In the News

The Dallas Morning News

Senators urge more money in tobacco deal

Proposal affects industry too little, witness says

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By George Rodrigue / The Dallas Morning News

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But the lobbying triumph is also an argument for accepting the settlement instead of waiting fruitlessly for Congress to pass the perfect deal, said Mississippi Attorney General Mike Moore.

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

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

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

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

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

That struck a chord with Mr. Hatch.

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

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COMMENTARY

By Mike France & John Carey

TOBACCO: DON'T JUMP AT THIS DEAL

America now has an unprecedented opportunity to save millions of lives. With public outrage at Big Tobacco hitting all-time highs, and the industry's power sinking to new lows, it appears to be politically feasible—for the first time ever—to impose a powerful regulatory regime on cigarettes, one of the world's deadliest consumer products.

But there's a risk that the country will blow this historic opportunity. Well-publicized peace talks are now under way over the future of tobacco. Unfortunately, these negotiations—and the public debate—are dominated by three groups that do not necessarily have society's best interests at heart: the industry, plaintiffs' lawyers, and attorneys general from 24 states that have sued manufacturers. Rather than focusing on the regulation of tobacco, these players have put the bulk of their energy into developing a $250 billion to $300 billion fund that would compensate the industry's alleged victims. It's clear what they find appealing about such a deal: Plaintiffs' lawyers stand to make hundreds of millions; the industry wants to limit its liability and stabilize its stock valuations; and the state AGs will be able to crow about the billions they have won for their states.

TEMPTATION. But these peace talks are worrisome. While it's tempting to grab the industry's billions now, the price for such a mammoth compensation fund will be far too high. In exchange for a share of tobacco's profits, the powerful lawyers at the bargaining table may have to trade off the right to fully regulate everything from tobacco advertising to nicotine content. While the attorneys would obtain tougher limits than those that currently exist, there are already signs that they would fall far short of what is needed to seriously slash tobacco use. Then America's hands would be tied, since the negotiators want to cement their deal in congressional legislation. Says former Food & Drug Administration Commissioner David A. Kessler: "We can't afford to buy into a system that looks good today but may turn out not to be effective."

Kessler is right. While there may come a time when settlement talks are appropriate, now isn't it. The public-health community, unprepared for the speed with which Big Tobacco's political power has crumbled, still has to do some serious thinking about the right way to cut tobacco use. Moreover, the wrong parties are at the table. The industry, the AGs, and the plaintiffs' lawyers share a strong financial interest in striking a deal that focuses on compensating Big Tobacco's victims rather than regulating it in the future. While paying money to smokers and states that have shouldered huge Medicaid bills may one day be desirable, it isn't the top priority.

Instead, it is far more important to take immediate steps to raise cigarette taxes, curb tobacco advertising, and accelerate the campaign to ban smoking in public places. Only after these goals have been achieved should the issue of a compensation fund be addressed. "If there is only a limited amount of money available, it's always better to use that money to prevent future loss than to compensate people for past loss—as cruel as that choice may seem to be," says Jeffrey O'Connell, a professor at the University of Virginia law school and expert in injury-compensation plans.

Taking tougher steps to prevent future smoking is possible right now—without conceding anything to the industry. An enormous legal hurdle to regulation fell on Apr. 25, when a North Carolina federal judge declared that the FDA has jurisdiction over tobacco. If the decision is upheld on appeal, as many lega[...] tack on te[...] dramatic f[...] of nicotine [...] with the i[...]

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The lawyers at the table are focusing too much on the [...]

ILLUSTRATIONS BY JEFFREY SMITH

many legal experts expect, the FDA could accelerate its attack on teenage smoking—and begin thinking about such dramatic future steps as requiring reductions in the amount of nicotine in cigarettes. Before striking an irreversible deal with the industry, let's see what the FDA can do first.

What, specifically, should be done? Looking forward, policymakers should be guided by some fundamental principles. University of Michigan tobacco policy expert Kenneth E. Warner, for instance, advocates four key rights: All Americans have the right to breathe air not tainted with tobacco smoke at work and in public places; addicted smokers deserve more help to quit; children and teenagers have the right to an environment free of ads and other inducements to use tobacco; adults who are well-informed about all the risks should have the right to use tobacco.

We would add to Warner's list another important right, dear to the hearts of Americans: the right to sue manufacturers of dangerous products.

TAX HIKE. We must, of course, be careful to respect freedom of choice, also a cherished American value. If restrictions are placed on people's smokes, critics wonder, what will be next? "Before I jump on the tobacco bandwagon, I want to know why aren't caffeine, chocolate, sugar on there, too," grumbles Lawrence W. Schonbrun, a Berkeley (Calif.) attorney who fights excessive class-action lawyers' fees.

