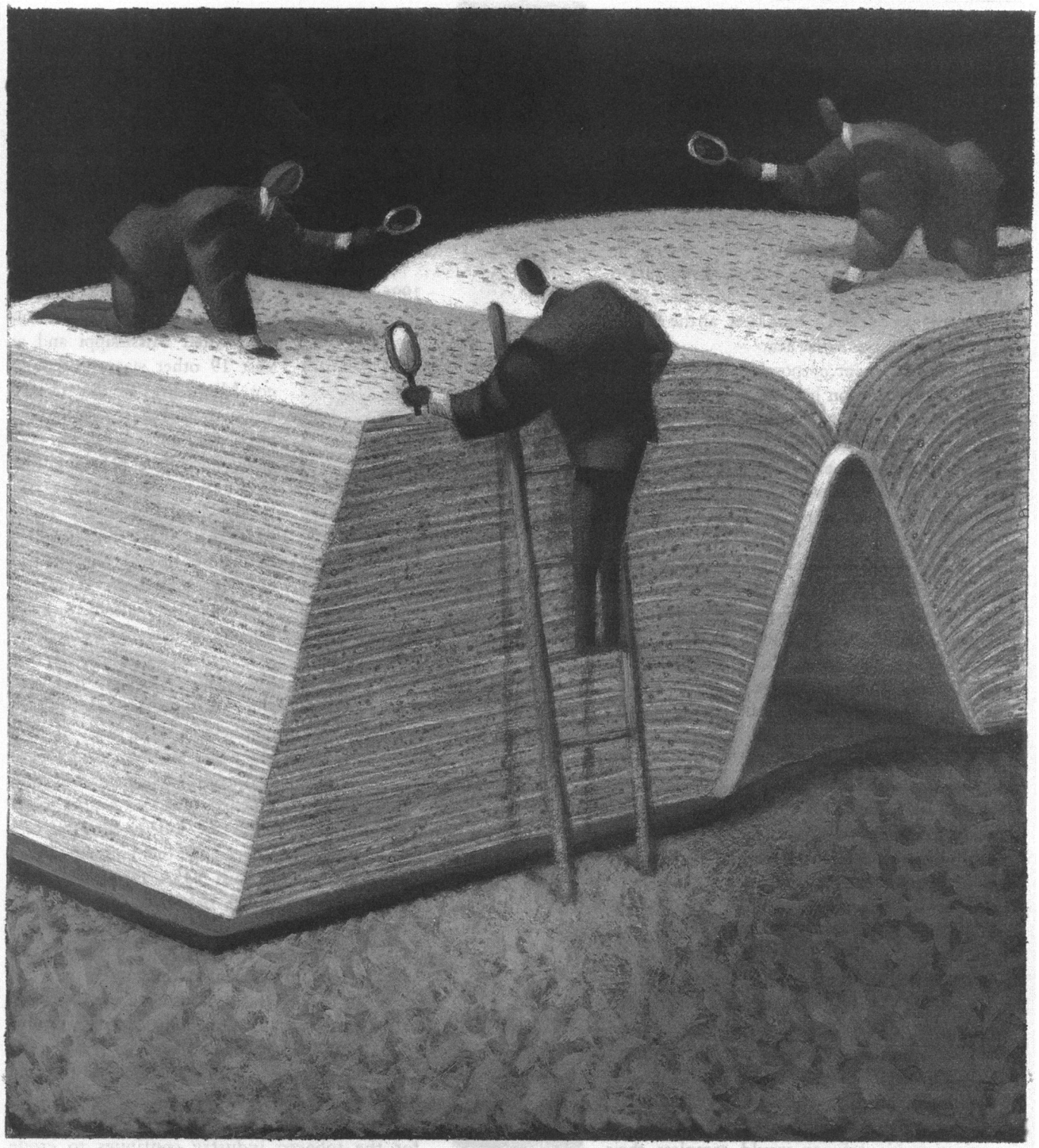
Three years ago, the state of Minnesota became the second state to sue the tobacco industry for wrongdoing and the first to charge consumer fraud and conspiracy. Together with our co-plaintiff, Blue Cross/Blue Shield of Minnesota, we filed a lawsuit against the six major U.S. cigarette manufacturers, two tobacco trade organizations, and British American Tobacco Industries (BAT), the parent company of Brown and Williamson. Specifically, the lawsuit alleges that the industry defrauded consumers and engaged in false advertising, deceptive practices, and anti-trust violations, including conspiracy to stifle development of safer cigarettes and to conceal information on smoking and health. Many later-filing states patternedcomplaints after Minnesota's, and virtually all have incorporated some or all of the claims first pled in the Minnesota complaint.

