

**STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
LAW ENFORCEMENT SECTION**

Hubert H. Humphrey III
Attorney General

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DATE: June 16, 1997

TO: See attached list

FROM: Hubert H. Humphrey III
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NUMBER OF PAGES (including cover page): 5

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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

June 16, 1997

102 STATE CAPITOL
ST. PAUL, MN 55155-1002
TELEPHONE: (612) 296-6196

Re: Important Input from the Koop/Kessler Advisory Committee on Tobacco Policy and Public Health

Dear Colleague:

We are now at a critical juncture. We must decide whether the leverage we have created through filing lawsuits on behalf of the citizens of our states has given the public health community the tools they need to defeat this epidemic. If we don't get this right, whether through ignorance or impatience, we will condemn untold millions more to early, slow, painful, -- and preventable -- deaths. We cannot afford to settle for half-measures or reforms that will not prove effective. History tells us that, when it comes to cutting deals with the tobacco industry, the fear of squandering an historic opportunity and getting bamboozled by tobacco companies is well founded - it has happened before.

Pain, suffering and death caused by tobacco have touched each of our lives. There is no disagreement among us that getting tobacco prevention and control right is the number one public health issue of our time. That's why we're in this fight.

But we are lawyers, not public health experts. Given the sensitivity of our cases and the speed of current settlement negotiations, it has been difficult for many of us to gather the depth of public health input we would like. Until the convening of the Advisory Committee on Tobacco Policy and Public Health, co-chaired by former Surgeon General Dr. C. Everett Koop, and Former Food and Drug Commissioner Dr. David Kessler, there was no one place for us to obtain the breadth and depth of public health expertise we need to judge the likely success of reforms under discussion in the settlement negotiations. Each of us was doing the best we could on our own, and reaching different conclusions.

For months now we have heard public health experts and tobacco control organizations in our own states, and across the nation, urge the Attorneys General to proceed cautiously and allow the public health community time to analyze any tradeoffs being discussed in the settlement talks. Based on what we heard at the gathering of more than 100 public health organizations in Chicago convened by the American Medical Association, and other input, we think it is fair to say that the overwhelming sentiment of this community is that the settlement process to date has made only a preliminary start at bringing in the public health expertise needed to get it right. We are also hearing loud and clear public health's deep concerns with the effectiveness of some of the reforms being touted in the settlement talks.

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Fax: 612 297 4036

MN ATTY GENERAL

Now the public health community, as well as the White House, has coalesced around the Koop/Kessler Advisory Committee. The Committee has pooled the collective wisdom of all the major health organizations in the country, and pledged to take no more than thirty days to lay out a thirty-year blueprint for tobacco control in our nation. Organizations on the Committee, along with Health and Human Services Commissioner Donna Shalala, and Mike McCurry speaking for the President, have indicated they will not endorse or reject any settlement terms until the public health blueprint is finished. The Committee will have it's next full meeting on June eighteenth in Washington, DC.

Because millions of lives hang in the balance, I urge you to follow the lead of the Koop/Kessler Committee, and to:

- o Refrain from publicly endorsing or rejecting any settlement plank under discussion until all the details are available and the Koop/Kessler Committee has completed its work.
- o Continue to consult with public health, provider, and tobacco control groups in your own state to get their expert advice about which tobacco control measures are most likely to achieve the outcomes we all want, and which are likely to prove to be false solutions or to provide new defenses for the tobacco industry.
- o Keep educating the public about the tobacco industry's wrongdoing, the harmfulness and addictiveness of their products, and tobacco's growing success at attracting new customers at home and around the globe, even in nations that allow no marketing whatsoever.

It has been said that those who forget the lessons of history are doomed to repeat them. So let's take a moment to remember our history. Again and again, we've been 'rolled' by this industry. We must respect the public health community enough to honor their expertise and process. When the next definitive history of the tobacco industry is written, we don't want to find ourselves as the principal players in one more tragic chapter of betrayal through false solutions accepted because we rushed to judgment. Let's take the time to listen to the people with real expertise in tobacco control policy.

Best Regards,

/HHH III/

HUBERT H. HUMPHREY III
Attorney General

cc: Dr. C Everett Koop
Dr. David Kessler
Donna Shalala
Bruce Lindsey

Tobacco

MN AG

**STATE OF MINNESOTA
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Hubert H. Humphrey III
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TO: Toby Donenfelt

DATE: May 30, 1997

FAX NO.: 202-456-6231

FROM: *+ Elizabeth Drie*
202-456-5581 215-1533
Luanne Nyberg PHONE (612) 215-1553 FAX (612) 296-9663

NUMBER OF PAGES (including cover page): 15

COMMENTS: The clips, taken together, make an interesting turn of events.

I'm going to be in D.C. next week, and would love to touch base on the tobacco litigation issues Thursday afternoon or Friday morning (plane leaves at 2 p.m.).

Would any time in there work for you? Please let me know on Monday or Tuesday.

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TO:Gretchen Musicant
FAX NO.:659-1477

DATE: May 30, 1997

FROM: Luanne Nyberg PHONE (612) 215-1553 FAX (612) 296-9663

NUMBER OF PAGES (including cover page):

15

**COMMENTS: 1. The best national stories re: A. Public Health Folks not supporting talk
B. More AGs publicly criticizing talks
2. American Lung Association Resolution opposing global talks**

As the AP story says, the pro-tobacco crew are trying to get at least one "major" health group to support the process and content of the talks.

Because tobacco illnesses represent 7% of health care spending in the U.S., and because hospitals do so much charity care, it seems like an issue that hospital groups would care about. It would be really helpful if the grassroots folks would let their state and national organizations know what they think right away.

I'll talk to you Monday, I hope.

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The Boston Globe

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New hurdles to tobacco settlement raised

Associated Press, 05/29/97 20:00

WASHINGTON (AP) - In what may be the most serious threat yet to a tobacco peace deal, a small but growing core of state attorneys wants legal protection for cigarette makers taken off the negotiating table, according to a survey by The Associated Press.

Congress is about to throw the talks a bigger curve: Two bills to be introduced in the House and Senate next week would set stronger restrictions on secondhand smoke and teen smoking than the proposed settlement.

And cigarette makers are quietly signaling that if at least one major health group doesn't switch sides and support the deal, "this thing dies," said a source familiar with the tobacco camp.

In an informal survey Thursday of 25 of the 32 states that have sued the tobacco industry, most support the ongoing talks. But six attorneys general say the proposed deal would unfairly strip state smokers of their rights to recover damages.

Until now, Minnesota was alone in publicly attacking the proposed megadeal.

"I don't see why we should cut a special deal for a group that has a 40-year history of deceiving the public," said Missouri Attorney General Jay Nixon. "They don't deserve exemptions. That's part of the civil justice system."

"I don't think that we should be changing state tort law to preempt the right of anyone to sue," said Pennsylvania Attorney General Mike Fisher.

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who wants state courts to retain control over all civil liability issues, including giving sick smokers punitive damages.

Added Wisconsin's James Doyle: "I don't see any way I'd go hand-in-hand to Congress with the tobacco companies arguing that Congress should pass a law that tells the state of Wisconsin who can sue and what conditions they have to meet to sue."

Criticism by Doyle, who joins Iowa, Arkansas and Maryland in the hardest-line stance, is particularly unsettling to proponents of a deal. Next month Doyle is to become president of the National Association of Attorneys General.

Several other states - including Montana and Texas - say they also are disturbed by the legal liability provisions but will wait to see if other gains from the proposed settlement offset them.

Such criticisms "have changed the tenor of these discussions" for the worse, warned New York Attorney General Dennis Vacco as he entered the Manhattan talks Thursday.

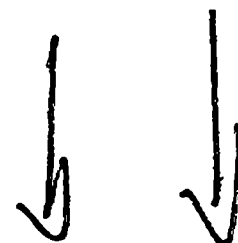
"We can accomplish more to change the culture of this industry through the negotiation process than we can through our individual lawsuits," Vacco said.

A deal "will be well worth the effort if we're able to save a lot of children, perhaps a generation, from the kind of injury, addiction and death that this product causes," said Connecticut Attorney General Richard Blumenthal.

While skeptical of several proposals, Blumenthal spent Thursday trying to resolve differences among the state attorneys. Chances of a final deal are "no higher than 50-50," he said.

Vermont on Thursday became the 32nd state to sue cigarette makers, seeking to recover Medicaid funds spent treating sick smokers. Attorneys are negotiating a megadeal to settle tall of the state suits.

Once it gains a imprimatur from Congress, a



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settlement could put unprecedented curbs on tobacco, get rid of Joe Camel and other ads and virtually ban public smoking everywhere but bars or restaurants. Settlement proposals also envision the tobacco industry paying up to \$1.5 billion a year if teen smoking is not reduced by 60 percent in 10 years.

But other proposed provisions would severely restrict who can sue tobacco companies, cap at \$1 million the compensatory damages a sick smoker could win in such civil suits and prohibit any punitive damages.

That would be a big money-saver for the industry because compensatory damages are fully tax-deductible and punitive damages aren't, said Richard Daynard of Northeastern University's Tobacco Liability Project.

Two bills to be introduced in Congress next week would go further, forcing cigarette makers to reduce teen smoking 90 percent in six years and snuffing out cigarettes in bars, restaurants and on international airline flights.

"These bills are meant to send a strong signal to those involved in tobacco settlement talks that Congress is the ultimate arbiter of what comes out of these talks," co-sponsor Sen. Frank Lautenberg, D-N.J., said in a statement.

Meanwhile, public health groups, led the American Lung Association, remain highly skeptical of any deal. In Washington, cigarette makers began lobbying furiously for their support Thursday, calling support by at least one medical organization necessary for a megadeal to pass Congress, said a source close to the tobacco camp.

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TOBACCO UPDATE

STATEMENT OF ATTORNEY GENERAL J. JOSEPH CURRAN, JR.

Despite reports that a tobacco settlement is reaching its final stages, I want to reiterate that my position on waiving future liability for the industry is non-negotiable. As long as the tobacco industry knows it can be sued, we have a gun to its head. Take away the gun and who knows what will happen to the health of Americans?

Any deal that relieves the tobacco industry of liability is not a settlement, but a gift. And why should we be giving something to an industry that manufactures a product that has killed so many people?

The tobacco industry wants us to become addicted to its money so we'll forget what's really important -- justice and the future health of Americans. I want it to be known that I am one attorney general who can resist the temptation to take the money and run.

We cannot give up the integrity of our civil justice system. I'll wager that if the tort system is compromised in any way, we'll never hear from tobacco again -- we will, however, continue to hear from its victims.

Reduction of Youth Smoking. One of the most important objectives of Maryland's lawsuit was to address the targeting of minors by the cigarette companies. Any deal would have to ensure that the tobacco industry will not only cease entirely its efforts to lure young people into the lifelong addiction of cigarette smoking, but will be penalized unless they work toward a sharp *reduction* in youth smoking in the coming years. Preserving federal regulatory power is essential to achieving the reduction of youth smoking and has the potential for addressing other harms. As explained by former Commissioner Kessler, the policy choice embodied in the current FDA regulations represents a first effort to curb youth smoking. I believe we cannot compromise and should not the ability of the FDA in the future to adopt more stringent regulation in the future, including restricting the nicotine content of cigarettes, if the current restrictions do not achieve the desirable result.

In my view, there are reasons why one ought not concede much in response to an industry offer to agree to certain advertising restrictions. First, that decision will be reviewed in the Court of Appeals for the Fourth Circuit, in which the federal government

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has a strong likelihood of prevailing. Second, state governments may themselves regulate certain industry advertisement, much as Baltimore City has done in banning billboard advertising near schools.

For these reasons, I oppose any movement to yield any ground to the tobacco industry on the breadth of FDA regulatory power. We should carefully examine whether there is any real need for legislation addressing regulatory issues.

In addition, I have pressed my fellow Attorneys General to make sure that the negotiating team has the full benefit of input from the public health community -- the AMA, the American Lung Association, the American Cancer Society, and other organizations. I have spoken to Secretary Wasserman and other important leaders of Maryland's public health community to obtain the benefit of their views. While FDA regulatory jurisdiction is one of the most important assurances we can have that the public health concerns will be safeguarded, these groups' participation will help us to consider other appropriate health programs that should be included in the deal, such as smoking cessation programs, counter-advertising, youth education, and many other items.

A few concepts will guide my evaluation of the adequacy of the money that the tobacco industry puts on the table with regard to immunity. Attorney Generals ought not readily agree to changing the tort system for this product.

- (1) *We cannot let the tobacco industry settle cheap or pass on the cost of settlement to smokers.* The tobacco industry must disclose all the assets they have that could be used for the fund, including their insurance policies that might cover any liability. The tobacco industry's stonewalling on their insurance coverage causes me to suspect very strongly that substantial coverage may indeed exist.
- (2) *Immunity.* The tobacco industry has asked for "blanket immunity." I will state my own position clearly: I will *never* accept a deal that cuts off the rights of individuals to bring traditional lawsuits in the future, if they so choose. In other words, unless there is an "opt-out," I will urge that we state Maryland is "out" of any "immunity" deal.

Unless I am satisfied on these points, I will not agree to a deal that compromises the well-being of our citizens or lets an industry that has perpetrated a vast destruction walk away unscathed.

Tobacco Deal Faces Growing Criticism

Officials of 3 States Oppose Any Proposal to Limit Individual Right to Sue

The tobacco industry and the small coterie of lawyers across the bargaining table have pledged to wrap up a settlement agreement in the next two weeks, but opposition to the deal is escalating.

Yesterday, three of the 29 attorneys general who have sued the tobacco indus-

By Wall Street Journal staff reporters Sarah L. Huang and Aliz M. Freedman in New York and Thomas M. Burton in Chicago.

try to recoup the costs of treating people with smoking-related illnesses for the first time publicly expressed strong misgivings about the proposed settlement. Marking the most serious rift to date, attorneys general in Iowa, Maryland and Wisconsin, said they want to take any deal that would limit an individual's right to sue the tobacco industry off the negotiating table.

"I'll be very reluctant to agree to any significant limitations on individual liability," Iowa's Attorney General Tom Miller said in an interview. "It's hard to give

special liability protection to the tobacco industry when they're the worst not the best and are only now doing what a responsible industry should have done 40 years ago."

Added Wisconsin's Jim Doyle: "Even though we have no real authority, we are bargaining away the rights of future individuals. I am very uncomfortable in limiting citizens' rights to go to court."

Richard P. Scruggs, a lead negotiator for the states, said that these state officials have "a sincere concern that the rights of victims to compensation will not be respected" in the proposed agreement. But he defended the proposed limitations on lawsuits saying they are intended "to insure the ability of future victims to recover and not just the first in line."

Political Risk

The mounting criticism to cutting a hasty deal and giving the tobacco industry significant immunity from lawsuits could endanger the settlement's prospects on Capitol Hill. While Congress could force

Joe Feels the Heat

An FTC complaint accuses RJR of using its Joe Camel character to entice underage smokers. Meanwhile, Florida's pension fund voted to sell off its tobacco holdings. Articles on B1 and A4.

states to settle their cases, such an action would become politically risky if enough

states come out against the plan. Until now, Minnesota's Hubert Humphrey III has been the only attorney general to speak out publicly against the settlement.

"If this is too controversial, no one on the Hill is going to go near it," said David Kessler, former commissioner of the Food and Drug Administration, which has asserted its authority to regulate cigarettes as a drug. "In trying to solve everything, (the negotiators) have created an almost impossible task for themselves."

As it now stands, the current proposal would restrict the ability both of current smokers and individuals bringing second-hand-smoke claims to sue cigarette makers. It would be even tougher for future smokers to be compensated for the most common tobacco-related illnesses, such as lung cancer.

Industry leaders Philip Morris Cos. and RJR Nabisco Holdings Co. have been negotiating with lawyers for the states and individual smokers as well as public-health representatives for the past two months. The talks mark a watershed in the four-decade-long history of tobacco litigation, since the \$45 billion industry has until now staunchly refused to either settle lawsuits or to concede that smoking causes disease.

The tobacco proposals also were coming under fire yesterday at a national summit of hundreds of antismoking activists. Please Turn to Page A11, Column 3

Tobacco Negotiators On Settlement Face Growing Opposition

Continued From Page A3

ists near Chicago. A number of advocacy-group representatives gathered at the Sofitel Hotel in Rosemont, Ill., to condemn the industry's pursuit of immunity as well as the secrecy of talks conducted over the past several weeks by some of their own colleagues with representatives of the tobacco industry.

"This has been done in secret all along," said John R. Garrison, chief executive of the American Lung Association, the biggest health group to assail the settlement. He added: "This wouldn't be the right time for a settlement. Every day, there are more documents being made public. Why should we bail the industry out?"

Although public-health organizations aren't likely to reap big financial benefits from a the talks, the groups do exert significant political clout. For example, Maryland's attorney general Joseph Curran, said he was uncomfortable not only with restricting an individual's ability to sue, but also with endorsing any deal that doesn't have the blessing of the public-health community. "My position is going to be that if the health community isn't on board, we're not going to be on board," he said.

Mr. Scruggs, the negotiator, countered that some of the members of the public-health community "have unrealistic expectations of what can be achieved in litigation, especially against an industry that has never paid a dime in compensation or lost a major lawsuit after appeals."

Mississippi Attorney General Mike Moore, a chief negotiator at the settlement talks, flew to Chicago yesterday to build

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Tobacco settlement is no done deal, Chicago talks suggest

By Anthony Flint, Globe Staff, 05/29/97

Doctors, public health officials and antismoking activists got their first look at a major draft accord on tobacco yesterday at a meeting in suburban Chicago, and peppered the deal with criticism.

The rough reception was indicative of the tough road that the proposed deal faces as it moves through the gantlet of public debate, starting with the public health community and ultimately Congress.

The settlement proposal is fragile to begin with, patched together by disparate interests that could split at any moment, and still unfinished in several key areas. But backers were cheered that mainstream health groups did not denounce the proposed pact outright.

"People in the audience spoke their minds and said they were pleased to be heard and wanted to keep the process going," said William Novelli, director of the Campaign for Tobacco-Free Kids.

Reporters were not allowed in the meeting, which was convened by the American Medical Association and included such groups as the American Cancer Society, the American Heart Association, the American Association of Public Health Physicians, state tobacco control officers and grass-roots antismoking groups.

Mississippi Attorney General Michael Moore, who is suing the industry along with 30 other attorneys general, and Matthew Myers, counsel for the Campaign for Tobacco Free Kids, presented the basic framework of the settlement, which would change the way cigarettes are sold and regulated in exchange for a onetime payment of more than \$300 billion and protections against future lawsuits.

Representatives of Minnesota Attorney General Hubert Humphrey III, who is opposed to the pact, and the American Lung Association, which says the tobacco companies cannot be trusted, made their case against a deal. They object to any pact that allows cigarette makers to continue to sell a lethal product, or allows them to escape punishment for past actions.

Dr. Tom Houston, a tobacco specialist for the AMA, said public health advocates questioned why it was necessary to rush to a settlement now, especially given mounting legal and regulatory leverage against the tobacco industry. Another concern was whether loopholes might be inserted into the pact as it moves through Congress.

Public health advocates were also wary about any measures in the settlement that limit an individual's ability to sue the industry in the future, Houston said.

There was considerable doubt about a provision in the tentative accord that would allow the Food and Drug Administration to regulate the amount of nicotine in cigarettes - but not call for the reduction of nicotine beyond a minimum level.

"My sense is that's a deal-breaker. People in the room were united on that," said Richard Daynard, director of the Tobacco Products Liability Project at Northeastern University, who attended yesterday's meeting.

Daynard said many public health advocates are reserving judgment on the pact, but may grow increasingly dismayed as they see the fine print. "Some of the broad descriptions sound great, but the devil is in the details," he said.

Gregory Connolly, director of the Massachusetts Tobacco Control Program, said the settlement package attempts to address so many different areas - be they public health, legal, regulatory and financial - that it will be extremely difficult to maintain a consensus on it.

"It could hang together, but it's so topheavy it may well collapse of its own weight," he said.

Lawyers, attorneys general and tobacco representatives are continuing to meet to iron out sticking points. But with yesterday's meeting, backers of the pact wanted to give the basic framework of the package a trial run, to test the reaction.

This story ran on page A16 of the Boston Globe on 05/29/97.
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Health Experts Eye Tobacco Talks

By *MIKE ROBINSON*

Associated Press Writer

Wednesday, May 28, 1997 7:21 pm EDT

ROSEMONT, Ill. (AP) -- Negotiators appealed to public health experts Wednesday for support in talks with the tobacco industry, but they ran into widespread doubt that cigarette makers could be trusted on any worthwhile deal.

"The industry's record of deceit and lethal behavior makes it highly likely that any agreement will be full of loopholes and that the intent of the agreement will be ignored by the tobacco industry," said Dr. Dave Cundiff of Louisville, Ky., a board member of the American Association of Public Health Physicians.

He was among dozens of experts who attended an American Medical Association meeting to air concerns about negotiations between state attorneys general and the tobacco industry. The negotiations resume Thursday in New York.

The goal is a settlement that would eliminate all but a small amount of cigarette advertising, reduce teen-age smoking and compensate smokers who develop health problems as a result.

In exchange, the tobacco industry wants 30 attorneys general to drop lawsuits they have filed against the cigarette makers, along with some other concessions.

Public health officials have divided sharply over whether reaching the agreement is a good idea.

Much of Wednesday's meeting was taken up by a debate between Mississippi Attorney General Mike Moore, chief negotiator for the states, and representatives of Minnesota Attorney General Hubert H. Humphrey III, the leading critic of the settlement negotiations.

"To settle with the tobacco companies before we have all the facts, including the industry's self-proclaimed 'privileged' documents, is to buy the proverbial pig in a poke," Humphrey said in a letter distributed at the meeting. He was in Israel, but sent three members of his staff to argue against the talks.

Moore said a broad peace settlement with the industry is needed because decades of lawsuits against cigarette makers by individual smokers have gotten nowhere.

"The tobacco companies are not worried about individual smoker cases -- they have beaten them for 50 years," Moore said.

He outlined a partial agreement already reached with the tobacco industry that would limit cigarette advertising to adults-only magazines and counter displays and provide \$500 million from the industry for an anti-smoking campaign.

The changes would reduce teen smoking by 30 percent in five years and 60 percent in a decade, he said.

Moore conceded that a number of sticking points remain to be negotiated, including cigarette makers' hope for immunity from liability lawsuits in exchange for a fund containing billions of dollars to compensate victims of smoking-related diseases.

Moore said negotiators will not agree to total immunity.

The other obstacle appeared to be how much the Food and Drug Administration will be able to regulate the nicotine content of cigarettes. A federal court in North Carolina recently ruled that the FDA already has complete authority to regulate tobacco, but the industry is appealing.

Moore said if the talks don't seem promising within the next two weeks, "it'll be time to go back home and prepare my opening arguments."

The case is set for trial July 7.

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Health Groups Air Differences On Tobacco Deal

Many Remain Opposed To a 'Global Bailout'

By Sandra Torrey

Washington Post Staff Writer

Thursday, May 29 1997; Page A17

The Washington Post

Public health advocates came away from an all-day meeting in a Chicago suburb yesterday as divided as they were at its start over a potential negotiated settlement with the tobacco industry.

"If there was going to be consensus building, it didn't happen today," said Paul Billings, deputy director of government relations for the American Lung Association, which has staunchly opposed any deal. "The tenor of every comment [is that] people are real skeptical."

The meeting, the first major gathering of public health advocates since the secret negotiations began last month, brought together about 100 representatives of major health organizations, including the American Medical Association and the American Cancer Society, and smaller grass-roots anti-smoking groups to exchange information and express concerns about a possible settlement. Because any deal will require congressional action, support from the health community could be crucial.

But many of those attending the meeting sported yellow buttons with little round bombs on them, proclaiming "no global bailout," and their comments underscored that position.

"It's too soon [for a deal]," said Anne Morrow Donley of Virginia GASP, Group to Alleviate Smoking in Public, who added that damaging new information about the industry is being uncovered every day. "I am not sure they should even be at the table now."

Opponents of a settlement asserted that negotiators are giving up too much for any concessions they may win, and that the industry cannot be trusted to forge a deal without loopholes that it can later turn to its advantage.

Still, some of the health advocates who remain open to the idea of a deal pronounced the meeting a success. It was designed to provide information and give "a sense of input" to the public health groups that have not been at the negotiating table, said former AMA president Lonnie R. Bristow, who has sat in on some of the talks. People expressed "diverse opinions, with great passion," he said. "Some may modulate

their positions, and others will not."

The meeting featured presentations from Mississippi Attorney General Mike Moore, who has been leading a negotiating team for a group of state officials suing the industry, and representatives of Minnesota's Hubert H. Humphrey III, the attorney general who has been the strongest critic of a deal.

Humphrey aide Eric Johnson said in an interview that yesterday's move by the Federal Trade Commission for a virtual ban on R.J. Reynolds's "Joe Camel" advertising campaign only served to underscore Humphrey's position. "The tobacco companies are on the ropes -- with every new document that becomes public, every new whistleblower, every new judgment in court, every new action by agencies such as the FTC, our position grows stronger," he said. "This is no time for hasty compromises."

Meanwhile yesterday, a small group of negotiators met in New York and a larger group was scheduled to meet today. While agreement has been reached on several issues, the negotiators have yet to agree on such major concerns as how much protection tobacco companies would get from lawsuits, the total amount of money the industry would pay and the scope of federal regulation of nicotine in cigarettes the industry would accept. One negotiator called the nicotine question "probably highest on the list of deal-breakers."

Also yesterday, another attorney general, Maryland's J. Joseph Curran Jr., joined those taking a hard line against a deal. "Any deal that relieves the tobacco industry of liability is not a settlement, but a gift," said Curran, who also questioned yielding any ground to the industry on the scope of federal regulation.

Some of those who favor an agreement had strong reaction to the negative comments from public health advocates.

"In three years, Mike Moore and his troops have accomplished more than the health community, Congress or anyone else has [on the tobacco front] in 60 years," said D.C. lawyer John P. Coale, who is part of a coalition of trial lawyers suing the industry in 17 states. Negotiators already have won concessions from the industry "that the health community never dreamed were possible, such as a ban on virtually all advertising and a good faith effort to drastically reduce teen smoking."

Others who have been at the negotiating table said the debate was healthy. "These are issues that will effect generations to come, and the caution and skepticism are very well-grounded in" the industry's history, said Connecticut Attorney General Richard Blumenthal, who has been a frequent participant in the talks. "We need to hear and heed those views."

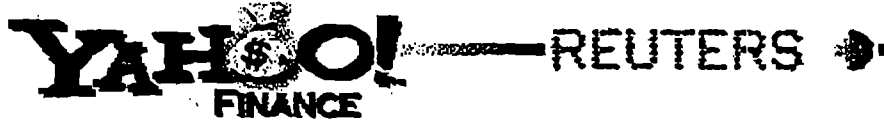
Special correspondent Jennifer Ordonez in Chicago contributed to this report.

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ool - Ex U.S. FDA chief Kessler criticizes tobacco talks

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Wednesday May 28 9:19 PM EDT

Ex U.S. FDA chief Kessler criticizes tobacco talks

WASHINGTON, May 28 (Reuter) - Former Food and Drug Administration Commissioner David Kessler said Wednesday that public health interests were not being served by the current tobacco settlement talks.

The goal should be "to try to reduce the number of people who smoke, and the number of people addicted, not how much money should be received," Kessler said in an interview.

In Chicago Wednesday, Mississippi Attorney General Mike Moore said that the industry and state attorneys general had agreed on the public health issues, but that limiting industry liability was still a stumbling block to a final deal.

Kessler said he is not satisfied that the talks will get at the root of the tobacco problem, what he called children being seduced into picking up the habit.

He welcomed Wednesday's action by the Federal Trade Commission against R.J. Reynolds Tobacco Co([RN](#) - [news](#)) to prevent it using its cartoon "Joe Camel" advertisements to attract minors to smoking.

"There could not be anything that more personifies the targetting of young people than Joe Camel," Kessler said.

Kessler, who led the Clinton Administration's crackdown on the tobacco industry until leaving the FDA earlier this year, will keep a hand in the issue even as he assumes his new position as Dean of the Yale Medical School on July 1.

He will co-chair, with former Surgeon General C. Everett Koop, a new committee to advise Congress on the settlement talks and a national tobacco control policy.

The Advisory Committee on Tobacco Policy and Public Health's first meeting will be held June 5 on Capitol Hill.

The group includes representatives from the American Medical Association, American Cancer Society, American Lung Association, American Heart Association, the Society for Preventive Medicine, the National Medical Association, and the National Center for Tobacco-Free Kids.

Kessler said he stayed at FDA for six years partly to complete the job on tobacco that he began in 1991. He does not view tobacco as his life's work, but added, "it's not the kind of responsibility I walk away from."

Nevertheless, he is not optimistic he can convince Yale to divest itself of its tobacco investments. The school knew his views, Kessler said, but "the last thing anyone wants is me to give them investment advice."

More news for referenced ticker symbols: [RN](#), and related categories and industries: [food/beverages](#).

ALA/ATS GOVERNMENT RELATIONS POSITION

Position Title: The Global Tobacco Settlement

Date Approved: May 1997

Committee: Government Relations

Position Text: The American Lung Association opposes any global tobacco settlement beyond the scope of the Medicaid suits filed by state Attorneys General, because of the clear benefits afforded to the tobacco industry. The tobacco industry must be held accountable for its actions. A global settlement would involve issues beyond the scope of the suits filed by the Attorneys General. Moreover, the American Lung Association believes that in any settlement discussions:

1. No immunity should be provided the tobacco industry or tobacco industry executives. This includes no criminal immunity, no preemption of class actions or an individual's rights to sue in state/federal court and no caps on award settlements.
2. No conditions should be made relative to the authority of the Food and Drug Administration to regulate tobacco products.

The American Lung Association supports the state Attorneys General in their suits to recover Medicaid expenditures for tobacco-related diseases. Any continuing settlement discussions should be germane to this limited scope of action.

Tobacco - VA



Department of Veterans Affairs
Washington, DC 20420

Office of Public Affairs
Office of the Deputy Assistant Secretary

Fax Cover Sheet

DATE: 6.19.97

TO:

*Elizabeth Dye
Domestic Policy
Council*

PHONE: 456-2216

FAX: 456-2818

FROM:

Jim Holley

PHONE: (202) 273-5710

FAX: (202) 273-5719

Number of pages including cover sheet: 8

Message

*Per Harold Gracely, COS, Dept.
of Veterans Affairs
Subj: Nicotine Dependence Issue
Please deliver to Elizabeth Dye - 222
DEOB.*

**Department of
Veterans Affairs****Memorandum**

Date May 13, 1997 VAOPGCPREC 19-97

From: General Counsel (022)

Subj: Secondary Service Connection Based on Nicotine Dependence

To: Director, Compensation and Pension Service (21)

QUESTION PRESENTED:

Under what circumstances may service connection be established for tobacco-related disability or death on the basis that such disability or death is secondary to nicotine dependence which arose from a veteran's tobacco use during service?

COMMENTS:

1. Section 3.310(a) of title 38, Code of Federal Regulations, provides, in pertinent part, that, "[d]isability which is proximately due to or the result of a service-connected disease or injury shall be service connected." The disabling condition stemming from the service-connected disease or injury is referred to in the regulation as a "secondary condition." Where a claimant can establish that a disease or injury resulting in disability or death was a direct result of tobacco use during service, e.g., damage done to a veteran's lungs by in-service smoking gave rise to lung cancer, service connection may be established without reference to section 3.310(a). However, where the evidence indicates a likelihood that a veteran's disabling illness had its origin in tobacco use subsequent to service, and the veteran developed a nicotine dependence during service which led to continued tobacco use after service, the issue then becomes whether the illness may be considered secondary to the service-incurred nicotine dependence and resulting disability or death may be service connected on that basis pursuant to section 3.310(a).

2. VAOPGCPREC 2-93 (O.G.C. Prec. 2-93) held that determination of whether nicotine dependence may be considered a disease for compensation purposes is essentially an adjudicative matter to be resolved by adjudicative personnel based on accepted medical principles. That opinion also noted in passing that, if nicotine dependence is considered a disease for compensation purposes, such dependence began in service, and resulting tobacco use led to disability, the issue would become whether secondary service connection could be estab-

2.

Director, Compensation and Pension Service (21)

lished for that disability pursuant to 38 C.F.R. § 3.310(a). The threshold question which must be answered with regard to claims for secondary service connection of tobacco-related disability or death is whether nicotine dependence may be considered a disease within the meaning of the veterans' benefit laws. See VAOPGCPREC 2-93, paras. 2-4. In a May 5, 1997, memorandum, the Under Secretary for Health, relying upon the criteria set forth in VAOPGCPREC 67-90 (O.G.C. Prec. 67-90), stated that nicotine dependence may be considered a disease for VA compensation purposes.

3. Assuming the conclusion of the Under Secretary for Health that nicotine dependence may be considered a disease for compensation purposes is adopted by adjudicators, secondary service connection may be established, under the terms of 38 C.F.R. § 3.310(a), only if a veteran's nicotine dependence, which arose in service, and resulting tobacco use may be considered the proximate cause of the disability or death which is the basis of the claim. We note initially that a determination of proximate cause is basically one of fact, for determination by adjudication personnel. VADIGOP, 3-17-71 (Vet). "Proximate cause" is defined by *Black's Law Dictionary* 1225 (6th ed. 1990) as "[t]hat which, in a natural and continuous sequence, unbroken by any efficient intervening cause, produces injury, and without which the result would not have occurred." This definition is very similar to the following definition of proximate cause adopted by the General Counsel of the Bureau of War Risk Insurance in a January 12, 1921, opinion, 13 Op. G.C. 141 (Bureau of War Risk Ins. 1921):

An act which directly produced the injury * * *.
That cause which naturally leads to and which
might have been expected to produce the result.
That from which the effect might be expected to
follow without the concurrence of any unusual cir-
cumstances. That which immediately produces the
effect as distinguished from a predisposing cause.
(32 Cyc. 745).

See also VADIGOP 3-17-71 (Vet) (quoting same definition).

4. A subsequent event, which is referred to as an "intervening" cause, may interrupt the causal connection between an event or circumstance and subsequent incurrence of disability or death. See, e.g., *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1051-52 (5th Cir. 1983). An "intervening" cause which "'turns aside the[] course [of events],

3.

Director, Compensation and Pension Service (21)

prevents the natural and probable result of the original act or omission, and produces a different result that could not have been reasonably anticipated'" may be considered a supervening cause of injury which severs the causal connection between the original act and the injury. *Sheehan v. New York*, 354 N.E. 2d 832, 835-36 (N.Y. 1976) (quoting 1 Warren's N.Y. Negligence § 5.08).¹

5. Again, assuming that adjudicators adopt the Under Secretary for Health's conclusion that nicotine dependence may be considered a disease, the two principal questions which must be answered by adjudicators in resolving a claim for benefits for tobacco-related disability or death secondary to nicotine dependence are: (1) whether the veteran acquired a dependence on nicotine during service; and (2) whether nicotine dependence which arose during service may be considered the proximate cause of disability or death occurring after service. With regard to the first question, determination of whether a veteran is dependent on nicotine is a medical issue. According to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (1994) (DSM-IV) at 243, the criteria for diagnosing substance dependence are generally to be applied in diagnosing nicotine dependence. Under those criteria, as applied to the specific circumstances surrounding nicotine use, nicotine dependence may be described as a maladaptive pattern of nicotine use leading to clinically significant impairment or distress, as manifested by three or more of the following criteria occurring at any time in the same 12-month period: (1) tolerance, as manifested by the absence of nausea, dizziness, and other characteristic symptoms despite use of substantial amounts of nicotine or a diminished effect observed with continued use of the same amount of

¹ Relevant considerations in determining whether an "intervening" cause supercedes an earlier event as the proximate cause of an injury include: (1) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the original event; (2) the extraordinary, rather than normal, nature of the force's operation; (3) the fact that the intervening force is operating independently of any situation created by the original event or is or is not a normal result of such an event; (4) the fact that the operation of the intervening force is due to another's action or failure to act; (5) the fact that the intervening force is due to an act of another which is wrongful and subjects the actor to liability; and (6) the degree of culpability of a wrongful act of another which sets the intervening force in motion. Restatement (Second) of Torts § 442 (1965).

4.

Director, Compensation and Pension Service (21)

nicotine-containing products; (2) withdrawal, marked by appearance of four or more of the following signs within twenty-four hours of abrupt cessation of daily nicotine use or reduction in the amount of nicotine used: (a) dysphoric or depressed mood; (b) insomnia; (c) irritability, frustration, or anger; (d) anxiety; (e) difficulty concentrating; (f) restlessness; (g) decreased heart rate; or (h) increased appetite or weight gain; or by use of nicotine or a closely related substance to relieve or avoid withdrawal symptoms; (3) use of tobacco in larger amounts or over a longer period than was intended; (4) persistent desire or unsuccessful efforts to cut down or control nicotine use; (5) devotion of a great deal of time in activities necessary to obtain nicotine (e.g., driving long distances) or use nicotine (e.g., chain-smoking); (6) relinquishment or reduction of important social, occupational, or recreational activities because of nicotine use (e.g., giving up an activity which occurs in smoking-restricted areas); and (7) continued use of nicotine despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by nicotine. *Id.* at 181, 243-45.

6. If it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must determine whether the post-service usage of tobacco products was the proximate cause of the disability or death upon which the claim is predicated. As discussed above, a supervening cause of the disability or death would sever the causal connection to acquisition of the nicotine dependence in service. Post-service exposures to environmental or occupational toxins other than tobacco products may also be found, under the facts of particular cases, to constitute supervening causes of the disabilities or deaths so as to preclude findings of service connection.

7. Moreover, if a nicotine-dependent individual has achieved sustained full remission and then resumes use of tobacco products, the question arises whether such resumption constitutes a supervening cause which breaks the connection between the individual's prior tobacco use and disability or death resulting from resumed use of tobacco and results in de novo reoccurrence of the nicotine dependence. DSM-IV, at 180, indicates that sustained full remission is achieved when none of the criteria for nicotine dependence has been met for twelve months or longer. Where a veteran achieves sustained full remission of nicotine dependence following service and subsequently resumes tobacco use, and it can be determined that disability or death resulted from tobacco use, and a de novo dependence, which occurred after

5.

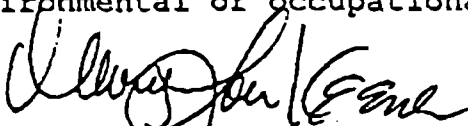
Director, Compensation and Pension Service (21)

the resumption, the causal connection between nicotine dependence incurred during service and the claimed secondary condition should, in our view, be considered to have been severed.

HELD:

a. A determination as to whether service connection for disability or death attributable to tobacco use subsequent to military service should be established on the basis that such tobacco use resulted from nicotine dependence arising in service, and therefore is secondarily service connected pursuant to 38 C.F.R. § 3.310(a), depends upon whether nicotine dependence may be considered a disease for purposes of the laws governing veterans' benefits, whether the veteran acquired a dependence on nicotine in service, and whether that dependence may be considered the proximate cause of disability or death resulting from the use of tobacco products by the veteran. If each of these three questions is answered in the affirmative, service connection should be established on a secondary basis. These are questions that must be answered by adjudication personnel applying established medical principles to the facts of particular claims.

b. On the issue of proximate cause, if it is determined that, as a result of nicotine dependence acquired in service, a veteran continued to use tobacco products following service, adjudicative personnel must consider whether there is a supervening cause of the claimed disability or death which severs the causal connection to the service-acquired nicotine dependence. Such supervening causes may include sustained full remission of the service-related nicotine dependence and subsequent resumption of the use of tobacco products, creating a de novo dependence, or exposure to environmental or occupational agents.


Mary Lou Keener

**Department of
Veterans Affairs****Memorandum**

Date: MAY 5 1997

From: Under Secretary for Health (10)

Subj: Request for Opinion - Nicotine Dependence

To: General Counsel (022)

1. In response to your request of April 9, 1997, regarding VHA's opinion as to whether nicotine dependence may be considered a disease for compensatory purposes, please be advised that the Diagnostic and Statistical Manual of Mental Disorders (4th edition) classifies nicotine dependence as a substance use disorder. Thus, I suppose that nicotine dependence may be considered a disease, as illustrated in your reference to VAOPGCPREC 67-90 (which states that a disease is usually capable of improvement or deterioration).

