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A Year of Living

DANGER

SYNOPSIS

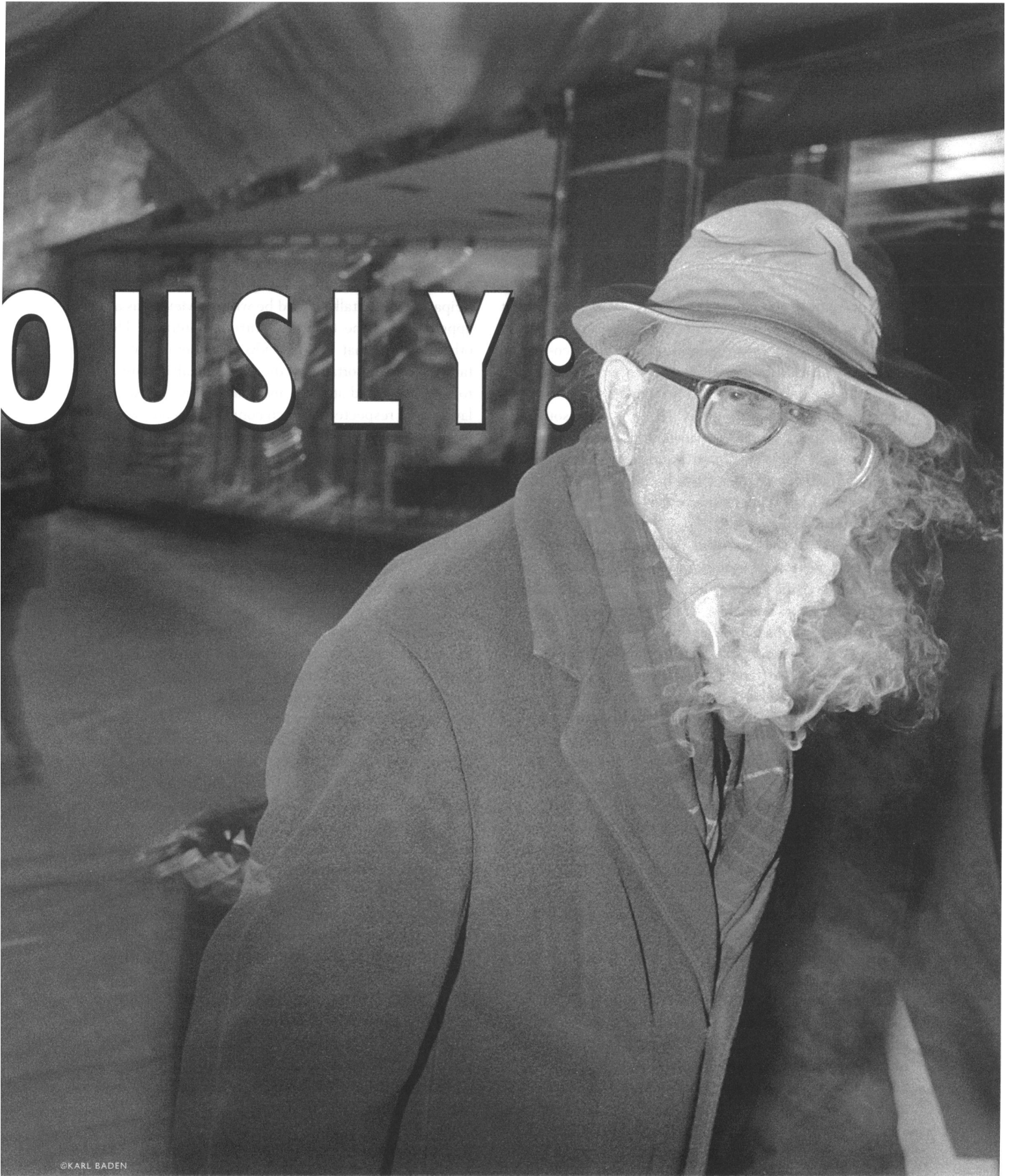
MOMENTUM TOWARD Congressional action on tobacco issues began with the announcement in June 1997 of a proposed "global tobacco settlement" between the tobacco industry, a group of state Attorneys General, and private class action lawyers. For the next year, tobacco issues received unprecedented national attention, culminating in the U.S. Senate's consideration and ultimate defeat of the McCain tobacco bill. Through the proposed settlement, the Attorneys General and others involved in talks with the industry sought to reduce tobacco use by attempting to forge a "win-win" solution for all parties. In exchange for money and public health concessions, the industry would be granted sweeping protection from litigation and thus a stable environment in which to operate. Members of the public health community responded to the "global tobacco settlement" in very different ways. The authors explore how different visions of possibilities and practicalities were played out in the fight for strong Federal tobacco control legislation and attempt to draw lessons for the future.