Hubert H. Humphrey III, JD

LET'S TAKE THE TIME TO GET IT



RIGHT

What's the Hurry?

In the May/June 1996 issue of *Public Health Reports*, Mississippi Attorney General Mike Moore, who filed the first state lawsuit and has since led the negotiations for a global settlement of all state lawsuits, talked tough about the history of tobacco litigation in the United States, the strength of the innovative legal theories being argued in the state suits, and the ultimate goal: "It is time to require the tobacco companies to pay their fair share of the financial consequences of their deadly product."[1] A year later, at the Senate Judiciary Committee's first hearing on the settlement proposals held in Washington on June 26, 1997, Attorney General Moore took a softer position, telling the Committee that no one has ever been successful in recovering a penny from the tobacco companies and that the proposed settlement had produced changes that could never be won in court—even if all 40 state lawsuits were successful. He and others argued that given the industry's historical success in litigation, the wisest course of action would be to settle the state lawsuits before even one of them went to trial.

Since Mississippi's suit, scheduled to begin July 7, 1997, would have been the first to go to court, I believe he and others conducted the negotiations before the rest of us fighting the tobacco industry were at our position of greatest strength, before, for example: the documents Liggett & Myers would provide in turning state's evidence would be made public; before the court in Minnesota would have had time to complete its review of what we believe are the most incriminating documents of all—those documents hidden behind claims of attorney-client privilege—before any of the four Federal grand juries investigating big tobacco would complete their work; before the first class action suit (Broin v. Philip Morris, et al.) against the industry had time to work its way through court.

What's the rush to settle? Information is power, not only in court but with the public, which has a huge role to play in stopping the tobacco epidemic. Based on the information that has been pried out of the companies by state lawsuits or provided by whistleblowers, I am confident that a number of the state, class action, payer, and individual suits now set for trial will prevail. Think of these suits as missiles aimed at the companies. They don't all have to hit the target—we only have to land two or three to get the whole truth out. Once that happens, our nation, and others around the world who may follow our lead, can proceed with what really counts—restructuring the industry, creating safer products, and compensating victims for the harm done.

Rumors of settlement began floating in August 1996, and there was a push to settle not long after. In December 1996, Richard Scruggs, whose firm represented Mississippi and at least 19 other states (although not Minnesota) in the tobacco litigation and at the settlement talks, was quoted in the *Wall Street Journal* as believing that the campaign against big tobacco had "reached a high-water mark." "It's foolish not to settle now," he said.[2] If there had been a settlement then, we would have missed out on Liggett & Myers's admissions that cigarettes are addictive, that the industry targets children, and that cigarettes cause cancer, emphysema, and heart disease. We would not have had a Federal court's confirmation that nicotine is indeed a drug, cigarettes are indeed drug-delivery devices, and that both are subject to full FDA regulation. We would have missed the Baltimore case affirming the right to limit the locations of billboards displaying tobacco advertising, the Minnesota ruling that incriminating tobacco documents may no longer be hidden under attorney-client privilege, and the sight of a retired Philip Morris executive invoking his Fifth Amendment right to remain silent in order to avoid self-incrimination in grand jury and state proceedings.

Tobacco officials understand the full magnitude of what they will face in court. That's why they want to settle now.

As more facts become known, public support for the tobacco industry continues to erode rapidly. Growing public unhappiness with the conduct of the tobacco industry is reflected at the White House and in Congress, where the settlement proposals received an initially tepid response.

Tobacco officials understand the full magnitude of what they will face in court. That's why they want to settle now. And Wall Street does too—tobacco stocks, which had been deeply discounted because of the costs and threats of litiga-

tion, rose more than 20% during the negotiating process and are predicted to rise at least that much again if the June settlement is enacted into law.[3]

A Tobacco Conspiracy

Minnesota's case, and the cases of others who have followed our lead allege that the tobacco industry has broken state laws through a decades-long conspiracy of willful and intentional wrongdoing on the part of the leading cigarette manufacturers and their trade associations.

