

THE MULTISTATE MASTER SETTLEMENT AGREEMENT AND THE FUTURE OF STATE AND LOCAL TOBACCO CONTROL:

**An Analysis of Selected Topics and Provisions
of the Multistate Master Settlement Agreement of
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Prepared by: The Tobacco Control Resource Center, Inc., at Northeastern
University School of Law

Edited by: Graham Kelder and Patricia Davidson

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For inquiries, contact either Graham Kelder or Patricia Davidson at the Tobacco Control Resource
Center, (617) 373-2026.

Contributors

Richard A. Daynard, J.D., Ph.D., is Professor of Law at Northeastern University, President of the Tobacco Control Resource Center, Chairman of the Tobacco Products Liability Project, Editor-in-Chief of the *Tobacco Products Litigation Reporter*, and Principal Investigator of the National Cancer Institute's "Legal Interventions to Reduce Tobacco Use." He is the author of numerous articles on tobacco control and tobacco litigation. He appears almost daily in the media discussing these issues.

Peter Enrich, J.D., is Professor of Law and Associate Dean at Northeastern University School of Law. Professor Enrich drafted Question One, the ballot initiative which funded the Massachusetts Tobacco Control Program and wrote much of the American Cancer Society's brief in support of Question One before the Massachusetts Supreme Judicial Court. Professor Enrich is an expert in state and local government law. He has published extensively, including several tobacco-related articles and papers. Professor Enrich co-authored (along with Ms. Davidson) "Local and State Regulation of Tobacco: The Effects of the Proposed National Settlement," 35 *Harvard Journal on Legislation* 87 (Winter 1998), and several of the TCRC Working Papers analyzing portions of the June 20, 1997 proposed tobacco settlement pertaining to state and local regulatory power.

Wendy Parmet, J.D., is Professor of Law at Northeastern University School of Law. Professor Parmet has published extensively in the field of public health law, including co-authorship of articles on disability law and its application to Environmental Tobacco Smoke (ETS) [e.g., Wendy E. Parmet, Mark A. Gottlieb and Richard A. Daynard, "Accommodating Vulnerabilities to Environmental Tobacco Smoke: A Prism for understanding the ADA," 12 *Journal of Law and Health* 1 (1997-1998)]. Professor Parmet also authored two of the TCRC Working Papers analyzing selected provisions of the June 20, 1997 proposed tobacco settlement.

Graham Kelder, J.D., is Managing Attorney of the Tobacco Law and Policy Project, the larger of TCRC's two legal divisions. Mr. Kelder has written articles on tobacco control and tobacco litigation for the *Stanford Law and Policy Review*, *Trial Magazine*, the *Journal of Social Issues*, the *Journal of the American Medical Women's Association*. He is the co-author of *An Action Plan to Protect the Health of Massachusetts Citizens and Their Children: Using Tobacco Settlement Funds to Reduce the Health and Economic Costs of Tobacco-Related Disease in the Commonwealth*. Mr. Kelder is the editor of two legal policy manuals for Massachusetts municipal officials and public health officers. He wrote two Working Papers analyzing the Hatch and McCain bills codifying the June 20, 1997 proposed national tobacco settlement. He is Editor-in-Chief of *Tobacco Control Update*. Mr. Kelder also serves as chairperson of the Massachusetts Tobacco Control Program's Community Assistance Statewide Team. He has presented lectures at numerous tobacco control conferences across the United States. Mr. Kelder has also been quoted numerous times discussing tobacco issues in both domestic and foreign publications ranging from the *American Bar Association Journal* to the *New York Times*. He has appeared several times on National Public Radio.

Patricia Davidson, J.D. is a staff attorney at TCRC and the Project Director for the National Cancer Institute's "Legal Interventions to Reduce Tobacco Use." She has

published articles on tobacco control and litigation in *Wisconsin Women's Law Journal*, *Harvard Journal on Legislation*, and *Cornell Journal of Law and Policy*. Ms. Davidson also manages a team of attorneys and law professors who drafted a nine-part series of Working Papers analyzing the June 20, 1997 proposed national tobacco settlement and related legislation. She has presented workshops on tobacco advertising and state and local tobacco control to national and local audiences.

Mark Gottlieb, J.D., is a staff attorney at TCRC and co-author of *Accommodating Vulnerabilities to Environmental Tobacco Smoke: A Prism for Understanding The ADA*, 12 *Journal of Law and Health* 1 (1997), dealing with the application of the Americans with Disabilities Act to ETS.

Laura Hermer, J.D., is a staff attorney at TCRC and a member of the MTCP's Community Assistance Statewide Team. She is the co-author of *An Action Plan to Protect the Health of Massachusetts Citizens and Their Children: Using Tobacco Settlement Funds to Reduce the Health and Economic Costs of Tobacco-Related Disease in the Commonwealth*.

Robert Kline, J.D., is a staff attorney at TCRC and an authority on tobacco advertising issues. He has written a manual discussing legal theories that nonsmoking residents of multiple occupancy buildings may employ when affected by ETS from neighboring units. Mr. Kline is also the Director of the Tobacco Control Legal Clinic at Northeastern University School of Law. He has presented lectures at tobacco control forums across the country.

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Executive Summary

By Laura Hermer

E1: Historical Background

In 1994 and 1995, Mississippi, Minnesota, West Virginia and Florida filed lawsuits in state court against the tobacco industry to secure reimbursement from it for health care expenditures for ailments arising from tobacco use. They were shortly joined in their endeavor by 41 other states and two jurisdictions. A group of state attorneys general presented a tobacco settlement proposal – which purported to settle all pending class action lawsuits against the tobacco industry and all pending actions against the industry brought by states and other governmental entities – to the American public on June 20, 1997.

Because the settlement proposal needed to bind all 50 states, it had to be drafted and enacted in the form of the Congressional legislation in order to give it the force of law.¹ A number of bills - including the bipartisan effort sponsored by Senators McCain, Gorton, Breaux and Hollings - were introduced for this purpose of "convert[ing] into legislation the \$ 368.5-billion national tobacco settlement announced in June."²

Many people involved in America's Multibillion-Dollar Tobacco War had high hopes for the McCain Committee bill. Senate Majority Leader Trent Lott (R-MS) had gone to McCain earlier in 1998 and asked him to craft a bill in the Commerce Committee that embodied the tobacco settlement.³ The McCain Committee bill, while not perfect in the eyes of most analysts, was stronger than the June 20th Agreement in most respects.⁴ Among other things, the McCain Committee bill would have:

- required the tobacco industry to pay \$516 billion (as compared to the June 20th Agreement's \$368.5 billion) over 25 years to help states and the federal government bear the medical costs of smoking-related illness;
- raised cigarette taxes by \$1.10 per pack over five years;
- preserved the Food and Drug Administration's ability to regulate the tobacco industry in ways that the June 20th Agreement did not;
- and
- drastically reduced cigarette marketing, advertising and promotion.⁵

¹ Graham Kelder, et al., *The Proposed Tobacco Settlement*, TOBACCO CONTROL UPDATE 1997b, (1.3-4), at 5.

² Graham Kelder, *Tobacco Pact Moves Forward: President Clinton Enunciates Principles For Comprehensive Legislation on Tobacco as Divergent Coalitions Form and Legislation is Introduced in Congress Codifying the Proposed National Settlement*, TOBACCO CONTROL UPDATE 1997a (2.1) at 4-16.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

On April 8, 1998 – nine days after the Commerce Committee endorsed the preliminary version of the McCain Committee bill – Steven Goldstone, RJR Nabisco's CEO, angrily announced that his company was withdrawing its support of the Congressional process for developing comprehensive tobacco legislation. Blaming Congress for failing to stick to the terms of the June 20th Agreement, Mr. Goldstone, speaking to the National Press Club in Washington, DC, declared his company's intention not to sign the consent decrees to "voluntarily" limit advertising that were part of the McCain Committee bill. Philip Morris, Brown and Williamson, U.S. Tobacco, and Lorillard made similar announcements shortly after Mr. Goldstone's speech.⁶ In the end, tobacco industry brinkmanship – when paired with a huge, industry-sponsored advertising campaign that painted the McCain Committee bill as a big "tax-and-spend" proposal – worked, and the bill died.⁷

During this time, four states – Minnesota, Mississippi, Florida and Texas - achieved individual settlements with the tobacco industry, yielding total payments of at least \$35.3 billion over the next 25 years, with certain payments continuing annually thereafter in Mississippi, Florida and Texas. After the last of these settlements and after they managed to kill the McCain bill on June 17, 1998, the nation's largest tobacco companies⁸ began secretly trying to negotiate a multibillion-dollar settlement of the dozens of state lawsuits pending against the industry.⁹ The talks fell apart on several occasions. On the last weekend in August, frustrated with what he called foot-dragging by the tobacco industry, Massachusetts Attorney General Scott Harshbarger pulled out of negotiations between nine states and cigarette makers trying to reach an out-of-court national tobacco settlement. Harshbarger said he decided to walk away and focus instead on winning a potential multibillion-dollar settlement for Massachusetts in state court.¹⁰ Massachusetts' withdrawal was significant because Harshbarger's court case is considered among the strongest of those set for trial.¹¹

By early October, the *Washington Post* reported that the eight-state negotiating team and two of the nation's leading tobacco companies had made significant progress toward fashioning a multibillion-dollar settlement of dozens of lawsuits against the tobacco industry.¹² The meetings with lawyers from several states – including California, Colorado, New York and

⁶ *Id.*

⁷ On June 17, 1998, the Senate rejected, by a vote of 57 yeas to 42 nays, a motion to limit debate on the McCain bill (60 votes are needed for cloture). After this cloture vote, Senator Stevens brought a point of order against the McCain Bill because it violated the Budget Act. Sixty votes are needed to waive the Budget Act. By a vote of 53 yeas to 46 nays, the Senate rejected waiver of the Budget Act, thus, in effect, killing the McCain Bill.

⁸ See Graham Kelder, *Fight the Future Or Everything You Always Wanted To Know About How The Tobacco Industry (a.k.a. The Cigarette Smoking Men) Killed The McCain Bill But Were Afraid To Ask*, TOBACCO CONTROL UPDATE, Vol. 2, Issues 3 & 4 (Spring/Summer 1998).

⁹ Sandra Torry, *Tobacco Giants Try To Settle With States; 37 Cases Pending Against Companies*, THE WASHINGTON POST (July 10, 1998).

¹⁰ Frank Philips, *Bay State Drops Out Of Tobacco Pact Talks; Harshbarger Eyes Mass. Settlement*, THE BOSTON GLOBE.

¹¹ *Id.*

¹² Sandra Torry and John Schwartz, *Progress Reported in Settlement Talks of 8 States, 2 Tobacco Firms*, THE WASHINGTON POST (October 3, 1998).

Washington –resulted in a deal to settle all 37 pending state cases¹³ and quiet potential claims in the remaining states.

E2: Consent Decrees or Judgments

A consent decree is generally defined as

A decree entered in an equity suit on consent of both parties; it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights¹⁴

The MSA requires that each settling state seek entry of an order of dismissal of claims in the relevant court, dismissing with prejudice all claims against the Participating Manufacturers and other parties. It also requires each settling state to provide to the relevant court a copy of the MSA and a consent decree for entry conforming to the model consent decree attached to the MSA as Exhibit L. Again, this consent decree will contain the terms of the agreement between the settling state in question and the tobacco industry participants in the agreement. [MSA XIII].

Both the consent decree filed in each state and the MSA have great bearing on the enforcement of the provisions of the MSA. According to the MSA, the parties to the agreement may "apply to the Court¹⁵ to enforce the terms of the Consent Decree (or for a declaration construing any such term) with respect to alleged violations within such Settling State." [MSA Section VII(b)]. In the event that the Court determines that any Participating Manufacturer or Settling State has violated the Consent Decree within such Settling State, "the party that initiated the proceedings may request any and all relief available within such Settling State pursuant to the Consent Decree."¹⁶ [MSA Section VII(b)]. This arrangement is likely to lead to conflicting interpretations of the MSA as Courts settle conflicts within their respective states, in which case the Attorneys General, NAAG and the Participating Manufacturers are to confer together and use their "best efforts to coordinate and resolve" discrepancies which are not "exclusively local." [MSA VII(f)].

E3: The Effect of Appeals on States That Have Consented to the Multistate Master Settlement Agreement

Final approval of the MSA will occur on the sooner of two events: either (1) 80% of both the number of settling states must reach, individually, "State-Specific Finality" and those settling states must have aggregate allocable shares (as set forth in Exhibit A of the MSA) of at least 80% of the total allocable shares assigned to all settling states, or (2) June 30, 2000 must pass. [MSA II(u)]. "State-Specific Finality" occurs in an individual state when the MSA and consent decree has been approved and entered in the relevant court, the relevant court also makes an entry dismissing all relevant claims against the Participating Manufacturers, and either the time for

¹³ Torry, *supra* note 9.

¹⁴ BLACK'S LAW DICTIONARY (FIFTH EDITION) at 370.

¹⁵ "Court" as used in the MSA is defined as "the respective court in each Settling State to which this Agreement and the Consent Decree are presented for approval and/or entry as to that Settling State." [MSA II(p)].

¹⁶ The MSA states that "All orders and other judicial determinations made by any court in connection with this Agreement or any Consent Decree shall be subject to all available appellate review, and nothing in this Agreement or any Consent Decree shall be deemed to constitute a waiver of any right to any such review." [MSA VII(d)].

appeal has expired or any appeal made has been dismissed, and the approval of the consent decree has been made final. [MSA II(ss)].

To date, no challenges to the approval of the MSA have been successful. Trial courts have been granting approval of the MSA. Several appeals, some filed by parties who fear that certain language in the MSA may threaten their rights to sue the participating tobacco manufacturers, are, however, pending.¹⁷ One relevant question is whether the Attorney General in each of the states in question had the power to release political subdivisions of the state or other entities from potential claims against the industry. While certain individuals and organizations¹⁸ have sought to intervene in the states' cases in order to challenge the MSA or persuade the presiding judge to delay any decision on approving a settlement until fairness hearings could be held, forty-one of the forty-six signing states had approved the MSA by February 4, 1999.¹⁹

The pending and any future appeals could take some time to be decided, but most observers are of the opinion that state-specific finality and approval of the MSA will be reached in every state allowing the provisions of the agreement to go into effect. Until that occurs, however, nothing is truly settled.

E4: The Non-Participating Manufacturer Adjustment, Qualifying Statutes, and the Model Statute in Exhibit T of the MSA

The purpose of the Master Settlement Agreement's Non-Participating Manufacturer (NPM) Adjustment provisions is to prevent competitors of the Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard tobacco companies – the Original Participating Manufacturers (OPMs) of the MSA – from gaining market share at their expense. The NPM Adjustment is triggered by at least a 2% drop in the combined market share of all Participating Manufacturers below what their combined share was in 1997. [MSA IX(d)(1)(B)(i)]. Furthermore, the trigger does not apply unless an independent economic research firm concludes that "the disadvantages experienced as a result of this Agreement were a significant factor contributing to the Market Share Loss for the year in question." [MSA IX(d)(1)(C)].

If this NPM trigger is ever pulled, the MSA provides, according to a particular formula, for up to a 100% reduction in state tobacco settlement payments (the NPM Adjustment) if the states do not pass "Qualifying Statutes." [MSA IX(d)(2)]. The MSA defines a "Qualifying Statute" as "a Settling State's statute, regulation, law and/or rule (applicable everywhere the Settling State has authority to legislate) that effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within such Settling State as a result of the provisions of this Agreement." [MSA IX(d)(2)(E)].

¹⁷ Appeals the are reportedly pending in California, New Jersey, New York, Pennsylvania, and Tennessee. See Justice, *Tobacco Settlement in Jeopardy?* PHILADELPHIA INQUIRER, Feb. 24, 1999. Only in the case of Pennsylvania are the merits of the MSA at issue. In the other appealing states, allocation of the settlement payments to localities is the basis of the appeal.

¹⁸ *E.g.*, counties or other political subdivisions, hospitals, smokers, and health advocates.

¹⁹ On February 4, 1999, the National Association of Attorney General (NAAG) posted a list of states and territories that had received trial court approval of the MSA on its web site at <http://www.naag.org/consent.htm>. State final approval occurs once the window for appeals has closed in each state.

More likely than not, a state could collect all of the money due it under the MSA without ever passing any special legislation. But there is a small chance that, at some point in the future, the "Non-Participating Manufacturer (NPM) Adjustment" [MSA IX(d)] could kick in. If and when that happens, any state that has not passed what the MSA refers to as a "Qualifying Statute" could see its settlement payments reduced or even totally eliminated.

The effect of the MSA's NPM Adjustment provisions is to put tobacco control on this year's legislative agenda in most of the 46 states that have signed the MSA. This could be very good for tobacco control. There are many useful tobacco control measures that have been languishing in every state's legislature. Although the "Model Statute" safe harbor does not apply if it is introduced in combination with any other legislative or regulatory proposal, there is no such restriction on other safe harbor (in which the independent economic research firm certifies that a statute meets the requirements for a "Qualifying Statute"). Tobacco control proponents could (a) argue to their legislature that, if legislation designed to protect the OPMs' market share is to be enacted, it should also enact some real tobacco control legislation, and (b) get a legislative leader or committee to submit the proposed package to the economic research firm appointed under the MSA.

While the state legislatures' perceived need to adopt "Qualifying Statutes" therefore presents opportunities for tobacco control, there are also hazards. The tobacco industry's friends in the legislature could try to slip unrelated industry protections (e.g. preemption) into legislation purportedly designed just to protect the state's tobacco settlement revenues.

E5: The Preclusive Effect of the MSA on Future Actions by State and Local Governments Against Participating Manufacturers

As with any settlement agreement in any litigation, one effect of the Master Settlement Agreement is to bring an end to the lawsuits from which it arises. The Master Settlement Agreement, however, goes far beyond the ordinary preclusion provisions. Its broadly worded preclusion provisions [MSA XII] restrict the abilities of the settling states and, to a substantial extent, their subdivisions to bring future claims. The claims potentially precluded include not only suits for past conduct covered in the settled cases, but also ones brought for a broad range of future conduct by not only the tobacco companies but also a wide array of other tobacco-related entities, including some claims against tobacco retailers and distributors.

Not all claims are precluded, however. The MSA expressly preserves the right of states to bring any criminal actions that may be warranted. The settlement has no bearing on any such criminal proceedings, whether grounded in federal, state, or local law [MSA XII(a)(7)]. The MSA also makes an express exception for state suits concerning tax liabilities or liabilities under any licensing fee provisions [MSA II(nn)(1)]. Finally, the MSA does not preclude the states from going to court to enforce the commitments undertaken by the tobacco companies in the settlement agreement and the associated consent decrees.

Drawing on this relationship, the Attorneys General, in the settlement agreement, give up not only their states' rights to pursue further legal actions against the tobacco companies and related businesses and individuals, but also the rights of the states' agencies and subdivisions as well [MSA II(pp)]. Under the language of the MSA, the range of claims that are precluded for these governmental subdivisions is precisely the same as the range of claims precluded for the states [MSA XII(a)(1),(3),(4)]. Whether and to what extent state Attorneys General have the authority to preclude such claims on the part of state subdivisions, and particularly on the part of

municipalities, is a matter of state law, and the scope of the authority likely varies from state to state. However, even in those cases where municipalities or other governmental subdivisions may still have the authority to bring tobacco-related lawsuits, the MSA contains provisions that will undermine their viability and their impact.

E6: Advertising Restrictions

The MSA requires the discontinuation of certain types of outdoor advertising, most notably billboards and certain other forms of outdoor advertising (not including "Brand Name Sponsorships", discussed below), effective April 23, 1999. [MSA II(ii)(1) & (2), III(d)]. With regard to billboards, if there is any time left on the lease of a Participating Manufacturer after it has to take a billboard down, the state Attorney General may choose to use the space available (at the cost of the state) for the remainder of that lease term for counter-advertising "intended to discourage the use of Tobacco Products by youth and their exposure to secondhand smoke." [MSA III(d)(3)].

However, certain advertisements, signs and placards located in or at the site of adult-only facilities²⁰ [MSA II(ii)(2)], outside of tobacco product manufacturing facilities [MSA II(ii)], and either outside or inside retail establishments that sell tobacco products [MSA II(ii)] are expressly excluded from the advertising prohibitions. Thus, for example, notwithstanding the billboard advertisement restrictions, tobacco products retailers may post tobacco placards of up to 14 square feet outside their establishments.

Beginning May 22 1999, Participating Manufacturers cannot use cartoons – defined as exaggerated or anthropomorphized depictions or depictions of entities with superhuman powers [MSA II(l)] - in advertising, promoting, packaging, or labeling of tobacco products. [MSA III(b)]. Thus, for example, the MSA specifically prohibits Joe Camel as a cartoon, [MSA III(b)] but it does not cover the standard camel logo or drawings of a camel because such images do not exaggerate, or attribute human or superhuman qualities to the camel. It also does not prohibit continued use of the Marlboro Man or other human characters, as well as any drawing or depiction that was used as a Participating Manufacturer's logo in any state on July 1, 1998.

With regard to the targeting of youth, the MSA expressly forbids the Participating Manufacturers from engaging in two different types of conduct. "No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of youth smoking within any Settling State." [MSA III(a) (emphasis added)].

The MSA also imposes restrictions on product placement and endorsements. Participating Manufacturers may not give anything of value to any person or entity to "use, display, make reference to or use as a prop" any tobacco product or package or advertisement, or any other item with a tobacco brand name "in any motion picture, television show, theatrical production or other live performance, live or recorded performance of music, commercial film or

²⁰ The MSA defines an "adult-only facility" as "a facility or restricted area (whether open-air or enclosed) where the operator ensures or has a reasonable basis to believe (such as by checking identification as required under state law, or by checking the identification of any person appearing to be under the age of 27) that no Underage person is present. A facility or restricted area need not be permanently restricted to Adults in order to constitute an Adult-Only Facility, provided that the operator ensures or has a reasonable basis to believe that no Underage person is present during the event or time period in question." [MSA II(c)].

video, or video game ("Media"). [MSA III(e)]. However, the limit on payment for media placement does not include media viewed only in an adult-only facility, media not intended for distribution or display to the public, or "instructional" media concerning "non-conventional" cigarettes "viewed only by or provided only to smokers who are Adults," among other media [MSA III(e)].

Beginning July 1, 1999 Participating Manufacturers and others licensed by the Participating Manufacturers may no longer market, distribute, offer, sell, or license any apparel or merchandise bearing a tobacco product brand name. [MSA III(f)]. This prohibition expressly includes catalogues and direct mail strategies. However, the ban excludes such merchandise if its sole purpose is to advertise tobacco products, or if it is used in an adult-only facility and is not distributed to the general public. Furthermore, the ban does not require Participating Manufacturers to breach or terminate contracts with third parties in existence as of June 20, 1997, or to retrieve items already being marketed or distributed. [MSA III(f)-(f)(2)].

Among other provisions, the MSA also puts certain restrictions on "Brand-Name Sponsorships," which are excluded from the outdoor advertising bans mentioned above. A "Brand Name Sponsorship" is "an athletic, musical, artistic, or other social or cultural event" for which payment of any kind is made to include the brand name as either 1) the name of the event, or 2) to identify, advertise, or promote the event, an entrant, participant or team in the event. [MSA II(j)]. With some exceptions, Participating Manufactures are limited to sponsoring one "Brand Name Sponsorship" per year. [MSA III(c)(2)(A)]. The time is calculated from the date of the initial sponsorship. Such sponsorships may not include concerts, events in which the intended audience is comprised of a significant percentage of youth, events in which any paid participants or contestants are youth, or any athletic event between opposing teams in any football, basketball, baseball, soccer or hockey league. [MSA III(c)(1)]. The "Brand Name Sponsorship" provisions are complex, and include a number of exceptions, some of which are related to other types of restrictions such as those concerning product placement and brand name apparel.

E7: Youth Access Provisions

The Multistate Master Settlement Agreement (MSA) expressly states that both the settling states and the Participating Manufacturers are "committed to reducing underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products." [MSA I]. The funds which the settling states will receive from the settlement are the most important component with regard to putting that commitment into practice, as the funds can be used in part for the purpose of reducing youth access to and desire for tobacco products.

Substantive provisions in the MSA itself, however, do little towards that end. The MSA places certain restrictions on the provision of manufacturer gifts [MSA III(h)] and free samples [MSA III(g)] to persons who are "Underage," prohibits participating manufacturers from marketing packs containing fewer than 20 cigarettes or less than 0.60 ounces of loose tobacco until the year 2001 [MSA III(k)], and contains an express commitment by Participating Manufacturers to assist in the reduction of tobacco use by youth. [MSA III(l)(1)]. The provisions concerning manufacturer gifts and free samples, however, may only apply in those states which have criminalized the purchase or possession of tobacco products by youths. Outside of such states, only the time-limited pack size requirement and the stated commitment of the Participating Manufacturers to reduce the use of tobacco products by youth remain. **Finally and most notably**, the MSA includes no provisions regulating or prohibiting self-service displays of tobacco products, point-of-sale advertising or tobacco products vending machines,

nor does it contain any "lookback" provisions which could cause tobacco products manufacturers to have to pay states extra money if the percentage of youth using tobacco products by certain dates does not drop below a target percentage.

States and municipalities that are interested in restricting youth access to tobacco products can fill in the substantial gaps left in the MSA by enacting restrictions and/or bans on self-service displays, point-of-sale advertising, tobacco products vending machine siting and minimum pack size. They could also adopt tobacco retailer licensing or permitting requirements. Moreover, those legislative bodies that have not criminalized youth possession of tobacco products might consider adopting restrictions on tobacco product sampling and the provision of manufacturer gifts, rather than attempting to rely on the provisions of the MSA.

E8: State and Local Lobbying Restrictions

The MSA does not prohibit tobacco companies from opposing proposed state or local laws or administrative rules which are intended to limit youth access to and consumption of tobacco products. Rather, it prohibits only Participating Manufacturer opposition to:

1. Limitations on Youth access to vending machines.
2. Inclusion of cigars within the definition of tobacco products.
3. Enhancement of enforcement efforts to identify and prosecute violations of laws prohibiting retail sales to Youth.
4. Encouraging or supporting use of technology to increase effectiveness of age-of-purchase laws, such as, without limitation, the use of programmable scanners, scanners to read drivers' licenses, or use of other age/ID data banks.
5. Limitations on promotional programs for non-tobacco goods using tobacco using tobacco products as prizes or give-aways.
6. Enforcement of access restrictions through penalties on Youth for possession or use.
7. Limitations on tobacco product advertising in or on school facilities, or wearing of tobacco logo merchandise in or on school property.
8. Limitations on non-tobacco products which are designed to look like tobacco products, such as bubble gum cigars, candy cigarettes, etc. [MSA Exhibit F]

Moreover, the MSA expressly permits Participating Manufacturers to: (1) challenge the enforcement of, or attempt to obtain declaratory or injunctive relief from, any such legislation or rule on any grounds; (2) oppose state or local legislative proposals or administrative rules introduced prior to the time of State-Specific Finality; (3) either oppose or cause to be opposed excise or income tax provisions or user fees or other payments relating to Tobacco Products or Tobacco Product Manufacturers; or (4) oppose or cause to be opposed any state or local legislative proposal or administrative rule not included among the prohibited subjects listed above. [MSA III(m)(1)].

The MSA also prohibits lobbyists²¹ from supporting or opposing state, federal, or local laws or actions without express authorization of the companies, "except where such

²¹ For purposes of this provision, the MSA specifically lists all of a Participating Manufacturer's officers and employees engaged in lobbying activities in a Settling State after State-Specific Finality, "and any other third parties

advance express authorization is not reasonably practicable." [MSA III(m)(2)(A)]. Such support or opposition can, however, go forward after the lobbyists secure the necessary permission from the tobacco companies after making certain written certifications to the companies regarding their activities. The lobbyists must also, of course, comply with all laws and regulations relating to disclosure of financial contributions [MSA III(m)(2)(B)].

Among its other lobbying-related provisions, the MSA restricts Participating Manufacturers from supporting or causing to be supported any diversion of the settlement proceeds to any other than tobacco- or health-related uses. However, it leaves the tobacco industry free to pursue its favorite tactic of diverting monies from tobacco-related uses to other health-related uses. It dissolves the Council for Tobacco Research-USA and the Tobacco Institute, Inc. [MSA III(o)(1) and (2)]. The MSA also states that Participating Manufacturers²² "may not reconstitute CTR or its function in any form." [MSA III (o) (5)]. Participating Manufacturer may, however, form or participate in new tobacco-related trade associations, subject to the above restrictions. [MSA III(p)(1)].

E9: The National Foundation

The National Foundation will be a non-profit entity established by the executive committee of the National Association of Attorneys General (NAAG) [MSA VI(d)], and the National Public Education Fund ("NPEF") will be the Foundation's grant-making arm. [MSA Sections VI(a) and (c)]. The Foundation's basic programmatic charge is twofold. First, it will support both the study of - and programs to - reduce youth use of tobacco products²³ and youth substance abuse. [MSA VI(a)]. Second, the Foundation will support the study of - and educational programs to - prevent diseases associated with tobacco product use.