Keeping all these principles in mind, here are some steps worth taking. For starters, the most effective way to prevent smoking is to raise the tax on cigarettes. A 10% rise in the cost of tobacco sends sales down 4%—and among youths, the drop is higher, perhaps as much as 12%. "Kids are sensitive to price, if not to risk," explains health economist Willard G. Manning of the University of Minnesota (table, page 112). We should heed the recommendation of smoking foes for a major nationwide tax increase—about $2 per pack, to roughly $4.50.

From an international perspective, that's still not very high: A pack costs $4.80 in Britain. But it would be enough to discourage children and push millions of adults to cut back or quit. Admittedly, new taxes are a hard sell in Congress, but polls show that Big Tobacco is a pariah to a majority of Americans, so cigarette taxes may be a breed apart. Some key Republicans have signed onto a bill that would modestly raise cigarette levies, and a record number of states are considering boosts. The billions of dollars raised could be used to fund education programs and hard-hitting antismoking campaigns. Such revenues might eventually fall as consumption does, but that's the point, after all.

Another effective tool: strict curbs on ads and promotions aimed at kids. Right now, America's youth are bombarded with merchandise offers, clever ads in magazines and on billboards, and alluring store displays—a barely regulated free-for-all. That's just what the FDA was trying to curb when it announced new ad restrictions last fall. U.S. District Judge William L. Osteen blocked the FDA's ad limits in his recent ruling, but the U.S. Supreme Court on Apr. 28 endorsed the government's right to regulate commercial speech for the public good—a sign that some restrictions on tobacco marketing are likely to be tolerated.

That's welcome news: More than 90% of current smokers begin puffing before the age of 18, and in recent years such enticements as cartoon characters and free merchandise have helped boost smoking by kids. Typically, they're well aware of the hazards of smoking, and they never intend to make it a lifelong habit. But before they reach adulthood, they're hooked. "The big problem is that kids underestimate the addictive power of nicotine," explains Neal Benowitz, an addiction expert at the University of California at San Francisco Medical School.

The message that smoking is cool also comes from secondary-source promotion through the mass media, such as Hollywood movies. There is a deliberate industry-funded effort to get cigarettes placed in movies and TV shows. "We're getting killed in the entertainment media," laments Gregory Connolly, director of the tobacco-control project at Massachusetts' Public Health Dept. It's a tough problem to solve, given the First Amendment. But it's worth trying to jawbone Hollywood into deglamorizing smoking.

We also need to push companies and local government to

the past, rather than on preventing future smokers

WHAT WE SHOULD DO ABOUT TOBACCO

POSTPONE THE SETTLEMENT TALKS Current negotiations amount to a backroom deal by lawyers and would give away too much to industry and hobble our ability to regulate in the future.

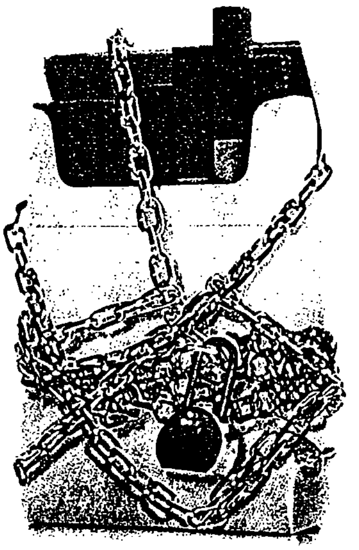
BAN ADVERTISING AND PROMOTION AIMED AT KIDS Without trampling the First Amendment, we need to keep the industry from hooking smokers early.

RAISE TAXES Boost the price of cigarettes—by as much as $2 a pack—to dramatically cut sales, especially to kids.

EXPAND SMOKE-FREE WORKPLACES AND PUBLIC AREAS Studies show that when a company bans indoor smoking, nearly 25% of its smokers quit and others cut back. More states need to sign on.

DISCLOSE ALL INGREDIENTS Adults could make more reasoned decisions. Now many smokers think "lite" cigarettes are safer than nicotine patches.

KEEP FDA ON THE CASE Current rules barring tobacco sales to kids are only a start. We need a strong regulatory hand that could impose further restrictions.



make everything from offices to sections of restaurants smoke-free. "It's the most effective single intervention," says Stanton A. Glantz, a prominent antitobacco activist. When a company bans smoking, about one-quarter of smokers quit, and the rest cut back 20%. But we have a long way to go. A new Massachusetts survey shows that in 1995, 35% of companies in the state still didn't have such a ban—and Massachusetts is one of the more enlightened states on this issue.

Individuals should be free to smoke, of course. But full disclosure of all the ingredients in tobacco—and their effects—is crucial if people are to make more rational choices. Massachusetts officials, using recent focus groups, discovered that a majority of smokers believe "lite" cigarettes offered a safer way to quit than nicotine patches did. That's because the patches come with an extensive list of warnings about their dangers, while cigarettes, despite containing a bevy of more toxic ingredients, say next to nothing about their dangers.