In late 1953, tobacco company executives met at the Plaza Hotel in New York and concocted a public relations scheme to hide the truth about the hazards of smoking. On January 4, 1954, the industry bought full-page ads in newspapers in virtually every American city with more than 50,000 residents to run "A Frank Statement to Cigarette Smokers," pledging to "accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business," and stated, "We always have and always will cooperate closely with those whose task it is to safeguard the public health." Other public statements over the years repeated the representation that the industry was dedicated to the pursuit and dissemination of the scientific truth regarding smoking and health.

Instead, as their own documents state, "the joint industry-funded smoking and health research programs have not been selected against specific scientific goals, but rather for various purposes such as public relations, political relations, positions for litigation, etc. In general, these programs have provided some buffer to public and political attack of the industry as well as background for litigious strategy."[4]

The industry conspired to keep research and product development of safer products from ever seeing the light of day. The Minnesota complaint documents the suppression of R. J. Reynolds's "Mouse House" research that had begun to uncover promising avenues of investigation into the mechanisms of smoking-related diseases. The division was disbanded in one day in 1970 and all 26 scientists fired without notice. We also cite the abrupt closing of a Philip Morris nicotine lab in April 1984, complete with firings and legal threats for publishing findings on animal subject research.[4] In the 1970s at least one manufacturer, Liggett, was successful in developing a safer cigarette but decided not to market it after an apparent threat of retaliation[4] and after an executive expressed concern that marketing a safer cigarette would imply that the traditional cigarettes were not safe. The Assistant Director of Marketing at Liggett at the time told interviewers: "The president of Liggett Tobacco made the statement that he was told by someone in the Philip Morris company that if we tried to market such a product that they would clobber us."[4]

Though the vast majority of the 33 million pages of industry documents in Minnesota's case are still under a court seal requested by the tobacco industry, information already made public in Minnesota and other state cases' pretrial motions include these revealing and incriminating statements:

> *A 1970s memo by a Philip Morris researcher:* "I would be more cautious in using the pharmic-medical model—do we really want to tout cigarette smoke as a drug? It is, of course, but there are dangerous FDA implications to having such conceptualization go beyond these walls."[5]

> *A 1964 report of three officials of Imperial Tobacco Company of Canada after visiting the United States:* "The main power on the smoking and health situation undoubtedly rests with the lawyers, and more particularly with the Policy Committee of Lawyers.... This Committee is extremely powerful. It determines the high policy of the industry on all smoking and health matters—research and public relations matters, for example, as well as legal matters."[5]

> *Undated handwritten note by former Philip Morris research director:* "Ship all documents to Cologne.... Keep in Cologne. O.K. to phone and telex (these will be destroyed)...if important letters or documents have to be sent, please send to home. I will act on them and destroy."[5]

Tobacco Industry's "Scorched Earth" Tactics Continue

Despite talk in the settlement proposals of a new corporate culture, the tobacco industry is still trying to make litigation as expensive, time-consuming, and oppressive as possible. In Minnesota, for example, they have tried to cut Blue Cross/Blue Shield out of our suit (we won), dumped 33 million pages of information on us and fought our requests for their indexes and logs (we won), resisted our request to let the judge review their product formulas (we won), fought our assertion that the judge should review documents sheltered under attorney-client privilege and release to us those he believes were created during the perpetuation of a crime or a fraud (we won), and the list goes on. In fact, we have won the majority of motions and have won each of five appeals, including one to the Minnesota Supreme Court, and another that went all the way to the U.S. Supreme Court.

But the industry presses on. It has demanded millions of pages of documents from the Blues, various state agencies, and other health providers and payers across the state as well as from the University of Minnesota. It fought us tooth and nail over youth access in the 1997 Minnesota legislature (we won), suing—minutes after the Governor signed the historic Youth Access Bill—to stop implementation of this legislation requiring retailer licensing, compliance checks, administrative penalties for youth sales, single packs of all

tobacco products behind the counter, and disclosure, by brand, of ammonia, formaldehyde, cadmium, arsenic, and lead in all tobacco products sold in the state. A change in corporate culture? It sure doesn't look like it to me.