2. An individual who becomes dependent on nicotine can go into remission by eliminating the use of products/substances containing nicotine, such as tobacco products. Sometimes this is facilitated by or requires medical treatment.

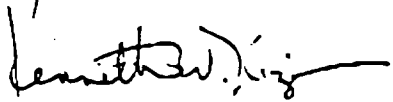
3. I must point out that, however, another important issue in this regard is the time at which a person becomes dependent on nicotine, or for that matter, any substance. At present, there are no physiologic criteria, medical data, or other scientific bases to determine how long it takes to become dependent on nicotine. Dependence may occur after smoking the first few packs of cigarettes, or after the first month of smoking, or many months after starting to smoke.

4. For those persons whose nicotine dependence requires medical treatment, please be advised that there exists a variety of treatment regimens, including use of tapering doses of nicotine delivered by a skin patch or gum. When one quits smoking, with or without the assistance of medical treatment, I suppose you could consider the nicotine dependence to be in remission, although it is not customarily thought of in this way. However, since everyone is susceptible to the addictive potential of nicotine, as far as we know, it cannot be scientifically stated, at this time, whether the reoccurrence of nicotine dependence that would occur with resumption of tobacco use is a relapse of the original condition or a *de novo* reoccurrence of the condition.

5. Finally, please be advised that the use of "proximate" as related to disability or death caused by conditions associated with nicotine dependence, and as commonly defined, is not supported by medical evidence. For example, it cannot be medically determined that an individual who smoked and died from atherosclerosis or congestive heart failure (CHF) due to chronic obstructive pulmonary disease would not have died from CHF if

he/she did not smoke. Other risk factors such as diet, exercise, cholesterol levels, etc., also substantially influence the development of heart disease and the relative etiologic contribution of such factors cannot be scientifically apportioned.

6. If I may be of further assistance to you in this matter, please do not hesitate to contact my office.

A handwritten signature in black ink, appearing to read "Kenneth W. Kizer", with a long horizontal flourish extending to the right.

Kenneth W. Kizer, M.D., M.P.H.

Tobacco - MN AG

**STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
LAW ENFORCEMENT SECTION**

Hubert H. Humphrey III
Attorney General

TRANSMISSION BY FACSIMILE

Suite 1400 NCL Tower
445 Minnesota Street
St. Paul, MN 55101
Tele No.: (612) 296-7575

To: Tobacco Staff

June 23, 1997
From: Luanne Nyberg 612-215-1533 p 612-297-4036 fx

Re: Tobacco Settlement Analysis

Attached, please find:

1. The opening analysis from the Wall Street Journal - get Monday's paper & read it all.
2. A money piece from Prof. Richard Daynard, who runs the Tobacco Litigation Project at Northeastern University, asserting that the industry can pay \$35 - \$45 billion a year, and that limits on the full range of legal remedies, civil as well as criminal, must still remain available.
3. An e-mail from Daynard analyzing the youth look-back as a 'deform' not a 'reform'.
4. A tax analysis from Public Citizen stating taxpayers will lose \$123 billion from the deal
5. An article outlining individual cigarette executives \$65 million windfall from the deal.
6. A NYT piece quoting advertising executives on the marketing restrictions "It may be a whole new opportunity for the tobacco industry to make fools of the legal community."
7. Koop comments the day after the settlement was announced. "It's like removing the end run and the pass for making forward progress."
8. Dr. Stan Glantz author, "The Cigarette Papers" op ed piece from the LA Times.
9. Stan Glantz analysis of Center for Tobacco Free Kids summary of the settlement
10. Community concern about second hand smoke provisions in the agreement
11. Community concern with long time-line for youth lookback to begin.

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75 CENTS

Burning Questions

Tobacco Pact's Limits —And Its Loopholes— Presage Fierce Debate

In the Fine Print: Hurdles For FDA, and a Rebate To Firms if Smoking Falls A Spur to 'Safer' Cigarettes

By ALIX M. FREEDMAN
And STEIN L. HWANG

Staff Reporters of THE WALL STREET JOURNAL

Get ready for a scorching national debate over whether the cigarette industry came away from the historic tobacco settlement with too sweet a deal.

The pact announced Friday by a host of state attorneys general, plaintiffs' lawyers, public-health advocates and the nation's cigarette makers would place sweeping restrictions on America's most lethal

Its, Ands and Butts

Congressional leaders and the White House will demand changes in the tobacco settlement, but in the end it's likely to make it into law. Article on page B1. In other coverage:

- Fees for plaintiffs lawyers may total an 'obscene' amount, B1.
- Ad agencies are already thinking up new gimmicks to sell smoke, B9.
- Kicking the habit takes more than a ban on billboards, B8.
- Most analysts believe the long-term outlook for tobacco stocks is good, C1.
- The smoking hassle is just getting started overseas, A11.

consumer product. That would have been unimaginable as recently as a year ago.

If Congress blesses it, the industry could pay \$368.5 billion over the next 25 years and succumb to a ban on billboards, vending machines, sports promotions and ads with people and cartoon characters, such as Joe Camel and the Marlboro Man. It would yield to regulation by the Food and Drug Administration and print dire new warning labels such as "Smoking Can Kill You." And it would stop hiding what it knows about the deadly effects of smoking—for the first time, telling smokers just how much tar and nicotine they are really inhaling and disclosing the additives believed to make U.S. cigarettes among the world's most hazardous.

But the pact, banged together after nearly three months of fractious negotia-

tion, fear of waving a red flag to liability lawyers. And the settlement is pockmarked with loopholes that would probably let tobacco companies keep racking up huge profits from addicted smokers, while restricting legal redress in the courtroom.

Fewer Smokers

The industry is likely to pass along to smokers its massive settlement bill in the form of price increases of 35 to 50 cents a pack. The industry says that would probably cut the ranks of the nation's 45 million smokers by 15% during the next two years. But one mechanism in the proposed agreement could ensure that the industry won't lose too many smokers too quickly.

If cigarette volumes drop below 1996 levels, companies would get a big rebate in their annual settlement payments, which after an upfront \$10 billion payment will begin at \$8.5 billion and ascend to \$15 billion in the fifth year of the agreement. That rebate, in turn, could let the industry lower prices and thus reignite sales.

"In order to get the \$368 billion, we need to keep people smoking," says Attorney General Joe Curran of Maryland, one of the 40 states that sued the industry. "This is a real paradox that's very troubling."

On paper, the agreement gives the FDA authority to reduce and even eliminate levels of nicotine in cigarettes—perhaps its best tool for bringing smoking rates down. But don't hold your breath. Although a landmark federal-court ruling this year said the FDA has the power to regulate nicotine as a drug, the settlement creates a new set of hurdles before the agency can take that step.

Among them, the FDA would have to prove that ratcheting down nicotine in U.S. cigarettes wouldn't create "significant demand for contraband." Regulators freely concede they don't have any idea how to prove that.

Shadowy Subject

The agreement also stipulates that the industry can take the agency to court to dispute its evidence, and orders judges to defer to the FDA's judgment only in areas where the agency has expertise. Nobody expects the FDA to claim expertise on the shadowy subject of contraband.

Indeed some industry chieftains are already offering reassurances that the pact won't be a major disruption in the cigarette business.

"After the shock of the 15% drop over the next couple of years, thereafter we'll be back to the normal trend," predicts Martin Broughton, chief executive of B.A.T Industries PLC, whose Brown & Williamson Tobacco Corp. is the U.S.'s No. 3 cigarette supplier. "This gives shareholders and employees more certainty and consumers a respite from the constant demonization of cigarettes."

In an interview, Mr. Broughton, who emerged as the most stiff-spined chief executive in the settlement talks, says he isn't worried about the FDA ever regulating nicotine. "It's an unlikely prospect," he says. "The contraband part gives me

settlement was announced. Steven Goldstone, chief executive of No. 2 player R.J.R. Nabisco Holdings Corp., said he had "every confidence" that the tobacco company will be able to "make critically important financial contributions" to the parent company. He added that R.J.R. has already been operating in heavily regulated overseas markets, an area the cigarette makers are actively exploring, and "we don't see any reason to doubt the future of the domestic market under similar conditions."

Public Debate

Thus, as Congress and the White House launch a review of the agreement that is certain to be long and bruising, the pact thrusts the nation into a wrenching public debate over how to regulate its most controversial product ever.

The debate will be shaped by powerful crosscurrents running through America at the end of the century. On the one hand, thanks to a surging reverence for individual responsibility, there is a widely held belief that smokers should be accountable for their own behavior and don't need the FDA to wean them off nicotine. The cigarette industry has pressed this point successfully over and over to avoid courtroom losses and regulations it branded unduly paternalistic.

At the same time, the industry has until now maneuvered to be virtually untouched by the wave of consumer and environmental protection that has transformed so many other industries. The result: A product believed to be responsible for 425,000 deaths each year gets less government oversight of its contents and marketing than ice cream. And supporters of harsh regulation of cigarettes have made their cause hugely popular by focusing on the heavy toll on minors.

"We've reached a point in our political warfare in which public-health forces have the power and influence to counteract the tobacco lobby, but even among the most zealous of advocates there is a recognition of the right of consenting adults to commit smoking to their own home," says Michael Pertschuk, a former commissioner of the Federal Trade Commission and veteran antismoking advocate. "Finding the right balance will test the responsiveness of our democratic institutions and is going to be a challenge the nature of which we have never before faced in America."

Instant Criticism

The loopholes in the agreement drew instant criticism from some public-health advocates and lawmakers, who argued that negotiators gave away too much to an industry on the ropes. Nonetheless, inside the tobacco camp some officials were shaken as they totted up the damage of a settlement that gave up far more than they ever imagined.

When the CEOs of R.J.R. and industry-leader Philip Morris Cos. kicked off negotiations on April 3, they intended to pay about \$200 billion in exchange for full protection from liability lawsuits. Instead

14. into the 1990s

RECOMMENDATIONS RELATING TO CIVIL LIABILITY
Richard Daynard

- to Keep/Kessler
Committee

Should the industry's exposure be capped, and if so at what level?

The cigarette companies are concerned, in descending order of priority, to protect their non-US-tobacco assets (i.e. everything besides their US tobacco operations), to protect their US tobacco assets, and to protect their profits from their US tobacco assets.

Since the companies' non-US-tobacco assets were typically purchased using their largely ill-gotten earnings from their US tobacco assets, and since the "parent" companies actively manage their US tobacco subsidiaries, the assets of the entire companies are appropriately at risk in the US litigation. The stock market value of the parent companies in recent years has reflected a substantial discount for the possibilities that the US tobacco subsidiaries, or even the entire companies, will go bankrupt: indeed, these values often hover around an amount that reflects a zero valuation for the US tobacco subsidiary. Eliminating the threat to the non-US-tobacco assets by itself would raise the stock prices substantially, since by eliminating the possibly disastrous negative financial contributions of the US tobacco subsidiaries to the parents' balance sheets, the predicted contributions from these subsidiaries (even allowing for the possibility, but not certainty, that the subsidiaries would go bankrupt) would be positive and substantial. Obviously, protecting the US tobacco subsidiaries from bankruptcy as well would further increase the parents' stock market valuations, since it would eliminate the need to take the possibility of a zero contribution from these subsidiaries into account in making the valuations. Even better, from the companies' perspective, would be a legislatively fixed cap on legal liability, set at a level to guarantee large profits indefinitely into the future. This would of course justify a large increase in the parents' stock market valuations.

The cigarette companies have no moral or legal claims to any of these protections. But it may be that public health concerns can be satisfied while meeting some of the tobacco executives' priorities. According to an analysis done by Jeffrey Harris, MD, Ph.D., the maximum contribution that the US cigarette subsidiaries could make on an ongoing basis is about \$35 billion/year, based on raising the price of a pack of cigarettes by about \$2.25 to somewhat over \$4/pack (the "monopoly", or revenue-maximizing price). The US non-tobacco subsidiaries could also contribute their current profits, as could the non-US tobacco subsidiaries: this could produce another \$5 - 10 billion/year (although financing a domestic compensation scheme on the basis of foreign tobacco profits may be seen as morally and politically unacceptable). Thus, even though the industry causes about \$50 billion/year in medical costs and another \$50 billion in lost wages, it is economically impossible to extract any more than about \$35 - \$45 billion/year from it on an ongoing basis. Hence, even a modest workers' compensation-type scheme, which would reimburse medical costs and lost wages, could not be funded at more than a 35-45% level. An additional one-time payment could also be extracted, perhaps forcing the companies to sell their non-US-tobacco assets.

A possible settlement might cap the industry's liability at \$35 billion/year (to be adjusted for inflation), plus an additional one-time payment, applicable to any claims for past misdeeds. This should guarantee that their US tobacco subsidiaries would not be forced into bankruptcy, and should therefore help their stock market valuations. Since this would meet the industry's first two priorities, it should only be granted in return for very substantial public health benefits.

B. How much should the industry pay?

A related question to liability caps is minimum payments. One question is what the money should be used for (compensation, tobacco control activities, helping farmers, etc.); that will not be discussed in this section. The other question is the public health benefits obtainable from forcing the companies to raise prices so as to finance regular payments. These benefits are well recognized. At the \$2.25/pack increase that would follow from imposing a \$35 billion/year payment requirement, smoking rates overall would drop about 40%, but the drop among children and teenagers would be much greater. While increasing the payment obligation beyond that would not force the companies to raise the prices further (the monopoly price being the revenue-maximizing price), larger price increases could be mandated by statute (perhaps through taxes), though at the cost of decreasing the industry's payment capabilities.

What should the continuing role of litigation be?

This obviously depends in part on what the industry has been required to pay under the terms of the settlement. If the industry has been required to make the maximum possible contribution (presumably, about \$35 billion/year), then litigation will not be needed to achieve the public health benefits attendant about raising cigarette prices to the monopoly level. Conversely, if the required payments are below the maximum possible contribution, litigation would continue to be needed for the critical public health goal of forcing up the industry's costs and prices, thereby reducing consumption.

Another purpose of litigation is to punish the companies for their past misbehavior. Since the companies made deliberate decisions to addict millions of youngsters, knowing full well that that would lead to hundreds of thousands of premature deaths each year, an annual payment which would permit the companies to continue to make profits would not constitute adequate punishment. See *US v. McVeigh*. However, the amnesty programs developed in Chile, South Africa, etc. may provide some guidance. Companies could be protected against the use of any documents in litigation for the purpose of obtaining punitive damages if the companies have placed these documents in a public depository within six months of the date of the settlement, and before the commencement of the trial in question.

No settlement or legislation should provide the industry with a license to violate legal standards prospectively. Thus, the full range of legal remedies, civil as well as criminal, that would be available for the misbehavior of any other industry, must be available to invoke against the tobacco industry. This includes punitive damages. The industry's notorious past record obviously justifies ~~developing extraordinary~~ additional remedies as well.

To the extent that continuing litigation is needed, the full range of civil procedures currently available to facilitate this and other litigation must remain available. This includes class actions and the ability of a court to consolidate cases and otherwise expedite trials, it also includes not creating new defenses not currently available to the industry. The industry has bragged that "the way we win these cases, to paraphrase General Patton, is not by spending all of Reynolds' money but by making that other son of a bitch spend all of his." There is no point in pretending to allow litigation to proceed against the industry, while at the same time making it even harder for that litigation to succeed.

From: Stan Glantz
To: Multiple recipients of list St
Subject: Re: TFK Summary of Settlement
Date: Sunday, June 22, 1997 1:28AM

Here are some interesting comments I recieved from Dick Daynard that are worthy of wider dissemination.

- >
- >Your items (3) and (4) understate the nature of the problem.
- >
- >The "look-back" provision is basically a 4 cent/pack tax, to take effect five
- >years from now. If the companies are so unlucky as to come within 22
- >percentage points of meeting their goals, the tax goes down (but since this
- >is an industry that makes its own luck, that seems unlikely). There is not
- >much incentive for any one company to do anything to reduce youth smoking,
- >since the assessment is against the entire industry for total youth smoking:
- >the exception is that a company could try to qualify for the 75% rebate but
- >showing its good faith, etc. The problem with that is that this is supposed
- >to be an objective performance standard, not a subjective good faith
- >standard. And, you're right (as was Kessler on Wednesday, who made the same
- >point): the \$80 million/point missed (to be reduced if per unit profit
- >declines, which it will) is too small, since it is calculated to achieve
- >indifference between addicting kids and paying the penalty. Treble damages
- >would make more sense.
- >
- >The tort "deform" goes beyond class actions, also eliminating consolidations,
- >statistical extrapolations, etc. — anything that would make the cases
- >economically viable. It also, extraordinarily, provides that if the
- >companies misbehave in the future, they can take 80% of what they pay off
- >their other obligations under the agreement, and deduct the remaining 20%
- >from their taxes.
- >
- >On these items, and on the FDA jurisdiction, the agreement needs to be sent
- >back to the negotiating table.
- >
- >

"look-back"
\$
"deform"
not a reform

Public Citizen

NEWS RELEASE

For Immediate Release:
June 20, 1997

Contact: Brian Dooley, 202/588-7703
Booth Gunter, 202/588-7741

TAXPAYERS BURNED IN DEAL WITH THE DEVIL

The announcement by the state attorneys general today that they have reached "an agreement in principle" should be viewed by everyone who cares about the ravages of tobacco with extreme skepticism.

"We question how the attorneys general can announce a deal in principle with those who have no principles," said Public Citizen President Joan Claybrook. "And taxpayer beware: You will be losing over \$120 billion in tax revenues from this deal."

The public won't know the true impact of this deal until a detailed settlement is made public and the implementing legislation is drafted. President Clinton was right to refuse to comment until he can review all the details.

"The public health community is in the middle of preparing a blueprint for tobacco control, under the leadership of former FDA Commissioner David Kessler and former Surgeon General C. Everett Koop. When that blueprint is completed in the next two weeks, citizens should use it as a guidepost against which to measure the particulars of the settlement," said Alan Morrison, Senior Attorney at Public Citizen Litigation Group.

Even in the absence of details, it is very doubtful that this is a good deal for the public.

Consider the following:

- * Although the industry will pay almost \$370 billion dollars over 25 years, almost every penny will be tax deductible, which means the U.S. Treasury will lose \$123 billion in tax revenues and the American people will underwrite this settlement out of their paychecks.
- * Because most smokers are addicted, the industry can raise its prices to cover its added costs. Addicted smokers will have no choice but to pay and pay.
- * Every time the public health community has "won" a regulatory battle with the tobacco industry, the industry has turned its defeat into victory. Why should this time be different, since the industry's record for truth is as bad as it gets?
- * We have yet to be told how the pot of money is going to be divided. How much will go to the victims, how much to the states, and how much to the lawyers?

Here are some things to watch out for:

Are there limits placed on when and how nicotine can be regulated by the FDA?

What secret documents will finally be disclosed to the public concerning the industry's wrongful conduct and the health consequences of tobacco?

Are there limits placed on the rights of tobacco victims to sue for actual damages? (We know there are for punitive damages, yet what industry deserves them more?)

What about the rest of the world? Are we giving the tobacco industry a green light to kill abroad, just the way they have done here, and will foreign sales be used to pay the amounts required in this deal?

Tobacco company CEOs could
make millions off settlement
Saturday, June 21, 1997

BLOOMBERG NEWS
NEW YORK

Top executives at cigarette makers stand to make millions of dollars for themselves through a settlement of tobacco litigation. Chief executives of Philip Morris Cos., RJR Nabisco Holdings Corp. and other companies hold stock and options that could rise as much as \$65 million by the end of next year, based on analyst estimates that take the settlement into account. Much of that amount would go to Philip Morris CEO Geoffrey Bible, whose holdings could rise as much as \$50 million. Investors and analysts said they don't begrudge the cigarette executives their potential riches. Instead, it's quite the opposite. "That's what the CEO is supposed to do -- get the stock up," said Sanford C. Bernstein & Co. analyst Gary Black. Tobacco companies and their foes have agreed to a historic plan that would have the industry pay \$368.5 billion over 25 years, impose restrictions on marketing and accept government regulation of nicotine. The settlement limits future lawsuits against the industry. By ending the litigation, cigarette producers will pare their legal costs and eliminate the risk of a crippling damage award. That risk has made tobacco shares less valuable than the stocks of most other consumer-products companies -- a big reason why investors pushed the CEOs to settle. The prospect of a settlement lifted share prices in recent months. Shares of Philip Morris -- maker of Marlboro, the world's top-selling cigarette -- rose 22 percent since the talks heated up in late March, while RJR's gained 13 percent and U.S. Tobacco Inc.'s rose 6.9 percent. Black said he expects Philip Morris's shares to rise as high as 60 in the next six to 12 months from today's 45 1/2. RJR

Nabisco's shares should go to about 44 from 35, Black said. Other forecasts are just as optimistic. Diana Temple, an analyst with Salomon Bros. said that RJR Nabisco's shares could rise to \$55 by the end of 1998. While tobacco executives stand to gain from rising share prices, they can't exercise their options and stock grants for several years in some cases. For that reason, investors said that the executives will protect their interests. "It's important for management of companies that we're invested in to have investments along with us," said Art Cecil, an analyst at T. Rowe Price Inc., which holds about 1 million shares of RJR Nabisco, the maker of Winston and Camel cigarettes. Investors and analysts also said that it wasn't the prospect of personal profit that got tobacco CEOs to the bargaining table. "When you're talking about people who are already making \$5 million a year and probably are worth \$30 million, you have to wonder whether a few more million is really going to turn their heads," said Graef Crystal, an executive compensation expert. Phillip Morris CEO Bible has more to gain than any tobacco executive. Bible either owns, or has options to buy, 3.9 million shares. At a recent price of 48, those shares are worth about \$185 million. If a settlement boosted Philip Morris's shares to 60, as Bernstein's Black expects, Bible's stake would rise by about \$50 million to about \$235 million. Steven Goldstone, chief executive of No. 2 cigarette maker RJR Nabisco, wouldn't do badly either. He owns, or has options to buy, about 1 million shares of his company. Based on Black's forecast, the value of Goldstone's RJR Nabisco stake would rise \$8 million to \$44 million on a settlement.

THE ADVERTISING

Industry Still Has Many Weapons Available

By STUART ELLIOTT

The sweeping changes that the nation's tobacco companies have agreed in principle to make in how they sell cigarettes — from eliminating the Marlboro Man in advertisements to banning bearing brand logos and limiting signs in stores — will make a significant difference in consumer behavior, a range of experts predicted yesterday.

But many said they also believed that there were enough remaining weapons in the marketing arsenal to enable cigarette makers to continue selling their products profitably for decades. Indeed, similar restrictions, including the banning of Joe Camel and the Marlboro Man, have long existed in Europe, and the makers have resorted to clever advertisements that use landscapes to evoke a pleasant mood or to get attention.

The proposed advertising restrictions in the United States "are historic, extraordinary," said Emanuel Goldman, an analyst for Paine Webber in San Francisco. "Losing the Marlboro Man and Joe Camel is a big thing," he added.

Still, the settlement "doesn't cripple or hobble the industry," Mr. Goldman said. Rather, he added, "It ramps their style and forces them to be a little more creative."

Alan Brody, president of Tetf Marketing Inc. in Scarsdale, N.Y., who has long tracked cigarette marketing, agreed.

"The restrictions don't get to two core issues: Why do people, especially teen-agers, smoke, and what do

the tobacco companies know about advertising?" Mr. Brody said.

"If you don't face those issues, this is a waste of time," he added. It may be "a whole new opportunity for the tobacco industry to make fools of the legal community."

Mr. Brody and Marshall Blonsky, a semiotician who studies the meanings of symbols, said they believed that the settlement does not go far enough despite bans on outdoor advertising and other measures aimed primarily at curbing the appeal of cigarettes to underage smokers.

"The power part of cigarette advertising is the visual connotations" of brand imagery like Marlboro's bright red logo and Western scenery, said Mr. Blonsky, who teaches at the New School in Manhattan. "The brand, once you get it branded into people, is like the Cheshire cat's smile: Once you have it, the cat is no longer necessary."

"So you don't need people" in advertisements to sell cigarettes, he added. For instance, an advertising campaign for Benson & Hedges, introduced before the settlement was reached, presents cigarettes in human-like poses rather than showing actual smokers.

"I think the tobacco companies have long been preparing for this, and it's still 'Happy Days Are Here Again' for them," said Donny Deutsch, chief executive of Deutsch Inc., an advertising agency in New York.

"It looks like they're giving a pound of flesh, when I don't think they've given a quarter-ounce," he

added. *New York Times* 12-21-97

Dave Mulryan, president of Mulryan/Nash, an advertising agency in New York, said, "The creative community can work around restrictions."

The settlement particularly emphasizes reducing the appeal of smoking to the young, which is a main reason for the provision to end sports-related marketing efforts like sponsorship of auto and boat racing. Tobacco makers spent an estimated \$185 million last year on sports sponsorships, according to the newsletter IEG Sponsorship Report.

The settlement limits magazine advertising by requiring advertisements in publications with large amounts of young readers to run only with black and white text; advertisements in color can continue, though, in other magazines.

But tobacco advertisements in magazines have declined during this decade as cigarette makers focused on direct mail that enable them to target smokers. For example, tobacco advertisement spending as a percentage of total magazine advertising revenue declined to 3.1 percent in 1995, from 3.4 percent in 1994.

As for the banning of all outdoor advertising of cigarettes, "our industry in the short term will take a hit," said Kippy Burns, a spokeswoman for the Outdoor Advertising Association of America, "but in the long run we will fully recover" because, she said, the industry is pursuing business from other advertisers.

Excerpted Comments of Dr. C. Everett Koop, Former Surgeon
General, Regarding FDA Regulation of Nicotine

Cable News Network
Aired June 21, 1997 - 8:05 a.m. ET
Saturday Morning News

I think many of the things that are so good for kids in this settlement might be negated by what is a very serious flaw in the agreement, as far as I'm concerned, and that is the new provisions in reference to FDA's powers.

What happens now is that addiction remains the heart of this industry, because the new rules make it very difficult for FDA to proceed to reduce the nicotine in cigarettes, because of the restrictions placed upon them...

They have to do two things that are very difficult and one that is impossible. Any modification that they would like to make in cigarettes has to prove significant reduction in the health effects, and that is hard to prove, according to the new rules.

The second thing is that anything they request in the change in the cigarette manufacture has to be technically feasible. Now, that's a reasonable request, but for all other industries, FDA sets the standard, and the industry makes it feasible. Here, FDA has to take care of the feasibility.

Then the final thing that is I think impossible, and that is no change in cigarette manufacture if there is any chance that there would be a contraband reaction. By that I mean smuggling or black market. And this is a negative thing that is almost impossible to prove. So I think this is the part that requires the greatest scrutiny by Congress and the White House.

Well, at the present time, if FDA is sued, it can make its case on the basis of what science and medicine think at the present time about a particular issue. Under the new rules, they have to prove substantial evidence, which in the kinds of things we're talking about, is almost impossible to prove.

And so you may find, if you liken this say to a football game, it's like removing the end run and the pass for making forward progress.

From: Stan Glantz
To: Multiple recipients of list St
Subject: op-ed
Date: Sunday, June 22, 1997 1:20AM

I will shortly be publishing this op ed

The tobacco industry "settlement" that was announced Friday is quite simple: The tobacco companies get economic certainty by eliminating the threat that litigation will destroy them. In exchange they offer \$14 billion a year and accept modest restrictions on advertising.

Fourteen billion a year sounds like a lot of money, but it is not. Smoking costs society \$100 billion a year in medical and related costs alone. The industry is getting off for pennies on the dollar. Even more troubling, the tobacco companies will simply pass these costs through to their victims, the smokers, leaving management and investors untouched. The litigation discovery process will stop and we will never know the full extent of the wrong doing. The likelihood that industry officials and lawyers will face criminal prosecution drops.

One of the key provisions of the agreement, the "look back" provision, fines the tobacco companies if certain goals for reducing teen smoking are not met. Unfortunately, the fines for not meeting these goals are smaller than the long term value of addicting new smokers. The deal will make the tobacco industry a little less profitable while guaranteeing its continued long term health.

Finally, free of the huge threat of litigation at home, the industry will be free to expand its markets in Asia, Eastern Europe, and elsewhere. Even if fewer Americans die from tobacco as a result of this deal, it will be at a price of even more deaths overseas.

Above all, keep in mind that this "settlement" is not really a settlement at all. A settlement in a legal dispute is an agreement among the parties. What was announced Friday is a backroom political deal in which the negotiators freely gave away the rights of the people who were not in the room. (For example, none of the California cities that are suing the industry were allowed to participate, nor were the lawyers representing the flight attendants.) Since neither the attorneys general nor the private lawyers who negotiated the deal can grant the industry the kind of immunity it is seeking, this deal will have to go to Congress for approval.

The two largest sources of soft money for the Republican in the last election were Philip Morris and RJ Reynolds. It is simply inconceivable that Trent Lott and Newt Gingrich will do anything to seriously burden the tobacco industry. One can be certain that, as bad as this deal looks today, what emerges from Congress will be worse.

Indeed, the best indicator of the damage to the public health that this deal will do is the stock market. Every time settlement rumors heat up, tobacco stocks go up. The business community clearly thinks that this deal is good for tobacco. And what is good for tobacco is bad for public health.

The deal also puts important elements of the health community, particularly the American Cancer Society and American Heart Association, in the position of going to Congress to support a deal that will insure the survival of the tobacco industry. (The American Lung Association staunchly opposes the deal.)

What is the alternative to the deal? Finish the job that the

attorneys general started. Finish the discovery so that we know the full extent of the wrongdoing. Take a few cases to trial and let the public decide what the real liabilities are. I am confident that, given patience and hard work, the tobacco industry will lose enough of these cases to bring it to its knees.

At that point, the same stock market that has been bidding up tobacco stocks will force Philip Morris, RJ Reynolds, and the others out of the tobacco business. The liability associated with a pack of cigarettes will simply exceed the profits.

We should reconsider a settlement when the stock market is driving tobacco stocks down, which would put the cookie, cheese and beer assets of Philip Morris and the others at risk.

What should we accept in such a settlement? We should take the tobacco business, all of it, including foreign subsidiaries, as part of an agreement to let these companies keep their cookies, cheese, and beer. We should let the government make plain cigarettes available (no fancy brands, no nicotine boosting additives, no campaign contributions) for smokers who can't quit. We should take the money from the sales of these cigarettes and use it to run a big, aggressive anti-smoking campaign (modeled on California's successful campaign) to reduce smoking as quickly as possible and also help tobacco workers and farmers retool. Since we will own the overseas business, we can simply close it so that America can no longer be accused of exporting death.

Last week, a jury voted the death sentence for Timothy McVeigh because he killed 168 Americans. The tobacco industry has killed 10 million Americans since 1964. No attorney general or politician even considered letting McVeigh cop a plea; the same should be true for the tobacco industry.

From: Stan Glantz
 To: Multiple recipients of list St
 Subject: TFK Summary of Settlement
 Date: Saturday, June 21, 1997 1:01PM

The summary of the settlement on the Tobacco Free Kids website is a great sales job; it goes in to excruciating detail on all the good things and glosses over the price.

A few comments:

1. The FDA actually LOOSES authority over tobacco and nicotine. Right now, the FDA has unrestricted jurisdiction over nicotine and nicotine delivery devices (and this jurisdiction has been upheld in court). The settlement would limit this jurisdiction by forbidding elimination of nicotine before 2009 and add additional administrative procedures prior to action. (This is buried in item 11.)
2. The agreement would continue to key aspects of the cover up of wrongdoing by the tobacco industry and its attorneys. The "Full Disclosure" provision (Item 5) is limited to health-related research. While releasing this information is important, the crucial information is in the 'attorney-client' documents. Contrary to what TFK says, Minnesota and others have been making good progress in securing release of thousands of these 'attorney-client' documents, which lie at the heart of the cover-up.
3. The fines for missing the youth smoking targets are too low to provide a disincentive against recruiting kids. The real value of a new smoker is not current consumption but future consumption, and the fines will still leave it in the tobacco companies economic interests to recruit new smokers. The economic benefits will simply take longer to accrue.
4. The provisions releasing the tobacco industry from liability are buried in item 12. The agreement would wipe out class action litigation and punitive damages for past behavior, which will make it much less economically feasible for individuals to sue. This is the most important provision of the agreement.

From: Stan Glantz
 To: Multiple recipients of list St
 Subject: Secondhand smoke and settlement
 Date: Saturday, June 21, 1997 6:53PM

In response to my comments on TFK summary of the settlement, several people emailed me chastising me for not saying anything about the failure to include restaurants and bars "because of expected hostility from the hospitality industry" and because hospitality workers have the highest exposures to secondhand smoke.

I agree with this criticism and, on reflection, am troubled that TFK has bought in to the industry's line that there is genuine opposition to smokefree laws from the hospitality industry. While the industry has mobilized some support from legitimate hospitality interests, most of it is manufactured through industry front groups such as the California Business and Restaurant Alliance and other similar organizations.

Another reason that the industry is fighting so hard to keep smoking in restaurants and bars is because they have the potential for becoming major promotional venues. (This is happening in Australia, where there are much more severe advertising restrictions than the settlement proposes.) Even though kids are not allowed in bars, they see the promotions for cigarette nights etc and these seem to exert a powerful influence.

From: Stan Glantz
To: Multiple recipients of list St
Subject: Re: TFK Summary of Settlement
Date: Sunday, June 22, 1997 1:25AM

Another point worth circulating.

I suggest that people with good ideas send them to settlement-L@smokescreen.org in order to get them circulated directly. People on my list who are not subscribers to the settlement-L list should subscribe

>Date: Sun, 22 Jun 1997 00:03:11 -0400 (EDT)

>From: JWCherner@aol.com

>To: glantz@cardio.ucsf.edu

>Subject: Re: TFK Summary of Settlement

>

>I agree with most of your summary. Add this complaint to the list:

>

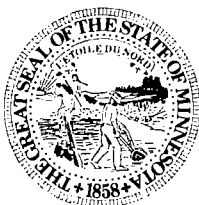
>The tobacco industry is off the hook for five years before it is held
>accountable. It will have unpenalized access to youth for five years.
> During that time, we will get a new President and a new Congress. Surely
>the tobacco industry will get Congressional approval to push back any
>reduction targets in teen smoking.

>

>The industry should be held accountable every year.

>

>



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

LAW ENFORCEMENT SECTION
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ST. PAUL, MN 55101-2131
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March 17, 1997

Elizabeth Drie
Chief of Staff
Domestic Policy Council
222 Old Executive Office Building
Washington, D.C. 20501

Dear Ms. Drie:

Thanks for making time in your incredible schedule to discuss the status of Minnesota's tobacco litigation. It is heartening to know that we share the same concern for the health of the public.

Just to reiterate, Minnesota is suing to achieve three fundamental outcomes:

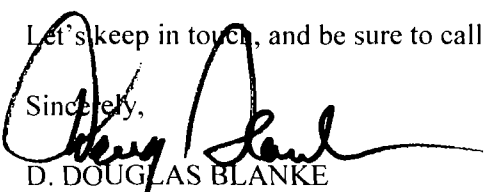
1. To protect the public health, there must be a guarantee that the tobacco conglomerates fundamentally change the way they do business, including a complete end to marketing to children.
2. Tobacco companies must tell everything they knew, and when they knew it, including disclosure of the truth about research on things like safer cigarettes.
3. Damages must be paid commensurate with the harm done.

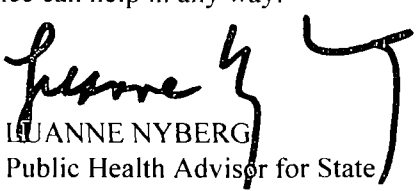
Minnesota is proceeding full speed ahead to put together the toughest case the tobacco industry has ever faced, and Attorney General Humphrey feels strongly that though there comes a proper time and place in many cases for a settlement, this year is not the time and Congress is not the proper place to resolve state actions brought under state law. I have enclosed the following for your files:

- A copy of Minnesota's original Complaint;
- A set of general questions and answers about our litigation that was put together for the lay reader;
- A recent St. Paul Pioneer Press spread that reviews Minnesota's litigation to date;
- An editorial from the Rochester Post Bulletin (home of the Mayo Foundation and Clinic, and in the heart of a rather conservative part of our state) urging no Congressional settlement of state tobacco litigation;
- A March 5 JAMA article raising public health questions about a global settlement.

Let's keep in touch, and be sure to call if our office can help in any way.

Sincerely,


D. DOUGLAS BLANKE
Director of Consumer Policy


LUANNE NYBERG
Public Health Advisor for State
and Federal Tobacco Issues

Facsimile: (612) 297-4348 • TTY: (612) 297-7206 • Toll Free Lines: (800) 657-3787 (Voice), (800) 366-4812 (TTY)



**STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL**

**QUESTIONS AND ANSWERS
RE: TOBACCO LITIGATION**

1. WHAT ARE THE MAIN ALLEGATIONS OF OUR CASE?

The lawsuit alleges that late in 1953, tobacco company executives met at the Plaza Hotel in New York and concocted a public relations scheme to hide the truth about the hazards of smoking. In January 1954, the tobacco companies ran advertisements in newspapers throughout the country, including Minneapolis, St. Paul, and Duluth, entitled "a frank statement to cigarette smokers." The tobacco industry promised in this advertisement and other public statements that it would "promote the progress of independent scientific research in the field of tobacco and health" and cooperate "in efforts to learn and to make known all the facts." In spite of these promises, the lawsuit alleges that the industry has continued to deceive the public and conspire to suppress research and block development of a safer product.

The lawsuit charges that to this day, despite knowing that tobacco causes cancer and that nicotine is addictive, the tobacco companies continue to mislead the public, withhold what they know and stifle development of safer cigarettes, all while reaping billions of dollars in profits on their deadly products.

2. WHAT IS THE BASIS FOR THE CASE AGAINST THE TOBACCO INDUSTRY?

This landmark case charges that the tobacco companies violated the public trust through conspiracy, fraud and deception.

The suit is based on Minnesota's antitrust and consumer protection laws. It charges that the tobacco industry promoted the distribution and sale of products it knew to be harmful and concealed research proving the addictive qualities of nicotine, while conspiring to keep potentially safer products off the market. As a result, the cost of health care has been inflated, penalizing purchasers such as the State of Minnesota and BCBSM.

3. WHAT ARE WE SEEKING IN THIS LAWSUIT?

Cigarettes kill six thousand Minnesotans every year--and cause thousands more to contract cancer, heart disease, emphysema, asthma and bronchitis. Cigarettes kill more people than the combined totals from alcohol, homicide, AIDS, cocaine, heroine and motor vehicles. Everyone in Minnesota is paying for this carnage--more than \$350 million every year in health care costs in our State. (The precise portion of the \$350 million paid by the State and by BCBSM is not yet determined.)

It's time for the tobacco companies to pay for the harm they have caused by their unlawful conspiracy and fraudulent conduct. Specifically, the State is seeking to recover the portion of the \$350 million paid each year by the State to treat tobacco-related illnesses. BCBSM similarly is seeking to recover its damages caused by the tobacco industry. We also are seeking to put an end to the 40-year conspiracy and to force the tobacco companies to fund an independent, truthful campaign about smoking and to fund clinical smoking cessation programs in Minnesota to help remedy the harm they have caused.

4. HOW IS THIS CASE DIFFERENT FROM OTHER CASES?

Our lawsuit is different in several significant ways.

(1) This is the first state lawsuit in the nation to allege an antitrust conspiracy and consumer fraud against the tobacco companies;

(2) Previous lawsuits have challenged the tobacco companies mainly on the ground that their product is harmful using product liability theories; this lawsuit says the tobacco companies should pay because of their conduct--an antitrust and consumer fraud conspiracy that has caused great harm to the State and BCBSM;

(3) The State and BCBSM are joined together in this lawsuit--the two largest purchasers of health care services in Minnesota;

(4) In addition to seeking damages, we are seeking to force the tobacco companies to fund an independent public education campaign relating to the issues of smoking and health, to have the Council for Tobacco Research and the Tobacco Institute dissolved, and to have the tobacco companies fund clinical smoking cessation programs in the State of Minnesota to remedy their 40 years of conspiracy and fraud.

5. ARE WE SEEKING TO PUT THE TOBACCO COMPANIES OUT OF BUSINESS?

No. We are seeking to have the tobacco companies come clean with what they know to be the truth about smoking and pay for the damage to the State of Minnesota caused by their unlawful conduct. The tobacco companies are earning billions of dollars a year in profit. They can and should pay for the death and disease that they have caused in our state, and for the many millions of dollars that have been paid by Minnesota taxpayers--nonsmokers and smokers alike--for state-financed medical care for the victims of this conspiracy. But we can only remedy the harm done to Minnesotans. Congress, the FDA and other federal bodies will have to decide the industry's future.