HOOKED. We may also want to consider the controversial idea of reducing the level of nicotine in cigarettes. That could conceivably allow teenagers to experiment with tobacco without getting hooked. It would also take away the most compelling reason for adult smoking. "We've largely won the public-health battle if we take the nicotine out of cigarettes," says a former FDA lawyer.

True, there's the problem of 48 million Americans still addicted to the drug. Heavy smokers would have to smoke more to get their daily nicotine fixes. And it might encourage bootlegging of stronger foreign brands. But patches, gum, or other delivery systems could be just as effective in satisfying the craving, without many of the health risks.

Naturally, any course of action needs flexibility, fine-tuning, and plenty of debate. And it's wise to remember that in the case of even the most well-meaning regulations, the industry has a history of turning the laws to its advantage. After the 1971 ban on radio and TV tobacco ads, for example, companies rebounded with a series of strategies—from merchandise giveaways to sports sponsorships—that reached impressionable youth.

Once a strong regulatory scheme is in place, then it may be time to move on to the issue of compensating Big Tobacco's victims. But beforehand, society needs to reach a consensus on how much money smokers really deserve. After all, the vast majority knew of the risks of cigarettes and therefore contributed to their own injuries. So is it fair to force the industry to pay for their full medical expenses?

There's also reason to believe that any compensation scheme for tobacco victims would be a mess. The crux of the problem: Smoking causes a wide variety of health ailments, but it is not the sole cause of any of them. If a compensation scheme tries too hard to separate legitimate claimants from illegitimate ones—weighing factors such as how long they smoked—it will burn up every penny in the fund. But without some guidelines, millions of people could be eligible for money—reducing the average payout to a fraction of most victims' medical expenses and lost wages.

Given these flaws, it may never be worth handing the industry blanket immunity from liability solely in exchange for a compensation fund. There's no reason to deprive people of their day in court, especially since the FDA's recent triumph in court has reduced the need to provide the tobacco industry legal protection in exchange for cooperation.

America is at a crucial crossroads. The tobacco industry is on the run, and there is a unique opportunity to shape the future. Let's not rush into a lawyer-driven deal that sacrifices this once-in-a-lifetime chance to kick the tobacco habit.

Mike France covers legal affairs from New York, and John Carey reports on health from Washington.

THE POWER OF TAXES

A recent study shows the strong correlation between high cigarette taxes and reduced consumption, especially among young people:

PROPOSED TAX INCREASE	REDUCTION IN NUMBER OF YOUTH WHO SMOKE	REDUCTION IN CIGARETTE CONSUMPTION BY YOUTH
$1.00	25%	50%
$2.00	40%	70%

DATA: CHALOUPKA & GROSSMAN FOR NATIONAL BUREAU OF ECONOMIC RESEARCH, BW

PHOTOGRAPH OF CIGARETTE BOX BY TED MORRISON; PHOTO ILLUSTRATION BY JOHN BLACKFORD

With Tobacco Settlement, Trial Lawyers May See Another Mammoth Payday

By Saundra Torry and John Schwartz
Washington Post Staff Writers

Many of the trial lawyers who got rich suing the makers of asbestos, Agent Orange and defective heart valves may be on the verge of getting rich again, thanks to the $368.5 billion tobacco deal.

Their fees are not yet set, and nobody knows the exact amount if the deal is approved, but estimates range from the hundreds of millions into the billions. The settlement itself dwarfs previous large legal deals, and if history is any guide, the fees could mirror that magnitude.

"More than $360 billion will change hands," said University of Texas law professor Samuel Issacharoff, who studies legal fees. "Anybody who has an active involvement is going to get a piece of that money."

With so much at stake and the formula for distributing the fees still undecided, rival groups of lawyers involved in the deal already have begun jockeying for the fees.

And the potential lawyers' payments have become a favorite target of those criticizing the proposed deal, which faces a difficult battle winning approval from the White House and Congress.

House Speaker Newt Gingrich (R-Ga.) and consumer advocate Ralph Nader, who rarely agree, have both taken aim at the trial lawyers from different angles. Gingrich said he would likely oppose the deal "if it simply makes trial lawyers richer." Nader, who fears that colossal fees would taint the reputation of his trial lawyer allies, said that he has heard the lawyers may pocket "2 percent of the entire pie," or about $7 billion.

James E. Tierney, a former Maine attorney general who has consulted with the state attorneys general suing the industry, said that "no one is contingency fee rates you've been hearing about. . . . Not going to happen."

On the flip side, a handful of the large corporate law firms that defend tobacco companies may take a hit to their revenues because the deal would kill a total of 57 major lawsuits. That litigation has run up defense fees of more than $600 million a year, according to estimates by tobacco analysts on Wall Street.

