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Tobacco: Liability Limits

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Prof. Richard A. Daynard
April 5, 1998

Some thoughts about the Civil Liability provisions of the McCain committee bill

1. The bill is explicitly preemptive. Sec. 703. It preempts all state-law causes of action, substituting instead a single federal claim. At first glance this doesn't appear to matter, since state law determines the substance of the claim, and the bill provides for ``concurrent jurisdiction" by state and federal courts. But this preemption does matter, since it transforms all tobacco cases into ``federal cases", with the result that even if plaintiffs file their cases in state court the industry can remove them to federal court. Federal courts are generally more hostile to tobacco claims than state courts.

2. While the $6.5 billion liability cap will tend to protect the companies from bankruptcy, other provisions of the bill have the perverse effect of greatly increasing the likelihood that ``tobacco companies" will declare bankruptcy. The single federal claim that the bill permits (all others being preempted) can be brought only against the domestic tobacco subsidiaries of the tobacco conglomerates. Despite the fact that these conglomerates purchased their other assets - Kraft, Nabisco, Philip Morris' international operations, etc. - with profits from sales to U.S. smokers, the bill effectively immunizes these other assets leaving a drastically smaller asset and income base for use in paying off American tobacco claims. Thus if bankruptcy is a genuine concern, the bill's immunization of the great majority of ``big tobacco's" asset base lowers the bankruptcy threshold to a fraction of what it would otherwise be. The bill also removes from the table the assets of other appropriate contributors to the industry's debt to its victims, such as co-conspiring law firms.

3. The $6.5 billion cap does not (contrary to some published reports) increase in future years if not fully spent in past ones. Thus, if the industry pays only $5 billion in year one, it is capped at $6.5 billion (rather than $8 billion) in year two. If this was supposed to be measured by the industry's ability to pay, there is no reason why it should not be required to put the unused caps into a reserve.

4. The industry has done nothing to earn these unique benefits. Indeed, Senator Ashcroft's point seems unanswerable: if Congress wishes to give any industry the benefit of e.g. its choice of forum, immunization of its non-operating assets, and arbitrary caps on the liability of its operating subsidiaries, it should begin with a life-preserving industry rather than one that knowingly deals out addiction and death.

Total Pages: ____

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503-0001

URGENT

Wednesday, February 4, 1998

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer - See Distribution below

Janet R. Forsgren

FROM: Janet R. Forsgren (for) Assistant Director for Legislative Reference
OMB CONTACT: Robert J. Pellicci
PHONE: (202)395-4871 FAX: (202)395-6148
SUBJECT: **JUSTICE Testimony on civil liability portions of the proposed tobacco settlement**

DEADLINE: **NOON Wednesday, February 4, 1998**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President. **Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

COMMENTS: Hearing is scheduled before the House Judiciary Committee tomorrow, February 5th.
DEADLINE IS FIRM.
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PREPARED STATEMENT OF DAVID W. OGDEN, COUNSELOR TO THE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE

Mr. Chairman, I am pleased to testify today on behalf of the Department of Justice regarding the civil liability portions of the proposed tobacco settlement.

I. Introduction

On September 17th of last year, and again in his State of the Union speech, the President made clear his strong desire to work with this Congress in a bipartisan fashion to enact national tobacco legislation. For our part, the Justice Department is eager to work closely with this Committee and the Congress to ensure that sound, comprehensive legislation is enacted. Smoking and the use of smokeless tobacco have had a devastating impact on our society in terms of death and human suffering. This cycle of disease and death is renewed each day, as 3,000 children and teenagers begin smoking regularly. The President and this Congress are faced with an historic opportunity -- and profound responsibility -- to address one of this country's greatest single health problems. We praise the hard work and leadership of the President, the states' attorneys general and other public health advocates, whose unwavering efforts have been instrumental in creating this opportunity. We offer the following remarks in the hope of facilitating the development and passage of comprehensive national legislation regarding tobacco products.

II. Events Leading up to the Present Consideration of the Proposed Tobacco Settlement

Working closely over the last several years, State and Federal officials have dramatically altered the legal landscape faced by the tobacco industry. For decades, individuals harmed by the use of tobacco had little recourse -- those that sued the tobacco companies always lost and regulatory agencies took no action to regulate tobacco to prevent future harm. This situation began to change in 1994, when the Administration, prompted by an epidemic of tobacco use by teenagers, authorized the Food and Drug Administration (FDA) to conduct an extensive investigation of the tobacco industry with an eye toward determining whether nicotine-containing tobacco products should be subject to FDA regulation. Based on that investigation, the FDA promulgated regulations aimed at the reduction of youth smoking. In April 1997, a federal district court in North Carolina affirmed the FDA's authority to regulate tobacco products. (This decision is currently on appeal.)

During the same period, the tobacco industry has been sued in many fora. Since 1994, forty-two states have sued the major tobacco companies in an effort to recover smoking-related health care costs. In addition, many private lawsuits have been filed by those who claim to have been injured by smoking. On June 20, 1997, the states and the companies reached a tentative settlement to most of these actions, contingent upon enactment of appropriate federal legislation. This agreement is embodied in the proposed settlement. The industry has already settled lawsuits in three states where trial was imminent (Mississippi, Florida, and Texas). Trial in the Minnesota case brought by Attorney General Hubert Humphrey, III, began on January 20, 1998, in St. Paul.

