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THE DECISION TO REJECT THE JUNE, 1997 NATIONAL SETTLEMENT PROPOSAL AND PROCEED TO TRIAL†

Hubert H. "Skip" Humphrey, III††

I appreciate the opportunity to be here today, and I want to thank William Mitchell College of Law, and particularly Barbara Colombo, for their efforts in organizing this symposium. I hope this will be one of many opportunities for us to meet as we come to grips with obviously the number one public health concern in the nation and, frankly, the world. I appreciate the chance to briefly review how we became involved in this effort.

One of the great things about this terrific symposium is that it has given me an opportunity to look back at the really incredibly intense experience that the tobacco case was. I would hope, also, that as we review the legal side of this, we remember that the lawsuit—as intriguing, complex, historic, and (as a learning experience) as important as it is—is only a lawsuit. The goal here is to change our ways for the better public health. The lawsuit is just one of the key vehicles for achieving that ultimate goal.

One of the things that strikes me as I look back at this whole business is that nothing came easy, although at times Mike Ciresi and Roberta Walburn and their team at Robins, Kaplan, Miller & Ciresi made it look easy. Getting the documents was not easy. Neither was getting access to the industry’s witnesses or trying the case.

Certainly for me, three of the most memorable moments were the crucial turning points, the decisions that determined our basic legal and policy direction. Now, you can probably guess at least two of these. One was, why and when do you start the case? Obviously, the other one was the decision to settle the case. I just want to say a

† This essay is based on a speech Hubert H. Humphrey, III gave at William Mitchell College of Law’s Center for Health Law & Policy symposium titled, “Tobacco Regulation: The Convergence of Law, Medicine & Public Health.”
†† Attorney General, State of Minnesota from 1983 to 1998. Prior to his election as attorney general in 1982, Mr. Humphrey served as a state senator for ten years, practiced law privately for twelve years, and served as a deputy United States Marshall in Washington, D.C. He graduated from the American University and has a J.D. from the University of Minnesota.

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few words about those two before I turn to the third, and in some ways, most difficult decision. That was the decision to oppose the so-called national settlement of June 20, 1997.\footnote{See David Phelps & Maura Lerner, \textit{Don't Be Bamboozled, Says Humphrey}, \textit{STAR TRIB.} (Minneapolis-St. Paul), June 21, 1997, at 1A (discussing Humphrey’s criticisms to national tobacco settlement).}

It has been a little over four years since I and a few people in this room sat around a conference table, in the capitol at the office of the Attorney General, debating the pros and cons of suing the tobacco industry. At the time, the cons were a lot more obvious than the pros. Think of it for a moment. We were talking about taking on one of the richest industries in the country and certainly the most politically connected. The industry had the reputation of being invincible in court.\footnote{See Benjamin Weiser, \textit{Tobacco Trials; Cigarette Makers Once Were So Hard to Beat in Court that Many Top Lawyers Refused to Take Them On. Then a Group of Attorneys, Mostly in Small Southern Towns, Found New Ways Past Tobacco's Defenses}, \textit{WASH. POST}, Dec. 8, 1996, at W15. “For nearly half a century, despite hundreds of thousands of American deaths each year due to smoking, the tobacco industry has been nearly invulnerable in the U.S. courts.” \textit{Id}.} We had a top-notch legal team, but we knew that if we could field dozens of lawyers, they could counter with dozens of law firms. In short, the decision to sue appeared long on risk and short on reward. State attorneys general like to say that they stand at the crossroads of law and public policy. Well, I can tell you it was not hard to imagine that if we took on the tobacco industry there was bound to be some road kill. We hoped it was not going to be us.

There was only one factor clearly on the “pro” side. If we did pull this off, we would unmask an industry that had made an art form of misleading the public and had legitimized the practice of profiting from other people’s misery. If we could rip off the mask of legitimacy, we could save a lot of people. That alone made it worth the risk.\footnote{See The Settlement; A Sweeping Victory for Public Health, \textit{STAR TRIB.} (Minneapolis-St. Paul), May 9, 1998, at 22A (describing the terms of the May 8, 1998, Minnesota tobacco settlement).}

Then a little over four months ago there was the decision to settle.\footnote{See The Settlement; A Sweeping Victory for Public Health, \textit{STAR TRIB.} (Minneapolis-St. Paul), May 9, 1998, at 22A (describing the terms of the May 8, 1998, Minnesota tobacco settlement).} Our case had gone extremely well, but we were in uncharted waters going to the jury. I can recall Mr. Ciresi’s eyes as we came in on that last day and those last moments. The industry was ready to concede unprecedented public health protections and industry reforms, not to mention putting some money on the table. It was tempting to hold out for a powerful verdict that would have
been the first courtroom repudiation of this outlaw industry.⁴ In the end, the responsible course of action was clear. We found through the settlement that we could meet and even exceed all of our goals for the litigation. And we could find certainty in that settlement. So we settled.

The third turning point, of course, came in mid-1997. In April 1997, I got a call from one of my state attorneys general colleagues. She told me that she and a few others had been secretly meeting with the tobacco industry for a couple of weeks about a global settlement of all of the tobacco cases. She wanted to know if I wanted to come to Washington, D.C. and join the process.

Imagine the thoughts that ran through my mind when I got this call. I can still hear the phone conversation. It was no secret to anybody that Minnesota, of all the litigating states, had built the strongest foundation for a tobacco trial. We were forcing what was to become the largest production of documents in history. We had world-class experts, and our legal theories were one hundred percent intact. So the thought did cross my mind, “Wait a minute here, you have been negotiating a settlement of my case, our case, without even talking to us?” That was rather interesting.

Fortunately, we were prepared. In fact, we had already had a couple of dry runs at evaluating national legislation and dry runs involving many of the same cast of attorneys general. The first dry run started with a mysterious phone call back in 1996 from my counterpart in Mississippi, Attorney General Michael Moore, who said, “I want to fly up to talk to you in your office tomorrow. Do not tell anybody.” I said, “Well, I will check and see what I can do. I have to check with my chief deputy.” “No, no, no, do not talk to anybody,” he said.

He had secretly negotiated a settlement with Liggett, the smallest of the tobacco company defendants, and he wanted me to join in. When we saw the terms, we said, “Thanks, but no thanks.” We felt the deal gave away too much for too little. Liggett got immunity without agreeing to cooperate fully with our cases against the bigger companies. So, we said no. We held firm. A year later, Liggett came around and agreed to turn over all of its documents and cooperate with the states.⁵ I recall that settlement because I

⁴ See supra note 2 and accompanying text.
⁵ See David Phelps, A Tobacco Company Settles; Cigarette-Maker Concedes: Smoking is a Cause of Cancer, STAR TRIB. (Minneapolis-St. Paul), Mar. 21, 1997, at 1A (describing Liggett’s settlement and its agreement to disclose “extremely damaging”
was the last person to sign that agreement and the final concessions by Liggett did not occur until about five minutes before we finally saw the documents.

The Liggett settlement started us thinking more concretely about the role of our litigation in the formation of public policy. While Mike and Roberta and the other Robins, Kaplan lawyers were in the courtroom making the litigation work, my staff and I were refining and building support for the principles that we felt should drive tobacco policy. These principles were well in place when the other shoe fell in August 1996. That’s when Attorney General Moore and his outside counsel, Dick Scruggs, first floated the idea of a national deal.6

It soon became clear that although people were calling this proposal a “settlement,” it was really not a settlement.7 It was a proposal for Congress to wipe out the state’s cases legislatively, whether the states liked it or not. Needless to say, we had major problems with this approach. Among other things, it would have given the tobacco companies complete immunity from most lawsuits.8 It would have drastically curtailed the Food and Drug Administration’s (“FDA”) jurisdiction.9 And, it would have had little impact on the companies’ bottom lines.

