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Giving 10% to gain eternity

After US Congress failed to enact legislation in the summer of 1998 that would have ratified the June 20, 1997 deal to settle lawsuits filed by state attorneys general (AGs) against tobacco companies, in November, 1998 the AGs agreed to a different Master Settlement Agreement (MSA) with tobacco companies that did not require Congressional approval (see <http://www.naag.org/glance.htm>). Just as had occurred with the first settlement, the AGs hailed the MSA as a major advancement for public health. However, the public health community once again criticised the new settlement’s unwarranted protection for the tobacco companies. Although some health advocates initiated court challenges to block the MSA, the majority of the public health community have been urging state legislatures to spend a portion of the settlement funds for tobacco control programmes. Both of these public health strategies seem to be failing, as most state courts have already approved the MSA, and only a few state legislatures have appropriated a significant amount of MSA funds for tobacco control programmes. With unprecedented future legal protection granted by the state AGs in exchange for money, it appears that the tobacco industry has emerged from the state lawsuits even more powerful.

While monitoring the settlement negotiations between the state AGs and the tobacco industry last summer and fall, and after analysing the MSA last November, many public health and civil justice advocates concluded that the MSA provides far greater benefits for tobacco manufacturers than for public health.

After failing to convince the AGs to oppose the deal, health advocates, hospitals, counties, and others went to court in many states to challenge the MSA. Of these, court challenges remain in nine states, with the only public health based challenge existing in Pennsylvania. Additionally, several federal lawsuits now challenge the MSA, and experts anticipate far more litigation in the future, some of which ultimately may unravel the MSA.

During this past year, many AGs have greatly exaggerated the MSA’s public benefits while not even acknowledging its tobacco industry protection provisions; Congress (at the request of the National Governor’s

Association, the National Association of Attorneys General, and the National Conference of State Legislatures) gave away the federal share of Medicaid settlement funds to the states with no conditional requirements for tobacco control programmes; courts in most states have politically rubber stamped the MSA without evaluating its merits or its many legal precedents and contradictions; more tobacco industry protection loopholes have been discovered in the MSA; violations of the MSA have gone unenforced; and only a few states have allocated an adequate amount of settlement funds for tobacco control programmes.

That said, the MSA did contain public health benefits, chief among them is the \$0.40 per pack price hike by the cigarette companies to more than cover the costs of payments to the states. Reports filed by cigarette makers in the first and second quarters of this year state that domestic cigarette sales dropped by slightly

greater than 10% in the past year, much of which was a result of the MSA.

Building on Mike Pertschuk's soundbite that "the tobacco industry will give an inch to gain a decade", it appears that in settling with the states "the tobacco industry gave 10% to gain eternity", as the unprecedented and extensive liability release and offset provisions in the MSA, unless struck down by the courts, will extend in perpetuity.

The MSA's advertising restrictions have eliminated tens of thousands of large outdoor billboards, but these have already been replaced by hundreds of thousands of smaller cigarette billboards located outside nearly every retailer—right at children's eye level. While the MSA eliminates nearly all small scale brand sponsorships, tobacco companies are likely to increase overall sponsorship budgets by greatly expanding national level brand sponsorships like the Winston Cup.

MSA loopholes

The MSA's lobbying limitations on tobacco companies, corporate culture commitments, prohibitions on material misrepresentations, and many other clauses that purportedly protect public health, contain so many loopholes as to render them moot. For example, nothing in the MSA prohibits the National Smokers Alliance, chambers of commerce, manufacturers associations, restaurant associations, tobacco retailer groups, anti-tax organisations, and others who receive tobacco industry funding from continuing many of these same practices that the manufacturers are now prohibited from doing.

Even when the tobacco companies violate provisions in the MSA, only the AGs are permitted to take enforcement action against the violations. The Pennsylvania activists who correctly accused Philip Morris of violating the MSA in May by sponsoring more than 100 Marlboro billboards with the Wawa convenience store chain are still waiting for the state's AG Mike Fisher to initiate enforcement action against Philip Morris. While these billboards were ultimately removed as a result of public pressure and media scrutiny, Philip Morris has continued claiming these billboards did not violate the MSA.

The lesson here for the public health community is that enforcing even blatant violations of the MSA by tobacco companies will require citizen watchdogs and political pressure on the AGs.

Payments to states

While the \$246 billion payments to states over 25 years appears in much testimony and press releases, the MSA's volume adjustment provision will reduce tobacco industry payments at nearly the same rate as the drop in domestic cigarettes sales. For example, the overall decrease in domestic cigarette sales of 12% during the past two years will result in about a 12% decrease in payments to states next year and every year thereafter. And if cigarette sales continue to drop at the almost 2% annual rate they have over the past two

decades, all states will receive a total of about \$160 billion, instead of \$246 billion, over the next 25 years.