A Flawed Negotiating Process

Invited to the negotiating table in early April 1997 only after negotiations had been going on for more than two weeks, I wondered why they wanted me there. Perhaps it was because the nation's top-rated tobacco analyst, Gary Black, ranked Minnesota's case as the "biggest threat" of all cases facing the industry[6] and highly respected litigation analysts Auerbach, Pollak, and Richardson called it "potentially the most dangerous lawsuit currently pending against the tobacco industry."[7]

Asked to rush to Washington to participate in settlement negotiations, once there I discovered that there were no comprehensive written summaries of issues or of negotiations up to that point that might have provided an understanding of what was under discussion or why. Most disturbing of all, I was told that there had been a tentative agreement to end the FDA's existing regulatory framework for nicotine in favor of a Food, Drug, and Tobacco Administration with rules and regulations not yet spelled out. Also under favorable consideration was sweeping immunity for the tobacco industry which would protect it from the most efficient and effective tools in our legal system. The Attorneys General had already given tentative approval to what would have been a paltry $300 billion industry payment over 25 years.

Concerned about both the process and substance of these secret negotiations, I left. After consulting with several Attorneys General, I called publicly for a more deliberative process with a timeline that would allow for a broad public understanding and consensus on both the substantive and procedural issues raised by the concessions the industry was seeking. In response, working groups were formed among the Attorneys General to create consensus positions on important issues. But during the very compressed time those groups were working out the positions the Attorneys General as a group would take, the negotiations continued. Pieces of the settlement proposal began to appear in the media. I repeatedly asked for a more deliberative process, and when it became clear this was not to happen, decided to end my involvement, declining to participate in even Attorneys General briefing calls.

Health professionals don't work out a treatment plan until they have all the appropriate medical and social information. I believe the time to negotiate the best settlement possible is when both sides have all of the available information. Unfortunately, the settlement proposals were negotiated before that happened. In the spring of 1997, all but a handful of the 33 million documents in our case were still under a seal requested by the tobacco companies. The documents Liggett provided as part of turning state's evidence were still tied up in court by the other companies. And we didn't yet have the most precious documents of all—those the companies were trying to shield under attorney-client privilege.

In 1964—the year of the first Surgeon General's report on smoking and health—the Council for Tobacco Research (CTR) formed a "Special Projects Division" to assist the industry in concealing unfavorable information. As the notes of one CTR meeting, written in 1981, stated, "When we started the CTR Special Projects, the idea was that the scientific director of CTR would review a project. If he liked it, it was a CTR special project. If he did not like it, then it became a lawyers special project."[4] About a month before the June 1997 settlement was announced, the judge in Minnesota agreed with us that there is cause to believe that the documents the companies are trying to hide may come under the crime/fraud exception to attorney-client privilege and should be made available to those suing the industry. A Special Master was appointed to review them all and recommend documents for release under the exception. Having those documents will make the final disposition of these cases, whether through the courts or through Congress, much better for the public.

A Flawed Proposal

Proponents of the June settlement proposals argue that the public health gains they contain could never be achieved through the courts. Nonsense! The marketing restrictions, provisions designed to reduce use of tobacco by young people, and funding streams for public education, cessation, children's health coverage, FDA enforcement activities, and so on could all be put in place by uniform consent decrees coordinated among Attorney General. What can't be obtained in court are the concessions made to the industry that must be enacted by Congress: limitations on FDA and Occupational Safety and Health Administration authority and protection from the most effective parts of the nation's legal framework for bringing wealthy corporations to justice and compensating their victims.

The settlement proposals released in June would once again permit the tobacco industry to avoid the just consequences of its past misconduct. The short list of serious flaws includes:

The settlement undercuts the authority of the FDA. The deal seriously detracts from the FDA's authority to regulate nicotine by creating long and arbitrary timelines for limiting nicotine reduction in cigarettes and by setting up huge roadblocks even to the agency's weakened regulatory actions. It was these pro-industry standards that caused British American Tobacco Industries Chairman Martin Broughton to tell the *Wall Street Journal* in June that FDA regulation of nicotine is "an unlikely prospect" and for the *Journal* itself to conclude that "actually purging cigarettes of nicotine... would be virtually impossible."[8]

Youth smoking provisions are a sham. The penalties to encourage a reduction in youth smoking are too late, too little, and fail to create effective incentives for individual companies to comply. If youth smoking remained at current levels or increased, the penalty after tax deductions equals about five cents per pack on all packs sold in the United States, a cost easily recouped from higher prices. According to the settlement, if companies "pursue all reasonably available measures" but miss the target, 75% of the fine is forgiven. And since the surcharge is levied against the industry as a whole, fines against companies that flout the target would be paid by their more law-abiding competitors. In a June 26, 1997, dispatch from the Reuters newswire, British American Tobacco Chairman Martin Broughton was quoted as saying about the targets: "My expectation is that we will fail to meet them."