But, it had some surface credibility. Mr. Moore and Mr.

documents regarding the tobacco industry); see also Paul Caminiti, An Industry Perspective and the Unique Role of the Liggett Group, 25 WM. MITCHELL L. REV. 447 (1999).
6. See Weiser, supra note 2, at W15. Their proposal was known as the Tobacco Claims Settlement Act of 1996. See id.
7. See id. The terms of the proposal provided that the tobacco industry would pay approximately $160 million over a 20-year period “to partially reimburse state Medicaid costs and fund independent research and public education programs on the dangers of smoking” while also disclosing its own tobacco research. Id. It also allowed the Food and Drug Administration’s proposals to curb sales to minors to become law. See id. In return, the FDA would be prohibited from regulating the industry, the industry would be immune from suits from smokers or states for 20 years, and damages awarded from any pending suits would be subject to a cap. See id. After this proposal was made, many voiced negative opinions regarding its provisions. See Joseph A. Califano, Jr., Big Tobacco’s Smoke Screen, WASH. POST, June 28, 1997, at A19. “The president and Congress should preserve the power of the Food and Drug Administration to regulate nicotine as a drug now and at any time in the future, as science and sound public policy dictate.” Id.; see also John Mintz & Ceci Connolly, Wounding the Giant; Small-Town Blow Exposed Cigarette Industry’s Soft Spot, WASH. POST, Mar. 30, 1998, at A1 (describing Moore and Scruggs’ response to criticisms of their proposal coming from the anti-cigarette movement).
8. See Weiser, supra note 2, at W15
9. See id.
Scruggs are very persuasive gentlemen. There was also the little fact that Mr. Scruggs' brother-in-law is a fellow named Trent Lott. You may have heard of him. He happens to be, of course, the Senate Majority Leader. ¹⁰

Throughout the fall of 1996 and early 1997, we called attention to the shortcomings of this approach and we floated stronger alternatives, particularly amongst my colleagues. Eventually, the Mississippi proposal sputtered and died. But at that point, while some of my colleagues expressed interest in my ideas for a tougher approach, none of them were signing up to help me lead the charge in Washington.

Now, I guess it is fair to ask a question here. Why wouldn't every attorney general want to get behind the toughest proposal possible? Well, the answer is that not everybody was as confident in their lawsuit as we were. You have to recall this was not a multi-state case brought in one jurisdiction like Minnesota where other states joined in. There were individual cases in individual states, some of which have stronger laws and stronger case law. Some of which have substantially weaker state law and substantially weaker case law. So, there were any number of situations in which there might be weaker situations than we found here in Minnesota.

I had the luxury of being able to advocate from a position of strength because our team was doing a great job in the courtroom. When you are talking about the impact of litigation on policy, there is absolutely no doubt: just as good facts make good law, good cases make good policy. So I was glad to be in the position of strength in April, 1997 when I got a call, “Hey, Skip, come to Washington. We've been negotiating with the tobacco companies, and we think we can reach a national deal.” It sounded like an echo from the past.

I did go. But, when I saw where they were headed, I came home and instead of climbing on that bandwagon, I decided that if we could not turn it back on the right path, we had to try and stop it. When their proposed deal was finally announced on June 20 last year,¹¹ I called it a sellout.¹² I can tell you that everyone on the team

¹⁰. *See id.* When approached regarding the idea of a national tobacco settlement, Mr. Lott reportedly told Mr. Scruggs “that while he would not become directly involved in the talks between the parties, if a satisfactory deal was reached, [he] would be willing to help enact the legislation necessary to put it in place.” *Id.*

¹¹. *See Mintz & Connolly, supra note 7, at A1* (stating that on June 20, 1997, a “historic settlement” was announced wherein the tobacco industry would pay $368.5 billion upon ratification of the settlement by Congress and the president).
here—Mr. Czajkowski, Mike Ciresi, and Roberta Walburn—shared that view. There was not a weak knee in the group. We had steadfast support from the American Lung Association, from the Smoke-Free Coalition, and many other public health advocates. I should point out that in time a number of other states came to share our views. But, I can distinctly remember that day. It was a pretty lonely day when we said “no” to something that on the surface looked like the slickest deal you have ever seen with lots and lots of money hanging out there.

Now, why did we oppose this deal so strongly? Well, the June 20 deal was the direct descendent of the Mississippi proposal we had rejected the year before. Our detailed analysis of the deal is included in the materials that you have, but here are some of the main areas where we felt it fell short.

It would have seriously weakened the FDA’s jurisdiction over nicotine. There were inadequate incentives to reduce youth smoking. There were limitations on the tobacco companies’ liability tantamount to complete immunity from suit. These outlaw companies would have enjoyed legal privileges afforded to no other businesses in our country. The compensation was inadequate. States would have received far less per capita than we eventually achieved through our settlement. The document disclosure provisions were weak and uncertain. Finally, there was wide-ranging and unnecessary preemption of state laws.

12. See Phelps & Lerner, supra note 1, at 1A.
13. See id. (describing the American Lung Association’s opposition to tobacco settlement); Mississippi Attorney General Target of Anti-Smoking Card Barrage, BATON ROUGE ADVOCATE, Nov. 27, 1997, 13B (describing Minnesota Smoke Free Coalition’s writing campaign against critics of Humphrey’s opposition to national tobacco settlement).
16. See id. (describing limitations on advertisements in magazines with significant youth readership).
17. See id. (describing limitations on seeking punitive damages for any past misconduct and banning class action suits).
18. See id. (stating that the tobacco companies would pay $360 billion over the first 25 years and then $15 billion per year thereafter).
19. See id.
20. See id. (calling for the industry to “tell the truth” about the harms associated with tobacco use and to establish a public library for all its documents relating to the health effects of tobacco, addiction, and marketing directed at minors).
21. See id. (providing for the termination of 40 state lawsuits).
The reason all this is important, of course, is because we still do not have a national tobacco policy. If and when Congress does act, the result may not be pretty. This raises a key point about my opposition to the June 20 deal. I believe that we are better off with no federal tobacco legislation than with bad federal legislation. If federal legislation has unnecessary preemptions or tobacco company immunity (and those are two very strong possibilities if Congress gets involved), then we are better off without it. Why do I think that? In part, because we have learned from our history. Remember the last time that Congress acted? We ended up with a labeling act that preempted the states and gave the tobacco companies a strong contributory fault defense.

But I also believe in federalism and the boundless creativity of states, counties, cities and towns. Think of what we have accomplished here in Minnesota alone. I believe in federalism because the city of White Bear Lake, Minnesota was the first place on the planet to ban cigarette vending machines.\(^22\) I believe in federalism because the Great American Smoke Out did not originate in Washington, D.C. It originated in Monticello, Minnesota.\(^23\) I believe in federalism because Congress did not pass the first Clean Indoor Air Act, Minnesota's legislature did.\(^24\) It was not the Department of Justice that brought the first antitrust and consumer protection charges against the tobacco industry, it was the Minnesota Attorney General's office. So, we need to make sure that before we surrender to Washington what can be done at the state level, we gain something from national legislation. I believe there can be a proper national, maybe even international, tobacco policy but we have to be very, very careful that we actually achieve that.

Now, as much as I believe in Minnesota, it is not just our great state. It is cities, counties and states all over the country that will change our tobacco-oriented culture from the bottom up as long as

\(^{22}\) See James Walsh, *White Bear Lake Leads the Charge in Cigarette Vending Machine Ban*, STAR TRIB. (Minneapolis-St. Paul), July 9, 1990, at 1B (stating White Bear Lake, Minnesota, was the first city in the country to ban cigarette vending machines).