The Foundation will be run by a board of directors selected according to a given set of criteria. Both the Foundation and the NPEF will be funded by separate payments from Participating Manufacturers. An escrow agent will disburse the industry base payments to the Foundation when State-Specific finality²⁴ occurs in at least one Settling State [MSA VI(b)], a requirement that has already been satisfied, and the initial \$250 million (March 31, 1999)

who engage in lobbying activities...on behalf of such Participating Manufacturer." [MSA Section III (m) (2)]. "Lobbyist" and "lobbying activities" will, for purposes of this provision, be given the "meaning such terms have under the law of the Settling State in question." [MSA Section III (m) (2)].

²² Defined in the Introduction of this analysis.

²³ The MSA's definition of "tobacco products" is limited to cigarettes and smokeless tobacco. [MSA II (vv)]. Thus, none of its provisions, including those pertaining to NPEF grants or Foundation activities, encompass cigars. A startling increase in cigar use by both adults and adolescents, following a period of intensive and apparently successful marketing and promotion by the industry, has been recently documented. *Cigars: Health Effects and Trends*, at 14-17; 195-219. New data from a Florida survey, finding that 7.8% of Florida sixth graders smoke cigars and that nearly 20% of Florida eighth graders smoke cigars, prompted the state to decide to use some of its tobacco control funds to launch a counter-advertising campaign directed at underage cigar use. Bob LaMendola and Glenn Singer, *Teen Cigar Smoking Is on the Rise*, SUN-SENTINEL SOUTH FLORIDA at p. 1 (January 25, 1999). The state of Florida entered into an independent settlement of its Attorney General's suit against cigarette and smokeless tobacco companies in 1997 and is not a signatory to the MSA. *State of Florida v. American Tobacco Company*, Civil Action No. 95-1466 AH, Settlement Agreement (Aug. 25, 1997).

²⁴ "State-Specific Finality", with regard to a particular settling state, means that the relevant state court has formally and finally approved of both the MSA and the state consent decree. Any appeals could delay this date. [MSA II (ss)].

industry payment to be credited to the NPEF will also be disbursed by the escrow agent to the Foundation upon the happening of the same event. [MSA VI(c)]. Subsequent industry payments, however, will be disbursed by the escrow agent to the Foundation "only when State-Specific Finality has occurred in Settling States having aggregate Allocable shares equal to at least 80% of the total aggregate Allocable Shares..." [MSA Section VI(c)(3)]. The MSA does not include a timetable for the NPEF grant process or the actual distribution of grant funds to successful applicants for grant funds. It also includes no timetable for the establishment of the Foundation.

The MSA describes 11 Foundation activities, nine of which are programmatic in nature. [MSA Section VI(f)]: (1) carrying out a nationwide advertising and education program regarding youth use of tobacco products and educating consumers about the causes and prevention of diseases associated with tobacco use [MSA Section VI(f)(1)]; (2) developing and disseminating model advertising and education programs to counter illegal youth use of substances [MSA VI(f)(2)]; (3) developing and disseminating model K-12 classroom education programs and "curriculum ideas" about smoking and substance abuse. [MSA VI(f)(3)]; (4) developing and disseminating criteria for effective cessation programs. [MSA VI(f)(4)]; (5) commissioning studies, funding research and publishing reports about the factors that influence youth smoking and substance abuse [MSA VI(f)(5)]; (6) developing "other innovative youth smoking and substance abuse prevention programs" [MSA VI(f)(6)]; (7) providing targeted training and information for parents [MSA VI(f)(7)]; (8) maintaining a public library which will feature Foundation funded studies, reports and other publications related to the prevention and cause of youth smoking and substance abuse [MSA VI(f)(8)]; (9) tracking and monitoring youth smoking and substance abuse [MSA VI(f)(9)]; (10) "receiving, controlling and managing contributions from other entities to further the purposes described in this Agreement" [MSA VI(f)(10)]; and (11) and receiving, controlling and managing funds paid by tobacco companies under the payment provisions pertaining to the Foundation and NPEF. [MSA VI(f)(11)].

The MSA authorizes (but does not apparently require) the Foundation to make grants from the NPEF to settling states and their political subdivisions. [MSA VI(g)]. No other entities are expressly listed as eligible for NPEF grants. NPEF grants may be made for the purpose of "carry[ing] out sustained advertising and education programs" that counter youth tobacco product use and educate consumers about the cause and prevention of diseases associated with the use of tobacco products. [MSA VI(g)].

While the MSA puts no dollar limits on acceptable grant amounts, there are several limits on Foundation activities and the use of Foundation funds. First, the MSA prohibits the Foundation from engaging in - and the use of Foundation funds for - "any political activities or lobbying, including, but not limited to, support of or opposition to candidates, ballot initiatives, referenda or other similar activities." [MSA VI(h)]. Second, Foundation activities (including the NPEF) must be carried out solely within the states. [MSA VI(h)]. Third, the Foundation must ensure that its programs are culturally and linguistically appropriate. [*Id.*].

Fourth, and perhaps most importantly, the MSA forbids the use of the NPEF for "any personal attack on or vilification²⁵ of, any person (by name or business affiliation), company, or governmental agency, whether individually or collectively." [MSA Section VI(g) (emphasis

²⁵Webster's dictionary defines "vilification" as 1: "the act of vilifying: abuse 2: an instance of vilifying: a defamatory utterance." MERRIAM-WEBSTER DICTIONARY (1999). The word "vilify", in turn, is defined as "1: to lower in estimation or importance 2: to utter slanderous and abusive statements against: defame." *Id.* The word "malign" is listed as synonym.

added)]. This prohibition, which appears to encompass "personal" attacks or vilification of the tobacco industry (by virtue of the words "company" and "collectively") could censor the most effective of state and local advertising and education campaigns.

E10: Securing Settlement Funds for State and Local Tobacco Control

The best way to effectuate the public health purposes of the Tobacco Settlement – to modify patterns of tobacco use so as to protect the health of the United States' citizens and their children and to reduce or eliminate the future costs attributable to tobacco use – would be to dedicate a substantial portion of the funds generated by the Tobacco Settlement to tobacco control in each Settling State. "Tobacco control" refers to all of the strategies employed by government officials, public health professionals and advocates to reduce youth access to tobacco products and to limit the exposure of non-smokers to environmental tobacco smoke (ETS).

Prior to approaching their state legislature, tobacco control advocates must determine the mechanics of appropriating state settlement funds in their state. Advocates should first find local counsel to help them to determine how the proceeds from the MSA may be allocated in their state. This is a matter determined by each Settling State's state law. The cause of action in each Settling State may also have some bearing on how settlement proceeds may be allocated. Also, note that future legislative sessions may not be absolutely bound in their actions by prior ones in many states. This means that, of course, future sessions of the legislature may amend or repeal prior enactments as they see fit. To see how these issues are being dealt with in Massachusetts, for example, see *An Action Plan to Protect the Health of Massachusetts Citizens and Their Children: Using Tobacco Settlement Funds to Reduce the Health and Economic Costs of Tobacco-Related Disease in the Commonwealth* at <http://www.tobacco.neu.edu/mtcerl/blueprint.htm>.

Second, tobacco control advocates should draft a blueprint that outlines how settlement funds should be used for tobacco control. The settlement blueprint drafted by the Tobacco Control Resource Center for the American Cancer Society (New England Division – Massachusetts), the American Heart Association (New England Affiliate) and the Massachusetts Coalition for a Healthy Future may be found at <http://www.tobacco.neu.edu/mtcerl/blueprint.htm>.

Introduction

By Graham Kelder

In the following pages, the Tobacco Control Resource Center, Inc. (TCRC) at Northeastern University School of Law in Boston, MA, presents its analysis of selected topics and provisions of the November 23, 1998 Multistate Master Settlement Agreement (MSA). Our analysis focuses on the following key areas:

Historical Background of the MSA

Brief Description of Consent Decrees or Judgments

The Effect of Appeals on States That Have Consented to the MSA

The Non-Participating Manufacturer Adjustment, Qualifying Statutes, and the Model Statute in Exhibit T of the MSA

The Preclusive Effect of the MSA on Future Actions by State and Local Governments Against Participating Manufacturers

Advertising Restrictions

Youth Access Restrictions

Lobbying Restrictions

The National Foundation

Some Brief Advice About Securing Settlement Funds for State and Local Tobacco Control

In an effort to provide a timely report, our analysis is limited to the particular provisions of the MSA identified and discussed in each chapter of this analysis. Thus, there may be provisions of the MSA that we have not reviewed which may affect our interpretations and conclusions.

It is important at the outset to note that the MSA applies only to Participating Manufacturers. According to the MSA, "Participating Manufacturer" means "a Tobacco Product Manufacturer²⁶ that is or becomes a signatory to" the MSA. [MSA II(jj)]. One subset of this

²⁶ According to the MSA, a "Tobacco Product Manufacturer" means

an entity that after the MSA Execution Date directly (and not exclusively through any Affiliate):

(1) manufactures Cigarettes anywhere that such manufacturer intends to be sold in the States, including Cigarettes intended to be sold in the States through an importer (except where such importer is an Original Participating Manufacturer that will be responsible for the payments under this Agreement with respect to such Cigarettes as a result of the provisions of subsections II(mm) and that pays the taxes specified in subsection II(z) on such Cigarettes, and provided that the manufacturer of such Cigarettes does not market or advertise such Cigarettes in the States);

(2) is the first purchaser anywhere for resale in the States of Cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the States; or

group consists of "Original Participating Manufacturers," defined in the MSA as Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated and R.J. Reynolds Tobacco Company, "and the respective successors of each of the foregoing." [MSA II(hh)].²⁷ The second subset of this group consists of Tobacco Product Manufacturers that are not Original Participating Manufacturers. [MSA II(jj)].²⁸ When Tobacco Product Manufacturers that are not Original Participating Manufacturers become Participating Manufacturers, they become bound by the MSA "and the Consent Decree"²⁹...in all Settling States in which this Agreement and the Consent Decree binds Original Participating Manufacturers"³⁰ [MSA II(jj)].

In the case of a Tobacco Product Manufacturer that signs the MSA after the MSA Execution Date, such Tobacco Product Manufacturer, within a reasonable period of time after signing the MSA, must make

any payments (including interest thereon at the Prime Rate) that it would have been obligated to make in the intervening period had it been a signatory as of the MSA Execution Date. [MSA II(jj)].

The MSA makes clear that "Participating Manufacturer" shall also include the successor of a Participating Manufacturer.³¹

As of this writing, most of the Original Participating Manufacturers' competitors have agreed to join the MSA. These include Liggett (which was required to raise its prices only if its market share increased substantially), Japan Tobacco, and Commonwealth Brands.

The MSA is no ordinary civil settlement. The MSA's scope is broad and its ramifications far-reaching. Critical issues of public health will be significantly affected by the MSA's complex

(3) becomes a successor of an entity described in subsection (1) or (2) above.

The term "Tobacco Product Manufacturer" shall not include an Affiliate of a Tobacco Product Manufacturer unless such Affiliate itself falls within any of subsections (1) - (3) above. [MSA II (uu)].

²⁷ Except as expressly provided in the MSA, "once an entity becomes an Original Participating Manufacturer, such entity shall permanently retain the status of Original Participating Manufacturer." [MSA II(hh)].

²⁸ A member of this second subset of Participating Manufacturers is referred to in some parts of the MSA as a "Subsequent Participating Manufacturer." [MSA II(tt)]. A "Subsequent Participating Manufacturer" means

a Tobacco Product Manufacturer (other than an Original Participating Manufacturer) that: (1) is a Participating Manufacturer, and (2) is a signatory to this Agreement, regardless of when such Tobacco Product Manufacturer became a signatory to this Agreement. "Subsequent Participating Manufacturer" shall also include the successors of a Subsequent Participating Manufacturer. Except as expressly provided in this Agreement, once an entity becomes a Subsequent Participating Manufacturer such entity shall permanently retain the status of Subsequent Participating Manufacturer, unless it agrees to assume the obligations of an Original Participating Manufacturer as provided in subsection XVIII(c). [MSA II(tt)].

²⁹ Or, in any Settling State that does not permit amendment of the Consent Decree, a consent decree containing terms identical to those set forth in the Consent Decree. [MSA II(jj)].

³⁰ Provided, however, that such Tobacco Product Manufacturer need only become bound by the Consent Decree in those Settling States in which the Settling State has filed a Released Claim against it. [MSA II(jj)].

³¹ Except as expressly provided in the MSA, "once an entity becomes a Participating Manufacturer such entity shall permanently retain the status of Participating Manufacturer." [MSA II(jj)].

provisions for the foreseeable future. As the following partial analysis makes clear, the MSA contains few tangible public health benefits, and does little, therefore, by itself, to reduce the continuing harmful impact of tobacco use on the U.S. economy or the health of its citizens. The devastation wrought by tobacco in this country will be reduced only by the MSA as it operates in conjunction with fully-funded state tobacco control programs fueled (in part) by settlement dollars, the activities of the National Foundation, and the continuing efforts of the national tobacco control community. This fact is acknowledged in the MSA itself. The document states in the "Recitals" section that settling states "have agreed to settle their respective lawsuits and potential claims pursuant to terms which will achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, including the enforcement of the mandates and restrictions related to such measures, as well as funding for a national Foundation dedicated to significantly reducing the use of Tobacco Products by Youth" [MSA I]. Indeed, among the principal potential public health benefits of the Tobacco Settlement are the public health programs to which the funds generated by the settlement may be dedicated.

The best way to effectuate the public health purposes of the Tobacco Settlement – to modify patterns of tobacco use so as to protect the health of the United States' citizens and their children and to reduce or eliminate the future costs attributable to tobacco use – would be to dedicate a substantial portion of the funds generated by the Tobacco Settlement to tobacco control in each Settling State. For these reasons (and others that will be outlined herein), it makes good sense to use a substantial portion of the tobacco company payments generated by the Tobacco Settlement to combat the future harm that will be wrought by tobacco use on the health of America's' citizens and on the well-being of the economy of each Settling State.

Part One:
**Consenting or Objecting to
the Multistate Master
Settlement Agreement**

Chapter One:

Historical Background

By Graham Kelder

In 1994, the attorneys general of four states – Mississippi, Minnesota, West Virginia, and Massachusetts – separately filed innovative lawsuits to secure from the tobacco industry reimbursement for health care expenditures for ailments arising from tobacco use. In early 1995, these states were joined by Florida. By the end of 1996, eighteen states and two other jurisdictions had filed similar legal actions.³² Forty-one states eventually filed such legal actions prior to the release of the Multistate Master Settlement Agreement ("MSA").³³ These are the lawsuits being settled by the MSA.³⁴

On June 20, 1997, a group of state attorneys general presented a tobacco settlement proposal – which purported to settle all pending class action lawsuits against the tobacco industry and all pending actions against the industry brought by states and other governmental entities – to the American public. Because the settlement proposal needed to bind all 50 states, it had to be drafted and enacted in the form of Congressional legislation in order to give it the force of law.³⁵

The first comprehensive bill seeking to codify the national settlement reached by the tobacco industry and state attorneys general on June 20, 1997 was introduced in the Senate on November 5, 1997. The bipartisan bill, introduced by Senate Commerce Committee Chairman John McCain (R-Ariz.) and three co-sponsors – Slade Gorton (R-Wash.), John Breaux (D-La.) and Ernest Hollings (D-S.C.) – was, according to the *Los Angeles Times*, "seen as merely a starting point for an effort next year to convert into legislation the \$ 368.5-billion national tobacco settlement announced in June".³⁶ In the next few months, several other "settlement" bills were filed:

- the Kennedy Bill, filed by Senator Ted Kennedy (D-MA) and two other Senate Democrats;³⁷
- the HEALTHY Kids Act, written by Senator Kent Conrad of North Dakota in his capacity as chairman of the Senate Democratic Task Force on Tobacco;³⁸

³² Tobacco Products Liability Project, *State Suit Summary*, at <http://www.tobacco.neu.edu>.

³³ *Id.*

³⁴ As discussed more fully below, four states achieved individual settlements with the tobacco industry.

³⁵ Kelder et al., *supra* note 1, at 5.

³⁶ Kelder, *supra* note 2, at 4-16.

³⁷ *Id.*

³⁸ Graham Kelder, *Tobacco Pact More Likely As Positions Clarified: Clinton Administration Endorses Anti-Tobacco Measure Offered by the Senate Democratic Task Force on Tobacco as 20 Public Health Groups Tell Congress "No Preemption! No Immunity!"* TOBACCO CONTROL UPDATE 1998b (2.2) at 3-9.

- a bill drafted by Senator James Jeffords, a Vermont Republican and chairman of the Senate Labor and Human Relations Committee.³⁹

In March, 1998, the McCain bill became the focus of all settlement-related legislative activity in the Senate. The Commerce Committee endorsed a preliminary version of a substitute bill, S. 1415, on March 30, 1998, by a vote of 19 to 1. On May 1, 1998, the Commerce Committee's version of the bill – S. 1415rs ("the McCain Committee bill") – was reported by Senator McCain to the full Senate (the official short title of S. 1415rs was the "National Tobacco Policy and Youth Smoking Reduction Act"). The McCain Committee bill was further modified on May 18, 1998, when the Floor Manager's Amendment was substituted for the original McCain Committee bill.⁴⁰

Many people involved in America's Multibillion-Dollar Tobacco War had high hopes for the McCain Committee bill. Senate Majority Leader Trent Lott (R-MS) had gone to McCain earlier in 1998 and asked him to craft a bill in the Commerce Committee that embodied the tobacco settlement.⁴¹ The McCain Committee bill, while not perfect in the eyes of most analysts, was stronger than the June 20th Agreement in most respects.⁴² Among other things, the McCain Committee bill would have:

- required the tobacco industry to pay \$516 billion (as compared to the June 20th Agreement's \$368.5 billion) over 25 years to help states and the federal government bear the medical costs of smoking-related illness;
- raised cigarette taxes by \$1.10 per pack over five years;
- preserved the Food and Drug Administration's ability to regulate the tobacco industry in ways that the June 20th Agreement did not; and
- drastically reduced cigarette marketing, advertising and promotion.⁴³

On April 8, 1998 – nine days after the Commerce Committee endorsed the preliminary version of the McCain Committee bill – Steven Goldstone, RJR Nabisco's CEO, angrily announced that his company was withdrawing its support of the Congressional process for developing comprehensive tobacco legislation. Blaming Congress for failing to stick to the terms of the June 20th Agreement, Mr. Goldstone, speaking to the National Press Club in Washington, DC, declared his company's intention not to sign the consent decrees to "voluntarily" limit advertising that were part of the McCain Committee bill. Philip Morris, Brown and Williamson, U.S. Tobacco, and Lorillard made similar announcements shortly after Mr. Goldstone's speech.⁴⁴

In the end, this tobacco industry brinkmanship – when paired with a huge, industry-sponsored advertising campaign that painted the McCain Committee bill as a big "tax-and-spend" proposal – worked. Emboldened by the industry-sponsored advertising campaign's effect on public opinion, the tobacco industry's Senate allies twisted the McCain Committee bill

³⁹ *Id.*

⁴⁰ Kelder, *supra* note 8, at 5-27.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

beyond recognition by adding a series of amendments to it, some of which worsened the bill's impact on public health and some of which were arguably not germane to the bill's real subject matter.⁴⁵ On, June 17, 1998, the bill died after four week's of grueling debate and partisan maneuvering.⁴⁶ Just prior to its death, the bill had been shorn of almost all of its funds for tobacco control, and the tobacco industry had been given a form of "back door" immunity in the form of caps on plaintiffs' attorneys' fees.⁴⁷ The June 20, 1997 deal died with the death of the McCain bill.

Four states achieved individual settlements with the tobacco industry. On July 2, 1997, Mississippi settled its claims so that it would receive at least \$3.3 billion over 25 years, with annual payments of at least \$135 million continuing in perpetuity. Florida settled its case on August 25, 1997, for at least \$11 billion over 25 years, with annual payments of at least \$440 million continuing thereafter. On January 16, 1998, Texas settled its claims for at least \$14.5 billion over 25 years, with annual payments of at least \$580 million continuing thereafter. The Florida and Texas settlements contained public health measures as well. The Mississippi, Florida and Texas settlement agreements also contained a provision, referred to as the "most favored nation" clause, that allow a settling state to incorporate the terms of any later nonfederal settlement agreements that are more favorable.

Minnesota settled its case on May 8, 1998, for \$6.5 billion. The industry also agreed to do the following:

- pay about \$6.1 billion to Minnesota and \$469 million to Blue Cross and Blue Shield (BC/BS) of Minnesota (which was also a plaintiff) over 25 years;
- disband the Council for Tobacco Research;
- not pay for tobacco placement for movies (a provision that obviously extended beyond Minnesota's borders)
- stop offering or selling non-tobacco merchandise, such as jackets, caps and T-shirts, bearing the name or logo of tobacco brands in Minnesota;
- remove all tobacco billboards in Minnesota within six months and eliminate such ads on buses, taxis and bus shelters;
- refrain from opposing in Minnesota certain new laws designed to reduce youth tobacco use and clean indoor air laws that could adversely affect the industry;
- agree to new lobbying disclosure rules for Minnesota;
- release internal indexes to millions of previously secret industry documents, providing a road map to make it much easier for attorneys and researchers to find relevant information;
- maintain at industry expense for 10 years a depository of millions of tobacco documents in Minneapolis and another in Great Britain;

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

- instruct retailers in Minnesota to move cigarettes behind the counter in order to restrict minors' access to those cigarettes; and
- pay out \$440 million in fees to the private attorneys who represented the plaintiffs.⁴⁸

Shortly after Minnesota settled its case and the nation's largest tobacco companies⁴⁹ managed to kill the McCain bill on June 17, 1998,⁵⁰ the tobacco industry began trying to negotiate a multibillion-dollar settlement of the dozens of state lawsuits pending against the industry.⁵¹ According to the *New York Times*, the secret talks

apparently grew out of a court-ordered effort to mediate a coming smoking-related lawsuit brought by the State of Washington against the tobacco industry. The negotiations then expanded to include other states with pending lawsuits, including New York, California and Colorado.⁵²

Several state attorneys general were very open to the idea of trying to salvage some kind of multi-state tobacco deal, and at the court-ordered mediation negotiations for the State of Washington, which began almost immediately after the death of the McCain bill,

. . . two tobacco industry lawyers, Arthur Golden and Meyer Koplow, and Joe Rice, a lawyer from Charleston, S.C., who represents about 25 states with tobacco lawsuits, met with Ms. Gregoire, the Washington Attorney General, to discuss bringing other states into the talks⁵³

"The attorneys general have always said that if Plan A didn't work then we would always go with Plan B," said Jeffrey Modisett, the Attorney General of Indiana.⁵⁴

Industry negotiators met with lawyers from several states – including California, Colorado, New York and Washington – in New York in early July to try to craft a deal that could serve as a framework to settle all 37 pending state cases, according to the *Washington Post*.⁵⁵ The July talks – which involved representatives from Philip Morris Companies Inc., R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp. and Lorillard Inc. – focused immediately on a deal that was much narrower than the June 20, 1997 agreement or the McCain bill. The new deal would not require approval by Congress because it would not include provisions dealing with federal jurisdiction over the nicotine contained in tobacco products. The new deal would also not grant the industry its major wish: the limits on lawsuits brought by class action plaintiffs,

⁴⁸ Edward Sweda, *Big Tobacco Surrenders in Minnesota*, TOBACCO CONTROL UPDATE 1998 (2.3) at 38-41.

⁴⁹ See Kelder, *supra* note 8.

⁵⁰ On June 17, 1998, the Senate rejected, by a vote of 57 yeas to 42 nays, a motion to limit debate on the McCain bill (60 votes are needed for cloture). After this cloture vote, Senator Stevens brought a point of order against the McCain bill because it violated the Budget Act. Sixty votes are needed to waive the Budget Act. By a vote of 53 yeas to 46 nays, the Senate rejected waiver of the Budget Act, thus, in effect, killing the McCain bill.

⁵¹ Torry, *supra* note 9.

⁵² Barry Meier, *Tobacco Companies Seek New Accord With States*, THE NEW YORK TIMES (July 10, 1998).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Torry, *supra* note 9.

insurers or municipalities that became one of the most controversial parts of the original deal and, in a somewhat different form, the defeated Senate measure.⁵⁶

The talks fell apart on several occasions. On the last weekend in August, frustrated with what he called foot-dragging by the tobacco industry, Massachusetts Attorney General Scott Harshbarger pulled out of negotiations between nine states and cigarette makers trying to reach an out-of-court national tobacco settlement. Harshbarger said he decided to walk away and focus instead on winning a potential multibillion-dollar settlement for Massachusetts in state court.⁵⁷ Massachusetts' withdrawal was significant because Harshbarger's court case is considered among the strongest of those set for trial.⁵⁸

By early October, the *Washington Post* reported that the eight-state negotiating team and two of the nation's leading tobacco companies had made significant progress toward fashioning a multibillion-dollar settlement of dozens of lawsuits against the tobacco industry.⁵⁹ The MSA was released to state attorneys general on Monday, November 16, 1998. State attorneys general had until the following Monday – the MSA's: Execution date: November 23, 1998 – to read the MSA (a document of over 200 pages including appendices) and to decide whether their respective states would become a party to it. [MSA I(aa)].

⁵⁶ *Id.* The civil liability provisions of the May 1, 1998 version of the McCain Committee bill provided unacceptable forms of immunity to the tobacco industry. Specifically, the \$6.5 billion dollar cap was an outright gift to the industry and it did not, contrary to some reports, increase in future years if it was not fully spent in past years. Moreover, section 705(b) of the May 1, 1998 version of the McCain Committee bill restricted "permissible defendants" in civil actions based on tobacco claims to "a tobacco product manufacturer," which was defined to include only domestic tobacco subsidiaries of the tobacco conglomerates. Immunizing these conglomerates, whose assets were purchased with the profits from sales to U.S. smokers, left a drastically smaller asset and income base for paying off American tobacco claims. Ironically, if bankruptcy was a genuine concern, this immunity provision lowered the bankruptcy threshold to a fraction of what it would otherwise be. The immunity provisions of the McCain Committee bill, thus, undermined the social purposes served by tort law: general deterrence, specific deterrence and compensation. The Gregg-Leahy Amendment, introduced by Judd Gregg (R-NH) and Patrick Leahy (D-VT), would have fixed most of the civil immunity problems in the McCain Committee bill. On May 21, 1998, by a vote of 37 yeas to 61 nays (2 Senators voting "present"), the Senate rejected the motion to table the Gregg-Leahy Amendment to modify the provisions relating to civil liability for tobacco manufacturers. Senators McCain and Kerry promised that the Gregg-Leahy Amendment would be approved by a voice vote, but this was not done before the McCain Committee bill was killed. On June 16, 1998, the Senate indirectly reinserted immunity in the bill through an amendment – offered by Slade Gorton (R-WA) and passed on a 49-48 vote – that would limit plaintiff attorneys' fees in all tobacco litigation filed after June 15, 1998 to \$500/hour. While \$500/hour sounds like fair compensation for any professional, when applied to the highly speculative area of tobacco litigation, such a restriction would have, as Professor Richard Daynard of the Tobacco Control Resource Center and Matt Myers of the National Center for Tobacco-Free Kids pointed out, discouraged good attorneys from taking tobacco cases. This amendment, thus, added a kind of de facto civil immunity for the tobacco industry to the McCain Committee bill.

⁵⁷ Philips, *supra* note 10.

⁵⁸ *Id.*

⁵⁹ Torry and Schwartz, *supra* note 12.

Chapter Two:

Consent Decrees or Judgments

By Graham Kelder

A consent decree is generally defined as

A decree entered in an equity suit on consent of both parties; it is not properly a judicial sentence, but is in the nature of a solemn contract or agreement of the parties made under the sanction of the court, and in effect an admission by them that the decree is a just determination of their rights⁶⁰

With the procedural merger of law and equity, most state courts have replaced "decree" with the term "judgment." In such states, one speaks of consent judgments.⁶¹

The Master Settlement Agreement (MSA) defines "Consent Decree" as "a state-specific consent decree as described in subsection XIII(b)(1)(B) of this Agreement." [MSA II(o)].

Section XIII of the MSA states:

(a) Within 10 days after the MSA Execution Date (or, as to any Settling State identified in the Additional States provision of Exhibit D,⁶² concurrently with the filing of its lawsuit), each Settling State and each Participating Manufacturer that is a party in any of the lawsuits identified in Exhibit D shall jointly move for a stay of all proceedings in such Settling State's lawsuit with respect to the Participating Manufacturers and all other Released Parties (except any proceeding seeking public disclosure of documents pursuant to subsection IV(b)). Such stay of a Settling State's lawsuit shall be dissolved upon the earlier of the occurrence of State-Specific Finality or termination of this Agreement with respect to such Settling State pursuant to subsection XVIII(u)(1).