After reviewing the settlement, the President on September 17, 1997 called for comprehensive tobacco legislation with a goal of reducing teen smoking by 50 percent within seven years. The President stressed five key elements that must be at the heart of any national tobacco legislation:

1. a comprehensive plan to reduce teen smoking, including a combination of penalties and price increases that raise cigarette prices by up to $1.50 per pack over the next 10 years as necessary to meet youth smoking targets;
2. express reaffirmation that the FDA has full authority to regulate tobacco products;
3. changes in the way the tobacco industry does business, especially in the area of advertising directed at children;
4. progress toward other critical public health goals, such as the expansion of smoking cessation and prevention programs and the reduction of secondhand smoke; and
5. protection for tobacco farmers and their communities.

During his State of the Union address last week, the President again forcefully emphasized that his top priority is the reduction of underage smoking. Of the three thousand young people who begin smoking each day in America, one thousand will die prematurely from tobacco-related diseases. Reducing teen smoking is the most important step that Congress and the Administration can take now towards protecting the Nation's health in the next century and minimizing future health care costs.

III. The Civil Liability Provisions

A. A Summary of the Provisions

The civil liability provisions of the settlement contemplate federal legislation that would work major changes in the current tort liability regime. Broadly speaking, such federal legislation would provide an annual cap on the industry's potential liability in civil actions, eliminate punitive damages for past industry misconduct, and impose various procedural restrictions on parties who would sue tobacco companies for smoking-related injuries. I will address the specific provisions individually in a moment, but first I want to identify general principles we believe should govern their consideration.

B. Guiding Principles When Analyzing the Civil Liability Provisions

Our civil justice system exists to provide means of redress for individuals who are harmed by the conduct of others and to deter such harmful conduct in the future. These are very important goals, and their achievement is fundamental to any just society. Although the existing tort system is certainly not perfect or the only way to achieve these goals, it has as a general matter served them well. For that reason, the structure of the tort system should not be modified except for important reasons. Nor should tobacco companies become special favorites of the law.

Nevertheless, it is essential to consider proposed modifications of the tort system in the larger context of this legislation, in service not only of the compensatory and deterrence objectives of the tort system itself, but also of the compelling public health obligations identified by the President. Although some states have recently achieved large settlements with the tobacco companies, the victims of tobacco-related diseases, to date, have received virtually nothing in the form of compensation through the tort system. Nor has that system until now deterred industry misconduct, such as marketing cigarettes to minors. Litigation alone will not reduce youth smoking; only comprehensive legislation addressing price, access, marketing, and other industry practices will be enough to achieve this objective. Reasonable provisions modifying the civil liability of the tobacco industry thus would be acceptable to the Administration, but only in the context of a comprehensive bill that advances the public health by fulfilling the President's five principles -- reducing youth smoking by substantially raising the price of cigarettes and imposing tough penalties on the industry; expressly confirming the full authority of the FDA; changing the way the industry does business; achieving other public health goals; and protecting tobacco farmers. We also believe such provisions should be crafted to make more achievable the recovery of appropriate compensation for deserving injured parties than historically has been the case and to reinforce the legislation's other, comprehensive safeguards against industry misconduct.

I want to highlight specific principles that we believe must guide our analysis of any proposed modifications to the civil liability system as they apply to tobacco:

- Any legislation proposing changes in the civil liability system must be consistent with the President's goals of reducing teen smoking, improving public health by confirming the full authority of the Food and Drug Administration, and changing the way tobacco companies do business;
- Legislation should make deterrence of industry misconduct more effective -- and compensation of victims more fair -- than historically has been the case;
- Because civil suits provide an important tool for discovering the truth, any final settlement should create powerful incentives for tobacco manufacturers to fully and publicly disclose all appropriate documents; and

- Any changes to the civil justice system must be constitutionally sound.

C. <u>A Description of the Civil Liability Provisions and Some Questions Raised</u>

Let me turn now to the provisions of the proposed settlement.

The proposed settlement leaves open many questions. No definite terms establish who or what will be paid or for how long. The settlement is more of a template for constructing a legislative solution than a traditional out-of-court settlement of the state lawsuits and the numerous individual and class action lawsuits. Nonetheless, some initial observations are possible.

There are four broad areas in which the proposed settlement would affect the civil liability system.

1. <u>Resolution of Pending Litigation</u>

The settlement contemplates that much of the pending litigation would be settled, including the present states attorneys general actions. It appears that the settlement also contemplates that future litigation of those kinds would be prohibited by federal law. Pending addiction/dependence claims by injured smokers also apparently would be settled.

2. <u>Limits on Annual Liability</u>

The settlement contemplates federal legislation that would impose limits on the annual aggregate and individual damage payments for which the participating tobacco manufacturers could be liable. An "annual aggregate cap" for the payment of judgments and settlements would begin at $2 billion in the first year and increase to $5 billion in the ninth year and thereafter. If total judgments and settlements for a given year exceeded the annual aggregate cap, the excess would be rolled over for payment in future years. Payments would be limited to $1 million per judgment per year unless every other judgment and settlement could first be satisfied in that year without exceeding the annual cap. Unpaid individual judgments in excess of the individual cap would be rolled forward, without interest, for payment in future years.