\(^{23}\) See Dan Wascoe, Jr., *Smokeout Got Off the Ground in Minnesota in '74*, STAR TRIB. (Minneapolis-St. Paul), Nov. 15, 1995, at 1E (stating that the Great American Smoke Out originated in Monticello, Minnesota, where residents were encouraged to lick lollipops instead of smoking).

\(^{24}\) See Walsh, *supra* note 22, at 1B ("Minnesota is the home of the Clean Indoor Air Act of 1974, which prohibited smoking in public accommodations, such as restaurants, except in designated areas."); see also MINN. STAT. §§ 144.411-.417 (1998) (the Minnesota Clean Indoor Air Act).
Congress does not bar them from doing so. It is private litigants who will, slowly and surely, using our evidence, hold the tobacco industry accountable for its actions.

Now we are on to the next steps. Next week we launch what we hope will be the catalyst for the world's most effective tobacco control efforts. As many of you know, our settlement set aside $202 million—that is about three percent of the total settlement—for tobacco-control activities.\footnote{See Humphrey Names Panel for Tobacco Funds, \textit{STAR TRIB.} (Minneapolis-St. Paul), Sept. 29, 1998, at 2B.} One hundred two million dollars of that is for smoking cessation and the rest is for research on youth smoking and anti-tobacco activities.\footnote{See Melissa Levy, \textit{Nonprofit Group to Direct a Sliver of Tobacco Billions; $202 Million of the $6.1 Billion that the State Won Will Go Toward Antismoking Efforts, Research, STAR TRIB.} (Minneapolis-St. Paul), July 8, 1998, at 1B.} In August, the court approved our proposal to create an independent, nonprofit organization to administer these funds. This week we filed the articles of incorporation of the Minnesota Partnership for Action Against Tobacco (MPAAT).\footnote{See Humphrey Names Panel for Tobacco Funds, supra note 25, at 2B (naming members of MNPAAT panel).} I am honored that former Surgeon General Dr. C. Everett Koop and former Director of the FDA Dr. David Kessler, have agreed to serve as honorary co-chairs for MPAAT.\footnote{See id.} Its mission will be to design the world's most effective strategies for reducing the human and economic consequences of tobacco use. I believe that its inaugural meeting next Tuesday afternoon at the state capitol will be a landmark.

The tobacco wars are not over, not by a long shot. We started with a public health problem. We used the courts to combat law breaking, and in the process, we unearthed information that helped spur a reexamination of national health policy. Now MPAAT gives us the opportunity to return to the health problem and become a model for the world in beating this epidemic.

\footnotesize{25. See Humphrey Names Panel for Tobacco Funds, \textit{STAR TRIB.} (Minneapolis-St. Paul), Sept. 29, 1998, at 2B.
26. See Melissa Levy, \textit{Nonprofit Group to Direct a Sliver of Tobacco Billions; $202 Million of the $6.1 Billion that the State Won Will Go Toward Antismoking Efforts, Research}, \textit{STAR TRIB.} (Minneapolis-St. Paul), July 8, 1998, at 1B.
27. See Humphrey Names Panel for Tobacco Funds, supra note 25, at 2B (naming members of MNPAAT panel).
28. See id.}
The battle may have subsided here in Minnesota from the legal perspective, but it goes on in Washington, D.C. We must take up the effort on the public health agenda and see that we accomplish as much there as we have on the legal side. That will be a great challenge. I know we can accomplish it if we work together.
This memorandum is a preliminary analysis of the issues raised by the proposed tobacco “settlement.” The focus here is on the legal issues, but we have attempted to include major policy concerns where appropriate. The first section concentrates on the civil liability and disclosure issues, while the following sections analyze the regulatory provisions and the payment obligations built into the proposal.

I. CIVIL LIABILITY PROVISIONS

Although many of these provisions do not come up until Title VIII of the June 20 proposal, clearly the primary consideration for the tobacco industry is the protection they would receive from liability, both from present lawsuits and from possible future claims.

A. Key Elements of the Proposal

1. Termination of Existing Lawsuits

Many existing lawsuits would simply be terminated, or, for all practical purposes, dismissed with prejudice by act of Congress:
• All present attorney general actions, all similar government actions (e.g., lawsuits brought by San Francisco and New York City), and all parens patriae actions;

• All present private class action lawsuits, including the post-Castano nicotine addiction cases.

The states and the private plaintiff classes, the groups who were at the negotiating table, would receive favorable financial treatment in the proposed legislation. Not faring as well in the proposed legislation are two other groups of pending lawsuits, who were not represented:

• Any third-party claims brought as class actions, whether based on subrogation or not.

• All other present “addiction”/dependence claims, which presumably includes individual claims using addiction evidence to avoid assumption of risk defenses.

Those cases will be terminated, and the state statutes and common law which permits them to proceed would be preempted, but it is not clear if they will share substantially in the financial package.

2. Restrictions on Remaining Present Lawsuits

The only existing lawsuits that would be permitted to continue would be claims of individuals brought by person[[s]] claiming injury or their heirs, not based on addiction or dependence; third-party (and similar) claims not based on subrogation pending as of June 9, 1997; and third-party payor (and similar) claims based on subrogation, but only those involving individual claims, not aggre-

1. Presumably, this means that plaintiffs could not assert “addiction” or dependence in their pleadings and proof, nor could they allege facts or introduce evidence of “addiction” or dependence as a response to an industry argument that the individual plaintiff assumed the risk. In effect, this would be a new federal exclusionary rule, applied to any litigation involving tobacco and health.

2. This is, of course, a critical distinction for the tobacco industry. In subrogation cases, a “third party payor,” typically an insurer who has paid a claim to an insured, is “subrogated” to the claims that insured individual might have against others for his injury or illness. For example, if Joe gets lung cancer from smoking, and Blue Cross pays his medical bills, Blue Cross might be able to assert a subroga-
Even those few remaining lawsuits, however, will be subject to serious restrictions:

- No punitive damages, ever, under any circumstances, based on past conduct.

- No class actions, joinder, aggregations, consolidations, extrapolations, or "other devices to resolve cases other than on the basis of individual trials," without defendants' consent.

That means the courts would be unable to use many of the devices besides class action settlements they have used to help resolve "mass tort" cases, e.g. nonbinding mini-trials, using hypothetical verdicts to induce settlements; judicial identification of "representative" plaintiffs that go to trial first, and set settlement or resolution pattern; statistical or sampling adjudication, where claimants agree to accept "averages" based on series of sample trials; or "science-only" trials to establish liability and general causation, often with epidemiological evidence, to be followed by individual adjudications (currently in progress in the silicone breast implant litigation). All of those innovations would be barred. If state courts refused to comply, the proposal calls for automatic removal to federal court, a new expansion of the jurisdiction of the federal judiciary.

- All industry defenses are preserved, including cigarette labeling act preemption defenses. There are no industry concessions on liability, causation, assumption of risk, or any other issue. There is likewise no limit on the availability of new preemption defenses based on greater FDA regulation.

- Any evidence of the development of "reduced risk" to-
bacco product after the effective date is neither admissible nor discoverable, another new exclusionary rule. [Note: The new Restatement on Products Liability emphasizes evidence of an ability to reduce risk not taken as the basis of liability.]