(b) Not later than December 11, 1998 (or, as to any Settling State identified in the Additional States provision of Exhibit D, concurrently with the filing of its lawsuit):

(1) each Settling State that is a party to a lawsuit identified in Exhibit D and each Participating Manufacturer will:

(A) tender this Agreement to the Court in such Settling State for its approval; and

⁶⁰ BLACK'S LAW DICTIONARY (5TH EDITION) at 370.

⁶¹ *Id.*

⁶² Exhibit D of the MSA lists the lawsuits of the states that had sued Original Participating Manufacturers by November 16, 1999: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York State, Ohio, Oklahoma, Oregon, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wisconsin. [MSA Exhibit D]. For each Settling State not listed above, the "Additional States" provision of the MSA specifies "the lawsuit or other legal action filed by the Attorney General or Governor of such Settling State against Participating Manufacturers in the Court in such Settling State prior to 30 days after the MSA Execution Date asserting Released Claims." [MSA Exhibit D].

(B) tender to the Court in such Settling State for entry a consent decree conforming to the model consent decree attached hereto as Exhibit L (revisions or changes to such model consent decree shall be limited to the extent required by state procedural requirements to reflect accurately the factual setting of the case in question, but shall not include any substantive revision to the duties or obligations of any Settling State or Participating Manufacturer, except by agreement of all Original Participating Manufacturers); and

(2) each Settling State shall seek entry of an order of dismissal of claims dismissing with prejudice all claims against the Participating Manufacturers and any other Released Party in such Settling State's action identified in Exhibit D. Provided, however, that the Settling State is not required to seek entry of such an order in such Settling State's action against such a Released Party (other than a Participating Manufacturer) unless and until such Released Party has released the Releasing Parties (and delivered to the Attorney General of such Settling State a copy of such release) (which release shall be effective upon the occurrence of State-Specific Finality in such Settling State, and shall recite that in the event this Agreement is terminated with respect to such Settling State pursuant to subsection XVIII(u)(1) the Released Party agrees that the order of dismissal shall be null and void and of no effect) from any and all Claims of such Released Party relating to the prosecution of such action as provided in subsection XII(a)(2). [MSA XIII].

The Consent Decree filed in each state and the MSA have great bearing on the enforcement of the provisions of the MSA. The MSA clearly states that, "[e]xcept as expressly provided in the Consent Decree, any Settling State or Released Party may apply to the Court⁶³ to enforce the terms of the Consent Decree (or for a declaration construing any such term) with respect to alleged violations within such Settling State." [MSA VII(b)]. While a Settling State may not seek to enforce the Consent Decree of another Settling State, nothing contained in the MSA "shall affect the ability of any Settling State to (1) coordinate state enforcement actions or proceedings, or (2) file or join any amicus brief." [MSA VII(b)]. In the event that the Court determines that any Participating Manufacturer or Settling State has violated the Consent Decree within such Settling State, "the party that initiated the proceedings may request any and all relief available within such Settling State pursuant to the Consent Decree."⁶⁴ [MSA VII(b)].

This arrangement is likely to lead to conflicting interpretations of the MSA as Courts settle conflicts within their respective states. The MSA provides a mechanism for resolving such conflicts:

The Attorneys General of the Settling States (through NAAG)⁶⁵ shall monitor potential conflicting interpretations by courts of different States of this Agreement and the Consent Decrees. The Settling States shall use their best efforts, in cooperation with the Participating Manufacturers, to coordinate and resolve the

⁶³ "Court" as used in the MSA is defined as "the respective court in each Settling State to which this Agreement and the Consent Decree are presented for approval and/or entry as to that Settling State." [MSA III(p)].

⁶⁴ The MSA states that "All orders and other judicial determinations made by any court in connection with this Agreement or any Consent Decree shall be subject to all available appellate review, and nothing in this Agreement or any Consent Decree shall be deemed to constitute a waiver of any right to any such review." [MSA VII(d)].

⁶⁵ NAAG is the National Association of Attorneys General.

effects of such conflicting interpretations as to matters that are not exclusively local in nature. [MSA Section VII(f)].

This provision will, in all likelihood, have a de minimus effect on the states and the conflicting interpretations that will arise. The Attorneys General, NAAG, and Participating Manufacturers have no power to impose their interpretation of the MSA on individual states or state courts that interpret the MSA differently than NAAG does.

Chapter Three:

The Effect of Appeals on States That Have Consented to the Multistate Master Settlement Agreement

By Mark Gottlieb

3.1: Summary

In several states, individuals or organizations opposed to one or more aspects of the MSA attempted to legally intervene in the settlement. To date, no legal challenge to the MSA has been successful.

3.2: Background

In order for the terms of the MSA to take effect, the MSA must reach final approval. Final approval of the MSA will occur on the sooner of two events: either (1) 80% of both the number of settling states must reach, individually, "State-Specific Finality" and those settling states must have aggregate allocable shares (as set forth in Exhibit A of the MSA) of at least 80% of the total allocable shares assigned to all settling states, or (2) June 30, 2000 must pass. [MSA II(u)]. "State-Specific Finality" occurs in an individual state when the MSA and consent decree has been approved and entered in the relevant court, the relevant court also makes an entry dismissing all relevant claims against the Participating Manufacturers, and either the time for appeal has expired or any appeal made has been dismissed, and the approval of the consent decree has been made final. [MSA II(ss)].

3.3: Q & A

3.3.1: What has been the impact of legal challenges to the approval of the MSA?

To date, no challenges have been successful and trial courts have been granting approval of the MSA, although several appeals are pending. While certain individuals and organizations⁶⁶ have sought to intervene in the states' cases in order to challenge the MSA or persuade the presiding judge to delay any decision on approving a settlement until fairness hearings could be held, forty-one of the forty-six signing states had approved the MSA by February 4, 1999.⁶⁷

⁶⁶ *E.g.*, counties or other political subdivisions, hospitals, smokers, and health advocates.

⁶⁷ On February 4, 1999, the National Association of Attorney General (NAAG) posted a list of states and territories that had received trial court approval of the MSA on its web site at <http://www.naag.org/consent.htm>. State final approval occurs once the window for appeals has closed in each state. The states and approval dates included the following:

1. Washington -- granted 11/23/98
2. Ohio -- granted 11/25/98
3. Connecticut -- granted 11/25/98
4. Colorado -- granted 11/25/98
5. Oregon -- granted 11/30/98
6. Maryland -- granted 12/1/98
7. Arizona -- granted 12/1/98

However, appeals filed in several of those states⁶⁸ challenging the approval of the MSA and consent decree approving the settlement are still pending.

The November 23, 1998 settlement with the tobacco industry required settling states to submit the MSA and a consent decree to the relevant court with jurisdiction over the lawsuit no later than December 11, 1998 and seek dismissal of the action [MSA XIII(b)].

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8. Oklahoma -- granted 12/1/98
 9. Montana -- granted 12/1/98
 10. Massachusetts -- granted 12/4/98
 11. Kansas -- granted 12/3/98
 12. Maine -- granted 12/3/98
 13. Idaho -- granted 12/3/98
 14. New Jersey -- granted 12/4/98
 15. Wisconsin -- granted 12/4/98
 16. Michigan -- granted 12/7/98
 17. Iowa -- granted 12/7/98
 18. Illinois -- granted 12/8/98
 19. California -- granted 12/9/98
 20. Georgia -- granted 12/9/98
 21. Puerto Rico -- granted 12/9/98
 22. Arkansas -- granted 12/1/980
 23. Nevada -- granted 12/10/98
 24. Louisiana -- granted 12/11/98
 25. Indiana -- granted 12/11/98
 26. West Virginia -- granted 12/11/98
 27. New Hampshire -- granted 12/11/98
 28. Hawaii -- granted 12/11/98
 29. New Mexico -- granted 12/11/98
 30. South Dakota -- granted 12/11/98
 31. Vermont -- granted 12/14/98
 32. Rhode Island -- granted 12/17/98
 33. Nebraska -- granted 12/20/98
 34. Tennessee -- granted 12/21/98
 35. North Carolina -- granted 12/21/98
 36. Kentucky -- granted 12/21/98
 37. New York -- granted 12/23/98
 38. North Dakota -- granted 12/23/98
 39. N. Marianas -- granted 12/24/98
 40. Wyoming -- granted 12/28/98
 41. U.S. Virgin Is. -- granted 12/30/98
 42. South Carolina -- granted 12/31/98
 43. American Samoa -- granted 1/5/99
 44. Guam -- granted 1/6/99
 45. Utah -- granted 1/6/99
 46. D.C. -- granted 1/8/99
 47. Pennsylvania -- granted 1/13/99
 48. Delaware -- granted 1/28/99
 - 49. Alaska -- granted 2/9/99**
 - 50. Virginia -- granted 2/24/99**

⁶⁸ Appeals the are reportedly pending in California, New Jersey, New York, Pennsylvania, and Tennessee. *See* Justice, *supra* note 17. Only in the case of Pennsylvania are the merits of the MSA at issue. In the other appealing states, allocation of the settlement payments to localities is the basis of the appeal.

On November 18, 1998, three Pennsylvania public health activists and several public health organizations filed motions with the court to intervene in that state's litigation against the tobacco industry in the Court of Common Pleas in Philadelphia. A hearing was held on January 8, 1999. It was reported that the health groups and activists seeking to intervene decried the broad and permanent protections from litigation that the tobacco industry would receive from the state.⁶⁹ Moreover, they believed that the breadth of the future claims by the state, political subdivisions (e.g., counties, municipalities, or localities), and others barred by the MSA, were beyond the scope of the Attorney General's powers to agree to and release. [MSA II(nn),(pp)]. Petitioners feared that the right to recover damages from tobacco companies was being taken away illegally and unfairly.

The MSA's definition of "Releasing Parties" (i.e., state governmental entities giving up future claims, including political subdivisions of a state and persons or entities acting in *parans patriae* or any other governmental or quasi-governmental capacity), is clear in that the Releasing Parties are released by the Attorney General only:

to the full extent of the power of the signatories (i.e., attorneys general) hereto to release past, present and future claims . . . [MSA II(pp)]

Therefore, if the Attorney General never had the power to release certain claims, then those claims were not released by the signing of the MSA. The burden of proof would likely fall on a party described in the MSA as a "Releasing Party" to show that it is not, in fact, released. This could be a significant impediment to future legal actions against tobacco companies by such parties.

On January 13, 1999, Philadelphia Common Pleas Court Judge John W. Herron approved the MSA and the settlement in Pennsylvania without addressing the merits of the petitioners' claims.⁷⁰ The petitioners have filed an appeal that was rejected by Judge Herron, reportedly on the basis that the petitioners' claims were largely theoretical.⁷¹ Allegheny County, Pennsylvania, appealed Judge Herron's decision to deny the county's motion to intervene and filed a separate lawsuit against the tobacco industry for medical cost recovery on March 5, 1999.⁷² A hearing on that appeal was reportedly scheduled for April 14, 1999, in Commonwealth Court.⁷³ These actions by Allegheny County will, at the very least, further delay state-specific finality for Pennsylvania.

While other potential intervenors have petitioned courts deciding motions to enter the consent decree and approve the MSA in several states, none has yet been successful. It appears that the few courts that have yet to issue an order accepting the settlement of their states' litigation and MSA will do so by the end of March of 1999.

The pending and any future appeals could take some time to be decided, but most observers are of the opinion that state-specific finality and approval of the MSA will be reached

⁶⁹ Justice, *Tobacco Foes Take Aim At U.S. Deal*, PHILADELPHIA INQUIRER, Jan. 9, 1999.

⁷⁰ Justice, *Pa. Moves A Little Closer To Sharing In Tobacco Suit Settlement*, PHILADELPHIA INQUIRER, Jan. 17, 1999.

⁷¹ Singer and Justice, *Opinion Issued On Tobacco Settlement*, PHILADELPHIA INQUIRER, Feb. 27, 1999.

⁷² Belser and Belko, *County Files Suit Against Tobacco*, PITTSBURGH POST-GAZETTE, March 6, 1999.

⁷³ *Id.*

in every state allowing the provisions of the agreement to go into effect. Until that occurs, however, nothing is truly settled.

Chapter Four:

The Non-Participating Manufacturer Adjustment, Qualifying Statutes, and the Model Statute in Exhibit T of the MSA

By Richard Daynard

4.1: Q & A

4.1.1: **Why does the MSA include provisions for a Non-Participating Manufacturers Adjustment?**

The purpose of the Master Settlement Agreement's NPM Adjustment provisions is to prevent competitors of the Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard tobacco companies – the Original Participating Manufacturers (OPMs) of the MSA – from gaining market share at their expense. The OPMs knew that they would have to raise prices substantially to pay their financial obligations to the states under the MSA. Their fear was that non-participating manufacturers, which did not have these financial obligations, would be able to undercut their prices, thereby taking substantial market share away from the OPMs.

4.1.2: **What, generally, does the NPM Adjustment do?**

If the combined market share of all Participating Manufacturers drops at least a certain small percentage below what it was in 1997 in any given settling state, the MSA provides, according to a particular formula, for up to a 100% reduction in state tobacco settlement payments, unless the state in question has passed a "Qualifying Statute." [MSA IX(d)(2)]. This reduction is the NPM Adjustment.

4.1.3: **How does the MSA deal with the OPMs' fear of market share loss?**

The MSA deals with the OPMs fear of market share loss in two ways. One way is to encourage competitors to join the MSA and agree to make the same per-package payments as the OPMs. The encouragement offered is the release by the AGs of any possible claim similar to those that they brought against the OPMs that the AGs might have against these competitors. Thus, the competitors would lose their competitive price advantage, but would be released from a major source of worry. Apparently, this offer has proved attractive to most of the OPMs' competitors, which have agreed to join the MSA. These include Liggett (which was required to raise its prices only if its market share increased substantially), Japan Tobacco, and Commonwealth Brands.

The second way the MSA deals with the OPMs market share worries is to threaten the states with up-to-100% reductions in tobacco settlement payments (the NPM Adjustment) if they do not pass "Qualifying Statutes." [MSA IX(d)(2)]. The MSA defines a "Qualifying Statute" as "a Settling State's statute, regulation, law and/or rule (applicable everywhere the Settling State has authority to legislate) that effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within such Settling State as a result of the provisions of this Agreement." [MSA IX(d)(2)(E)].

4.1.4: Why Might the Attorneys General Have Conceded to the Inclusion of an NPM Adjustment?

One conceivable response the negotiating Attorneys General (AGs) could have made to the OPMs' fear might have been to tell them: "Too bad! The MSA is a settlement of some very serious charges against you, the OPMs. If you lose market share to competitors who have not committed similar misdeeds, that's only fair. Maybe your financial pain will serve as a warning to others who might contemplate similar misbehavior." This would have been a fair and totally justified response. But the OPMs would probably have reacted to such a response by refusing to settle for anything like the \$206 billion MSA figure, on the theory that if they will face severe financial pain if they settle, they might as well take their chances in court. Thus, the NPM Adjustment provisions are part of the "quid pro quo" for what the states receive under the MSA.

4.1.5: Is the NPM Adjustment likely to kick in?

The NPM Adjustment is triggered by at least a 2% drop in the combined market share of all Participating Manufacturers below what their combined share was in 1997. [MSA IX (d)(1)(B)(i)]. The trigger does not apply unless an independent economic research firm concludes that "the disadvantages experienced as a result of this Agreement were a significant factor contributing to the Market Share Loss for the year in question." [MSA IX (d)(1)(C)].

This trigger seems unlikely ever to be pulled. The offer to join the MSA has been, and is likely to continue to be, more attractive to the OPMs' competitors than the possibility of using their price advantage as non-MSA-participants to compete with them in the marketplace.⁷⁴ If all of the OPMs' significant competitors become participants in the MSA, the combined market share of Participating Manufacturers will almost certainly not fall more than 2% below the 1997 levels.

4.1.6: What happens to a state's tobacco payments if the NPM Adjustment kicks in?

If the NPM Adjustment were to be triggered, states that had passed (and were conscientiously enforcing) "Qualifying Statutes" would be unaffected.

However, the result for those (probably few) states that had not passed "Qualifying Statutes" would be draconian. To start, the total amount by which the tobacco companies would be able to reduce their payment to the states through the NPM adjustment begins at three times the "Market Share Loss." This is defined as the amount by which the prior year's combined market share of all Participating Manufacturers was more than 2% less than the 1997 combined market share. [MSA IX(d)(1)(B)(i)-(iii)]. Once this shortfall reaches 16 2/3%, causing an NPM adjustment of 50% (16 2/3 (the market share loss) multiplied by three - a most unlikely event), a

⁷⁴ This is likely to continue to be true for the following reason: most states will probably pass a "Qualifying Statute" just to make sure they are not subject to an NPM Adjustment. Any competitor who elects to stay out of the MSA will lose its cost advantage in all of those states (that, after all, being the purpose of these "Qualifying Statutes"). Nonetheless, the non-signing competitor continues to be the subject of possible AG Medicaid reimbursement suits in all 50 states. By contrast, signing the agreement gives them protection from such suits in the 46 signatory states to the MSA. Indeed, as of February 1999, manufacturers representing 98.5% of the market had signed on to the MSA. Laurence M. Cruz, *Bill Would Level Playing Field for Tobacco Companies, Lawmakers Told*, ASSOCIATED PRESS, February 13, 1999.

different formula takes effect which continues to raise the NPM adjustment as the shortfall increases, though at a slower rate. [MSA IX(d)(1)(A)(iii)].

But the effect of the NPM Adjustment (were it ever triggered) on states that had not adopted "Qualifying Statutes" would actually be much greater. Since states with "Qualifying Statutes" would not have to pay any part of the NPM Adjustment, their share of this Adjustment would get reallocated to the states that had not adopted such a statute. [MSA IX(d)(2)(D)]. If the majority of states (especially larger states) have such statutes, the remaining states would find their tobacco settlement payments drastically reduced, or even wiped out entirely.

Thus, even though the likelihood of the NPM Adjustment being triggered is small, states should pass "Qualifying Statutes" to avoid even the possibility of such draconian decreases in their tobacco settlement receipts.

4.1.7: What sort of legislation must a state adopt to avoid the possibility of being hurt by an NPM adjustment?

The MSA does not require states to pass a "model statute," or indeed to use any particular form of words, to avoid possible harm from an NPM adjustment. Again, a "Qualifying Statute" is defined by the MSA as "a Settling State's statute, regulation, law and/or rule (applicable everywhere the Settling State has authority to legislate) that effectively and fully neutralizes the cost disadvantages that the Participating Manufacturers experience vis-à-vis Non-Participating Manufacturers within such Settling State as a result of the provisions of this Agreement." [MSA IX (d)(2)(E)].

Since it would be hard for a state legislature to know in advance whether any particular legislative proposal would "effectively and fully neutralize the cost disadvantages," and hence protect the state from a possible NPM Adjustment, the MSA provides two "safe harbors." One is that the state may submit the proposed legislation to the independent economic research firm appointed under the MSA. That firm must evaluate the proposed legislation within 90 days of receiving the request. If that firm concludes that the proposed legislation meets the definition of "Qualifying Statute," its determination is final and binding on all parties. [MSA IX(d)(2)(G)]. So long as the state then makes reasonable efforts to enforce the statute, the tobacco companies cannot use the NPM Adjustment to reduce that state's payments.

The second "safe harbor" for the states is to pass the "Model Statute" set out in Exhibit T to the MSA. The parties to the MSA have agreed that the "Model Statute," "if enacted without modification or addition (except for particularized state procedural or technical requirement) and not in conjunction with any other legislative or regulatory proposal, shall constitute a Qualifying Statute." [MSA IX(d)(2)(E)]. Furthermore, the Participating Manufacturers agree to support the enactment of the "Model Statute," so long as it is not substantially modified or accompanied by another legislative proposal. [MSA IX(d)(2)(E)].

There is, however, one reason why a state might prefer to pass the "Model Statute" without accompanying it with any tobacco control provisions. Under the MSA, if a state passes the "Model Statute" and vigorously defends the statute against legal attacks (e.g., assertions that it violates the federal anti-trust laws) and if the statute is nonetheless invalidated by a court, the state is entitled to retain at least 35% of the payments due under the MSA even if the NPM Adjustment kicks in. [MSA IX(d)(2)(F)]. If, however, it adopts a "Qualifying Statute" other than the unaccompanied "Model Statute," and that statute is invalidated by a court, the state would

run the risk of losing all of its payments if the NPM Adjustment provisions kick in. [MSA IX(d)(2)(H).]

4.1.8: What would the "Model Statute" do?

The "Model Statute" requires all cigarette manufacturers selling cigarettes within the settling state to either (a) join the MSA, or (b) place a specified per-pack amount in an escrow fund. The escrow fund allows the manufacturer to receive the interest from the fund, but preserves the principal for 25 years exclusively for the purpose of paying any claim the state may later bring against that manufacturer. The rationale given for this escrow requirement is that cigarette-caused "diseases most often do not appear until many years after the person in question begins smoking," and absent an escrow the non-participating manufacturers could distribute their profits to their shareholders as they receive them, and be left without assets to pay state medical cost reimbursement claims as these arise. [MSA Exhibit T(a)].

Interestingly, the per-pack amount which Exhibit T requires (to equalize the cost disadvantage that Participating Manufacturers would otherwise face) is set at about 20 cents/pack in 1999 and 2000, and tops out at about 37 cents/pack beginning in 2007. Compare the 45 cents/pack price increase which the OPMs imposed in December 1998, ostensibly to pay for their obligations under the MSA.

4.1.9: Would adopting a "Qualifying Statute" be good or bad for tobacco control?

The short answer is that it probably would not matter much for tobacco control purposes. To the extent that a "Qualifying Statute" would discourage cigarette price competition, it might produce some slight reductions in smoking. The effect on teenage smoking would likely be particularly small, since teenagers generally do not smoke the unbranded cigarettes that would likely be the major part of the non-participating manufacturers' business. On the other hand, to the extent that such a statute would help guarantee that the OPMs suffer little adverse financial consequences from the MSA, it would tend to undermine the deterrent and punitive effect of the laws under which the AG's cases were brought.

The effect of the MSA's NPM Adjustment provisions, however, is to put tobacco control on this year's legislative agenda in most of the 46 states that have signed the MSA. This could be very good for tobacco control. There are many useful tobacco control measures that have been languishing in every state's legislature. Although the "Model Statute" safe harbor does not apply if it is introduced in combination with any other legislative or regulatory proposal, there is no such restriction on the other safe harbor (in which the independent economic research firm certifies that a statute meets the requirements for a "Qualifying Statute"). Thus, tobacco control proponents could (a) argue to their legislature that, if legislation designed to protect the OPMs' market share is to be enacted, it should also enact some real tobacco control legislation, and (b) get a legislative leader or committee to submit the proposed package to the economic research firm appointed under the MSA. The legislative package could be adopted as soon as the firm approves it as a "Qualifying Statute" – which it would almost certainly do (since the additional tobacco control legislation would not vitiate the cost-neutralizing effects of the "Model Statute").

While the state legislatures' perceived need to adopt "Qualifying Statutes" therefore presents opportunities for tobacco control, there are also hazards. The tobacco industry's friends in the legislature could try to slip unrelated industry protections (*e.g.* preemption) into legislation purportedly designed just to protect the state's tobacco settlement revenues. Any language

inserted in such legislation that does not track the model presented in Exhibit T should be considered suspicious and potentially dangerous. As always, the price of tobacco control is eternal vigilance.

However, the safest course for any state to take, in light of the NPM provisions, is to pass the "Model Statute," rather than any other form of "Qualifying Statute."

Chapter Five:

The Preclusive Effect of the MSA on Future Actions by State and Local Governments Against Participating Manufacturers

By Peter Enrich

5.1: Q & A

5.1.1: **To what extent does the MSA affect the ability of state and local governments to bring future lawsuits concerning tobacco products and their effects?**

As with any settlement agreement in any litigation, one effect of the Master Settlement Agreement is to bring an end to the lawsuits from which it arises. In particular, the MSA ends an array of suits brought by the states against the tobacco manufacturers, largely seeking compensation for health care costs incurred by the states in connection with tobacco related diseases. Termination of these suits is, of course, one of the primary benefits that the tobacco company defendants derive from the settlement. As part of the agreement to terminate the existing lawsuits, the settlement agreement expressly precludes the parties from bringing any future lawsuits that seek to reopen the issues that were raised in the settled suits.

The Master Settlement Agreement, however, goes far beyond these ordinary preclusion provisions. Its broadly worded preclusion provisions [MSA XII] restrict the abilities of the settling states to bring future claims, not only for past conduct covered in the settled cases, but also for a broad range of future conduct by the tobacco companies. Moreover, the preclusion provisions apply, not only to future actions against the tobacco companies who are the parties to the settlement, but also to suits against a wide array of other tobacco-related entities, including some claims against tobacco retailers and distributors. In addition, the MSA limits future suits, not only by the settling states, but also by any cities, towns, counties, or other agencies or subdivisions of the states.

5.1.2: **To what extent are state suits concerning past wrong-doing precluded by the MSA?**

The preclusive effect of the MSA on claims relating to past conduct is sweeping in its breadth. It applies not only to claims or issues actually raised in the settled lawsuits but to virtually any claims or issues that the states might have raised that relate in any way to the production, distribution or use of tobacco products. [MSA II(nn)(1)].⁷⁵ No matter what new information may emerge about past misconduct by the tobacco companies and their associates,

⁷⁵ The specific language of the MSA's definition of released claims applies to claims "directly or indirectly based on, arising out of or in any way related, in whole or in part, to (A) the use, sale, distribution, manufacture, development, advertising, marketing or health effects of, (B) the exposure to, or (C) research, statements, or warnings regarding, Tobacco Products" [MSA II(nn)].

and no matter what future costs may be found to be the results of past misconduct, no future state lawsuits can be brought concerning any past actions (or inactions).

This prohibition affects claims, not only against the settling tobacco manufacturers, but also against a wide array of other parties that have participated in the production, marketing, and sale of tobacco products. The release extends to all parent and subsidiary corporations affiliated with the manufacturers, to all of their officers and employees, and to advertising agencies, attorneys, suppliers and other businesses that have participated or assisted in their business activities. [MSA II(oo)].

5.1.3: What about state suits relating to future wrong-doing?

The preclusion of claims relating to future conduct purports to be somewhat narrower, although it, too, applies not only to the tobacco manufacturers but to the full range of related businesses and individuals. Claims for reimbursement of future health care costs linked to tobacco exposure are expressly barred, apparently regardless of what future wrong-doing by the tobacco companies might be the basis for the claim. Beyond these reimbursement claims, the settlement precludes claims relating to future misconduct only if the claims relate to "the use of or exposure to Tobacco Products manufactured in the ordinary course of business." [MSA II(nn) (2)]. How broadly this preclusion will be interpreted is hard to predict, but it, at least, appears intended to protect the tobacco companies from state suits that would hold them liable for harms flowing from the continued operation of their "ordinary" business of manufacturing and selling tobacco products.

While this provision is framed in a way that purports to limit the scope of the preclusion, it nonetheless appears to reach quite broadly, with the result that even newly identified future misconduct by the tobacco companies would not appear to warrant state action to recover for resultant costs, if those costs arose from use of or exposure to tobacco products. Thus, future state claims for medical costs seem likely to be completely off limits, whatever their basis. The extent to which this prohibition also bars, for instance, state actions to recover civil penalties for violations of state laws relating to tobacco manufacture, marketing or sales is less clear, although the MSA's broad definition of "claims" [MSA II(n)] appears problematic in this regard.

5.1.4: How does the MSA affect state suits against retailers and distributors of tobacco products?

The MSA's definition of "Released Parties" includes distributors and retailers of tobacco products [MSA II(oo)], but not all claims against these businesses are barred. In fact, the settlement expressly does not preclude actions against retailers, suppliers or distributors based on their sale or distribution of tobacco products [MSA XII(a)(8)]. Thus, state suits based on illegal retail sales to minors or on other theories that might hold retailers or distributors liable for the harmful effects of the tobacco products they sold appear not to be precluded by the settlement. By contrast, state suits against retailers or distributors resting on improprieties concerning advertising or marketing (rather than sales or distribution) might well be precluded.

Even where state suits against retailers or distributors are not directly precluded, the MSA sets up further obstacles to effective litigation. If the retailer or distributor is able to hold a tobacco manufacturer (or other entity covered by the preclusion provision) accountable for any part of its liability in such a suit, then to that extent the suit is barred, or is paid for out of the existing settlement fund [MSA XII(a)(8)(A)-(B)]. In other words, if a state sues a retailing chain on the basis of its sales practices and the retailing chain is able to argue that the tobacco

companies are financially liable to the chain for its damages, then the states agree to forego recovery of those damages, or else to reduce the tobacco companies' settlement payments to offset any liabilities resulting from the lawsuit.