The Tobacco Control Community Meets the Global Settlement

THE ANNOUNCEMENT IN JUNE 1997 of the proposed "global tobacco settlement" touched off a year of heated debate on tobacco issues.

On June 20, 1997, a group of state Attorneys General and private class action lawyers announced an agreement with the tobacco industry that sought to reduce tobacco use dramatically, especially among young people, by attempting to forge a "win-win" solution for all parties. In exchange for substantial monetary and public health concessions, the tobacco industry would be granted sweeping protection from litigation and thus a stable environment in which to operate.

OUSLY:



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Members of the tobacco control community responded to the proposed settlement in very different ways, reflecting differing visions of both progress and process. In this article, we explore how divisions within the tobacco control community affected the fight for strong Federal tobacco control legislation, and attempt to draw lessons for the future.

THE TOBACCO INDUSTRY UNDER SIEGE

On May 23, 1994, three years before the proposed global tobacco settlement, Mississippi Attorney General Michael Moore had made history when his state became the first to file suit against the tobacco industry. Mississippi's suit sought to recover monies spent by the state on Medicaid and other indigent care expenditures for tobacco-related illnesses.¹ That August, Minnesota became the second state to file suit against the tobacco industry. Attorney General Hubert H. Humphrey III, who also sought to recover the state's health care costs for tobacco, alleged an antitrust conspiracy, consumer fraud, deceit, and misrepresentation.² By December 1995, both Florida and Massachusetts had filed similar suits, and by the end of 1997, 41 states had filed suit.

As the state lawsuits were taking shape, several class action suits were filed against the tobacco industry. These sought to "level the playing field" by matching the tobacco industry's resources with those of an entire class of individuals, thus greatly enhancing plaintiffs' ability to wage successful cases.³ At the same time, suits by individuals against the industry proliferated, and the political climate facing the industry was dramatically changing—thanks to the release of secret documents; the testimony of "whistleblowers"; the testimony before Congress of industry executives, who denied tobacco's addictive and harmful nature; and other factors.⁴

Although the tobacco industry had long maintained a stance of aggressively fighting all lawsuits, by 1996 the industry had apparently concluded that it should come to the bargaining table, agreeing to secret negotiations with several state Attorneys General and some of the lawyers pursuing class action suits. The industry wanted protection from its potentially unlimited exposure to liability for damages based on the dangers of its products and on its own misconduct. For their part, many of the Attorneys General and others involved in the negotiations preferred the certainty of settlement to the risks of trial.

When the nation found out about the secret negotiations in the summer of 1996, the tobacco control community was united in condemning them. But the parties went back to the table, again secretly.⁵ In April 1997, the public learned about this second round of talks and that they had a broader focus than simply settling the state Medicaid cases. Rather, the talks were aimed at devising a "global settlement" to provide industry with broad liability protec-

tion in exchange for substantial financial and public health concessions. In addition, the public learned that a prominent tobacco control advocate, Matthew Myers, Executive Vice President of the National Center for Tobacco-Free Kids, was participating in the talks, as an advisor to the state Attorneys General.

News of the talks and of Myers's participation were greeted with intense criticism from the tobacco control community, foreshadowing the rifts that would later emerge. Many raised objections to the "closed-door" negotiation process or argued that no one person or group could adequately represent the multifaceted tobacco control community. Some correctly foresaw that Myers's participation in the talks would be wrongly viewed as a seal of approval from the tobacco control community. However, others argued that because advocates could not stop the talks, it was important for the public health point of view to be represented at them and that Myers, an experienced lawyer and respected tobacco control advocate, was a good choice. Finally, a majority felt that it was simply wrong for tobacco control organizations to participate in secret negotiations with the tobacco industry.