- All claims against wholesalers, distributors, retailers, advertisers, attorneys, or anyone other than tobacco manufacturing companies, their successors and assigns, future fraudulent transferees, or “entities for suit designated to survive defunct manufacturer[s],” such as liquidating trusts, are dismissed and barred. The agreement specifically refers to “tobacco manufacturing companies,” so arguably the non-tobacco assets of these companies are shielded from liability. All state law, whether statutory or common law, creating those causes of action would be preempted by the new federal statute.

- All claims against insurers (not brought by tobacco manufacturers) are barred. State law causes of action would be preempted.

- All individual claims and all pre-June 9 third-party payor claims not based on subrogation (e.g. Blue Cross-Blue Shield of Minnesota’s claim, some of the Taft-Hartley health and welfare fund claims) are subject to a $1 million annual payment cap, “unless every other judgment/settlement can be satisfied within the annual aggregate cap.” For example, if Blue Cross-Blue Shield of Minnesota were to get a $100 million judgment against the manufacturers, it might wait 100 years for payment, or possibly longer, because of the “global” liability cap.

- The industry would be covered by a global liability cap ranging from $2 billion in year one to $5 billion in years nine and later, adjusted by the Consumer Price Index (CPI) or 3% annually, whichever is greater, and adjusted downward or upward based on domestic sales volume (downward adjustment to be reduced by 25% of any increase in overall industry profits based on domestic tobacco sales). Individuals or third-party payors who secure judgments will have to wait in line for payment, if the cap amounts are reached in any particular year.
• All successful claims against any of five negotiating companies would be paid pursuant to a "joint sharing agreement for civil liability," to limit competitive impact. Any manufacturer with a judgment or settlement to pay would obtain an 80 cents-on-the-dollar credit against other required annual payments, which effectively pools the liability industry-wide.

• The five "protocol" manufacturers would be protected from joint and several liability based on non-protocol manufacturer liability, and would be entitled to severance from any case involving non-protocol manufacturer. For example, then, the surviving spouse of a Chesterfield and Winston smoker could not proceed jointly against Liggett and RJR Nabisco, but would have to proceed separately against each, with each defendant free to try to shift the blame to the other. Moreover, if Liggett were out of business or otherwise judgment-proof, RJR could not be held responsible [[for]] anything more than its share of liability, no matter what the state law on joint and several liability might be.

3. Restrictions on Future Litigation

Unlike present state and private class action plaintiffs, future claimants receive no financial benefit from the proposed settlement, but their rights are severely restricted. They are subject to all of the restrictions listed above for the present lawsuits which survive—no punitive damages for past conduct, no class actions or "extrapolation," no claims against anyone except "tobacco manufacturing companies," no "addiction"/dependence claims, no evidence of "reduced risk" products, no joint actions with non-participating manufacturers, annual individual case caps, and annual global liability caps. With the exception of the ban on punitive damages, all of these restriction[s] extend to future claims, even if they are based on future conduct of the industry. In addition, there are other restrictions:

3. Some of the private class action lawsuits may include future claimants within their proposed class definitions, and so the impact on future claims may be uncertain. Likewise, most future claimants would likely assert fraud or damage occurring prior to the date of the "settlement."
• No future prosecution of attorney general, parens patriae, or class actions, of any kind, ever, relating to tobacco and health.

• No third-party payor (or similar) claims not based on subrogation, of any kind, whether based on past, present, or future conduct of the industry. For example, all of the health and welfare cases filed in the last few weeks would be barred.  

• No aggregation of third-party subrogation cases. Any subrogation cases must proceed based on one individual at a time.

B. Analysis of Proposal

The civil justice system has four basic purposes: the disclosure of product hazards and corporate misconduct, fair compensation for victims, punishment, and deterrence from future misconduct. If this proposal is enacted, none of those purposes will be served. The full truth about what the tobacco industry knew and when they knew it will stay under wraps, most victims (except those whose lawyers negotiated the deal) will go uncompensated or face insurmountable hurdles to asserting their claims, the industry will escape financial punishment for past misconduct, and what is likely the only truly effective incentive for the industry to take greater account of the public health—the prospect of unlimited, unknowable liability—will be lost, all of this in perpetuity. In addition, the proposal makes considerable changes in the relationship between the states and the federal government, and raises a number of significant constitutional issues.

This analysis focuses on the following general subject areas:

—Background
—Settlement of present class actions
—Prospective prohibition of class actions and aggregation of claims
—Bar on punitive damages
—Liability caps

4. The Presidential Commission appointed to allocate unused amounts under the caps is permitted to consider applications for compensation from third-party payors making nonsubrogation claims.
1. Background

To understand the problems with the proposed legislation, it might be helpful to have a brief background on some of the developments in the law that have brought the tobacco industry to the bargaining table and have shaped this “settlement.”

First of all are the changes in state products liability law that have tended to favor plaintiffs in the past twenty-five years: the expansion of strict liability (no proof of fault required), the recognition of new categories of compensable harms (e.g. compensation for fear of future injury), the increase in the level of compensatory damages, and the relaxation of standards for awarding punitive damages. Closely related to that is the greater willingness of the courts to entertain claims brought by those suffering more indirect damages, including government and private third-party payors of health care costs.

Second has been the development of techniques for bringing groups of similar cases together, i.e. the development of “mass tort” litigation—asbestos, DES, Agent Orange, Dalkon Shield, Bendecitin, silicone breast implants, nuclear testing, repetitive strain disorders, and so on. Before the 1980’s, class action “mass tort” litigation was relatively rare. The Advisory Committee that drafted Fed. R. Civ. P. 23 [the federal class action rule] declared in the Rule Comments that a “mass accident” is ordinarily not appropriate for a class action because of the presence of issues like causation and affirmative defenses like assumption of the risk that affect individual class members differently, and until the mid-1980’s, the courts largely adhered to that position. In 1986, however, the Fifth Circuit affirmed class certification in an asbestos case, Jenkins v. Raymark Industries, 782 F.2d 468 (5th Cir. 1986), and then courts around the

5. Although there has been some judicial and legislative retrenchment of this trend, on other fronts, the trend continues. For example, the Restatement of Torts § 402A, which imposes liability on the manufacturers of “unreasonably dangerous” products used to contain comment i, which said that it only applied to articles “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics,” with the primary example being tobacco. The current committee working on the third version of the Restatement has, however, now voted to delete the “tobacco exception,” and that could be expected to have its influence on the courts.

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country began to reverse themselves—in the Agent Orange cases, *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 145 (2d 1987), cert. denied, 484 U.S. 1004 (1988), and then in the Dalkon Shield cases, *In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.), cert. denied, 493 U.S. 959 (1989). What changed the courts’ minds on the mass tort class action was the sheer volume of cases filed, and the perceived need to aggregate the claims somehow to achieve some measure of “rough justice” for the claimants.

Out of that has come a predictable mass tort evolutionary cycle. In the early cases, defendants have the strategic, financial, and information advantage, and tend to win. As information comes out, however, the balance often begins to shift decisively to the plaintiffs.

At that point, particular “mass torts,” e.g. asbestos, become recognized lawyer specializations, and the plaintiffs’ attorneys who have invested time and money in becoming experts become highly motivated to search nationwide for new claimants to represent. The cases become highly interconnected, and a success in one case on, for example, causation, or avoiding assumption of the risk, affects similar cases across the country, and increases their settlement value. At that point, the number of claimants willing to sue can begin to increase exponentially. For example, “worst case” scenarios for the number of asbestos claimants were around 100,000 in the early 1980’s, but had increased to 500,000 or 600,000 by the early 1990’s. The defendant manufacturers turn to mass tort defense specialists and try to coordinate their efforts, e.g. the Center for Claims Resolution (CCR), the 21 nonbankrupt asbestos manufacturers with single counsel, to match the coordinated plaintiffs’ bar. Once the courts see an avalanche of cases coming, the cases are consolidated, the responsible judges become “managerial,” and they begin to explore aggregate techniques for getting at least the common issues of liability and causation (and sometimes punitive damages) resolved on a class basis.