As a result of this provision, it seems likely that, in future actions brought against retailers and distributors, it will become a common strategy for the retailer or distributor to raise a range of arguments for holding the tobacco manufacturers and their affiliates responsible for any wrong-doing, and for the tobacco companies to structure their relations with retailers and distributors in ways that will assist them in making those arguments. The net effect will be to render such suits ineffectual, since they will fail to impose any new liabilities on anyone.

5.1.5: Are there any types of state suits that are not precluded by the MSA?

Yes. The MSA expressly preserves the right of states to bring any criminal actions that may be warranted. The settlement has no bearing on any such criminal proceedings, whether grounded in federal, state, or local law. [MSA XII(a)(7)]. The agreement also makes an express exception for state suits concerning tax liabilities or liabilities under any licensing fee provisions. [MSA II(nn)(1)]. Finally, the agreement does not preclude the states from going to court to enforce the commitments undertaken by the tobacco companies in the settlement agreement and the associated consent decrees.

5.1.6: How does the MSA affect the rights of counties, cities, and other subdivisions of the states?

As a legal matter, counties, cities, and towns, as well as state universities and other governmental entities, are "creatures" of the state. That is to say, they are created by the state and have only those powers granted to them by the state. Drawing on this relationship, the Attorneys General, in the settlement agreement, give up not only their states' rights to pursue further legal actions against the tobacco companies and related businesses and individuals, but also the rights of the states' agencies and subdivisions as well. [MSA II(pp)]. Under the language of the MSA, the range of claims that are precluded for these governmental subdivisions is precisely the same as the range of claims precluded for the states. [MSA XII(a)(1),(3),(4)].

This means that a municipality or a state-created entity (like a state college) is barred from bringing a lawsuit to recover, for example, the costs that it has incurred in providing health care for smokers, even though it has not previously had an opportunity to raise those claims and even though it will receive no compensation for those claims under the settlement. The Attorneys General have released all such claims as part of the quid pro quo for the tobacco companies' financial settlement of the states' own reimbursement claims.

Whether and to what extent state Attorneys General have the authority to preclude such claims on the part of state subdivisions, and particularly on the part of municipalities, is a matter of state law, and the scope of the authority likely varies from state to state. In recognition of this limitation, the MSA makes clear that the scope of the preclusion extends only as far as the signers of the agreement have the power to extend it. [MSA II(pp)]. A municipality considering bringing a suit that may come within the scope of the MSA's preclusion should seek the advice of local counsel as to whether its claims have been effectively barred.

However, even in those cases where municipalities or other governmental subdivisions may still have the authority to bring tobacco-related lawsuits, the MSA contains provisions that will undermine their viability and their impact. Specifically, the settlement stipulates that, if any such suit is brought and is not precluded by the settlement agreement, then any damages that are

recovered by the municipality or subdivision will be deducted from the liability of the tobacco companies to the parent state. [MSA XII(b)(2)(A)]. As a result, such a suit, even if successful, would have no financial impact on the tobacco companies; rather, it would simply transfer some portion of the settlement payments from the state to the municipality or subdivision. The effect is to give the states a direct financial interest in deterring any such suits. In fact, the MSA expressly reserves for the states the right to intervene in such suits to protect their own interests against those of the municipality or subdivision. [MSA XII(b)(2)(C)]. These provisions have the likely effect of turning the states into agents of the tobacco companies in efforts to prevent local governments from pursuing tobacco control enforcement actions.

**Part Two:
The Effect of Selected
Provisions of the
Multistate Master
Settlement Agreement**

Chapter Six:

Advertising Restrictions

By Robert Kline and Patricia Davidson

6.1: Background

Tobacco advertising is one of the leading causes of teen tobacco use. Cigarette advertising strategies lure children and teens into smoking by associating the use of tobacco with adulthood, rebellion against authority and independence.⁷⁶ Although tobacco advertising has little impact on adults, every major tobacco advertising campaign has corresponded to a major increase in smoking among 14- to 17-year-olds.⁷⁷ Camel, Marlboro, and Newport – the three most heavily advertised brands of cigarettes – are smoked by 86 percent of the teenage market.⁷⁸ The industry also makes effective use of ad placements near schools and on promotional items such as caps and T-shirts to enhance tobacco sales by ensuring that the "face" of their particular product is never far from the curious eyes of America's teenagers.⁷⁹

6.2: Q & A

6.2.1: Will outdoor advertising be eliminated under the MSA?

Certain types of outdoor advertising, as defined by the MSA (and described below), must be discontinued under the MSA effective April 23, 1999. [MSA III(d)].

6.2.2: What is included in the term "outdoor advertising" under the MSA?

The term "outdoor advertising" includes billboards [MSA II(ii)(1)], as well as signs and placards in open air or enclosed arenas, stadiums, shopping malls and video game arcades. [MSA II(ii)(2)].⁸⁰ Under this definition, tobacco advertising in sporting arenas should be prohibited unless the event is a "Brand Name Sponsorship." The term "outdoor advertising" also includes any other tobacco advertisement located outdoors or "on the inside surface of a window facing outward," unless the location is a tobacco retailer in which case such a window display would not be considered "outdoor advertising." [See explanation below; MSA II(ii)].

6.2.3: What is excluded from the term "outdoor advertising" under the MSA?

⁷⁶ WILLIAM BAILEY, *THE INVISIBLE DRUG*, Mosaic Publications, Inc., Houston, Texas, 1996 at 60.

⁷⁷ Centers for Disease Control and Prevention (hereinafter CDC), *Changes in the Cigarette Brand Preferences of Adolescent Smokers - United States, 1989-1993*, MORBIDITY AND MORTALITY WEEKLY REPORT (hereinafter MMWR), August 19, 1994 at 524.

⁷⁸ *Id.* at 577.

⁷⁹ BAILEY, *supra* note 76, at 63.

⁸⁰ Under this definition there should be no tobacco advertising in sporting arena unless the event is a "Brand Name Sponsorship" (*see* discussion below) or there is a tobacco retail establishment in the arena.

There are **five** significant exceptions to the MSA's definition of "outdoor advertising." **First**, signs and placards in adult-only facilities⁸¹ are excluded. [MSA II(ii)(2)]. **Second**, advertisements outside of tobacco product manufacturing facilities are excluded. [MSA II(ii)].

Third, certain types of advertisements located at tobacco retail establishments⁸² often referred to as "point-of-sale" advertisements, are not considered "outdoor advertising" under the MSA. Specifically an individual tobacco advertisement that is 14 square feet in size or smaller⁸³ is not treated as forbidden "outdoor advertising" if it located (1) on the outside of a retail establishment that sells tobacco products; or (2) outside of and on the property of a retail establishment selling tobacco products; or (3) "on the inside surface of a window facing outward" in a retail establishment that sells tobacco products. [MSA II(ii)].

Fourth, any size advertisements inside retail establishments that sell tobacco products that are not located on the inside surface of a window facing outward are specifically excluded from the definition of "outdoor advertising." [MSA II(ii)].

Fifth, "outdoor advertisements" (including billboards) of any size located "at the site of an event to be held at an Adult-Only-Facility" up to 2 weeks prior to the event (and placed there during the time that "facility or enclosed area constitutes an Adult-Only Facility") are excluded. [*Id.*]. The MSA is silent as to when such outdoor advertising must be removed in order to qualify for this exception. Under this fifth exception outdoor advertising for events such as "Camel Nights" at local bars and clubs would be permitted for up to 2 weeks before each event.

6.2.4: Does the MSA prohibit tobacco advertising on billboards?

The MSA forbids outdoor advertising of tobacco products on billboards. [MSA II(ii) and MSA III(d)]. However, the prohibition of tobacco billboards does not apply to outdoor advertising for "Brand Name Sponsorships". [MSA III(c)(2)(E)]. Thus, for example, RJR can still advertise on billboards promoting the Winston Cup series.

6.2.5: How does the MSA affect transit advertising?

Tobacco product "transit advertising" must also be eliminated under the MSA by April 23, 1999. [MSA III(d)]. However, like "outdoor advertising", the MSA definition of "transit advertising" includes some important exceptions, described below. [MSA II(xx)].

6.2.6: What is included in the term "transit advertising" under the MSA?

⁸¹ The MSA defines an "adult-only facility" as "a facility or restricted area (whether open-air or enclosed) where the operator ensures or has a reasonable basis to believe (such as by checking identification as required under state law, or by checking the identification of any person appearing to be under the age of 27) that no Underage person is present. A facility or restricted area need not be permanently restricted to Adults in order to constitute an Adult-Only Facility, provided that the operator ensures or has a reasonable basis to believe that no Underage person is present during the event or time period in question." [MSA II(c)].

⁸² The MSA does not define the term "tobacco retail establishment." However, the "outdoor advertising" definition clarifies that retail establishments that sell tobacco products solely through a vending machine do not qualify for the retail establishment exclusions. [MSA II(ii)].

⁸³ To qualify for this exception an ad may not be "placed in such proximity to any other advertisement so as to create a single "mosaic"-type advertisement larger than 14 square feet" nor may it "function solely as a segment of a larger advertising unit or series." [MSA II(ii)].

The MSA defines "transit advertising" as "advertising on or within private or public vehicles and all advertisement placed at, on or within any bus stop, taxi stand, transportation waiting area, train station, airport or any similar location." [MSA II(xx)].

6.2.7: What is excluded from the term "transit advertising" under the MSA?

First, under the MSA the term "transit advertisement" does not include tobacco advertisements "placed in, on or outside the premises of any retail establishment that sells Tobacco Products" unless the advertisement is larger than 14 square feet; is located so close to another advertisement that it creates "a single 'mosaic'-type advertisement larger than 14 square feet;" or "functions solely as a segment of a larger advertising unit or series." [MSA II(xx)].

Second, advertising at the site of an event to be held at an adult-only facility is also excluded from the transit advertising prohibition under the same conditions that apply to adult-only facility outdoor advertising. [MSA II(xx)]. Thus, in order to qualify for the exception, the advertising must be placed at the site when it "constitutes and Adult-Only Facility"; may be located there no more than two weeks before the event; and may not advertise any tobacco product.⁸⁴ [MSA II(xx)].

Under these exceptions, tobacco advertising in an airport that houses a tobacco retail establishment may be permissible. In that case the advertising may be placed in, on or outside the retail establishment as long as the poster or sign is not larger than 14 square feet. Brand advertising for events such as "Camel Nights" at airport or train station bars and clubs for two weeks before each such event may also be allowed under the conditions described above.

6.2.8: What effect does the MSA have on storefront signs?

The MSA has little effect on storefront signs and placards. Tobacco advertising visible from the outside of a tobacco retail establishment (whether the sign itself is inside or outside) cannot be larger than 14 square feet. [MSA II(ii)]. The signs may be on the outside structure of the store or elsewhere on the tobacco retailer's property. Signs may also be on the inside of store windows, or inside the store facing outward and visible from the street. [MSA II(ii)]. State and local governments may chose to regulate storefront advertising beyond the scope of the MSA using the rationale upheld by the courts in the Baltimore⁸⁵, Tacoma⁸⁶, or St. Louis⁸⁷ tobacco advertising restrictions (e.g., that tobacco advertising may be restricted because it encourages youth to be involved in illegally purchasing tobacco products). State and local governments may chose to regulate storefront advertising beyond the scope of the MSA using the rationale upheld by the courts in the Baltimore,⁸⁸ Tacoma,⁸⁹ or St. Louis⁹⁰ tobacco advertising restrictions (e.g.,

⁸⁴ Using a brand name to identify the event (i.e., "Winston") is not considered to be an advertisement of a tobacco product. [MSA II(xx)].

⁸⁵ *Penn Advertising of Baltimore v. Mayor and the City Council of Baltimore*, 101 F.3d 332 (1996), *Penn Advertising of Baltimore, Inc. v. Schmoke*, 63 F.3d 1318 (4th Cir. 1995).

⁸⁶ *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F. Supp. 2d 1213 (1997).

⁸⁷ *Missouri Retailers Association v. City of St. Louis*, No. 4:98CV1514 ERW (E. D. Mo. Dec. 12, 1998).

⁸⁸ *Penn Advertising of Baltimore v. Mayor and the City Council of Baltimore*, 101 F.3d 332 (1996), *Penn Advertising of Baltimore, Inc. v. Schmoke*, 63 F.3d 1318 (4th Cir. 1995).

⁸⁹ *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F. Supp. 2d 1213 (1997).

⁹⁰ *Missouri Retailers Association v. City of St. Louis*, No. 4:98CV1514 ERW (E. D. Mo. Dec. 12, 1998).

that tobacco advertising may be restricted because it encourages youth to be involved in illegally purchasing tobacco products).

6.2.9: When does "outdoor advertising" and "transit advertising" have to end?

No later than April 23, 1999, Participating Manufacturers must remove all 1) billboards that qualify as "outdoor advertising;" 2) signs and placards that fit the definition of "outdoor advertising" which are located in arenas, stadiums, shopping malls and video arcades; and 3) transit advertising of tobacco products. [MSA III(d)(1)]. Participating Manufacturers may not install any new "outdoor advertising" or "transit advertising" (as those terms are defined by the MSA) as of November 23, 1998, the date the MSA was signed. [MSA III(d)(2)].

Notably, the April 23, 1999 removal deadline appears to apply only to particular types of "outdoor advertising." [*Compare* MSA III(d)(1) to MSA II(ii)]. It is not clear, for example, if a sign on a tobacco retail establishment that is larger than 14 square feet (and therefore not exempt under the MSA) must be removed as of April 23, 1999. Tobacco control advocates might argue that such a sign is a billboard⁹¹ and therefore must come down by April 23, 1999.

6.2.10: Can tobacco industry billboard and transit advertisement locations be used for counter-advertising when the industry ads come down?

Yes. If the MSA requires a Participating Manufacturer (PM) to remove a tobacco advertisement from a leased billboard and there is time left on the lease, the state Attorney General may choose to use the space available for the remainder of that lease term for counter-advertising "intended to discourage the use of Tobacco Products by youth and their exposure to secondhand smoke." [MSA III(d)(3)].

Each Attorney General should be encouraged to find out which industry advertising locations subject to removal have lease time remaining and when the tobacco advertising will be removed.⁹² The Attorney General should then arrange to promptly place tobacco control advertising in available space. Although the PM must pay for the cost of the lease until the term ends, the state must pay for all other costs associated with the counter-advertising. [MSA III(d)(3)].

6.2.11: Can state and local governments regulate tobacco advertising?

Yes. The MSA does not prevent state legislatures or local governments from enforcing existing laws or passing new laws.

6.2.12: What about agreements between a manufacturer and a third party prohibiting tobacco control counter-advertisements?

Participating Manufacturers cannot enter into or enforce existing agreements *prohibiting* third parties from selling, purchasing or displaying counter-advertising "discouraging the use of Tobacco Products or exposure to second-hand smoke." [MSA III(d)(4) (emphasis added)]. For example, RJR is prohibited from contracting with a convenience store owner to give the store

⁹¹ The term "billboard" is not defined by the MSA.

⁹² The MSA requires PMs with outdoor advertising or transit advertising covered by the MSA to provide the AG of states where such ads are located with a contact person "from whom the Settling State may obtain periodic reports as to the progress of their elimination." [MSA III(d)(5)].

owner some benefit, if the owner in return promises that he will not display posters discouraging tobacco use.

6.2.13: What are the rules around cartoons and other types of advertising images?

Beginning May 22, 1999, Participating Manufacturers may not use cartoons in advertising, promoting, packaging, or labeling of tobacco products. [MSA III(b)]. A cartoon is "any drawing or other depiction of an object, person, animal, creature or any similar caricature" that 1) uses exaggerated features; or 2) attributes human characteristics to animals, plants or other objects; or 3) attributes superhuman abilities to the subject of the drawing or depiction. [MSA II(l)]. Thus, the MSA would prohibit advertising that portrayed cute cigarettes posed in human positions (on a porch swing, for example).

The MSA specifically prohibits Joe Camel as a cartoon, [MSAII(l)(3)] but it does not cover the standard camel logo or drawings of a camel because such images do not exaggerate, or attribute human or superhuman qualities to the camel. It also does not prohibit continued use of the Marlboro Man or other human characters.

6.2.14: Are there any special exceptions to the no "cartoon" rule?

Yes. The definition of "cartoon" specifically excludes "any drawing or other depiction that on July 1, 1998, was in use in any State in any Participating Manufacturer's corporate logo or in any Participating Manufacturer's Tobacco Product packaging". [MSAII(l)]. The MSA thus allows continued use of drawings and depictions that would otherwise be outlawed as cartoons if they appeared on corporate logos or tobacco product packaging in any state (not just settling states) on July 1, 1998. It is not clear whether tobacco packages or corporate logos containing such images may be used in advertising the product.

6.2.15: Can the tobacco industry continue to target youth?

The MSA expressly forbids the Participating Manufacturers from engaging in two different types of conduct. "No Participating Manufacturer may take any action, directly or indirectly, to target Youth within any Settling State in the advertising, promotion or marketing of Tobacco Products, or take any action the primary purpose of which is to initiate, maintain or increase the incidence of youth smoking within any Settling State." [MSAIII (a) (emphasis added)].

Analyzing the two parts of the youth targeting prohibition separately (by relying on the comma separating them) is the key to countering anticipated industry claims that it may take any action so long as its primary purpose is not to target youth. For example, the industry may argue that certain marketing activities are permissible because any effect on youth is secondary to the industry's purpose of encouraging adult smokers to switch brands.

Tobacco control advocates and the state Attorneys General should assert that this is an incorrect interpretation of the MSA youth targeting prohibition. The "primary purpose" language only modifies the second type of restricted conduct (action "to initiate, maintain or increase the incidence of Youth smoking within any Settling State"). [*Id.*]. It does not expressly qualify the flat prohibition on targeting youth "in the advertising, promotion or marketing of Tobacco Products." [*Id.*].

6.2.16: How does the MSA effect product placement and endorsements?

Participating Manufacturers may not give anything of value to any person or entity to "use, display, make reference to or use as a prop" any tobacco product, package or advertisement, or any other item with a tobacco brand name "in any motion picture, television show, theatrical production or other live performance, live or recorded performance of music, commercial film or video, or video game ("Media")." [MSA III(e)]. For example, Philip Morris is prohibited from paying money (or providing free or discounted cigarettes) to Sylvester Stallone for using Marlboro cigarettes in his next film. However, Mr. Stallone may still smoke Marlboros in his next film so long as Philip Morris didn't provide anything of value to anyone associated with making the film.

6.2.17: Are there any exceptions to the tobacco product placement/endorsement restriction?

Yes. The limit on payment for tobacco product placement/endorsement does not include media viewed exclusively in an adult-only facility, media not intended for distribution or display to the public, or "instructional" media concerning "non-conventional" cigarettes "viewed only by or provided only to smokers who are Adults." [MSA III(e)].

Furthermore, limits on payments to celebrities and for media placement [MSA III(e)] do not apply to the single permissible Brand Name Sponsorship selected annually by each Participating Manufacturer or those allowed under the "existing contracts" exception. [MSA III(c)(3)(C)].⁹³ (*See* discussion of "Brand Name Sponsorships" below).

6.2.18: How does the MSA affect clothing and merchandise bearing tobacco brand names?

Beginning July 1, 1999, Participating Manufacturers and others licensed by the Participating Manufacturers may no longer market, distribute, offer, sell, or license any apparel or merchandise bearing a tobacco product brand name. [MSA III(f)]. This prohibition expressly includes catalogues and direct mail strategies.

6.2.19: Are there any exceptions to the ban on tobacco brand name merchandise?

Yes. **First**, Participating Manufacturers and their licensees may continue to market, distribute, offer, sell, or license tobacco products, items the sole function of which is to advertise tobacco products (e.g., advertising posters, perhaps), and written and electronic communications. [MSA III(f)].

Second, a Participating Manufacturer is not required to breach or terminate any licensing agreement or contract it may have with a third party, if the contract was in existence as of June 20, 1997. [MSA III(f)]. Presumably, contracts covered by this section and entered into after that date would have to be terminated. However, since the end dates of all such industry contracts is not known, it may be quite a long time before this section becomes effective.

Third, Participating Manufacturers are not required to "retrieve collect or otherwise recover" items that were already being marketed, distributed, offered, sold, or licensed before November 23, 1998. [MSA III(f)].

⁹³However, limits on payments to celebrities and for media placement do apply to the Brand Name Sponsorships allowed under the special exception for Brown & Williamson. [MSA III(c)(3)(C)]. *See* discussion of Brand Name Sponsorships, below).

Fourth, the use of coupons or other items used by adults solely to purchase tobacco products is not prohibited by this section. [*Id.*]

Fifth, the ban does not include apparel or merchandise used within an adult-only facility which is not distributed to members of the general public. [MSA III(f)]. It is not clear whether the term "general public" limits this exception to merchandise giveaways to anyone in attendance in the adult-only facility or merchandise giveaways to only the staff of the adult-only facility. [MSA III(f)].

6.2.20: Can third parties use tobacco brand names in marketing and advertising and promotion?

Participating Manufacturers may not enter into new agreements with third parties to use or advertise brand names in a manner that the manufacturer is not allowed to do. [MSA III(i) (emphasis added)]. But Participating Manufacturers are not required to terminate or breach any contract calling for such advertising with a third party if the contract was entered into prior to July 1, 1998. [MSA III(i)].

Furthermore, Participating Manufacturers are not required to retrieve, recover or collect otherwise banned items already out of the manufacturer's possession (but not necessarily in the hands of a consumer) as of November 23, 1998. [MSA III(i)].

6.2.21: Can a Participating Manufacturer use a non-tobacco brand name for a tobacco product?

No. Participating Manufacturers may not use brand names for non-tobacco products as the name of a new tobacco product unless the tobacco product brand name was in existence on July 1, 1998. [MSA III(j) (emphasis added)].

The prohibition is limited, however, to "nationally recognized or nationally established brand name[s] or trade name[s] of any non-tobacco item or service or any nationally recognized or nationally established sports team, entertainment group or individual celebrity." [MSA III(j)]. For example, Participating Manufacturers cannot introduce new brands with names such as "Denver Broncos Cigarettes", or "Leonardo DiCaprio Cigarettes" or "Disney Cigarettes."

6.2.22: What industry lobbying restrictions apply to advertising issues?

The Participating Manufacturers are limited to some extent in lobbying regarding specific advertising-related legislation. [MSA III(m)]. These limitations apply to Participating Manufacturers lobbying efforts regarding "Limitations on tobacco product advertising in or on school facilities, or wearing of tobacco logo merchandise in or on school property." [MSA Exhibit F, No. 7] (emphasis added). This does not address the issue of tobacco industry lobbying on laws regarding tobacco retail store front advertising near schools.

6.2.23: What is a "Brand Name" under the MSA?

The MSA defines brand name as "a brand name (alone or in conjunction with any other word), trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or other indicia of product identification identical or similar to, or identifiable with, those used for any domestic brand of tobacco products." [MSA II(i)].

However, "brand names" do not include "the corporate name of any Tobacco Product Manufacturer that does not after the MSA Execution Date sell a brand of Tobacco Products in the States that includes such corporate name." [MSA II(i) (emphasis added)].

6.2.24: What is a "Brand Name Sponsorship"?

A "Brand Name Sponsorship" is "an athletic, musical, artistic, or other social or cultural event" for which payment of any kind is made to include the brand name as either 1) the name of the event, or 2) to identify, advertise, or promote the event, an entrant, participant or team in the event. [MSA II(j)].

The Winston Cup NASCAR races are one example of a "Brand Name Sponsorship", but an event does not need to be named after the brand to qualify as a "Brand Name Sponsorship". Sponsorships can include local cultural festivals that pay or accept something of value (broadly defined) and are then promoted in conjunction with a tobacco brand name. [MSA II(j)]. For example, "Brand Name Sponsorship" exists where a Participating Manufacturer pays for a booth at a state fair and then promotes its booth at the state fair. It would also exist if the Participating Manufacturer helped subsidize a performer's or athlete's attendance at the state fair and then promoted that performer or athlete in conjunction with a brand name.

But, events held in adult-only facilities are excluded from the definition of "Brand Name Sponsorship." [MSA II(j)]. Thus, "Camel Nights" at a bar would presumably not be considered a "Brand Name Sponsorship."

6.2.25: Which "Brand Name Sponsorships" are prohibited by the MSA?

Under the MSA the following four types of "Brand Name Sponsorships" by Participating Manufacturers are prohibited:

"(A) concerts; or

(B) events in which the intended audience is comprised of a significant percentage of Youth; or

(C) events in which any paid participants or contestants are Youth; or

(D) any athletic event between opposing teams in any football, basketball, baseball, soccer or hockey league." [MSA III (c)(1)] (emphasis added)].

There are several questions left unanswered about how some of this language will be interpreted. For example, what percent of an audience must be identified as youth in order for the sponsorship prohibition to apply? Is a tobacco manufacturer excused if it "intended" the event to be for an adult audience, but "a significant percentage" of the audience is comprised of youth? Does the ban cover auto racing where youth represent "a significant percentage" of the audience or is NASCAR racing exempt based on the definition of "Brand Name Sponsorship?" [MSA II(j)].

6.2.26: Which "Brand Name Sponsorships" are restricted by the MSA?

Participating Manufacturers are limited to sponsoring one "Brand Name Sponsorship" per year. [MSA III(c)(2)(A)]. The year is calculated from the date of the initial sponsorship.

6.2.27: Are there any exceptions to the ban and restriction on "Brand Name Sponsorships" under the MSA?

Yes. **First**, despite the one "Brand Name Sponsorship" per year limit, Participating Manufacturers are not required "to breach or terminate any sponsorship contract in existence as

of August 1, 1998" until the earlier of the expiration of the current term of the contract⁹⁴ or November 23, 2001. [MSA III(c)(2)(B)(i)]. Thus, Participating Manufacturers may exceed the one sponsorship per year limit if they satisfy the terms of this exception.

Second, there is a special concert exception for Brown & Williamson Tobacco Corporation. Brown and Williamson may sponsor "either the GPC country music festival or the Kool jazz festival as its one annual Brand Name Sponsorship . . . as well as one Brand Name Sponsorship" under the existing contracts exception. [MSA III(c)(2)(B)(ii) (emphasis added)].

6.2.28: Are Corporate Name Sponsorships Restricted or Prohibited Under the MSA?

No. The MSA specifically permits Participating Manufacturers to sponsor "any athletic, musical, artistic, or other social or cultural event, or any entrant, participant or team in such event (or series of events) in the name of the corporation which manufactures Tobacco Products", provided that the name doesn't include the brand name of a domestic tobacco product. [MSA III (c)(4)]. Thus, for example, Philip Morris may sponsor museum exhibits in its corporate name, in addition to its allowable "Brand Name Sponsorships" for Marlboro cigarettes.

6.2.29: Does the NASCAR racing tour qualify as one "Brand Name Sponsorship" or is it a series of "Brand Name Sponsorships"?

A NASCAR racing series is a single "Brand Name Sponsorship" under the MSA because a single national or multi-state series or tour is considered one "Brand Name Sponsorship". [MSA II(j)]. Similarly, the Virginia Slims Senior Tennis Tournament would qualify as one sponsorship even though it might consist of a series of matches in a number of cities.

Also, where a Participating Manufacturer sponsors an entrant or team in its own "Brand Name Sponsorship" it is counted as one sponsorship. [MSA II(j)]. For example, RJR can sponsor NASCAR's Winston Cup series of races and also sponsor a team or driver in the Winston Cup series and count that as one sponsorship. If Philip Morris sponsored a driver in the Winston Cup, however, it would be a separate sponsorship. [MSA II(j)].

6.2.30: Are there restrictions on advertising "Brand Name Sponsorships" under the MSA?

To the extent that a Participating Manufacturer may have a "Brand Name Sponsorship" (*see above*) there are certain advertising and promotion restrictions that apply to advertising the sponsorship. Advertising of a "Brand Name Sponsorship" may use a brand name to identify that sponsorship, but the brand name may not be used to advertise tobacco products directly. [MSA III(c)(3)(A)]. For example, RJR may advertise the Winston Cup NASCAR series but it may not advertise Winston cigarettes in those ads (except to use the name Winston to identify the Winston Cup Sponsorship). RJR may also include an entry in the race which bears the Winston colors. RJR could use a picture of the Winston cigarette colors on the Winston race car in the advertising for the "Brand Name Sponsorship." [MSA III(c)(3)(A)] and [MSA III(c)(3)(E)].

However, tobacco product advertisement may not refer to "Brand Name Sponsorships" or to participants in the sponsorship. [MSA III(c)(3)(B)]. For example, Brown & Williamson's

⁹⁴ The current term of the contract is defined "without regard to any renewal or option that may be exercised by such Participating Manufacturer." [MSA III(c)(2)(B)(i)].

advertising of Kool cigarettes may not include references to the Kool Jazz festival or any musicians featured in the festival.