THE GLOBAL TOBACCO SETTLEMENT

The agreement that emerged from these talks, the "global tobacco settlement" announced in June 1997, was a proposal for sweeping Federal legislation that would give unprecedented legal protections (de facto immunity) to the tobacco industry in exchange for monetary and public health concessions. Parties to the agreement urged President Clinton and Congress to enact the settlement into law before the summer recess.

The announcement of the global settlement deepened divisions within the tobacco control community. Some, most notably the National Center for Tobacco-Free Kids, praised the settlement. Matt Myers said it constituted "the single most fundamental change in the history of tobacco control."⁶ Others were harshly critical. For example, in an op-ed piece in the *Washington Post*, Representative Henry Waxman (D-CA), a leading Congressional critic of the tobacco industry, wrote, "The proposed settlement delivers to the industry its Holy Grail...absolutely full immunity."⁷ Indeed, much of the argument that followed concerned precisely the extent to which the proposed legal protections for the tobacco industry amounted to de facto immunity from lawsuits that would hold the industry accountable for the death, disability, suffering, and health care costs associated with tobacco products during the years in which the industry had concealed the addictive and deadly nature of their products.⁸

Arguments for the settlement. The architects of the settlement proposed to end decades of trench warfare with a

“win-win” solution. They argued that the public would receive money and important concessions from the industry in exchange for substantial legal protections from liability and a more stable environment for the industry’s operations. Frustrated by the lack of progress in reducing adult smoking and especially by rising youth smoking, they pointed out that in nearly 40 years of anti-industry litigation, industry had lost only one case. Keeping the ability to litigate, they argued, would be a hollow victory. If enacted, the settlement would force significant and dramatic changes in the tobacco industry, including some that could never be obtained through litigation—even successful litigation.

Advocates for a settlement also believed that a unique

agreement if Congress doesn’t approve it. That would be tragic.”⁹

Arguments against the settlement. Opponents of the settlement focused not on what public health would gain but on what it would lose—the ability to sue tobacco companies. Settlement opponents argued that litigation was a crucial tool and that the tide in court cases had begun to turn against the industry. Opponents also questioned the fairness, wisdom, and ethics of legal protections for an industry which, all agreed, had wrought tremendous harm to society. If the tobacco industry were given such protections, would Congress



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opportunity presented itself. The state Attorney General lawsuits had lowered the value of tobacco stocks, and under pressure from Wall Street, the companies were willing to make major concessions in exchange for resolution of their legal problems. While perhaps troubled by the ethical and tactical arguments against the offer of special liability protections, advocates of the settlement believed that depriving the industry of its quid pro quo would torpedo the entire deal.

In an extraordinary turn of events, some forces within the tobacco control community agreed to join the industry in working for enactment of the settlement into law. In an article entitled “A New Leaf: Now, the Archenemies Need Each Other,” a spokesperson for the Campaign for Tobacco-Free Kids was quoted as saying, “We have been at war with the tobacco companies. But we will urge Congress to support this package, and we anticipate that the tobacco companies will do so too. The nation will lose the many public health benefits of this

grant similar concessions to other industries that had harmed the public?”

Grassroots advocates, engaged for many years in “hand-to-hand” combat with the tobacco industry, thought it wrong to “cut a deal” just when they were beginning to make real progress at the state and local levels. Based on their experience with state legislation, grassroots advocates dreaded complicated Federal legislation into which industry lobbyists could insert “loop-holes,” especially measures to preempt states and localities from enacting stronger laws. Congress had long been a refuge for the tobacco industry; thus, legislation produced by a Congress unfriendly to public health seemed, to many, a bad idea.

Some opponents pointed to potential global ramifications of the settlement, especially that a stable domestic business environment would increase tobacco sales overseas. In the words of Mohammad Akhter, MD MPH, Executive Director of the American Public Health Asso-

ciation, “any agreement will likely be made at the expense of the rest of the world.”¹⁰

THE KOOP-KESSLER ADVISORY COMMITTEE

In May 1997, during the turmoil surrounding news of the secret tobacco talks, a bipartisan group of legislators, led by Representative Henry Waxman, had asked former Surgeon General C. Everett Koop and former FDA Commissioner David Kessler to convene a group to advise Congress on tobacco issues. Koop and Kessler created the Advisory Committee on Tobacco Policy and Public Health with representatives from public health, medicine, voluntary health organizations, and tobacco control groups.

