Research, U.S. District Judge H. Lee Sarokin in New Jersey said the documents show that in marketing cigarettes the companies chose "sales over safety, money over morality," leading him to conclude that the tobacco industry "may be the king of concealment and disinformation."

He ordered the documents surrendered. But later that year, a federal appeals court reversed his order, saying that Sarokin's harsh language was a sign that he had failed to act impartially. Nonetheless, the appeals court said another judge should review the material, and now, nearly five years later, the once-dormant case has been reopened and that document review is about to begin in Newark, N.J.

Some of the same documents that Sarokin reviewed are at issue in Florida's lawsuit against the industry, which hopes that the state Supreme Court will reverse an appeals court decision and keep the documents from public view.

W.C. Gentry, a Jacksonville attorney who is one of Florida's special counsels in its suit against the industry, said the fact that the cigarette companies are having to defend so many

document challenges at once makes it possible that "the floodgates are about to open."

As a sign of how fiercely the industry is resisting, lawyers for Florida have had to file 75 separate motions to compel the production of documents after its initial requests were rebuffed by industry attorneys.

It had been anticipated that the industry would reach a separate settlement with Florida, as it did with Mississippi, to avoid possible negative publicity while the national settlement is pending in Congress. But both sides said last week that they were far apart, and Florida Atty. Gen. Robert Butterworth said he would not settle the case unless the cigarette companies turn over the eight documents addressed by the five Florida judges.

Jury selection in the case began Friday and opening statements are scheduled for September.

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Tax Deal Reasserts Tobacco Industry's Clout

Amendment Would Ease Sting of Per-Pack Cost Increase by Funneling Funds to Pay Settlement

By Saundra Torry
Washington Post Staff Writer
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The Washington Post

The amendment slipped into the Taxpayer Relief Act of 1997 was only a few scant lines, but it spoke volumes about Big Tobacco's clout in Congress.

Over the past few weeks, what began in the Senate as a 20-cent increase in cigarette taxes was whittled down to 10 cents per pack, rising to 15 cents in 2002 -- even though the House had wanted no tax at all. Then came the amendment meant to take even more sting out of the tax hike.

The plan would allow the tobacco industry to use revenues raised by the tax as a credit against the proposed $368 billion national tobacco settlement, which still must be approved by Congress. The amendment was inserted so quietly that sponsors of the tax increase were taken by surprise, and when it was discovered, no one in Congress was willing to claim authorship.

Late Thursday, as the tax bill sailed through the Senate, Sen. Edward M. Kennedy (D-Mass.), who co-sponsored the cigarette tax, denounced the amendment as the "Joe Camel tobacco loophole," and Sen. Richard J. Durbin (D-Ill.) complained that the tobacco industry had "pulled a fast one" by effectively reducing its commitment to pay for smoking-related illnesses.

House Minority Leader Richard A. Gephardt (D-Mo.) called the amendment "an absolute outrage" and charged it was put in the bill "by the Republican leadership in the dead of night." Appearing on NBC's "Meet the Press," he said President Clinton should excise it with a line-item veto. The White House said Friday the provision may not be subject to the line-item veto law and that any settlement with the tobacco industry may need to be increased to

offset the tax-bill provision.

Sen. Orrin G. Hatch (R-Utah), co-sponsor with Kennedy of the tax hike, called the amendment "stupid" and said it would not result in any credit in the settlement. "I am sure that is what they were trying to do," he said. "But they did a very poor job."

Still, the episode marked the third time in recent days that tobacco interests had flexed their muscles in Congress. First, legislators from tobacco farming states preserved a federal crop insurance program against assaults in the House and Senate. Then, they beat back measures in both chambers to provide $34 million to the Food and Drug Administration to enforce under-age smoking bans.

While the industry denied any role in the crop and FDA issues and bridled at the notion that it had worked magic on what one industry source called a "burdensome" tax hike, others acknowledged it was not a bad run for a lobby that is supposed to be on the ropes. "When you consider how politically incorrect it is to defend the industry and how everybody is after it," said Rep. Wayne Edward Whitfield (R-Ky.), "we did extremely well."

Some people saw tobacco's success as a preview of what could happen as Congress takes up the proposed national tobacco settlement when it returns next month. From Wall Street to Washington, observers echoed a single theme.

"Big Tobacco still swings a heavy club around here," said Sen. Tom Harkin (D-Iowa). Industry analyst Gary Black marveled that the outcome of the tax hike spoke "loudly that the industry still has plenty of friends on Capitol Hill."

It needs them.