Third has been the growing availability of statutory causes of

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6. Some have suggested that the U.S. Supreme Court’s recent decision in *Amchem Products, Inc. v. Windsor [Georgine]*, 65 U.S.L.W. 4635, 1997 WL 345149 [[117 S. Ct. 2231]] (U.S., June 25, 1997) will significantly limit the availability of the “mass tort” class action. To the contrary, what the Court did in *Amchem* is reject “futures only” class settlements, where future claims are sacrificed for present claims, and direct the courts to use subclasses to avoid single law firms representing different groups with directly conflicting interests. [[Amchem, 117 S. Ct. at 2250-52.]]
action, enforceable either by state government or by "private attorneys general," for violations of antitrust and consumer fraud laws, and the increasing possibility of recovering substantial penalties and damages under those statutes. In Minnesota, for example, the legislature has eliminated the "indirect purchaser" and "pass through" defenses to antitrust,7 and has granted broad private standing to enforce the unfair discrimination and competition, deceptive trade practices, and false statement in advertising statutes. Moreover, the Minnesota courts have very badly construed these provisions to enhance consumer protection, expanding the connection between conduct and injury necessary to permit suit, rejecting efforts to elevate the standard of proof, and ordering a wide range of remedies, including restitution, disgorgement of unjust enrichment, multiple civil penalties,8 and attorney fees. See State v. Alpine Air Products, Inc., 500 N.W.2d 788 (Minn. 1993); see also State ex rel. Humphrey v. Philip Morris, Inc., 551 N.W.2d 490 (Minn. 1996) (Court upholding availability of these theories and remedies to both public and private plaintiffs in tobacco case).

Fourth has been the production of industry documents through discovery that show an arguably unprecedented pattern of unlawful conduct. In the Minnesota case, the industry has produced some 33 million pages of documents, held in storage depositories in Minneapolis and London, and in early May 1997, the judge ruled that Minnesota had made a threshold showing that it was entitled to see nearly 250,000 documents and over one million pages under the exception to the attorney-client privilege applicable when a crime or fraud may have been committed. Those documents are currently under in camera review by a special master, with rulings expected later this year.** As that information comes forward, in Minnesota's litigation and then across the country, the informational advantage favoring the industry will have shifted considerably.

All of these trends have done a great deal to shift the balance


8. Minnesota authorizes $25,000 civil penalties per violation of the consumer fraud laws, and $50,000 per violation of the antitrust laws, and the courts have construed "violation" to allow for the multiplication of penalties for patterns of illegal conduct.

** [[Editor's Note: See Michael V. Ciresi et al., Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation, 25 WM. MITCHELL L. REV. 477, 513-39 (1999).]]
of power from defendants to plaintiffs in these cases, at least in certain states. Unfortunately, some of these developments—particularly the development of the mass tort settlement class action have also created the circumstances for collusion—"repeat players," all with an incentive to settle early; often a single forum with a judge eager to get a "global" settlement; and passive future claimants whose rights can be affected without their knowing it. As a result, the courts have had to confront (and have sometimes embraced) inventory settlements, where plaintiffs' counsel get present clients and themselves favorable terms, in exchange for "global" settlement of all future claims on terms favorable to defendants; double-dipping, where plaintiffs' counsel get class attorney fees, plus later fees for representing individuals in negotiated claims resolution process; front-loading claim funds, so present claimants and fees are taken care of early, at expense of future claimants, eligibility restrictions and illusory benefits.

The ultimate result is the Georgine process: defendants facing uncertain and potentially devastating liability contact certain plaintiffs' class counsel (who they have likely worked with before, and who they know have a strong incentive to settle early) before law-

9. For plaintiffs' counsel, early settlement can mean early, and substantial, fees with less investment of time and resources. For defendants, early settlement can preclude tipping of the balance of power to plaintiffs, can avoid the perils of bankruptcy, and can provide all of the spin-off benefits of greater certainty about liability. For courts, early settlement is a way to clear the docket, and to avoid a mind-numbing series of near-identical trials on the same subject.

10. Many commentators have written about this topic. E.g. [[John C.] Coffee, [[jr.]], Class Wars: The Dilemma of the Mass Tort Class Action, 95 COLUM. L. REV. 1343 (1995). A letter signed by 129 law professors to the Judicial Conference's Rules Committee, opposing Rule 23 amendments which would expressly sanction settlement class actions, in a section called "Inviting Collusion," says that the rule change would "license[] a regime under which plaintiffs' lawyers are encouraged to compete to sell out the claims of people in order to gain the defendant's acquiescence to a ... class." Their view was cited in Justice Ginsburg's opinion for the Court in Amchem Products v. Windsor [Georgine], 65 U.S.L.W. 4635, 1997 WL 345149 [[117 S. Ct. 2231]] (U.S., June 25, 1997).

11. Prof. Carrington has identified what he calls "significant wealth transfers" inherent in settlement class actions - the shift in the burden of the transactions costs of evaluating individual claims from the defendants to the claimants, the transfer of wealth from those with stronger cases to those with weaker ones, and the transfer of wealth to leading class action lawyers "who amass large fortunes in short periods at the bar" from lawyers who would otherwise present the claims of individual clients. See letter of Paul D. Carrington to Judicial Conference Rules Committee, cited in Amchem, at ___. [[117 S. Ct. at 2247.]]

12. Georgine is the asbestos settlement which the U.S. Supreme Court recently rejected in Amchem Products, Inc. v. Windsor. [[117 S. Ct. at 2252.]]
suits are filed, reach "global" agreement favorable to current clients but unfavorable to future claimants, and then file a complaint, motion for class certification, and settlement with a receptive court, all on the same day.

With the U.S. Supreme Court's decision in Georgine the last week of this past Term, fewer federal courts will approve mass tort settlement class actions, and no court could or would approve the kind of settlement negotiated by the attorneys general and the private class counsel—paying off present claimants in exchange for limiting the rights of future claimants.\(^{13}\) Hence, the issue goes to Congress, which may have greater power to adjust the rights of different classes of individuals on this kind of macro level,\(^{14}\) but which must also face the fundamental due process and equal protection issues that were not directly addressed in Georgine.

2. Settlement of Present Class Actions

The proposal calls for all present class action lawsuits involving tobacco and health to be "legislatively settled," without any further discussion. At present, there are somewhere between 15 and 20 Castano-like class actions pending in state courts around the country, there is the Florida secondhand smoke lawsuit on behalf of a class of flight attendants, where the trial is now underway, and there are a number of third-party payor actions filed before the June 9 cutoff which are proceeding on at least a purported class basis.

Although the public information about this is limited, the idea of a legislatively imposed settlement of the present class actions raises a number of obvious concerns and questions:

- How many people are included in the purported classes? Do the post-Castano class action lawsuits include most or all of the smokers that were in the original federal court class defi-

\(^{13}\) Indeed, Congress recognized this issue in 1994, when it adopted amendments to the Bankruptcy Code to allow bankruptcy courts to consider and preclude future tort claims against the bankrupt entity. Congress insisted that any such resolution must meet two standards—future claimants must be treated in a manner similar to present claimants, and there must be assurance that there are funds available to pay their claims. 11 U.S.C. § 524(g), (h) (1994), as amended by section 111, Bankruptcy Reform Act of 1994.