a measure of social respectability—to be seen as a responsible member of the business world rather than a group of corporate renegades that operate outside the bounds of social norms. With such a glaring difference between what is right and wrong for the public, Congress should have little difficulty in choosing a course that contains no deals and no trades. We support tobacco legislation by Congress, but we are opposed to granting any concessions to the tobacco industry.”¹¹

THE PRESIDENT WEIGHS IN

Mindful of the explosive political ramifications of appearing to protect the tobacco industry, Republicans delayed



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In July 1997, the Advisory Committee produced a “blueprint” for tobacco control and then evaluated the global settlement against it. The committee concluded that the global tobacco settlement fell far short of sound Federal tobacco policy. As a result, most organizations muted their enthusiasm for the June 20 settlement, although some continued to support the concept of a settlement.

In the following months, Drs. Koop and Kessler expressed increasingly strong views on the central issue of immunity. In a February 1998 article they wrote, “Basically, the tobacco industry seeks three fundamental refuges. First it seeks to protect itself from accountability for past, present, and future wrongdoing. Second, it seeks to diminish or weaken individual and group access to the fundamental right of due process. Third, it seeks to limit Federal agencies from having oversight and regulatory authority. It also seeks, through ‘the settlement,’ to obtain

action until President Clinton expressed his opinion on the settlement. Clinton had been the first sitting U.S. President to challenge the tobacco industry, in the summer of 1995 supporting FDA Commissioner Kessler’s contention that the FDA had authority to regulate nicotine-containing tobacco products. But, reflecting the intensity of lobbying from the tobacco industry and public health interests, the complexity of the issue, and the political implications of a decision, the President delayed taking a position on the settlement for almost three months. Finally, in September 1997, he announced that he could not accept the settlement as written, preferring to outline his own requirements for a national tobacco policy. To a question on the divisive issue of immunity, he was vague but appeared open-minded, saying, “Well, I don’t think they’ve asked for future liability, I think they’ve asked for immunity from liability for past suits. And the question

there would be, what are they willing to agree to?" ("Remarks by the President on Tobacco Settlement Review." Wednesday, September 17, 1997. Office of the Press Secretary, The Oval Office. 10:55 a.m. EDT.) The President's apparent willingness to "cut a deal" on immunity alarmed settlement opponents.

Several months later, in January 1998, President Clinton announced that his 1998 budget would use funds generated by the tobacco legislation for domestic spending. By specifying how potential revenues were to be used, the President helped initiate a focus on the money rather than on the public health merits of the bill. And once again, he appeared open to offering industry special legal protections if they were necessary to obtain the legislation's passage.

SETTLING THE STATE LAWSUITS

Despite the announcement of the proposed settlement, the state lawsuits continued moving toward trial. On July 3, 1997, the Mississippi case was settled out of court, with tobacco companies agreeing to pay \$3.3 billion over 25 years. Florida settled next, on August 25, 1997, for \$11.3 billion, followed by Texas, on January 16, 1998, for \$15.3 billion and Minnesota, on May 8, 1998, for \$6.1 billion.

The landmark Minnesota case forced the disclosure of millions of industry documents, exposing deceptive conduct and helping lay the foundation for future legal actions. The Minnesota agreement requires the industry to maintain depositories of 30 million documents and to release an index to millions of previously released documents.

The Minnesota settlement also provides a model for other states still engaged in negotiations because of its provisions banning: distribution of promotional items bearing a product name or logo; misrepresentation of the health consequences of tobacco use (including additives); suppression of research on smoking and health; targeting of children in advertising, promotion, or marketing of cigarettes; and placement of ads on buses, taxis, and bus shelters.

The settlements granted no liability protection to the industry and incorporated so-called "most favored nation" clauses, giving earlier-settling states the benefit of concessions within later state settlements. To settlement opponents, the success of the state suits proved that many of the public health concessions contained in the global settlement could be obtained without granting any immunity, preemption of local authority, or other reciprocal concessions to the tobacco industry.

A DIVIDED TOBACCO CONTROL COMMUNITY

By fall 1997, the tobacco control community was sharply divided on the relative merits of a settlement, specifically on the issue of providing the tobacco industry with any special

legal protections. In the months to come, two large national coalitions formed to advocate for the differing views.