6.2.31: What restrictions exist for product placement and endorsements of "Brand Name Sponsorships"?

Limits on payments to celebrities and for media placement ([MSA III(e)]; *see above*) do not apply to the one "Brand Name Sponsorship" selected each year by each Participating Manufacturer or the exception for existing contracts. [MSA III(c)(3)(C) (emphasis added)]. But, limits on payments to celebrities and for media placement do apply to the "Brand Name Sponsorships" allowed by the special concert exceptions for Brown & Williamson. [*See id.*].

6.2.32: How does the MSA affect clothing and merchandise bearing "Brand Name Sponsorships"?

The MSA restrictions on tobacco product advertising on apparel and other merchandise [MSA III (f)] and third party use of brand names [MSA III(i)] do not apply to items "marketed, distributed, offered, sold or licensed" at the site of a "Brand Name Sponsorship" event if those items include the brand name of the event (as opposed to the brand name of the cigarette itself.) [MSA III(c)(3)(D)].⁹⁵

Those restrictions also do not apply to apparel or merchandise used at the site of a permitted "Brand Name Sponsorship" during such an event if they are not distributed "to any member of the general public." [MSA III(c)(3)(D)(ii)].⁹⁶

6.2.33: How does the MSA affect outdoor advertising and transit advertising for "Brand Name Sponsorships"?

Outdoor advertising and transit advertising restrictions [MSA III(d)] apply to "Brand Name Sponsorships" with two important exceptions. [MSA III(c)(3)(E)]. **First**, outdoor advertising (i.e. billboards) for "Brand Name Sponsorships" may be placed at the site of the sponsorship for 90 days before the event and remain there for 10 days after the event is over. [MSA III(c)(3)(E)(ii)].⁹⁷

Second, the restriction on transit advertising does not apply to vehicles used in "Brand Name Sponsorship." [MSA III(c)(3)(E)(i)]. Thus, RJR does not violate the transit advertising restrictions by putting the Winston colors or the name "Winston" on its entry in the Winston Cup Series. However, outdoor "Brand Name Sponsorship" advertising still may not be used to advertise tobacco products directly. [MSA III(c)(3)(A)].

6.2.34: Can stadiums and arenas be named for tobacco brand names?

Stadiums and arenas may not be named or renamed for tobacco product brand names. [MSA III(c)(5)]. For example, Philip Morris may not pay for or otherwise cause the renaming of Los Angeles' Dodger Stadium to "Marlboro Stadium." Since corporate names are apparently allowed, however, theoretically Dodger Stadium could be re-named "RJR Stadium".

⁹⁵ This exception does not appear to apply to the special Brown & Williamson concert exception. *Id.*

⁹⁶ These exceptions, however, do not appear to apply to the Brown & Williamson music festivals allowed in under the special exception to the Brand Name Sponsorship rule. [MSA III(c)(2)(B)(ii)].

⁹⁷ But, outdoor advertising still may not be used to advertise tobacco products directly. [MSA III(c)(3)(E)(ii); MSA III(c)(3)(A)].

6.2.35: Does the MSA prohibit using brand names in conjunction with sports leagues and teams?

Participating Manufacturers may not pay football, basketball, baseball, soccer, or hockey leagues or teams in those leagues for use of a brand name. [MSA III(c)(6)]. For example, RJR could not sponsor the "Camel Cotton Bowl" on New Year's Day, or be the "official sponsor" of the National Basketball Association. Furthermore, "Brand Name Sponsorships" may not include athletic events between opposing teams in any football, basketball, baseball, soccer, or hockey leagues. [MSA III(c)(1)(D)]. These provisions include major and minor leagues and presumably college sports conferences.

6.2.36: Can state and local governments regulate advertising of "Brand Name Sponsorships"?

Yes. Under current First Amendment rules regarding advertising a state or local government might be able to regulate "Brand Name Sponsorship" advertising as a sub species of tobacco advertising. Common sense suggests that the reason the tobacco industry spends money on promotional sponsorships is because it attracts new smokers to tobacco products. Experts could easily demonstrate that sponsorship of events is an important advertising tool for any product. Social science evidence shows tobacco advertising is linked to youth smoking.⁹⁸ Restrictions on tobacco advertising have been upheld by the Fourth Circuit Court of Appeals,⁹⁹ and federal judges in Tacoma¹⁰⁰ and St. Louis.¹⁰¹ Similar restrictions, however, have been overturned in Chicago,¹⁰² New York City¹⁰³ and Burlington, Vermont.¹⁰⁴

⁹⁸ Pierce, et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511 (1998) (Minors exposure to tobacco advertising and marketing is best predictor of smoking initiation).

⁹⁹ *Penn Advertising of Baltimore, Inc. v. Schmoke*, 63 F.3d 1318 (4th Cir. 1995). 63 F.3d 1318, 1325 (4th Cir. 1995), *vacated and remanded*, 518 U.S. 1030 (1996), *readopted*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 1569 (1997).

¹⁰⁰ *Lindsey v. Tacoma-Pierce County Health Dept.*, 8 F. Supp. 2d 1213 (1997).

¹⁰¹ *Missouri Retailers Association v. City of St. Louis*, No. 4:98CV1514 ERW (E. D. Mo. Dec. 12, 1998).

¹⁰² *Federation of Advertising Industry Representatives, Inc. v. Chicago*, 12 F. Supp. 2d 844 (1998).

¹⁰³ *Greater New York Metropolitan Food Council, Inc. v. Guiliani*, No. 98 Civ. 251(DAB), 1998 U.S. Dist. LEXIS 19498, (S.D. NY Dec. 15 1998).

¹⁰⁴ *Rockwood v. City of Burlington*, 21 F. Supp. 2d 411 (1998).

Chapter Seven:

Youth Access Provisions

By Laura Hermer and Graham Kelder

7.1: Background

The nicotine contained in tobacco products is addictive.¹⁰⁵ This means that although smoking involves an initial decision to start, it quickly changes from a matter of free choice into one of nicotine addiction. In 1988, the Surgeon General confirmed that nicotine causes an addiction similar to and as powerful as that of cocaine or heroin.¹⁰⁶ On August 10, 1995, the Food and Drug Administration ("FDA") concluded that "the nicotine in tobacco products is highly addictive, causes other psychoactive effects, such as relaxation and stimulation, and affects weight regulation."¹⁰⁷

Most nicotine addiction begins during adolescence, and the prevalence of tobacco use by children and adolescents is on the rise.¹⁰⁸ Eighty-two percent of adult smokers begin smoking before they have reached 18, the age at which they are legally allowed to be sold cigarettes.¹⁰⁹ In fact, a majority of high school seniors who smoke at least a half pack each day say that they have already tried unsuccessfully to quit smoking — some of them repeatedly.¹¹⁰ It has been estimated that 13 percent of 12- to 18- year-olds (3.1 million youngsters) smoke cigarettes,¹¹¹ and that one million use snuff or chewing tobacco.¹¹² Seventy percent of teen-age smokers become regular smokers by age 18.¹¹³

Furthermore, teen smoking is on the rise. "From 1991 to 1994, smoking increased 30 percent among eighth graders, 20 percent among 10th graders, and 12.5 percent among high school seniors."¹¹⁴ This surge in teen smoking is due to a number of factors, including the targeting of minors in tobacco industry advertising, coupled with an alarming decline of concern among teenagers about the dangers of cigarette use.¹¹⁵

¹⁰⁵ At least some cigarette and spitting tobacco manufacturers take steps to enhance this addictiveness.

¹⁰⁶ US DEPARTMENT OF HEALTH & HUMAN SERVICES, THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL (hereinafter USDHHS I), Washington DC, 1988: iii-v. DHHS publication CDC-88-8406.

¹⁰⁷ *Id.* at 41, 464.

¹⁰⁸ *Id.* at 41, 785-41,786.

¹⁰⁹ CDC, *Trends in Smoking Initiation Among Adolescents and Young Adults*, MMWR 44(28); 521-525 (1995).

¹¹⁰ *Id.* at 521.

¹¹¹ U.S. DEP'T OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: SURGEON GENERAL'S REPORT (hereinafter USDHHS II), 9 (1994).

¹¹² *Id.* at 97.

¹¹³ *See id.* at 84.

¹¹⁴ *A Surge in Teenage Smoking*, U.S. NEWS & WORLD REP., July 31, 1995 at 8.

¹¹⁵ Don Colburn, *Rise in Teen Smoking Has Experts Vexed*, WASHINGTON POST, September 10, 1996.

One of the most pernicious facts about the problem of youth smoking is that teenagers can obtain tobacco products with relative ease. According to studies done by the CDC in 1995, 62% of minors reported that they could easily purchase their own cigarettes, and 75% reported that they were never asked for identification to verify their age. Children can also obtain cigarettes quite easily from vending machines and self-service displays.¹¹⁶

In 1993 and 1994, a committee appointed by the Institute of Medicine (IOM)¹¹⁷ – chartered in 1970 by the National Academy of Sciences to enlist distinguished members of the appropriate professions to study policy matters related to public health – conducted an 18-month study on the prevention of nicotine dependence among children and youths.¹¹⁸ In its study, the IOM identified what it considered to be the essential components of any program to reduce youth access to tobacco.¹¹⁹ The IOM's guidelines are considered normative in the national tobacco control community at all levels – federal, state and local.

The IOM recommended that states or localities "establish a licensing system requiring merchants to obtain a license to sell tobacco products, which may be suspended or revoked if the merchant sells tobacco to minors or violates other state and local laws designed to reduce youth access" to tobacco, and that "[l]icensing fees should be earmarked for the enforcement of youth access legislation."¹²⁰ The IOM stated that, in light of the number and variety of tobacco vendors, "a tobacco retailer licensing program must be the cornerstone of any successful enforcement effort."¹²¹ This licensing approach has been endorsed by nearly every study of youth access interventions,¹²² and experience with licensing and permitting systems on the local level has demonstrated the effectiveness of this approach.¹²³ This approach has, for example, been used extensively and to great effect by the communities that are funded by the Massachusetts Tobacco Control Program.

The IOM also recommended that states or localities ban tobacco vending machines.¹²⁴ This is because minors rely on vending machines as a major source for tobacco products,¹²⁵ and younger children are most likely to rely on tobacco vending machines as a source for cigarettes.¹²⁶

¹¹⁶ BAILEY, *supra* note 76, at 68-71.

¹¹⁷ The Institute of Medicine acts under both the National Academy of Science's 1863 congressional charter responsibility to be an advisor to the federal government and its own initiative in selecting the issues it studies.

¹¹⁸ BARBARA S. LYNCH & RICHARD J. BONNIE, *GROWING UP TOBACCO FREE: PREVENTING NICOTINE ADDICTION IN CHILDREN AND YOUTHS*, National Academy Press, Washington, DC, 1994, at ix.

¹¹⁹ *Id.* at 210-224.

¹²⁰ *Id.* at 211.

¹²¹ *Id.* at 210.

¹²² *Id.*

¹²³ OFFICE OF THE INSPECTOR GENERAL, *YOUTH ACCESS TO TOBACCO*, Department of Health and Human Services, December, 1992.

¹²⁴ LYNCH & BONNIE, *supra* note 118, at 212-214.

¹²⁵ *See, e.g.*, Michael K. Cummings, et al., *Where Teenagers Get Their Cigarettes*, 1 *TOBACCO CONTROL* (1992) at 264-267; RESPONSE RESEARCH, INC., *STUDY OF TEENAGE SMOKING AND PURCHASE BEHAVIOR*, June/July, 1989.

¹²⁶ *See, e.g.*, RESPONSE RESEARCH, *supra* note 125; Joseph Cismoski, *Fond du Lac School District Survey*, Kercher Center for Social Research, Western Michigan University, Kalamazoo, MI, January 1994 (unpublished).

Furthermore, the IOM recommended that states or localities should ban the sale of tobacco products by self-service displays.¹²⁷ Self-service displays – which allow both teenagers and legitimate customers to help themselves to tobacco products – are a prime source of tobacco products for minors and invite shoplifting.¹²⁸

Finally, the IOM recommended that states or localities ban two other potent sources of tobacco products for adolescents: single cigarette sales and the free distribution of tobacco products.¹²⁹

In addition to recommending that the federal government play a leadership role in facilitating state and local efforts to control the sale and use of tobacco, the IOM recommended that "states adopt a youth access plan that does not preempt local governments from adopting stronger local initiatives."¹³⁰ The tobacco industry strategy of preempting local tobacco control efforts will be discussed at length in Section 8.2 of this analysis.

7.2: Q & A

7.2.1: Does the Multistate Settlement Agreement (MSA) include any commitment to restrict youth access to tobacco products?

Yes. The Multistate Master Settlement Agreement (MSA) expressly sets forth that both the settling states and the participating manufacturers are "committed to reducing underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products." [MSA I].

7.2.2: Does the MSA make any express provisions for the achievement of this commitment?

Yes, it does. Perhaps most saliently, the MSA provides funding which the agreement expressly suggests may be used for tobacco control. In the "Recitals" section, the MSA provides that settling states "have agreed to settle their respective lawsuits and potential claims pursuant to terms which will achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, including the enforcement of the mandates and restrictions related to such measures, as well as funding for a national Foundation dedicated to significantly reducing the use of Tobacco Products by Youth" [MSA I].¹³¹

The MSA also contains several non-monetary provisions which may restrict youth access to tobacco products.¹³² These provisions are generally weak, and leave entirely unaddressed

¹²⁷ LYNCH & BONNIE, *supra* note 118, at 214-215.

¹²⁸ See, e.g., Dena Cox, et al., *When Consumer Behavior Goes Bad: An Investigation of Adolescent Shoplifting*, 17.2 JOURNAL OF CONSUMER RESEARCH (1990) AT 149-159; ROSWELL PARK CANCER INSTITUTE, SURVEY OF ALCOHOL, TOBACCO AND DRUG USE: NINTH GRADE STUDENTS IN ERIE COUNTY, 1992, Buffalo, NY, 1993; Cismoski, *supra* note 126.

¹²⁹ LYNCH & BONNIE, *supra* note 118, at 215-219.

¹³⁰ *Id.* at 210.

¹³¹ For an analysis of the Foundation provisions, see *infra* chapter 9.

¹³² This analysis pertains only to youth access provisions. For an analysis of provisions relating to youth and advertising, see *supra* chapter 6.

some of the most effective tobacco control strategies. Thus, they should not be relied upon as a central feature of any state or locality's plan to restrict youth access to tobacco products.

7.2.3: What specific youth access measures does the MSA contain?

It places certain restrictions on the provision of manufacturer gifts [MSA III(h)] and free samples [MSA III(g)] to persons who are "Underage," prohibits participating manufacturers from marketing packs containing fewer than 20 cigarettes or less than 0.60 ounces of loose tobacco until the year 2001 [MSA III(k)], and contains an express commitment by participating manufacturers to assist in the reduction of tobacco use by youth. [MSA III(l)(1)].

7.2.4: How does the MSA define "youth" and someone who is "Underage"?

"Youth" means "any person or persons under 18 years of age." [MSA II(bbb)]. "Underage" is defined as being "younger than the minimum age at which it is legal to purchase or possess (whichever minimum age is older) Cigarettes in the applicable Settling State." [MSA III(yy)].

The MSA uses each term, separately, to denote different classes of people affected by a number of settlement provisions. In a number of provisions, most notably a majority of the few pertaining to youth access, only the term "Underage" is used to refer to the target population.

The problem with the definition of "Underage" which the MSA uses is that many states have not made the purchase or possession of tobacco products by minors illegal. Rather, a substantial minority of states have criminalized only the sale of tobacco products to minors, rather than minors' own purchase or possession of such products. Thus, in such states, *no one* is "Underage."

In order to effectuate most of the few youth access-related terms of the agreement, numerous states will have to make youth possession and purchase of tobacco products illegal. This, in turn, may lead to a number of adverse effects. Criminalization of youth possession may help create a "deviant subculture of youth who gain self-esteem through contempt for the law."¹³³ It may also focus enforcement efforts - and any civil or criminal penalties which may result - on children whom society does not yet consider to be responsible enough to decide to take up the addiction for which they are being punished. If states do not expressly include any exception to the contrary, it may also affect public health departments' and other entities' ability to use minors in performing retailer compliance checks.

7.2.5: What restrictions does the MSA place on the provision of manufacturer gifts to minors?

The MSA prohibits Participating Manufacturers from providing gifts to "underaged" persons based on proofs of purchase. [MSA III(h)]. It also stipulates that no participating manufacturer may provide any such gifts or cause such gifts to be provided without requiring the recipient to offer a driver's license or other government-issued identification card (or legible photocopy thereof) as proof that s/he is of a legal age to purchase or possess cigarettes in the applicable state. [MSA III(h)].¹³⁴

¹³³ See, e.g., Graham E. Kelder, *The Promises, Perils and Pitfalls of Criminalizing Youth Possession of Tobacco*, 1 TOBACCO CONTROL UPDATE (Winter 1997), viewed at <http://tobacco.neu.edu/tcu/3-97/>.

¹³⁴ *Id.* The section provides that a person must provide proof that she/he is an "Adult" prior to receiving any gifts, credits, proofs of purchase or coupons with respect to a purchase of cigarettes. In part II, section (b) of the MSA, an

In its favor, this provision is at least more restrictive of youth access to tobacco company merchandise than most state law provisions throughout the country. However, this provision functions only in states which have prohibited youth possession of tobacco products, since it prohibits distribution of gifts only to "Underage" individuals. It also provides a large loophole for youth access by permitting redemption of proofs of purchase for gifts by mail, even though the recipient must provide a photocopy of an identification card as proof of age. [MSA III(h)]. Rather than being dependent on the MSA provision, states and/or municipalities that have not criminalized youth possession of tobacco products could simply prohibit the distribution of gifts from tobacco products manufacturers to individuals under the age of 18. They could also enact requirements similar to those found in the MSA regarding the provision of gifts by mail.¹³⁵

7.2.6: What restrictions does the MSA place on the provision of free tobacco product samples to minors?

The MSA bans Participating Manufacturers from distributing free samples of tobacco products or causing such distribution at any place other than an establishment or other restricted area in which the operator ensures (for instance by checking identification) that no "Underage" individual is present during the sampling. [MSA III(g) and II(c)]. Few states have enacted similarly restrictive statewide measures regulating where free samples may be distributed. As noted above, however, a substantial minority of states have no laws stipulating a minimum age for purchase or possession of tobacco products, thus rendering the protection moot under their current law. Again, states and/or localities that have not criminalized youth possession of tobacco products could simply ban the distribution of free samples and coupons for such samples entirely, rather than attempting to rely on the provisions of the MSA.¹³⁶

7.2.7: Does the MSA contain any restriction on marketing "kiddie" packs?

Yes, but it only lasts for fewer than the next three years. The MSA contains a provision which prohibits Participating Manufacturers from producing packs containing fewer than twenty cigarettes, or packages of loose tobacco containing fewer than 0.60 ounces of the substance. [MSA III(k)]. Such a provision would help limit the access of minors, who may not be able to afford to purchase a pack containing twenty cigarettes, to tobacco products. However, this section only is in effect until the end of 2001, after which time the industry may apparently sell "kiddie" packs. [MSA III(k)]. States and localities with a serious interest in limiting youth access to tobacco products might consider enacting, through their own legislative bodies, a similar, but permanent, provision.

"Adult" is defined as a person who is not "Underage," i.e., under the minimum age to purchase or possess cigarettes in the relevant settling state, whichever minimum age of the two is older. [MSA II (yy).]

¹³⁵ Note, however, that there is a chance that such restrictions could run afoul of the Federal Cigarette Labeling and Advertising Act (FCLAA) if it is found to constitute "a requirement or prohibition based on smoking and health . . . imposed under state law with respect to . . . advertising and promotion." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 524, 112 S.Ct. 2608 (1992). For more information on the FCLAA and the *Cipollone* decision, see Edward O. Correia, *State and Local Regulation of Cigarette Advertising*, 23 J. LEGIS. 1 (1997). Compare *Lindsey v. Tacoma-Pierce Cty Health Dept.*, 8 F.Supp.2d 1213 (W.D. Wash. 1997) (holding that restrictions on promotional activity that does not affect packaging or advertising content is not subject to FCLAA).

¹³⁶ Note that not all localities have been successful in merely restricting tobacco products sampling to certain locations, as the MSA does. In at least one recent case, a federal district court in the Second Circuit found that restrictions on the permitted location of tobacco product sampling were preempted by the FCLAA. See *Rockwood v. City of Burlington*, 21 F.Supp.2d 411, 420 (2nd Cir. 1998).

7.2.8: The MSA mentions a stated commitment by the participating manufacturers to reduce tobacco use by youth. Does the MSA provide any requirements regarding this commitment?

The MSA requires participating manufacturers to either create or reaffirm its commitment to assist in the reduction of tobacco use by minors. [MSA III(1)(1)]. Each participating manufacturer must designate an executive level manager to identify methods to reduce youth access to and consumption of tobacco products. Each manufacturer must also encourage its employees to assist in identifying such methods. [MSA III(1)(2)].

It will be left to see how effective, if at all, this requirement may be, given that documents produced in state's suits against tobacco products manufacturers have provided direct evidence that various manufacturers have expressly targeted a teenage market.¹³⁷ In fact, at least one of these documents asserts that the tobacco industry must target teenagers in order to maintain demand for their products.¹³⁸ Independent studies have shown this industry claim to be correct: the Surgeon General's Report on preventing tobacco use among young people concluded that 71% of all individuals who ever smoked daily started smoking daily by the age of 18.¹³⁹

7.2.9: Does the Multistate Settlement include any provisions regulating self-service displays of tobacco products?

No, the MSA contains no provisions regulating self-service displays of tobacco products. The MSA also omits any provisions preventing participating manufacturers from permitting their products to be used as part of a self-service display. Self-service displays make it easier for youth to obtain tobacco products for a variety of reasons. Self-service displays prevent sales clerks and other individuals from exercising an important aspect of control over tobacco products sales. They are frequently located at child-level. They also function not only as advertisements, but also as potential sources of items which children might take without anyone seeing.

7.2.10: What are the implications of omitting restrictions on self-service displays of tobacco products?

Without such provisions, Participating Manufacturers are not required to take any steps to prevent the use of their products in such displays, and accordingly cannot liable under the terms of the settlement for failure to take such steps. State and/or local governments that are interested in restricting youth access to tobacco products should consider banning the storage or display of tobacco products where they are accessible to customers without the assistance of salespeople.

7.2.11: Does the MSA include any restrictions on point-of-sale advertising?

¹³⁷ See, e.g., John Schwartz, *1973 Cigarette Company Memo Proposed New Brands for Teens; RJR Official Cited Need for "Share of Youth Market,"* WASHINGTON POST, Oct. 4, at A2 (quoting the author of the memo, Claude E. Teague, then R.J. Reynolds Tobacco Company's assistant director of research and development, as stating that "[s]tatistics show that large, perhaps even increasing, numbers in the [approximately twenty-one year old and under] group are becoming smokers each year, despite bans on promotion of cigarettes to them. If this be so, there is certainly nothing immoral or unethical about our Company attempting to attract these smokers to our products").

¹³⁸ *Id.* (quoting Claude E. Teague as stating that "[r]ealistically, if our company is to survive and prosper over the long term, we must get our share of the youth market. In my opinion, this will require new brands tailored to the youth market").

¹³⁹ See USDHHS II, *supra* note 111, at 67. The report also found that 82% of all people who had ever tried a cigarette did. so before the age 18, and that the mean age of becoming a daily smoker was 17.7 years. *Id.* at 65, 67.

No. Not only does the MSA omit any restriction on Participating Manufacturers' participation in point-of-sale advertising; rather, it expressly permits such advertising [MSA II(ii), III(d)]. In fact, the MSA even allows tobacco products advertisements of up to fourteen feet square in size to be displayed inside or outside on the property of tobacco products retailers. [MSA II(ii), III(d)]. Numerous studies have shown that children are particularly susceptible to certain tobacco products advertisements, and are influenced in their decision to begin smoking by tobacco products ads.¹⁴⁰

7.2.12: What actions can states or localities take, given the absence of point-of-advertising restrictions?

The absence of such provisions in the settlement presents a difficult issue for those who wish to stop the peddling of tobacco products to children. Similar provisions enacted by state and local governments have faced significant challenges, due to federal preemption and First Amendment issues.¹⁴¹ Ideally, however, a state or municipality would be able to put substantial restrictions on point-of-sale advertising, if not an outright ban on it. Any permitted point-of-sale advertisements should be restricted to plainly informing adult consumers of the tobacco products brands available at the location and their prices, along with any required statements such as warnings and nicotine and tar contents.

7.2.13: Does the Multistate Settlement contain any restrictions on tobacco products vending machines?

The MSA contains no restriction of any kind on the ability of Participating Manufacturers to operate or lease tobacco products vending machines, or to contract with operators or lessors of such vending machines.

7.2.14: Why is the omission of vending machine provisions troubling?

Numerous studies have shown that minors generally have substantial success in illegally purchasing tobacco products through vending machines. However, only approximately half of all states have statewide restrictions on the siting of tobacco products vending machines.

7.2.15: What are the implications of the lack of restrictions on the Participating Manufacturers' control and/or supply of tobacco products vending machines? May states and/or municipalities restrict tobacco products vending machine siting?

The MSA leaves the ability of states and localities to restrict the siting of tobacco products vending machines totally unaffected. States and localities may continue to regulate vending machine placement, to the extent permitted by their own laws. Thus, the standard courses of action taken by most states and municipal governments interested in restricting youth access to tobacco products vending machines remain open to them, just as if the MSA had never

¹⁴⁰ See, e.g., USDHHS II, *supra* note 111; J. Pierce, et al., *supra* note 98 (reporting a strong link between tobacco promotion and the decision by adolescents to begin smoking); CDC, *supra* note 77 (showing a twenty-fold increase in the market share of Camel cigarettes among teen smokers after the introduction of the Joe Camel ad campaign in the late 1980's).

¹⁴¹ For an example of the sorts of federal challenges which strong point-of-advertising restrictions may face, see *Rockwood v. City of Burlington*, 21 F.Supp.2d 411, 420, 422-423 (2nd Cir. 1998).

been enacted.¹⁴² In fact, states and municipalities interested in restricting youth access to tobacco products should restrict the siting of vending machines to only those locations in which no one under the age of 18 is permitted, or ban the use of tobacco products vending machines entirely.

7.2.16: Does the MSA contain any lookback provisions?

No. The settlement entirely omits "lookback" provisions. A "look-back" law 1) sets targets for the reduction of underage tobacco use; 2) specifies payments that must be made by tobacco product manufacturers that fail to meet the targets; 3) establishes a mechanism for assessment of these payments; and 4) determines the state agency that would receive such payments.

For example, the tobacco settlement proposal ("the June 20th agreement") presented by a group of state attorneys general to the American public on June 20, 1997, specified that underage tobacco use must decline by at least 30% by the 5th year after the settlement took effect, 50% by the 7th year, and 60% by the 10th year.¹⁴³ If targets were not met, the FDA would impose a surcharge on the industry¹⁴⁴ in the amount of \$80 million¹⁴⁵ for each percentage point it fell short of the goal. The June 20th agreement provided for a \$2 billion cap (adjusted for inflation) on the total amount payable in any given year.¹⁴⁶

However, a lookback provision would have to be stronger than the one in the June 20th Agreement in order to be effective. In a *New York Times* article, former Surgeon General Dr. C. Everett Koop pointed out that even if the full \$2 billion fine were levied, it would amount to only 8 cents per pack of cigarettes, 3 cents of which would be deductible as a business expense. He said: "So the fine comes to a nickel a pack. An unscrupulous C.E.O. of a tobacco company could say, 'Let's market to kids all we want and raise the price by 6 cents a pack and make a fortune.'"¹⁴⁷

States could, of course, pass such a provision independently from the MSA if they so desired.

¹⁴² The MSA provides that the participating manufacturers will not oppose legislation to limit youth access to vending machines. MSA, Exhibit F(1).

¹⁴³ Proposed Tobacco Settlement, page 24.

¹⁴⁴ The surcharge payable by cigarette manufacturers will be joint and several obligation of those manufacturers, allocated by market share.

¹⁴⁵ This amount is based on an approximation of the present value of the profit the industry would earn over the lives of all underage users in excess of the target.

¹⁴⁶ Proposed Tobacco Settlement, page 24.

¹⁴⁷ NEW YORK TIMES, June 24, 1997.

Chapter Eight:

State and Local Lobbying Restrictions

By Graham Kelder

8.1: Background

Historically, two of the greatest deterrents to local and statewide tobacco control efforts have been 1) tobacco industry legal intimidation; and 2) tobacco industry opposition to local and statewide initiatives through lobbying, the activity of astro-turf roots groups (like the National Smokers Alliance), and the use of tobacco industry proxies (like state or regional convenience store and/or restaurant associations).