\(^{14}\) Still open is the question of whether the federal courts can exercise jurisdiction over future claimants, who may not have standing sufficient to satisfy Article III justiciability requirements.
nition? Do they include potential future claimants as well as present claimants? Will even the limited rights to sue supposedly preserved in the “settlement” be extinguished or limited further by these “side agreements”?

- Is it intended that this be a “no opt out” settlement for class members (as in the Ahearn asbestos settlement negotiated by many of these same lawyers)? If class members can opt out, are they governed by all other restrictions on future claimants?

- Is it intended that the attorneys will negotiate some kind of administrative compensation scheme for present claimants? If so, how will different kinds of claims (e.g., serious lung cancer now vs. pre-cancer indicators vs. fear of cancer and so on) be decided, and by whom? Will any new compensation system be available to future claimants? If so, what assurances are there that the fund will be adequate to pay those claims as well?

- If future claims have been sacrificed to benefit present claimants, do negotiators have a conflict of interest that raises ethical concerns? Obviously, those losing otherwise viable claims were not consulted by the negotiators.

- What are the proposed class attorney fee arrangements, and are they appropriate?

We will not be able to provide answers to these questions until we have more detail about these “side” agreements, but these are good questions to at least start the inquiry.

3. Impact of Prohibition on Class Actions or Other Aggregation of Claims

Under current rules, in order to proceed as a class action, several criteria must be met: numerosity, commonality, typicality, and adequate representation, Fed. R. Civ. P. 23(a), and the court must
be able to find "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* 23(b)(3). To make that determination, judges are to consider: (1) the interests of members of the class in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action.

Therefore, what the proposal recommends is that, even for cases where there are too many claimants to join them all, where the questions of law or fact in common predominate over the individual issues, where the representative claims are typical where the representation is adequate, where the individual interest in controlling claims is limited, the litigation history suggests class treatment, it is desirable to concentrate the cases in one forum, and the class action is manageable, even under all those circumstances, the class action device will be barred anyway, even if only used for particular issues. Moreover, all of the other techniques for aggregating claims will be barred as well.

On balance, the prohibition on class actions and claim aggregation will likely have the following effects:

- It will discourage most potential victims from filing suit, and few law firms will choose to make the financial and human capital investment necessary to become expert in bringing these cases and going out and getting an inventory of plaintiffs. The costs of litigation against the tobacco industry are high, the evidentiary burden is substantial (for example, epidemiological evidence is much more likely to be admitted in class or representative cases than in individual cases, even though it can be highly probative on issues of causation), and realistically, those costs can only be borne by lawyers who might be able to share in class damages awards. Even a plaintiff with $1 million in damages would have difficulty getting an attorney, since few lawyers, under normal contingency fee arrangements, could make such a case pay with the kind of aggressive defense typical of the tobacco industry.
• If the history of other “mass tort” litigation is a guide, most claimants do not come forward until the liability picture has tipped decisively toward plaintiffs, which is much less likely if class or consolidated litigation is precluded.

• Even, however, if the number of individual tobacco cases remains high, and even if, with new evidence and successful trial strategies, the balance shifts toward plaintiffs, and the avalanche of cases the industry fears comes to pass, the prohibition on class and aggregate procedures simply guarantees that the courts would not be able to manage the caseload except on defendants’ terms, either by dismissing cases, delaying their prosecution, or forcing settlements favorable to defendants. Consolidation in single forums, representative cases, consolidated liability, causation, or punitive trials, statistical sampling, “reversed bifurcation,” and other innovative techniques would be unavailable to the judiciary. Therefore, even if the cases continue, the likelihood of fair results is very low, and would only get worse as future claimants come into the picture.

4. Bar on Punitive Damages

An absolute bar on punitive damages for past conduct, no matter how egregious the conduct, preempts all applicable state law on the issue, would be an extraordinary decision on the part of Congress. Particularly with class and consolidated actions prohibited, punitive damages attached to individual claims may be the only way to attract attorneys to these cases, and the threat of punitive damages certainly would be the only way the civil justice system could still serve its deterrent purpose.

There is, of course, a case to be made against unlimited punitive damages, particularly the prospect of repeated punitive awards in a whole series of similar cases that end up killing rather than just stinging the offending companies. Some judges have therefore used class actions to resolve punitive damages claims together, and, conceptually, a single or a series of aggregated punitive damages cases.

16. In comparison, the products liability reform bill vetoed by the President last year would have imposed a $250,000 punitive damages cap (or twice the economic damages) in an individual case.
awards against the tobacco industry could be justified. Of course, such an award would actually have to punish the industry, that is, be high enough to affect shareholder equity significantly, and with restrictions to make it less likely that the punitive liability could be laid off on either consumers, insurers, or taxpayers. Clearly, the figures contained in the proposed settlement and the requirement that those payments be passed through to consumers through a per-pack charge do not meet those criteria, on any level.

5. Liability Caps

With the restrictions on the kind of litigation the industry may face, the liability caps may well be largely immaterial. Nevertheless, there are concerns to be raised:

- Precedent: No other industry has a global liability cap, not even those with per-case caps like the vaccine manufacturers. If Congress is prepared to offer that to tobacco, they can expect other industries with liability concerns to seek similar or better treatment.

- By definition, of course, all global liability or "case flow" caps discourage and discriminate against future claimants in favor of present ones, because of the prospect of payment delay.

- With liability caps and industry liability pooling arrangements in place, any adverse liability experience for any particular company is unlikely to have any competitive impact, so the threat of competitive consequences for misconduct or set of incentives is removed.

- The value to the industry of certainty about liability, even at very high figures, would be difficult to underestimate: increases in shareholder value, reallocation of management focus, removal of "fraudulent conveyance" barriers to tobacco "spin-offs," greater or more secure access to long-term financing, and so on.

- If Congress were to remove the limits on class or consolidated actions, or eliminate or modify the punitive damages
bar, the $2-5 billion annual payments would likely be low. It would initially be less than 2% of what CDC estimates the total annual harm to be, and could easily be consumed by only a handful of judgments, e.g. the Florida flight attendants' secondhand smoke case, or a single union health and welfare fund case. Prior "mass tort" settlement funds have invariably proven to be inadequately funded, and become insolvent quickly once the liability picture shifts toward plaintiffs. If the fund becomes insolvent, the possibility of successful constitutional challenges to the abrogation of common-law rights becomes greater.

- The payment levels contemplated by the proposal are, of course, much less than what the industry can afford, particularly with the appreciation in stock prices (20% during the negotiations alone), continued growth in international sales and the revenue-raising elements built right into the proposal:

  ♦ Mandatory pass-through of costs to consumers through price increases.
  ♦ Tax deductibility of all costs, whether punitive in nature or not.
  ♦ Reduction in advertising expenses [current level: $6 billion annually].
  ♦ Reduction in legal expenses.

Several analyses have concluded that the industry could increase prices by $2 a pack or more without sacrificing any significant profitability from decreased demand. Such a figure would generate at least $32 billion a year, again without affecting either shareholder equity or industry profitability.

6. Disclosure

The proposal establishes a new centralized document depository in Washington, D.C., which will contain the documents produced so far in the Minnesota litigation.^{17} Those documents will be available to Congress, state and federal agencies, and the public.

^{17} Or in any other case, although the Minnesota discovery effort has been the most comprehensive.
under certain conditions.

The industry, however, would be permitted to withhold any document for which it asserts attorney-client privilege, work product, or trade secret protection. They would be permitted to conduct a new document-by-document review of everything previously withheld on grounds of privilege (hundreds of thousands of documents, over 1 million pages), and then create new privilege logs for that data.