The annual caps proposed in the settlement could be modified in various ways. Limits could be established on the amount paid in each lawsuit or could be imposed only on future claims, or only on past ones. Within the context of the settlement as a whole, we should explore whether liability caps can be part of a creative scheme that also furthers the goals discussed earlier.

One critical issue, of course, is whether the annual caps or other mechanisms would afford sufficient funds to meet the needs of victims or whether they should be raised. It may be valuable for Congress to ask that the tobacco manufacturers share their calculations and research concerning the likely dollar requirements of those injured by tobacco products. We are prepared to work with Congress on that issue.

3. <u>Limits on Punitive Damages</u>

Under the settlement, all punitive damages claims would be extinguished with respect to conduct taking place prior to the effective date of the bill enacting the settlement. Punitive damages could be awarded with respect to conduct taking place after passage of the legislation.

The purpose of punitive damages is to deter and punish. Congress is being asked to remove this tool with respect to the tobacco manufacturers' past conduct. At the same time, however, Congress is considering legislative provisions that will serve similar purposes. In deciding upon appropriate punitive damages provisions, Congress should consider the overall legislative package and the framework it establishes for deterring future wrongdoing and serving the public interest. Moreover, Congress could consider other alternatives such as capping punitive damages or -- perhaps most interestingly -- retaining punitive damages with respect to claims based on facts not disclosed by the tobacco manufacturers to Congress and the public. Finally, with respect to any of these proposals, Congress will have to look carefully at the constitutionality of the proposed legislation.

4. Procedural Restrictions

The settlement apparently contemplates federal legislation that would abolish class actions and other forms of multi-case tobacco litigation without the defendants' consent. Litigation brought by third party plaintiffs, such as pension funds and health insurers, would be prohibited entirely unless the litigation was based on the subrogation of a single individual's personal injury claim. Third-party payor claims that were pending on June 9, 1997, would be allowed under a grandfather clause.

It has been difficult to bring class actions for tobacco-related injuries in federal courts, and many state courts have denied class certification. Some state courts have granted class certification to claimants against the tobacco manufacturers, however, and other joinder mechanisms that would be affected by the proposal can significantly reduce individual litigant's costs of suit. Restrictions on such joinder mechanisms could make it more difficult for some plaintiffs to pursue their claims in court. Such restrictions also raise novel federalism issues. Thus, we believe that Congress should consider carefully the legal and practical consequences of such provisions, and consider in tandem with them the adoption of rules or mechanisms that improve injured tobacco users' access to justice.

V. Conclusion

The Department of Justice strongly supports comprehensive tobacco legislation. Crafting legislation that significantly reduces teenage tobacco use and meets the other goals the President has announced is an enormous, yet vitally important, challenge. We would be happy to join with this Committee in a dialogue to find the best possible solution.

Thank you for giving me this opportunity to furnish the views of the Department of Justice regarding this legislation. I will be pleased to answer any questions you may have.

Mr. Chairman, I am pleased to testify today on behalf of the Department of Justice addressing, as you have requested, the civil liability portions of the proposed tobacco settlement.

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During the same period, the tobacco industry has been sued in many fora. Since 1994, forty-two states have sued the major tobacco companies in an effort to recover smoking-related health care costs. In addition, many private lawsuits have been filed by those who claim to have been injured by smoking. On June 20, 1997, the states and the companies reached a tentative settlement to most of these actions, contingent upon enactment of appropriate federal legislation. This agreement is embodied in the proposed settlement. The industry has already settled lawsuits in three states where trial was imminent (Mississippi, Florida, and Texas). Trial in the Minnesota case brought by Attorney General Hubert Humphrey, III, began on January 20, 1998, in St. Paul.

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Nevertheless, proposed modifications of the tort system could be considered in the larger context of this legislation, in service not only of the compensatory and deterrence objectives of the tort system itself, but also of the compelling public health obligations identified by the President. Although some states have recently achieved large settlements with the tobacco companies, the victims of tobacco-related diseases, to date, have received virtually nothing in the form of compensation through the tort system. Nor has that system until now deterred industry misconduct, such as marketing cigarettes to minors. Certainly, recent revelations about the industry's conduct could change the situation. Litigation alone, however, is unlikely to reduce youth smoking; only comprehensive legislation addressing price, access, marketing, and other industry practices will be enough to achieve this objective. As the Administration has consistently stated, if there is agreement on a comprehensive bill that advances the public health by fulfilling the President's five principles -- reducing youth smoking by substantially raising the price of cigarettes and imposing tough penalties on the industry; expressly confirming the full authority of the FDA; changing the way the industry does business; achieving other public health goals; and protecting tobacco farmers -- then reasonable provisions modifying the civil liability of the tobacco industry would not be a dealbreaker. We also believe that any such provisions should be crafted to make more achievable the recovery of appropriate compensation for deserving injured parties than historically has been the case and to reinforce the legislation's other, comprehensive safeguards against industry misconduct.

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Payments would be limited to $1 million per judgment per year unless every other judgment and settlement could first be satisfied in that year without exceeding the annual cap. Unpaid individual judgments in excess of the individual cap would be rolled forward, without interest, for payment in future years.