As a general rule, the tobacco industry is most politically powerful at the federal and state levels.¹⁴⁸ The story is different at the local level:

Although the tobacco industry has some influence on local public policy, it is less able to influence local elected officials, who represent their friends and neighbors and are highly accountable to their constituents, making them less inclined to serve tobacco industry interests.¹⁴⁹

This is why the tobacco industry is most vulnerable to regulation by cities and towns. Because of this weakness, local governments – city councils, town meetings, county governments, local health boards and local health programs – have led the way in developing innovative, effective and enforceable measures regulating the sale, distribution and use of tobacco products. Local governments have pioneered a variety of tobacco control measures, for example, designed to reduce tobacco use by children -- such as cigarette vending machine bans and limitations on some types of tobacco advertising and promotion.

The tobacco industry hates local action in tobacco control, precisely because it is so effective. As Raymond Pritchard, former Chairman of the Board of the Brown & Williamson Tobacco Company, put it on July 17, 1986, "Our record in defeating state smoking restrictions has been reasonably good. Unfortunately our record with respect to local measures...has been somewhat less encouraging.... Over time, we can lose the battle over smoking restrictions just as decisively in bits and pieces – at the local level – as with state or federal measures."¹⁵⁰ As Victor Crawford put it, "We [the tobacco industry] could never win at the local level."¹⁵¹

¹⁴⁸ For a general discussion of the tobacco industry's political might at the federal and state levels, see Graham Kelder and Richard Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, STAN. L. & POL'Y REV., Volume 8:1 (Winter 1997) at pp. 66-70 and the sources cited therein. See also Siegel *et al.*, *Preemption in Tobacco Control: Review of an Emerging Public Health Problem*, JAMA (September 10, 1997 - Vol. 278, No. 10) at pp. 859-860 and the sources cited therein.

¹⁴⁹ Siegel, *supra* note 148, at pp. 859.

¹⁵⁰ AMERICAN CANCER SOCIETY ET AL., ACTIONS SPEAK LOUDER THAN WORDS: THE TOBACCO INDUSTRY'S STEALTH STRATEGY IN STATE LEGISLATURES (May 28, 1996), at p. 1.

¹⁵¹ *Id.* at p. 5.

The tobacco industry currently uses a variety of tools in an attempt to thwart local action. The industry's primary tool in blunting local action is preemption. The tobacco industry tries to achieve preemption in two ways: simple preemption and "super preemption." Simple preemption means passing a bill on a particular aspect of tobacco control and thereby preempting local action on that particular aspect of tobacco control. Super preemption, a strategy that first surfaced in 1994, means preempting "all local government action on tobacco issues, no matter what the subject of the specific bill at hand."¹⁵² The typical super preemption clause reads as follows:

The provisions of this law shall supersede any existing or subsequently enacted local law, ordinance or regulation which relates to the use, sale, promotion and distribution of tobacco products.¹⁵³

Pseudo-preemption is also a concern of most tobacco control professionals. Where it cannot achieve true preemption, the tobacco industry tries to pass weak, loophole-ridden laws with weak substantive provisions and/or weak enforcement mechanisms at the state level, knowing that even if these bills aren't technically preemptive, they will have a pseudo-preemptive effect, i.e., they will chill local action on the particular subject being regulated.¹⁵⁴ These pseudo-preemptive bills almost always have the appearance of being good tobacco control legislation, but would actually accomplish nothing to control the sale, distribution and use of tobacco. The industry achieves pseudo-preemption by aggressively promoting legislation that is "nothing more than window dressing designed to look like tobacco control" or by hijacking and distorting otherwise legitimate tobacco control legislation.¹⁵⁵

The tobacco industry also directly opposes particular state and local tobacco control initiatives. In addition, the tobacco industry often uses alliances with other business groups, fake grassroots ("astroturf-roots") organizations and smokers' rights magazines in an effort to derail state and local tobacco control efforts. This strategy was described succinctly in a 1992 communication from Kurt L. Malmgren, then Senior Vice President of State Activities for the Tobacco Institute:

Our approach is to use local advocates to make our case under the umbrella of local coalition groups we set up. Quite often, the local advocate will be a local restaurateur or other member of the coalition we organize. We will expand and deploy coalition coordinators to make the necessary rounds to the restaurants and other businesses to drum up support for our position. That support will come in the form of testimony, letters-to-the-editor and to lawmakers and other coalition efforts. Through member company reports and additional T.I. coordinators, we are ready to make it happen.¹⁵⁶

"Astroturf-roots" organizations across the country accumulate as much publicity as they can about their opposition to anti-tobacco regulations and higher cigarette taxes, yet keep

¹⁵² *Id.* at pp. 4-5.

¹⁵³ *Id.* at p. 4 (citing Mississippi Code Chapter 45-37-7, enacted 1994).

¹⁵⁴ Heather R. Macdonald & Stanton A. Glantz, *Political Realities of Statewide Smoking Legislation: The Passage of California's Assembly Bill 13*, TOBACCO CONTROL (Spring 1997).

¹⁵⁵ AMERICAN CANCER SOCIETY ET AL., *supra* note 150, at pp. 1-3.

¹⁵⁶ Kurt L. Malmgren, KLM Remarks for the 12/10 Executive Meeting (12/3/92).

understandably quiet about their financiers.¹⁵⁷ The National Smokers Alliance ("NSA") gathers recruits in bars, restaurants, bowling alleys, and wherever else people congregate.¹⁵⁸ They also advertise in newspapers, offering up to \$20 an hour for signature-garnering campaigns to secure new members.¹⁵⁹ The NSA's membership consists of about one million smokers nationwide, and its board of advisors at one time included at least one of Philip Morris's vice presidents.¹⁶⁰ In fact, Philip Morris has had a hand in the NSA since the beginning, helping to inspire and fund its creation.¹⁶¹

Many times the tobacco industry pursues a coordinated strategy, using all of the weapons in its arsenal: direct opposition, diversion of tobacco control funds, preemption, pseudo-preemption, and the use of astroturf-roots groups.¹⁶²

8.2: Q & A

8.2.1: Does the Multistate Master Settlement Agreement ("MSA") prohibit tobacco companies from opposing proposed state or local laws or administrative rules which are intended to limit youth access to and consumption of tobacco products?

No. The MSA states merely that:

No Participating Manufacturer may oppose, or cause to be opposed (including through any third party or Affiliate), the passage by such Settling State (or any political subdivision thereof) of those state or local legislative proposals or administrative rules **described in Exhibit F hereto** intended by their terms to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products. [MSA III(m)(1) emphasis supplied].

8.2.2: Who are Participating Manufacturers?

According to the MSA, "Participating Manufacturer" means "a Tobacco Product Manufacturer¹⁶³ that is or becomes a signatory to" the MSA. [MSA II(jj)]. One subset of this

¹⁵⁷ Ralph Perrella, *Joe Camel In Sheep's Clothing: The Tobacco Industry Tries to Pass "Astroturf-roots" Organizations Off as Grassroots Organizations*, TOBACCO ON TRIAL (August/September 1994) at 14.

¹⁵⁸ *Id.* at 15.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *See, e.g.*, Malmgren, *supra* note 156.

¹⁶³ According to the MSA, a "Tobacco Product Manufacturer" means

an entity that after the MSA Execution Date directly (and not exclusively through any Affiliate):

(1) manufactures Cigarettes anywhere that such manufacturer intends to be sold in the States, including Cigarettes intended to be sold in the States through an importer (except where such importer is an Original Participating Manufacturer that will be responsible for the payments under this Agreement with respect to such Cigarettes as a result of the provisions of subsections II(mm) and that pays the taxes specified in subsection II(z) on such Cigarettes, and provided that the manufacturer of such Cigarettes does not market or advertise such Cigarettes in the States);

(2) is the first purchaser anywhere for resale in the States of Cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the States; or

group consists of "Original Participating Manufacturers," defined in the MSA as Brown & Williamson Tobacco Corporation, Lorillard Tobacco Company, Philip Morris Incorporated and R.J. Reynolds Tobacco Company, "and the respective successors of each of the foregoing." [MSA II(hh)].¹⁶⁴ The second subset of this group consists of Tobacco Product Manufacturers that are not Original Participating Manufacturers. [MSA II(jj)].¹⁶⁵ When Tobacco Product Manufacturers that are not Original Participating Manufacturers become Participating Manufacturers, they become bound by the MSA "and the Consent Decree"¹⁶⁶ . . . in all Settling States in which this Agreement and the Consent Decree binds Original Participating Manufacturers"¹⁶⁷ [MSA II(jj)].

In the case of a Tobacco Product Manufacturer that signs the MSA after the MSA Execution Date, such Tobacco Product Manufacturer, within a reasonable period of time after signing the MSA, must make

any payments (including interest thereon at the Prime Rate) that it would have been obligated to make in the intervening period had it been a signatory as of the MSA Execution Date. [MSA II(jj)].

The MSA makes clear that "Participating Manufacturer" shall also include the successor of a Participating Manufacturer.¹⁶⁸

8.2.3: What are the state or local legislative proposals or administrative rules listed in Exhibit F of the MSA, the passage of which no Participating Manufacturer may oppose, or cause to be opposed?

The "Potential Legislation Not To Be Opposed" listed in Exhibit F of the MSA includes:

1. Limitations on Youth access to vending machines.

(3) becomes a successor of an entity described in subsection (1) or (2) above.

The term "Tobacco Product Manufacturer" shall not include an Affiliate of a Tobacco Product Manufacturer unless such Affiliate itself falls within any of subsections (1) - (3) above. [MSA II (uu)].

¹⁶⁴ Except as expressly provided in the MSA, "once an entity becomes an Original Participating Manufacturer, such entity shall permanently retain the status of Original Participating Manufacturer." [MSA II(hh)].

¹⁶⁵ A member of this second subset of Participating Manufacturers is referred to in some parts of the MSA as a "Subsequent Participating Manufacturer." [MSA II(tt)]. A "Subsequent Participating Manufacturer" means

a Tobacco Product Manufacturer (other than an Original Participating Manufacturer) that: (1) is a Participating Manufacturer, and (2) is a signatory to this Agreement, regardless of when such Tobacco Product Manufacturer became a signatory to this Agreement. "Subsequent Participating Manufacturer" shall also include the successors of a Subsequent Participating Manufacturer. Except as expressly provided in this Agreement, once an entity becomes a Subsequent Participating Manufacturer such entity shall permanently retain the status of Subsequent Participating Manufacturer, unless it agrees to assume the obligations of an Original Participating Manufacturer as provided in subsection XVIII(c). [MSA II(tt)].

¹⁶⁶ Or, in any Settling State that does not permit amendment of the Consent Decree, a consent decree containing terms identical to those set forth in the Consent Decree [MSA II(jj)].

¹⁶⁷ Provided, however, that such Tobacco Product Manufacturer need only become bound by the Consent Decree in those Settling States in which the Settling State has filed a Released Claim against it. [MSA II(jj)].

¹⁶⁸ Except as expressly provided in the MSA, "once an entity becomes a Participating Manufacturer such entity shall permanently retain the status of Participating Manufacturer." [MSA II(jj)].

2. Inclusion of cigars within the definition of tobacco products.
3. Enhancement of enforcement efforts to identify and prosecute violations of laws prohibiting retail sales to Youth.
4. Encouraging or supporting use of technology to increase effectiveness of age-of-purchase laws, such as, without limitation, the use of programmable scanners, scanners to read drivers' licenses, or use of other age/ID data banks.
5. Limitations on promotional programs for non-tobacco goods using tobacco using tobacco products as prizes or give-aways.
6. Enforcement of access restrictions through penalties on Youth for possession or use.
7. Limitations on tobacco product advertising in or on school facilities, or wearing of tobacco logo merchandise in or on school property.
8. Limitations on non-tobacco products which are designed to look like tobacco products, such as bubble gum cigars, candy cigarettes, etc. [MSA Exhibit F]

8.2.4: Does the MSA specifically preserve any tobacco company lobbying and related rights?

Yes. The MSA states that that the Exhibit F limitations on lobbying (which will be discussed in more detail below):

. . . [do] not prohibit any Participating Manufacturer from (A) challenging enforcement of, or suing for declaratory or injunctive relief with respect to, any such legislation or rule on any grounds; (B) continuing . . . to oppose or cause to be opposed...any specific state or local legislative proposals or administrative rules introduced prior to the time of State-Specific Finality in such Settling State; (C) opposing, or causing to be opposed, any excise or income tax provision or user fee or other payments relating to Tobacco Products or Tobacco Product Manufacturers; or (D) opposing, or causing to be opposed, any state or local legislative proposal or administrative rule that also includes measures other than those described in Exhibit F. [MSA III(m)(1)].

8.2.5: Does the MSA leave Participating Manufacturers free to seek declaratory or injunctive relief with respect to any such legislation or rule on any grounds?

Yes. The MSA leaves Participating Manufacturers free to seek declaratory or injunctive relief with respect to, any such legislation or rule on any grounds. [MSA III(m)(1)(A)]. Declaratory relief generally consists of a court-issued declaration of rights in an actual controversy between two parties.¹⁶⁹ Injunctive relief generally consists of a remedy or order issued by a court forbidding a party or entity from doing some act.¹⁷⁰ The tobacco industry can thus seek declaratory or injunctive relief with respect to

- Limitations on Youth access to vending machines [MSA III(m)(1)(A) and Exhibit F];

¹⁶⁹ BLACK'S LAW DICTIONARY (5TH ED.) at 368.

¹⁷⁰ *Id.* at 705.

- Inclusion of cigars within the definition of tobacco products [*Id.*];
- Enhancement of enforcement efforts to identify and prosecute violations of laws prohibiting retail sales to Youth [*Id.*];
- Encouraging or supporting use of technology to increase effectiveness of age-of-purchase laws, such as, without limitation, the use of programmable scanners, scanners to read drivers' licenses, or use of other age/ID data banks [*Id.*];
- Limitations on promotional programs for non-tobacco goods using tobacco using tobacco products as prizes or give-aways [*Id.*];
- Enforcement of access restrictions through penalties on Youth for possession or use [*Id.*];
- Limitations on tobacco product advertising in or on school facilities, or wearing of tobacco logo merchandise in or on school property [*Id.*];
- Limitations on non-tobacco products which are designed to look like tobacco products, such as bubble gum cigars, candy cigarettes, etc. [*Id.*];
- Any legislation or rule not enumerated in Exhibit F of the MSA.

This means that if a state or locality passes legislation or a rule embodying one of the topics enumerated in Exhibit F of the MSA, it will be able to do so without Participating Manufacturer opposition, but any Participating Manufacturer can immediately take such state or locality to court to enjoin having this legislation or rule from taking effect and becoming actual law. This is one of the classic forms of tobacco industry legal intimidation, and greatly diminishes the effect of all of the concessions given in Section III(m)(1) and Exhibit F of the MSA.

8.2.6: Does the MSA give Participating Manufacturers the freedom to continue to oppose, or cause to be opposed, the enforcement of any legislation or rule?

Yes. The MSA also gives Participating Manufacturers the freedom to continue to oppose, or cause to be opposed, the enforcement of any legislation or rule. [MSA III(m)(1)(A)]. This also greatly reduces the effect of all of the concessions given in Section III(m)(1) and Exhibit F of the MSA., because "[t]he ultimate success of a youth access strategy lies in providing credible and effective mechanisms for enforcing the law."¹⁷¹ Indeed, active enforcement has been shown to be the most effective means to achieve long-term compliance with youth access restrictions.¹⁷²

The MSA, however, allows Participating Manufacturers to continue to oppose, or cause to be opposed, the enforcement of

- Limitations on Youth access to vending machines [MSA III (m)(1)(A) and Exhibit F];
- Inclusion of cigars within the definition of tobacco products [*Id.*];

¹⁷¹ LYNCH & BONNIE, *supra* note 118, at 220.

¹⁷² *See, e.g.*, PETER D. JACOBSON & JEFFREY WASSERMAN, TOBACCO CONTROL LAWS: IMPLEMENTATION AND ENFORCEMENT (RAND 1997).

- Enhancement of enforcement efforts to identify and prosecute violations of laws prohibiting retail sales to Youth [*Id.*];
- Encouraging or supporting use of technology to increase effectiveness of age-of-purchase laws, such as, without limitation, the use of programmable scanners, scanners to read drivers' licenses, or use of other age/ID data banks [*Id.*];
- Limitations on promotional programs for non-tobacco goods using tobacco products as prizes or give-aways [*Id.*];
- Enforcement of access restrictions through penalties on Youth for possession or use [*Id.*];
- Limitations on tobacco product advertising in or on school facilities, or wearing of tobacco logo merchandise in or on school property [*Id.*];
- Limitations on non-tobacco products which are designed to look like tobacco products, such as bubble gum cigars, candy cigarettes, etc. [*Id.*];
- Any legislation or rule not enumerated in Exhibit F of the MSA.

8.2.7: Does the MSA allow Participating Manufacturers to continue to oppose, or cause to be opposed, any legislative proposals introduced prior to State-Specific Finality?

Yes. The MSA allows Participating Manufacturers to continue to oppose, or cause to be opposed, any legislative proposals or rules introduced prior to State-Specific Finality. [MSA III (m)(1)(B)]. State-Specific Finality does not occur until 1) the MSA and Consent Decree have been approved by the Court as to all Original Participating Manufacturers (or until all appeals are exhausted); 2) all claims have been released as provided by the MSA; and 3) the time for appeal or to seek review of or permission to appeal from the approval or entry of the MSA has expired. [MSA II(ss)]. Participating Manufacturers can, thus, continue their opposition to some of the most significant pieces of legislation in the nation, such as Massachusetts' Cigarette Ingredients Disclosure Law.¹⁷³

8.2.8: Does the MSA also preserve the right of Participating Manufacturers to continue to oppose, or cause to be opposed, any excise or income tax provision or user fee or other payments relating to Tobacco Products or Tobacco Product Manufacturers?

Yes. The MSA also preserves the right of Participating Manufacturers to continue to oppose, or cause to be opposed, "any excise or income tax provision or user fee or other payments relating to Tobacco Products or Tobacco Product Manufacturers." [MSA III(m)(1)(C)]. This would leave Participating Manufacturers free to oppose two of the most significant provisions a state could pass:

- A further excise tax on tobacco products; and
- A statewide look-back law (which is arguably payment relating to Tobacco Products and Tobacco Product Manufacturers).

¹⁷³ Mass. Gen. Laws ch. 94, § 307B.

Participating Manufacturers can also make a strong argument that they are free to oppose any local or statewide law or rule that contains monetary penalties for industry misbehavior. Participating Manufacturers would, in all likelihood, be free, for example, to oppose

- local or statewide permitting of tobacco retailers if retailers had to pay a fee for such a permit;
- any law that fines retailers for selling tobacco products to minors; and
- any law containing one of the restrictions enumerated in Exhibit F of the MSA if it also contains "any excise or income tax provision or user fee or other payments relating to Tobacco Products or Tobacco Product Manufacturers." [MSA III(m)(1)(C)].

8.2.9: Does the MSA also allow Participating Manufacturers to continue to oppose, or cause to be opposed any state or local measure that also includes measures other than those described in Exhibit F?

Yes. The MSA also allows Participating Manufacturers to continue to oppose, or cause to be opposed any state or local measure "that also includes measures other than those described in Exhibit F." [MSA III(m)(1)(D)]. This means that if a state or locality combines any of the items in Exhibit F with anything else, Participating Manufacturers are specifically sanctioned by the MSA to be free to oppose such a state or local measure.

8.2.10: Can you give a concrete example of how the Participating Manufacturer rights preserved in MSA III(m)(1) would operate together to nearly obliterate the significance of any of the restrictions placed on the ability of Participating Manufacturers to lobby against state and local measures by MSA III(m)(1)(A) and Exhibit F?

Yes. The MSA states that Participating Manufacturers cannot oppose, or cause to be opposed, those state or local legislative proposals or administrative rules that encourage or support "use of technology to increase effectiveness of age-of-purchase laws, such as, without limitation, the use of programmable scanners, scanners to read drivers' licenses, or use of other age/ID data banks." [MSA III(m)(1) and Exhibit F(4)]. A jurisdiction could, thus pass such a measure without Participating Manufacturer opposition.

The significance of this restriction is, however, greatly diminished by the fact that the MSA preserves the ability of Participating Manufacturers to seek declaratory or injunctive relief with respect to, any such measures that encourage or support the use of technology to increase effectiveness of age-of-purchase laws on any grounds and to continue to oppose, or cause to be opposed,

- the enforcement of any such measures that encourage or support the use of technology to increase effectiveness of age-of-purchase laws [MSA III(m)(1)];
- any such measures that encourage or support the use of technology to increase effectiveness of age-of-purchase laws introduced prior to State-Specific Finality [*Id.*];
- any such measures that encourage or support the use of technology to increase effectiveness of age-of-purchase laws that also include "any . . . user fee or other payments relating to Tobacco Products or Tobacco Product Manufacturers" [*Id.*]; and

- any such measures that encourage or support the use of technology to increase effectiveness of age-of-purchase laws that also include "measures other than those described in Exhibit F." [*Id.*].

8.2.11: Are there any other factors that diminish the significance of the restrictions placed by the MSA on the rights of Participating Manufacturers to oppose, or cause to be opposed, those state or local legislative proposals or administrative rules that limit youth access to vending machines [MSA III(m)(1) and Exhibit F(1)]?

Yes. In addition to the limitations on the significance of this restriction discussed above, the omission of self-service displays from Exhibit F of the MSA means that Participating Manufacturers are free to oppose any and all restrictions on self-service displays (which are otherwise known to tobacco control advocates as "vending machines without glass and knobs"). As discussed more fully in Chapter Seven of this analysis, self-service displays – which allow both teenagers and legitimate customers to help themselves to tobacco products – are a prime source of tobacco products for minors and invite shoplifting.¹⁷⁴

8.2.12: Are there any other factors that diminish the significance of the restrictions placed by the MSA on the rights of Participating Manufacturers to oppose, or cause to be opposed, those state or local legislative proposals or administrative rules that include cigars within the definition of tobacco products [MSA III(m)(1) and Exhibit F(2)]?

Yes. In addition to the limitations on the significance of this restriction discussed above, this restriction is largely insignificant, because the Participating Manufacturers whose lobbying activities are restricted by it are manufacturers of cigarettes and smokeless tobacco products. The most likely opponents of the inclusion of cigars in the definition of tobacco products would be cigar manufacturers, and the MSA would do nothing to restrict their opposition to such measures.

8.2.13: Are there any other factors that diminish the significance of the restrictions placed by the MSA on the rights of Participating Manufacturers to oppose, or cause to be opposed, those state or local legislative proposals or administrative rules that enhance "enforcement efforts to identify and prosecute violations of laws prohibiting retail sales to Youth." [MSA III(m)(1) and Exhibit F(3)]?

Yes. In addition to the limitations on the significance of this restriction discussed above, the exact wording of this provision is troublesome in two respects. First, the industry can easily argue that this should be interpreted very narrowly to cover exactly what it says and no more: "Enhancement of enforcement efforts to identify and prosecute violations of laws prohibiting retail sales to Youth." [MSA Exhibit F(3), emphasis supplied]. The industry would be free to oppose any other attempts to enhance enforcement efforts, including by the passage of a state look-back law or the passage of state or local laws for the licensing of tobacco retailers. These are among the most significant measures that could be enacted to limit youth access to tobacco

¹⁷⁴ See, e.g., Cox, *supra* note 128, at 149-159; ROSWELL PARK CANCER INSTITUTE, *supra* note 128; Cismoski, *supra* note 126.

Second, the use of the word "prosecute" may provide an opening for the tobacco industry to argue that they have only agreed not to oppose enhancement of criminal enforcement efforts. In many jurisdictions, prohibitions on the sale of tobacco products to minors are enforced through less cumbersome civil and administrative procedures.¹⁷⁵

8.2.14: Are there any other factors that diminish the significance of the restrictions placed by the MSA on the rights of Participating Manufacturers to oppose, or cause to be opposed, those state or local legislative proposals or administrative rules that limit "promotional programs for non-tobacco goods using tobacco products as prizes or give-aways." [MSA III(m)(1) and Exhibit F(5)]?

Yes. In addition to the limitations on the significance of this restriction discussed above, the exact wording of this provision leaves Participating Manufacturers free to oppose limitations on promotional programs for tobacco goods (as opposed to non-tobacco goods) using tobacco products as prizes or give-aways.

8.2.15: The MSA states that Participating Manufacturers cannot oppose, or cause to be opposed, those state or local legislative proposals or administrative rules that limit "enforcement of access restrictions through penalties on Youth for possession or use." [MSA III(m)(1) and Exhibit F(6)]. Don't most tobacco control advocates oppose the enforcement of access restrictions through penalties on Youth for possession or use?

Yes. Many tobacco control advocates oppose the enforcement of access restrictions through penalties on Youth for possession or use.¹⁷⁶ Advocates assert that youth tobacco

¹⁷⁵ In Massachusetts, for example, many boards of health have enacted regulations that require businesses to obtain board of health permits in order to be able to sell tobacco products. Many of these regulations also provide for the suspension or revocation of these permits if a retailer repeatedly sells tobacco to minors in violation of the law. Administrative procedures are used for these suspensions and revocations, and these regulations also establish administrative review procedures in conformity with the due process requirements of both the United States and Massachusetts Constitutions. These administrative procedures and administrative review procedures offer boards of health a less cumbersome method of suspending or revoking retailers' tobacco sale permits and reviewing such suspensions and revocations. These procedures also have the benefit of not overburdening the courts with these suspension and revocation matters.

¹⁷⁶ There are better ways to reduce youth possession of tobacco without penalizing it. Better alternatives are:

- restricting youth access;
- restricting tobacco advertising;
- denormalizing adult smoking by restricting smoking in public places.

Restricting youth access is discussed in some detail in Chapter 7 of this analysis. Advertising restrictions are discussed in Chapter 6 of this analysis. The best way to denormalize the use of tobacco by adults is by restricting adult smoking in public places. Research shows that restricting adult smoking in public places plays a vital role in creating a social environment that supports non-smoking behavior. Nancy Rigotti, *Trends in the Adoption of Smoking Restrictions in Public Places and Worksites*, 1 NEW YORK STATE JOURNAL OF MEDICINE (1989) at 19-26. Such restrictions contribute to adolescents' perceptions that smoking is not "normal" among adults and has negative health consequences for both smokers and non-smokers. USDHHS II, *supra* note 111, at 245. Publicizing of the negative health consequences of passive smoke can denormalize adult smoking further. For a fuller discussion of the penalization of youth possession issue, see generally Kelder, *supra* note 133.

possession initiatives are an effective and essential deterrent.¹⁷⁷ Critics of such measures contend, however, that

- perceptions of decreased social acceptability or increased risks from parental or legal authorities are not likely to deter the young people who are most at risk from smoking, because most teen smoking is rooted in adolescent rebellion;
- the penalization of youth possession is not likely to add much to signaling disapproval of teen smoking, given the fact that a very negative view of teen smoking has permeated the news of the last few years;
- the penalization of youth possession is not likely to make parents take the dangers of youth smoking any more seriously than they already do;
- such penalization may create a climate of disrespect for the law and a counter-culture of law-breakers, because such measures are rarely enforced;¹⁷⁸
- penalizing tobacco possession may further romanticize smoking as an "outlaw" practice among teenagers, because many teenagers are attracted to risk-taking or smoke out of an adolescent desire to rebel; and
- the penalization of youth possession of tobacco constitutes a form of victim blaming, because the tobacco industry spends millions every year to lure teenagers into smoking.

Most members of the national tobacco control community share the concerns listed above and do not, therefore, favor the adoption of measures aimed at penalizing youth possession or purchase of tobacco. In addition, critics of youth anti-possession measures point out that the tobacco industry advocates such measures. The tobacco industry supports these measures, in large part, because the industry knows that penalization of youth possession may make it difficult for communities to use minors to conduct compliance checks of tobacco retailers.

Although more research is needed before policymakers can make truly informed decisions about whether penalizing youth possession of tobacco will serve as an effective deterrent to teenage tobacco use, the available research to date indicates that tobacco youth possession laws are almost never enforced. This is especially true when one looks at rates of enforcement as compared to the prevalence of violations.¹⁷⁹

The available research to date also indicates that penalization of youth possession of tobacco will deflect the attention of law enforcement personnel and the community from

¹⁷⁷ The literature supporting these measures emphasizes how these measures are congruent with alcohol control policies, are an effective deterrent, create parental involvement because of greater accountability, and reinforce positive values in adolescent society.

¹⁷⁸ Critics of these programs argue that penalizing possession is a form of victim blaming. Municipalities may be creating a deviant subculture of individuals who gain self-esteem by contempt for the law. Another fear is that penalizing tobacco possession may romanticize the practice of smoking among young people. Still others fear that enforcement will selectively be based upon gender, race, or class variables. See e.g., Joseph Cismoski, *Blinded by the Light: The Folly of Tobacco Possession Laws Against Minors*, WISCONSIN MEDICAL JOURNAL, November 1994 at 591.