At that undetermined future date, when the new industry review is completed, anyone who wishes to challenge the industry’s continued assertion of privilege or trade secret must file a claim with a new three-judge panel of Article III judges appointed by the Judicial Conference. The decision will be binding on all state and federal courts in all litigation in the United States, and may be reviewed only by a certiorari petition to the U.S. Supreme Court under 28 U.S.C. § 1254. The only exception would be for disputes that have already been “resolved” by other state or federal courts prior to the time the three-judge panel has had the opportunity to review privilege claims.

The panel will review claims of privilege or trade secret protection, not according to applicable state law, but rather under the ABA/ALI Model Rules and/or federal common law with respect to privilege, and the Uniform Trade Secrets Act with respect to trade secrecy. The panel may appoint tobacco industry-funded special masters, and, if the decision is to order disclosure, the panel can consider awarding costs, fees, or other sanctions.

The likely result of these provisions is that the discovery process nearing completion in Minnesota would be short-circuited, and jurisdiction wrested from our state court system to the new three-judge federal panel. Meanwhile, any surviving or prospective litigation would presumably have to continue while litigation in the new federal forum over document production takes place. If one of the central goals of the civil justice system is to force disclosure of product hazards and industry misconduct, this proposal is a significant step backward.

18. Compare the present situation in Minnesota, where the judge and a special master are conducting an in camera review of those documents under the “crime/fraud” exception to the attorney-client privilege.

19. “Resolved” is undefined, but presumably that means appeals have been exhausted.
7. Constitutional Issues

Our research is still quite preliminary on these issues, and we have reached no conclusions, but some of the major constitutional questions presented by this proposal should be relatively obvious:

(a) **Tenth Amendment** [or more precisely, the Constitution’s system of “dual sovereignty”]: The source of authority for Congress to take these actions would presumably be the Commerce Clause, and obviously the authority of Congress to regulate commerce among the states and, under the Supremacy Clause, to preempt conflicting state laws, remains substantial. The Supreme Court has, however, now made it clear that, despite that authority, the federal government may not commandeer the states to accomplish federal purposes. *Printz v. United States*, No. 95-1478 [[117 S. Ct. 2365, 2380]] (U.S., June 27, 1997) (Brady Act); *New York v. United States*, 505 U.S. 144 (1992) (Low-Level Radioactive Waste Policy Amendments)

The proposal would have Congress directing the 50 state court systems to, in effect, change their rules of civil procedure and their rules of evidence governing state-law claims. If state courts refuse to comply, the consequence is that the federal courts take jurisdiction through removal, although how these state law claims would, absent diversity, become claims arising under the “laws of the United States” under the well-pleaded complaint rule and therefore come within the federal courts’ Article III, Section 2 authority is not completely clear.

State courts of course have to comply with federal law, but Congress directing them how and under what circumstances to adjudicate state law cases might be a qualitatively different assertion of federal power, and raise significant Tenth Amendment and constitutional federalism concerns. Of course, even if the courts did not strike the statute down, the proper scope of federal preemption of state legislation, state court rules, and state causes of action, both statutory and common-law, and the precedent of that policy decision, are certainly topics Congress should consider.

(b) **Due process/equal protection**: The proposal would substantially restrict citizen access to the courts, and would eliminate or

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20. We presume this is intended to fit this provision within the exception contained in *New York*, allowing the federal government to order states to implement regulatory programs, if states can opt out and a federal agency steps in to take the enforcement responsibility. [[See New York, 505 U.S. at 167-69.]]
curtail a number of both pending and prospective state court claims. In particular, at least two elements of the proposal raise substantive due process concerns—the elimination of entire causes of action and the granting of immunity without substitute avenues of redress, and the possibility of claimants being bound by legislatively imposed "settlements" without an effective opportunity to opt out. Likewise, distinctions in the treatment of claimants based solely on the time of filing (present vs. future) may raise equal protection issues, particularly when it involves quasi-fundamental rights such as access to courts.

The Supreme Court has noted that "statutes limiting liability are relatively commonplace and have consistently been enforced by the courts," Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59, 88 n.32, 98 S. Ct. 2620, 2638 n.32 (1978), and that the "Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to obtain a permissible legislative object." Id. (upholding nuclear industry liability limits in Price-Anderson Act); see also Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530-31, 112 S. Ct. 2608, 2625 (1992) (allowing preemption of state failure-to-warn claims).

There are limits, however. The Court has expressed its hostility to the idea of Congress setting aside final judgments, on the grounds that the "Constitution's separation of legislative and judicial powers denies it the authority to do so." Plaut v. Spendthrift Farm, Inc., [514 U.S. 211, 240,][115 S. Ct. 1447, 1463 (1995) Moreover, the Court has at least left open the question of whether the due process clause requires some reasonably just substitute for common law rights replaced by a new federal statute. Duke Power, 438 U.S. at 93, 98 S. Ct. 2640-41. As Justice White noted in a dissent from a dismissal of an appeal in 1985, "[w]hether due process requires a legislatively enacted compensation scheme to be a quid pro quo for the common-law or state-law remedy it replaces, and if so, how adequate it must be, thus appears to be an issue unresolved by this Court, and one which is dividing the appellate and highest courts of several States." Fein v. Permanente Medical Group, 474 U.S. 892, 894-95, 106 S. Ct. 214, 216 (1985) (White, J.[, dissenting])); see also Pruneyard Shopping Center. v. Robins, 447 U.S. 74, 94, 100 S. Ct. 2035, 2047 (1980) (Marshall, J., concurring); Cipollone, 505 U.S. at 541, 112 S. Ct. at 2630 (1992) (Blackmun, J., concurring in part and dissenting in part, joined by Souter, J. and Kennedy, J.). Depending on the circumstances governing present and future claim-
ants, that issue may be tested if this proposal is enacted into law.

(c) Right to a jury trial: The Seventh Amendment provides that “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.” This would apply only to actions in federal court, but again there is the question of whether Congress can direct states to eliminate their own right to a jury trial in state law cases. In the federal court cases, the Supreme Court has held that Congress cannot take away that right if the cause of action is legal and if it involves a matter of “private right.” Granfinanciera. S.A. v. Nordberg, 492 U.S. 33, 109 S. Ct. 2782 (1989); see also Atlas Roofing Co. v. OSHRC, 430 U.S. 442, 97 S. Ct. 1261 (1977). Of course, the courts have been divided on whether damages limitations violate the Seventh Amendment, and particularly when the limits extend to compensatory and out-of-pocket damages, some courts might be more likely to find an infringement of the right to a jury trial. If the proposed private class action “legislative settlements” include mandatory, “cram down,” “no opt out” arrangements, that may also raise significant Seventh Amendment issues.

(d) First Amendment: Obviously, the advertising and marketing restrictions raise “commercial speech” issues. See generally 44 Liquefied, Inc. v. Rhode Island, [[517 U.S. 484,]] 116 S. Ct. 1495 (1996); Central Hudson Gas & Electric Corp. v. Public Service Comm’n, 447 U.S. 557 (1980). The proponents of the “settlement” claim that by incorporating the manufacturers’ waiver of First Amendment rights in consent decrees that they can insulate the new rules from First Amendment review. Given the relatively relaxed nature of First Amendment standing, however, and the number of different, non-tobacco parties who have an interest in challenging content-based marketing restrictions, it seems likely that the First Amendment issues will be resolved judicially, no matter how hard the parties try to keep those questions away from the courts.