If Congress wishes to consider annual caps, a variety of approaches could be discussed. Limits could be established on the amount paid in each lawsuit or could be imposed only on future claims, or only on past ones. Within the context of the settlement as a whole, we should explore whether liability caps can be part of a creative scheme that also furthers the goals discussed earlier.

One critical issue, of course, is whether annual caps or other mechanisms would afford sufficient funds to meet the needs of victims or whether they should be raised. It may be valuable for Congress to ask that the tobacco manufacturers share their calculations and research concerning the likely dollar requirements of those injured by tobacco products. We are prepared to work with Congress on that issue.

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The purpose of punitive damages is to deter and punish. Congress is being asked to remove this tool with respect to the tobacco manufacturers' past conduct. At the same time, however, Congress is considering legislative provisions that will serve similar purposes. In considering punitive damages provisions, Congress should consider the overall legislative package and the framework it establishes for deterring future wrongdoing and serving the public interest. Congress could consider whether separate punitive damages limitations are needed if annual caps govern manufacturers' total liability. Moreover, Congress could consider alternatives such as capping punitive damages or -- perhaps most interestingly -- retaining punitive damages with respect to claims based on facts not disclosed by the tobacco manufacturers to Congress and the public. Finally, with respect to any of these proposals, Congress will have to look carefully at the constitutionality of the proposed legislation.

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It has been difficult to bring class actions for tobacco-related injuries in federal courts, and many state courts have denied class certification. Some state courts have granted class certification to claimants against the tobacco manufacturers, however, and other joinder mechanisms that would be affected by the proposal can significantly reduce individual litigants' costs of suit. Restrictions on such joinder mechanisms could make it more difficult for some plaintiffs to pursue their claims in court. As with punitive damages, Congress should consider the need for special procedural restrictions if it enacts annual caps on industry liability. Moreover, such restrictions raise novel federalism issues. Thus, we believe that Congress should consider carefully the legal and practical consequences of such provisions, and consider in tandem with them the adoption of rules or mechanisms that improve injured tobacco users' access to justice.

V. Conclusion

The Department of Justice strongly supports comprehensive tobacco legislation. Crafting legislation that significantly reduces teenage tobacco use and meets the other goals the President has announced is an enormous, yet vitally important, challenge. We would be happy to join with this Committee in a dialogue to find the best possible solution.

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Copy for Toby Jo Rymande

MEMORANDUM

TO: **Those Concerned**

FROM: **Chick Koop** CK

RE: **Activities with the Anti-Tobacco Coalitions**

DATE: **Monday, December 15, 1997**

After the Advisory Committee to Congress on Tobacco Control Policy (Koop-Kessler) presented its report to the members of Congress who had requested the report, and the White House, we neither disbanded the committee, nor did we plan its next meeting. Shortly thereafter, eleven member groups formed a new coalition called ENACT, an acronym for Effective National Action to Control Tobacco. Subsequently, I was asked by ENACT to be its spokesperson. I declined for two reasons; one, I felt that if this had been a sincere desire for me to be spokesperson, I would have been included in the planning of the coalition; and two, I thought that what ENACT planned to present to Congress as the ideal tobacco control bill was aiming far too low. To compromise would be worse than the present situation.

That decision led to an invitation to speak to ENACT, at which time I explained my position: I told them why I thought their proposal was the floor when it should be the ceiling and asked at this particular time in planning and negotiations, that they unite with the rest of the public health community so that we presented a united front and avoid the confusion of two anti-tobacco coalitions speaking for Public Health.

Meanwhile, many in the public health community who had been members of the Koop-Kessler group as well as many others began to coalesce to form a second coalition, which originally had no name. It included not only representatives of public health organizations, but also groups further removed from the public health center, such as union health plans. It is interesting to note that some of the member groups represented in ENACT also had representatives in the new coalition.

Eventually, I was asked to address the new and larger coalition as well. I presented them with the same plea for unity and came to the easy conclusion that the issue that separated ENACT from all of the others was its stance, or lack thereof, on the issue of immunity.* Remember that every member of ENACT had agreed in the Koop-Kessler report (which had consensus) that "all currently available avenues of litigation,

* A BUZZ WORD WHICH SHOULD BE ABANDONED FOR SOMETHING LIKE "LIMITED LIABILITY"

both civil and criminal, must be fully preserved ". Nevertheless, immunity is not mentioned in ENACTS platform and in direct conversation with members of ENACT, they refuse to take a position on immunity of the tobacco industry from future litigation. The other coalition, which by this time had assumed the name "Save Lives, Not Tobacco: A Coalition of Accountability", believed strongly that the question of immunity is a public health problem and to grant immunity to tobacco companies would not be good for the public's health and played dangerously with the issue of federal preemption of local anti-tobacco ordinances already enforced.

There is a firm connection between preemption and the granting of immunity. It would be very difficult to craft legislation that granted immunity to the tobacco companies without interfering with preemption. Even if such legislation were initially written, it could easily be attacked by tobacco lobbyists with friends in Congress and it is doubtful that the preemption protections would survive in a final bill.

After meeting with both coalitions separately, I then met with representatives of both coalitions together and this was a meeting marked by rancor. ENACT, largely influenced by the Campaign for Tobacco-Free Kids, refused to consider immunity in its platform and was unwilling to give reasons. My position is that by taking no stand on immunity, ENACT sends a very clear message that it is not opposed to immunity and indeed makes that particular issue quite negotiable.