6. HOW MUCH ARE WE SEEKING IN DAMAGES?

At this time we do not know the exact amount paid by the State or by BCBSM for tobacco related health care costs, although this information will be developed during the case. We do know, however, that in Minnesota, more than \$350 million a year is spent to pay the health care expenses for disease caused by cigarettes. Of course, we are seeking much more than just the damages the State and BCBSM have suffered. In addition to damages, we're also seeking civil penalties, dissolution of the industry's research and propaganda apparatus, and to force the tobacco companies to open their research files as they promised to do 40 years ago. They must tell the public everything they know about the harmful effects of cigarettes.

7. ARE WE SEEKING TO RECOVER DAMAGES FOR INDIVIDUALS WHO HAVE DIED OR CONTRACTED DISEASES FROM SMOKING CIGARETTES?

No. In this lawsuit we are seeking to recover damages that the State itself has incurred, which of course will be for the benefit of all of the taxpayers of Minnesota. It would not be practical in this case to represent individual smokers who have been harmed, for there are too many people with too many individual claims. BCBSM similarly is seeking to recover its damages for the benefit of its subscribers, who have paid increased premiums for health care coverage.

8. WHY ARE CIGARETTES BEING SINGLED OUT?

This case is unique, just as tobacco is unique. Unlike other products or activities that may harm one's health, cigarettes are the only consumer product that cause disease and death when used as the manufacturer intends. Moreover, we know of no other industry that has conspired like this to suppress research, defraud the public and prevent development of a safer product.

9. HOW MUCH WILL THIS LAWSUIT COST THE STATE OF MINNESOTA?

Although we will be putting our time into this case -- as we do in other consumer protection cases -- the State is not paying the out-of-pocket costs of this litigation. The law firm we are working with is absorbing the up-front costs to fund this litigation. If we win, we will ask the court to require the tobacco companies to pay for the the cost of litigation.

10. IF THE CASE IS SUCCESSFUL, WILL CONSUMERS RECEIVE A SHARE OF ANY FINANCIAL AWARD?

Any funds recovered in this case will benefit the State and all of its taxpayers. If the case is successful, it could result in lower health care costs for all Minnesotans. The State's total health care costs would be reduced by having the tobacco companies pay for tobacco-related illnesses they have caused. BCBSM, as a nonprofit health plan, also would pass any savings directly to the consumer. Any financial recovery gained by the State or BCBSM also could directly benefit consumers in other ways. The money could be used to lower premiums, to invest in research, to support wellness and preventive programs or for other consumer-oriented purposes.

11. HOW MUCH DOES THE STATE HAVE TO PAY THE PRIVATE ATTORNEYS IF WE WIN?

Nothing. The State will ask the Court to require the tobacco companies to pay all the attorney fees. Moreover, we have put a cap on any attorney fees at 25 percent of the damages, substantially below the standard 33 percent retainer.

12. WHY ISN'T THE ATTORNEY GENERAL'S OFFICE HANDLING THIS LAWSUIT ON ITS OWN?

(1) A case of this magnitude requires extensive legal resources. If we were to handle this on our own, it would take the entire legal staff of the Attorney General's Consumer and Antitrust Division plus additional staff. By appointing special counsel to work with us, we can continue to maintain our ongoing consumer and antitrust enforcement initiatives and take on the tobacco industry.

(2) We are working with what may be the best law firm in the world for this kind of a case. Robins Kaplan has great expertise in complex challenging litigation like this. We have assembled the best possible legal team to handle this type of case.

13. WHY ARE THE STATE AND BCBSM GOING FORWARD TOGETHER IN THIS CASE?

The State and BCBSM are the two largest purchasers of health care services in the State. As such, they are perhaps the largest economic victims of the tobacco industry conspiracy in Minnesota. The lawsuit seeks recovery of the increased expenditures for health care services caused by the unlawful actions of the tobacco companies. Together, the State and BCBSM present the strongest possible front in going after the tobacco companies and seeking to recover for the damages they've caused.

14. DON'T THE TOBACCO INDUSTRIES' TAXES AND TAXES ON CIGARETTES PAY FOR THE HARM THAT THE TOBACCO INDUSTRY HAS CAUSED?

This case is not about taxes.

(1) Paying taxes doesn't give anyone a license to engage in conspiracies or defraud the public. Corporations that violate the laws still must be accountable for the harm that they cause. For example, other companies that have produced harmful products, such as the Dalkon shield, have paid for the harm they have caused. That's all we're asking here -- that the tobacco companies also pay for the damage that they have caused as a result of their unlawful conduct;

(2) Taxes don't come close to covering the harm caused by tobacco-related illnesses. Despite the massive health consequences of its product, the tobacco industry has never paid a cent in compensation to society.

15. WHY AREN'T SMOKERS SIMPLY CHARGED A HIGHER PREMIUM FOR HEALTH CARE COVERAGE?

The basis of the suit is the illegal activity of the tobacco industry and the higher health care costs that have resulted from the industry's actions.

In some cases, smokers are charged higher premiums for insurance products, including some health coverage policies. However, most people receive health coverage through their employer. Group coverage does not lend itself to pricing products on an individual basis. In

addition, it is not possible for an employer to monitor the behavior of employees and their families outside the workplace. Most importantly, however, the tobacco companies, not smokers, should pay for the damage caused by the tobacco companies' unlawful conduct.

16. HOW LONG WILL THIS LAWSUIT LAST?

It's difficult to say. Our best guess is that the litigation will last anywhere from two to five years. The tobacco companies, who are known for their scorched-earth litigation tactics, may do everything possible to drag out the litigation.

17. DOES THIS CASE SEND AN ANTI-BUSINESS MESSAGE?

Absolutely not. This case is a statement of support for all the honest businesses of Minnesota. They don't conspire together to mislead the public. They don't conspire together, to stifle competition. They don't hold themselves above the law.

In fact, to a large extent it's the honest businesses of Minnesota who are saddled unfairly with the added costs of health care that should be paid by the tobacco industry. Every business owner talks about the high cost of health care; anything we can do to lower the cost of health care will send a strong pro-business message.

18. IS IT APPROPRIATE FOR THE STATE, AS WELL AS THE FEDERAL GOVERNMENT, TO BE INVOLVED WITH THESE ISSUES?

Absolutely. Our cases involve claims under Minnesota law for harm caused to the State by the tobacco companies. Of course, we would invite the federal government to pursue all appropriate actions against the tobacco companies as well.

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Case Type: Other Civil

THE STATE OF MINNESOTA,

BY HUBERT H. HUMPHREY, III,
ITS ATTORNEY GENERAL,

and

BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

Court File No. _____

vs.

COMPLAINT

PHILIP MORRIS INCORPORATED,
R.J. REYNOLDS TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO CORPORATION,
B.A.T. INDUSTRIES P.L.C.,
LORILLARD TOBACCO COMPANY,
THE AMERICAN TOBACCO COMPANY,
LIGGETT GROUP, INC.,
THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC., and
THE TOBACCO INSTITUTE, INC.,

Defendants.

The State of Minnesota, by its Attorney General, Hubert H. Humphrey, III, and Blue Cross and Blue Shield of Minnesota, for their complaint allege, upon information and belief, as follows:

THE NATURE OF THIS ACTION

1. This action arises out of a decades-long combination and conspiracy of willful and intentional wrongdoing by the leading cigarette manufacturers and their trade associations, which

together control virtually the entire industry in Minnesota and are defendants herein.

2. These defendants undertook a special duty to accept an interest in the public's health as a basic and paramount responsibility, to cooperate closely with those who safeguard the public health, and to conduct research and disclose to the public complete and authenticated information about smoking and health. Yet these same defendants have known for decades from their own internal studies that their products are deadly and addictive. Instead of disclosing this knowledge, these defendants intentionally chose to engage in a unified campaign of deceit and misrepresentation. This course of conduct was intended by the defendants to control and maintain their market, to maximize their profits, and to minimize their legal exposure -- all for the "self-preservation" of the industry.

3. The defendants' collective conduct has resulted in an unprecedented impact on the public health, in both human and economic terms. The death toll in one year alone from cigarette smoking equals the number of American lives lost in battles in all the wars this country has fought this century. Overwhelmingly, the new recruits in this death march are children and adolescents.

4. Despite the duration and the severity of the misconduct, the industry has enjoyed virtual immunity because of its economic and political power, its scorched-earth litigation tactics, and its fraudulent concealment of unlawful conduct. The State of Minnesota and Blue Cross and Blue Shield of Minnesota bring this action to

place upon the industry the legal responsibility for the consequences of its actions. The premise of this action is that this industry -- and not the State of Minnesota, or its citizens, and not Blue Cross and Blue Shield of Minnesota, or its member groups -- should pay for the staggering health care costs caused by its actions in violation of the laws of this State.

JURISDICTION AND VENUE

5. This court has jurisdiction over the subject matter of this case pursuant to Minn. Stat. §§ 8.31, 325D.15, 325D.45, 325D.58, 325F.70, and 484.01.

6. Venue is proper in Ramsey County pursuant to Minn. Stat. §§ 325D.65 and 542.09.

THE PLAINTIFFS

7. The Attorney General, Hubert H. Humphrey, III, brings this action on behalf of the State of Minnesota pursuant to his authority under the common law, as well as Minn. Stat. §§ 8.01, 8.31, 325D.09-15, 325D.43-45, 325D.49-66, and 325F.67-70. The Attorney General brings this action to protect the citizens and the public health of the State of Minnesota by seeking declaratory and equitable relief and civil penalties. The Attorney General also brings this action to vindicate the State's proprietary interest in enforcing the State's rights to damages for economic injuries to the State which were caused by the unlawful actions of

the cigarette industry. Such damages include but are not limited to increased expenditures for:

a. Minnesota's Medicaid plan, Medical Assistance, see Minn. Stat. § 256B.01 et seq. and 42 U.S.C. §1396 et seq. Minnesota has determined that Medical Assistance for needy persons "is hereby declared to be a matter of state concern" and that to provide such care, "a statewide program of medical assistance . . . is hereby established." Minn. Stat. §256B.01. Under the Medical Assistance Program, the State of Minnesota pays for medical services provided to program recipients. The State of Minnesota pays a substantial share of the costs of Medical Assistance, in fact, one of the highest shares of any state Medicaid plan in the country, with the federal government bearing the remaining costs. In fulfilling its statutory duties, the State of Minnesota has expended and will expend substantial sums of money due to the increased cost of providing health care services for treatment of smoking-caused diseases. These increased expenditures have been caused by the unlawful actions of the cigarette industry.

b. General Assistance Medical Care, see Minn. Stat. § 256D.03, subd. 3. General Assistance Medical care is available to qualifying persons who are not eligible for Medical Assistance. The State of Minnesota pays for the entire cost of this care. In fulfilling its statutory duties, the State of Minnesota has expended and will expend substantial sums of money due to the increased cost of providing health care services for treatment of

smoking-caused diseases. These increased expenditures have been caused by the unlawful actions of the cigarette industry.

c. MinnesotaCare, see Minn. Stat. § 256.9351 et seq., as amended by 1994 Minn. Laws, Ch. 625. MinnesotaCare provides subsidized health coverage for qualifying Minnesotans not otherwise covered by Medical Assistance. In fulfilling its statutory duties, the State of Minnesota has expended and will expend substantial sums of money due to the increased cost of providing health care services for treatment of smoking-caused diseases. These increased expenditures have been caused by the unlawful actions of the cigarette industry.

d. The State Employee Group Insurance Program. The State of Minnesota, as an employer which makes available health coverage for its approximately 60,000 employees pursuant to statutory and contractual obligations, is mandated by law to offer comprehensive and major medical health coverage and benefits that include coverage for treatment of smoking-caused diseases. The State of Minnesota has entered into contractual agreements with certain health care service providers and plans in order to make available to its employees health coverage that includes these mandated benefits. Blue Cross and Blue Shield of Minnesota operates and administers the largest and most widely-used state employee health care service plan. The State of Minnesota has paid and will pay substantial sums of money pursuant to these statutory and contractual obligations due to the increased cost of providing health care services for treatment of smoking-caused diseases.

These increased expenditures have been caused by the unlawful actions of the cigarette industry.

e. The State of Minnesota has expended and will expend substantial sums of money to fund and promote wellness and healthy lifestyle programs in order to reduce health care costs, including smoking cessation. In addition, the State of Minnesota operates a program of preventive health services for state employees. These expenditures have been and will be increased by the unlawful actions of the cigarette industry.

f. The unlawful actions of the cigarette industry threaten and interfere with the statutory and contractual duties of the State of Minnesota, as described above, and with the public health of the citizens of the State of Minnesota.

8. Blue Cross and Blue Shield of Minnesota is a nonprofit Minnesota corporation with its principal place of business at 3535 Blue Cross Road, Eagan, Minnesota 55122. Blue Cross and Blue Shield of Minnesota is, with its corporate affiliates, the only nonprofit health service plan in the State of Minnesota incorporated pursuant to the Minnesota Nonprofit Health Service Plan Corporations Act, Minn. Stat. §§ 62C.01, et seq. This Act provides that the purpose and intent of a nonprofit health service plan is "to promote a wider, more economical and timely availability of hospital, medical-surgical, dental, and other health services for the people of Minnesota" and to "advance the public health" within the State of Minnesota. Minn. Stat. § 62C.01, subd. 2. The articles of incorporation of Blue Cross and

Blue Shield of Minnesota also embrace this purpose and intent. Blue Cross and Blue Shield of Minnesota brings this action to vindicate and further these statutory and corporate directives and pursuant to the common law, as well as Minn. Stat. §§ 8.31, 325D.09-15, 325D.43-45, 325D.49-66, and 325F.67-70.

a. As a health service plan corporation, Blue Cross and Blue Shield of Minnesota contracts with numerous health care service providers in the State of Minnesota, including 12,000 doctors and clinics, 135 hospitals, and 6,000 allied health care providers, and is a purchaser of health care services. As a purchaser, Blue Cross and Blue Shield of Minnesota is directly liable for charges incurred in connection with smoking-related diseases.

b. Blue Cross and Blue Shield of Minnesota also contracts with groups comprised of private employers and political subdivisions in the State of Minnesota to provide prepaid health care service to employees and dependents. Blue Cross and Blue Shield of Minnesota charges and collects a fixed premium from the political subdivisions and private employers with whom it contracts.

c. Pursuant to Minnesota law, the health care service plans Blue Cross and Blue Shield of Minnesota offers to private employers and political subdivisions must contain comprehensive and major medical health coverage and benefits that include coverage for treatment of smoking-caused diseases.

d. Blue Cross and Blue Shield of Minnesota has paid and will pay substantially higher charges to its contracted health care providers due to the increased cost of providing health care services for treatment of smoking-caused diseases. These increased expenditures have been caused by the unlawful actions of the cigarette industry.

e. In addition, Blue Cross and Blue Shield of Minnesota has expended and will expend substantial sums of money to fund and promote wellness and healthy lifestyle programs in order to reduce health care costs, including Doctors Helping Smokers, a program to help physicians identify patients who smoke and encourage them to quit. These increased expenditures also have been caused by the unlawful actions of the cigarette industry.

f. The unlawful actions of the cigarette industry threaten and interfere with the statutory purpose of Blue Cross and Blue Shield of Minnesota to promote a wider and more economical availability of health care services for the people of Minnesota and to advance the public health within the State of Minnesota. In addition, the unlawful actions of the cigarette industry interfere with the contractual obligations among Blue Cross and Blue Shield of Minnesota and the health care service providers and its member groups.

g. Blue Cross and Blue Shield of Minnesota brings this action for declaratory and equitable relief, as well as for economic damages for increased costs for health care services caused by the unlawful actions of the cigarette industry. Blue

Cross and Blue Shield of Minnesota brings this action on its own behalf as a purchaser of health care services and on behalf of its fully insured groups with whom it has contracts, who have been required to pay increased premiums for health insurance and who will benefit from any recovery in this action.

THE DEFENDANTS

9. Philip Morris Incorporated ("Philip Morris") is a Virginia corporation whose principal place of business is 120 Park Avenue, New York, New York 10017.

10. R.J. Reynolds Tobacco Company ("R.J. Reynolds") is a New Jersey corporation whose principal place of business is 4th & Main Street, Winston-Salem, North Carolina 27102.

11. Brown & Williamson Tobacco Corporation ("Brown & Williamson") is a Delaware corporation whose principal place of business is 1500 Brown & Williamson Tower, Louisville, Kentucky 40202.

12. B.A.T. Industries P.L.C. ("B.A.T. Industries"), is a British corporation with its principal place of business at Windsor House, 50 Victoria St., London. Through a succession of intermediary corporations and holding companies, B.A.T. Industries is the sole shareholder of Brown & Williamson. Through Brown & Williamson, B.A.T. Industries has placed cigarettes into the stream of commerce with the expectation that substantial sales of cigarettes would be made in the United States and in Minnesota. In addition, B.A.T. Industries conducted, or through its agents

and/or co-conspirators conducted, critical research for Brown & Williamson on the issue of smoking and health. Further, Brown & Williamson is believed to have sent to England research conducted in the United States on the issue of smoking and health in an attempt to remove sensitive and inculpatory documents from United States jurisdiction, and these documents were subject to the control of B.A.T. Industries. B.A.T. Industries has been involved in the conspiracy described herein and the actions of B.A.T. Industries has affected and caused harm in Minnesota.

13. Lorillard Tobacco Company ("Lorillard") is a Delaware corporation whose principal place of business is 1 Park Avenue, New York, New York 10016.

14. The American Tobacco Company ("American Tobacco") is a Delaware corporation whose principal place of business is 281 Tresser Boulevard, Stamford, Connecticut 06904.

15. Liggett Group, Inc. ("Liggett") is a Delaware corporation whose principal place of business is 700 Main Street, Durham, North Carolina 27702.

16. The Council for Tobacco Research - U.S.A., Inc. ("CTR"), successor in interest to the Tobacco Institute Research Committee ("TIRC"), is a nonprofit corporation organized under the laws of the State of New York with its principal place of business at 900 3rd Avenue, New York, New York 10022.

17. The Tobacco Institute, Inc. is a nonprofit corporation organized under the laws of the State of New York with its

principal place of business at 1875 I Street N.W., Suite 800, Washington, D.C. 20006.

THE CONCENTRATION OF THE INDUSTRY

18. Cigarette manufacturing has been one of the most concentrated industries in the United States throughout this century. Together, Phillip Morris, R.J. Reynolds, Brown & Williamson, Lorillard, American Tobacco, and Liggett comprise the Big Six cigarette manufacturers, which control virtually 100% of the market in the United States and in Minnesota. Phillip Morris and R.J. Reynolds are the industry leaders, with national market shares of approximately 42% and 29%, respectively. The approximate market shares of the other Big Six manufacturers are: Brown & Williamson, 12%; Lorillard, 7%; American Tobacco, 7%, and Liggett, 3%.

19. In part because of its concentration, the cigarette industry has long been one of America's most profitable businesses, with profit margins estimated in at least the 30% range. The industry continues to harvest billions of dollars in profits each year from domestic sales alone.

20. In addition, the concentration of the industry has allowed the manufacturers and their two trade associations to engage in a decades-long conspiracy relating to the issue of smoking and health and to direct their considerable profits to further that end.

THE BEGINNING OF THE INDUSTRY CONSPIRACY ON SMOKING AND HEALTH

21. The industry conspiracy and combination began as early as the 1950s, when the cigarette manufacturers were confronted with the publication of several scientific studies which sounded grave warnings on the health hazards of cigarettes. One of the first of these studies was published in 1952 by Dr. Richard Doll, a British researcher. Dr. Doll, in a statistical analysis, found that lung cancer was more common among people who smoked and that the risk of lung cancer was directly proportional to the number of cigarettes smoked. A second study was published in December 1953 by Dr. Ernest Wynder of the Sloan-Kettering Institute. Dr. Wynder painted the shaved backs of laboratory mice with a residue of cigarette smoke. Malignant tumors grew in 44% of the mice, providing biological confirmation of the cancer-causing properties of cigarettes.

22. The Doll and Wynder studies generated widespread public concern about the health hazards of cigarettes. Confronted with this evidence, the presidents of the leading tobacco companies met at an extraordinary gathering in the Plaza Hotel in New York City on December 15, 1953. Hill and Knowlton, a public relations agency, coordinated the meeting and later prepared a memorandum summarizing the discussions of that day. According to the Hill and Knowlton memorandum:

a. The companies had not met together since two previous antitrust decrees had prohibited "many group activities." However, the companies viewed the current

problem "as being extremely serious and worthy of drastic action."

b. Another indication of the seriousness of the problem was "that salesmen in the industry are frantically alarmed and that the decline in tobacco stocks on the stock exchange market has caused grave concern. . . ."

c. The problem was viewed entirely in terms of a public relations problem, as opposed to a public health concern. The industry leaders "feel that the problem is one of promoting cigarettes and protecting them from these and other attacks that may be expected in the future" and that the industry "should sponsor a public relations campaign which is positive in nature and is entirely 'pro-cigarettes.'"

d. All of the leading manufacturers, except Liggett, agreed to "go along" with the public relations strategy. Liggett decided not to participate at that time "because that company feels that the proper procedure is to ignore the whole controversy."

e. The group discussed forming an association "specifically charged with the public relations function."

f. Hill and Knowlton was to play a central role in the industry association. "The current plans are for Hill and Knowlton to serve as the operating agency of

the companies, hiring all the staff and disbursing all funds."

13. Thus, the Tobacco Industry Research Committee ("TIRC") was conceived and born. Five of the Big Six cigarette manufacturers were original members. Liggett did not join until 1964, the same year that the Surgeon General issued its first report on smoking and health and concluded that cigarette smoking was a cause of lung cancer. Also in 1964, TIRC changed its name to the Council for Tobacco Research ("CTR"). A second trade group, the Tobacco Institute, was formed by cigarette manufacturers in 1958.

REPRESENTATIONS AND UNDERTAKINGS BY THE INDUSTRY

24. At the time of forming its first trade association, the industry undertook a special and continuing duty to protect the public health by representing that it would conduct and disclose unbiased and authenticated research on the health risks of cigarette smoking. The industry knew that failure to fulfill this duty would increase the public health risks of cigarette smoking and the cost of health care.

25. The cigarette industry announced the formation of TIRC on January 4, 1954, with newspaper advertisements placed in virtually every city with a population of 50,000 or more, including Minneapolis, St. Paul, and Duluth, reaching a circulation of more than 43 million Americans. The advertisement was captioned "A Frank Statement to Cigarette Smokers" and was run under the auspices of TIRC with, inter alia, five of the Big Six

manufacturers listed by name. The advertisement stated, in part, as follows:

a. "Recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking is in some way linked with lung cancer in human beings."

b. "Although conducted by doctors of professional standing, these experiments are not regarded as conclusive in the field of cancer research."

c. "[T]here is no proof that cigarette smoking is one of the causes" of lung cancer.

d. "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business."

e. "We believe the products we make are not injurious to health."

f. "We always have and always will cooperate closely with those whose task it is to safeguard the public health."

g. "We are pledging aid and assistance to the research effort into all phases of tobacco use and health."

h. "For this purpose we are establishing a joint industry group consisting initially of the undersigned. This group will be known as TOBACCO INDUSTRY RESEARCH COMMITTEE."

i. "In charge of the research activities of the Committee will be a scientist of unimpeachable integrity and medical reputation. In addition there will be an Advisory Board of scientists disinterested in the cigarette industry."

j. "This statement is being issued because we believe the people are entitled to know where we stand on this matter and what we intend to do about it."

26. Other public statements by the defendants over the years have repeated the representations that the industry was dedicated to the pursuit and dissemination of the scientific truth regarding smoking and health.

27. For example, the Tobacco Institute ran an advertisement captioned, "A Statement About Tobacco and Health," and stated:

a. "We recognize that we have a special responsibility to the public -- to help scientists determine the facts about tobacco and health, and about certain diseases that have been associated with tobacco use."

b. "We accepted this responsibility in 1954 by establishing the Tobacco Industry Research Committee, which provides research grants to independent scientists. We pledge continued support of this program of research until all the facts are known."

c. "Scientific advisors inform us that until much more is known about such diseases as lung cancer, medical

science probably will not be able to determine whether tobacco or any other single factor plays a causative role -- or whether such a role might be direct or indirect, incidental or important."

d. "We shall continue all possible efforts to bring the facts to light."

28. Also, in 1970 the Tobacco Institute ran an advertisement captioned, "The question about smoking and health is still a question." In this advertisement, the Tobacco Institute stated:

a. "[A] major portion of this scientific inquiry has been financed by the people who know the most about cigarettes and have a great desire to learn the truth . . . the tobacco industry."

b. "[T]he industry has committed itself to this task in the most objective and scientific way possible."

c. "In the interest of absolute objectivity, the tobacco industry has supported totally independent research efforts with completely non-restrictive funding."

d. "Completely autonomous, CTR's research is directed by a board of ten scientists and physicians. . . . This board has full authority and responsibility for policy, development and direction of the research effort."

e. "The findings are not secret."

f. "From the beginning, the tobacco industry has believed that the American people deserve objective, scientific answers."

29. Again, in 1970 the Tobacco Institute stated, "The Tobacco Institute believes that the American public is entitled to complete, authenticated information about cigarette smoking and health." The Tobacco Institute further stated that, "The tobacco industry recognizes and accepts a responsibility to promote the progress of independent scientific research in the field of tobacco and health."

THE CAMPAIGN OF DECEIT AND MISREPRESENTATIONS

30. In actuality, the industry's promises of full disclosure and objective scientific research were never fulfilled. Instead, the trade associations -- dominated by public relations officials and attorneys, as opposed to independent scientists -- have served as industry fronts in a campaign of deceit and misinformation aimed at undermining the public perception of the health risks of smoking. Research was undertaken not in pursuit of the scientific truth on smoking and health but to aid the industry in its public relations and litigation battles. Research that might confirm the health risks of smoking was concealed.

31. In 1964, the year of the first Surgeon General's report, CTR formed a "special projects division" to assist the industry in concealing unfavorable information, making a further mockery of the undertaking to conduct and disclose all of the facts relating to smoking and health. Under the auspices of the special projects

division, industry research that might indict smoking as a cause of illness was diverted and shielded from the public by a fraudulent claim of attorney-client privilege. As the notes of one CTR meeting, written in 1981, stated, "When we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers' special project." Another memorandum from 1981 explained, "Difference between CTR and Special Four (lawyers' projects). Director of CTR reviews special projects -- if project was problem for CTR, use Special Four."

32. As with many of its strategies, the industry has been successful in using the CTR special projects division to conceal harmful information. To this day, research from the special projects division remains shielded from public scrutiny.

33. Other internal industry documents also shed light on the true nature of the trade associations, as the following quotations demonstrate by way of example:

a. "CTR began as an organization called Tobacco Industry Research Council (TIRC). It was set up as an industry 'shield' in 1954. That was the year statistical accusations relating smoking to diseases were leveled at the industry; litigation began; and the Wynder/Graham reports were issued. CTR has helped our legal counsel by giving advice and technical information, which was needed at court trials. . . . [T]he 'public relations' value of CTR must be considered and continued It is very important that

the industry continue to spend their dollars on research to show that we don't agree that the case against smoking is closed "

b. "CTR is best & cheapest insurance the tobacco industry can buy and without it the Industry would have to invent CTR or would be dead."

c. "Historically, the joint industry funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, position for litigation, etc. . . . In general, these programs have provided some buffer to public and political attack of the industry, as well as background for litigious [sic] strategy."

d. "Historically, it would seem that the 1954 emergency was handled effectively. From this experience there arose a realization by the tobacco industry of a public relations problem that must be solved for the self-preservation of the industry."

e. "When the products of an industry are accused of causing harm to users, certainly it is the obligation of that industry to endeavor to determine whether such accusations are true or false. Money spent for such purpose should not be regarded as a charitable contribution but as a business expense -- an expense necessary to keep that industry alive. In view of the billions of dollars of annual sales of our industry our expenditures for health research has been of a minimal order."

f. "For nearly twenty years, this industry has employed a single strategy to defend itself on three major fronts -- litigation, politics, and public opinion. While the strategy was brilliantly conceived and executed over the years helping us win important battles, it is only fair to say that it is not -- nor was it intended to be -- a vehicle for victory. On the contrary, it has always been a holding strategy, consisting of . . . creating doubt about the health charge without actually denying it. . . . In the cigarette controversy, the public -- especially those who are present and potential supporters (e.g. tobacco state congressmen and heavy smokers) -- must perceive, understand, and believe in evidence to sustain their opinions that smoking may not be the causal factor."

34. Despite overwhelming scientific evidence, and the confirmation of this evidence by their own internal research, the cigarette manufacturers and their trade associations continue to this day to repeat -- over and over, in a unified stance -- that there is no causal connection between cigarette smoking and adverse health effects and that cigarette smoking is not addictive. These representations -- which are fraudulent, misleading, deceptive, and untrue -- rest at the center of the industry's ongoing conspiracy and combination to market and profit from a product it knows is deadly and addictive.

THE CONSPIRACY TO SUPPRESS RESEARCH AND PRODUCT DEVELOPMENT

The "Gentlemen's Agreement"

35. The joint efforts of the industry on the issue of smoking and health also included the general counsel of the Big Six meeting to review proposals for scientific research and the scientific directors of the Big Six meeting and acknowledging "a general feeling that an industry approach as opposed to an individual company approach was highly desirable."

36. There was also a "gentlemen's agreement" among the manufacturers to suppress independent research on the issue of smoking and health. This agreement was referenced in a 1968 internal Philip Morris draft memo, which stated, "We have reason to believe that in spite of gentlemen's [sic] agreement from the tobacco industry in previous years that at least some of the major companies have been increasing biological studies within their own facilities." This memo also acknowledged that cigarettes are inextricably intertwined with the health field, stating, "Most Philip Morris products both tobacco and non-tobacco are directly related to the health field."

37. As indicated by this memo, it was believed within the industry that individual companies were performing certain research on their own, in addition to the joint industry research. But the fundamental understanding and agreement remained intact that harmful information and activities would be restrained, suppressed, and/or concealed. This included restraining, suppressing, and concealing research on the health effects of smoking, including the

addictive qualities of cigarettes, and restraining, concealing, and suppressing the research and marketing of safer cigarettes.

Suppression of Liggett's Safer Cigarette

38. At least one manufacturer -- Liggett -- was successful in researching and developing a safer cigarette. But Liggett decided not to market this product after an apparent threat of retaliation by another manufacturer and after executives expressed concern that marketing a safer cigarette would imply that traditional cigarettes were not safe.

39. Liggett initiated its safer cigarette project, called XA, in 1968. After a minimal expenditure of only \$14 million, Liggett was able, internally, to proclaim the project a success in 1979. By applying an additive of palladium metal and magnesium nitrate to tobacco to act as a catalyst in the burning process, Liggett found that "[c]igarette tar has been neutralized" and that there was "[n]o evidence for new or increased hazard. . . ."

40. Using this process, Liggett was able to produce cigarettes "which are believed to be of commercial quality." These cigarettes, however, were never marketed.

41. Two reasons apparently led Liggett to abandon its XA project. One was fear that the marketing of a "safer" cigarette would be, in essence, a confession that its -- and the industry's -- other cigarettes were not safe. Thus, one Liggett executive wrote that, "Any domestic activity will increase risk of cancer litigation on existing products." In addition, there was an

apparent threat of retaliation from industry leader Philip Morris if Liggett broke ranks.

42. James Mold, who was assistant director of research at Liggett during the development of the safer cigarette, has provided the following overview of the XA project and its abandonment:

a. Mold stated that the XA project produced a safer cigarette. He stated, "We produced a cigarette which was, we felt, was commercially acceptable as established by some consumer tests, which eliminated carcinogenic activity. . . ."

b. Mold stated that after 1975, all meetings on the project were attended by lawyers, lawyers collected all notes after the meetings, and all documents were directed to the law department to maintain the attorney-client privilege. He stated, "Whenever any problem came up on the project, the Legal Department would pounce upon that in an attempt to kill the project, and this happened time and time again."

c. Mold was asked why Liggett didn't market a safer cigarette. He stated, "Well, I can't give you, you know, a positive statement because I wasn't in the management circles that made the decision, but I certainly had a pretty fair idea why. . . . [T]hey felt that such a cigarette, if put on the market, would seriously indict them for having sold other types of cigarettes that didn't contain this, for example." Also, "[a]t a meeting

we held in . . . New Jersey at the Grand Met headquarters. . . at which the various legal people involved and the management people involved and myself were present. At one point Mr. Dey . . . who at that time, and I guess still is the president of Liggett Tobacco, made the statement that he was told by someone in the Philip Morris company that if we tried to market such a product that they would clobber us."

Avoiding an Industry War

43. Philip Morris also explored research to develop a safer cigarette, or, in the words of one memorandum to the board of directors, cigarettes with "superior physiological performance." This memorandum noted competitive pressures to produce "less harmful" cigarettes. However, the memorandum was careful to state that, "Our philosophy is not to start a war, but if war comes, we aim to fight well and to win." Philip Morris never marketed such a safer cigarette.

The Industry Position on Safer Cigarettes

44. A memorandum authored by an attorney at the firm of Shook, Hardy & Bacon, long-time lawyers for the cigarette industry, confirmed that there was an industry-wide position regarding the issue of a safer cigarette.

45. The 1987 memorandum was written in the context of the marketing by R.J. Reynolds of a smokeless cigarette, Premier, which heated rather than burned tobacco. The Shook, Hardy attorney wrote that the smokeless cigarette could "have significant effects on the

tobacco industry's joint defense efforts" and that "[t]he industry position has always been that there is no alternative design for a cigarette as we know them." The attorney also noted that, "Unfortunately, the Reynolds announcement. . . seriously undercuts this component of industry's defense."

Suppression of the R.J. Reynolds "Mouse House" Research

46. For a period of time in the late 1960s, R.J. Reynolds had a state-of-the-art laboratory in Winston-Salem, nicknamed "the mouse house." Here, scientists conducted research with mice, rats, and rabbits and began to uncover promising avenues of investigation into the mechanisms of smoking-related diseases. In 1970, this entire research division was disbanded in one day, and all 26 scientists were fired without notice. Company attorneys had collected dozens of research notebooks, still undisclosed, from the biochemists several months before the firings.

Suppression of Research on Nicotine

47. In the early 1980s, researchers working at a Philip Morris laboratory in Richmond confirmed the addictive nature of nicotine and worked to develop a synthetic form of nicotine that would avoid its cardiovascular complications. However, in April 1984, the company abruptly shut the laboratory. The researchers were fired and threatened with legal action if they published their work.

48. The research was conducted by Victor J. DeNoble and his colleague Paul C. Mele, who remained silent about their work under confidentiality agreements imposed by Philip Morris until testifying in 1994 before a congressional committee in Washington.

49. The research was so secretive that laboratory animals were brought in at night, under cover. The researchers discovered that nicotine demonstrated addictive qualities and that the animals self-administered the substance, pressing levers to obtain nicotine. The researchers also discovered nicotine analogues, artificial versions of nicotine. These analogues affected the brain much like nicotine. But the analogues did not seem to produce the harmful cardiovascular effects of nicotine. Thus, rats using the analogue behaved as if they had a nicotine "high" but did not show signs of heart distress like rapid heart beat.

50. By 1983, the research was becoming particularly problematic. A number of personal injury cases had been filed against the industry, with nicotine dependence a critical issue. In June 1983, DeNoble was called to the Philip Morris headquarters in New York to brief top executives. Following the meeting, company lawyers visited the lab and reviewed research notebooks. There were discussions of shifting the research out of the company, perhaps to DeNoble and Mele as outside contractors or to a lab in Switzerland, to distance Philip Morris from the results.

51. Finally, in April 1984, the researchers were abruptly told to halt their work, kill all rats, and turn in their security badges. The researchers also were forced to withdraw a paper on the addictive qualities of nicotine, even after it had been accepted for publication by a scientific journal.

BROWN & WILLIAMSON: CONFIRMING CAUSATION, REMOVING "DEADWOOD"

52. Recently, a series of Brown & Williamson documents was disclosed which set forth the far-ranging deceptions of that company in particular, and of the industry in general.

53. Brown & Williamson, as with the other manufacturers, was aware early on of the dangers of cigarettes. Indeed, a Brown & Williamson review of published statistical research, including the 1952 report by Dr. Doll, noted that the studies offered "frightening testimony from epidemiological studies."

54. By 1957, one of Brown & Williamson's British affiliates, which conducted much of the health research for the U.S. company - - was using the code name "zephyr" for cancer. For example, in a March 1957 report, the British affiliate stated, "As a result of several statistical surveys, the idea has arisen that there is a causal relation between zephyr and tobacco smoking, particularly cigarette smoking."

55. In 1962, Brown & Williamson's London-based parent company conducted a meeting of its worldwide subsidiaries in South Hampton, England. A transcript of the meeting reveals the following remarks:

a. One researcher stated that "smoking is a habit of addiction" and that "[n]icotine is not only a very fine drug, but the technique of administration by smoking has considerable psychological advantages." (Several years later, in 1967, the researcher admitted that the

company "is in the nicotine rather than the tobacco industry.")

b. Another research executive "thought we should adopt the attitude that the causal link between smoking and lung cancer was proven because then at least we could not be any worse off."

c. Another researcher stated that "no industry was going to accept that its product was toxic, or even believe it to be so, and naturally when the health question was first raised, we had to start denying it at the P.R. level. But by continuing that policy, we had got ourselves into a corner and left no room to maneuver. In other words, if we did get a breakthrough and were able to improve our product, we should have to about-face, and this was practically impossible at the P.R. level."

d. The chairman of Brown & Williamson's British affiliate stated that it "was very difficult when you were asked as chairman of a tobacco company to discuss the health question on television. You had not only your own business to consider but the employees throughout the industry, retailers, consumers, farmers growing the leaf, and so on. And you were in much too responsible a position to get up and say, 'I accept that the product which we and all our competitors are putting on the

market gives you cancer,' whatever you might think privately."

e. The chairman also stated that if the company manufactured safer brands, "how to justify continuing the sale of other brands? . . . It would be admitting that some of its products already on the market might be harmful. This would create a very difficult public relations situation."

56. The next year, in 1963, Brown & Williamson engaged in an internal debate over whether to disclose what it knew about the adverse effects of smoking to the Surgeon General, who was preparing his first official report on cigarettes. Some of the documents generated by Brown & Williamson as part of this process were shared with its London-based parent company, as well as other cigarette manufacturers and TIRC/CTR. In fact, Addison Yeaman, who was then general counsel at Brown & Williamson and who authored some of the most critical memoranda from this time, subsequently became a director of CTR.

57. Yeaman wrote in a 1963 analysis that:

- a. "[N]icotine is addictive."
- b. "We are, then, in the business of selling nicotine, an addictive drug. . . ."
- c. Cigarettes "cause, or predispose, lung cancer. . . ."
- d. "They contribute to certain cardiovascular disorders. . . ."

e. "They may well be truly causative in emphysema, etc. etc."

58. Yeaman suggested that Brown & Williamson "accept its responsibility" and disclose the hazards of cigarettes to the Surgeon General. He noted that this would allow the company to openly research and develop a safer cigarette.

59. Yeaman warned, however, that one danger of candid disclosure was that jurors would learn that the cigarette companies knew of the hazards of their products and had the means to make safer cigarettes -- but didn't. Yeaman noted that this might cause an "emotional reaction" in jurors. Ultimately, Yeaman's suggestion for full disclosure was rejected.

60. Subsequently, Brown & Williamson continued to conduct -- and conceal -- biological research. Some of these research projects confirmed causation.

61. The more sensitive research was often undertaken by Brown & Williamson's British affiliates, acting on behalf of both companies. Much of the work was performed at a British laboratory called Harrogate, which performed work for a number of cigarette manufacturers, and some of this research was shared with these other companies and the Tobacco Institute.

62. Brown & Williamson also attempted to develop a safer cigarette or, in the words of an internal document, "a device for the controlled administration of nicotine." There were at least two safer cigarette projects, Project Ariel, which focused on heating rather than burning tobacco, and Project Janus, which

focused on isolating and removing the harmful elements of tobacco. At least some of the work was performed by Battelle laboratories in Frankfurt. By the end of the 1970s, however, in a pattern that was repeated throughout the industry, Brown & Williamson closed its research labs and halted work on a safer cigarette.