If the federal Department of Justice files suit against the tobacco industry and settles for about \$125 billion over the next 25 years, which many Wall Street tobacco stock analysts and tobacco litigation experts think will occur, the ensuing cigarette price hike will further reduce domestic cigarette sales and corresponding industry payments to states. Similarly, an enormous damage award in the Engle class action suit in Florida and/or other court verdicts against the tobacco industry will further increase cigarette prices, which will reduce cigarette sales and industry payments to the states. And we must never forget that the Engle case would not have gone to court had the AGs' June 20, 1997 global bailout been enacted by Congress.

Absent the federal government conceding unwarranted liability releases and offsets to the tobacco industry in settling its anticipated lawsuit, and I expect public health and civil justice advocates to oppose vigorously such immunity, continued litigation against the tobacco industry should bring about additional cigarette price hikes, reduced domestic cigarette sales, and reduced industry payments to states. This is the course that appears to hold the most promise for sharply reducing tobacco addiction in this country and throughout the world.

The tobacco industry fully agrees with this scenario, which is why it will insist upon massive immunity in any settlement with the federal government, and why it will continue stepping up tort reform lobbying efforts at the federal and state levels. And with settlement payments to states dependent upon cigarette sales volume, governors and state legislatures will become ever more vulnerable to the specious argument that immunising the tobacco industry from lawsuits is in the states' best financial interests.

Several weeks ago, five tobacco state governors advocated that very argument (and cited a study funded by Philip Morris) in a letter to other governors urging them to oppose a federal lawsuit against the tobacco industry.

To prevail over this economic sophistry, public health and civil justice advocates must redouble their efforts to conduct more research and educate state and federal government officials that the \$6–7 billion in annual settlement payments to the states are only a fraction of the tens of billions of dollars spent annually by the states, local governments, public entities and other releasing parties in the MSA to pay for the many damages caused by tobacco products.

Grey market cigarettes

A recently discovered tobacco industry protection loophole in the MSA that you will hear a lot about in the future is referred to by tobacco companies as "grey market cigarettes", by importers as "repatriated cigarettes", but what is really "cigarette dumping into developing countries".

By considering only domestically sold cigarettes in determining MSA payments to

states, and by lobbying for federal and state laws to ban so called grey market cigarettes in the USA, tobacco companies are trying to preserve their predatory marketing practices in developing nations where they sell tobacco at below cost in order to increase smoking rates and market share. At the same time, these same below cost cigarettes that importers ship back to the USA are exempted from tobacco industry payments to states. Either way, tobacco companies win.

If Philip Morris, British American Tobacco, and RJ Reynolds truly wanted to eliminate this growing problem that they masterminded, they would simply raise the price of cigarettes intended for export to match the prices of cigarettes they sell in the USA, as that would protect public health in the third world and preserve settlement payments to the states. But do not expect this to occur.

Grey market tobacco industry protection bills, along with the model statute (exhibit T in the MSA) legislation to protect participating manufacturers from price competition by non-participating manufacturers, present opportunities for tobacco control advocates to expose these scams and to amend these bills with effective public health provisions as they travel through state legislatures.

Youth

In negotiating the MSA, tobacco companies also inserted provisions that recognise, and that appear to provide incentives for the enactment of, state laws to criminalise youth for the purchase or possession of cigarettes. Over the past five years, tobacco manufacturers and retailers have aggressively lobbied for these laws to preserve their ability to market cigarettes to youth, as these laws shift criminal and civil liability away from the adults in the tobacco industry and onto their youthful prey. These laws have never proven effective in reducing youth smoking, and instead appear to increase the youths' desire to experiment with the forbidden fruit. I strongly urge public health advocates to continue opposing these bills that scapegoat youth for the outrageous behaviour of the tobacco industry.

Big tobacco also continues pushing pre-emption bills, like those now pending in Wisconsin and Michigan. Health advocates must be prepared to take time out of their

campaigns to secure settlement funds to fight the tobacco industry on these and other legislative fronts.

In creating the American Legacy Foundation, the MSA prohibits its programmes from criticising the tobacco industry, which has proven a most effective method of tobacco control education and counter advertising. The MSA also requires the foundation to address other drugs of abuse in its programmes. Will these requirements turn the American Legacy Foundation into another DARE programme or Partnership for a Drug Free America, whose programmes make politicians and the public feel good, but are not effective in reducing drug addictions?

Many health advocates have been betrayed by their governors and legislatures, who diverted settlement funds to programmes which have nothing to do with tobacco. We cannot allow this to continue. Stan Glantz was right at last year's conference when he said "politicians understand two things, money and pain". Tobacco companies are giving the politicians huge amounts of money, and health advocates must be willing to criticise the politicians who attempt to divert settlement funds away from tobacco control programmes.

Also, expect to see more government funded programmes that are called tobacco control, but which are really corporate welfare, public relations, and/or ineffective programmes. As the California experience has taught us, eternal vigilance is essential for keeping tobacco control programmes adequately funded and effective.

Finally, in carrying out these many important activities in this time of opportunities and threats, health advocates must put aside self interests and truly collaborate, as we cannot allow the tobacco industry to prevail.

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