The offer of immunity is unacceptable. The agreement contains completely unacceptable immunity for the tobacco companies. Professor Richard Daynard of Northeastern University said in a memo he submitted to the Advisory Committee on Tobacco Policy and Public Health, chaired by Drs. C. Everett Koop and David Kessler, that the settlement calls "for dismantling part of the civil justice system that otherwise threaten[s] to continue to annoy the tobacco companies.... What did the civil justice system, or future plaintiffs, do wrong that they have to make a contribution to this 'settlement'?" Daynard called the bar against class actions, joinder, aggregations, consolidations, extrapolation, or other devices to resolve cases other than on the basis of individual trials "obscene" and asserts that "the only possible purpose of this is to make it impossible for plaintiffs' attorneys to bring, or state courts to process, cases in an efficient and cost-effective manner.... It makes a mockery of the notion that the settlement is not abridging the right of smokers, and nonsmokers, to obtain redress against the tobacco industry in court."[10]

The payment is too small. The total payment—$368.5 billion over 25 years with adjustments for inflation, and $15 billion a year thereafter in perpetuity, is subject to reduction if tobacco sales fall off. It is also tax deductible, reducing the real cost to the companies by about a third. These sums are so much less than the industry can afford that they have no punitive effect. The proposed payments don't even come close to meeting the test Attorney General Moore laid out last year: that the industry pay its fair share of the more than $110 billion in annual health costs and wage losses caused by the use of its products.

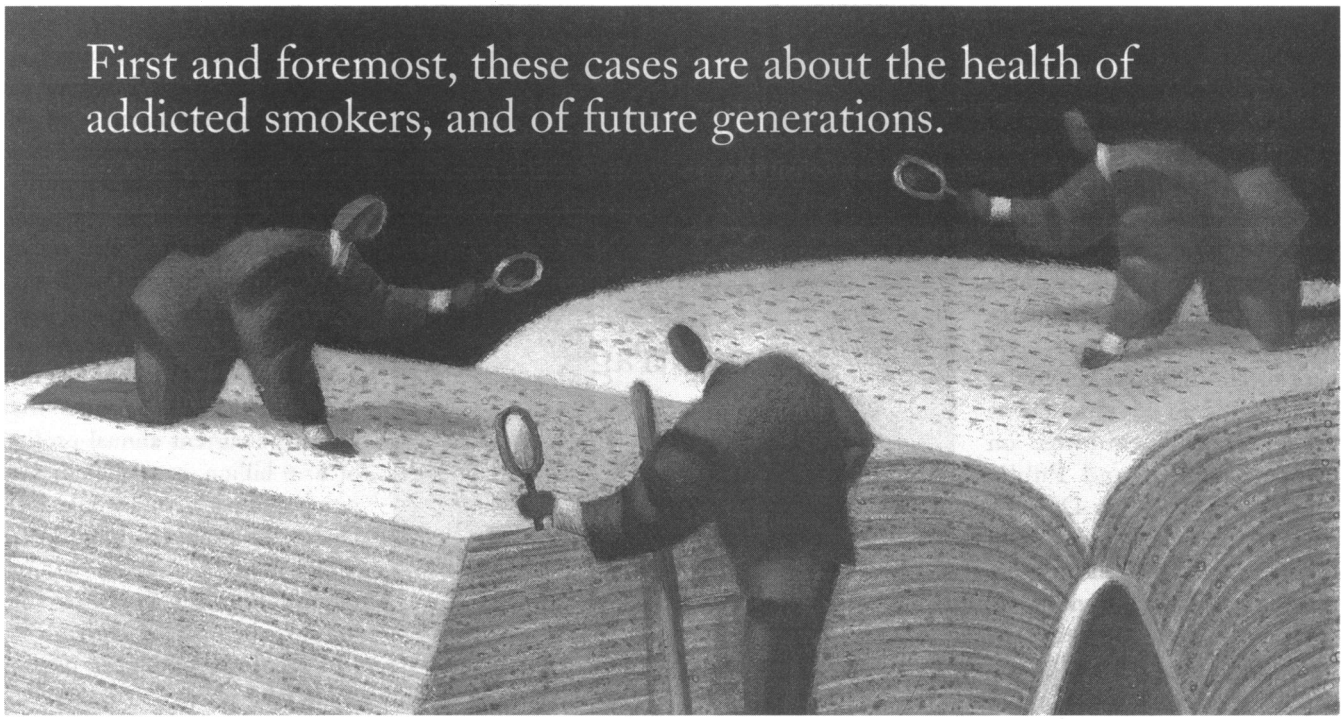
Where could the tobacco industry get more money to pay a meaningful penalty? There will be marketing and legal savings to the industry under this agreement. The industry could amass $800 billion over 25 years by raising the price of cigarettes in the United States. Jeffrey Harris, MD, professor of economics at the Massachusetts Institute of Technology, estimated that in the 1996 U.S. market, the "monopoly profit-maximizing price of cigarettes is currently about $4 per pack,"[9] well above the 1995 average of $1.88 per pack. At such a price, U.S. tobacco sales would generate an additional $24.4 billion annually, above and beyond the industry's current annual profits of $7.6 billion, even though the number of packs sold would fall. Under the proposed June, 1997 settlement, Congress would require that the costs to the industry be "passed through"[10] to the consumers in the form of higher prices. Forcing the industry to raise prices that much also produces important public health benefits. Professor Daynard wrote the Koop-Kessler Committee, "At the $2.25/pack increase that would follow from imposing a $35 billion/year payment requirement, smoking rates overall would drop about 40%, but the drop among children and teenagers would be much greater."[11] (See "Cigarette Taxes: The Straw to Break the Camel's Back" July/August 1997 *PHR*, pages 290–297.)