ENACT. The ENACT (Effective National Action to Control Tobacco) coalition was organized by the National Center for Tobacco-Free Kids to fight for "comprehensive, sustainable, effective, well-funded national tobacco control legislation." ENACT included most large national voluntary health and medical associations, prominently the American Cancer Society, the American Heart Association, and the American Medical Association.

ENACT did not take a public position on immunity for many months, although it was widely believed that the group was prepared to accept immunity as part of a comprehensive agreement. In a letter made public by the *Washington Post*, Dr. Koop declined to be a spokesperson for ENACT, saying he couldn't understand "why these public health people are not carrying the carrot out further in front of the horse."¹²

In early 1998, however, ENACT formally adopted a position on immunity:

"Our first priority is to ensure the passage of comprehensive tobacco control legislation in this session of Congress. If there are provisions that address the tobacco industry's liability, they must not weaken the ability of the civil justice system to protect public health or weaken the right of victims of the tobacco industry to seek compensation for their injuries. We are committed to evaluating any legislation in its entirety based on its overall impact on the public health."¹³

To settlement opponents, ENACT's commitment to "evaluating any legislation in its entirety" signaled its willingness to accept special legal protections for the tobacco industry. ENACT members generally believed that the need for comprehensive national tobacco legislation outweighed the need to preserve every avenue of litigation against the industry.

ENACT's position reflected a legislative model. During the legislative process, representatives of the powerful affected interests ("the players") typically meet to negotiate behind closed doors. In most cases the resulting agreement involves concessions on all sides, but leaves each player feeling, on balance, better off.

Save Lives. The American Lung Association was the only large national voluntary health or medical organization that unequivocally opposed legal protections for the industry. The opposition to these provisions of the global settlement was concentrated in grassroots anti-tobacco groups and state and local tobacco control organizations. In working to galvanize public opposition to the sweeping immu-

nity provisions of the “global tobacco settlement,” opponents slowed momentum toward the settlement’s enactment by Congress.

In October 1997, settlement opponents organized into a coalition known as Save Lives, Not Tobacco: The Coalition for Accountability, which eventually grew to include more than 350 national, state, and local organizations. Guided by the maxim *primum, non nocere* (“first, do no harm”), the group believed that while national legislation would be beneficial, it did not take precedence over the need to hold the industry accountable and preserve all legal avenues of redress. Unwilling to trade a “harm” (immunity) for a “good,” Save Lives adopted a position in its statement of principles of unequivocal opposition to any special legal protections for the tobacco industry:

Congress must preserve all currently available avenues for citizens, governments and others to pursue justice against the tobacco industry, including the ability to bring class actions, use all lawful means to join cases, and seek punitive damages. Tobacco executives, lawyers and agents must not be shielded from civil or criminal liability. The civil justice system’s ability to address industry misconduct and protect public health must not be preempted.

In contrast to ENACT, the Save Lives coalition included few large national organizations and operated on a bare-bones budget. Its strengths were the hundreds of state and local grassroots organizations it could call upon to lobby and its championing of a position with immense popular support.

Different visions. The arguments for and against the settlement were essentially about different visions of how to further the anti-smoking agenda—about how to balance idealism with pragmatism, principle with practicality, process with outcome. Principled people could and did land on both sides of the debate. But, since members of the two coalitions were working from different premises, they wasted precious time fighting each other, not the common enemy, the tobacco industry. The tobacco control community largely failed to grapple with the divisions and consider their implications for the battles ahead.

The divisions were reminiscent of earlier divisions within the tobacco control field, when medical and health groups focused largely on public education, smoking cessation, and research while grassroots organizations concentrated on legislation and public policy. The antagonism between the two “camps” significantly hampered the success of tobacco control and prevention efforts. By the late 1980s, however, greater unity had been achieved,¹⁴ but in response to the proposed settlement

the health community was again divided, largely between national leadership and state and local advocates. Internal struggles took place in several large organizations. For example, the grassroots governing bodies of both the American Medical Association and the American Public Health Association took a clear stand against providing the tobacco industry with any special legal protections, a view that was not unanimous in these organizations.