The intricate, multi-faceted tobacco settlement is unlike anything the tobacco industry or anyone else has ever tried to push through Congress. It is the product of three months of intense negotiations among the industry, many state attorneys general who had sued the companies and a coalition of trial lawyers. The 68-page settlement has yet to be crafted into legislation, and, according to a source who was involved in the talks, the task has turned out to be a nightmare.

If and when a bill is introduced, it may have to pass muster with as many as six committees in the Senate and an undetermined number in the House. Every stop on the way to a vote creates danger for the deal's proponents, said a lobbyist who is working against the settlement. "There are all these opportunities for obstructionists in the committees, for a filibuster in the Senate or scores of other ways to mess it up."

While the White House continues its review of the settlement, in which tobacco companies agreed to pay

$368.5 billion and to submit to federal control over the way they make and market cigarettes, the companies are girding for battle.

In addition to its veterans, the industry has brought on fresh lobbying forces in an effort to improve its grim image. The tobacco companies hired the Washington law firm of Verner, Liipfert, Bernhard, McPherson and Hand, putting former Senate majority leader George J. Mitchell (D-Maine) and former Texas governor Ann Richards (D) on their team. Meyer Koplow and Arthur Golden, lawyers more accustomed to Wall Street than Pennsylvania Avenue, have been signed up as Washington persuaders, too.

The team already is hitting the pressure points. Last week, for instance, at the National Governors' Conference in Las Vegas, former Republican Party chairman Haley Barbour, now a Washington lobbyist, was talking up the settlement, and Richards was at the conference, as well.

"It hasn't been heavy lobbying, but there have been talks," said Wisconsin Gov. Tommy Thompson (R), who is asking the governors to form a panel to study the proposed deal.

At the same time, the industry has kept up the flow of campaign contributions that reached $9.9 million during the 1995-96 election cycle, according to a study by Common Cause. In the first five months this year, the nation's major tobacco companies pumped more than $550,000 into Democratic and Republican party organizations, with the bulk going to the GOP, according to the latest Federal Election Commission reports.

Political action committees (PACs) associated with the companies raised $740,000 from employees and contributed more than $400,000 to candidates and political organizations this year, according to the FEC.

"They have a built-in constituency," said Durbin. "Plenty of members would like to say, `Sure, I took their money, but when I had the chance, I voted for the public health.' "

It is too early to predict the outcome of what is sure to be a monumental battle over the deal. Many legislators are waiting for completion of the White House review and for Clinton to announce his position. He already has called proposed restrictions on the government's authority to regulate nicotine "totally unreasonable."

Many questions remain unanswered. If the White House proposal greatly strengthens that authority, will the companies still favor the deal? If the White House does not, will support from public health groups evaporate? Will a way be found to satisfy members of Congress from tobacco states, who are crucial to passage of any settlement but are angry over being ignored in the deal?

"It is totally up in the air, chaotic and confused," said Kentucky's Whitfield of the settlement's future in the House. Sen. Wendell H. Ford (D-Ky.), who would play a major role in steering any deal through Congress, was more optimistic. "I have gotten the message that they [the White House] want to be helpful to the farmer," Ford said. If the farm issue is resolved and if senators "don't try to load up [the deal] so much that it falls of its own weight, I believe it can be passed, but it will be tight."

Even Durbin, no friend of tobacco, said he fears the settlement has attained such weight and notoriety that "this is almost a too-big-to-fail situation now."

But some staunch tobacco foes have other ideas, and they have potent allies. The Association of Trial Lawyers of America, a major contributor to Clinton and the Democratic Party, opposes the deal because it gives the industry unprecedented protections against lawsuits. The lawyers maintain it violates the rights of victims and sets a dangerous precedent.

Despite tobacco's legendary skills on Capitol Hill, the industry also has a weakness: Tobacco has been successful at killing legislation, said House and Senate aides, but it has never tried to get anything passed.

Tobacco supporters who pushed the tax bill amendment last week may have erred. The move has reinvigorated an underlying distrust of the industry and soured potential allies.

"It was a stupid thing for the companies to try to do, but they won't get away with it," Clinton's domestic policy adviser Bruce Reed said.

Massachusetts Attorney General Scott Harshbarger, a settlement supporter, said the amendment gave him pause. "This latest stunt should serve as a wake-up call to those who are trusting Congress to strengthen the agreement . . . that the attorneys general negotiated," he said. "It's a good thing the attorneys general are still pursuing their lawsuits. Maybe that's our only realistic hope for protecting children, improving the public health and repaying the taxpayers."

Staff writers Peter Baker, Ceci Connolly, Susan Schmidt and John Schwartz and researcher Nathan Abse contributed to this report.

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