The tobacco industry's ability to pay should not be based on U.S. cigarette revenues alone. The industry could contribute untold billions more from their tobacco profits earned outside the United States and from their other profit centers, including, among others, the Kraft and Nabisco food lines, Loews theaters, and Miller beer. They

> When the next definitive history of the tobacco industry is written, we don't want to find ourselves in it as one more tragic chapter of betrayal and false solutions.

could also help pay their fair share by selling assets, skipping stock dividends, or cutting executive perks. Under the June settlement proposals, the tobacco companies could end the first year of "payment" with no net loss of revenue. Under the marketing restrictions contained in the proposed settlement, the companies could well save $4 billion of the $6 billion they spend yearly on promotions in the United States. Immunity from future lawsuits would allow the industry to save $600 million to $1 billion in reduced legal fees each year. In addition, the proposed settlement offers tax benefits to the tobacco industry that have been estimated by Public Citizen, in testimony before the Koop-Kessler Committee, at an annual average of about $5 billion. The total yearly savings to the industry under the proposed settlement (approximately $10 billion) create a no-cost first-year payment for the tobacco companies.

Marketing restrictions aren't likely to work. The long list of marketing restrictions, some of the main "concessions" made by the industry, are unlikely to really reduce consumption especially among young people. International marketing professor Jean Boddewyn wrote in a letter to the editor of the New York Times published on June 3, 1997, that "even countries with a long-standing total ban on tobacco advertising and assorted drastic measures often ranging well beyond those proposed by the FDA have failed to reduce juvenile smoking after many years." Professor Boddewyn went on to say that, "according to Statistics Finland, the proportion of daily smokers ages 14, 16, and 18 hardly changed between 1977 (the year preceding the Finnish advertising ban) and 1993." Dave Mulryan, President of the Mulryan/Nash ad agency in New York, says that from the length of the list of restrictions, "It looks like they're giving a pound of flesh, when I don't think they've given a quarter-ounce. The creative community can work around restrictions." Alan Brody, a leading cigarette marketing expert, says of the settlement, "It may be a whole new opportunity for the tobacco industry to make fools of the legal community."[11]



The financial burdens imposed on consumers are so small they will also do little to reduce consumption through price increases. And if any of the settlements strategies to reduce smoking are successful, the industry's obligations decline when smoking declines. As Attorney General Joseph Curran of Maryland said, "In order to get the $368 billion, we need to keep people smoking. This is a real paradox that's very troubling."[8] Because the overall payments are so much less than the industry can afford, and because by law, the cost of payments would be passed on to consumers of cigarettes, the settlement proposals effectively hold shareholders, executives, and others with a financial stake in the companies completely harmless and free of financial penalty. The industry is not paying its fair share. Instead, the financial burden is being borne by addicted smokers and the taxpayers.