¹⁷⁹ One of the best analogies available to tobacco control advocates may be the penalization of youth drinking. While raising the drinking age from 18 to 21 has been an enormous public health success, penalization of youth possession of alcohol has, in general, produced mixed results. These laws are not enforced very stringently. An estimated 2 of every 1,000 occasions of illegal drinking by youth under 21 result in an arrest.

lawbreaking adults who furnish tobacco to minors and misdirect it at children and adolescents. Many researchers feel that penalization of youth drinking has, for example, resulted in a mistaken focus on underage lawbreakers as opposed to those who violate the law to provide alcohol to them.¹⁸⁰

8.2.16: Does the MSA provide some measure of protection against preemptive statewide bills?

Perhaps. Although not explicitly spelled out in the MSA, tobacco control advocates can make a strong argument that Participating Manufacturer support for bills that would preempt any of the measures listed in Exhibit F of the MSA would constitute "opposition" prohibited by Section III(m)(1) of the MSA. A case can thus be made that Participating Manufacturers are no longer free to lobby for, or cause others to lobby for statewide bills that would preempt

- local limitations on Youth access to vending machines;
- the ability of localities to include cigars within the definition of tobacco products in local laws or administrative rules;
- local laws aimed at enhancement of enforcement efforts to identify and prosecute violations of local laws prohibiting retail sales to Youth;
- local laws aimed at encouraging or supporting use of technology to increase effectiveness of age-of-purchase laws, such as, without limitation, the use of programmable scanners, scanners to read drivers' licenses, or use of other age/ID data banks;
- local limitations on promotional programs for non-tobacco goods using tobacco using tobacco products as prizes or give-aways;
- enforcement of access restrictions through local penalties on Youth for possession or use;
- local limitations on tobacco product advertising in or on school facilities, or wearing of tobacco logo merchandise in or on school property; and
- local limitations on non-tobacco products which are designed to look like tobacco products, such as bubble gum cigars, candy cigarettes, etc.

Participating Manufacturers can counter-argue, however, that the provisions of Section III(m)(1)(D) of the MSA preserve their right to support statewide bills that would preempt the ability of localities to legislate any of the Exhibit F measures if such statewide bills included preemption of "measures other than those included in Exhibit F." [MSA III(m)(1)(D)]. Participating Manufacturers can make a strong case, for example, that the MSA leaves them free to support the so-called super preemption bills discussed in Section 8.1 of this analysis.

Participating Manufacturers can also counter-argue that the provisions of Section III(m)(1)(C) preserve their right to support statewide bills that would preempt the ability of localities to legislate any of the Exhibit F measures if such statewide bills also included

¹⁸⁰ For every 1,000 arrests of a minor for youth possession of alcohol, only 130 retail outlets have any action taken against them and only 88 adults are arrested for furnishing alcohol to youth.

"any excise or income tax provision or user fee or other payments relating to Tobacco Products or Tobacco Product Manufacturers." [MSA III(m)(1)(C)].

8.2.17: Does the MSA contain any similar restrictions on the ability of Participating Manufacturers to lobby against restrictions on Environmental Tobacco Smoke?

No. This is unfortunate. As Cliff Douglas, president of Tobacco Control Law and Policy Consulting in Ann Arbor, Michigan, has pointed out, the tobacco industry will use Judge Osteen's July 17, 1998 decision vacating the EPA's classification of secondhand smoke as a Class A carcinogen¹⁸¹ "fraudulently to mount an all-out assault against public and workplace smoking restrictions."¹⁸² Indeed, in a statement, Philip Morris said the ruling "supports our view that...the enactment of severe smoking restrictions is not justified."¹⁸³ Charles A. Blixt, executive vice president and general counsel of R. J. Reynolds Tobacco Company said, "We feel vindicated by the federal court's decision that the EPA wrongly classified secondhand smoke as a cause of cancer in non-smokers. This decision should prevent the EPA from becoming a participant in the anti-smoking industry's crusade to ban smoking. The court's ruling supports Reynolds Tobacco's belief that science does not justify public smoking bans."¹⁸⁴ And newspapers as prominent as *The Washington Post* erroneously reported that Judge Osteen's decision "could imperil hundreds of local and regional ordinances banning indoor smoking."¹⁸⁵

Armed with Osteen's ruling, tobacco firms may revive efforts to challenge secondhand-smoke laws,¹⁸⁶ and the MSA places no restrictions on their ability to lobby against secondhand-smoke restrictions. But, it's important for tobacco control advocates to remember that, even if Judge Osteen's ruling is upheld on appeal, it still will not disturb the validity of hundreds of state and local laws that protect nonsmokers from secondhand smoke.¹⁸⁷ This is because local, regional and statewide governments do not derive their authority to regulate secondhand smoke from the Environmental Protection Agency or its reports. State, regional and local governments have broad authority and wide discretion to set their own regulatory agendas.

In addition, the EPA's 1992 report is not the only scientific study to have associated second-hand smoke with health risks. There are scores of other studies on which laws can be

¹⁸¹ *Flue-Cured Tobacco Cooperative Stabilization Corporation v. EPA*, 1998 U.S. Dist. LEXIS 10986 (July 17, 1998). On July 17, 1998, Judge William L. Osteen of the United States District Court for the Middle District of North Carolina vacated the EPA's classification of secondhand smoke as a Known Human (Group A) Carcinogen, because he found that the EPA had wrongly excluded the tobacco industry from the risk assessment process, "cherry-picked" existing data, and engaged in de facto regulation of tobacco products. The thrust of Judge Osteen's opinion was that the EPA had failed to follow proper procedure in classifying secondhand smoke as a Group A Carcinogen.

¹⁸² Quoted in Paul Raeburn, *Secondhand Smoke. It's Deadly. Period.*, BUSINESS WEEK, August 3, 1998.

¹⁸³ *Id.*

¹⁸⁴ H. Josef Herbert, *EPA Stands By Tobacco Report Voided By Judge*, ASSOCIATED PRESS, July 20, 1998.

¹⁸⁵ John Schwartz, *Secondhand Smoke Finding Struck Down; Local Cigarette Ordinances Could Be Imperiled*, THE WASHINGTON POST, July 19, 1998.

¹⁸⁶ Susan Headden et al., *Secondhand Smokescreen*, U.S. NEWS & WORLD REPORT, August 3, 1998.

¹⁸⁷ Myron Levin, *Ruling Mainly Moral Victory For Big Tobacco*, LOS ANGELES TIMES, July 20, 1998.

based. One could even base a law on those parts of the EPA's report not vacated by Judge Osteen.¹⁸⁸

Two recent developments will also aid state and local efforts to regulate environmental tobacco smoke. On August 3, 1998, another United States Federal District Court explicitly recognized the dangers of secondhand smoke. In *Sayville Inn v. County of Suffolk*, Judge Jacob Mishler of the United States Federal District Court for Eastern District of New York denied plaintiffs' motion for a preliminary injunction against a county ordinance prohibiting smoking in bar areas of restaurants while allowing it in "stand-alone" bars. Plaintiffs – the owners and operators of restaurants in Suffolk County, New York – claimed that their Fourteenth Amendment right to equal protection was being violated by the ordinance because it discriminated against them by allowing smoking in bars while forbidding it in the bar areas of their restaurants. In denying plaintiffs' motion, Judge Mishler stated, "It is beyond dispute that second-hand smoke is a carcinogen The risk to the health of non-smoking patrons of restaurants and its employees, when exposed to second-hand smoke, is obvious."¹⁸⁹ Tobacco control advocates can use this case to point out that the federal judiciary is divided in its view of environmental tobacco smoke.

Even more significantly, on December 1, 1998, the subcommittee of the National Toxicology Program's Board of Scientific Counselors voted unanimously to affirm the recommendations of two groups of government scientists that environmental tobacco smoke be labeled a carcinogen.¹⁹⁰ This vote paves the way for environmental tobacco smoke to be included in the federal government's official list of cancer-causing substances.¹⁹¹

8.2.18: Is it true that the MSA prohibits lobbyists from supporting or opposing state, federal, or local laws or actions without authorization of the companies?

Yes. Section III(m)(2) prohibits lobbyists¹⁹² from supporting or opposing state, federal, or local laws or actions without express authorization of the companies, "except where such advance express authorization is not reasonably practicable." [MSA III(m)(2)(A)]. Such support or opposition can, however, go forward after the lobbyists secure the necessary permission from the tobacco companies.

¹⁸⁸ Judge Osteen did not invalidate the EPA's extensive findings regarding secondhand smoke and respiratory disorders other than lung cancer. The EPA's findings, thus, remain intact regarding secondhand smoke and its effects on 1) acute respiratory illnesses in children; 2) acute and chronic middle ear diseases; 3) cough, phlegm and wheezing; 4) asthma; 5) Sudden Infant Death Syndrome (SIDS); 6) lung function in children; and 7) respiratory symptoms and lung function in adults. The EPA's formal assessment of the increased risk for respiratory illnesses in children from secondhand smoke (contained in chapter eight of the EPA's report) also remains untouched.

¹⁸⁹ *Sayville Inn v. County of Suffolk*, 98-CV-4527 (E.D.N.Y. 1998).

¹⁹⁰ Associated Press, *Secondhand Smoke Called a Carcinogen*, THE BOSTON GLOBE, December 4, 1998.

¹⁹¹ *Id.*

¹⁹² For purposes of this provision, the MSA specifically lists all of a Participating Manufacturer's officers and employees engaged in lobbying activities in a Settling State after State-Specific Finality, "and any other third parties who engage in lobbying activities...on behalf of such Participating Manufacturer." [MSA III(m)(2)]. "Lobbyist" and "lobbying activities" will, for purposes of this provision, be given the "meaning such terms have under the law of the Settling State in question." [MSA III(m)(2)].

Those lobbying on behalf of participating manufacturers, must certify in writing to the Participating Manufacturer that they:

- will not support or oppose any legislation without the Participating Manufacturer's express authorization [MSA III(m)(2)(A)];
- are aware of and will fully comply with the MSA and "all laws and regulations applicable to their lobbying activities, including, without limitation, those related to disclosure of financial contributions" [MSA III(m)(2)(B)];
- have reviewed and will fully abide by the Participating Manufacturer's corporate principles promulgated pursuant to the MSA "when acting on behalf of the Participating Manufacturer" [MSA III(m)(2)(B)].

8.2.19: Is it true that the MSA requires Participating Manufacturer's to disclose payments to lobbyists?

Yes. Section III(m)(2)(B) of the MSA requires lobbyists and participating manufacturers to comply with all laws and regulations "related to disclosure of financial contributions" [MSA III(m)(2)(B)]. In addition,

. . . if the Settling State in question has in existence no laws or regulations relating to the disclosure of financial contributions regarding lobbying activities, then each Participating Manufacturer shall, upon request of the Attorney General of such Settling State, disclose to such Attorney General any payment to a lobbyist that the Participating Manufacturer knows or has reason to know will be used to influence legislative or administrative actions of the state or local government relating to Tobacco Products or their use. [MSA III(m)(2)(B)].

8.2.20: Does the MSA place any restrictions on the ability of Participating Manufacturers to lobby for or against the use of settlement proceeds?

Yes. Section III(n) of the MSA states that,

After the MSA Execution Date, no Participating Manufacturer may support or cause to be supported (including through any third party or Affiliate) the diversion of any proceeds of this settlement to any program or use that is neither tobacco-related nor health-related in connection with the approval of this Agreement or in any subsequent legislative appropriation of settlement proceeds. [MSA III(n)].

Unfortunately, this leaves the tobacco industry free to pursue its favorite tactic of diverting monies from tobacco-related uses to other health-related uses. In 1992, for example, the Tobacco Institute – an organization "formed in 1958 to take over the tobacco industry's lobbying and public relations needs"¹⁹³ – sought to "[m]anage the legislative appropriations process in Massachusetts."¹⁹⁴ The Tobacco Institute and its tobacco industry sponsors attempted to target the Question 1 initiative monies¹⁹⁵ "[t]o appropriate channels within the education community and elsewhere – such as for indigent health care, pre-natal assistance for the needy and hospital

¹⁹³ STANTON A. GLANTZ ET AL., THE CIGARETTE PAPERS (1996) at p. 39.

¹⁹⁴ Malmgren, *supra* note 156.

¹⁹⁵ The monies intended for the Massachusetts Tobacco Control Program.

emergency room support."¹⁹⁶ The Tobacco Institute and its tobacco industry sponsors hoped that they would thereby

- "[P]ick up support from such groups as the state board of education, teachers unions, school nurses association, chambers of commerce and perhaps the League of Women Voters;"¹⁹⁷ and
- "[K]eep disbursement of initiative funds to local health boards to a minimum."¹⁹⁸

The Tobacco Institute and its tobacco industry sponsors vowed to "leave no stone unturned in this effort,"¹⁹⁹ and managed to successfully divert a substantial portion of Question 1 funding away from the Massachusetts Tobacco Control Program.²⁰⁰

These sorts of diversion efforts are likely to be supported by the tobacco industry in Settling States in the coming months. The MSA would do nothing to prevent this.

8.2.21: Does the MSA dissolve the Council for Tobacco Research-USA and the Tobacco Institute?

Yes. The MSA dissolves the Council for Tobacco Research-USA and the Tobacco Institute, Inc., the chief villain in the campaign against the Massachusetts Tobacco Control Program described above. [MSA III(o)(1) and (2)]. The MSA also states that Participating Manufacturers²⁰¹ "may not reconstitute CTR or its function in any form." [MSA III(o)(5)]. Under the MSA, a Participating Manufacturer may, however,

form or participate in new tobacco-related trade associations (subject to all applicable laws), provided such associations agree in writing not to act in any manner contrary to any provision of this Agreement. Each Participating Manufacturer agrees that if any new tobacco-related trade association fails to so agree, such Participating Manufacturer will not participate in or support such association. [MSA III(p)(1)].

8.2.22: Does the MSA place any other restrictions on the ability of Participating Manufacturers to lobby for or against state or local tobacco control measures?

Yes. Under the MSA, each Participating Manufacturer agrees that following State-Specific Finality in a Settling State it will not initiate, or cause to be initiated, a facial challenge against the enforceability or constitutionality of such Settling State's (or such Settling State's political subdivisions') statutes, ordinances and administrative rules relating to tobacco control enacted prior to June 1, 1998 (other than a statute, ordinance or rule challenged in any lawsuit listed in Exhibit

¹⁹⁶ Malmgren, *supra* note 156.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Wendy Ritch and Michael Begay, *The Battle to Appropriate Tobacco Tax Revenues in Massachusetts*, SCHOOL OF PUBLIC HEALTH AND HEALTH SCIENCES MONOGRAPH SERIES (November 1998).

²⁰¹ Defined in the Introduction to this analysis.

M²⁰²). [MSA V].

A facial challenge is one based on the language of the law itself, whereas an "as applied" challenge is one based on the application of the law, or the law as put into practice. Each Participating Manufacturer can argue, therefore, that this prohibition on facial challenges does not prevent a Participating Manufacturer from challenging such measures as they may be applied to that Participating Manufacturer.

²⁰² The Participating Manufacturers' lawsuits against Settling States listed in Exhibit M are:

- *Philip Morris, Inc., et al. v. Margery Bronster, Attorney General of the State of Hawaii, In Her Official Capacity*, Civ. No. 96-00722HG, United States District Court for the District of Hawaii;
- *Philip Morris, Inc., et al. v. Bruce Botelho, Attorney General of the State of Alaska, In His Official Capacity*, Civ. No. A97-0003CV, United States District Court for the District of Alaska;
- *Philip Morris, Inc., et al. v. Scott Harshbarger, Attorney General of the Commonwealth of Massachusetts, In His Official Capacity*, Civ. No. 95-12574-GAO, United States District Court for the District of Massachusetts;
- *Philip Morris, Inc., et al. v. Richard Blumenthal, Attorney General of the State of Connecticut, In His Official Capacity*, Civ. No. 396CV01221 (PCD), United States District Court for the District of Connecticut;
- *Philip Morris, et al. v. William H. Sorrell, et al.*, No. 1:98-ev-132, United States District Court for the District of Vermont.

Chapter Nine:

The National Foundation

By Patricia Davidson

9.1: Q & A

9.1.1: What is the National Foundation?

The National Foundation will be established by the executive committee of the National Association of Attorneys General (NAAG) as non-profit entity. It will be organized for educational, charitable and scientific purposes. [MSA VI(d)].

9.1.2: What is the National Public Education Fund?

The National Public Education Fund ("NPEF") will be the Foundation's grant-making arm. [MSA VI(a) and (c)].

9.1.3: What is the purpose of the National Foundation?

The Foundation's basic programmatic charge is twofold. First, it will support both the study of - and programs to - reduce youth use of tobacco products²⁰³ and youth substance abuse. [MSA VI(a)]. Second, the Foundation will support the study of – and educational programs to – prevent diseases associated with tobacco product use. This description of the Foundation's mission is reiterated and elaborated upon in MSA sections describing Foundation functions [MSA VI(f)(1)] and NPEF grants [MSA VI(g)].²⁰⁴

The Foundation will also operate a grant-making arm, the National Public Education Fund ("NPEF"), which is described in the following pages. [MSA IV(g)].

9.1.4: How will the National Foundation be organized and run?

NAAG's executive committee will create the Foundation, which will be run by an 11 member Board of Directors. [MSA VI(d)].

²⁰³ The MSA's definition of "tobacco products" is limited to cigarettes and smokeless tobacco. [MSA II(vv)]. Thus, none of its provisions, including those pertaining to NPEF grants or Foundation activities, encompass cigars. A startling increase in cigar use by both adults and adolescents, following a period of intensive and apparently successful marketing and promotion by the industry, has been recently documented. *Cigars: Health Effects and Trends*, at 14-17; 195-219. New data from a Florida survey, finding that 7.8% of Florida sixth graders smoke cigars and that nearly 20% of Florida eighth graders smoke cigars, prompted the state to decide to use some of its tobacco control funds to launch a counter-advertising campaign directed at underage cigar use. Bob LaMendola and Glenn Singer, *Teen Cigar Smoking is on the Rise*, SUN-SENTINEL SOUTH FLORIDA at p. 1 (January 25, 1999). The state of Florida entered into an independent settlement of its Attorney General's suit against cigarette and smokeless tobacco companies in 1997 and is not a signatory to the MSA. *State of Florida v. American Tobacco Company*, Civil Action No. 95-1466 AH, Settlement Agreement (Aug. 25, 1997).

²⁰⁴ The Foundation Purposes section of the MSA also states: "The Settling States believe that a comprehensive, coordinated program of public education and study is important to further the remedial goals of this Agreement." [MSA VI (a)]. Notably the participating tobacco companies are not mentioned. Moreover, while the "Recitals" section of the MSA [MSA I] sheds some light on the goals shared by the settling states and participating manufacturers (e.g., "reducing underage tobacco use by discouraging such use and by preventing Youth access to Tobacco Products"), the MSA is devoid of a clear and comprehensive statement of its remedial goals.

The Foundation will be a 501(c)(3) non-profit entity, "organized exclusively for charitable, scientific and educational purposes." [Id.]

9.1.5: How will the Foundation's Board of Directors be selected?

NAAG will select two Directors from its membership. [MSA VI(d)]. Two Directors will be selected by the National Governor's Association ("NGA") from its membership and two additional Directors will be chosen by the National Conference of State Legislatures ("NCSL") from its members. [Id.]

These six Directors, representing NAAG, NGA and NCSL, will in turn select the other five Foundation Directors. [Id.]. One of the five must "have expertise in public health issues." [Id.] The remaining four directors must possess "expertise in medical, child psychology, or public health disciplines." [Id.] The Foundation's Board of Directors must be geographically diverse.

9.1.6: How will the Foundation be funded?

The Foundation will be funded by tobacco industry base payments of \$25 million per year for a period of 10 years. [MSA VI(b)]. Beginning on March 31, 1999 (and on that date for the following nine years), each original participating manufacturer ("OPM") must pay its relative market share of the \$25 million to the Escrow Agent.[Id.]

Base payments made by OPMs to the foundation under Section VI (b) are not subject to adjustments, reductions or offsets. [Id.]

9.1.7: How will the NPEF be funded?

The NPEF will be funded for a minimum of 5 years by separate tobacco industry payments. [MSA VI(c)] On March 31, 1999 each OPM must pay its relative market share of \$250 million to the Escrow Agent for the Foundation's NPEF. [Id.]

On March 31, in the years 2000–2003 each OPM will pay its relative market share of \$300 million to the NPEF account annually. [Id.]

However, except for the initial payment-due March 31, 1999-tobacco company payments to the NPEF are subject to the MSA's inflation adjustment,²⁰⁵ volume adjustment,²⁰⁶ and offsets for miscalculated or disputed payments as described in Section XI(i)²⁰⁷ of the MSA. [Id.]

9.1.8: Are there other funding sources for the NPEF?

Yes, two other sources are identified in the MSA. First, other (undefined) entities may contribute money directly to the Foundation, designated for the NPEF. [MSA VI(c)(4)]. Second, starting in 2004, after the industry payments to the NPSF described above cease, Supplemental Payments from the OPMs may be due. [MSA IX(e)].

9.1.9: How will the tobacco industry's obligation to pay Supplemental Funds to the NPEF be triggered?

²⁰⁵The MSA's "inflation adjustment" is defined in Section II(x) and the formulas are set forth in Exhibit C.

²⁰⁶The MSA's "volume adjustment" is defined in Section II(aaa) and the formulas are set forth in Exhibit E.

²⁰⁷Section XI(i) addresses underpayments and overpayments by participating manufacturers under the MSA.

If, on April 15, 2004 and every April 15th thereafter, the sum of the market shares of the participating tobacco manufacturers²⁰⁸ (that were participating manufacturers during the entire calendar year immediately preceding the year in which the payment would be due) equals or exceeds 99.05% of the total cigarette market, each OPM must pay its relative market share of an additional \$300 million to the escrow agent for the Foundation. [MSA IX(e)].

9.1.10: Are there any restrictions on or adjustments to Supplemental Funds?

Yes. The Supplemental Payment funds must be used for the Foundation's national advertising and education program to counter youth tobacco product use and educate consumers about the causes and prevention of diseases associated with tobacco use. [MSA IX(e)]. Provisions of the MSA pertaining to Foundation grants from the NPEF [MSA VI(g)] and restrictions on Foundation and NPEF activities [MSA VI(h)] also apply to the use of Supplemental Payments. [MSA IX(e)]. Furthermore, the amount of any Supplemental Payments is subject to a number of potential adjustments, including the MSA's inflation adjustment, volume adjustment, non-settling states reduction and the section XI(i) offset for miscalculated or disputed payments. [MSA IX(e)].

9.1.11: Who will manage NPEF funds?

The Foundation. [MSA VI(c)(5); VI(f)(10); VI(f)(11)].

9.1.12: When will tobacco industry payments be made available to the Foundation and NPEF?

The escrow agent will disburse the industry base payments to the Foundation when State-Specific finality²⁰⁹ occurs in at least one Settling State [MSA VI(b)], a requirement that has already been satisfied.

The initial \$250 million (March 31, 1999) industry payment to be credited to the NPEF will also be disbursed by the escrow agent to the Foundation upon the occurrence of State Specific Finality in at least one Settling State. [MSA VI(c)].

However, the subsequent industry payments to the NPEF (via the Foundation) will be disbursed by the escrow agent to the Foundation "only when State-Specific Finality has occurred in Settling States having aggregate Allocable shares equal to at least 80% of the total aggregate Allocable Shares . . ." [MSA VI(c)(3)].

9.1.13: When will grant money be available to the states and localities through the NPEF arm of the Foundation?

The MSA does not include a time table for the NPEF grant process or the actual distribution of grant funds to successful applicants. The only deadlines pertain to industry payments to the escrow agent and the escrow agent's disbursement of funds to the Foundation and NPEF. [MSA VI(b) and (c)]. Moreover, there does not appear to be a timetable for the establishment of the Foundation.

²⁰⁸ Participating manufacturers may include tobacco manufactures that were not original signers of the MSA. [MSA II(jj)] The definition includes a number of complex provisos. [*Id.*]

²⁰⁹ "State-Specific Finality," with regard to a particular settling state, means that the relevant state court has formally and finally approved of both the MSA and the state consent decree. Any appeals could delay this date. [MSA II(ss)].

9.1.14: What will the Foundation do?

The MSA describes **11 Foundation activities**, nine of which are programmatic in nature. [MSA Section VI(f)].

First, the Foundation is charged with carrying out a nationwide advertising and education program for the dual purposes of (1) countering youth use of tobacco products, and (2) educating consumers (presumably of tobacco products) about the causes and prevention of diseases associated with tobacco product use. [MSA Section VI(f)(1)].

Second, the Foundation will develop and disseminate model advertising and education programs to counter youth use of substances (not apparently limited to tobacco) that are illegal for youth to purchase or use. Reducing youth smoking will be emphasized, but will not necessarily be the primary focus of the Foundation's model programs. [MSA VI(f)(2)].

The Foundation must monitor and test the effectiveness of these model advertising and education programs. Based on this evaluation, the Foundation may develop and disseminate revised versions of its model advertising and education programs. [*Id.*].

Third, the Foundation will develop and disseminate model K-12 classroom education programs and "curriculum ideas" about smoking and substance abuse. [MSA VI(f)(3)]. These models must include (but are not apparently limited to) target programs for undefined "special at-risk populations." [*Id.*].

The Foundation is obliged to monitor and test the effectiveness of such model programs and curriculum ideas. Based on its evaluation, the Foundation may develop and disseminate revised versions. [*Id.*].

Fourth, the Foundation is charged with developing and disseminating criteria for effective cessation programs. [MSA VI(f)(4)]. Again, the Foundation must monitor and test the effectiveness of such criteria and may disseminate revised versions, based on its evaluation. [*Id.*].

Fifth, the Foundation will commission studies, fund research and publish reports about the factors that influence youth smoking and substance abuse. It must also develop strategies to address the conclusions reached by such studies and research. [MSA VI(f)(5)].

Sixth, the Foundation is generally charged with developing "other innovative youth smoking and substance abuse prevention programs." [MSA VI(f)(6)].

Seventh, targeted training and information for parents must be provided by the Foundation. Neither the scope nor the focus (tobacco, general substance abuse) of the training mandate is clear. [MSA VI(f)(7)].

Eighth, the Foundation will maintain a public library which will feature Foundation funded studies, reports and other publications related to the prevention and cause of youth smoking and substance abuse. [MSA VI(f)(8)].

Ninth, the Foundation must track and monitor youth smoking and substance abuse, focusing on "reasons for any increase or failures to decrease Youth smoking and substance abuse" as well as actions that could be taken to reduce youth smoking and substance abuse. [MSA VI(f)(9)].

The remaining two Foundation functions are financial. Specifically the Foundation is charged with "receiving, controlling and managing contributions from other entities to further the

purposes described in this Agreement" and funds paid by tobacco companies under the payment provisions pertaining to the Foundation and NPEF. [MSA VI(f)(10) and (11)].

9.1.15: Aside from the NPEF (which is operated by the Foundation), will the Foundation be affiliated with any other organizations?

Yes. The MSA states that the Foundation will be formally affiliated with an educational or medical institution to be selected by the Board of Directors. [MSA VI(e)]. In addition, the Foundation's Board of Directors must be included in the biannual meetings and triennial national conference convened by NAAG for the Attorneys General and tobacco manufacturers' designees. [MSA VIII(a)(2)]. The purpose of the mandatory meetings and conferences is to evaluate the success of the MSA and coordinate efforts by the Attorneys General and participating tobacco manufacturers to curb youth smoking. [*Id.*].

9.1.16: Who is eligible for NPEF grants?

The MSA authorizes (but does not apparently require) the Foundation to make grants from the NPEF to settling states and their political subdivisions. [MSA VI(g)]. No other entities are expressly listed as eligible for NPEF grants.

9.1.17: What will these NPEF grants fund?

NPEF grants are for states and localities to "carry out sustained advertising and education programs" that counter youth tobacco product use and educate consumers about the cause and prevention of diseases associated with the use of tobacco products. [MSA VI(g)].

9.1.18: What criteria will the Foundation use in making grants from the NPEF?

The Foundation must consider four factors, including whether the state or local government applicant: (1) "demonstrates" the extent of the youth smoking problem in the state or political subdivision; (2) will use the grant to implement a model program developed by the Foundation or has a specific plan for the use of grant funds, including a demonstrated ability to develop an effective advertising and education campaign and to assess its effectiveness; (3) has other funds readily available to carry out the type of sustained advertising and education program eligible for grant funding; and (4) is not a settling state or political subdivision that has severed the provisions of the MSA pertaining to the Foundation and NPEF from its settlement agreement with the industry. [MSA VI(g) (*see below*)].

9.1.19: What is involved in state severance of the provisions of the MSA pertaining to the Foundation (and NPEF)?