63. In 1985, a Brown & Williamson attorney recommended that much of its medical research be declared "deadwood" and shipped to England. The attorney stated that, "I have marked with an X documents which I suggested were deadwood in the behavioral and biological studies area. I said that the B series are Janus series studies and should also be considered deadwood." The attorney further suggested that the research, development, and engineering department also "should undertake to remove the deadwood from its files."

INDUSTRY CONTROL OF NICOTINE LEVELS

64. Nicotine is recognized as addictive by major medical organizations including: the Office of the U.S. Surgeon General, the World Health Organization, the American Medical Association, the American Psychiatric Association, the American Psychological Association, and the American Society of Addiction Medicine. The cigarette industry has long been aware of the addictive qualities of nicotine, although it continues to this day its public denials. However, internally the cigarette manufacturers quite explicitly view the cigarette as a high technology nicotine delivery system.

65. The industry's recognition of the extent to which nicotine -- and not tobacco -- defines its product is illustrated in a 1972 Philip Morris report on a CTR conference, which stated:

"As with eating and copulating, so it is with smoking. The physiological effect serves as the primary incentive; all other incentives are secondary. The majority of the conferees would go even further and accept the proposition that nicotine is the active constituent of cigarette smoke. Without nicotine, the argument goes, there would be no smoking."

. . .

"Why then is there not a market for nicotine per se, to be eaten, sucked, drunk, injected, inserted or inhaled as a pure aerosol? The answer, and I feel quite strongly about this, is that the cigarette is in fact among the most awe-inspiring examples of the ingenuity of man. Let me explain my conviction.

"The cigarette should be conceived not as a product but as a package. The product is nicotine."

. . .

"Think of the cigarette pack as a storage container for a day's supply of nicotine. . . . Think of the cigarette as a dispenser for a dose unit of nicotine."

66. Accordingly, the industry has developed sophisticated technology to control the levels of nicotine in order to maintain its market. David A. Kessler, M.D., Commissioner of Food and

Drugs, recently testified before a congressional committee that cigarette manufacturers can manipulate precisely nicotine levels in cigarettes, manipulate precisely the rate at which the nicotine is delivered in cigarettes, and add nicotine to any part of cigarettes.

67. Dr. Kessler testified that "the cigarette industry has attempted to frame the debate on smoking as the right of each American to choose. The question we must ask is whether smokers really have that choice." Dr. Kessler stated:

a. "Accumulating evidence suggests that cigarette manufacturers may intend this result -- that they may be controlling smokers' choice by controlling the levels of nicotine in their products in a manner that creates and sustains an addiction in the vast majority of smokers."

b. "We have information strongly suggesting that the amount of nicotine in a cigarette is there by design."

c. "The public thinks of cigarettes as simply blended tobacco rolled in paper. But they are much more than that. Some of today's cigarettes may, in fact, qualify as high technology nicotine delivery systems that deliver nicotine in precisely calculated quantities -- quantities that are more than sufficient to create and to sustain addiction in the vast majority of individuals who smoke regularly."

d. "The history of the tobacco industry is a story of how a product that may at one time have been a simple

agricultural commodity appears to have become a nicotine delivery system."

e. "[T]he cigarette industry has developed enormously sophisticated methods for manipulating nicotine levels in cigarettes."

f. "In many cigarettes today, the amount of nicotine present is a result of choice, not chance."

g. "[S]ince the technology apparently exists to reduce nicotine in cigarettes to insignificant levels, why, one is led to ask, does the industry keep nicotine in cigarettes at all?"

68. In a subsequent appearance before Congress, Dr. Kessler testified that one manufacturer, Brown & Williamson, had developed a tobacco plant code-named Y-1 with perhaps twice the nicotine content of regular tobacco. Brown & Williamson manufactured and marketed cigarettes with Y-1 tobacco in the United States in 1993.

69. As a result of the industry's actions, as many as 74% to 90% of smokers are addicted. Eight out of 10 smokers say they wish they had never started smoking. Two-thirds of adults who smoke say they wish they could quit. Seventeen million try to quit each year, but fewer than one out of ten succeed. A high percentage of smokers who have had surgery for lung cancer or heart attacks return to smoking, as do 40% of smokers who have had their larynxes removed.

70. Beyond its addictive qualities, nicotine is believed to contribute to cardiovascular disease and death -- a fact of which the cigarette industry has long been aware.

MAINTAINING THE MARKET THROUGH SALES TO MINORS

71. In addition to ensuring a captive market through the addiction of its customers, the cigarette industry has maintained its sales -- and replaced the hundreds of thousands of smokers who die each year -- by the knowing attraction of children and adolescents.

72. Smoking begins primarily during childhood and adolescence. Ninety percent of male smokers begin smoking before age 18. Each day more than 3,000 American teenagers start smoking. The Surgeon General summarized the problem in her 1994 report:

a. "Nearly all first use of tobacco occurs before high school graduation; this finding suggests that if adolescents can be kept tobacco-free, most will never start using tobacco."

b. "Most adolescent smokers are addicted to nicotine and report that they want to quit but are unable to do so"

c. "Cigarette advertising appears to increase young people's risk of smoking by affecting their perceptions of the pervasiveness, image, and function of smoking."

d. In 1990, cigarette advertising and promotional expenditures were almost \$4 billion, making cigarettes

the second most promoted consumer products, after automobiles, in the U.S.

73. The most notorious recent example of the industry targeting of minors is the Joe Camel advertising campaign conducted by R.J. Reynolds. When R.J. Reynolds began this cartoon campaign in 1988, Camel's share of the children's market was only 0.5%. In just a few years, Camel's share of this illegal market has increased to 32.8%, representing sales estimated at \$476 million per year. Another indication of the phenomenal success of this marketing campaign is the fact that in a recent survey of six-year-olds, 91% of the children could correctly match Old Joe with a picture of a cigarette, and both the silhouette of Mickey Mouse and the face of Old Joe were nearly equally well recognized by almost all children.

74. All defendants are aware of the fact that smoking begins primarily among youth who are not yet 18 years of age.

THE INTENT AND EFFECT OF THE INDUSTRY'S UNLAWFUL CONDUCT

75. The cigarette manufacturers and their trade associations knew that their unlawful conduct, as outlined above, would cause millions of persons to begin to smoke, primarily in their youth and adolescence; would cause millions of persons to continue to smoke; would cause adverse health effects in millions of smokers; would cause the cost of medical care to increase dramatically; and would impact the insurance market in the United States as well as in the

State of Minnesota. In fact, these defendants had the intent to cause all of the above, as intent is defined by Minnesota law.

The Human Toll of Cigarette Smoking

76. As a direct result of the unrestrained and unlawful conduct of the cigarette industry, cigarette smoking has become the most pervasive public health issue of our time and the single most preventable cause of death in our society. Cigarette smoking is the most extensively documented cause of disease ever investigated in the history of biomedical research. Cigarettes kill when used as intended, and there is no known level of safe consumption.

77. The number of deaths caused by smoking -- more than 400,000 each year in the United States, or one out of every six deaths -- surpasses the combined totals for alcohol, suicide, homicide, AIDs, cocaine, heroine, and motor vehicles. At least one out of every four regular cigarette smokers dies of smoking-related diseases. In Minnesota, smoking-related diseases cause more than 6,000 deaths a year -- from diseases including cardiovascular (heart disease and stroke), cancer, emphysema, asthma, and bronchitis.

The Economic Toll of Cigarette Smoking

78. In addition to the human toll, the economic costs of cigarette smoking, and, in particular, health care expenditures from smoking-attributable diseases, amount to an unacceptable burden on society and the State of Minnesota.

79. The State of Minnesota has developed a statistical model to obtain data on smoking-attributable deaths and diseases and the

economic impact of smoking. The Centers for Disease Control (CDC) has updated the Minnesota model and distributed it for use in virtually every state, as well as a number of foreign countries. In Minnesota, the data shows that more than \$350 million a year is spent in this State each year to pay the health care expenses for cigarette-caused death and disease. This does not include the indirect costs of smoking to the State of Minnesota, such as loss of income from smokers whose illnesses render them unable to work. Nationwide, the CDC data shows that the estimated health care costs for smoking-attributable diseases are \$50 billion. These costs have been increasing at a precipitous rate, more than doubling in the period from 1987 to 1993.

THE NEED FOR A REMEDY

80. Despite the egregiousness of their conduct and the toll - human and economic -- wreaked by the cigarette manufacturers and their trade associations, the industry has enjoyed virtual immunity from regulation and successful litigation.

81. In the courts, the industry has not paid any damages, despite 40 years of litigation on smoking and health. In large part, the success of the industry has been founded on the industry's heretofore sanctioned litigation tactics. As one tobacco industry lawyer wrote in 1988:

"[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for

plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [R.J. Reynold]'s money, but by making that other son of a bitch spend all of his."

82. The industry's immunity also is attributable to its success in fraudulently suppressing harmful information. For example, Joseph A. Califano, Secretary of Health, Education and Welfare during the Carter Administration, stated recently that had he known in 1979 what the tobacco companies knew and been privy to their research on addiction and their ability to manipulate the amount of nicotine in cigarettes, "the 1979 surgeon general's report would have found cigarettes addictive, and we would have moved to regulate them. Unfortunately, the president of the United States, the secretary of HEW and the surgeon general were all victims of the concealment campaign of the tobacco companies."

83. Thus, the campaign of concealment continues, and cigarettes have remained virtually unregulated, avoiding regulation under the federal Food, Drug and Cosmetic Act, the Consumer Product Safety Act, the Hazardous Substances Act, the Fair Labeling and Packaging Act, and the Toxic Substances Act, as well as state statutes.

CAUSES OF ACTION

COUNT ONE -- UNDERTAKING OF SPECIAL DUTY

84. Plaintiffs reallege paragraphs 1 through 83.

85. Defendants assumed a special responsibility and duty to render services for the protection of the public health and a duty to those who advance and protect the public health, including the State of Minnesota and Blue Cross and Blue Shield of Minnesota, by their representation and undertaking to accept an interest in the public's health as a basic and paramount responsibility; to cooperate closely with those who safeguard the public health; to aid and assist the research effort into all phases of tobacco use and health; to continue research and all possible efforts until all the facts were known; and to provide complete and authenticated information about cigarette smoking and health.

86. Defendants recognized that their undertaking was necessary for the protection of the public health and that their conduct would affect the smoking habits and health of millions of Americans, the cost of medical care, and the operations of the insurance market.

87. Defendants have breached and continue to breach their special responsibility and duty through their failure to exercise reasonable care in performance of their undertaking. Defendants' failure to exercise such reasonable care increased the risk of harm and the cost of health care.

88. As a direct and proximate result of defendants' conduct, plaintiffs have suffered and will continue to suffer substantial injuries and damages.

COUNT TWO -- MINNESOTA ANTITRUST LAW

Conspiracy to Unreasonably Restrain Trade and Commerce

89. Plaintiffs reallege paragraphs 1 through 83.

90. Minn. Stat. § 325D.51 provides:

A contract, combination, or conspiracy between two or more persons in unreasonable restraint of trade or commerce is unlawful.

91. Beginning at least as early as the 1950s, and continuing until the present date, defendants entered into a contract, combination, or conspiracy in unreasonable restraint of trade and commerce in the market for cigarettes in Minnesota in violation of Minn. Stat. § 325D.51. The market for cigarettes in Minnesota is directly related to and inextricably intertwined with health care.

92. This contract, combination, or conspiracy had the purpose and effect of restraining competition in the market for cigarettes in Minnesota and controlling the market for cigarettes in Minnesota through restraining and suppressing research on the harmful effects of smoking; restraining and suppressing the dissemination of information on the harmful effects of smoking; and restraining and suppressing the research, development, production, and marketing of a higher quality and safer cigarette. This has resulted in millions of persons beginning and continuing to smoke, causing adverse health effects in millions of smokers, causing the cost of

medical care to increase dramatically, and impacting the health insurance market in the United States as well as in the State of Minnesota.

93. As a direct (or indirect) result of defendants' unlawful activity, plaintiffs have suffered and will continue to suffer substantial injuries and damages to their businesses and property.

94. Unless enjoined from doing so, defendants will continue to violate this statute.

COUNT THREE -- MINNESOTA ANTITRUST LAW

Monopolization of the Cigarette Market in Minnesota

95. Plaintiffs reallege paragraphs 1 through 83.

96. Minn. Stat. § 325D.52 provides:

The establishment, maintenance, or use of, or any attempt to establish, maintain, or use monopoly power over any part of trade or commerce by any person or persons for the purpose of affecting competition or controlling, fixing or maintaining prices is unlawful.

97. Defendants collectively have at all times material to this complaint maintained a monopoly over the sale of cigarettes in Minnesota and used their monopoly power to affect competition in the sale of cigarettes in Minnesota in violation of Minn. Stat. § 325D.52. The market for cigarettes in Minnesota is directly related to and inextricably intertwined with health care.

98. Beginning at least as early as the 1950s, and continuing until the present date, defendants maintained and used their monopoly power to affect competition by restraining and suppressing research on the harmful effects of smoking; restraining and

suppressing the dissemination of information on the harmful effects of smoking; and restraining and suppressing the research, development, production, and marketing of a higher quality and safer cigarette. This has resulted in millions of persons beginning and continuing to smoke, causing adverse health effects in millions of smokers, causing the cost of medical care to increase dramatically, and impacting the health insurance market in the United States as well as in the State of Minnesota.

99. As a direct (or indirect) result of defendants' unlawful activity, plaintiffs have suffered and will continue to suffer substantial injuries and damages to their businesses and property.

100. Unless enjoined from doing so, defendants will continue to violate this statute.

COUNT FOUR -- CONSUMER FRAUD

101. Plaintiffs reallege paragraphs 1 through 83.

102. Minn. Stat. § 325F.69, subd. 1, provides:

The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been misled, deceived, or damaged thereby, [is an unlawful practice].

103. Defendants, by engaging in the conduct described above, violated and continue to violate Minn. Stat. § 325F.69, subd. 1. Defendants' wrongful conduct includes, by way of example:

a. Defendants' fraudulent, misleading, and deceptive statements and practices relating to the issue of smoking and

health, including intentional misrepresentations that there is no causal connection between cigarette smoking and adverse health effects and that cigarette smoking is not addictive;

b. Defendants' fraudulent, misleading, and deceptive statements and practices relating to the industry's false promises to conduct and disclose objective research on the issue of smoking and health;

c. Defendants' fraudulent concealment of information relating to the issue of smoking and health and failure to disclose material facts, including intentional concealment and failure to disclose.

104. As a direct and proximate result of defendants' wrongful activity, plaintiffs have suffered and will continue to suffer substantial injuries and damages.

105. Unless enjoined from doing so, defendants will continue to violate this statute.

COUNT FIVE -- UNLAWFUL TRADE PRACTICES

106. Plaintiffs reallege paragraphs 1 through 83.

107. Minn. Stat. § 325D.13 provides that, "No person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise."

108. Defendants, by engaging in the conduct described above, violated and continue to violate Minn. Stat. § 325D.13. Defendants' wrongful conduct includes, by way of example:

a. Defendants' misrepresentations relating to the issue of smoking and health, including knowing misrepresentations that there is no causal connection between cigarette smoking and any adverse health effects and that cigarette smoking is not addictive;

b. Defendants' misrepresentations that they would conduct and disclose objective research into the issue of smoking and health, including knowing misrepresentations;

c. Defendants' fraudulent concealment of information relating to the issue of smoking and health and failure to disclose material facts, including knowing concealment and failure to disclose.

109. As a direct and proximate result of defendants' wrongful activity, plaintiffs have suffered and will continue to suffer substantial injuries and damages.

110. Unless enjoined from doing so, defendants will continue to violate this statute.

COUNT SIX -- DECEPTIVE TRADE PRACTICES

111. Plaintiffs reallege paragraphs 1 through 83.

112. Minn. Stat. § 325D.44, subd. 1, provides in part:

A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person:

(5) Represents that goods or services have . . . characteristics, ingredients, uses, benefits . . . that they do not have

(7) Represents that goods or services are of a particular standard, quality, or grade, . . . if they are of another.

(13) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

113. Defendants, by engaging in the conduct described above, violated and continue to violate Minn. Stat. § 325D.44. Defendants' wrongful conduct includes, by way of example:

a. Defendants' fraudulent, misleading, and deceptive statements and practices relating to the issue of smoking and health, including intentional misrepresentations that there is no causal connection between cigarette smoking and adverse health effects and that cigarette smoking is not addictive;

b. Defendants' fraudulent, misleading, and deceptive statements and practices relating to the industry's false promises to conduct and disclose objective research on the issue of smoking and health;

c. Defendants' fraudulent concealment of information relating to the issue of smoking and health and failure to disclose material facts, including intentional concealment and failure to disclose.

114. As a direct and proximate result of defendants' wrongful activity, plaintiffs have suffered and will continue to suffer substantial injuries and damages.

115. Unless enjoined from doing so, defendants will continue to violate this statute.

COUNT SEVEN -- FALSE ADVERTISING

116. Plaintiffs reallege paragraphs 1 through 83.

117. Minn. Stat. § 325F.67 provides in part:

Any person, firm, corporation, or association who, with intent to sell or in anywise dispose of merchandise . . . directly or indirectly, to the public, for sale or distribution, or with intent to increase the consumption thereof, . . . makes, publishes, disseminates, circulates, or places before the public, or causes, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, label, price tag, circular, pamphlet, program, or letter, or over any radio or television station, or in any other way, an advertisement of any sort regarding merchandise . . . or anything so offered to the public for use, consumption, purchase, or sale, which advertising contains any material assertion, representation or statement of fact which is untrue, deceptive, or misleading, shall, whether or not pecuniary or other specific damage to any person occurs as a direct result thereof . . . be guilty [of an unlawful practice].

118. Defendants, by engaging in the conduct described above, violated and continue to violate Minn. Stat. § 325F.67. Defendants' wrongful conduct includes, by way of example:

a. Defendants' untrue, deceptive, and misleading statements and practices relating to the issue of smoking and health, including intentional misrepresentations that there is no causal connection between cigarette smoking and adverse health effects and that cigarette smoking is not addictive;

b. Defendants' untrue, deceptive, and misleading statements and practices relating to the industry's false promises to conduct and disclose objective research on the issue of smoking and health;

c. Defendants' fraudulent concealment of information relating to the issue of smoking and health and failure to disclose material facts, including intentional concealment and failure to disclose.

119. As a direct and proximate result of defendants' wrongful activity, plaintiffs have suffered and will continue to suffer substantial injuries and damages.

120. Unless enjoined from doing so, defendants will continue to violate this statute.

COUNT EIGHT -- RESTITUTION

Performance of Another's Duty to the Public

121. Plaintiffs reallege Paragraphs 1 through 83.

122. Defendants assumed and owe a duty to pay for the harm caused by their wrongful conduct, yet defendants have repeatedly refused to do so. Instead, these defendants embarked on a campaign of denial, subterfuge, and deceit to deny responsibility and to avoid paying for the consequences of the harm they have caused.

123. Plaintiffs have been and will be required by statutory and contractual obligations to expend large sums of money to pay for the harm caused by the wrongful conduct of defendants. Plaintiffs have the intent to charge and recoup from defendants these sums of money. Plaintiffs' expenditures are immediately necessary to protect the public health and safety.

124. As a result of defendants' wrongful activity, plaintiffs have borne a duty that -- in law, equity, and fairness -- ought to have been borne by defendants.

COUNT NINE -- RESTITUTION

Unjust Enrichment

125. Plaintiffs reallege paragraphs 1 through 83.

126. Defendants, through their wrongful conduct as described above, have reaped substantial and unconscionable profits from the sale of cigarettes in Minnesota. These cigarette sales, in turn, have resulted in increased health care costs directly attributable to cigarette smoking.

127. Without justification, defendants have failed to pay for the consequences of their unlawful conduct.

128. As a result, plaintiffs have been required to pay for the medical costs stemming from defendants' unlawful acts. Plaintiffs have borne a duty that -- in law, equity, and fairness -- ought to have been borne by defendants.

129. In equity and good conscience, it would be unjust for defendants to enrich themselves at the expense of plaintiffs.

CONSPIRACY

130. Plaintiffs reallege Paragraphs 1 through 83.

131. Beginning at least as early as the 1950s, and continuing until the present day, defendants entered into a conspiracy with the intentional and unlawful purpose and effect of restraining and suppressing research on the harmful effects of smoking; restraining and suppressing the dissemination of information on the harmful effects of smoking; engaging in affirmative misrepresentations on the harmful effects of smoking; and restraining and suppressing the

research, development, production, and marketing of a safer cigarette. In furtherance of defendants' conspiracy, defendants lent encouragement, substantial assistance, and otherwise aided and abetted each other with respect to these wrongful acts.

132. As a direct and proximate result of defendants' unlawful conspiracy, plaintiffs have suffered and will continue to suffer substantial injuries and damages.

133. As a result of defendants' conspiracy, defendants are vicariously and jointly and severally liable with respect to each cause of action described above in Counts One through Nine above.

PRAYER FOR RELIEF

134. Wherefore, plaintiffs pray that this Court issue an order and judgment:

a. Declaring that defendants have engaged in consumer fraud, unlawful trade practices, deceptive trade practices, false advertising, unreasonable restraints of trade, and use of monopoly power to affect competition in violation of the laws of the State of Minnesota;

b. Enjoining defendants and their respective agents, servants, officers, directors, employees, and all persons acting in concert with them, directly or indirectly, from engaging in consumer fraud, unlawful trade practices, deceptive trade practices, false advertising, unreasonable restraints of trade, and use of monopoly power to affect competition in violation of the laws of the State of Minnesota;

c. Ordering defendants to disclose, disseminate, and publish all research previously conducted directly or indirectly by themselves and their respective agents, affiliates, servants, officers, directors, employees, and all persons acting in concert with them, that relates to the issue of smoking and health;

d. Ordering defendants to fund a corrective public education campaign relating to the issue of smoking and health, administered and controlled by an independent, third party;

e. Ordering defendants to take reasonable and necessary affirmative steps to prevent the distribution and sale of cigarettes to minors under the age of 18;

f. Ordering defendants to fund clinical smoking cessation programs in the State of Minnesota;

g. Ordering the manufacturing defendants to dissolve the Council for Tobacco Research and the Tobacco Institute, or, in the alternative, to divest their ownership, sponsorship, and/or membership in the Council for Tobacco Research and the Tobacco Institute;

h. Ordering defendants to disgorge all profits from sales of cigarettes in Minnesota;

i. Ordering defendants to pay restitution;

j. Awarding damages in excess of \$50,000 to each plaintiff, for past and future damages caused by the defendants' actions in violation of the laws of the State of Minnesota;

k. Trebling damages awarded to each plaintiff for violations of the Minnesota Antitrust Law, pursuant to Minn. Stat. § 325D.57;

l. Awarding reasonable attorneys' fees, together with costs and disbursements, pursuant to Minn. Stat. §§ 8.31, subd. 3a, 325D.57, and 325D.45; and

m. Granting such other legal or equitable relief, including attorneys' fees, as the Court deems just and equitable.

135. In addition, the State of Minnesota prays for the following order and judgment:

a. Awarding civil penalties in an amount equal to \$25,000 for each separate violation of the consumer fraud, unlawful trade practices, deceptive trade practices, and false advertising laws alleged herein, pursuant to Minn. Stat. §§ 8.31, subd. 3 and 645.24; and

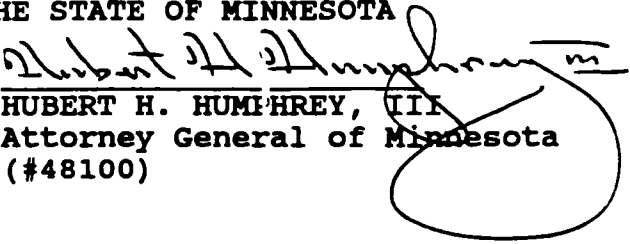
b. Awarding civil penalties in an amount equal to \$50,000 for each separate violation of the Minnesota Antitrust Law, pursuant to Minn. Stat. §§ 325D.56 and 645.24.

PLAINTIFFS HEREBY DEMAND A JURY TRIAL
FOR ALL OF THE ISSUES PLED HEREIN SO TRIABLE.

DATE: August 17, 1994.

THE STATE OF MINNESOTA

By:


HUBERT H. HUMPHREY, III
Attorney General of Minnesota
(#48100)

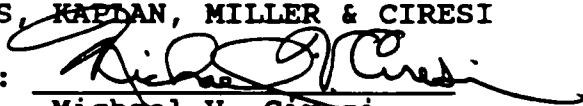
BLUE CROSS AND BLUE SHIELD OF MINNESOTA

By:

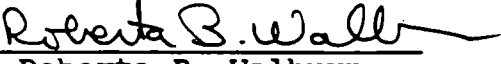

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and
ATTORNEYS FOR BLUE CROSS AND BLUE SHIELD OF MINNESOTA

ACKNOWLEDGMENT

The allegations in this complaint are well grounded in fact and are warranted by existing law or a good faith argument for its extension, modification, or reversal. Plaintiffs bring this complaint in good faith and not for any improper purposes. Plaintiffs acknowledge that costs, disbursements, and reasonable attorney and witness fees may be awarded to defendants pursuant to Minn. Stat. § 549.21, subd. 2 or the Rules of Civil Procedure if there is an affirmative finding to the contrary.


HUBERT H. HUMPHREY, III


Thomas F. Gilde


Michael V. Ciresi


Roberta B. Walburn

Editorial

Don't drop tobacco suits

Ending litigation would allow companies to continue causing death



The issue:

States are reported to be considering settlement of lawsuits against major tobacco companies.

Our comment:

States should not give up the opportunity to learn about tobacco industry, and curtail harmful effects of smoking.

Movement to derail the state-sponsored lawsuits against the tobacco industry seems to be growing in strength. That is regrettable.

Attorneys general from a number of states, including Minnesota, have sued tobacco companies for damages. They seek compensation for medical care costs the states have incurred in caring for victims of tobacco-related illnesses.

Minnesota has been a leading player in this litigation and has accumulated an impressive amount of information about the inner workings and secret policies of tobacco companies.

Under the reported plan to settle the lawsuits, the tobacco companies would pay a heavy price — possibly \$10 billion a year for 25 years — and would modify their advertising so as not to appeal to teen-agers. The proposal might also give the Food and Drug Administration power to regulate tobacco products and would give the Department of Health and Human Services the power to regulate the production and sale of tobacco. It apparently would not interfere with the companies' sale of cigarettes overseas.

No one has officially acknowledged the settlement proposal and the terms have not been confirmed.

According to the reports, Congress would pass legislation confirming the settlement agreement. The effect would be to shield the tobacco companies from further litigation and protect them from penalties which could possibly shut down the entire industry.

We are not surprised that the tobacco companies would agree even to a \$250 billion settlement considering what they would gain. Such a settlement could preserve their business franchise and reduce scrutiny of their operations. Stock analysts also

say it would result in a huge increase in the companies' financial value because it would lift the cloud of uncertainty caused by the states' lawsuits, litigation by individual plaintiffs and the threat of federal government action.

Unfortunately, it also would enable the companies to continue to sell illness and death to people in this country and to people around the world.

The tobacco companies' interest in a settlement is understandable. What is not understandable is the desire of the plaintiffs — 17 or more state governments — to give up an opportunity to tell the world the truth about the tobacco companies and about the unconscionable damage they inflict on the public health in this country and abroad.

The states' lawsuits have produced an unprecedented amount of information about clandestine practices of the tobacco companies which are not in the public interest. By agreeing to a settlement, prior to a trial, the states would forego access to that type of information in the future and would prevent the information from being disclosed to the public in open court.

In addition, the states would lose the opportunity to create public interest in the whole question of tobacco usage, its effect on the health of the population and the shameless export of tobacco-related illnesses to countries all over the world.

In short, the companies would benefit from a settlement and the people of the world would not.

The states' goal should not be to make billions; it should be to serve the public interest.

They should reject a settlement and proceed with the litigation for the same reasons that they filed the lawsuits in the first place.

Wednesday, February 20, 1997

Early education tops Humphrey's ed reform proposal

By Dave Olson
The Forum

Minnesota Attorney General Hubert "Skip" Humphrey III on Tuesday announced what he called an aggressive proposal for education reform.

Humphrey, who presented the plan at a number of locations around the state including Moorhead, said implementation of the proposal by the state Legislature could head off more lawsuits similar to two pieces of litigation in which the state is currently embroiled.

For the past 17 months, Humphrey's office has been defending the state against a suit brought by the Minneapolis Chapter of the National Association for the Advancement of Colored People and, more recently, one by the St. Paul School District.

The suits claim the current public school system does not meet the state constitution's requirement for "a general and uniform system of public schools."

Humphrey said he is confident the state will prevail in the litigation, but he said the Legislature should go further than maintaining the minimum requirements mandated in the constitution.

Humphrey said it should be the role of lawmakers and not judges to establish education policies and priorities.

Humphrey's plan is comprised of several major points, with early education heading the list.

"First of all," Humphrey said, "the absolute first priority is early education. As you probably know, study after study will tell us that the way to improve student achievement is to get students early and get them to school ready to learn," Humphrey said.

"Investing in early education now will save us billions in education, welfare and prisons later," he said. "I

think it's time to stop quoting these studies and actually start acting on them."

He said every 3-year-old should have the opportunity to begin formal education. Humphrey proposes that be done by expanding the Head Start program and developing early childhood screening programs to "ensure that all kids have quality child care."

Humphrey also stressed that students, parents, teachers and school boards be held accountable through implementation of graduation rules and other assessments and standards. He advocated that funding incentives be tied to a school district's measurable outcomes.

He said schools could become more effective by attempting a variety of things, including lengthening the school year, reducing class sizes and encouraging more use of alternative learning environments, as charter schools, cooperative districts and alternative learning centers.

"We've got to literally change the way we are educating our children," Humphrey said. "For schools that can't make the grade, we've got to try some other kinds of ways."

To achieve better equality of educational opportunity, Humphrey said education financing should be changed by shifting even more of the cost burden from local property taxes to general state revenues.

Humphrey said greater emphasis should also be placed on "school-to-work" programs that will help ease students not bound for college into apprenticeship and training programs. To keep students in school long enough to benefit from such programs, Humphrey proposes a "Learn and Earn" program that would give financial incentives for at-risk students to stay in school.

The lawsuits pending against the state deal largely with what school districts are or are not doing for such students, Humphrey said.

PIONEER PRESS

PioneerPlanet

SUNDAY

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The Paper Case



PIONEER PRESS PHOTO ILLUSTRATION BY JANET HOSTETTER

So far, cigarette companies are losing the battle to control millions of records that Minnesota's anti-tobacco forces hope will prove a history of deception by the industry.

BY DAVID SHAFFER

STAFF WRITER

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Thirty months after launching the state's courtroom war on the tobacco industry, Minnesota lawyers have placed cigarette makers where they don't like to be — on the losing side.

Tobacco giants, under a series of court orders, have been forced to hand over more secret papers than ever before, revealing damaging information about what industry officials

knew about the consequences of smoking.

In rulings on 32 major pretrial issues, Ramsey County District Judge Kenneth Fitzpatrick has rejected tobacco industry positions by almost a 2-1 margin, according to a Pioneer Press analysis of court orders. In five appeals to higher courts, the industry has lost each time.

And it is no secret that tobacco giants are feeling the heat.

"We have been disappointed in some of the rulings," Daniel Donahue, deputy general counsel for R.J. Reynolds, said in rare criticism of a sitting judge. "Some of them are clearly wrong."

To be sure, industry lawyers are still confident they will win the Minnesota lawsuit, one of 22 cases filed by state attorneys general demanding that tobacco companies repay Medicaid and other insurance expenses for treating smoking-related diseases.

Using some of the best law firms in the country, cigarette companies have never paid a dime in damages even though hundreds of smokers have filed lawsuits blaming cigarettes for their health problems.

The size of Minnesota's case file — the public portion takes up 10 feet of shelf space — illustrates the scope of the legal confrontation led by Minnesota Attorney General Hubert H. Humphrey III against 19 law firms representing seven tobacco companies and two industry associations.

And 10 months before it is scheduled for trial in St. Paul,

the landmark case already is revealing troubling secrets — and promises to reveal more — about an industry whose products are willingly inhaled by a quarter of American adults.

Under the court orders, the tobacco industry has:

- Turned over a record 28 million pages of research reports, memoranda and letters. If the 10,500 boxes brought to Minnesota were placed in 10 equal stacks, each would be as tall as the IDS Tower.

- Helped establish the first document depositories, in Minneapolis and London, where lawyers suing the industry can view 40 years of industry secrets.

- Disclosed at least some of their highly protected

SMOKE CONTINUED ON 15A ▶

With Kenneth Fitzpatrick, the judge from St. Paul presiding over Minnesota's historic tobacco litigation, "you know you'll get a fair shake," says one attorney. Story, Page 14A

INSIDE

■ Big-time law firms from Minnesota and the nation battle on both sides of the case. Page 14A

■ A Q&A examines what's at stake in the civil lawsuit. Page 16A

■ A time line tracks more than 40 years of tobacco's sometimes contentious role in public life. Page 16A

For previously published articles on the tobacco case, selected documents from the trial and links to other information on the World Wide Web, visit the PioneerPlanet at <http://www.pioneerplanet.com/archive/tobac/index.htm>



cigarette formulas to anti-tobacco attorneys for the first time.

■ Handed over the tobacco industry's huge computerized document indexes for the first time, giving opposing lawyers a valuable research tool.

All of this is part of a relentless document-gathering effort by the Minneapolis law firm of Robins Kaplan Miller & Ciresi, which represents the Minnesota attorney general and Blue Cross and Blue Shield of Minnesota in the lawsuit.

This is the story of where the paper trail started — and where it may end.

Chinks in the armor

For years, cigarette makers had a sure-fire defense against lawsuits filed by individual smokers who questioned the safety of the products they had puffed all their lives. Juries were told, "Smokers chose to smoke — and thereby contributed to their demise."

The defense has worked well, although there has been a recent crack. A Florida jury last year awarded \$750,000 to a Florida couple who smoked for years and then blamed cigarette makers for lung cancer. The verdict is being appealed.

Similar lawsuits — more than 1,000 cases since 1954 — have arrived in waves, as new generations of lawyers lined up to battle the tobacco giants. Only 21 individual smoker cases have gone to trial since 1960, and the industry won 20 of them, according to R.J. Reynolds. Many more cases withered before reaching a jury.

While industry lawyers racked up their remarkable record, the nation's major health institutions, from the Surgeon General to the American Medical Association, arrived at a different verdict — that smoking causes lung cancer, emphysema and heart disease. The tobacco industry, to this day, still does not admit that smoking causes these diseases.

Marc Edell, a New Jersey attorney, set out to prove them wrong in 1985. He spent seven years suing two cigarette makers on behalf of Rose Cipollone, a heavy smoker who died of lung cancer in 1984. Edell tracked down some of the industry's secret research on smoking, took his case to a jury and won a \$400,000 verdict against two cigarette makers — only to have it reversed by the U.S. Supreme Court.

"We did obtain hundreds of thousands of (industry) documents," Edell said. "Some of them were significantly damaging of the industry. It took us years before we got any documents. It was a continued effort of filing motions, of forcing the issue."

Although that case brought no money to the Cipollone family, it triggered the 1992 Supreme Court ruling that laid out what kinds of future lawsuits could be filed against tobacco companies.

A new strategy is born

The litigation strategy in Minnesota and other states can be traced to Edell's efforts. The strategy boils down to this: Get lots of internal cigarette company documents — and get rid of the easy-to-blame individual smokers.

In the early 1990s, product-liability lawyers wanted a new angle of attack on the tobacco giants — and the Medicaid reimbursement lawsuit was born.

Under such a lawsuit, tobacco companies would be sued not on behalf of the injured smoker, but on behalf of taxpayers who footed the medical bills for smokers receiving Medicaid, the federal-state program that pays medical bills for the poor.

As the lawyers conceived it, no smokers would grace the witness stand at such a trial. So there would be no questions about whether a smoker knew about the perils of cigarettes.

Instead, jurors would hear lots of bad things about cigarette companies. Jurors would see internal company research about nicotine and disease that conflicted with the healthy images of smokers splashed across the companies' magazine ads.

For the grand finale, the jury would hear from an economist. This expert in the economics of health care would take the witness stand and explain to jurors how much taxpayers had paid to treat smoking-related illnesses such as lung cancer, emphysema and heart disease.

"You have the state turning to citizens saying, 'Look, we believe that nonsmokers shouldn't foot the bill for smokers. Maybe the people who should be paying the health-care costs for smokers should be people who are smoking and profiting from smoking,'" said Edell, who is a consultant to the state of Maryland in its Medicaid case.

By the early 1990s, as a result of earlier lawsuits, the tobacco industry had created enormous collections of internal documents — research reports, memoranda between company officials, marketing studies, even chemical analyses of their competitors' products.

Although industry lawyers aggressively resisted disclosure, new documents began to surface as a result of leaks by tobacco industry insiders and congressional inquiries. For example, Dr. David Kessler, commissioner of the U.S. Food and Drug Administration, testified before a congressional committee in 1994 that tobacco company documents "lay to rest

any notion that there is no manipulation and control of nicotine undertaken in the tobacco industry."

Armed with such documents and the untested legal theory, Mississippi Attorney General Mike Moore filed the first Medicaid reimbursement suit in May 1994. Minnesota separately launched its case three months later. And Minnesota added a unique twist — the state had a partner, Blue Cross/Blue Shield, which also demanded money from the cigarette industry in reimbursement for treating smokers.

Tobacco companies had never seen anything like it. What lawyers call comparative fault — or placing part of the blame on the smoker — became elusive in this legal scenario. An attorney for Philip Morris, Thomas Silfen, railed against the strategy in court.

"Somebody has to be actually injured," Silfen said. "We are not going to have that person here."

During the next two years, 20 other attorneys general would file similar suits, all seeking damages that could add up to tens of billions of dollars and possibly bankrupt the industry.

In the text of those lawsuits, you won't find the name of a single smoking victim, dead or alive.

Will history incriminate?

The \$26-billion U.S. cigarette industry suddenly found itself in a fight not about ailing smokers, but about its history.

At the heart of the cases lies a question: Did the tobacco industry conspire since the 1950s to cover up and downplay the risk of smoking?

If the answer is yes, Minnesota contends, then the industry violated various laws, including consumer-protection measures usually enforced against small-time retail scams and anti-trust statutes used against huge, market-domineering corporations.

"This is not about banning cigarettes," said Michael Ciresi, a private attorney who is representing the Minnesota attorney general and Blue Cross/Blue Shield. "It has to do with ordering these companies to comply with the same laws that every other company doing business in Minnesota has to comply with."

The difference between this case and a fraud case against the corner retailer is the prospect of huge court-ordered damages, restrictions on tobacco sales or requirements to produce a safer, nonaddictive cigarette.

Donahue, the R.J. Reynolds attorney, said the plaintiffs' goal is a "judicial prohibition on cigarette smoking." After all, how could an industry ever sell cigarettes in Minnesota again if cigarette makers were liable for health-care costs of future smokers?

"What they are essentially saying, when you strip all the rhetoric away, is that the industry should be faulted for not making a product that nobody would buy," Donahue said.

Forty-five years ago, when the alleged industry conspiracy began, nearly half of all adults smoked, most cigarettes had no filters and tobacco companies had not yet discovered the power of television advertising. Then came the first studies linking smoking to cancer.

Faced with a national cancer scare, executives of the top cigarette companies gathered on Dec. 15, 1953, at the Plaza



JANET HOSSETTER/PHILADELPHIA PRESS

Roberta Walburn and Michael Ciresi, partners in Robins Kaplan Miller & Ciresi, argue motions on behalf of the state. If they can prove tobacco companies conspired to downplay smoking risks, they say, the industry should be found guilty of violating consumer-protection and anti-trust laws.

Hilton in New York to respond. With the help of the public relations firm Hill and Knowlton, industry officials created the Tobacco Industry Research Committee, later renamed the Council for Tobacco Research.

Two weeks later, the tobacco giants took out large newspaper ads in hundreds of newspapers, including the Pioneer Press, announcing the new research group and pledging that, "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in business."