What Should Be Done?

First and foremost, these cases are about the health of addicted smokers, and of future generations. I have to ask, why would we allow any advertising and promotion whatsoever of this addictive and deadly product? In contrast to the current proposal, a principled settlement with the tobacco industry would not undermine our justice system or negotiate away the rights of people who are not yet sick. A principled settlement would create tough outcome-based financial incentives that

would prod the industry to change its behavior. It would recover much more of the damages caused by tobacco products. It would not allow the tobacco companies to meet their obligations out of savings or to reap huge profits while absorbing the payments required under the settlement as a cost of doing business. A principled settlement would reach to the industry's accumulated profits, to the dividends that so richly reward tobacco shareholders, and even to the fat compensation packages of company executives. You know something's wrong with the current settlement when the value of stock options held by CEOs of Philip Morris, RJR Nabisco Holdings Corporation and other companies is expected to increase as much as $65 million if the June settlement is enacted.[3]

I believe the tide against the tobacco companies is still rising. When the next definitive history of the tobacco industry is written, we don't want to find ourselves in it as one more tragic chapter of betrayal and false solutions. The battle is not just against the tobacco companies; it is for the hearts and minds of the American people and their elected representatives. We must take the time to get the whole truth out and to create a deliberative, inclusive, and thorough process. We must reject false deadlines. Cigarettes kill more Americans than AIDS, alcohol, car accidents, fires, illegal drugs, murder, and suicides combined. Let's slow down and do this right.

Mr. Humphrey is the Attorney General for the State of Minnesota. Materials for this article were assembled by Luanne Nyberg, Public Health Advisor on Federal and State Tobacco Issues, Office of the Attorney General.

Address correspondence to Luanne Nyberg, Public Health Advisor on Federal and State Tobacco Issues, Office of the Attorney General, NCL Tower, Suite 1400, 445 Minnesota St., St. Paul MN 55101-2131; tel: 612-215-1533; fax: 612-297-4036; e-mail <luanne.nyberg @state.mn.us>.

References

1. Moore MC, Mikhail CJ. A new attack on smoking using an old-time remedy. Public Health Rep 1996;111:192-203.
2. Frisby MK, Ingersoll B. Smoke signals: omens of tobacco truce are in the air. Wall Street Journal, 1996 Dec 19;Sect. A:16.
3. Tobacco companies CEOs could make millions off settlement. Bloomberg News 1997 Jun 21. Available from: **www.bloomberg.com/bbn/index.html**.
4. State of Minnesota and Blue Cross and Blue Shield of Minnesota vs. Philip Morris, R.J. Reynolds, Brown & Williamson, BAT Industries, Lorillard Tobacco Company, American Tobacco Company, Liggett Group, Council for Tobacco Research, Tobacco Institute. Complaint filed in District Court, Second Judicial District, August 17, 1994.
5. Shaffer D. The paper case: so far, cigarette companies are losing the battle to control millions of records that Minnesota's anti-tobacco forces hope will prove a history of deception by the industry. St. Paul Pioneer Press and Dispatch 1997 Mar 2;Sect a:1.
6. Black GD. The tobacco industry: playing the litigation turn. Bernstein Research 1995 Aug. Crary CD. Litigation Review 1995 Jun. Calvert D.
7. Crary CD. Tobacco product liability litigation. Auerback, Pollak & Richardson Litigation Review 1995 Jun 1.
8. Burning questions: tobacco pact's limits and its loopholes presage fierce debate in the fine print: hurdles for FDA, and a rebate to firms if smoking falls. Wall Street Journal 1997 Jun 23;Sect. A:1.
9. Harris JE. U.S. cigarette manufacturers' maximum ability to pay product liability damages: overview and a rough calculation. Tobacco Control 1996;5:292–4.
10. Daynard R. Memo regarding litigation submitted to the Advisory Committee on Tobacco Policy and Public Health, Washington, D.C., 1997 June 23.
11. Stuart E. The tobacco agreement: the advertising industry still has many weapons available. New York Times, June 21, 1997.