A State Attorney General may sever the Foundation/NPEF Section VI from its settlement agreement with the participating tobacco companies if the Attorney General for a particular state determines that an applicable state law prevents the state from lawfully agreeing to the Foundation Section. [MSA VI(i) (emphasis added)]. If a State Attorney General severs the Foundation section he or she must provide written notice to each participating manufacturer and NAAG under Section XVIII(k) of the MSA. Tobacco company payments to the Foundation and

NPEF must still be made unless all of the settling states sever the Foundation section. [*Id.* (emphasis added)].²¹⁰

9.1.20: Are there any minimum or maximum dollar amounts for NPEF grants made by the Foundation?

The provisions of the MSA describing the Foundation and NPEF do not specify any minimum or maximum dollar amounts or allocation guidelines for NPEF grants made by the Foundation.

9.1.21: Are there any express limits on Foundation activities or the use of Foundation funds?

Yes, there are several limits. First, the MSA prohibits the Foundation from engaging in - and the use of Foundation funds for - "any political activities or lobbying, including, but not limited to, support of or opposition to candidates, ballot initiatives, referenda or other similar activities." [MSA VI(h)]. Second, Foundation activities (including the NPEF) must be carried out solely within the states. [MSA VI(h)]. Third, the Foundation must ensure that its programs are culturally and linguistically appropriate. [*Id.*]

9.1.22: Are there any express limits on the use of funds from the NPEF?

Yes. The MSA forbids the use of the NPEF for "any personal attack on or vilification²¹¹ of, any person (by name or business affiliation), company, or governmental agency, whether individually or collectively." [MSA VI(g) (emphasis added)]. This prohibition, which appears to encompass "personal" attacks²¹² or vilification of the tobacco industry (by virtue of the words "company" and "collectively") could censor the most effective of state and local advertising and education campaigns.

9.1.23: Will this "no tobacco industry attacks" provision inhibit the development of and funding of effective counter advertising campaigns.

Yes, to the extent states and localities depend on NPEF funds from the MSA to mount such campaigns. Counter-advertising campaigns that expose tobacco industry manipulation are among the most effective strategies for reaching target audiences and reducing tobacco consumption.²¹³ Furthermore, "the most successful industry manipulation advertisements specifically attack the tobacco industry by name, rather than using a vague 'they' or 'them.'²¹⁴

²¹⁰ A State Attorney General who subsequently determines that the state may lawfully agree to the Foundation section of the MSA may rescind a previous severance by following the notice provisions applicable to severance. [MSA VI(i)].

²¹¹ Webster's Dictionary defines "vilification" as 1: "the act of vilifying: abuse 2: an instance of vilifying: a defamatory utterance." MERRIAM-WEBSTER DICTIONARY (1999). The word "vilify", in turn, is defined as "1: to lower in estimation or importance 2: to utter slanderous and abusive statements against: defame." MERRIAM-WEBSTER DICTIONARY (1999). The word "malign" is listed as synonym.

²¹² A regulation of the Federal Communications Commission provides for a right to respond to certain broadcast "personal attacks." See 47 C.F.R. sec. 73.1920.

²¹³ See Lisa K. Goldman & Stanton A. Glantz, "Evaluation of Antismoking Advertising Campaigns," 279 JAMA 772 (March 11, 1998). According to authors Goldman and Glantz industry manipulation ads work differently for adults and youth. For adults, "industry manipulation advertisements help them redirect their feelings of guilt over their own smoking toward anger at the tobacco industry and its desire to profit from a deadly product." *Id.* at 774.

9.1.24: Are there any other strings attached to the use of NPEF funds?

Yes. The "no personal attacks or vilification" prohibition is accompanied by a directive that the NPEF "shall be used only for public education and advertising regarding the addictiveness, health effects, and social costs related to tobacco product . . . "[*Id.*]. This directive appears to be narrower than the stated purpose of Foundation grants from the NPEF, which is to counter youth tobacco use and educate consumers about the causes and prevention of diseases associated with use of tobacco products. [*Compare* MSA VI(g) *with* MSA VI(h)].

Furthermore, research has shown that media messages emphasizing the health consequences of tobacco use are not nearly as effective as industry manipulation ads.²¹⁵

For youth, who begin smoking as an expression of independence, industry manipulation ads work because they show teenagers that they are not acting independently when they decide to smoke. *Id.* In a recently released article, authors Balbach and Glantz report that the California advertising contractor who developed a series of hard-hitting ads for the state found that industry manipulation ads tested very strongly with youth focus groups (ages 12-18). See Edith D. Balbach & Stanton A. Glantz, *Tobacco Control Advocates Must Demand High Quality Media Campaigns: The California Experience* 7 *TOBACCO CONTROL* 397, 403 (1998). Balbach and Glantz also describe a series of politically motivated attempts to delay, squelch and alter industry manipulation ads in California and conclude that "[e]ffective advertisements must expose industry manipulation, but the experience of California and other states demonstrates that these advertisements are precisely the ones that the industry will work hardest to stop." *Id.* at 406.

²¹⁴ See Goldman & Glantz, *supra* note 213 at 774.

²¹⁵ Counter-advertising messages emphasizing the health effects of smoking have not proven to be especially effective in preventing youth from taking up smoking or convincing adults to stop. Balbach & Glantz, *supra* note 213 at 406. See also Goldman & Glantz, *supra* note 213 at 776.

Part Three:
**Securing Settlement Funds
for State and Local
Tobacco Control**

Chapter Ten:

Securing Settlement Funds for State and Local Tobacco Control

By Graham Kelder and Laura Hermer

10.1: Introduction

As the preceding analysis makes clear, the Multistate Master Tobacco Settlement Agreement (MSA) signed by state attorneys general on November 23, 1998, contains few tangible public health benefits, and does little, therefore, by itself, to reduce the continuing harmful impact of tobacco use on the U.S. economy or the health of its citizens. The devastation wrought by tobacco in this country will be reduced only by the MSA as it operates in conjunction with fully-funded state tobacco control programs funded by settlement dollars, the National Foundation, and the continuing efforts of the national tobacco control community.

This fact is acknowledged in the MSA itself. The document states in the "Recitals" section that settling states "have agreed to settle their respective lawsuits and potential claims pursuant to terms which will achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, including the enforcement of the mandates and restrictions related to such measures, as well as funding for a national Foundation dedicated to significantly reducing the use of Tobacco Products by Youth" [MSA I]. Indeed, among the only principal potential public health benefits of the Tobacco Settlement are the public health programs to which the funds generated by the settlement may be dedicated.

The best way, therefore, to effectuate the public health purposes of the Tobacco Settlement – to modify patterns of tobacco use so as to protect the health of the United States' citizens and their children and to reduce or eliminate the future costs attributable to tobacco use – would be to dedicate a substantial portion of the funds generated by the Tobacco Settlement to tobacco control in each Settling State.

What follows are some suggestions for securing a substantial portion of the Tobacco Settlement's funds to combat tobacco company harms.

10.2: Determining Who Has Authority to Appropriate Settlement Funds in Your State

10.2.1: State-Specific Appropriation Procedures

State and local tobacco control advocates must first find local counsel to help them to determine how the proceeds from the MSA may be allocated in your state. This is a matter determined by each Settling State's state law. In Massachusetts, for example, the proceeds from the Multistate Master Tobacco Settlement Agreement ("the Tobacco Settlement Agreement") will be received on account of the Commonwealth as a result of an action, brought by the

Commonwealth, for the primary purpose of third party reimbursement of state Medicaid claims.²¹⁶ As such, these proceeds will be considered public funds.²¹⁷

The general rule is that all public funds are to be paid into the state treasury under the Massachusetts Constitution.²¹⁸ Once deposited into the general fund, the money can only be appropriated by the state legislature, in accordance with the regular procedures prescribed by the Massachusetts Constitution.²¹⁹ The purpose of these procedures are to centralize control of the Commonwealth's funds and to ensure careful consideration of their expenditure.²²⁰

Given the purpose of these procedures, Massachusetts' Supreme Judicial Court has noted an exception to them, in which the purpose of article 63 of the Massachusetts Constitution can be fulfilled while avoiding the appropriations process. In a leading advisory opinion to the state House of Representatives, the S.J.C. held that funds "received by the Commonwealth and held in trust, to be disbursed only in compliance with legislatively prescribed conditions, are not subject to art. 63 even though they are received 'on account of the commonwealth' and the State Treasurer is named as custodian of the fund."²²¹ In other words, if the legislature has created a trust by statute and, in so doing, determined the source or sources of trust revenues and prescribed conditions for disbursement of the trust's funds, then funds from the delineated revenue sources may be deposited directly into the trust and those monies may be disbursed without having to go through the appropriations process.

The absence of any extant, legislatively-created trust fund for tobacco control purposes means that the court cannot validly order Massachusetts' funds from the Tobacco Settlement to be paid into a public trust to avoid going through the appropriations process.²²² Rather, the state legislature must appropriate the monies. Although there currently exists no way for these funds to avoid the appropriations process, the legislature can appropriate them for the purposes set forth in the Health Protection Fund. The Health Protection Fund ("Fund") was created through section 2GG of chapter 29 of the General Laws for the purpose of funding school health education programs, workplace-based and community smoking prevention and cessation programs, supporting community health centers, particularly regarding prenatal and maternal care, and funding DPH monitoring of morbidity and mortality from cancer and other tobacco-related illnesses.²²³ Additionally or alternatively, the legislature could enact a separate tobacco control program or a program to reimburse Medicaid for the expenses of treating illnesses,

²¹⁶ See Complaint, ¶¶ 206-210, *State v. Philip Morris, Inc.*, No. 95-7378 (1995); Hearing of May 28, 1998, *State v. Philip Morris*, No. 95-7378 (1998).

²¹⁷ MASS. GEN. L. ch. 12A, § 1 (1998) (defining "public funds" as "federal, state or local funds").

²¹⁸ MASS. CONST. art. 63, § 1.

²¹⁹ See MASS. CONST. art. 63, §§ 2-5. The power of appropriation is exclusively a legislative power, "to be exercised only by the legislature and in the particular manner prescribed under our Constitution." *Opinion of the Justices to the Senate*, 375 Mass. 827, 833, 376 N.E.2d 1217 (1978).

²²⁰ See, e.g., *Opinion of the Justices to the House of Representatives*, 393 Mass. 1209, 471 N.E.2d 1266 (1984); *Opinion of the Justices to the Senate*, 375 Mass. 851, 378 N.E.2d 433 (1956).

²²¹ *Opinion of the Justices*, 393 Mass. at 1222. See also *Opinion of the Justices*, 334 Mass. 721, 136 N.E.2d 223 (1956).

²²² See *Town of Manchester v. Dept of Environmental Quality Engineering*, 381 Mass. 208, 218-219, 409 N.E. 2d 176 (1980).

²²³ MASS. GEN. L. ch. 29, § 2GG(a) – (d) (1998).

including nicotine addiction, related to tobacco use. These programs could be enacted as funds such as the Health Protection Fund or as a legislatively-created trust.

To see how this issue is being dealt with in Massachusetts, for example, see *An Action Plan to Protect the Health of Massachusetts Citizens and Their Children: Using Tobacco Settlement Funds to Reduce the Health and Economic Costs of Tobacco-Related Disease in the Commonwealth* at <http://www.tobacco.neu.edu/mtcerl/blueprint.htm>

10.2.2: The Effect of the Cause of Action

The cause of action in each Settling State may also have some bearing on how settlement proceeds may be allocated. In Massachusetts, for example, the Commonwealth brought suit against the tobacco industry on the basis of several common law and statutory causes of action: undertaking of a special duty, breach of warranty, conspiracy and concert of action, unjust enrichment and restitution.²²⁴ The relief sought included a demand that the tobacco industry fund both a "corrective public education campaign" regarding smoking and health, to be administered and controlled by a third party, and a smoking cessation program, including the provision of nicotine replacement therapy, for "dependent smokers," as well as requiring the defendants to pay restitution and damages for past and future expenditures of the Commonwealth for the cost of treating sick smokers.²²⁵

Notwithstanding the several causes of action, Judge Sosman of the Massachusetts Superior Court ruled in October of 1997 that the complaint did not state a count for the common law claims of fraud, special duty and conspiracy.²²⁶ Rather, she found that those counts were merely necessary components to the state's restitution claim.²²⁷ Thus, the court held that there were only two causes of action in the case, both statutory.²²⁸ One stated an unjust enrichment claim based on section 93A of the General Laws, regulating consumer protection.²²⁹ The second stated a claim for restitution for Medicaid costs under section 22 of chapter 118E of the General Laws and section 276 of chapter 60 of the Massachusetts Acts of 1994.²³⁰

Section 276 of chapter 60 of the Massachusetts Acts of 1994 provides in relevant part that "[a]ny recovery resulting from any claim or action against a manufacturer of cigarettes to recover the amount of medical assistance provided by the commonwealth under chapter 118E of the General Laws shall be credited to the Health Protection Fund," less attorneys' fees and costs.²³¹ Revenues from the tobacco tax instituted by Question 1 are to be credited to the

²²⁴ See Complaint at ¶¶ 184-216, *State v. Philip Morris*, No. 95-7378 (1995).

²²⁵ See Complaint at ¶¶ A-H, *State v. Philip Morris, Inc.*, No. 95-7378 (1995).

²²⁶ See Transcript of 5/28/98 hearing in *Harshbarger v. Phillip Morris*. Judge Sosman determined that the primary function of the common law theories was to provide a basis for wrongful conduct required to state a claim under the Medicaid reimbursement statute. *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ MASS. ST. ch. 60, § 276 (1994). Given that section 276 was not tied to any portion of the 1994 General Appropriation Bill, of which it was an amendment, its provisions continue in force indefinitely unless amended or repealed. Telephone interview with Charlie Martel, Attorney, Massachusetts House Counsel's Office, December 1998.

Fund.²³² Given that the court ruled that the complaint contained only two primary causes of action, one of which was for Medicaid reimbursement under section 22 of chapter 118E, it is likely that at least a substantial portion, if not all, of any award from the suit must statutorily be credited to the Fund.

Note, however, that the mere fact that section 276 was used as a cause of action does not necessarily mean that all the proceeds of the settlement must be directed into the Fund. Even after Judge Sosman's October 1997 ruling, the case still contained a count under chapter 93A of the General Laws. Thus, a strong argument could be made not all the funds should go to the Health Protection Fund, but instead should also be used to fund a separate structure designed specifically to provide money for certain tobacco control programs. For example, pursuant to the 93A claim, defendants' conduct arguably unjustly enriched the defendants at the expense of the commonwealth, which must now bear a substantial burden of the costs of treating sick smokers.²³³ Using this assumption, one could easily argue that a substantial portion of the settlement proceeds should be allocated not only to the costs of smoking-related illnesses but also to prevention research, educational and cessation programs, potentially funded other than through the Health Protection Fund, which would be designed to keep youths who have not formed a tobacco habit from starting and helping those who already use tobacco to quit. Keep in mind, though, that the premise of allocating the funds to other than the Health Protection Fund cuts both ways, and may also be used against the service of tobacco control.

Notwithstanding the foregoing, the Massachusetts legislature has numerous choices regarding what to do with the money. Given its many options, it will be essential to advocate doing the right thing with the Tobacco Settlement funds - namely, consecrating them to both the service of tobacco control and reimbursement for the care of sick smokers. Note that, because it cannot be taken as a given that all the funds will be allocated to the Health Protection Fund, the possibility that the legislature will create other structures for dealing with the money and/or appropriate the funds for other uses cannot be overlooked.

The legislature has two tasks at hand: first, to create or determine means of handling the funds, and second, to appropriate the funds into the structures it created. Note that the frameworks used for allocation and the appropriation of funds themselves are two very different things. A statute which devises mechanisms, agencies, commissions, or other structures or entities meant for handling public funds, and/or also designate the uses of the funds going to such structures or entities is functionally no more than words printed on a page until the legislature has appropriated money towards its purposes. An appropriation occurs only when "public monies are set aside for a specific purpose in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and no other."²³⁴ In other words, even if a bill proposes that certain revenue in general be credited to a fund for specific purposes, without specifying any dollar figures, percentages or other designations, that bill does not bind the legislature to appropriate any money for the purpose set forth by the bill. Only when the legislature is considering designating a particular amount of money to be used for a given purpose does the bill concern an appropriation. Thus, for example, the state legislature, through the Health Protection Fund, created a variety of tobacco control programs. However, it

²³² MASS. GEN. L. ch. 29, § 2GG (1998).

²³³ See Complaint at ¶ 215, *State v. Philip Morris, Inc.*, No. 95-7378 (1995).

²³⁴ *Gilligan v. Attorney General*, 413 Mass. 14, 17, 595 N.E.2d 288 (1992).

must appropriate money to the fund in order to provide the programs with the revenues to function.

The Massachusetts legislature has a number of options regarding structures it can use or create into which it can appropriate funds from the Tobacco Settlement. First, it could simply use the Fund, which it could leave in an unamended form. This choice would require no statutory creation of a new or amended framework for handling the funds (though it would leave them subject to appropriation), and provides one logical legislative option.

Another possibility would be for the legislature to amend the Fund. For example, section 2GG could be amended by adding a provision stating that all revenues from Massachusetts' portion of the MSA settlement, less attorney's fees and costs, shall be paid into the Fund. The statute could also be amended to create new programs to be funded through section 2GG, such as prevention research, tobacco cessation, counteradvertising, and ETS enforcement. The funding for all such programs, again, would be subject to appropriation.

A third possibility would be for the legislature to enact a tobacco control program or a program to reimburse Medicaid for the expenses of treating illnesses, including nicotine addiction, related to tobacco use, outside the auspices of 2GG.²³⁵ These programs could be enacted as funds such as the Health Protection Fund or as a legislatively-created trust. If created as a fund, the legislature would need to appropriate money for the programs yearly, even if the statute creating the fund stated that revenues for the programs are to come from the MSA settlement proceeds. For example, the language of section 2GG provides that any crediting of revenue to the Fund is "subject to appropriations." This means that the legislature may simply choose to not fund the program to any degree in a given year, and use the revenue for other purposes, as former Governor Weld proposed doing in 1995 when he wanted to take up to \$60 million of the Health Protection Fund and use it towards "family social programs," including a \$500 million tax cut.²³⁶ This issue was stated in *Gilligan v. Attorney General*, in which the court noted that the inclusion of the phrase "subject to appropriation by the state Legislature" indicated that the legislature might appropriate monies in the Health Protection Fund for purposes other than those for which the Fund would be established.²³⁷

On the other hand, if the legislature created a trust to fund the programs, it could stipulate as a statutory provision that monies from Massachusetts' share of the Tobacco Settlement, whether in part or in whole, are to be paid into the trust as received and disbursed according to the statutory provisions, without being subject to the appropriations process.²³⁸ Such an option would, unless amended or repealed by a subsequent legislature, provide the programs with automatic funding, in addition to express directions regarding how to allocate the revenue.

Remember that setting up a structure for the monies is not the same as getting your programs funded. Out of all the options provided above, only the trust fund is not contingent on the appropriations process in order to obtain the funding it needs for its programs to function. With regard to the other possibilities, vigilance will be required each year to ensure that Massachusetts' portion of the Tobacco Settlement proceeds are used for tobacco control

²³⁵ This option would not preclude amendments to 2GG, of course.

²³⁶ BOSTON GLOBE, Nov. 10, 1995.

²³⁷ *Gilligan v. Attorney General*, 413 Mass. at 19-20.

²³⁸ See *supra*, note 219 and associated text.

purposes, rather than, for example, being shunted off for a tax cut or to fund new "hot button" issues. In order to get the funds where you want them to go, you need not only to have a desirable structure enacted, but also to have the programs which are set up through that structure funded through the appropriations process.

To see how this issue is being dealt with in Massachusetts, for example, see *An Action Plan to Protect the Health of Massachusetts Citizens and Their Children: Using Tobacco Settlement Funds to Reduce the Health and Economic Costs of Tobacco-Related Disease in the Commonwealth* at <http://www.tobacco.neu.edu/mtcerl/blueprint.htm>

10.2.3: Future Legislatures

Also, note that future legislative sessions may not be absolutely bound in their actions by prior ones in many states. This means that, of course, future sessions of the legislature may amend or repeal prior enactments as they see fit. This means that in Massachusetts, for example, it should be within the power of this or future legislative sessions to amend section 276 to permit the funds to go elsewhere. On the one hand, this could provide another avenue through which a certain portion of the settlement funds, if desired, could be allocated into a different, perhaps new, fund, such as one specifically created to fund local compliance checks, ETS enforcement, prevention research, tobacco use cessation programs, or other tobacco control programs which otherwise might not receive the amount of attention and funding if funded through an enormous, catch-all fund, such as might be created if section 2GG were amended to include funds not merely for certain tobacco control efforts, but also for Medicaid disbursements for tobacco-related illnesses, or for children and the elderly. On the other hand, it could also be used to defeat the use of the funds for tobacco control purposes by, for instance, abolishing the Health Protection Fund altogether. Just as with the appropriations issue, amending section 276 could work against tobacco control interests just as much as it could work in their favor.

To see how this issue is being dealt with in Massachusetts, for example, see *An Action Plan to Protect the Health of Massachusetts Citizens and Their Children: Using Tobacco Settlement Funds to Reduce the Health and Economic Costs of Tobacco-Related Disease in the Commonwealth* at <http://www.tobacco.neu.edu/mtcerl/blueprint.htm>

10.3: Drafting a Settlement Blueprint

The best course of action is for tobacco control advocates in each Settling State to draft a blueprint that outlines how settlement funds should be used for tobacco control. The settlement blueprint drafted by the Tobacco Control Resource Center for the American Cancer Society (New England Division – Massachusetts), the American Heart Association (New England Affiliate) and the Massachusetts Coalition for a Healthy Future may be found at <http://www.tobacco.neu.edu/mtcerl/blueprint.htm>

10.4: Other Sources of Information

The following list of sources was compiled by the National Center for Tobacco-Free Kids:

For data on deaths caused by smoking, smoking and smokeless tobacco use rates, and other tobacco-related information, see Centers for Disease Control and Prevention (CDC), U.S. Department of Health and Human Services, *State Tobacco Control Highlights 1997* (1998) or see CDC's state-specific website pages [<http://www.cdc.gov/nccdphp/osh/statehi/statehi.htm>]. Current smoker defined as having smoked in the past month. See, also, CDC, "Incidence of

Initiation of Cigarette Smoking – United States 1965-1996), Morbidity and Mortality Weekly Report (MMWR) 47(39): 837-40 (October 9, 1998); CDC, "State-Specific Prevalence Among Adults of Current cigarette Smoking and Smokeless Tobacco Use and Per Capital Tax-Paid Sales of Cigarettes – United States, 1997," MMWR 47(43): 922-926 (November 6, 1998); CDC, Surveillance Summaries, "Youth Risk Behavior Surveillance – United States, 1997," 47(SS-3): 10-12,15-17, 50-54 (August 14, 1998); CDC, "State-Specific Prevalence of Cigarette Smoking Among Adults, and Children's and Adolescents' Exposure to Environmental Tobacco Smoke – United States 1996," MMWR 46(44): 1038-1043 (November 7, 1997); CDC, "Smoking Attributable Mortality and Years of Potential Life Lost – United States, 1984" [with editor's update for 1990-1994], MMWR 46(20): 444-451 (May 23, 1997); J. R. Hall, Jr., National Fire Protection Association, The U.S. Smoking-Material Fire Problem Through 1995 (September 1997). For projected smoking deaths among today's youth, see CDC, "Projected Smoking-Related Deaths Among Youth -- United States," MMWR 45(44): 971-974 (November 8, 1996).

For data on kids exposed to secondhand smoke, see CDC, "State-Specific Prevalence of Cigarette Smoking Among Adults, and Children's and Adolescents' Exposure to Environmental Tobacco Smoke – United States 1996," Morbidity and Mortality Weekly Report 46(44): 1038-1043 (November 7, 1997). Good data is not currently available regarding adult exposure to secondhand smoke at their homes, or to the numbers exposed to ETS at workplaces, daycare centers, restaurants, or other public facilities.

For data on number of packs of cigarettes illegally sold to kids, see Cummings, et al., "The Illegal Sale of Cigarettes to US Minors: Estimates by State," American Journal of Public Health 84(2): 300-302 (February 1994). See, also, CDC, "Tobacco Use and Usual Source of Cigarettes Among High School Students – United States 1995," Morbidity and Mortality Weekly Report 45(20): 413-418 (May 24, 1996).

For nationwide data on smoking trends see CDC, "Tobacco Use Among High School Students – United States, 1997," Morbidity and Mortality Weekly Report 447(12): 229-233 (April 3, 1998); Institute for Social Research, University of Michigan, Monitoring the Future Study (1997) <http://www.isr.umich.edu/src/mtf/index.html> ; CDC, "Incidence of Initiation of Cigarette Smoking – United States 1965-1996)," MMWR 47(39): 837-40 (October 9, 1998).

For data on smoking-related total health and Medicaid expenditures, see L. Miller, et al., "State Estimates of Total Medical Expenditures Attributable to Cigarette Smoking, 1993" Public Health Reports 113: 447-58 (September/October 1998); L. Miller et al., "State Estimates of Medicaid Expenditures Attributable to Cigarette Smoking, Fiscal Year 1993," Public Health Reports 113: 140-151 (March/April 1998). Medicare estimate from L. Miller, personal communication (1/11/99). According to the Health Care Financing Administration, the federal government reimburses the states, on average, for 57% of their Medicaid expenditures, <http://www.hcfa.gov/medicare/ormedmed.htm#Medicaid>.

For data on costs associated with smoking or exposure to secondhand smoke during pregnancy, see E.K. Adams and C.L. Melvin, "Costs of Maternal Conditions Attributable to Smoking During Pregnancy," American Journal of Preventive Medicine 15(3): 212-19 (October 1998); CDC, "Medical Care Expenditures Attributable to Cigarette Smoking During Pregnancy," Morbidity and Mortality Weekly Report 46(44) (November 7, 1997); U.S. Department of the Treasury, The Economic Costs of Smoking in the U.S. and the Benefits of Comprehensive Tobacco Legislation (March 1998); J.J. Stoddard and B. Gray, "Maternal Smoking and Medical Expenditures for Childhood Respiratory Illness," American Journal of Public Health 87(2): 205-

209 (February 1997); E. Dejin-Karlsson, et al., "Does Passive Smoking in Early Pregnancy Increase the Risk of Small-for-Gestational-Age Infants," American Journal of Public Health 88(10): 1523-1527 (October 1998).

For additional information on tobacco-related costs, see U.S. Department of the Treasury, The Economic Costs of Smoking in the U.S. and the Benefits of Comprehensive Tobacco Legislation (1998) <http://www.treas.gov/press/releases/docs/tobacco.pdf>; F.J. Chaloupka and K.E. Warner, "The Economics of Smoking," in J. Newhouse and A. Culyer (eds), The Handbook of Health Economics (in press); CDC, Morbidity and Mortality Weekly Report 46(44) (November 7, 1997); CDC, Making Your Workplace Smokefree: A Decision Maker's Guide (1996); D. Mudarri, The Costs and Benefits of Smoking Restrictions: An Assessment of the Smoke-Free Environment Act of 1993 (H.R. 3434), U.S. Environmental Protection Agency report submitted to the Subcommittee on Health and the Environment, Committee on Energy and Commerce, U.S. House of Representatives (April 1994); P. Brigham and A. McGuire, "Progress Toward a Fire-Safe Cigarette," Journal of Public Health Policy 16(4): 433-439 (1995); J.R. Hall, Jr., National Fire Protection Association, The U.S. Smoking-Material Fire Problem Through 1995 (September 1997).

For tobacco advertising data, see Federal Trade Commission, Report to Congress for 1996 Pursuant to the Federal Cigarette Labeling and Advertising Act (1998) [annual amount is from 1996 data and does not include expenditures to market tobacco products other than cigarettes]. Data on tobacco industry political contributions and expenditures from Center for Responsive Politics, <http://www.crp.org/pubs/tobaccotally.htm> (October 1998); K.H. Jamieson, "Tax and Spend' vs. 'Little Kids': Advocacy and Accuracy in the Tobacco Settlement Ads of 1997-8," Annenberg Public Policy Center, University of Pennsylvania (August 6, 1998); Reuters News Service, "Cigarette Tax Initiative Squeaks Through in California" (November 4, 1998). See also Common Cause data at <http://www.commoncause.org/publications/062098.htm>. Lobbying data from Public Citizen, <http://www.citizen.org/tobacco/oct98lobby.htm> (October 1998).

Studies on cigarette advertising's influence on youth are R. Pollay, et al., "The Last Straw? Cigarette Advertising and Realized Market Shares Among Youths and Adults," Journal of Marketing 60(2):1-16 (April 1996); N. Evans, et al., "Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking," Journal of the National Cancer Institute 87(20): 1538-45 (October 1995); J.P. Pierce et al., "Tobacco Industry Promotion of Cigarettes and Adolescent Smoking," Journal of the American Medical Association 279(7): 511-505 (February 1998) [with erratum in JAMA 280(5): 422 (August 1998)].