I report all of this because I told you that I would do my best to bring these disparate factions together before the first of the year and I feel that that now will not be totally possible. It remains to be seen whether individual member organizations of ENACT, each of which has already essentially espoused a position of no immunity for the tobacco companies in the Koop-Kessler report, might be individually willing to reaffirm their stand on immunity. The polling of these member groups is now in process.

Meanwhile, we will accentuate those things on which the two coalitions agree and the Save Lives, Not Tobacco coalition will push with their congressional contacts for a no immunity position as legislation is crafted in the new year.

I have taken the position that I cannot represent either group nor be a spokesperson for one or both. I see my role as catalyst.

No Solution In Sight As Congress Prepares To Tackle Settlement

By Rebecca Carr, CQ Staff Writer

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News
Analysis
Community

Even before Congress begins scrutinizing the historic $368.5 billion tobacco agreement, new developments are threatening to undermine the deal and cloud chances for legislation. □

The most significant of these developments came from the Justice Department on Jan. 7, when it filed its first criminal charge in an ongoing investigation of the tobacco industry, alleging that a California biotechnology firm conspired with Brown & Williamson Tobacco Corp. to develop a high-nicotine tobacco plant that would be used to manipulate nicotine levels in cigarettes.

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The charge against DNA Plant Technology Corp. of Oakland is a misdemeanor violation of a seed export law which has since been repealed, but its importance rippled throughout Capitol Hill.

It was seen as a sign that there is more to come from the department's three-year probe of the industry. And the criminal charge immediately raised concerns among lawmakers of both parties and others about the prospect of turning the settlement into legislation.

The settlement, reached June 20 between the tobacco companies and 40 state attorneys general, calls for giving the industry limited protection from civil lawsuits in exchange for paying $368.5 billion in compensation to the government, private litigants and education programs over 25 years.

The Immunity Question

In interviews, members and aides expressed concern over the prospect of bargaining away immunity from lawsuits, which the tobacco industry badly wants, at a time when criminal indictments could be pending in another arena.

"This will have a major impact on Congress' effort to pass tobacco legislation this year," said Rep. Martin T. Meehan, D-Mass., co-chairman of the 90-member bipartisan

Congressional Task Force on Tobacco and Health.

Members have doubts about granting "sweeping protections to tobacco companies that have either been indicted or have pled guilty to criminal charges," Meehan said.

But the tobacco industry remained hopeful it would prevail with legislation that included protection from civil liability suits.

"It would be a deal-killer without it," said tobacco industry spokesman Scott Williams. "The goal of the industry is to establish a national tobacco policy and to create a predictable environment where companies can conduct their business."

Public health advocates appeared united in their opposition to giving the industry legal immunity and vowed to lobby against it. The powerful American Medical Association, for one, passed a resolution at its December meeting in Dallas that it would not support a national tobacco policy that shielded the tobacco industry from civil lawsuits.

Members of both parties said the deal would not pass as it now stands, but they predicted portions of it, such as curbing teen smoking, would have widespread support.

"Tobacco has replaced the Soviet Union as public enemy No. 1," said one senior Republican Senate leadership aide. "The settlement doesn't matter; Congress matters."

The aide suggested that the GOP did not have any intention of giving the tobacco industry immunity. "I don't see us doing the settlement," he said. "I do see us doing the right thing on the public health question. We are not bound, stapled and duct-taped to the settlement."

The Justice Department charge was only the latest development that has raised questions about the settlement. Others include:

- Concern over tobacco industry plans to launch a $25 million ad campaign to promote the agreement.

- Congressional concern about legal fees, as much as $2.8 billion, for private lawyers who worked under contract with the 40 state attorneys general on the deal.

- The states have been balking at attempts by the federal government to take at least half of any money recovered from lawsuits against tobacco companies to pay health care costs for people with smoking-related illnesses under Medicaid.

- Pending lawsuits in Minnesota, Tennessee and Texas alleging an array of charges against the tobacco industry, including a charge that the industry intentionally targeted blue-collar workers with special advertising and promotional campaigns.

- Other industries facing an onslaught of health-related complaints, such as asbestos companies, are looking to Congress for the same type of protection from civil lawsuits.

Added to all the concerns is President Clinton's desire to use new revenues from the tobacco settlement to pay for a slew of unspecified domestic projects. The anticipated revenue from the settlement, estimated to be nearly $10 billion in 1999 alone, would pay for such projects as medical research and child care. The White House said it planned to use the anticipated new revenues to pay for one-third of the cost of a $21.7 billion effort over five years to make child care more affordable.

Aides said Clinton clearly wants to see a tobacco bill in this session.

When asked at a news conference why there was such optimism for a tobacco bill when no Republican had stepped forward in support of specific legislation, White House spokesman Michael McCurry said, "There hasn't been specific legislation written, but there has been an enormous amount of work done on the issue. . . . And I think our optimism is well-founded."

But the president's view that the money should come from the settlement appeared to be at odds with the view of members of his own party on Capitol Hill, where support for turning the settlement into law as it stands is lackluster. The main stumbling block is the immunity question.

"If I were a member of the industry, I would say, 'Listen they have us cornered,'" said Frank R. Lautenberg, D-N.J. "It's time to give in, instead of their constant effort to conceal things and hide things."