Whether the industry carried out that promise now is in question. The state lawsuit alleges:

- The industry research group became nothing more than a public relations machine, spreading misinformation to cast doubt on the growing medical evidence against smoking

- Cigarette makers hid damaging

internal research, eventually shutting down research labs

- Instead of making cigarettes safer, the industry manipulated nicotine levels to keep smokers addicted and marketed cigarettes to young people to maintain the declining ranks of smokers.

To prove all of this, lawyers in Minnesota since late 1994 have mounted the most extensive lawsuit research effort in state history. Using legal tools that allow a litigant to demand documents from an opponent, the state's lawyers requested a broad range of documents about smoking and health, nicotine, youth marketing and — perhaps most important — the secret formulas for each cigarette brand.

Tobacco industry lawyers have fought them every step of the way. The magnitude of the effort is one of the few things both sides agree upon. Both sides also agree it was unnecessary, but they disagree on the reason.

Ciresi contends the tobacco industry tried to bury Minnesota in paper.

"We would get all kinds of documents about tobacco beetles and effluent discharges," said Ciresi, noting that, at most, 2 percent of the 28 million pages were relevant enough to photocopy and use in the litigation. "These people (in the tobacco industry) had indices of their documents. They could have pushed a computer button and sent the relevant ones. Instead, we got delays."

For months, Ciresi's firm has sent teams of lawyers to depositories in Minneapolis and London to read the documents. "It is time consuming," he said. "It is tedious. You have to be very dedicated to find the evidence."

And the end of the paper trail is nowhere in sight. Tobacco industry attorneys still have not turned over all of the tobacco formulas. A battle continues over access to an estimated 500,000 pages of undisclosed documents the industry says are protected by attorney-client privilege.

Other states suing the cigarette makers have found a way to avoid some of the paperwork drudgery. Out-of-state lawyers asked the tobacco companies to hand over only the documents that Minnesota lawyers considered worthy of copying.

Tobacco industry lawyers say Ciresi shouldn't be complaining because his firm brought on the document deluge itself by making such broad requests for information.

"It's been their constant request for more and more documents," said Tom McKim, associate general counsel for R.J. Reynolds. "They have invited it upon themselves."

The industry strikes back

Not to be outdone, tobacco industry lawyers are collecting their own mountain of paperwork, not only from state agencies but also from 32 nongovernment institutions, including other health plans not involved in the lawsuit.

One of the tobacco giants' targets has been an arch rival, the American Lung Association of Minnesota, which has campaigned against smoking for decades. In January, the association received a subpoena covering just about any document in its possession with the word tobacco

on it.

"We are viewing it as a harassing technique," said Barbara Hughes, associate managing director of the lung association. "I'm assuming when they look at our stuff they aren't going to find much of anything useful. My hope is that they go away."

The University of Minnesota Medical School, Allina Health Systems, the Mayo Health Plan, among others, have been targets of industry subpoenas. At the university, for example, the tobacco industry wants all records of research on cancer going back to 1950.

Larry Purdy, an attorney for the Council for Tobacco Research, said the industry isn't trying to harass anybody. Instead, he said, lawyers are seeking information to dispute one of the lawsuit's main contentions — that cigarette makers deceived people about the consequences of smoking.

The argument is shaping up like this: If organizations like the lung association and the university have documents suggesting smoking is dangerous, then how can the state claim widespread deception by the tobacco industry?

Cigarette makers also haven't given up on smokers. With a judge's permission, industry lawyers recently began questioning a handful of Medicaid recipients to determine whether their testimony would be relevant at the trial.

A ruling Friday in a California Medicaid lawsuit may strengthen the industry's argument that smokers should testify. And the industry may call two leaders of anti-tobacco groups to testify in Minnesota.

Lawyers for tobacco companies also are collecting every scrap of paper about the cigarette excise tax. The industry has argued that any Medicaid costs borne by the state should be offset by the \$175 million in annual state cigarette taxes.

Yet another possible industry defense is that Minnesota, by sponsoring a lottery, is itself promoting addiction — gambling.

In the end, the document battle remains largely a defensive operation for the tobacco industry. In the months ahead, as industry researchers and executives are called to testify at depositions and, ultimately, at trial, they must explain damaging statements in company memos and reports.

Fixing on nicotine

Some of the most damaging documents concern nicotine.

The U.S. Surgeon General's report on smoking didn't declare nicotine addictive until 1988 — it was characterized as merely habit-forming in earlier reports. Today, the addictiveness of nicotine is generally recognized — except by the tobacco industry, which still describes it as habit-forming.

Internal company documents released in this lawsuit and elsewhere suggest company researchers years ago concluded that nicotine is what kept smokers coming back and profits coming in.

SMOKE

▼ CONTINUED FROM 11A

Based partly on company documents, the U.S. Food and Drug Administration in 1994 concluded that cigarette makers adjust nicotine levels.

If the Minnesota lawsuit and others like it go to trial, jurors can expect to hear plenty about nicotine and, surprisingly, ammonia.

"The big issue is nicotine," Ciresi said.

Internal company documents made public in Minnesota and other states reveal that cigarette makers since the early 1970s have used ammonia during tobacco processing. Lots of things are added to tobacco, mainly for taste. But ammonia has emerged as something special.

The tobacco industry's position: Nicotine is needed for taste — and the levels of nicotine and tar in cigarettes have been going down for years. Ammonia is used mainly to enhance flavor, the industry contends.

Anti-tobacco forces say that nicotine tastes bad and that the cigarette makers know it's addictive and have kept it in tobacco for one reason: to hook smokers. Furthermore, this argument goes, as nicotine levels declined — as a consequence of lowering tar — the industry used ammonia to free up the remaining nicotine, assuring that plenty was available to satisfy addicted smokers.

In one of the industry research reports to surface, one of Philip Morris' competitors analyzed Marlboro in the 1970s and concluded the ammonia process gave the top-selling cigarette a "nicotine kick."

The industry says the ammonia argument is nonsense.

"They focus on the ammoniated processes . . . and they say by this process the industry has made this product addictive," said Donahue, the R.J. Reynolds attorney. "The simple question is — and it doesn't take a rocket scientist or a brain surgeon here — before the industry began using those processes, according to your definitions, were cigarettes addictive? And they are going to say, 'Yes.' And we are going to ask them, 'Well, what in the hell is the

difference?' If they were addictive before, what is the magic of this process?"

Even before companies began using ammonia, some industry officials may have known about nicotine's addictiveness. A federal judge in Kansas on Feb. 3 rejected the industry's claim of lawyer-client confidentiality and ordered disclosure of the minutes from a 1967 Council for Tobacco Research committee meeting that "may contain evidence of knowledge . . . in 1967, and prior thereto, that nicotine was addictive." The document, and several others about nicotine, have not been made public, however.

The fight for a finish

Months of legal skirmishing lie ahead before a St. Paul jury will hear about nicotine, ammonia, Joe Camel and the history of the tobacco industry.

In fact, the most intensive phase of the litigation is about to begin. Scores of company officials, researchers and others will be questioned under oath by lawyers from both sides. The outcome of these historic confrontations likely will determine the course of the trial scheduled for January.

Talk of a grand tobacco settlement, possibly one brokered by Congress, remains in the air and could keep this case from going to trial. But Minnesota lawyers say they don't want to settle.

Meanwhile, at least some industry lawyers hold out for an appellate court ruling that will end it all.

"At some point, at some time, some appellate court somewhere is going to take a reasoned, rational look at the legal underpinnings of this case and say, 'Hey, this doesn't make any sense,'" said Donahue, the R.J. Reynolds attorney.

Ciresi says the industry has received more than its share of appeals and due process. In one of the tobacco industry's five appeals in Minnesota, for example, the Supreme Court took a close look at the lawsuit's legal underpinnings. The court said the lawsuit could go ahead.

"What is due process?" Ciresi asked. "The cigarette industry apparently thinks it is entitled to go to the far reaches of reasonableness. If they aren't afforded that right, then they are denied due process. . . . They try to dance in the shadow of every ambiguity of the law."

Their share of smokers

Here's a look at the five U.S. cigarette companies.



Philip

Morris USA

Parent company: Philip Morris Cos.

Headquarters: New York

***Annual tobacco sales:** \$11.9 billion

Top brands: Marlboro, Basic, Virginia Slims

Other businesses: Kraft Foods and Miller Brewing



Market share**



R.J. Reynolds

Parent company: RJR

Nabisco Holdings

Headquarters: New York

***Annual tobacco sales:** \$7.7 billion

Top brands: Winston, Doral, Camel, Salem

Other businesses:

Nabisco Brands



KOOL

Brown & Williamson Tobacco

(includes former American Tobacco Co., acquired in 1994)

Headquarters: Louisville, Ky.

Parent company: B.A.T. Industries, London, England

***Annual tobacco sales:** \$4.2 billion

Top brands: GPC, Kool

Other businesses: Farmers Group (insurance), British-American Tobacco Co.

L&M

Liggett Group

Parent company: Brook Group Ltd.

Headquarters: Miami

***Annual tobacco sales:** \$456 million

Top brands: L&M, Chesterfield, Lark

Other businesses: New Valley Holdings (real estate, finance)

Lorillard

Parent company: Loew's

Headquarters: New York

***Annual tobacco sales:** \$2 billion

Top brands: Newport, Kent, True

Other businesses: CNA Financial (insurance), Continental Corp. (insurance), Loews Hotels, Bulova

* U.S. market, 1995

** Percentage of cigarettes sold, U.S. market, September 1995-September 1996, reported by the Maxwell Consumer Report. Other sources: Company annual reports, Brown & Williamson

Paper Secrets

Tobacco companies are on the defense against their own internal documents.

Confidential memos and reports are being made public in lawsuits that accuse cigarette companies of hiding the truth about the perils of smoking.

Here are excerpts from some of the more revealing documents to surface in the Minnesota lawsuit and elsewhere:

"Ship all documents to Cologne...Keep in Cologne. O.K. to phone and telex (these will be destroyed)...If important letters or documents have to be sent, please send to home. I will act on them and destroy."

— Handwritten note of former Philip Morris research director regarding the exchange of documents with a company research lab in Germany.

■ **Significance:** Suggests the company didn't want anyone to see its offshore research documents.

"In consequence of the importance of the lawsuits, the main power on the smoking and health situation undoubtedly rests with the lawyers, and more particularly with the Policy Committee of Lawyers...This Committee is extremely powerful. It determines the high policy of the industry on all smoking and health matters - research and public relations matters, for example, as well as legal matters - and reports directly to the Presidents (of U.S. cigarette companies)."

— A 1964 report by three officials of Imperial Tobacco Co. of Canada after visiting the United States and meeting with top U.S. tobacco executives.

■ **Significance:** Suggests that tobacco company lawyers controlled the industry's response to the landmark 1964 Surgeon General's report that linked smoking with lung cancer.

"Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects. Thus a tobacco product is, in essence, a vehicle for delivery of nicotine, designed to deliver the nicotine in a generally acceptable and attractive form. Our industry is then based upon design, manufacture and sale of attractive dosage forms of nicotine."

— Confidential 1972 R.J. Reynolds report entitled, "The nature of the tobacco business and the crucial role of nicotine therein."

■ **Significance:** Suggests company officials knew nicotine was the drug that kept smokers coming back - long before a 1988 Surgeon General report documented that nicotine was addictive.

"We also think that consideration should be given to the hypothesis that the high profits additionally associated with the tobacco industry are directly related to the fact that the customer is dependent upon the product."

— A 1974 report on product innovation by B.A.T. Company Ltd., the London-based parent of Brown & Williamson.

■ **Significance:** Suggests a company official believed profits were directly related to addiction - nine years before the Surgeon General documented that nicotine was addictive.

"I would be more cautious in using the pharmacological model - do we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous FDA implications to having such conceptualization go beyond these walls."

— A 1970s memo by Philip Morris researcher discussing upcoming research plans.

■ **Significance:** Suggests a company scientist believed the U.S. Food and Drug Administration had authority to regulate cigarettes as a drug, something the company is fighting today.

"This is not the happy picture painted by the Cancer Society's anti-smoking commercial which shows an exuberant couple leaping in the air and kicking their heels with joy because they've kicked the habit. A more appropriate commercial would show a restless, nervous, constipated husband bickering viciously with his bitchy wife who is nagging him about his slothful behavior and growing waistline."

— Philip Morris researcher in 1971 describing the difficulties of quitting smoking after studying an Iowa smoking cessation program.

■ **Significance:** Company knew of withdrawal symptoms - a sign of addiction - 17 years before the Surgeon General concluded that nicotine was addictive.

"One way to see this is by comparing the percentage of Marlboro versus Winston smokers who smoked at age 18. For example, among white male Winston smokers who turned 18 in 1955-70, 70 percent smoked at age 18; for Marlboro, that percentage was 87 percent."

— Secret 1984 R.J. Reynolds research report, "Younger Adult Smokers: Strategies and Opportunities."

■ **Significance:** Although the company denies it markets to minors, industry critics say that studying youths who already smoke "at age 18" implies just the opposite.

Sources: U.S. Food and Drug Administration, Ramsey County District Court documents, deposition exhibit in Mississippi lawsuit.



St. Paul judge's style: Fairness without fuss

MOLLY GUTHREY STAFF WRITER

Kenneth Fitzpatrick, the judge presiding over Minnesota's historic tobacco litigation, is a straightforward, quiet Irishman known for even-handedness and his ability to handle the most complex civil cases.

A 21-year veteran of the Ramsey County District Court bench, Fitzpatrick is respected as a hard-working jurist. He's a lifelong St. Paul resident who spent many years studying for the Catholic priesthood before going into law. He's also a husband, father and grandfather who loves the outdoors and building houses.

Fitzpatrick said he likes to let lawyers present their cases without a lot of interference from him, but he's also a stern taskmaster who won't tolerate silly theatrics or frivolous lawsuits.

"He's a no-nonsense judge," said John Guthmann, chair of the Ramsey County Bar Association's civil litigation section. "If you find you've got Judge Fitzpatrick, you know you'll get a fair shake."

"I think his reputation in the legal community is excellent," said longtime friend Phil Byrne, an assistant St. Paul city attorney. "I think he's seen as one of the very best judges we have, who has a wealth of experience, the intelligence and legal knowledge to understand the arguments lawyers are making and a real good fund of common sense."

At 61, Fitzpatrick, who was gravely ill a few years ago with complications from gallbladder surgery, is thinking of retiring but says he will continue working as long as the tobacco litigation is pending. The judge has presided over the state's lawsuit against the tobacco industry since the case was filed in 1994.

During his career as lawyer and judge he's been involved in numerous prominent cases. As a special assistant attorney general, Fitzpatrick represented the state in a high-profile lawsuit against American Allied Insurance Co., in which insurance executives were charged with fraud.

It was Fitzpatrick who sentenced



PIONEER PRESS PHOTO

Kenneth Fitzpatrick, a Ramsey County district judge for 21 years, is thinking of retiring but says he will continue working as long as the tobacco litigation is pending.

Guy Harvey Baker to two consecutive life sentences in 1994 for the murders of St. Paul police officers Tim Jones and Ron Ryan Jr. He also presided over the civil case involving former St. Paul City Council member Paula Maccabee, in which a male employee accused her of sexually harassing him. The case was settled out of court.

In a recent interview, Fitzpatrick declined to discuss the pending tobacco case, other than to say it's challenging and interesting to handle a case that's drawing national attention. He's trying some strategies to streamline the mammoth case, such as using video conferencing for depositions. He also ordered two depositories be set up to store court papers for the case — which have more than 28 million pages of documents now.

Fitzpatrick, the youngest of four children of a schoolteacher and a con-

struction worker, grew up in a poor St. Paul neighborhood at Central and Western avenues.

"There were two values my parents drilled into us more than anything else — the first was religion and the second was our education," Fitzpatrick recalled. "They said those were the two things that no one could ever take away from you. And those have been the two things that have always been very important in my life."

After graduating from Nazareth Hall high school and junior college and earning a bachelor's degree from the St. Paul Seminary, he found his interest in the priesthood waning. He attended William Mitchell College of Law at the advice of his brother and graduated in 1962. After law school in 1963, then-Attorney General Walter Mondale appointed Fitzpatrick a special assistant in antitrust matters.

In 1966, Fitzpatrick was appointed assistant corporation counsel for the city of St. Paul and city attorney in 1972. Private practice never interested him, which he attributes to his training in the seminary, with its emphasis on community service.

He was appointed a St. Paul municipal court judge in 1973 and a Ramsey County district judge in 1976. He served as chief judge of the district from 1992 to 1996.

Fitzpatrick, who with his wife, Mary Ann, has four children and four grandchildren, said he looks forward to retirement, when he can spend more time with his family. He enjoys fishing, canoeing and camping. He and his family once built their own cabin in northern Minnesota, featuring a split-rock fireplace. He'd like to build another home when he retires.

TOBACCO LITIGATION

Big-time law firms fighting this legal war

■ **Largest law agencies in Minnesota are on both sides of case**

DAVID SHAFFER STAFF WRITER

Officially, the legal battle against Big Tobacco is a government operation mounted by 22 state attorneys general.

But the ground war in the litigation over Medicaid expenses is a contest involving some of the most high-powered law firms in the country.

In Minnesota, the state's second-largest law firm, Robins Kaplan Miller & Ciresi, of Minneapolis, handles virtually all of the day-to-day legal work for the Minnesota attorney general, including reviewing millions of pages of internal tobacco industry documents handed over in the litigation.

Three attorneys from the firm, Michael Ciresi, Roberta Walburn and Susan Richard Nelson, usually argue the motions in Ramsey County District Court, while one or two lawyers from the attorney general's staff remain in the audience. Seven other lawyers from the private firm also work regularly on the case.

The tobacco industry usually dispatches at least 20 lawyers to court hearings — and has more troops in reserve. In all, 19 law firms are working on behalf of the tobacco industry in the Minnesota lawsuit. Six of the top 10 law firms in Minnesota represent tobacco clients in the case. And each tobacco company and industry trade group also retain at least one national law firm.

Despite the heavyweight legal talents, Minnesota has invested little money in this legal contest, which is scheduled for trial in January. Although state officials won't give an exact figure, they say public outlays for the litigation are limited mainly to the salary of one attorney who oversees the case, plus expenses for collecting documents demanded by the tobacco industry.

The litigation is likely to cost the plaintiffs \$10 million or



JOE ODEN/PIONEER PRESS

Peter Sipkins, a former state solicitor general, represents Philip Morris in the lawsuit.

more — and most of that expense apparently is being borne by the Robins firm. Blue Cross and Blue Shield of Minnesota, also a plaintiff, is paying some of the litigation expenses but won't say how much. The state pays nothing to the law firm.

Instead, the law firm stands to collect 25 percent of the damages if it wins a judgment forcing the tobacco industry to reimburse the state Medicaid program for billions of dollars in smoking-related health-care expenses. It also stands to collect an undisclosed percentage if Blue Cross/Blue Shield wins.

The Robins firm, with 230 lawyers, has won big damage awards before. The firm represented Honeywell in its recent \$400 million settlement with competitors over an auto-focus lens patent. And the firm represented the government of India in a \$500 million settlement over the 1984 Union Carbide disaster in Bhopal.

Ciresi said his firm began thinking about a lawsuit against the tobacco industry in 1989 but felt that a suit on behalf of an individual smoker would not be successful.

"Over the years, we started thinking about the insurance companies or the state, some significant entity" that could bring a lawsuit, Ciresi said. "We came up with this idea."

Neither the attorney general's office nor Blue Cross/Blue Shield will give details about how the legal partnership with Robins came to be.

Unlike private law firms representing other states, the Robins firm is representing only the Minnesota plaintiffs. Other states are relying on law firms with multiple clients. A Charleston, S.C., law firm represents 10 states, and a Mississippi law firm represents six states.

The industry has long been represented by some of the top law firms in the country.

In the Minnesota case, a key player is Dorsey & Whitney, the state's largest law firm, which represents Philip Morris. The attorney handling the case for the firm is Peter Sipkins, a former state solicitor general.

Arnold & Porter, a big-time Washington, D.C.-based law firm representing Philip Morris, also is working intensely on the Minnesota case. The nation's second-largest law firm, Jones Day Reavis & Pogue, represents R.J. Reynolds in the Minnesota case.

Q&A

What's at stake in lawsuit against the tobacco interests

Q. Who is suing whom?

A. The Minnesota attorney general, on behalf of taxpayers, and Blue Cross and Blue Shield of Minnesota are suing the five U.S. cigarette manufacturers, Philip Morris, R.J. Reynolds, Brown & Williamson, Lorillard and Liggett Group, and two tobacco trade groups, The Council for Tobacco Research and The Tobacco Institute. Also named in the suit are B.A.T. Industries, the London-based parent of Brown & Williamson, and American Tobacco, now part of that company.

Q. What are the allegations?

A. The lawsuit alleges cigarette makers conspired for 40 years to mislead people about the health risk of smoking. The lawsuit alleges companies suppressed research into safer cigarettes, manipulated nicotine to keep smokers hooked and targeted youth to maintain market share.

Q. What laws supposedly were broken?

A. The cigarette industry is accused of breaching a special duty to protect customers' health, restraining trade by suppressing information that might hurt sales and violating four consumer protection laws — consumer fraud, unlawful trade practices, deceptive trade practices and false advertising. All are civil charges.

Q. What damages are sought?

A. The state and Blue Cross/Blue Shield seek restitution for treating people whose illnesses are linked to smoking. The state wants reimbursement for spending on Medicaid, called Medical Assistance in Minnesota, and three smaller state insurance programs.

The litigants are keeping secret the damages they'll seek. But the Pioneer Press recently obtained research that calculates at \$1.3 billion the cost to Minnesota in Medicaid spending from 1980 to 1993. However, the state will likely sue for a far higher amount.

The lawsuit also seeks disclosure of all industry research on smoking, industry payments for smoking-cessation programs, dissolution of industry trade groups and court-ordered steps to prevent sale of cigarettes to minors.

Q. What is the tobacco industry's defense?

A. The industry denies misleading the public. And the industry says its conduct didn't cause increased health-care expenses. The industry also may argue that state officials knew about research linking smoking to disease and could have responded by passing a law, rather than filing a lawsuit. The industry also is sure to argue that smoking-related health-care costs are not as high as experts estimate and should be offset by taxes on cigarettes.

Q. What would the trial be like?

A. The case is scheduled for trial in January 1998 before Ramsey County District Judge Kenneth Fitzpatrick. The case will be presented to a jury of at least six members and probably will last months. The evidence is likely to include many internal company papers. Witnesses likely will include industry executives and researchers, and experts on health-care costs. It may be one of the first of 22 state lawsuits against the tobacco industry to go to trial.

Q. Is a settlement possible?

A. Minnesota officials say they want a jury to hear the case. But Congress may try to broker a nationwide settlement with state attorneys general, the tobacco industry and the U.S. Food and Drug Administration, which has new regulations on tobacco sales. A settlement with so many parties will be difficult, if not impossible.

A Smoky Past

1953

Federal government quires health warnings on cigarette packages; Winston's filter tipped cigarette becomes the leading U.S. brand.



1971

Ban on television cigarette advertising takes effect.

1954

We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business. We believe the products we make are not injurious to health.

1955

1960

Two juries reach verdicts in separate lawsuits blaming tobacco companies for smokers' lung cancer. Tobacco companies win each case, although one jury says cigarettes caused a smoker's death but awards no damages.



**Phillip
Morris
introduces
Marlboro.**

1968

Phillip Morris introduces Virginia Slims, launching a new era of marketing cigarettes to women.

The Tobacco Industry Research Committee, a creation of cigarette makers, publishes ad in 448 newspapers, "A Frank Statement to Cigarette Smokers," pledging to conduct research into smoking and health.

St. Paul Pioneer Press

A Frank Statement to Cigarette Smokers

[illegible]

Tobacco Industry Research Committee

INFORMATION		
1. NAME (Last, First, Middle)	2. DATE OF BIRTH	3. SEX
4. OCCUPATION	5. EDUCATION	6. RELIGION
7. POLITICAL AFFILIATION	8. SOCIAL SECURITY NUMBER	9. MARITAL STATUS
10. CURRENT ADDRESS	11. PREVIOUS ADDRESSES	12. EMPLOYMENT HISTORY
13. CRIMINAL RECORD	14. FINANCIAL RECORD	15. OTHER INFORMATION

**U.S. Surgeon General's
report links smoking
to lung cancer and
calls for action;
Philip Morris
launches
cowboy
image for
Marlboro.**



1972

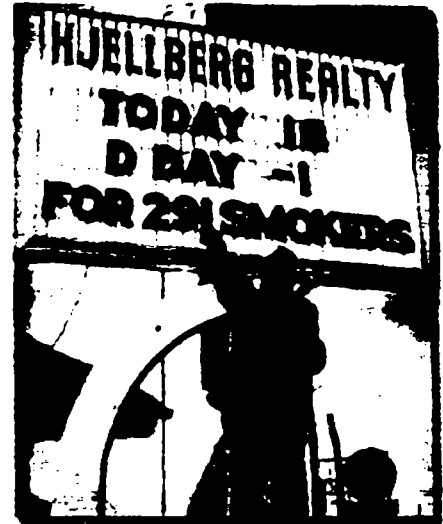
Marlboro becomes the top-selling brand in the world.

1974

Monticello, Minn., goes without cigarettes for a day, sparking the "Great American Smoke Out."

1975

Minnesota passes Clean Indoor Air Act, one of the first state laws to require non-smoking areas in restaurants.



1987

R.J. Reynolds begins its Joe Camel campaign, later blamed for making the cigarette the second most popular among teen-agers.

1988

A New Jersey jury orders Liggett Group to pay \$400,000 in damages to family of smoker Rose Cipollone for contributing to her death. Award later overturned on appeal and case dropped.



1993

A former paralegal for Brown & Williamson's law firm tells his former employer that he stole 10,000 pages of internal company documents that show the company knew for 30 years the addictive nature and health risks of tobacco. The documents later were made public.

1994

Tobacco company CEOs swear before a congressional committee they don't believe nicotine is addictive.

Mississippi, followed by Minnesota, files lawsuits against cigarette makers seeking reimbursement for smoking-related health care costs.

1996

U.S. Food and Drug Administration decides to regulate cigarette advertising and vending machines; tobacco industry turns over a record 28 million

pages of documents in Minnesota lawsuit; a Florida jury awards \$750,000 to a former smoker who contracted lung cancer; Liggett Group, the smallest cigarette maker, settles lawsuits with five states.



Source: Pioneer Press research by David Shaffer

SURGEON GENERAL'S WARNING

Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy

Tobacco Litigation

Issues for Public Health and Public Policy

JAMA made international news in July 1996 when it published a series of 5 articles presenting the first academic analysis of about 10 000 pages of previously secret tobacco industry documents, known as the Brown and Williamson documents.¹⁻⁵ These documents demonstrated that, as long ago as the 1960s, the tobacco industry knew nicotine was an addictive drug and smoking caused cancer and other disease, and that it developed a sophisticated legal and public relations strategy to keep this information away from the public, public health authorities, and the courts. An accompanying Editorial⁶ identified 14 steps to pursue regarding its opposition to tobacco use, including "All avenues of individual and collective redress . . . through the judicial system." Fueled in part by publication of the Brown and Williamson documents, there has been an explosion of litigation against the tobacco industry since then.

Today the tobacco industry faces a wide variety of legal challenges: product liability lawsuits filed by individuals harmed by smoking; product liability lawsuits filed by individuals harmed by secondhand smoke; class-action lawsuits filed on behalf of people addicted to nicotine; lawsuits by various states to, among other things, recover Medicaid expenditures incurred for the increased costs for caring for indigent smokers; and lawsuits by municipalities and private insurers seeking the recovery of health-related expenditures.

In the past, individual plaintiffs' firms brought product liability suits on a contingency fee basis. The tobacco industry prevailed by simply grinding these firms down with a policy of dragging out litigation and appeals until the plaintiff's firm was exhausted. Today, that situation is dramatically different; there is a large network of public and private legal resources arrayed against the tobacco industry. A consortium of more than 60 major products liability firms have mounted a series of state class action suits regarding nicotine addiction.⁷ More recently, the state attorneys general of 21 states, as well as 14 cities and counties, have, with the cooperation of the private bar, brought suits designed to recover the costs to taxpayers of treating tobacco-induced illness. These actions have shifted the focus of tobacco policymaking out of Washington, DC, and back to states and cities, where the chances of a favorable outcome are much higher. These actions for the first time present the tobacco industry with legal opposition with sufficient resources to thwart its war-of-attrition tactics.

The theories on which these cases are being brought make it much harder for the tobacco industry to mount its usual de-

fenses. When an individual smoker sues, the industry works to discredit the individual and argues that it is impossible to be sure that it was smoking that caused the particular disease that injured or killed the plaintiff. The cases seeking reimbursement for health expenditures, however, are not subject to the tobacco companies' causation argument because they are based on epidemiologic evidence. Indeed, the Brown and Williamson documents show that in 1976, S. J. Green, head of British American Tobacco's research and development and a member of the board of directors, understood this situation. In a thoughtful essay entitled "Cigarette Smoking and Causal Relationships," he stated:⁸

The public position of the tobacco companies with respect to causal explanations of the association of cigarette smoking and diseases is dominated by legal considerations. In the ultimate companies wish to be able to dispute that a particular product was the cause of injury to a particular person. By repudiation of a causal role for cigarette smoking in general they hope to avoid liability in particular cases. . . . The industry has retreated behind impossible demands for "scientific proof" whereas such proof has never been required as a basis for action in the legal and political fields. Indeed if the doctrine were widely adopted the results would be disastrous. I believe that with a better understanding of the nature of causality it is plain that while epidemiological evidence does indicate a cause for concern and action it cannot form a basis on which to claim damage for injury to a specific individual.^{8,9}

Green, however, then goes on to conclude with an opinion that makes the very point upon which state lawsuits seeking recovery of medical care costs are based:

In summary, for social policy purposes it is sensible and totally relevant to use the experimental evidence pertaining to large groups and also to select the simplest hypothesis. It may therefore be concluded that for certain groups of people smoking causes the incidence of certain diseases to be higher than it would otherwise be.^{8,9}

In addition, the lawsuits designed to recover medical costs of smoking borne by taxpayers or private insurance companies deprive the tobacco companies of their favorite tactic of blaming the smoker. In product liability lawsuits brought by smokers, the tobacco companies use defenses such as assumption of risk and comparative negligence to blame the smoker for choosing to smoke and refusing to stop. They seek to eliminate the plaintiff as a sympathetic individual in the eyes of the jury. In contrast, when the issue is state or local taxpayer liability or the liability of private insurance ratepayers for the costs of smoking, the individual smoker's responsibility is moot.

These lawsuits are beginning to have an effect. The smallest US tobacco company, the Liggett Group, settled the cases against it brought by 5 states under terms that awarded these states (and others that chose to enter the settlement) up to 5% of its pretax revenues to help offset the costs of smoking.

From the Institute for Health Policy Studies and Department of Medicine, University of California, San Francisco.
Reprints: Stanton A. Glantz, PhD, Box 0124, University of California, San Francisco, CA 94143.

induced illness paid by these states.¹⁰ Liggett also reached a tentative settlement of the private national class action *Castano v American Tobacco Company*, but the *Castano* class was ultimately decertified by the Fifth Circuit Court of Appeals, thus voiding the settlement.

While the Liggett settlement—which was the first time any tobacco company settled any litigation against it—was hailed as a major political breakthrough, the terms of the settlement were not very good from the perspective of the actual costs of smoking. As it stands, the Liggett settlement will only reimburse the 5 initial settling states for about 8% of the Medicaid costs attributable to Liggett cigarettes; if the entire country joined the Liggett settlement, only about 1% of Medicaid costs attributable to Liggett cigarettes would be covered for the remaining states. These calculations are based on the most recently available numbers. Liggett's annual pretax income from US sales was approximately \$24.6 million in 1995.¹¹ The total US Medicaid costs due to tobacco were \$6.3 billion (4.8% of Medicaid expenditures due to smoking times \$130.8 billion total Medicaid expenditures) in 1993.¹² Liggett's market share was 2.3% in 1994.¹³ Increasing medical costs and declining Liggett market share will make the percentage recovery of medical costs in 1996 lower than we estimate. Indeed, 1 state, Minnesota, refused to join the settlement because it deemed the settlement inadequate.¹⁴ Likewise, the proposed *Castano* settlement was advantageous to Liggett, only amounting to a small fraction of the actual costs incurred by smokers addicted to Liggett cigarettes.

For its part, Liggett agreed to the settlements as part of a strategy to reduce its liability exposure in an (unsuccessful) effort to convince RJ Reynolds stockholders to agree to merge with Liggett.¹⁵ This decision represented the first time that such business considerations of limiting liability through settlement rather than a litigation war of attrition played a role in a tobacco company's legal strategy. Despite some controversy about the benefits of the Liggett settlement, the fact that it dealt only with 5 states and that Liggett is the smallest tobacco company made the downside risks relatively small compared with the value of obtaining the first break in the tobacco industry's united opposition to settlement.

The stakes of settlement discussion increased dramatically in August 1996, when the press reported that there were discussions under way on a congressionally sanctioned global settlement, which was weaker than the heavily criticized one proposed by Kluger.¹⁶ The proposed global settlement would have encompassed not only all litigation surrounding the tobacco industry,^{17,18} but also the Food and Drug Administration (FDA) regulations finding that tobacco products were nicotine delivery devices and imposing modest restrictions on tobacco advertising and promotion.¹⁹

Though never finalized or released for public review, the proposal reportedly called for the payment by the tobacco companies of \$6 billion in 1997, escalating to \$10 billion per year in the fourth year continuing for the next 11 years. Much of this money was to be paid to the states to reimburse them for Medicaid costs, and some was to be paid toward individual compensation for sick smokers and to fund tobacco control programs, primarily aimed at children. The tobacco companies were to voluntarily adopt most of the prescriptions in the FDA regulations, and the FDA would forfeit jurisdiction unless certain targets regarding the reduction in youth smoking were met. In exchange, the tobacco companies were to gain protection from most lawsuits.¹⁷ This proposal attracted considerable criticism from the public health community, and the attorney general of Minnesota released a statement condemning the proposed settlement on the same day it was reported on by the *Wall Street Journal*.¹⁸

While this proposal was not implemented, it reemerged in a modified form in December 1996, accompanied by expres-

sions of interest in a legislative settlement by leaders of the tobacco industry, including Steven F. Goldstone, chief executive officer of RJR Nabisco Holdings.²⁰⁻²² While Philip Morris has been reported to deny any interest in a settlement in its statements to the media,²³ its consolidated financial statement filed with the Securities and Exchange Commission states that management "will explore all reasonable measures that may be in the best interests of its shareholders."^{24,25}

The prospects of a possible global resolution raise several important issues that require consideration by the public health community, related to the question of what, if any, non-judicial resolution of the broad range of law suits now confronting the tobacco industry would be in the interests of public health.

First, given the progress that is occurring on multiple fronts, it is clear that any talk of a legislative resolution is grossly premature. Important information is coming out of the discovery process associated with the litigation and we do not even know the full extent of the industry's wrongdoing or liability. A resolution at this time would stop this important process.

Second, any discussions of a legislative resolution need to be conducted with a full understanding of the history of how the tobacco industry uses Congress and federal preemption to evade responsibility for its actions. There is a strong potential to repeat the mistakes made by the health community in the 1960s.²⁶ There are many parallels with the situation today. The first surgeon general's report on smoking and health²⁷ had just been released, there was broad public interest in issues surrounding tobacco and its promotion, and several federal agencies and states were actively engaged in the tobacco issue. The industry responded by going to Congress and, in exchange for some concessions, including weak warning labels, obtained federal legislation preempting state action on cigarette advertising. The issue all but disappeared from the public agenda. At the time, many in the public health community thought that they had secured a victory. In hindsight, most now think that the tobacco industry outsmarted them.

Third, special concerns are raised with the involvement of Congress. Decentralized approaches to tobacco control have been more effective than a single national approach.²⁸ If the Congress is actively involved in the negotiations toward a resolution, there is a greater likelihood that the tobacco companies will sculpt the agreement to suit their interests rather than the public interest. Historically, Congress has been more beholden to tobacco interests than to states, localities, or public health concerns.^{27,29}

Fourth, while the proposed settlement involved \$10 billion per year, this amount is only a small fraction of the \$50 billion in direct medical costs and \$100 billion in total costs smoking imposes on society every year.¹⁸ In addition, there needs to be careful consideration of how much money would be available from the tobacco industry to finance a settlement. Harris³⁰ estimates that current tobacco industry annual profits are around \$8 billion, but that, under monopoly pricing, the industry could raise prices to \$4 per pack, which would generate approximately \$30 billion in profits that could be applied to a settlement. (In addition to raising money, the associated price increase would reduce total cigarette consumption by 47%, with the attendant public health benefits.) More money could be generated (on a 1-time basis) if the industry were to liquidate some of its capital, particularly in light of the fact that a settlement would remove significant litigation risks now faced by the industry and would probably double the value of its stocks.³¹ The increase in stock value has been estimated to be at least \$60 billion for Philip Morris alone, and the total "litigation discount" in stock value for the entire industry could be \$100 billion to \$200 billion, more than the value of the previously proposed settlement.

Fifth, any global resolution of tobacco litigation would represent one of the most significant public policy decisions on a public health issue in the last half of the 20th century. This decision calls for a broad public discussion over what things would and would not be acceptable as part of a nonjudicial resolution, including whether any such resolution would be in the public interest.

Several important public policy issues require discussion:

- How can the public health community actively influence any nonjudicial resolution, including influencing whether or not such a resolution occurs?
- What are the public health priorities for a settlement?
- What role should tobacco control advocates and public health organizations play in any possible settlement?
- How should a settlement be structured to reimburse public and private agencies for both past and future damages?
- Should the financial portion of any settlement seek to fully reimburse society for the costs of smoking or should it be linked to tobacco industry profitability?
- Should any of the substantial increase in stock value that would accompany a settlement be recaptured for public purposes as part of the settlement?
- What are the public costs and benefits of having a global solution that would preempt evolving local solutions?
- What opportunities are lost by preempting private cost recovery lawsuits?
- What opportunities are lost by preempting private product liability lawsuits?
- What other judicial opportunities are lost by preempting all suits, including those under theories not yet developed?
- What are the implications of not obtaining full disclosure of internal tobacco industry documents, including those currently in the hands of plaintiffs but under protective orders as well as documents still in the industry's hands?
- What effect would incomplete disclosure have on ongoing criminal investigations of the tobacco industry and its officers?
- Does it make sense to involve issues outside the scope of the litigation, such as the fate of the FDA regulations, in the discussion of a global solution?
- Should any antitobacco education program be focused on children^{30,31} or should it be designed to include adults, where the short-term public health benefits will be realized more quickly?
- What are the legal and ethical implications of selecting a single industry for special consideration in avoiding application of the law?
- How can a settlement best be administered to avoid capture or other future manipulation by the tobacco industry?

While these questions are raised in the context of a potential global resolution, the issues they raise are equally relevant to potential settlements of the individual attorney general actions and the private class action suits.

Finally, there needs to be a special awareness of the potential conflicts of interest between the private attorneys involved in this litigation and the public interest. While there is no question that the entry of the private bar has transformed this issue, it is also an unfortunate fact that there is tremendous pressure on these law firms to accept an agreement that would permit them to reap substantial fees today rather than continue to incur substantial expenses as litigation drags on. While this tension is understandable, it heightens the importance of the need for the attorneys general, as well as the public health community, to insist that the public interest be protected.

To rush into a settlement without adequately considering these issues could allow the tobacco industry to capitalize on the public health community's mistakes as it has done in the past. For example, Annas³² recently suggested that it is time to work out "reasonable terms" in a global settlement built around "strategies to discourage children from smoking and in produc-

ing a safer and less addictive cigarette." There is significant debate within the tobacco control community whether focusing tobacco control efforts on children will serve the tobacco companies' interests³³ and whether the phenomenon of "smoker compensation" described in the Brown and Williamson documents³⁴ may preclude "safer and less addictive" cigarettes. Moreover, this suggestion ignores the full scope of tobacco control activities. Annas would trade only "limited immunity" for his limited goals, but this limited immunity could prove to be too high a price if it is given away without fully exploring all of the policy ramifications attendant with a global settlement.

Given the substantial progress that has occurred in the 20 months since JAMA published the original reports on the Brown and Williamson documents, the best short-term decision is for the states and others to resist pressure for a global political settlement and to stay the course and continue the litigation.