But even for tobacco's defenders, the deal could be a boon, as lobbying, battles over federal regulation and new court challenges replace the litigation that is lost. "In some ways, the need for phalanxes of lawyers will be increased," said David Vladeck, of Public Citizen Litigation Group, which opposes the deal. "You don't have to worry that lawyers in Washington will have to give up their leased Mercedes and Lexuses."

On the anti-tobacco side, one reason the estimates run so high is because there are so many lawyers. One coalition includes 65 law firms, whose members have spent more than $15 million pressing class-action lawsuits for addicted smokers in 17 states, according to Washington lawyer John P. Coale, a coalition leader.

A second group of trial lawyers represents the 40 states that filed lawsuits against the industry to recover the Medicaid costs of treating sick smokers.

These lawyers were hired to bring and finance the cases because the states did not want to spend public funds to press their claims, which are extremely novel.

During the talks, lawyers in the class-action coalition, known as the Castano group, said their fees would be "negotiated" separately with the tobacco companies. But last Thursday, industry lawyer Meyer Koplow told Congress that all the lawyers' fees will be set "by an independent third party."

Many of the state-hired lawyers have contracts promising fees of 25 percent of the state's recovery, but those contracts contain clauses nullifying the fee agreement if the case is settled. And even states without the benefit of those clauses may try to limit their lawyers' fees.

Regardless, Tierney and some state officials have said they expect the industry to pay all the attorneys fees and costs. And according to one source familiar with the talks, the industry is willing to pay between $2 billion and $3 billion beyond the $368.5 billion settlement.

Issacharoff, the legal fee expert, said the largest contingency fee in history is the $400 million that went to Houston lawyer Joseph Jamail after winning a case brought by Pennzoil Co. against Texaco Inc. in the mid-1980s. The case settled for $4 billion while on appeal.

Some of the lawyers most involved in the tobacco deal also have raked in fortunes in earlier cases. Cincinnati lawyer Stanley M. Chesley, a member of the Castano group, was the lead lawyer in a class-action lawsuit over defective heart valves, in which judges have awarded legal fees of nearly $11 million so far. Lawyers including Ronald Motley of South Carolina and Peter Angelos of Baltimore are estimated to have received hundreds of millions of dollars in fees from trials and settlements of asbestos cases. While contingency fees in such cases generally run from 33 percent to 40 percent of settlements, the asbestos fees have never been publicly revealed.

But experts say there really is no precedent for fees in the tobacco deal, because the settlement is so enormous.

"There's no question the attorneys [in the tobacco deal] would ask for a lesser percentage . . . in large part" because their fees will be a target in the political battle over the deal, Issacharoff said. Indeed, comments by New Orleans lawyer Russ Herman last week that 3 percent of the pot—about $11 billion—might be paid out over several years to all the lawyers set off angry denunciations even among his fellow lawyers. "There'd be capital punishment for trial lawyers if the fees got that high," one lawyer said.

Both Issacharoff and Tierney argued that the trial lawyers should be well paid. The fairly quick settlement of the cases, all filed since 1994, "has a lot to do with the kind of firepower" these seasoned lawyers brought to the table, Issacharoff said. Tierney added that many of the lawyers "are out of pocket millions of dollars. They put years of their lives into this."

Coale, part of the Castano group, said the fees are "very nebulous. . . . We don't know till Congress" approves the deal. The calculation, he said, would be based not only on the settlement's size, but on the risk taken by the lawyers and other issues. As for the firms who represent the industry, a few may feel the pinch, but overall the work simply may be redistributed.

Washington's Covington & Burling, for instance, has represented the Tobacco Institute, the industry's lobbying arm, since it was founded in 1958, and the settlement calls for doing away with the institute.

Meanwhile, the Washington firm of Verner, Liipfert, Bernhard, McPherson and Hand was hired by the industry last year to help smooth the way for settlement talks. Since then, many of the firm's top lobbyists, including former Texas governor Ann Richards, have been working on the tobacco account.

Even the firms heavily involved in defending the current lawsuits insist that the deal presents no problems for them. While management at Arnold & Porter, which represents Philip Morris Cos. nationally, did not return calls about its tobacco litigation, firm chairman Michael Sohn shot off an internal e-mail message to calm his anxious troops last week. It said the settlement would have no material effect on the firm's business, according to a source at the firm.

And for now, the battle goes on unabated. Industry lawyers have been told to move "full steam ahead" in defense of their cases, said Dan K. Webb, a partner at Chicago's Winston & Strawn, which also represents Philip Morris. If the defense effort slowed "all of a sudden, it would send the wrong signal," said one industry source. "You want everybody to stay committed to the deal."

FOR MORE INFORMATION

To review all recent Post coverage and commentary on the tobacco settlement, click on the above symbol on the front page of The Post's Web site at www.washingtonpost.com