When told that the tobacco industry said there would be no deal without immunity from civil lawsuits, Lautenberg echoed others by saying, "Tobacco says everything is a deal breaker, but believe me, they can't wait to talk."

To Tax or Not to Tax?

The White House remained convinced that the money for new domestic programs would come from the settlement, not new taxes. "The revenues are not tax increases; they come from revenue generated by comprehensive tobacco legislation," said Bruce R. Lindsey, White House deputy counsel and assistant to the president.

But the tobacco companies are clear that they will not support the deal without immunity. And without the tobacco companies at the table, the new revenues would inevitably have to come from additional taxes or fees.

Lindsey would not say how Clinton's programs would be paid for if a comprehensive tobacco bill failed to pass in Congress, or if the tobacco companies then withdrew from their commitment to pay $368.5 billion over 25 years.

Academics suggested that the money could come from a mixture of cigarette taxes and user fees. Several tobacco bills pending before Congress call for raising cigarette taxes by at least $1.50 per pack.

But the tobacco industry has opposed such an increase, warning that raising prices too quickly could create a "Canadian problem." When Canada raised its cigarette prices to $7 a pack ($5.26 in U.S. dollars), it created a black market for cigarettes.

As these issues are ironed out, the White House intends to work closely with congressional committees to draft legislation.

Perhaps learning from its lost battle over creating a national health care plan in 1994, the White House does not intend to dictate to Congress what it wants in the tobacco bill.

"We have no plans to introduce our own tobacco legislation," Lindsey said. "The president's budget will include both new programs and an expansion of programs using tobacco-related revenues, but Congress will be in charge of legislating the settlement. We, of course, will work with them to make sure the president's priorities and concerns are addressed."

General Hubert Humphrey III. "We are just seeing the tip of the iceberg in terms of what Justice will be coming out with."

Pursell said it has become clear that Congress does not "know all that it needs to know before it passes a law granting immunity or regulating tobacco."

But Mississippi Attorney General Michael Moore, who led the negotiations between the attorneys general and the industry, stood behind the settlement.

"The proposed agreement is a compromise," Moore said. "We got what we wanted, and they got a very few items."

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Tobacco Road

The tobacco industry sees the president's move as evidence of a definite will to pass legislation this year. The industry is betting on legislators eager to pass a national tobacco policy before they go home to campaign for re-election in the fall.

"The president's continued endorsement of a national tobacco policy is important toward moving this forward," said Williams, the tobacco spokesperson. "The more he can highlight the plan, the more support there will be for legislation."

The lobbying effort is expected to be fierce as the industry pushes to end its liability problem.

"I don't believe that you can both exact vengeance on this industry and produce a good public policy tobacco-control law at the same time," said J. Phil Carlton, a tobacco lobbyist, before an editorial board in October.

Is the Deal Off?

But academics and anti-tobacco activists remained skeptical about passing legislation that granted immunity to tobacco.

Former Surgeon General C. Everett Koop said the settlement is no longer viable. "There is no settlement," he said. "Now it is in the hands of Congress." The focus of any future legislation should be on smoking education programs and on raising the price of cigarettes by $2 a pack to discourage smoking amoung youth, Koop said.

Legal experts see trouble on the horizon for legislation, too.

As more players enter the fray, the chance for legislation lessens, said John F. Banzhaf III, a law professor at George Washington University.

In Minnesota, where one of those lawsuits is pending, the criminal case against DNA Plant Technology Corp., the California company, was seen as vindication for holding out against signing the deal with the other attorneys general.

"This is just the first of a series of federal charges," said Thomas Pursell, senior counsel to Minnesota Attorney

Monday, December 15, 1997

Smoking Foes Split as Factions Oppose Industry Immunity

■ Health: As congressional battle looms, groups struggle over how to gain passage of proposed $368.5-billion settlement. Fissure may threaten the deal, some say.

By HENRY WEINSTEIN, MYRON LEVIN, Times Staff Writers

On the eve of a high-stakes struggle in Congress over sweeping regulation of the nation's cigarette companies, the tobacco-control movement is badly fractured, beset by philosophical differences, personal animosities and tactical disagreements.

Reflecting the deep divide in the anti-smoking movement, critics of a proposed national tobacco settlement have organized a new coalition to challenge rival groups that are willing to grant legal protections to cigarette makers in exchange for public health gains--the quid pro quo at the heart of the proposed $368.5-billion national tobacco settlement.

The new coalition, called Save Lives, Not Tobacco, is expected to urge Congress to pass sweeping anti-smoking legislation without granting the industry its cherished goal of immunity from the most threatening types of lawsuits.

The group's formation, to be announced in coming weeks, underscores the bitter ideological debate and personal hostilities that have festered within anti-smoking ranks over whether it is necessary to cut a deal with cigarette makers to achieve public health goals. The split is likely to further complicate the already thorny task of moving major tobacco legislation through Congress next year.

The more militant health and consumer groups, such as the American Lung Assn. and Ralph Nader's Public Citizen, oppose any special legal protections for tobacco firms, including restrictions on class-action lawsuits or limitations on punitive damages. They maintain that the civil justice system should not be changed for the sake of one interest group, especially a rogue industry such as tobacco, which has been linked to the deaths of 400,000 Americans a year.