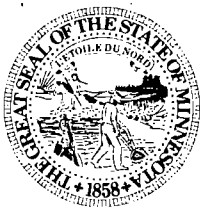
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This work was supported in part by National Cancer Institute grant CA-61021.

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HUBERT H. HUMPHREY III
ATTORNEY GENERAL

July 25, 1997

TO: CLINTON ADMINISTRATION TOBACCO ANALYSTS

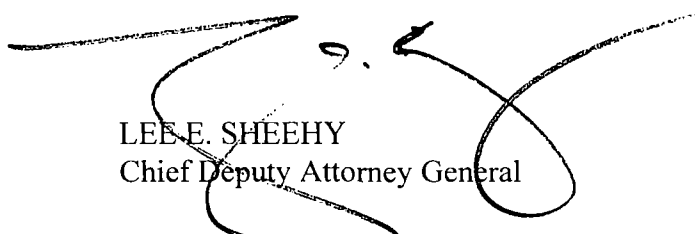
As you know, our Office has continued to analyze and raise questions about the inadequacy of the public health and other provisions of the Tobacco settlement proposal. Attorney General Hubert H. Humphrey III testified before the Senate Judiciary Committee last week, and will appear before the Senate Commerce Committee next week.

Attorney General Humphrey's statements reflect his continuing concerns with both the timing and content of the settlement proposals. Attached are the following documents for your review:

1. Attorney General Humphrey's July 16, 1997 Judiciary Testimony;
2. A Preliminary Analysis provided to the Judiciary Committee that focuses primarily on legal and policy concerns raised by the sweeping civil liability concessions granted to the Nation's number one killer industry; and
3. A broader draft analysis of the settlement, with comments and questions.

Our Office stands ready to help in any way that you would find useful. Please do not hesitate to contact me at (612) 296-2351.

Respectfully submitted,


LEE E. SHEEHY
Chief Deputy Attorney General

LES:gmm
Enclosures

c: Attorney General Hubert H. Humphrey III (w/o Encls.)

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

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

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

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

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

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

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

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

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

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

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

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

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

1. FDA Authority

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

2. Civil and Criminal Liability

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

3. Documents

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

4. State Preemption

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

5. The Money

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

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

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

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

And, it ought to hurt!

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

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

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

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

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

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

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

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

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

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

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

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

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

That's one example out of 33 million pages.

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

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

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

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

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

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

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

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TOBACCO PROPOSAL--PRELIMINARY ANALYSIS

July 18, 1997

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

I. CIVIL LIABILITY PROVISIONS

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

A. KEY ELEMENTS OF THE PROPOSAL.

1. Termination of existing lawsuits.

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

- All present attorney general actions, all similar government actions (e.g., lawsuits brought by San Francisco and New York City), and all parens patriae actions;
- All present private class action lawsuits, including the post-Castano nicotine addiction cases.

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

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- Any third-party claims brought as class actions, whether based on subrogation or not.
- All other present "addiction"/dependence claims, which presumably includes individual claims using addiction evidence to avoid assumption of risk defenses.

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

2. Restrictions on remaining present lawsuits.

The only existing lawsuits that would be permitted to continue would be claims of individuals brought by person claiming injury or heirs, not based on "addiction" or dependence;¹ third-party party (and similar) claims not based on subrogation pending as of June 9, 1997, and third-party payor (and similar) claims based on subrogation², but only of individual claims, not aggregates. [That is, a health insurer who paid the medical bills for an individual could file a subrogation claim against a tobacco manufacturer for that person, but could not do so for two or more individuals at the same time.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Restrictions on future litigation.

Unlike present state and private class action plaintiffs, future claimants get no financial benefit from the proposed settlement³, but their rights are severely restricted. They are subject to all of the restrictions listed above for the present lawsuits which survive--no punitives for past conduct, no class actions or "extrapolation," no claims against anyone except "tobacco

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

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

- No future prosecution of attorney general, parens patriae, or class actions, of any kind, ever, relating to tobacco and health.
- No third-party payor (or similar) claims not based on subrogation, of any kind, whether based on past, present, or future conduct of the industry. For example, all of the health and welfare fund cases filed in the last few weeks would be barred.⁴
- No aggregation of third-party subrogation cases. Any subrogation cases must proceed based on one individual at a time.

B. ANALYSIS OF PROPOSAL.

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

This analysis focuses on the following general subject areas:

- Background
- Settlement of present class actions

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

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

1. Background.

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

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

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

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

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

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

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

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

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

those statutes. In Minnesota, for example, the legislature has eliminated the "indirect purchaser" and "pass through" defenses to antitrust;⁷ and has granted broad private standing to enforce the unfair discrimination and competition, deceptive trade practices, and false statement in advertising statutes. Moreover, the Minnesota courts have very broadly construed these provisions to enhance consumer protection, expanding the connection between conduct and injury necessary to permit suit, rejecting efforts to elevate the standard of proof, and ordering a wide range of remedies, including restitution, disgorgement of unjust enrichment, multiple civil penalties⁸, and attorney fees. See State v. Alpine Air Products, Inc., 500 N.W.2d 788 (Minn. 1993); see also State ex rel. Humphrey v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996)(Court upholding availability of these theories and remedies to both public and private plaintiffs in tobacco case).

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

All of these trends have done a great deal to shift the balance of power from defendants to plaintiffs in these cases, at least in certain states. Unfortunately, some of these developments--particularly the development of the mass tort settlement class action have also created the circumstances for collusion--"repeat players," all with an incentive to settle early⁹; often a single

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

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

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

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

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

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

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

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

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

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

paying off present claimants in exchange for limiting the rights of future claimants.¹³ Hence, the issue goes to Congress, which may have greater power to adjust the rights of different classes of individuals on this kind of macro level¹⁴, but which must also face the fundamental due process and equal protection issues that were not directly addressed in Georgine.

2. Settlement of present class actions.

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

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

- How many people are included in the purported classes? Do the post-Castano class action lawsuits include most or all of the smokers that were in the original federal court class definition? Do they include potential future claimants as well as present claimants? Will even the limited rights to sue supposedly preserved in the "settlement" be extinguished or limited further by these "side agreements"?
- Is it intended that this be a "no opt out" settlement for class members (as in the Ahearn asbestos settlement negotiated by many of these same lawyers)?¹⁵ If class members can opt out, are they governed by all other restrictions on future claimants?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Bar on punitive damages.

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

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

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

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

5. Liability caps.

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

- **Precedent:** No other industry has a global liability cap, not even those with per-case caps like the vaccine manufacturers. If Congress is prepared to offer that to tobacco, they can expect other industries with liability concerns to seek similar or better treatment.
- **By definition,** of course, all global liability or "case flow" caps discourage and discriminate against future claimants in favor of present ones, because of the prospect of payment delay.
- **With liability caps and industry liability pooling arrangements in place,** any adverse liability experience for any particular company is unlikely to have any competitive impact, so the threat of competitive consequences for misconduct or set of incentives is removed.
- **The value to the industry of certainty about liability,** even at very high figures, would be difficult to underestimate: increases in shareholder value, reallocation of management focus, removal of "fraudulent conveyance" barriers to tobacco "spin-offs," greater or more secure access to long-term financing, and so on.
- **If Congress were to remove the limits on class or consolidated actions, or eliminate or modify the punitive damages bar,** the \$2-5 billion annual payments would likely be low. It would initially be less than 2% of what CDC estimates the total annual harm to be, and could easily be consumed by only a handful of judgments, e.g. the Florida flight attendants' secondhand smoke case, or a single union health and welfare fund case. Prior "mass tort" settlement funds have invariably proven to be inadequately funded, and become insolvent quickly once the liability picture shifts toward plaintiffs. If the fund

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

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

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

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

6. Disclosure.

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

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

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

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

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

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

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

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

7. Constitutional issues.

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

(a.) Tenth Amendment [or more precisely, the Constitution’s system of “dual sovereignty”]: The source of authority for Congress to take these actions would presumably be the Commerce Clause, and obviously the authority of Congress to regulate commerce among the states and, under the Supremacy Clause, to preempt conflicting state laws, remains substantial. The Supreme Court has, however, now made it clear that, despite that authority, the federal government may not commandeer the states to accomplish federal purposes. Printz v. United States, No. 95-1478 (U.S., June 27, 1997)(Brady Act); New York v. United States, 505 U.S. 144 (1992)(Low-Level Radioactive Waste Policy Amendments). The proposal would have Congress directing the 50 state court systems to, in effect, change their rules of civil procedure and their rules of evidence governing state-law claims. If state courts refuse to comply, the consequence then is that the federal courts take jurisdiction through removal²⁰, although how these state law claims would, absent diversity, become claims arising under the “laws of the United States”

¹⁹ “Resolved” is undefined, but presumably that means appeals have been exhausted.

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

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

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

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

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

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

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

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

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

II. FDA

A. FDA PRODUCT SAFETY STANDARDS.

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

- No elimination, and no non-"gradual" reduction of nicotine yields for no fewer than twelve years;
- No reduction in nicotine, and no elimination of "other constituents or other harmful components" unless FDA can find the modification: (a) will result in a significant reduction of the health risks associated with such products to consumers thereof [cf. current standard--to provide reasonable assurance of safe and effective performance]; (b) is technologically feasible; and (c) will not result in the creation of a significant demand for contraband or other tobacco products that do not meet the product safety standard.
- New procedural requirements: formal rulemaking under APA²¹ (trial-type hearings, right to introduce direct and rebuttal evidence through oral testimony, right to cross-examination, agency decision based on "substantial evidence" developed at the hearing), burden of proof on FDA for all findings, cf. 21 CFR § 12.86, full judicial review under less deferential standard (not "arbitrary and capricious" but "deference to extent to which matter at issue is within Agency's field of expertise"), and Congressional "regulatory reform" review.
- Other new requirements after 12 years, when FDA could eliminate nicotine or other harmful ingredients: same new substantive standards, "preponderance of evidence" burden, rather than "substantial evidence," manufacturer [apparently, each and every single manufacturer] can select rulemaking process, judicial review of original decision and all subsequent petitions to amend, minimum two-year phase-in [cf. current one-year or earlier], and Congressional review.

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

B. MARKETING AND ADVERTISING RESTRICTIONS.

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

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

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

- The proposed regulations go beyond current FDA regulation, but they do not necessarily expand the FDA's current authority to regulate.
- No penalties are provided for violations--no civil penalties, no actual damages, no attorney fees, no private enforcement standing.
- Some of the restrictions may be illusory. For example, the point-of-sale advertising restrictions would permit outlets such as convenience stores to display ten 2' x 2' signs--40 square feet of point-of-sale advertising messages.
- FDA would be prohibited except under "extraordinary circumstances" to alter the restrictions for five years. With the burden of proof on the agency, and the opportunity for litigation that presents, that might limit their ability to regulate, for example, direct mail, which appears to be the tobacco industry's next advertising frontier.
- The proposal would continue to permit brand logo advertising on the package, with teens being particularly brand sensitive.
- Finally, no matter what is included in consent decrees, nonparties to the agreements cannot be bound by them, and will be able to raise any applicable First Amendment arguments.

C. WARNINGS, LABELING, AND PACKAGING.

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

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

- The preemption language in the Federal Cigarette Labeling and Advertising Act would not be repealed.
- The rulemaking proceeding provides another opportunity to dispute, litigate, delay, and possibly dilute the proposed standards.
- The new warnings may well strengthen the industry's assumption of risk defense in individual cases, and may therefore benefit the industry more than consumers.

D. LICENSING OF RETAIL TOBACCO PRODUCT SELLERS.

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

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

E. NON-TOBACCO INGREDIENTS.

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

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

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

- There is ambiguity about whether the ingredient disclosure requirements refer to the components of tobacco, or the components of tobacco smoke. Some non-tobacco ingredients are perfectly safe if eaten, but harmful if burned and inhaled.
- There is a five-year preemption of state content disclosure laws, such as those enacted in Massachusetts and Minnesota. [The preemption language is in Title V.]

III. COMPLIANCE AND CORPORATE CULTURE

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

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

- No requirement that records be turned over to receiver (or FDA), who would in turn disclose evidence of misconduct;
- No regulatory or public interest representation on any new group's board; and
- No open records and visitation rights for DOJ, FTC, or states.

IV.

"LOOK BACK" PROVISIONS AND STATE ENFORCEMENT INCENTIVES

A. CONTENTS OF PROPOSAL.

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

- Targets for the reduction of underage tobacco use, with separate criteria for cigarettes and smokeless tobacco. The targets are based on a "base percentage" of underage smokers age 13 and up who smoke (in the case of cigarettes) on a daily basis.
- Sanctions, in the form of "mandatory" FDA-imposed surcharges for failure to meet the targets. The sanctions are subject to rebates for good-faith attempt to comply.
- A state enforcement scheme, including funding for enforcement, but also significant sanctions for states where the tobacco industry fails to meet youth access reduction targets.

The tobacco use reduction targets are:

	<u>Year 5</u>	<u>Year 7</u>	<u>Year 10</u>
Cigarettes	30%	50%	60%
Smokeless	25%	35%	45%

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

B. ANALYSIS.

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

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

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

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

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

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

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

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

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

V.

PENALTIES AND ENFORCEMENT

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

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

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

Difficulties with this provision include the following:

- Preemption: This is unclear, but it appears that state consumer protection enforcement would go to federal court, be limited in its breadth and interpretation by the substance of the new federal act, and be limited by the penalties of the Act.
- Federalism: The removal provisions are an unwarranted infringement on state sovereignty and expansion of federal court jurisdiction.
- Limits on remedies: The injunctive-relief-only provision discourages state enforcement, and removes the deterrent effect of civil penalties, damages, and possible fee and cost recovery.

VI. ENVIRONMENTAL TOBACCO SMOKE

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

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

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

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

- The OSHA standard would require enclosed ventilated areas under negative pressure, i.e. separate rooms for smoking. The settlement does not require the smoking areas to be separately enclosed.
- The OSHA standard would require posted signs stating that smoking is restricted to designated areas; the settlement does not.
- The OSHA standard would apply to "all indoor nonindustrial work environments"; the settlement would only apply to "public places."

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

VII. SCOPE AND EFFECT

Title V of the proposal contains two major difficulties:

- It limits the proposal to "all product sold in U.S. commerce," which means that, despite Congress's constitutional authority under the Foreign Commerce Clause, international marketing is left unregulated.
- It purports to preserve state and local authority, but it in fact preempts state and local authority in several respects:
 - ◆ It preempts more restrictive state and local youth access and retailer licensing laws, and preempts harsher state and local penalties;
 - ◆ It preserves FDCA preemption of state advertising restrictions.
 - ◆ It curtails state ability to set manufacturing performance standards.
 - ◆ It freezes state content disclosure laws for five years after its effective date (achieving in Congress what the industry has not been able to achieve in some state legislatures and in the courts).

VIII. INDUSTRY PAYMENTS

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

- When the President signs the bill, the industry makes a \$10 billion lump sum cash payment, which appears to go to the states [allocation to be determined later].
- On December 31, 1998²², \$8.5 billion--a \$6 billion "base amount" and \$2.5 billion for a new public health trust.
- After that, the payment schedule looks like this:

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

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

Two other salient points:

- The legislation would "provide" that all industry payments "be reflected in the prices manufacturers charge for tobacco products," which means passed through to tobacco consumers. This is essentially a new antitrust exemption for tobacco pricing.
- None of the payments will be deemed fines or penalties, and all payments (including expressly the youth lookback penalties) are deemed to be ordinary and necessary business expenses and therefore tax deductible. With the projected reductions in advertising expenses and legal costs, most of the payment amounts will either come out of new industry savings or from taxpayers, with the balance passed through to consumers. The risk to manufacturer assets and equity appears to be virtually zero.

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

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

yha

STATE OF MINNESOTA
Office of the Attorney General

TO : HUBERT H. HUMPHREY, III DATE : July 23, 1997
Attorney General

FROM : THOMAS F. PURSELL PHONE : 296-7579 (Voice)
Senior Counsel 297-7206 (TDD)

SUBJECT : Legal and Policy Issues in the Proposed Tobacco Settlement

INTRODUCTION

This memorandum analyzes the proposed settlement negotiated by the tobacco companies, several state attorneys general, and private class action lawyers. I have regretfully concluded that the settlement is not in the public interest - it falls short on substance; it is full of subtle preemptions of state authority and procedural advantages for the tobacco companies; it will create a host of fact questions which will let the industry litigate forever over details while regulators remain frozen during what the industry obviously hopes will be a five-year "cooling off" period.

Among the most serious flaws in the agreement:

- A grant of regulatory authority to the FDA which is so riddled with loopholes as to be almost illusory.
- Inadequate incentives to reduce youth smoking, including provisions which may even increase competition in the illegal market.
- Limitations on future liability which stack the deck against the industry's victims.
- Payments which the industry can easily absorb as a cost of doing business.
- Severely limited enforcement authority over marketing regulations, with no provision for monetary penalties, attorneys fees, actual damages or private rights of action.
- Temporary preemption of state content disclosure statutes and permanent preemption of more stringent penalties for tobacco licensees.
- Retreat from the second-hand smoke standards contained in the pending OSHA regulations.
- Document disclosures which fall short of a clean break with past covers.

In addition to these flaws, the settlement document is incomplete. It is simply silent on dollars and cents issues such as how the industry payments will be apportioned among public and private plaintiffs, among sub-categories of those groups, and among the private plaintiffs' attorneys.

TITLE I: REFORMATION OF THE TOBACCO INDUSTRY

A. Restrictions on Marketing and Advertising: The proposal incorporates the existing FDA regulations and, in addition, bans the use of human images and cartoon characters, extends the advertising ban to stadia and ads directed outside from retail locations, further restricts point of sale ads, bans movie and TV product placement payments and the direct or indirect "glamorization" of tobacco use in media appeals to minors (e.g. the current "It's a Woman Thing" rock music campaign).

The FDA would be locked into this scheme for five years, except under "extraordinary circumstances." Thereafter the agency could review and revise "under applicable agency procedures."

Comments: The drafters deliberately put the best news first, even moving the logically first "scope" of legislation" section to Title V. The negotiating Attorneys General promised to deliver "FDA Plus," and have in fact exceeded the FDA's *current* advertising and marketing restrictions (although not necessarily the restrictions the FDA could impose when the agency's authority in this area is ultimately upheld in the courts). Even so, the agency would be locked into these restrictions for five years. Marketing has been the tobacco companies' historic genius, and if there is one area where they've shown they can outfox regulators, this is it. In addition, the industry's experience in countries where sales remain strong despite equally tough or tougher regulation makes it easy for them to concede "FDA Plus" and give the negotiating plaintiffs an important cosmetic victory. The industry is even now launching a sophisticated direct mail campaign directed at young women (see attached Exhibit 1), using a mammoth data base built up in anticipation of the FDA regulations. Any doubts in this area must be resolved against the industry.

We believe no advertising and promotion should be permitted, in light of what we now know about the tobacco industry and its products. While it is often argued that cigarettes are a "lawful product," they may only be so because of the conspiracy at issue here. A ban on advertising would be consistent with the nature of the product and the companies' misconduct. Other issues:

- No penalties are provided for violations of Title I marketing restrictions. The lack of meaningful penalties was an almost uniform criticism of last summer's Moore/Scruggs proposal. We have proposed civil penalties of up to \$100,000 per violation, actual damages, attorneys fees and private enforcement standing, none of which are present here. The lack of incentives to enforce seriously diminish the effectiveness of the proposed marketing regulations, as they do with any law.

- Some of the "restrictions" may be illusory. For example, the point-of-sale advertising restrictions would permit outlets such as convenience stores to display 10 2' x 2' signs - 40 square feet of point-of-sale ad messages, more than most carry now for any event.
- We know from the Liggett experience that highly significant terms should be embedded in definitions. The proposal does not contain a definitions section, and therefore leaves key terms subject to later interpretation by the drafters. Among significant terms: what is "advertising?" Does it include direct mail, which is the industry's big advertising frontier?
- A significant omission in the advertising and marketing regulations is the failure to deal with the cigarette package (except through expanded warning labels provided in Section B). Market research has shown that teens are extraordinarily brand sensitive: witness Starter jackets, Guess jeans, team logo caps, the Nike swoosh. Part of the allure of smoking for teens is the brand logo identification. The cigarette package is a brand accessory, as is obvious from the success of Marlboro gear, Camel jackets and the like. On the other hand, black and white generic packaging is decidedly uncool. A good settlement would ban all advertising and promotion; an acceptable one would at least provide for generic packaging.
- This section, through the "extraordinary circumstances" test, (FDA can only change regulations under "extraordinary circumstances" during the first five years), sets up the first of a blizzard of potential fact questions--to wit, what constitute "extraordinary circumstances" justifying an early revision to the regulations?--which, given the industry's propensity to litigate every possible advantage, could well paralyze even an aggressive regulator. A better deal would build in procedural or evidentiary advantages for the regulators, rather than the tobacco companies, or contain industry agreements not to challenge certain features, either directly or through surrogates.
- The proposal itself notes that Title I restricts advertising and marketing "in ways that have previously been challenged on First Amendment grounds." While the companies themselves may agree, in consent decrees, to such restrictions, other affected parties, such as outdoor advertising companies, could still challenge the statute and, arguably, the consent decrees themselves. Groups such as vending machine companies have already announced that they believe the bans on vending machines deprive them of property without just compensation. They demand compensation and say they will challenge the deal if they don't get it. Collateral challenges not only cloud the political picture but could nullify or delay key parts of the agreement.

B. Warnings, Labeling and Packaging: The agreement provides new, rotating warnings on cigarettes and smokeless packages. The warnings would occupy 25% of the front package panel, although on certain flip-top boxes (Marlboros) it would be smaller. The FDA would be required to promulgate rules governing the testing, reporting and disclosure of tobacco smoke constituents, this authority being transferred from the Federal Trade Commission.

Comments: The proposal would not, as we have previously recommended, repeal the preemptive provisions of the existing Federal Cigarette Labeling and Advertising Act. The FDA rulemaking proceeding would offer the industry another shot at disputing, litigating and possibly diluting the proposed standards. It is uncertain whether the label warnings deter smoking. They clearly will strengthen the industry's assumption of risk defense, and on balance, probably favor the industry more than consumers.

C. Restrictions on Access to Tobacco Products: This is another area where the negotiators claim "FDA Plus." The agreement incorporates the existing FDA regulations on youth access and, in addition, bans all vending machine sales and self-service displays except in adults-only facilities. In other facilities, products must be "out of reach of consumers."

Comment: This claim of "FDA Plus" appears to be mistaken. The FDA rule already bans self-service.

D. Licensing of Retail Tobacco Product Sellers: The agreement would mandate minimum federal standards for licensing, to be enforced by federal, state and local authorities and funded by the "Industry Payments." Anyone selling tobacco products directly to consumers would need a license. The penalty scheme would preempt more stringent state and local sanctions. Penalties for violations are set forth in detail in Appendix II to the agreement. Licensing fees would cover state administrative costs. There would be a "comparable" licensing program for U.S. government facilities such as military posts, and for Indian lands (Appendix III to the agreement).

Comments: The tobacco licensing sanctions are a significant breach of faith with the concept of no or minimal preemption: The sanctions listed in Appendix II would be mandatory, and "shall not exceed" the listed penalties, which could be significantly less severe than those just signed into law in Minnesota. It is a truism of tobacco control that the industry favors preemption of local standards whenever it can get them because they are community appropriate, effective, and difficult for the industry to control through lobbying.

Even apart from our general opposition to preemption, this is inadequate substantive law. It is a bald return to the days when Philip Morris trumpeted its own retailer sanctions program--which never resulted in any sanctions at all while we were tracking it.

E. Regulation of Tobacco Product Development and Manufacturing. Section E “impose[s] a regulatory regime to govern the development and manufacturing of cigarettes and smokeless tobacco products, including FDA approval of the ingredients...and...standards for reducing the level of certain constituents, including nicotine.” Because of the length and complexity of this section, comments will follow each provision as necessary.

2. Tobacco will remain a “drug”, and “device” under the FDCA. Tobacco products will receive a new classification as “Class II” devices.

Comment: We need to determine the effect of the creation of this new “Class II” classification within the overall context of the FDCA.

3. Sale of tobacco products “to adults in the form that conforms to Performance Standards established for tobacco products pursuant to Section 514 of the FDCA shall be permitted notwithstanding” specified sections of 21 U.S.C.

Comment: Again, the significance of this language is not clear from the text of the agreement. The other sections must be consulted and the meaning of this parsed in light of the referenced sections of federal law.

4. The FDA would approve and require substantiation of health claims.

Comment: The manufacturer would have the burden of showing a “significant” risk reduction, but there is no guidance as to what constitutes “significant.” FDA would be authorized to adopt more lenient health claim standards for tobacco than for other products if it determined that “such advertising would reduce harm and promote the public health” under rules it is required to promulgate.

5. Manufacturers would notify FDA of new risk reduction technology and cross license such technology to other companies also covered by the obligations for a “commercially reasonable fee.” FDA could require introduction of technologically feasible, less hazardous products after a formal, APA rule making, or the licensing of such technology to another company which promises to bring it to market “within a reasonable time.”

Comments: Cross licensing only to “other companies also covered by the obligations” would create an enormous potential barrier to entry of new companies wanting to aggressively produce safer cigarettes. This barrier will inevitably strengthen the Big Five’s current shared monopoly. Even among this group, disputes over what constitutes a “commercially reasonable fee”, and the APA rulemaking required to force introduction of new features, could significantly delay introduction of safer products. A better approach would be to declare all existing risk reduction technologies subject to forfeiture for the companies’ past misconduct in suppressing them, and

for the FDA to own and license the technology to all comers. Future innovations--the product of legitimate, competitive research--should be subject to cross-licensing for a reasonable fee.

6. FDA could promulgate "Performance Standards" to reduce harm, but not prohibit "the sale to adults of traditional tobacco products in the basic form as described in the August 28, FDA Rule...." This authority is subject to significant restrictions, however. For "no fewer than twelve years" the agency could not eliminate nicotine or other components, and could only reduce it if could show in a rulemaking process, by "substantial evidence" that:

- (a) the reduction would "result in a significant reduction of the health risks....,"
- (b) technological feasibility, and
- (c) that the change would "not result in the creation of a significant demand for contraband or other tobacco products that do not meet the product safety standard, taking into account the number of dependent tobacco product users and the availability of alternative products."

After the initial 12-year period, the agency could set additional standards, but must make its case by a preponderance of the evidence, in a forum of the tobacco manufacturer's choosing, showing (b) and (c), above, and (a) "significant overall reduction of the health risks to tobacco consumers as a group."

Section 5 also sets a maximum 12 mg. "tar" yield effective within 3 years.

Comments: This section embodies significant limitations on FDA jurisdiction. Drs. Koop and Kessler have publicly questioned whether the FDA would ever be able to make the showing required to even reduce, let alone eliminate, nicotine; and the chairman of BAT Industries told the Wall Street Journal that, because of the contraband provisions in particular, he's not worried about the FDA ever regulating nicotine. This section not only requires a potentially impossible evidentiary showing, including proving a negative (no "significant" demand for contraband) but also heightens the agency's normal evidentiary burden "substantial evidence," in the first instance, rather than "arbitrary and capricious," rising to "preponderance of the evidence" in a forum of the manufacturer's choosing for additional limitations, after the initial 12-year period.

In addition, the wording of the section--its reference to options of "a manufacturer" (singular) implies that the FDA would not be able to make the required showing across the board, but rather on a manufacturer-by-manufacturer or even brand-by-brand basis -- an impossible burden, in practice.

To further complicate the agency's job, in any judicial review "the deference accorded to [its] findings shall depend upon the extent to which the matter at issue is within the Agency's field of expertise." Matters such as the operations of contraband markets are not necessarily within the FDA's field of expertise.

Finally, even if the FDA is able to make the required Herculean showings, any final action on nicotine elimination would have to be phased in, and would be delayed for at least two years to give Congress an opportunity to overrule it.

Taken together, the above restrictions on FDA authority over nicotine are significant and unacceptable, and contrary to what the negotiators promised on numerous occasions: full and unfettered FDA authority to do whatever is necessary to solve the problems of tobacco and the public health. This elaborate, formal rule-making process hasn't been used for almost a generation, according to press reports. The last use involved regulation of the number of peanuts used in peanut butter: it took ten years. Other comments:

- The legal consequences of the language permitting continued sales of "traditional tobacco products. . . as described in The . . . FDA rule," must be examined. Because the FDA rules do not apply to products containing no nicotine, the intent appears to be to perpetuate nicotine in tobacco products.

7. The industry would be subject to good manufacturing practice standards for the first time. Tobacco farmers "will face no greater regulatory burden than the producers of other raw products regulated by the federal government."

Comments: Good manufacturing standards are needed but so is more study needed to determine whether food standards are appropriate. Standards are not a substitute for FDA regulation over components. Under Title V, state regulation of manufacturing standards is largely preempted.

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

Comments: As with nicotine, this section would give the FDA nominal authority, but imposes so many obstacles that real regulation will be impossible.

- This section F is home to one of the most ludicrously one-sided provisions in the entire proposal: the tobacco companies get five years to prepare safety assessments of hundreds of ingredients. When that mountain of evidence is filed, the FDA has all of 90 days to review, approve or disapprove, with the failure to disapprove equaling approval. Clearly, the

manufacturers need much less time, and the FDA much more. Given the vast information the industry already has on its own ingredients, the companies should need no more than 90 days to submit all existing data, with the FDA able to act without restrictions as reliable information becomes available.

- State disclosure laws have been a huge issue for the industry in recent months. This section acknowledges the existence of such laws, but requires only that the companies must disclose all ingredients "which they *have been* compelled to publicly disclose" in compliance therewith. (So far, of course, there are none, since the industry has challenged the constitutionality of the laws and delayed their enforcement.) Buried in Title V is a five-year preemption of state disclosure laws such as those in Massachusetts and Minnesota. This settlement would set content disclosure back from existing law. Even after five years states must apparently apply for an "exemption" from preemption.
- The language regarding the obligation to disclose ingredients is unclear. In particular, it is unclear whether the companies would have to disclose the components of smoke, and test the safety of ingredients when burned. But see III.B. 4 which indicates that there will be "disclosure of tobacco smoke constituents." For example, licorice--a common flavoring--is perfectly safe to eat, but harmful when burned and inhaled. Information should be provided on burned cigarettes.

G. Compliance and Corporate Culture. The stated purpose of this section is to "forc[e] a fundamental change in the way the tobacco industry does business." Specifics:

- Create annually reviewed compliance plans to identify ways to reduce youth consumption, and provide incentives for development of reduced risk products.
- Protect "Whistleblowers" to the extent permitted by current federal law.
- Promulgate corporate principles, designate compliance officers, report to shareholders on progress.
- A rein on lobbyists, who could not weigh in on tobacco issues "without the manufacturer's express authorization." Lobbyists and agents must also have knowledge of the compliance obligations and the consent decrees.
- Companies subject to fines and "scarlet letter" advertising for breach of their obligations.
- Within 90 days, dissolve and disband the Tobacco Institute and the Council for Tobacco Research. Any new trade associations subject to regulation

Comments: Not much change requiring actual results here, except for the last point, the key disbanding of the CTR and TI. These two organizations have been little more than agencies of unlawful conspiracy for decades, and their dissolution is consistent with antitrust practice in similar cases. However, even this provision will be meaningless unless carefully implemented by consent decrees. TI's Walker Merriman has said that he anticipates business as usual under this agreement. Among the specifications needed to reform future trade associations:

- CTR and TI records must be turned over to the FDA or to a receiver, who would, among other things, disclose any evidence of misconduct.
- Regulatory and public interest representation on any new group's board.
- Open records and visitation rights by law enforcers (DOJ, FTC, and selected states).

Note that other "corporate culture" reforms, discussed during the negotiations, are not included. Example: putting outsiders, or tobacco control people, on the companies' boards of directors.

H. Effective Dates:

TITLE II: "LOOK BACK" PROVISIONS/STATE ENFORCEMENT INCENTIVES

Title II contains three provisions intended to reduce youth smoking:

- Targets for the reduction of underage tobacco use, with separate criteria for cigarettes and smokeless tobacco. The targets are based on a "base percentage" of underage smokers age 13 and up who smoke (in the case of cigarettes) on a daily basis.
- Sanctions, in the form of "mandatory" FDA-imposed "surcharges for failure to meet the targets. The sanctions are subject to rebates for good faith attempt to comply.
- A state enforcement scheme, including funding for enforcement, but also sanctions against states where the tobacco industry fails to meet youth access reduction targets.

The tobacco-use reduction targets are:

	<u>Year 5</u>	<u>Year 7</u>	<u>Year 10</u>
Cigarettes	30%	50%	60%
Smokeless	25%	35%	45%

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

Comments: This section is a sham. It recites that a "central aim of this legislation is to achieve dramatic and immediate reductions in the number of underage consumers"; but the targeted reductions are neither dramatic nor immediate. The target reduction levels are too low, the first "lookback" is too late, the sanctions too light and riddled with loopholes, and the state enforcement "incentives" would penalize the states for tobacco industry misconduct.

- **The target reduction levels are too low.** In our December, 1996 outline for a tobacco settlement we proposed as a goal the substantial elimination of youth smoking. Clearly, there will continue to be some underage smokers, just as there are underage users of alcohol and illicit drugs. But the proposed settlement goals fall unacceptably short of "zero

tolerance." To concede in advance that, after 10 years of supposedly intensive efforts, 40% of the number of young smokers will still smoke, is to concede the ineffectiveness of the marketing and access restrictions. This concession--this confidence on the part of the tobacco industry--is explicit in the statements of B.A.T. Industries Chairman Martin Broughton, who told the *Wall Street Journal*. "My expectation is we will fail to meet them [the targets]." The targets for reducing smokeless tobacco use are even further off the mark, a decrease of less than half.

The inadequacy of the benchmarks is magnified by the fact that the baseline percentage includes an artificially small population -- those kids age 13 - 17 who use cigarettes *every day*. The Centers for Disease Control and Prevention's Youth Risk Behavior Surveillance System (YRBSS) lists as "current" users 9 - 12 grade students having smoked *at least once in the last 30 days* (34.8% of the total subject population). "Frequent" 9 - 12 grade users, in the CDC definition, have smoked cigarettes on 20 or more of the last 30 days (16.1% of the total). The YRBSS does not have a category for daily users under age 18.

What this all means is that while in everyday conversation and ordinary understanding we count as "smokers" almost 35% of high school students, the proposed settlement will only measure reduced use among a much smaller percentage of "daily smokers."

It might be argued that it is likely to be more difficult to reduce the smoking of "daily smokers," since they are the most likely to be addicted. In this view, the narrow definition could be an advantage for the states, since it would logically be harder for the industry to meet the targets and therefore make sanctions more likely. One could further argue that the total package of marketing limitations and access restrictions would reduce smoking more among more occasional, less addicted, child smokers, and that the targets if anything undercount the effectiveness of the restrictions.

The problem with viewing this as an advantage is that the failure to meet targets won't hurt the tobacco companies, because the surcharges are too low and too riddled with loopholes. In the meantime, basing the discussion about smoking rates on an artificially small population of "smokers" vastly understates the magnitude of the youth smoking problem, further reducing pressure on the tobacco companies and their distribution system.

Compounding this problem is the fact that the Michigan data used to create smoking rate data counts only smokers in school. The incidence of smoking among dropouts is much higher (e.g., in a study of teens in detention homes, up to 83%).

We have supported and continue to support the youth tobacco use reductions in the Waxman Bill, which calls for a 20% reduction after two years, with annual 20% reductions thereafter until the sixth year, when the final 10% target is achieved. Penalties would be a \$1 per-pack "non-

compliance fee" for the first violation, rising \$1 for consecutive years' violations. Fees would fund tobacco enforcement and education.

- **The first lookback measurement is too late.** The settlement would require measurements, and the possible imposition of sanctions, after the fifth full year of the settlement and annually thereafter. Five years is the same period that the FDA regulations would be frozen, and state content disclosure laws preempted. The industry is obviously hoping that this five years will be a cooling off period during which public outrage will disappear and the political winds will blow in their favor. Close analysis of this proposal makes it clear that a five-year cool off period is a major element of tobacco industry strategy.
- **The permissible FDA surcharge would not discourage the tobacco companies from marketing to kids.** Here's how the calculation would be made, under the rules set out in Appendix V. B., in a hypothetical situation which assumes that the settlement legislation were effective December 31, 1997:

(1) The FDA establishes a base percentage, pretty much any time after the legislation goes into effect. It finds that 10% of the kids in the defined population smoke every day. (This is a hypothetical but realistic figure based on YRBSS findings that 16.1% of 9th - 12th graders are "frequent" smokers.) (App. V. A. 1.) Using Centers for Disease Control 1991 figures for illegal, underage sales, those 10% of underage smokers buy a total of 225 million packs of cigarettes. Note that the agency does *not* measure by brand or manufacturer, as the Waxman Bill would, but rather total smoking numbers.

(2) On January 1, 2003, the FDA looks back at smoking rates in the same population during the previous year, the fifth full year after the settlement. Under the proposal, the target reduction for that year is 30%. (V. A.3.; B. 1.)

(3) The FDA finds (hypothetically) that the number of underage smokers for the year 2002 is 9% -- that's a one-point reduction, or 10% of the original 10%. (V. B.1.(a) (i - ii)). Since the target reduction is 30%, the variance between the two percentages, and the basis of the surcharge, is 20%.

(4) The surcharge would be \$80 million for each percentage point of variance, or \$1.6 billion (\$80 million x 20) (V.B.1.(b)). Note that even had youth smoking actually *increased* two points, and the presumptive surcharge were \$3.2 billion, it would be reduced to \$2 billion because there is a surcharge cap. V.B.1.(b)(4). No matter how badly they perform, the companies will pay no more than \$2 billion.

(5) The \$1.6 billion is the "joint and several liability" of the manufacturers, payable in proportion to market share -- not specifically market share of the underage market, but of the overall market. (V.B.3.) Thus, Philip Morris would pay about half, or \$800 million; RJR about

a quarter, or \$400 million, etc. Note that because the surcharge for youth smoking is not based on the brands kids actually smoke, there would be no individual brand/manufacture accountability for "excess" youth smoking. On the contrary, even if the sanctions were genuinely punitive, the joint and several liability provides a positive incentive to gain a disproportionate share of the youth market, since any surcharge payment is based on total market share. Lorillard, for example, with something around 7% of the overall cigarette market, would be better off for grabbing a 50% share of the illegal market, since Philip Morris would pay 50% of the surcharge.

(6) The manufacturers apply for abatements of the surcharge under V.D. Each must show by a preponderance that it "acted in good faith and in full compliance with" applicable law, and "pursued all reasonably available measures" to meet the targets. The attorneys general are entitled to participate, and the FDA may bring forward any evidence that the companies tried to undermine enforcement. Because the companies carefully paper their files, having left their ad agencies to do the dirty work, the FDA has no basis to do anything except rebate 75% of the surcharge, with interest. The companies get back \$1.2, and end up paying, in the aggregate, \$400 million. When the tax savings are figured in, the failure to meet target by 20% in year 5 would cost the industry something around \$250 million. To put that figure in perspective:

- In 1991, the industry sold a CDC- estimated 225 million packs to underage smokers, earning a profit from those sales of around \$190 million. If those sales declined 10%, as in the hypothetical, profits from illegal sales would still be \$171 million, at current profit levels.
- In 1996 the cigarette companies sold 24 billion packages of cigarettes: they would have to raise prices between one and two cents per pack to recoup, collectively, a \$250 million surcharge.
- Even after ten years and a successful 60% reduction in cigarette sales to kids, if the cigarette companies maintained only their current profitability (foregoing the greater short-term profits from increased prices) they would make around \$76 million in profit on illegal sales.
- As far as the companies are concerned, given (a) their ability to raise prices to recoup a surcharge, and (b) the \$2 billion yearly cap, it is still in their interest to try to hook as many kids as possible, to protect long-term sales. If, by the end of year five, underage smoking goes up 2 percentage points, it might as well go up 20. With the cap, the penalty is the same.

(7) "Upon final completion and review of any abatement petition" -- which would be years after payment if the industry exercises its right to litigate the abatement issues -- the FDA would grant 90% of surcharge amounts to state and local government public health agencies, to be spent on youth smoking reduction activities. With litigation over the abatements a near certainty, if this legislation were enacted in 1997, the states would probably receive the first grant money for youth smoking reduction no sooner than the year 2006. There is no explanation of why the agency could not grant out uncontested money right away. See V.C.