II. FOOD AND DRUG ADMINISTRATION (FDA)

A. FDA Product Safety Standards

The FDA has asserted jurisdiction to regulate nicotine as a “drug” and tobacco products as drug delivery “devices,” and Judge Osteen in North Carolina ruled that the courts should defer to that judgment. Coyne Beahm, Inc. v. FDA, Civ. No. 95CV00591, [[966 F. Supp. 1374]] (M.D.N.C. 1997), [[rev’d sub nom. Brown & Williamson]]
Under the proposal, however, unlike any other "drug" or "device," the FDA would not have authority to ban, 21 U.S.C. § 360f, deem as misbranded, U.S.C. § 352(j), or recall 21 U.S.C. § 360h(e), tobacco products under current statutory health standards. Likewise, the FDA would be able to promulgate performance standards to regulate the contents of the product, as they can with any drug, but only subject to the following special restrictions:

- No elimination, and no non-"gradual" reduction of nicotine yields for no fewer than twelve years;

- No reduction in nicotine, and no elimination of "other constituents or other harmful components" unless the FDA can find the modification: (a) will result in a significant reduction of the health risks associated with such products to consumers thereof [cf. current standard—to provide reasonable assurance of safe and effective performance]; (b) is technologically feasible; and (c) will not result in the creation of a significant demand for contraband or other tobacco products that do not meet the product safety standard.

- New procedural requirements: formal rulemaking under APA 21 (trial-type hearings, right to introduce direct and rebuttal evidence through oral testimony, right to cross-examination, agency decision based on "substantial evidence" developed at the hearing), burden of proof on the FDA for all findings, cf. 21 C.F.R. § 12.86, full judicial review under less deferential standard (not "arbitrary and capricious" but "deference to extent to which matter at issue is within Agency's field of expertise"), and Congressional "regulatory reform" review.

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21. The proposal refers to the Administrative Procedures Act, presumably 5 U.S.C. §§ 556, 557, although the FDA has its own "Part 12" hearing process, 21 C.F.R. pt. 12, which is also quite formal but perhaps less so than the formal process described in the APA. Under current law, however, the FDA uses notice-and-comment rulemaking, 5 U.S.C. § 553, to promulgate performance standards, which allows them to incorporate their expertise and what they have learned from all sources to craft the rule, rather than serving as the impartial arbiter at a trial-type hearing.
• Other new requirements after 12 years, when the FDA could eliminate nicotine or other harmful ingredients: same new substantive standards, "preponderance of evidence" burden, rather than "substantial evidence," manufacturer [apparently, each and every single manufacturer] can select rulemaking process, judicial review of original decision and all subsequent petitions to amend, minimum two-year phase-in [cf. current one-year or earlier], and Congressional review.

These restrictions, of course, apply to no other "drug" or "device," and they impose a virtually impossible burden for the FDA to overcome in both the substantive standards and the procedural requirements. They are also directly contrary to the negotiators' publicly stated goals and what the Koop-Kessler Commission recommends: full and unfettered FDA authority to do whatever is necessary under current statutory authority to solve the problems of tobacco and the public health.

B. Marketing and Advertising Restrictions

The proposal incorporates existing FDA regulations, and adds prohibitions on the use of human images and cartoon characters, extends the advertising ban to stadia and ads directed outside from retail locations, further restricts point of sale ads, bans movie and TV product placement payments, and the direct or indirect "glamorization" of tobacco use in media appeals to minors.

The effectiveness and significance of advertising and marketing restrictions remain controversial, but the following additional issues should be noted:

• The proposed regulations go beyond current FDA regulation, but they do not necessarily expand the FDA's current authority to regulate.

• No penalties are provided for violations—no civil penalties, no actual damages, no attorney fees, no private enforcement standing.

• Some of the restrictions may be illusory. For example, the point-of-sale advertising restrictions would permit outlets such as convenience stores to display ten 2' x 2' signs—40 square feet of point-of-sale advertising messages.
The FDA would be prohibited except under “extraordinary circumstances” to alter the restrictions for five years. With the burden of proof on the agency, and the opportunity for litigation that presents, that might limit their ability to regulate, for example, direct mail, which appears to be the tobacco industry’s next advertising frontier.

The proposal would continue to permit brand logo advertising on the package, with teens being particularly brand sensitive.

Finally, no matter what is included in consent decrees, nonparties to the agreements cannot be bound by them, and will be able to raise any applicable First Amendment arguments.

C. Warnings, Labeling, and Packaging

The proposal provides new, rotating warning on cigarettes and smokeless packages. The warnings would occupy 25% of the front package panel [smaller on certain flip-top boxes]. The FDA would be required to promulgate rules governing the testing, reporting and disclosure of tobacco smoke constituents.

Again, as with advertising and marketing restrictions, the issue of whether warning labels deter smoking is controversial. There are other critical points, however:

- The preemption language in the Federal Cigarette Labeling and Advertising Act would not be repealed.

- The rulemaking proceeding provides another opportunity to dispute, litigate, delay, and possibly dilute the proposed standards.

- The new warnings may well strengthen the industry’s assumption of risk defense in individual cases, and may therefore benefit the industry more than consumers.
D. Licensing of Retail Tobacco Product Sellers

The proposal would mandate minimum federal standards for licensing, to be enforced by federal, state, and local authorities and funded by the industry payments. Anyone selling tobacco products directly to consumers would need a license, with penalties imposed for violations.

The primary problem with this provision is preemption. The penalty scheme would expressly preempt more stringent state and local sanctions, such as the ones recently signed into law in Minnesota. Moreover, the substantive law here may not be adequate; arguably, it is only a return to programs like Philip Morris's "retailer sanctions" program, which was notably ineffective.

E. Non-Tobacco Ingredients

Under the proposal, manufacturers would disclose ingredient information to the public "under regulations comparable to what current federal law requires for food products." They would also provide confidential lists of added ingredients, substances and compounds to FDA, by quantity in each brand. Manufacturers would have five years, for each ingredient, to provide a safety assessment, consistent with new regulations to be promulgated. The FDA then has ninety days to approve or disapprove; the failure to disapprove constitutes approval. Not all ingredients would have to be publicly disclosed under the food laws, and nondisclosable information would be kept confidential. Companies would be required to adopt procedures for the selection, testing, and use of ingredients.

Although this would give the FDA clearer statutory authority, the proposal imposes significant obstacles, which would make effective regulation nearly impossible:

- Five years for the industry to analyze what they likely already know, and then ninety days for the FDA to digest and review the mountain of documentation that would likely be produced is unbalanced. A much shorter time frame should be imposed on the industry, with FDA given the authority to act without restriction as reliable information becomes available.

- There is ambiguity about whether the ingredient disclo-
sure requirements refer to the components of tobacco, or the components of tobacco smoke. Some non-tobacco ingredients are perfectly safe if eaten, but harmful if burned and inhaled.

- There is a five-year preemption of state content disclosure laws, such as those enacted in Massachusetts and Minnesota. [The preemption language is in Title V.]

### III. COMPLIANCE AND CORPORATE CULTURE

The proposal would require the industry to create annually reviewed compliance plans to identify ways to reduce youth consumption, and provide incentives for the development of reduced risk products, to protect whistleblowers as permitted by current federal law, to promulgate corporate principles, designate compliance officers, and report to shareholders on progress, to inform lobbyists about the new requirements and limit their activities except as expressly authorized by the manufacturers, and to subject individual companies to fines and "scarlet letter" advertising for breach of their obligations.

The substantive change in this section is the requirement that the Tobacco Institute and the Council for Tobacco Research be disbanded, a remedy that is consistent with antitrust practice in similar cases. The regulations to prevent re-formation of these groups may be inadequate, however:

- No requirement that records be turned over to receiver (or FDA), who would in turn disclose evidence of misconduct;

- No regulatory or public interest representation on any new group’s board; and

- No open records and visitation rights for DOJ, FTC, or states.