Tobacco companies "should get no protection--nothing," said Bill Godshall, director of SmokeFree Pennsylvania. "The tobacco industry should be treated like every other corporation."

Moreover, Godshall and other activists contend that accepting any restrictions on lawsuits that could lead to huge damage awards against the tobacco industry would eliminate the strongest deterrent to industry misconduct and consequently undermine public health goals.

Their more moderate counterparts, such as the American Cancer Society and the National Center for Tobacco Free Kids, regard such legal protections for cigarette makers as a necessary evil. Banded together in a coalition called Effective National Action to Control Tobacco, or ENACT, they generally believe sweeping anti-smoking measures will never be passed unless the industry gets something in return.

The industry's primary goal in federal legislation is securing limits on its legal exposure, which is massive and growing weekly.

In the past, when anti-tobacco forces had little prospect of moving strong legislation through Congress, their periodic internecine warfare seemed largely academic. But now that the industry is anxious to buy peace, the stakes and the costs of disunity could be much higher.

"I think it's a terribly serious problem, and it's gotten worse in recent months," said Michael Pertschuk, who has battled the industry for three decades and headed the Federal Trade Commission during the Carter administration. "The bitterness is running so deep it is difficult to imagine coordination." The groups have virtually identical goals but are seriously split on tactics, said Pertschuk, who philosophically is closer to ENACT.

Mitchell Zeller, associate commissioner of the Food and Drug Administration and a longtime industry foe, said at a recent conference in San Francisco that the fissures might make it impossible to enact effective anti-tobacco legislation.

In an attempt to heal the rupture, former Surgeon General C. Everett Koop held a meeting in Washington last week to seek a consensus between representatives of ENACT and Save Lives. However, the meeting broke up after about 90 minutes, with the groups still divided on the "immunity issue," according to sources at the gathering.

The clash has become so divisive that Godshall, a Save Lives organizer, has compared Matt Myers, an ENACT leader, to Neville Chamberlain, the 1930s British prime minister who naively attempted to appease Hitler. Myers declined comment.

In turn, another ENACT leader, Linda Crawford, derided the militants as "tree huggers," likening them to environmental extremists.

Both coalitions advocate tough anti-smoking legislation, including unfettered regulatory authority for the FDA, major advertising restrictions, steep tax hikes on cigarettes and disclosure of internal industry research on the health hazards of smoking.

But their split on the immunity issue reflects sharply differing perceptions of how far the pendulum has swung against Big Tobacco.

The militants contend that the pendulum will continue to swing against the industry, which can be brought under control without any major concessions. The so-called moderates, many of whom are in fact steadfast liberals, believe that the cigarette companies, weakened though they are, could still kill a bill that would cost them billions and give them nothing in return.

In some ways, the clash parallels those within the $50-billion-a-year tobacco industry, whose members ordinarily present a united front in public relations, lobbying and litigation but aggressively compete for sales and have had internal disputes about elements of the settlement.

Beltway Insiders vs. Grass-Roots Skeptics

The differences between the two anti-smoking camps involve style as well as substance. With some exceptions, the ENACT groups are more established and well-funded, with strong Washington ties, whereas their critics are more ideological, grass-roots oriented and, in many instances, deeply skeptical that anything good can come out of Washington.

In addition to the American Cancer Society and Tobacco Free Kids, ENACT's member organizations include the American Heart Assn., the American Medical Assn., the American Academy of Family Physicians, the American College of Chest Physicians and the Children's Defense Fund.

Besides the Lung Assn. and Public Citizen, Save Lives' members include Americans for Nonsmokers Rights, the American Council on Science and Health, the American Public Health Assn., a bevy of local anti-tobacco groups, including Californians Against Death by Tobacco, UC San Francisco Medical School professor and author Stanton Glantz, and Minnesota Atty. Gen. Hubert H. Humphrey III.

Both sides, in what one observer called "the battle of the white hats," include individuals who have been fighting the industry for years.

The new coalition also includes litigants who were excluded from the proposed tobacco settlement announced in June. One member is the Coalition for Workers' Health Care Funds, which represents employee insurance programs that have filed lawsuits in 26 states seeking to make tobacco companies reimburse billions of dollars in smoking-related health care costs.

While the proposed tobacco deal would provide billions in health care reimbursement to states, its ban on class-action suits, and any other type of aggregated claims, could prevent the employee health care programs from pursuing their cases.

This is hardly the first dispute among anti-smoking activists. They have often been a fractious bunch, prone to squabbling over strategy and to jealous anxiety over who gets credit for what. They sometimes seem angrier at each other than at the tobacco companies, reminiscent of bitter divisions that beset the antiwar movement in the late 1960s.

Many of the personal salvos this year have been lobbed at Myers, executive director of the National Center for Tobacco Free Kids, a group founded two years ago with a multimillion-dollar grant from the Robert Wood Johnson Foundation.

Negotiating Tactics Sparked Disagreement

The attacks began when it came to light in April that Myers, an attorney and veteran anti-tobacco lobbyist, was the only movement representative participating in the negotiations that led to the massive settlement between the industry, 39 state attorneys general and plaintiffs lawyers.