(8) In subsequent years the surcharge would be further reduced "to prevent double counting of persons whose smoking had already resulted in the imposition of a surcharge in previous years (to the extent that there were not underage smokers of comparable age in those previous years on whom a surcharge was not paid because of the cap...)." This language is unclear and must be redrafted so that it may be assessed.

- **The state enforcement incentives mandate enforcement of youth access laws, but could punish the states for tobacco industry misconduct.** Under Appendix VI, "states" must conduct a youth access enforcement campaign which includes:
 - A no-sales-to-minors act
 - Random, unannounced inspections of retailers at least monthly
 - At least 250 such inspections per year for each million of population
 - Annual reports to the FDA, detailing enforcement activity, methods and strategies
 - Designating a "single state agency" accountable for results.

It is not clear whether the efforts of local governments would be counted toward these objectives or whether they would literally be the responsibility of the state governments and only the state governments.

For the states to get continued FDA grant money to enforce the youth access laws, the FDA would have to find that the state "pursued all reasonably available measures to enforce" the no sales to minors laws. However, the agency would "find presumptively" that the state had *not* used such measures unless the retail compliance checks found at least 75% compliance after the fifth year, 85% after 7 and 90% after 10 years. App. VI.

FDA would reduce grant moneys 1% for each percentage point by which the state fell short of its goal. The money would be redistributed to states that had exceeded performance targets.

In a parallel to the procedures for rebates of industry surcharges, the states could petition for rebates, attempt to show "good faith and full compliance", and potentially get back up to 75% of the withheld amounts.

Comments: It is inappropriate to penalize the states for failing to meet standards which are ultimately within the control of the tobacco companies and their chain of distribution. We don't take money away from local law enforcement because the police have failed to stamp out 90% of illegal drug use, or because some people still drink and drive. The states are the cops in the youth access enforcement world -- it is inappropriate and counterproductive to take enforcement funding away from them when, as noted above, the sanctions against tobacco companies will leave them with ample incentive to continue to sell to kids. Doing so would likely increase access in those areas where industry non-compliance is already highest.

Moreover, the percentage compliance targets may be unrealistic. From figures we put together early this year, based on enforcement experience in Minnesota, 85% compliance appears to be a reasonable, high level in an area with a strong ordinance and significant enforcement. Setting the targets any higher than that may be a setup for failure.

It is entirely appropriate to hold the states responsible for having and implementing an intelligent enforcement program, and to sanction the states for not conforming to the process. But to punish the states because the tobacco retailers are still violating the law, despite an enforcement program which conforms to federal standards, and in an environment where the companies still have an incentive to addict young people, is wrong.

TITLE III: PENALTIES AND ENFORCEMENT; CONSENT DECREES; NON-PARTICIPATING COMPANIES

- **A. Penalties and Enforcement:** The legislation would be enforceable by the states and the federal government. In addition, FDA could contract authority to the states. States could proceed under consumer protection "or similar statute[s]", but could not "impose obligations or requirements beyond those imposed by the legislation (except where [it] does not specifically preempt additional state-law obligations), and would be limited to" penalties provided. State enforcement proceedings under the Act or "predicated on conduct violating the Act" would be removable to federal court.

Comments: As discussed above, the lack of enforcement authority is a fatal flaw for this proposal. In addition, the extent of preemption here is far from clear. It appears, though, that a state suing under its own consumer protection "or similar" laws (left undefined) for conduct which also violates the Act, would (a) end up in federal court, (b) be limited in breadth and interpretation by the substance of the Act, (c) and be limited by the inadequate penalties of the Act. Removal to federal court of state enforcement actions is an unacceptable infringement on state sovereignty and a departure from principles of federal jurisdiction.

- Civil penalties of up to \$10 million per violation for breach of obligation to disclose certain health-related research or information to the FDA are provided. This section must be worded so as not to preclude more severe existing sanctions, such as criminal penalties for filing false reports with regulators. Criminal penalties should be provided if this conduct is not now clearly covered under the federal criminal code.

B. Consent Decrees. Certain terms will be reiterated in consent decrees. The decrees would take effect only after enactment of the legislation. Among the terms which would be effective both through the legislation and the consent decrees are marketing restrictions, trade association dissolution, lobbying restrictions, tobacco smoke constituent and ingredient disclosure, money payment obligations for the states' "reasonable share" and similar terms.

Excluded from consent decrees will be product design and testing, manufacturing standards and look-back provisions.

States are entitled only to injunctive relief in enforcing consent decrees, and are prohibited from seeking criminal or monetary sanctions. Consent decrees remain enforceable regardless of later changes in the legislation, with certain exceptions, and will contain waivers of defenses of unconstitutionality of consent decree and legislative provisions.

Comments: The sole remedy of injunctive relief for violation of the consent decrees is a significant, unwarranted and unacceptable limitation. States should at a minimum have the ability to enforce consent decrees in accordance with local law, to recoup attorneys fees and costs, and to get the same penalty as provided for the original violation. As drafted, this overbroad consent decree provision would discourage state enforcement. It leaves unanswered the question of how to treat conduct which violates both a decree and a substantive statute. With no penalties provided for the advertising and marketing restrictions, injunctive relief may be the only relief--and no deterrent at all to misconduct.

The decrees would presumably be entered in the courts where the individual state actions are venued, although the proposal does not specify.

C. Non-participating Companies. The ostensible purpose of this section is to equalize the market as among those companies which participate in the deal and those that don't. Non-participants would not be subject to the advertising restrictions, which might, the agreement recites, be subject to constitutional challenges by those companies which have not waived their rights. Instead, "non-participants" would be subject to youth access restrictions, general "regulatory oversight, a "user fee equal to the portion of the payments by participating manufacturers allocated to fund public health programs and...access restrictions," and a future liability escrow reserve payment one-and-a-half-times as large as "the annual payment required of participating manufacturers." In addition, non-participating manufacturers would not have the civil liability protections which are one of the main inducements for the companies to participate in this settlement. Similarly, the retailers and distributors who deal with non-participating companies would not be granted liability protection.

Comment: On the surface it seems fair not to place the settling companies at a competitive disadvantage by requiring some obligations of non-participating manufacturers. Below the surface, however, this section appears to be the cigarette cartel's naked attempt to erect barriers to new competition: the civil liability reserve payments are 150% of those expected of settling companies -- they would pay dearly for the right not to be bound by "FDA Plus" advertising and marketing restrictions. While it is fair that the non-participants have no statutory immunity, the withholding of immunity from distributors and retailers would discourage them from dealing with a non-participant, an additional barrier to entry.

We care about potential competition among tobacco companies because the defendants have in the past suppressed competition in new product development. Anything which solidifies the defendants' shared monopoly permits them to continue their collusion, grants unwarranted market protection, and effectively rewards them for their past misconduct.

- This section is plainly inconsistent with the negotiating states' obligations to Liggett under the existing settlement agreement with that company. Liggett would likely be a non-participant under this provision, as would new companies. Section 5 of the Liggett settlement requires the Attorneys General "to exercise best efforts to ensure that the financial terms...of any global settlement are no more onerous on...Liggett than the financial terms...of the agreement." The AG's are also required to use their best efforts in Congress to ensure that Liggett gets the benefit of its bargain. Liggett can withdraw from the agreement if these terms are not met.

Section 16.1 of the Liggett Agreement sets out "the intent of the parties...that the Settling Defendants enjoy a preferred position with respect to Non-Settling Tobacco Companies..." There follow a complex set of formulae designed to give Liggett the same kind of competitive advantage which the other companies seek in this proposal. This section C therefore sets up a "dueling most favored nations" situation. What are the conflicts? Which agreement controls? What are the States' obligations? What are the consequences if Liggett withdraws?

TITLE IV: NATIONWIDE STANDARDS TO MINIMIZE INVOLUNTARY EXPOSURE TO ENVIRONMENTAL TOBACCO SMOKE

The proposal would establish minimum federal standards for smoking in public places and workplaces, without preempting stricter state or local standards. A "public place" is any building "regularly entered by 10 or more individuals at least one day per week." Smoking would only be allowed in areas with a direct outside exhaust, maintained at negative pressure compared to surrounding areas, and with no recirculation of air.

No employee would be required to enter a smoking area while smoking is occurring. Bars and restaurants (except "fast food" restaurants) are exempt. It is not clear from the draft whether the "no employee required to enter" exception would apply to bars and restaurants, i.e. whether as a condition of employment a waitperson could be required to serve the smoking section.

OSHA would be required to issue and enforce regulations, with enforcement funded by the industry payments.

Comments: In dealing with second-hand smoke, the settlement proposal takes several steps back from the indoor air quality (IAQ) regulations proposed by the Occupational Safety and Health Administration. OSHA published notice of the proposed rules--which comprehensively govern IAQ in the workplace, including environmental tobacco smoke-- in April, 1994. Final action has been delayed, however, because the second-hand smoke provisions prompted the tobacco industry to engineer the largest public response to proposed regulations in the agency's history: over 100,000 comments, the bulk of the material from the tobacco industry.

The settlement would retreat from the proposed OSHA rules in the following ways:

- The rules would cover restaurants, bars and hotels (29 CFR 1910.1033(a)); the settlement would exempt them, except for "fast food restaurants" catering largely to minors.
- The rules require enclosed, ventilated areas under negative pressure (id. at (e)(1)(ii)); separate rooms, in other words. The settlement does not require the smoking areas to be separately enclosed.
- The rules would require posted signs stating that smoking is restricted to designated areas (id. at (e)(1)(vi)); the settlement doesn't.
- Coverage is potentially different, with the OSHA rules applying to "all indoor non-industrial work environments," and the settlement to "public places."

Taken together, the differences between the proposed rules and the settlement make the settlement significantly less effective in combating the country's third leading cause of preventable death. Smoking will still be allowed in restaurants, bars and hotels; and deletion of the requirement of enclosed smoking areas means inevitable exposure.

As Stan Glantz says, such designated smoking areas are the equivalent of signs requesting that swimmers urinate only in the shallow end of the pool. Finally, note that the costs of enforcing the reinvented OSHA would come out of the total settlement fund, and thus be subtracted from the amount available for victims.

TITLE V: SCOPE AND EFFECT

This section establishes the scope of the FDA's jurisdiction, the relationship between the FDA and other federal agencies which regulate tobacco products, and the general interplay between federal and state laws. By logic and custom it should be at the beginning of the proposed legislation instead of the advertising and marketing restrictions. Although short, this Title is complicated.

A. Scope of FDA Authority. This assigns regulatory responsibility and limits jurisdiction. It provides:

- The settlement legislation would apply to "all product sold in U.S. commerce."
- Applies to "new entrants" and "imports"
- The Bureau of Alcohol, Tobacco and Firearms would retain fiscal authority over tobacco products while the FTC would cede tar, nicotine and carbon monoxide testing to the FDA.
- FDA would have no jurisdiction over tobacco "growing, cultivation or curing."

Comment: Limitation of FDA jurisdiction to products "sold in U.S. commerce" is a clever way of saying that none of the FDA's standards will apply overseas. In other words, this bill ducks the international marketing issues, leaving the companies free to target children in other countries. At a minimum the industry should be required to stop targeting children abroad.

- Coverage of "new entrants" and "imports" raises the issues of market fairness addressed above. The rationale for covering new entrants and imports in the settlement generally varies depending on the provision at issue. The current defendants want their potential competitors to be at least as burdened by the settlement legislation as they are. In fact, as discussed above, they are clearly attempting to use the settlement to entrench their shared monopoly by creating unnecessary barriers to entry. It is fair and appropriate to include potential competitors in the FDA's regulation, or in any other provisions which have a public health content, since the newcomers too will be making and selling a dangerous product. It is also appropriate to tax or otherwise affect the price of their products, since, from the public health point of view, the more cigarettes cost, the better.
- Transfer of product testing from the FTC to FDA is an appropriate recognition of the latter agency's health and smoking related expertise.

B. State Authority. This section states the general relationship between state and local regulation, on the one hand, and federal regulation, on the other.

Section 1 purports to preserve state and local authority to control youth access "to the maximum extent"; specifically preserves local rights to enact more stringent second-hand smoke exposure standards; and preserves general state regulatory authority. It provides special rules for Indian tribes and federal facilities.

Section 2 continues the Cigarette Labeling Act, including the state preemptions that act contains, and further incorporates Food Drug and Cosmetic Act standards, including provisions which preempt state standards which would "unduly burden interstate commerce." Under this clause, "no [state] exemption relating to ingredients," "as described in Title 1 (F)" may be applied for five years. This language preempts state content disclosure laws, or at least delay

their effective date, for the initial five-year period when FDA regulation over marketing and advertising restrictions is itself frozen under Title I.

Comment: This section B is almost false advertising in itself. It purports to preserve maximum state authority over tobacco issues while subtly incorporating numerous unjustified preemptions:

- More restrictive state and local youth access/retailer licensing laws are preempted. Title V. B.1. states that the “legislation preserves, to the maximum extent, state and local government authority to take additional tobacco control measures” restricting youth access. In fact Appendix II contains a mandatory schedule of retailer licensing sanctions which preempt more stringent state and local punishments (“Such sanction shall not exceed the following....” Appendix II, 2.) The schedule conflicts with Minnesota’s newly enacted licensing restrictions in that our law provides mandatory penalties (albeit ones which fall below the Appendix II maximums), and permits more severe penalties.

Illustration: For a third offense within 24 months, the settlement would allow (but not require) a maximum penalty of \$2,000 and/or a 30-day license suspension. The actual sanction could be a \$10 penalty and no suspension. Our approach is to impose a mandatory \$250 penalty and minimum seven-day suspension. In other words, the actual sanction could be a \$250 penalty and a 60-day suspension. Furthermore, the Minnesota statute would permit local ordinances to be more severe. The legislation would preempt any contrary application of the Minnesota statute or local ordinance. There is nothing in the proposal which explains why this preemption is necessary. The statement in Title V B. 1. that the settlement preserves local youth access restrictions “to the maximum extent” is simply false.

- We have recommended in the past that the FDCA preemption of state advertising restrictions be repealed. This settlement would continue them. V.B.2.
- State ability to set manufacturing performance standards is curtailed. Id.
- In a significant setback to state consumer protection efforts, the settlement would freeze state content disclosure laws for five years after its effective date. Id. This provision would nullify the Massachusetts content disclosure law, which that state has already successfully defended in federal court. It is the tobacco industry’s attempt to win in Congress what it has already lost in state legislatures and in federal court. Minnesota’s content disclosure law would also be preempted.

TITLE VI: INDUSTRY PAYMENTS

The cash value of the settlement is advertised as \$368.5 over 25 years, a more or less arbitrary period of time. The payments actually continue in perpetuity. This figure does not include adjustments for inflation, changes in sales volume and other factors which cannot now be measured. The settlement does not include a present value calculation. Significantly, the proposal does not clearly identify how the money will be divided among the plaintiffs and future

claimants, the source of funds for the various programs, or the use of the "public health trust" designated payments. Assuming the settlement were approved in 1997, and not counting the various adjustments, the tobacco companies would make the following payments:

- \$10 billion lump sum cash payment when the President signs the Bill. This payment seems to go all to the States. There is no allocation in the proposal.
- On December 31, 1998, \$8.5 billion: A \$6 billion "base amount," and \$2.5 billion for the public health trust. It appears that the base amount is for all claimants and public health purposes, with the public health funds distributed to various programs in Title VII deducted from the base. It further appears that 1/3 of the base amount would be kept for the civil liability fund. Thereafter, the payments look like this:

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

Note again the significance of five years. Just as the controls will start to come off the FDA, the industry's payments will peak, giving them the strongest argument that they are paying their share. The payments are subject to the following adjustments:

- They will increase by 3% or CPI each year, whichever is greater, applied to the previous year's payment.
- If the volume of unit sales decreases from 1996 levels (the "base volume"), then the payment is a percentage of the scheduled payments: actual adult volume divided by base adult volume times the scheduled payment, with a further adjustment for any increased profitability. (Using adult volumes keeps the industry from getting a benefit from reduction in underage sales.)
- Payments have priority in bankruptcy, and this settlement could not be rejected in bankruptcy. VI B.6.
- "In order to promote maximum reduction in youth smoking, the statute would provide for the Annual Payments to be reflected in the prices manufacturers charge for tobacco products." VI B.7.
- Payments would be collected from all sellers of tobacco products. Participants would pay by agreement. Non-signators would be bound by statute; this would include new entrants and others not necessarily involved in the acts and practices complained of in the lawsuits.

- None of the payments are deemed fines or penalties, and all payments (including specifically the youth lookback "penalties") are deemed to be ordinary and necessary business expenses, and therefore tax deductible.

Here are two examples showing future payment scenarios:

Example #1: (using only adult figures): If 1997 volume sales decrease from 1996's 24 billion packages of cigarettes (the base volume) to 20 billion, the adjustment fraction is .833 (20 divided by 24), so the first year's payment, instead of being \$8 billion, would be \$6.667 billion. If, despite the decline in unit sales, the industry's profits increased above a "base year net operating profit" (which is not given in the agreement), then 25% of the increased profits go back into the payments. For example, if the "base year net operating profit" is \$7.6 billion, and in 1997, despite the above-hypothesized decline in sales, the industry's total profits are \$8 billion, then 25% of that \$0.4 billion, or \$0.1 billion, would be added to the payments, raising the total to \$6.767 billion.

Example #2: Instead of decreasing, 1997 sales increase to 30 billion units. The multiplier would be 1.25 ($30 \div 24$) and the total first-year payment would be \$10 billion instead of \$8 billion.

Comments: Perspectives on the amount of the payments:

(1) If the industry saves \$4 billion of its current annual outlay of \$6 billion in advertising and marketing; saves \$750 million in annual legal fees from fighting the state and class action lawsuits; and deducts all payments from taxes (about \$2.64 billion in the first year), its savings and tax benefits will amount to \$7.39 billion, or 92.4% of the first year's payment.

(2) The payments are far less than the industry can afford. At a minimum, the cigarette companies can increase prices an average of \$2 per pack, raising \$32 billion per year.

(3) Some experts suggest prices could be increased significantly more than \$2 per pack and still permit the companies to be profitable.

(4) The present value of the 25-year stream of payments is at a 10% discount rate is \$135.7 billion with the 3% inflation adjustment. Exhibit 2 shows the present value at a range of assumptions.

(5) The industry's stock increased over 20% in value during the negotiations.

- The mechanisms of the mandatory pass-through of price increases are not spelled out in the settlement. According to information leaked during the negotiations, they were to have been implemented by some exemption from the antitrust laws: Such an exemption would be completely inappropriate for companies with a long and sordid history of antitrust violations, and currently charged with one of the largest, longest, and costliest conspiracies in restraint of trade in the nation's history. Higher prices would indeed diminish youth smoking, but to justify an antitrust exemption on this ground is mere pretext. Youth smoking could and

should be discouraged to the maximum by requiring total industry payments which would boost prices by \$2 and more, a level already found to be critical in reducing consumption by underage smokers. If it is deemed desirable to have prices passed through to customers, this must be done carefully by government action, not through any agreements or sanctioned joint action among the companies. To set up a structure for these companies to work together on prices would be akin to government handing a loaded gun to a serial killer.

- In applying the payment obligations to non-defendant tobacco companies -- new entrants, for example -- it is again important to keep the focus on public health goals. It is fair and right to apply restrictions across the board in the public health interest; but neither this legislation nor any proposed settlement is a proper vehicle for helping the defendant tobacco companies entrench their undeserved and unlawful shared monopoly.
- The settlement does not contain a waiver of the federal share of Medicaid recoveries, nor any guarantees that congress or federal agencies will not reduce money otherwise available to the States.
- The stipulation that none of the payments is to be considered a fine or penalty is consistent with the tax benefit to the industry. However, it works against the states in that the proposed settlement does not have a federal Medicaid share waiver. The states would presumptively be able to keep all of any payments designated as fines or penalties, or devoted to non-Medicaid elements of damage. They may well have to pay back the federal share of Medicaid damages.
- Finally, it is critical to note that the obligation to pay is being placed only on domestic cigarette manufacturing. This would leave untouched the contribution potential of their domestic and international affiliates which were bought with unlawful tobacco company profits and are therefore subject to judgment in the pending lawsuits.

TITLE VII: Public Health Funds From Tobacco Settlement As Recommended by the Attorneys General For Consideration By the President and Congress

The proposal would devote substantial payments to tobacco-related public health programs and anti-tobacco promotions. It is not explicit from the document itself, but appears to be the case that this money comes out of the "base payments." There are five sections in this title. A summary of where the money goes, and when:

Members of the Senate

July 15, 1997

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Year	1	2	3	4	5	6	7	8	9	10
To HHS for Tob Use Reduction	\$125M	125	125	225	225	225	225	225	225	225
FDA enfrcmt & state grants	\$300M	300	300	300	300	300	300	300	300	300
ASSIST-type state & local funding	\$75	75M	100	125	125	125	125	125	125	125
R&D re: stop & no-start methods	\$100M	100	100	100	100	100	100	100	100	100
soft landing for sponsorship recip. (teams, events, etc.)	-	75	75	75	75	75	75	75	75	75
Public education, media campaign	\$500M	500	500	500	500	500	500	500	500	500
Cessation	\$1B	1	1	1	1.5	1.5	1.5	1.5	1.5	1.5
Totals	\$2.1B	2.175	2.2	2.325	2.325	(same into future...)				

The secretary of HHS (note: not the FDA) would establish programs for the use of the above money. Among the purposes would be reducing tobacco usage by discouraging underage smokers from starting and helping current users to quit; research and development into health effects of tobacco products and additives, and a multi-media public education campaign designed to "discourage and deglamorize" use of tobacco products. This campaign will be directed by an independent, non-profit organization to be created for this purpose. The Board of this non-profit will grant to non-profit entities with a demonstrated record of working effectively to reduce tobacco product use and expertise in multimedia communications campaigns.

The Secretary of HHS would also promulgate rules governing cessation programs, including standards for eligible cessation devices, individuals eligible to get cessation money, and procedures to govern the cessation program.

Finally, a Presidential commission would be appointed to distribute tobacco-related medical research from the \$25 billion Public Health Trust Fund.

Comments: The agreement is decidedly vague on money distribution issues. It appears from the overall structure of the agreement, but is not clear from the document itself, that the money for the programs listed in the above table would come out of the base payments, and therefore be unavailable as compensation to victims. The language establishing the trust fund seems to imply that the Presidential Commission money would be the trust fund.

If the public health trust fund money is entirely separate, and the money to be used for the anti-tobacco efforts listed the above table is part of the base payment, then the money available for distribution for all potential claimants would be as follows:

Year	1	2	3	4	5	6	7	8	9	10
Amt.	\$3.9B	4.825	5.8	7.675	10.175	12.675	12.675	12.675	12.675	12.675
Civil Liability Fund	2.0	2.31	2.64	3.33	3.33	4.125	4.125	5.00	5.00	5.00
Avail. to States, etc.	1.9	2.515	3.16	4.345	6.845	8.55	8.55	8.55	7.675	7.675

- There is no explanation why the development of programs under this Title would reside in the Department of Health and Human Services rather than specifically in the FDA, which will have the smoking and health expertise.
- Some of the research to be funded out of the industry payments is research that the industry ought to be doing in any event, for its own commercial purposes--research into safer product technology, for example. It is probably as well to have this research done outside the industry, with the results presumably available to anyone, without commercial restriction.
- Spending public health dollars on a soft landing for people who relied on tobacco sponsorship dollars is questionable, but the stipulation that they carry "quit tobacco use" messages makes this less objectionable.

TITLE VIII: CIVIL LIABILITY

This Title would preempt -- "legislatively settle," in the euphemism of the proposal--all present and future attorney general or similar governmental entity suits, present and future parens patriae actions, all present and future class actions; and all existing addiction/dependence (i.e. Castano-type) claims.

Third-party payor actions pending as of June 19, 1997 (such as Blue Cross/Blue Shield of Minnesota's claim) would not be settled, but would be subject to limitations governing liability for past conduct.

This Title has two main parts, establishing different rules for past and future conduct.

B. Past Conduct: This section applies to suits arising out of conduct occurring before the effective date of the act. It imposes a number of conditions and limitations on the ability of future (i.e. post-effective date) plaintiffs to recover for the industry's misconduct of the past four decades. Where noted, the same restrictions would also apply to future industry conduct:

- (1) No punitive damages in individual tort actions.
- (2) Individual trials only: i.e. no class actions, joinder, aggregations, consolidations, extrapolations or other devices to resolve cases other than on the basis of individual trials, without the defendant's consent. If a claim inconsistent with this paragraph were asserted in a state court, the case would be removable to federal court. In addition, under (9), below, an individual could only recover \$1 million in a given year, unless there was unpaid money within the industry's aggregate, annual liability payment cap. (This provision also applies to future conduct under Section C., below.)
- (3) Except as expressly modified, the Federal Cigarette Labeling and Advertising Act and case law would remain unchanged. (Applies to future conduct.)
- (4) No joint and several liability for any of the five negotiating companies which enter into the protocol. Trials involving both protocol and non-protocol companies would be severed -- i.e. tried separately.
- (5) No claims based on addiction or dependence (arguably the claims most likely to succeed).
- (6) Consistent with the limitations on class actions and other multi-party actions, only certain plaintiffs could sue the tobacco companies: individuals (injured parties or heirs); third-party payors with non-subrogation claims pending as of June 19, 1997 (i.e. BCBSM and the labor unions); third-party payors asserting subrogation claims. Only tobacco manufacturing companies, their designated survivors (as in bankruptcy or mergers/acquisitions), their assigns and future fraudulent transferees, and those vicariously liable for their acts, would be permissible defendants. (Applies to future conduct.)
- (7) Cases could be heard in state court unless impermissible claims were asserted, when cases would be removed to federal court. (Also applies to future conduct.)

(8) Development of reduced risk tobacco products after the effective date would not be admissible in evidence or discoverable. (Applies to future conduct.)

(9) Statute of limitations would run from the time of injury or discovery, or notice of a violation. (Applies to future conduct.)

(10) There is an annual payment cap with the following features:

- Annual liability payments to the permissible plaintiffs, whether by settlement or by judgment, would not exceed one-third of the industry's base payments for that year. Thus, in Year 1, for example, the industry could not be required to pay more than \$2 billion in individual liability damages. By year 9 the cap would rise to \$5 billion.
- Excess liability would roll over and be credited 80 cents on the dollar to the annual payments required in the year paid (thus snowballing the cumulative unpaid liability).
- No individual could collect more than \$1 million in a year, unless all unsatisfied judgments had been paid that year (i.e. if there was room under the cap). Unpaid amounts on individual judgments would roll forward, with interest. (Applies to future conduct.)

(11) If the cap is not reached in a given year then a Presidential Commission will decide how to allocate unused money. (Note that this implies that there is a fund, with money paid in by the industry -- the "cap" concept itself seems to imply only a limitation on liability. The settlement does not appear to elsewhere require the establishment of an annual payment fund.) (Applies to future conduct.)

(12) Manufacturers control insurance claims, and any insurance payments go 80% to the annual payments. Manufacturers pay defense costs, but retain any defense cost insurance payments.

Comments: The limitations on actions and on payments, in the aggregate, take away significant incentives for individuals and their lawyers to pursue claims against the tobacco companies. The ban on multi-party actions and non-subrogation theories; the unavailability of the possibility of punitive damages for what is arguably this Century's worst corporate misconduct; limitations on recoveries payable in a given year; the inconvenience of separate proceedings, and the apparent inability to pursue non-tobacco assets to satisfy a judgment all combine to make it unlikely that the tobacco manufacturers will face anything approaching the full and just consequences of their actions. The ban on addiction and dependence claims is armor plating for the industry's weakest spot in individual cases. It would ban precisely those cases where the industry's "assumption of risk" defense is strongest. Other comments:

- Presumably, the Presidential Commission referred to in this Title is the same one which would allocate program dollars under the preceding Title.

- We in the past have recommended that the preemptive provisions in the existing Federal Cigarette Labeling and Advertising Act be repealed. This section would leave the preemption intact, along with the case law which has interpreted in many cases favorably to the industry.

C. Future Conduct: In addition to the provisions identified above as applying to future conduct, there could be no third-party payor, non-subrogation claims.

TITLE IX: BOARD APPROVAL

This agreement is subject to approval by the tobacco companies boards of directors.

Appendix VIII - Public Disclosure of Past and Future Tobacco Industry Documents and Health Research

The proposed settlement establishes one centralized document depository in Washington D.C. and one method of obtaining review of materials alleged to be privileged or trade secret data *for all cases in state or federal court in the United States*. The only exception is for disputes in pending cases that *can be resolved* prior to the time the three-judge panel established by the Congress has an opportunity to *begin to review* claims. (It is not clear what will happen to Mississippi's documents as a result of the settlement in that case.)

The national depository in Washington D.C. will include:

- all documents produced by CTR, TI and the tobacco manufacturers in pending litigation, including the Minnesota litigation
- all indices of documents regarding smoking and health research as defined by the court's order in the Minnesota litigation
- any additional existing documents (which somehow have not been produced) regarding: health research, addiction or dependency, safer/less hazardous cigarettes, studies of smoking habits of minors, and the relationship between advertising or promotion and youth smoking.

These documents will have no confidentiality designations of any kind and will be available to members of Congress, state and federal agencies, and the public.

No documents for which the industry asserts attorney-client privilege, work product or trade secret protection will be placed in the depository. The industry will *as soon as practicable* conduct a good faith, de novo, document-by-document review of all documents previously withheld on grounds of privilege to:

- identify and place in the depository documents which the reviewer determines should not be privileged and
- create *new privilege logs* with all of the detail required by the Minnesota litigation.

Anyone who wishes to challenge the industry's continued assertion of privilege or trade secret protection must file a claim with a three-judge panel of Article III federal judges appointed by the Judicial Conference. The decision of the three-judge panel is binding on all state and federal courts in all litigation in the United States, and may be reviewed only via a petition for certiorari to the United States Supreme Court (28 U.S.C. § 1254). The one exception is for those disputes that have already been resolved by other federal or state courts prior to the time the three-judge panel has had an opportunity to begin to review privilege claims.

The panel will review claims of privilege in accordance with ABA/ALI Model Rules and/or federal common law with respect to privilege and the Uniform Trade Secrets Act with respect to trade secrecy. No prima facie showing is required to obtain in camera review. The panel may appoint a special master(s) to hear claims by any public or private party, subject to a right of intervention by any other interested party. If the panel rules in favor of disclosure, the panel will consider whether costs and attorneys' fees should be assessed against the entity claiming the privilege, and may impose such additional costs or sanctions as the panel deems appropriate.

The industry will have a continuing obligation to disclose to the FDA and the depository:

- any future original laboratory research relating to the health or safety of tobacco products, including all laboratory research relating to ways to make tobacco products less hazardous to consumers (except trade secret information need not be produced to the depository)
- any future studies of the smoking habits of minors or documents which refer to the relationship, if any, between advertising and promotion and underage smoking.

Comments: The removal of any confidentiality designation from the documents already produced is good; the system for determining remaining privilege claims appears designed to slow the discovery process down in a very significant way. Concerns which come to mind on first reading of the proposed settlement summary include:

- (1) Would the proposal take jurisdiction away from Judge Fitzpatrick and the Special Master to complete the process they have now begun for review of the industry's assertions of privilege? What does the fine print say about when the three-judge panel gets exclusive jurisdiction? It makes little sense to wrest jurisdiction from the Minnesota court if its review is ongoing (but not yet fully "resolved") prior to the time the three-judge panel has had an opportunity to "begin to review privilege claims." What do these terms mean for us?
- (2) Why does the industry need another "document-by-document" review of its assertions of privilege to prepare a new privilege log in as soon as practicable a time frame as it can? Judge Fitzpatrick estimated conservatively that if a person took only five minutes to review each of the documents for which the industry has claimed privilege, the review would take a very long time. Does the proposal

contemplate that privilege determinations would simply be held in abeyance as the industry completes its re-review of the documents? Is the provision for re-review an implicit concession by the industry that it has over-claimed privileges? The defendants have already produced privilege logs in the Minnesota litigation and are under a current obligation to provide all of those privileged documents to the Minnesota depository's secure facility this month. The Minnesota court's process for review of defendants' privilege assertions is well underway and should not be disturbed by whatever new process is contemplated by the settlement.

- (3) What does the "trade secret" protection for laboratory research keep confidential from the public in the future? Is this an exception that will swallow the rule of disclosure for research on safer cigarettes? Will the FDA be given access to this information (even if it is not publicly available)?

This settlement requires far less of the big companies than we will be able to get in our litigation, or than Liggett did. To get any kind of deal the companies should make a clean break with past lies. Without such disclosure, Congress will not know what abuses need to be regulated, and we will continue the absurd national policy of legislating on lies.

**STATE OF MINNESOTA
OFFICE OF THE ATTORNEY GENERAL
LAW ENFORCEMENT SECTION**

Hubert H. Humphrey III
Attorney General

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DATE: May 28, 1997

TO: See attached list

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NUMBER OF PAGES (including cover page): 11

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May 27, 1997

TO: PARTICIPANTS IN THE TOBACCO ADVOCACY CAUCUS

Re: Letter Regarding Tobacco Civil Liability Limits and Nicotine Regulation

Dear Friends:

I very much regret that I will not be able to attend your meeting on May 28 because of a long-standing commitment to lead a mission to Israel. Several representatives of my Office will attend to share my views on a fair and just resolution of the public policy issues posed by the Tobacco Industry, its conduct and its products.

I also want to share with you a letter I am sending to my Attorney General colleagues around the country. The letter, which is attached, highlights some of the issues raised by the tobacco companies' demand for immunity from future liability in individual and class action lawsuits; and the Industry's continuing struggle to avoid full and comprehensive FDA regulation. I hope you will read the entire letter; and I hope even more that, in evaluating any proposed "global settlement" with the Tobacco Industry, you will keep in mind that:

- Congress and the American people do not yet have all the facts. To settle with the tobacco companies before we have all the facts, including the Industry's self-proclaimed "privileged" documents, is to buy the proverbial pig in a poke.
- There is no precedent in our laws -- no legal model -- for the kind of immunity the Tobacco Industry is seeking. Fairness demands that people who have suffered from the Industry's misconduct have the right to timely and adequate compensation, and that we not encourage Congress to protect the tobacco companies from the consequences of their own actions.
- When it comes to nicotine, we need to read the fine print. A global settlement may have 20 pages of specific marketing restrictions, but if it does not give the FDA the full and comprehensive jurisdiction to address the problems of tobacco and regulate nicotine as a drug, it is a set-up for business as usual.

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PARTICIPANTS IN TOBACCO ADVOCACY CAUCUS

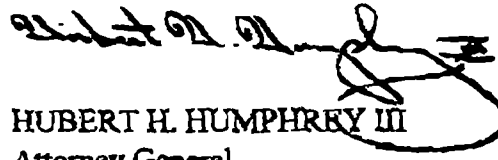
May 27, 1997

Page 2

- Because of the addictiveness of its product, the Tobacco Industry has an enormous ability to pass damages on to its customers without even losing revenue. Fixing the amount of the Industry's liability should not be a matter of raw horse trading — it should be based on principles of just compensation, retribution for past harm, and studied consideration of economic consequences.

All of us, working together, have brought the country far down the road toward a permanent solution to our problems with the Tobacco Industry. Let's do what it takes to finish the job, and get it right.

Best regards,



HUBERT H. HUMPHREY III
Attorney General

AG:28248 v1

Fax: 612 229 74036

MN ATTY GENERAL

May 28 1997



STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

HUBERT H. HUMPHREY III
ATTORNEY GENERAL

May 27, 1997

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Re: Tobacco--Civil Liability Limits

Dear Colleague:

For the past month, tobacco industry representatives have been discussing the possibility of a "global settlement" with some Attorneys General. A central part of those discussions has been the industry's attempt to secure Attorney General support for new statutory limits on the industry's civil liability, both for present claims and for claims that might be brought in the future, and for restrictions on the FDA's authority to regulate nicotine.

Although several questions have been raised about this negotiation process, I believe the discussions about civil liability and nicotine regulation restrictions have helped focus the issues. Those discussions have revealed the extraordinary nature of the relief the industry is demanding. They have also prompted key members of Congress to appoint a new Advisory Committee on Tobacco Policy and Public Health, to be chaired by Dr. C. Everett Koop and Dr. David Kessler, which will help assure that the public health perspective is not lost if Congress is asked to consider a "global settlement."

Recent press reports have outlined a proposal with the following key elements: an annual global industry liability cap of \$15 billion, with \$3.5 to 4.5 billion available to pay individual claims; prohibitions on private class-action litigation, on consolidation of claims, and on punitive damages; new eligibility restrictions for private claimants (including completion of smoking cessation programs); full immunity for suppliers, distributors, resellers, and other "agents" of the tobacco industry; immunity for the industry as a whole after a future date (unless the claim involves a contaminated product, violation of FDA rules, or an illness not associated with smoking today); withdrawal of industry objections to certain marketing and advertising restrictions; and significant limits on the authority of the FDA to regulate nicotine as a drug. The press has also reported that the industry recently sweetened the pot for the states, by allocating to them a greater share of the annual contribution, and reducing the amount that would be available to other claimants.

If that proposal or any other is submitted to Congress, all Attorneys General of course can and will express our views. Because the civil liability and nicotine issues are so central, however, I believe all Attorneys General and the new Advisory Committee must ask themselves the following questions:

1. *Do we genuinely need to make concessions on civil liability to accomplish our most significant regulatory goals?* We do not have to negotiate away what we have already won--full FDA jurisdiction over the regulation of tobacco and specifically, over nicotine as a drug and cigarettes as a drug delivery device; the disclosure of enormous new evidence of industry

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culpability, including court access to hundreds of thousands of "privilege log" documents; the reopening of the FTC's tobacco advertising investigation; regulation of environmental tobacco smoke in the workplace; and continuing Department of Justice grand jury investigations of potential criminal misconduct. Before anyone agrees to compromise away the rights of others to compensation, let's look at whether the industry has really put something on the table that we cannot obtain any other way.

2. *The possibility of unlimited civil liability is a powerful tool to drive true industry reform. Should we be urging Congress to take it away?* Regulation is important, but regulations can change, enforcement resources can be cut back, and, particularly in today's global markets, the impact of any single nation's regulatory system is limited. We have to seriously question whether there will ever be a "safer" cigarette unless the industry continues ultimately to face the potential risk of unlimited civil liability.

3. *Is it wise to cut a "global settlement" deal with the industry before we know the full truth about the industry's culpability and the scope of the harm that has been caused?* Our position grows stronger every day as we uncover more secret documents and new whistle blowers come forth. Should we really cut a deal with the tobacco cartel before we get to the truth? Consider developments in just the last few weeks:

- Significant new information, obtained through the discovery process and never before available to private claimants regarding the tobacco industry's culpability, is coming out. Within the past month, the judge in Minnesota's lawsuit ruled that we had established a prima facie case of fraud, and ordered the industry to disclose, in camera, 150,000 "privilege log" documents.
- Recent reports indicate that senior tobacco company officials, including retired Philip Morris vice-president and research director Thomas Osden, have sought criminal immunity from the Department of Justice in exchange for turning state's evidence in pending grand jury investigations.
- Just last week, a new academic study more firmly establishing the link between secondhand smoke and the incidence of heart disease was released.

The industry's strategic and informational litigation advantage is eroding. Almost every day, we learn more about what the industry knew and when they knew it, and we learn more about the scope of the harm that has been caused. To reach a global liability settlement now might make good sense to the industry, but, for everyone else, the time to entertain serious discussions about liability limits would be when the full truth is out.

4. *Will any proposed changes in the civil justice system be fair?* To the best of our knowledge, the industry wants to preserve all defenses and wants to place new and unprecedented restrictions on the eligibility of large categories of potential claimants to recover, including future smokers, present smokers who have not yet manifested disease,

victims of secondhand smoke, and smokers' family members. Apparently, the industry also wants Congress to preempt the use of class action procedures, consolidated actions, lawsuits against suppliers and distributors, and perhaps lawsuits from health insurers and employers who have been subsidizing the true cost of tobacco for decades. No other industry in America has that kind of protection. After over 40 years of fraud, conspiracy and deception, should the tobacco industry be rewarded with special liability protections available to no other industry in America?

5. Do we have satisfactory answers to the tough questions about liability caps?

Early on, the Working Group chaired by Attorney General Blumenthal properly insisted that individual claimants' access to the tort system could not be limited. There have been discussions, however, throughout about an annual liability cap that will limit the industry's overall liability.