Myers was instrumental in extracting many of the public health concessions in the deal. Since then, he has acknowledged that certain aspects of the settlement need strengthening--particularly provisions limiting the power of the FDA to regulate the cigarette companies.

Nonetheless, he has been chastised by some erstwhile allies. Some members of Save Lives have maintained since the spring that there was no need to negotiate because their side ultimately would prevail as a result of future legal victories.

Myers declined comment on the personal attacks. Rather, he said, "I think diversity of opinion among public health groups has been constructive and beneficial. However, to the extent the public health community sees each other as the enemy rather than the tobacco industry . . . it could weaken the voice of our entire community."

Richard Daynard, founder of Northeastern Law School's Tobacco Products Liability Project, said he too would prefer unity. But, he said, Save Lives' stance against sacrificing legal rights is fundamental and inextricably linked to health because much of the damaging information about the tobacco industry has emerged as a result of litigation.

"Lawsuits against the tobacco industry currently are the preeminent public health measure," Daynard maintained.

The debate among the activists over legal concessions to the industry has intensified in recent weeks.

Under the settlement, tobacco firms would pay $368.5 billion over the next 25 years to reimburse states for money spent treating sick smokers, as well as funding smoking cessation programs and anti-smoking advertising campaigns. Sharp limits would be imposed on tobacco advertising and marketing, including a ban on billboards and merchandise with tobacco logos, and the companies would have to terminate their sponsorship of sporting and cultural events.

In return, the industry would get a ban on lawsuits by the states and class-action claims, as well as prohibition of punitive damages in suits by individual smokers and a $5-billion annual cap on litigation damages.

Since cigarette makers have had remarkable success in the courts--and no one yet has won punitive damages--supporters of the deal, led by Mississippi Atty. Gen. Mike Moore, consider the concession worth making.

However, the settlement would require new federal statutes to limit the type and scope of lawsuits against tobacco firms.

In an attempt to come to grips with that reality, the American Cancer Society commissioned Hogan & Hartson, a Washington law firm, to review the settlement. That inadvertently led to one of the most ferocious skirmishes in the war of the anti-tobacco groups.

In July, the ACS leaders declared that the settlement was fundamentally flawed. To buttress its position, the ACS disseminated a stinging critique of how the deal would severely curtail the ability of the FDA to regulate the tobacco industry and in particular to reduce the nicotine content of cigarettes.

Later in the summer, the society sent to all members of Congress a lengthy analysis of several constitutional issues raised by the settlement. The analysis was prepared by Hogan & Hartson.

The study told members of Congress there are three possible ways it could restrict litigation against tobacco companies without running afoul of the Constitution. Among the memo's options: Congress could enact legislation compelling states to pass laws barring class-action lawsuits against tobacco companies and prohibiting punitive damages in order to qualify for federal funds.

For many weeks, the memo drew little notice. Then it came to Godshall's attention, and he lobbed a verbal grenade, an e-mail to anti-tobacco activists, contending that the ACS had come out in favor of "preempting" state laws.

Cancer Society Against 'Preemption'

In the tobacco-control world, "preemption" is a fighting word. Historically, it has connoted efforts by Big Tobacco to prevent states and localities from passing laws that are tougher than those enacted by the federal government.

The American Cancer Society memo stated flatly that it opposed preemption of any state or local tobacco-control laws, such as those prohibiting smoking in restaurants.

"We're not for preemption. We want more state and local policies to keep the pressure up on the tobacco companies," Crawford said in an interview.

Godshall retorted that neither Crawford nor any other ACS official had disowned the memo or come out against giving the industry any special legal protections.

"Why are we fighting among ourselves?," Crawford lamented. "We're not a legal group. Public health is our primary concern."

But Daynard said Crawford's position failed to address the link between litigation and public health. He derided the memo as a "cookbook on how to cut off the legal rights of cancer victims."

Late last week, another nasty skirmish indicative of the deep distrust erupted when ENACT released polling data saying residents of four states--Colorado, Michigan, Ohio, Oklahoma--all favored swift congressional action on comprehensive tobacco legislation.

Two Save Lives members--Action on Smoking and Health and the Workers Health group--immediately issued press releases saying that the pollsters failed to give relevant information to survey respondents in an effort to skew the results. ENACT spokesmen retorted that the detractors based their criticism on a draft question which was not asked.

Still, there was a potentially significant development at mid-week that could move the two camps closer together.

After considerable debate in Dallas, the policymaking delegate body of the American Medical Assn., a key ENACT member, approved a resolution opposing any civil immunity "or any other special legal advantages" for the tobacco industry.

At the meeting, the delegates voted against accepting an AMA task force report on immunity that would have given the organization wiggle room to endorse legislation to give cigarette companies such legal protections. "The delegates told us: 'Not over our dead bodies' would they accept immunity," said AMA trustee Dr. John C. Nelson.

The AMA vote followed a recent decision by Koop to spurn a request that he become the titular head of ENACT. A Koop aide said his staunch opposition to affording the industry any special legal protection played a role in his choice.

As time has passed, the militants have gained strength, aided in part by further damaging revelations about the industry and in no small part by industry miscues--in particular the attempt to sneak a $50 billion tax break for the cigarette companies into an appropriations bill last summer.

The House and Senate are expected to consider half a dozen or more tobacco bills--some of which include special legal protections for the industry and others that don't.