Global liability caps raise significant questions: Whose claims get priority? First come, first served? Will awards be prorated? Who will have authority to direct fifty state and hundreds of federal court jurisdictions what they can and cannot award? If the caps are reached, how are the rights of future claimants—individuals, third-party payers—to be preserved? Does delay in payment put unreasonable pressure on claimants to settle low? How do you adjust fund contribution levels to match liability experience? Should there be a sunset date in the near future so the impact of new information and new court decisions can be reassessed? Even with industry contribution levels at the highest conceivable level, these are very difficult questions; with the limited amounts discussed so far, they may be insurmountable. That is particularly true with a dangerous product that is staying on the market, with literally millions of potential claimants, and with all of the conflicts among the interests of all the various classes of present and potential victims.

6. Is the amount of money being offered sufficient to at least begin to compensate for the harm that has been caused? The Center for Disease Control estimates the harm caused by tobacco at \$97.2 billion annually—\$50 billion in health care costs, and \$47.2 billion in lost earnings, productivity, and early death. Those figures do not include the cost of perinatal care for the low-birthweight children of smokers or the treatment of disease caused by secondhand smoke, nor do they include the additional health insurance costs employers and individuals have to pay to deal with tobacco-related damages.

7. With the risk of unlimited potential liability removed, will the industry be able to absorb its payment obligation without a significant dent in either industry profits or shareholder equity? When the idea of a \$300 billion industry payment over 25 years was first reported, Philip Morris and RJR Nabisco stock soared. Wall Street tobacco analysts have estimated that liability protection could trigger a run-up in overall industry market capitalization by as much as a third. These projections indicate that the industry would simply absorb this obligation with a 50 cents-a-pack price increase. A \$1.50 per pack increase could generate \$600 billion over 25 years. And those estimates assume that the industry cannot shift any of this liability to their insurers.

After 40 years of fraud, conspiracy and deception by the tobacco cartel, justice demands that these companies be held financially accountable. Requiring smokers alone to bail out this industry is unacceptable. Any settlement must also impose appropriate financial sacrifice on the companies.

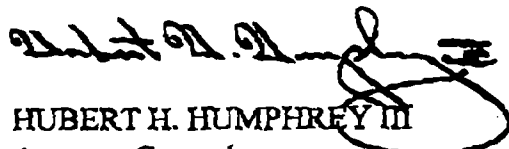
We should be ready to entertain now or in the future reasonable industry settlement offers of the state lawsuits that meet or address these concerns. We should not, however, agree to throw our support behind legislation which will compromise the rights of other parties, including both present and future claimants, unless and until we are satisfied that all of these concerns have been addressed.

Accordingly, I believe that the Attorneys General should insist on the following basic principles, if called upon to evaluate any proposed Congressional resolution:

1. Total, pervasive, and unabridged FDA control over tobacco, and specifically, over nicotine as a drug and cigarettes as a drug delivery device cannot be compromised. That regulatory process must be allowed to proceed unimpeded.
2. The industry must be willing to make an adequate up-front payment to the States for past damages, in addition to any ongoing annual payments to cover costs that are yet to be incurred. This payment must take into account the industry's full financial ability, including sale of assets, total insurance coverage, and debt or equity financing. An up-front payment means exactly that and does not mean structured over a period of time.
3. There must be full and complete disclosure of all documents relating to smoking and health, including those for which a claim of attorney-client privilege or work product has been asserted. There must be procedural mechanisms in place to insure that all of these documents are properly disclosed.
4. The availability of tort remedies should not be impaired or diminished. If the industry believes it must have greater economic predictability for a predetermined amount of time in order to reform, then an appropriate negotiating committee of private claimants may try to develop an appropriate yearly cap for all claims other than state Medicaid claims. Any such cap agreement should however contain a sunset date when the industry will again face full financial responsibility for its conduct.

I appreciate the opportunity to make my views clear.

Best regards,


HUBERT H. HUMPHREY III
Attorney General

LEVEL 1 - 6 OF 9 STORIES

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April 20, 1997, Sunday, Final Edition

SECTION: OP-ED; Pg. C07

LENGTH: 1055 words

HEADLINE: **Tobacco:** Getting the Right Deal

BYLINE: **Hubert H. Humphrey III**

BODY:

Now that a series of court setbacks and industry defections have brought the **tobacco** cartel to the negotiating table, a debate about the future of **tobacco** in America has shifted into high gear. However, before we rush to resolve the debate over the number one public health issue of our time on the **tobacco** industry's timetable, we should clarify the questions at the core of this historic debate.

Last week, it was reported that **tobacco** officials would consider making a limited payment to **tobacco** defendants in exchange for legal immunity in the future. This is hardly a surprise, and the fact that news of their proposal sent **tobacco** stocks into the stratosphere tells you a little about the beneficiaries of the deal. The fact is, prominent **tobacco** industry stock analyst Gary Black estimated that the industry simply could pass on the cost of their proposal to addicted smokers, and the resulting drop in earnings would be more than set off by an estimated 40 percent increase in stock prices that would pay huge windfalls to **tobacco** executives. In other words, the **tobacco** industry would make money settling the lawsuits and securing immunity from future lawsuits.

Now, one thing we all ought to be able to agree on is that the targets of law enforcement actions are not supposed to further profit off of the resulting sanctions. After four decades of lawbreaking and consequent carnage by **tobacco** officials, the American people would be justifiably angry if the outcome of those officials' illegal lies were to put more money in their pockets.

While it is clear that the **tobacco** industry's proposal did not serve the public interest, it is less clear what a good deal would look like. Getting the right deal is complicated by the fact that the rules that apply to other industries historically have not applied to the **tobacco** industry. This is an industry that has been granted unique privileges in this country. **Tobacco** is the only product granted legal status that kills when used as intended. It is the only product with an exemption from disclosing its dangerous ingredients -- or any ingredients for that matter. And nicotine is perhaps the most prominent legal drug to have escaped, until recently, FDA consumer protections.

Imagine allowing into the market a bottle of cough syrup that scientists said caused one in three consumers to die. Further imagine not being able to compare the contents or research on competing cough syrups, so you could know which was the safest choice. Now try to imagine the CEOs of the cough syrup manufacturers



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testifying before Congress that while thousands of their customers died using their products, a great many also enjoyed the taste, and so the companies should be allowed to deny the truth and perpetuate business as usual.

You might have a hard time even imagining this scenario because it's so absurd. It's as absurd as our national policy toward the **cigarette** industry. It's as absurd as the **tobacco** industry's proposal to get immunity from further legal actions while making an enormous windfall.

To inject some sanity in this debate about this uniquely privileged industry, we have to properly frame the debate. These are some of the fundamental questions that must be answered comprehensively in this debate.

Question 1. Does the settlement change the status quo so that **tobacco** products will be treated like comparable legal drugs?

Any proposal that perpetuates **tobacco's** special treatment in America will not address the long-term problems the product creates. The proposal must allow consumers to know what they are ingesting into their bodies as they do with any other product. And the FDA must have the responsibility it has with other legal drugs to protect consumers by requiring the removal of harmful substances, reducing the health risks of **tobacco** use and eliminating the scourge of children smoking. In short, will the settlement protect future generations of kids and help the 50 million Americans addicted to **tobacco**?

Question 2. Does the settlement require the **tobacco** industry to disclose the truth and stop lying?

Any deal that doesn't address past and future lying will not resolve the original consumer fraud allegations made in the states' cases. Regulators, health scientists and consumers must have the benefit of 40 years of hidden internal industry research and other documents on **tobacco** and health. Research about how to produce safer **cigarettes** needs to be made public so that addicts and those around them can enjoy the health benefits of a safer product. Finally, the mechanisms of past lying and conspiracy -- the **Tobacco** Institute and the Council for **Tobacco** Research -- must be disbanded so that they cannot continue to act as vehicles for concealing the truth.

Question 3. Are the sanctions strong enough to serve justice, compensate victims, and deter future lawbreaking?

In any law enforcement action, the sanction has to be strong enough to change the illegal behavior, address the harm caused and deter others from breaking the law. Clearly, the **tobacco** industry cannot be allowed to realize a financial windfall as a result of these law enforcement actions. It should pay an amount that is commensurate with the harm its illegal behavior has caused. That means the damages must be sufficient to help the 16 million nicotine addicts who will die prematurely because of their addiction and the taxpayers who pay their medical bills.

Finally, the amount of damages must be high enough that the **tobacco** industry has to do the things that lawbreakers facing justice frequently have to do to pay their debt to society -- make stockholders share in the pain, sell assets or make other financial adjustments beyond raising prices.



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The Washington Post, April 20, 1997

Are there other steps that need to be taken to further mitigate the effects of **tobacco** on the public health? Absolutely; I and public health advocates have a long list. But these lawsuits are not meant to resolve all **tobacco**-related issues. For any settlement to happen, negotiators must be able to answer these three core questions in the affirmative.

The writer, attorney general of Minnesota, was the first attorney general to sue the **tobacco** industry for consumer fraud and antitrust violations and is a participant in recent global settlement issues.

LANGUAGE: ENGLISH

LOAD-DATE: April 20, 1997



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td PLAINTIFF: MORE RELIEF THAN JOY 07/19/96

RICHMOND TIMES-DISPATCH
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DATE: Friday, July 19, 1996 TAG: 9607190384
PAGE: A-1 EDITION: City
SECTION: General LENGTH: 88 lines
ILLUSTRATION: PHOTO
SOURCE: By Chip Jones
Times-Dispatch Staff Writer
MEMO: (lko)

PLAINTIFF: MORE RELIEF THAN JOY
PHILIP MORRIS MIGHT APPEAL VERDICT IN SEX HARASSMENT CASE

The Kentucky woman awarded \$2 million yesterday in a sexual harassment case against Philip Morris USA said the verdict "feels like something's been lifted up off me."

Mary Wilson, a former supervisor at Philip Morris' Louisville cigarette plant, said she was more relieved than joyful after the jury's decision was announced.

"There had been such a weight on me," Wilson, 42, said of the monthlong trial. "There was a sigh of relief."

Wilson sought \$13 million in damages as compensation and punishment to Philip Morris for tolerating "an intolerable working environment."

Wilson's suit, filed in 1994, stemmed from a year she spent as a supervisor in the plant's tobacco conditioning department, known to workers as "the animal farm."

She charged that she was subjected to verbal and physical abuse by three male workers who didn't want to obey her orders. The case involved charges of pay inequity, promotions-for-sex and punishments for not providing sex.

The jury declined Wilson's request for punitive damages. Instead, it awarded her \$2 million in compensatory damages.

Philip Morris said it might contest the decision. "We have never paid any court-ordered damages for harassment charges," said Ellen Merlo, senior vice president of strategy and communications of Philip Morris Cos. Inc., the New York-based parent of Philip Morris USA.

The verdict from the seven-woman, five-man jury came shortly after midnight and followed more than 10 hours of sometimes rancorous deliberations, attorneys in the case said.

Kentucky law doesn't require a unanimous verdict in civil cases, but at least nine of 12 jurors must agree.

The vote was not unanimous, according to Wilson's attorney, Thomas E. Clay.

"Some jurors felt that Mary gave as good as she got," Clay said.

Other jurors wanted to award her more than \$2 million, he said.

The deliberations became heated enough for the jury to replace its foreman, Clay said.

Though his client won a \$2 million judgment, Clay said he might have alienated some jurors by asking for \$13 million. "Basically, I was just

Read the
highlighted parts!

This will
make any I
stomach turn -
And this company
won't legal
protection in
the settlement
that no other
industry in the
U.S. has
and is willing
to fund litigation
legal fees to
keep fighting.
Why would anyone
in their right
mind accept that
Philip Morris?
fessme

trying to shoot for the moon."

Some Richmond attorneys wondered yesterday why Philip Morris didn't settle * before the case went to trial. Typically, they said, corporations try to keep such high-profile cases out of court — and the news.

But Harris D. Butler III, a Richmond attorney who has represented clients in harassment cases, said, "Some employers — and Philip Morris kind of has a reputation in this regard — take the position of 'prove it.' " On the flip side, with the emotional toll of suing for on-the-job harassment, many women give up or accept "chump change" settlements, he said.

"It's not only a potentially expensive investment, but also an emotional investment," he said. "You can have some of the best cases in the world and you're still going to be attacked."

An out-of-court settlement still could be reached in the Louisville case. * "We're always willing to smoke the peace pipe with them," Clay said.

Wilson's case was the first of two sexual harassment lawsuits filed against Philip Morris in Louisville. Five of Wilson's co-workers have charged that * male managers rewarded female workers with promotions in return for sexual favors.

Richmond attorney David Baugh, a former federal prosecutor, found it interesting that a jury in Kentucky — like Virginia, a tobacco-growing state — ruled against Philip Morris. *

"It's not exactly one of those wild liberal states — not like New York or California," Baugh said.

The Louisville plant, which employs 2,400 people, is Philip Morris USA's * third largest production center. The largest one is in South Richmond; overall, the company employs about 8,000 people here.

The Louisville jury heard testimony from dozens of plant supervisors, * employees, human relations professionals and medical specialists. Wilson charged that her male manager transferred her to the rough-and-tumble conditioning department after she rebuffed his sexual advances.

In a statement, Philip Morris noted that the jury had rejected two of * Wilson's major claims about sexual harassment and working in a "hostile environment."

The company said it would challenge the verdict that Wilson had been forced out. Because she receives medical benefits, the company said, Wilson remains on its payroll.

But her attorney said the jury decided Wilson was forced out by a year of harassment and could never be expected to return to work there.

Wilson, for her part, said yesterday she had simple plans. "I have housework I have not done. And I'm going to talk to my children."

KEYWORDS: COURT VERDICT SEX HARASSMENT PLANT *
LOUISVILLE LAWSUIT RULING

td CHARGES OF SEX FOR PROMOTIONS 07/07/96

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RICHMOND TIMES-DISPATCH
Copyright (c) 1996, Richmond Newspapers, Inc.

DATE: Sunday, July 7, 1996 TAG: 9607070126
PAGE: A-1 EDITION: City
SECTION: General LENGTH: 233 lines
ILLUSTRATION: PHOTO
SOURCE: By Chip Jones
Times-Dispatch Staff Writer
DATELINE: LOUISVILLE, Ky. *

MEMO: (ljb)

CHARGES OF SEX FOR PROMOTIONS
KY. LAWSUITS PIT 'LOUISVILLE SIX' VS. PHILIP MORRIS

Allegations of sex-for-job promotions are peeling back a curtain of secrecy at Philip Morris USA, the cigarette giant known for closely guarding its privacy.

For the last three weeks in a Kentucky circuit court, six former or current front-line supervisors from America's leading tobacco company have detailed shocking charges about the way the Louisville cigarette plant awarded pay, promotions and job assignments in some cases.

In two civil lawsuits filed against Philip Morris in Jefferson County, the six workers are seeking unspecified monetary awards for alleged "emotional distress, humiliation and embarrassment" suffered while working at the manufacturer.

Philip Morris has roundly denied the allegations, but company officials declined to elaborate when contacted last week.

Among the allegations being heard by Judge Ellen Ewing and a 14-person jury as well as made in testimony and court papers:

* For decades, male managers and supervisors in Louisville have rewarded women willing to have sex with them with promotions and employment protection when the company has cut jobs — especially in 1994, when Philip Morris trimmed 10 percent of its work force in Louisville, Richmond and Cabarrus County, N.C.

* Sexual harassment is routinely practiced in the plant, often within view of other workers and administrators.

* Philip Morris operates a secret, in-house escort service — known as "the thoroughbreds" or "the stable" — that arranges dinner dates for executives visiting from its far-flung operations, including Richmond.

The thoroughbreds allegedly have been in demand in May, when the company shuts down its U.S. plants — including those in the Richmond area — to enjoy the Kentucky Derby, the first leg of the Triple Crown of horse racing.

* Because of these longstanding practices, all employees — men and women — are victims of job and pay discrimination.

The first case to come to trial — Mary Wilson vs. Philip Morris USA — involves an 18-year employee and plant supervisor who filed a sexual harassment suit in 1994. The trial, which will enter its fourth week tomorrow, centers on Wilson's allegations that she was transferred to work in one of the plant's toughest departments because she refused to have an affair with a male manager.

In the second lawsuit, which was filed May 28, five women supervisors — Genova Brooks, Cheryl Farris, Brenda Miller, Cherria Shobe-Palmer and Ada Wallace — presented a list of no-nos in the modern workplace:

"Sexual assaults, unwanted pressure for sexual favors, unwanted deliberate touching . . . cornering and pinching, unwanted sexual looks or gestures, unwanted letters, telephone calls and material of a sexual nature, unwanted pressure for dates, unwanted sexual teasing, jokes, remarks or questions."

In a statement issued by New York spokeswoman Karen Daragan, Philip Morris said it "takes pride in its long-standing and rigorous commitment to equal employment opportunity and is fully committed to providing a professional work environment" free of any "conduct which can be considered harassing or coercive."

Daragan would not say how many women work in salaried positions in Louisville. But Philip Morris introduced evidence it said shows that Louisville managers tried to address problems once they surfaced. "The company has a stringent policy prohibiting any sort of harassment, including sexual harassment, and does not tolerate misconduct by its employees," the

]

company stated.

In their lawsuits, the six women have charged that some departments at the 2,400-worker plant have operated under a patriarchal system that, for decades, has rewarded women for satisfying the sexual appetites of some male bosses, while punishing women who refused to play along.

Wilson's suit sparked the complaint filed by the five other salaried employees — grievances believed to be the largest single sexual harassment action against Philip Morris, which is the Richmond-area's largest private employer.

"We decided we had to come forward, or she'd fold under the pressure," said Wallace, a supervisor at the plant for 14 years until the 1994 layoffs. Wallace said in an interview that only after Wilson sued, did other women — many of whom are still at the plant — start comparing notes on their experiences.

The women said they sued the company because nothing changed after they complained about on-the-job treatment. In their complaint, the women said the Louisville plant had a "sexually hostile work environment."

The six women said the atmosphere was fostered by the company's long-held policy of secrecy surrounding its cigarette-making operations.

"Philip Morris had a strong wall of secrecy," Wallace said. "You could not discuss your salary, you could not discuss (product) defects. We were friends, but we never told each other what we were making, because you could get fired."

The Louisville cases present Philip Morris with a legal challenge that has more twists and turns than the Ohio River that flows past the city.

For starters, Philip Morris is battling more than 100 smoking-liability cases. Five federal grand juries are investigating the tobacco industry. More recently, states have sued to recover billions of taxpayer dollars spent each year to treat smoking-related illnesses.

In addition, tobacco companies are on the verge of facing a set of regulations by the U.S. Food and Drug Administration — restrictions that have been supported by President Clinton and opposed by Bob Dole, the presumed Republican presidential candidate.

While the smoking-liability cases usually turn on questions of health and science, the Louisville lawsuits have opened a different chapter in Philip Morris' history.

The Louisville cases also follow other high-profile harassment cases, including one at Mitsubishi's car-making plant in Illinois where the federal Equal Employment Opportunity Commission has filed a class-action lawsuit.

With annual revenue of \$32 billion at stake in its worldwide cigarette business, Philip Morris officials have cited the need to protect proprietary processes from the probing eyes of competitors eager to cut into the company's dominant market share in the United States.

Shobe-Palmer, who is the daughter of a Jefferson County circuit court judge, acknowledged in an interview that Philip Morris has been successful in beating back lawsuits about whether cigarettes kill people. But the company has never faced sexual harassment suits like those filed in Louisville, she said.

* * *

Mary Wilson vs. Philip Morris USA involves her time in the Louisville plant's tobacco conditioning department, otherwise known as "the pit," "the dog pound" and "the animal farm," according to the suit.

Its tough reputation aside, the tobacco conditioning department plays a major role in the production of up to 310 million cigarettes per day. Workers there are the keepers of the tobacco gate, opening barrels of leaf headed to the factory and applying steam to moisten it for cigarettes.

Wilson, 42, claims that she was ordered into the department only after rebuffing the sexual overtures of her supervisor, identified in court papers as Bob Weber.

"He would walk up and put his hands in my ear or blow in my ear," Wilson said in her sworn deposition. "Or if I'm sitting at the desk and he comes in, and I'm working on the computer, he would put his hands on my leg."

Under questioning, she said this happened about 20 times.

In its defense, Philip Morris questioned Wilson's earlier affairs with two * company employees, including one in top management. Wilson countered that she never received promotions or assignments from those old relationships.

Philip Morris said it acted promptly on her complaints about three men in * the conditioning department. In a video deposition shown to the jury, the company's former affirmative action specialist, Barbara Crockett, said she reassured Wilson that the company would stand behind her.

Wilson didn't want to leave the department, Crockett testified, but was "adamant that she wanted to deal with this issue . . . with the support of the company."

But Crockett also testified that she she believed Wilson had been the victim of on-the-job harassment.

Wilson's civil complaint charges that she was hugged against her will and "physically threatened." Wilson also charged that among the abusive remarks she endured from male workers were: "I want to lick you all over," and, "If you weren't a female, I would have done put a foot in your ass."

Although the men denied making the remarks, Crockett testified, they were ordered to attend sensitivity-training classes. However, the men did not receive written reprimands.

While Philip Morris has dug into Wilson's past, her attorneys have done * some digging, too. Clay and fellow attorney James M. Bolus Jr. said they have questioned 55 former and current Philip Morris employees, including some in * Richmond.

Among the Richmond-area employees who have emerged in the case is Derrick Johnson, manager of the company's second largest local plant, Stockton Street in South Richmond.

Johnson was named in the second lawsuit by Farris, a longtime employee who charged she was harassed for more than a decade as he "repeatedly approached (Farris) regarding sexual favors he required."

Johnson was later transferred to Richmond. Reached at the Richmond plant Wednesday, Johnson said he had "no comment at all" about the allegations.

Farris has testified that Johnson touched her buttocks "10,000 times" over the 10-year period — or about three times a day.

Why didn't she just quit? "I was a divorced mother with a child with a learning disability that costs money to educate," she said. "I had to have that job."

Whatever the outcome of Wilson's trial, the testimony and supporting documents have provided insights into a part of one of America's most closely watched — and, in business circles, most admired — corporations.

The female plaintiffs say that Philip Morris' culture of secrecy and * defensiveness is aided by employees who are deeply vested in Philip Morris' * lucrative stock option plans and paid comparatively top-dollar salaries.

"When you have a company as powerful as Philip Morris, and the kind of * money they pay to their employees, those employees will do an awful lot to hold on to their good-paying jobs," said Miller, a switchboard operator and general supervisor during her 13 years with Philip Morris. *

Miller said she and the other five women suing Philip Morris talked * privately for years about the way some women were encouraged by their bosses

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to date visiting executives, managers, clients, vendors and major stockholders. The "thoroughbreds" could decide for themselves what they did after dinner and drinks, the women said. But turning down requests to entertain could hurt their careers, they said.

"I was told by my supervisor that it would affect my (job) performances if I did not cooperate," Farris said.

Farris and Miller said they never became full-fledged thoroughbreds. But both said they were recruited as candidates for the extracurricular assignments.

Farris described an evening when she got a desperate call from a friend who had been asked to entertain a manager from Philip Morris' Richmond operations.*

"They needed someone to take him out to dinner, and she couldn't find anyone else to do it," Farris said. "She was going to be in some big time trouble, and it would affect her job, so she asked me."

Until then, Farris had heard only rumors about "the stable" of female employees meeting VIPs. After her friend pleaded for help, Farris said she agreed to spend one hour having drinks at The Seelbach, a downtown hotel overlooking the Ohio River.

Farris said she wouldn't give the man her phone number. She recalled meeting the Richmonder for a couple of drinks, then excusing herself to report for her shift at the plant.

The visiting manager tried to stop her. "He said, 'Come up to my room,'" Farris recalled.

When she turned him down, the manager said he could cover for her at the plant. But, she said, he had an ulterior motive.

"He said, 'Come upstairs and let me perform for you, then you can give (her friend) a good report on me. The next time I proposition her, she'll go for it.'"

When VIPs toured the Louisville operations -- often at the local annual * meeting in the spring -- "certain females were asked to come to the front of the floor to meet the shareholders," Farris said. "I always asked, 'Why do I have to go there?'"

She said she didn't like being window-dressing, nor did she like seeing older women shunted to the rear of the plant to be kept out of sight.

Today, the Louisville Six share their war stories like shell-shocked * veterans. Indeed, one of the plaintiffs -- Shobe-Palmer -- is on medical leave from Philip Morris because of the emotional wallop of the case. *

"You didn't know Mary (Wilson) before this," Wallace said. "I knew her, and she was a vibrant, and very self-assured type woman. And we're working back toward this, but she's not even close. . . . Her depression changed her personality."

Wilson filed her lawsuit a year after taking medical leave from Philip * Morris in 1993. *

"She had dropped out of sight," Wallace recalled. "She wouldn't come out of the house, and wouldn't talk to anyone on the phone. . . . We know now it was depression. She was trying to face it all by herself, trying to take on the world."

KEYWORDS: SEX EMPLOYMENT HARASSMENT TOBACCO INDUSTRY

Tobacco Companies' Violence Against Women

August, 1997

"Women have united with success to put the issues of drinking and driving, breast cancer and domestic violence on the national agenda. In that tradition, women's and girls' organizations all over the country are now working together to oppose the tobacco industry's targeting of women and girls." American Medical Women's Association, 1997

Smoking Affects All Women through Use, Second-Hand Smoke, and Health Costs

About 22 million women 18 years and older and at least 1.5 million adolescent girls in the United States smoke. (Centers For Disease Control and Prevention. *Cigarette Smoking Among Adults --United States, 1993. Morbidity and Mortality Weekly Report 1994; 43(50):925-930.*)

Almost half (47%) of adult U.S. smokers are women. (Centers for Disease Control and Prevention. *Cigarette Smoking Among Adults-United States. Morbidity and Mortality Weekly Report, 1994.*)

Smoking rates among U.S. women over 18 years by race include: White: 25.7%; African American: 25.4%; Hispanic: 17%; American Indian/Alaskan Native 36.2%; Asian/Pacific Islander: 7.8%. (Centers for Disease Control and Prevention Source page on Tobacco Adult Info Prevalence combined information from 1987-1991, July 1997.)

The less formal education a woman receives, the more likely she is to be a smoker. In 1990-1991, 59% of white women between the ages of 18-44 who did not finish high school were smokers; 36% of female high school graduates were smokers; 25% of white women with some college were smokers; and only 11% of women who graduated from college were smokers. (Centers for Disease Control and Prevention, Office on Smoking and Health, Unpublished Data)

More than 400,000 Americans die each year due to smoking related illness. (Centers for Disease Control and Prevention. Smoking-attributable mortality and years of potential life lost--United States, 1990. *Morbidity and Mortality Weekly Report 1993;42(33):645-8.*)

The Center for Disease Control estimates that in the United States the total economic burden of cigarette smoking is more than twice as high as the direct medical costs which were estimated at \$50 billion in 1993. (Centers For Disease Control and Prevention. Medical Expenditures Attributable to Cigarette Smoking- United States. *Morbidity and Mortality Weekly Report, July 8, 1994.*)

Tobacco Companies Hook Most American Women While Still Girls

One fourth of 17 and 18 year old girls smoke. (U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General, 1994.* Atlanta Georgia: U.S. Department of Health and Human Services, Public Health Service, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health)

Among women who smoke, 87% began smoking before 18 years of age. (American Medical Women's Association)

Smoking among teenage girls in the U.S. has increased in the last 5 years. (*Monitoring The Future*. University of Michigan Institute for Social Research. December 19, 1996.)

Women are beginning to smoke at younger ages than in the past, increasing their risks of developing smoking related diseases. (U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General*, 1994)

Smoking is a Growing Global Problem for Women

Female deaths due to smoking worldwide are increasing and will more than double over the next 30 years. By 2020, more than a million women will die every year from tobacco related diseases.” (*Women and Tobacco: International Issues* by Judith Mackay. Journal of the American Medical Women’s Association, January/April 1996. Volume 51 (1&2) p.48-49.)

Lung Cancer Among American Women is Skyrocketing

In 1986, lung cancer surpassed breast cancer as the number one cause of cancer death among women. (Ernster, Virginia. *Female Lung Cancer*.)

Since the 1950’s lung cancer rates among women have increased by more than 550%. (Ernster, Virginia. *Female Lung Cancer*. Annual Review of Public Health, 1996. Volume 17: 97-114.)

In 1950 lung cancer rates among women were at 3%, now one quarter of all women’s cancer rates are due to lung cancer. (Centers For Disease Control and Prevention. Cigarette Smoking Among Adults - United States, 1993. *Morbidity and Mortality Weekly Report* 1994; 43(50):925-930)

The American Cancer Society estimates that in 1994, lung cancer killed 64,300 women while breast cancer killed 44,300 women. (American Cancer Society. *Cancer Facts & Figures--1996*. Atlanta (GA): American Cancer Society, 1996.)

Research Suggests Smoking Increases Risk of Breast Cancer

When examining a gene that may be linked to breast cancer, post-menopausal women with that gene and who smoked more than one pack of cigarettes per day were about four times as likely to develop breast cancer as their non-smoking counterparts. Pre-menopausal women with that specific gene who smoked had 11 times the risk of developing breast cancer. (*Smoking Increases Breast Cancer Risk* on www.msnbc.com, 1997. Report by Suzanne Aolfo on a study in Journal of the National Cancer Institute, 1997.)

Smoking Harms Women’s Reproductive Health

Smoking has a damaging effect on women’s reproductive health and is associated with reduced fertility and early menopause. (U.S. Department of Health and Human Services, Public Health Service. *The Health Benefits of Smoking Cessation*)

The fertility rates of women who smoke are about 30% lower than those of non-smokers. (Baird DD, Wilcox AJ. Cigarette Smoking Associated with Delayed Conception. *JAMA* 1985.)

Smoking during pregnancy is associated with miscarriage, intrauterine growth restriction, premature delivery, and infant death. (Oncken, Cheryl A. *Toxicity and Physiologic Effects of Nicotine During Pregnancy*. March 21-23 1997.)

Smoking causes cervical cancer, bladder cancer, and kidney cancer. (Napier, Kristine et al. *Cigarettes: What the Warning Label Doesn't Tell You*. American Council on Science and Health. 1995)

Mothers' Smoking Hurts Their Children's Health Too

Women who smoke during pregnancy subject themselves and their developing fetus and newborn to special risks, including pregnancy complications, premature birth, low birth weight infants, stillbirth, and infant mortality. (U.S. Department of Health and Human Services Public Health Service. *The Health Benefits of Smoking Cessation*,)

Between 8,000 and 26,000 children are diagnosed with asthma every year in the United States because their mothers smoke at least 10 cigarettes a day. Between 200,000 and 1 million asthmatic children have their condition worsened by exposure to second hand smoke. (U.S. Environmental Protection Agency, Office of Research and Development, Office of Air and Radiation, *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*.)

Both intrauterine and passive smoke exposure to secondhand smoke after pregnancy increase the risk of SIDS, the leading cause of death in children between the ages of one month and one year. (Schoendorf K.C. 1992. *Relationship of Sudden Infant Death Syndrome to Maternal Smoking During and After Pregnancy*. *Pediatrics* 1992; 90:905-08.)

Women with HIV who smoke during pregnancy are more likely than non-smokers to pass the virus on to their babies. One in three infected women who smoke will pass on HIV to their children as opposed to 1 in four non-smoking women infected with HIV. (Maternal Smoking Found to Raise HIV Risk in Fetus. Reuters 1997, April 1. Report on study in the *Journal of Acquired Immune Deficiency Syndrome and Human Retrovirology*. April, 1997)

Children of smokers are more likely to have pneumonia and bronchitis. (Centers for Disease Control and Prevention. *Morbidity and Mortality Report Weekly*, 1991.)

According to new studies, newborns of smoking mothers carry a marker in their blood which may indicate heightened vulnerability to asthma and other allergic disease, researchers say. (*Smoking Mothers, Asthma Prone Babies*. Reuters 1997, May 22. report on study by Dr. Machado Fernando. 1997. Federal University in Santa Catarina, Brazil.)

Women (and Their Offspring) Exposed to Second Hand Smoke also Suffer

High exposure to second hand smoke nearly doubles a woman's risk of having a heart attack. (Kawachi, I., et al. *A Prospective Study of Passive Smoking and Coronary Heart Disease*. *Circulation* 1997 May 20; 95(10):2374-2379).

Women exposed to occasional second hand smoke have a 58% greater risk of heart disease than women who are not subjected to second hand smoke. (Kawachi, I., et al. *A Prospective Study of Passive Smoking and Coronary Heart Disease*.)

The Environmental Protection Agency estimates that passive smoking causes 3,000 deaths each year from lung cancer alone. (*Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*. 1993 study by the Environmental Protection Agency)

Non-smoking pregnant women exposed to second hand smoke at work have an increased risk of miscarriage or stillbirth. (Ahlborg G, Bodin L. *Tobacco Smoke Exposure and Pregnancy Outcome Among Working Women*. American Journal of Epidemiology 1991; 133: 338-47.)

Secondhand smoke constituents can be found in the urine and semiotic fluid of non-smoking pregnant women exposed to secondhand smoke. (Matsukura S. Taminato T, Kitano N, et al. *Effects of Environmental Tobacco Smoke on Urinary Cotinine Excretion in Nonsmokers; Evidence for Passive Smoking*. New England Journal of Medicine 1984; 311: 828-32 and Anderson BD NgKJ, Iams JD, Bianchine JR. Cotinine in amniotic fluids from passive smokers. Lancet 1982; i:791-2)

Maternal exposure to secondhand smoke for one hour or more per day is associated with an increase risk of miscarriage. (Windham GC, Swan SH, Fenster L. *Parental Cigarette Smoking and the Risk of Spontaneous Abortion*. American Journal of Epidemiology 1992; 135: 1394-1403)

Infants of non-smoking mothers exposed to secondhand smoke during pregnancy are of lower birth weight. (Mathai M, Vijayasri R, Babu S, Jeyaseelan L. *Passive Maternal Smoking and Birth Weight in a South Indian Population*. British Journal of Obstetrics and Gynecology. April 1992; 99:342-343)

Women exposed to secondhand smoke at work have an increased risk of delivering a small-for-gestational infant. The risk increases consistently with weekly duration, number of weeks, and intensity of exposure. The increased risk associated with heavy exposure to secondhand smoke was close to that of active smoking of 1-5 cigarettes a day. (Fortier I, Marcoux S. and Brisson J. *Passive Smoking During Pregnancy and the Risk of Delivering a Small-for-gestational-age Infant*. American Journal of Epidemiology 1994; 139:294-301.)

Smoking (and related Harm) Gender Gap is Now Eliminated in the U.S.

The gap in smoking rates between men and women has narrowed dramatically in recent years. While the number of male smokers has dropped 24% between 1965 and 1993, the number of female smokers has dropped only 11% in the same period. (Giovino GA. Schooley MW, Zhu BP, et al. Surveillance for Selected Tobacco Use Behaviors --U.S. 1990-1994. Morbidity and Mortality Surveillance Summary - 3, 1994.)

Young girls begin smoking as early and frequently as boys do. (*Stop Teenage Addiction to Tobacco's Tobacco-Free Youth Reporter*. March 1997, Volume 9(1):11). In 1993, 33.6% of girls and 31.8% of boys grades 9 - 12 had smoked during the past month. Centers for Disease Control and Prevention, *State Tobacco Control Highlights 1996*.

Before the 1964 Surgeon General's report, 40% of men smokers and 18% of women smokers could expect to die early from smoking related illnesses. Now, 57% of male smokers and 48% of women smokers can expect to die early from smoking related illness. (Shopland, Don, *Changes in Cigarette Related Disease Risk and their Implication for Prevention and Control*. National Cancer Institute, 1997.)

In 1996, 16% of all American girls ages 14 - 19 had smoked a cigar. "The trend is catching on among younger men and women. Celebrities like Arnold Schwarzenegger, Demi Moore, Vanessa Williams and even Michael Jordan have been seen chomping on a cigar." (Associated Press from a report by the Center for Disease Control and Prevention. May 23, 1997)

Tobacco Use Harms Women More than Men

Smoking is riskier for women than men. When compared to their non-smoking counterparts, female smokers had twice the relative risk of dying from respiratory diseases as their male peers. Women smokers have a higher relative risk of dying from vascular disease when compared with male smokers. All this, even though the women studied smoked less on average, started smoking later, and didn't inhale. (*Smoking Riskier for Women than Men*. Reuters 1997, May 22. Reporting of study by Dr. Eva Prescott et al. at the Institute of Preventative Medicine, Copenhagen, Denmark)

Tobacco Use Drives Up Health Costs, a Special Burden to Women

Smoking is responsible for approximately 7 percent of total U.S. health care costs. Smoking alone cost the U.S. economy more than \$50 billion in direct medical costs in 1993. (*U.S. Centers for Disease Control and Prevention*)

Maternal smoking is associated with significantly increased child health care expenditures.

(Stoddard, Dr., Jeffrey and Gray, Bradley, *Maternal Smoking and Medical Expenditures for Childhood Respiratory Illness*. American Journal of Public Health. February 1997, Volume 87, No. 2.)

For children, respiratory problems from second-hand smoke cost \$661 million in annual medical expenditures in 1987, representing 19% of all expenditures for childhood respiratory conditions. (Stoddard, Dr., Jeffrey and Gray, Bradley, *Maternal Smoking and Medical Expenditures for Childhood Respiratory Illness*.)

Women Quitting Smoking Saves Money as Well as Lives

For every dollar invested in smoking cessation for pregnant women, about six dollars are saved in neonatal intensive care costs and long term care associated with low birth weight deliveries. (Stoddard, Dr., Jeffrey and Gray, Bradley, *Maternal Smoking and Medical Expenditures for Childhood Respiratory Illness*.)

The health benefits of quitting smoking far outweigh any risks from weight gain caused by quitting smoking. Research shows that then average weight gain after quitting smoking is only five pounds and it can be controlled through diet and exercise. (U.S. Department of Health and Human Services. *The Health Benefits of Smoking Cessation*. Rockville, MD. U.S. Department of Health and Human Services, Public Health Service)

Tobacco Companies Woo Women

Young women and girls take up smoking for weight control, stress management, and to appear grown up; they are particularly vulnerable to tobacco advertising campaigns. (*Journal of the American Women's Medical Association*. January/April 1996. Volume 51 (1&2).)

Almost two-thirds (63%) of current and former women smokers say that peer pressure and social status is the reason they began smoking. (1989 *Adult Women's Survey on Tobacco Use*, Minnesota Department of Health. November 1990)

Six years after the introduction of Virginia Slims and other "women's cigarettes," the number of young girls who smoke had increased by 110%. (Pierce, John, et al, *Smoking Initiation by Adolescent Girls, 1944 through 1988*, JAMA, February 23, 1994)

When cigarette advertising was banned in the broadcast media in 1971, Virginia Slims poured money into magazines, newspapers and Sunday supplements, making it the biggest spender in print. (O'Keefe, Anne Marie, Pollay, Richard, *Deadly Targeting of Women in Promoting Cigarettes*. Journal of the American Women's Medical Association January/April 1996. Volume 51 (102) p. 68.

"Dakota: intended for 18-20 year old Caucasian females with no education beyond high school who worked in factory or service jobs". An RJR leaked memo described the typical Dakota smoker's favorite pastime as attending drag races or motorcross races, or just being with a boyfriend and doing whatever he is doing. (*Tobacco Stains* by Sharon Lerner, *MS. Magazine*. November/December 1996, p. 48.)

Tobacco Funding for Women's groups; Buying Silence or Giving Back?

Philip Morris spent \$3 million on contributions to women's causes between 1990 and 1995 and supported more than 100 women's groups in the last year alone. (*Tobacco Stains* by Sharon Lerner)

RJR spends less directly through women's groups but gives more to programs focused on education, economic develop, and selected community programs. (*Tobacco Stains* by Sharon Lerner.)

According to Ms. Magazine, national women's groups that accepted tobacco money in 1996 included: American Association of University Women, Catalyst for Women, The League of Women Voters, The National Coalition of 100 Black Women, the NOW Legal Defense and Education Fund, the Women's Legal Defense Fund, the Women's Research and Education Institute, The Asian Pacific American Women's Leadership Institute in Denver, MS. Foundation for Women, Center for American Women and Politics at Rutgers, National Women's Political Caucus, and the list goes on. (*Tobacco Stains* by Sharon Lerner.)