The American Public Health Association, several members of Congress, Dr. Koop, and others attempted to convince the two coalitions to work together. However, these efforts were largely unsuccessful; on occasion, confusion and embarrassment would result. For example, on February 17, 1998, Drs. Koop and Kessler organized a press conference aimed at presenting a united front against legal protections for the tobacco industry, releasing a consensus document signed by members of the Advisory Committee on Public Health. Five members of ENACT surprised Drs. Koop and Kessler by releasing a letter indicating willingness to support legislation that “addresses the tobacco industry’s liability in some limited way” (Seffrin J, Wheeler C, McCaffree DR, Richland J, Novelli W, Myers M. Letter to Dr. C.E. Koop and Dr. D. Kessler. February 16, 1998).

ATTEMPTS TO PASS FEDERAL LEGISLATION

The proposed global settlement stimulated several new pieces of legislation, ranging from bills to codify the June 20, 1997, proposal to others that formulated comprehensive tobacco control policy with no concessions to the tobacco industry. For example, in February 1998, Senator Kent Conrad (D-ND) introduced an exemplary bill, the Healthy Kids Act (S. 1638), which offered no liability protection to the industry. The Conrad bill, perhaps the strongest tobacco bill ever introduced in Congress, had the support of dozens of Democratic co-sponsors, many of whom had never previously supported progressive legislation on tobacco issues.

The McCain bill. By the spring of 1998, Senate Republicans had concluded that if they did not try to pass a tobacco bill, they would be vulnerable to harsh criticism from their constituents and the Democrats. Quoted in the *New York Times*, an anonymous Republican Congressman lamented, “If a tobacco bill gets passed we won’t get any credit. But, if no bill is passed, you can bet we’ll get blamed.”¹⁵ The party leadership assigned responsibility for crafting tobacco legislation to Senator John McCain (R-AZ), Chairman of the Senate Commerce Committee, who sponsored a bill that strengthened the health-promoting provisions of the “global tobacco settlement” while weakening the legal protections that the industry had sought. The bill called for a cap of \$6.5 billion a year on

the tobacco industry's liability, a \$1.10 increase in the Federal cigarette excise tax over five years, restrictions on tobacco advertising, and look-back penalties if these measures failed to reduce youth smoking.

The McCain bill was brought to the Senate floor on May 18, 1998; literally hundreds of proposed amendments were drafted, and several dozen were moved and voted upon. Earlier in the year, the Senate had approved a nonbinding sense-of-the-Senate resolution opposing immunity for tobacco companies, sponsored by Senator Judd Gregg (R-NH). At that time, only 19 Senators, including five from major tobacco growing states, opposed the resolution, in effect voting in favor of immunity. But the issue became far more difficult when it was time to vote on an actual bill.

Senators Judd Gregg (R-NH) and Patrick Leahy (D-VT) sponsored an anti-immunity amendment to the McCain bill. Lobbying was intense. Save Lives put forth a massive effort in support of the amendment, as did Dr. Koop. President Clinton opposed the amendment, arguing that it would jeopardize the bill's chances of final passage. Democrats were divided; Senator John Kerry (D-MA) led opponents of the amendment on the Senate floor, arguing that the McCain bill's special legal protections did not represent "immunity" for the tobacco industry. Nonetheless, an effort to "table" (kill) the anti-immunity amendment was defeated by a comfortable margin, uniting those (mostly Democrats) who opposed immunity and others (mostly Republicans) who hoped that passage of the amendment would result in the bill's eventual defeat.

Senators also passed amendments to strengthen the look-back provisions and to eliminate tax deductions for cigarette advertising expenses while defeating an amendment to increase the tobacco excise tax to \$1.50 over a three-year period. In a move criticized by the entire public health community, the President opposed the higher excise tax, fearing its passage would jeopardize the bill.

A key issue for many Senators, and for President Clin-

ton—whose domestic spending programs depended on the tobacco bill's passage—was how the money raised by the McCain bill would be used. To the dismay of health groups, the Senate amended the bill to use revenues to reduce the "marriage penalty" in the Federal income tax, a top funding priority for Republicans. This diverted substantial resources from funds that could have been used for anti-tobacco or other public health programs.

In the final days of debate on the bill, the Senate adopted an amendment offered by Slade Gorton (R-WA)

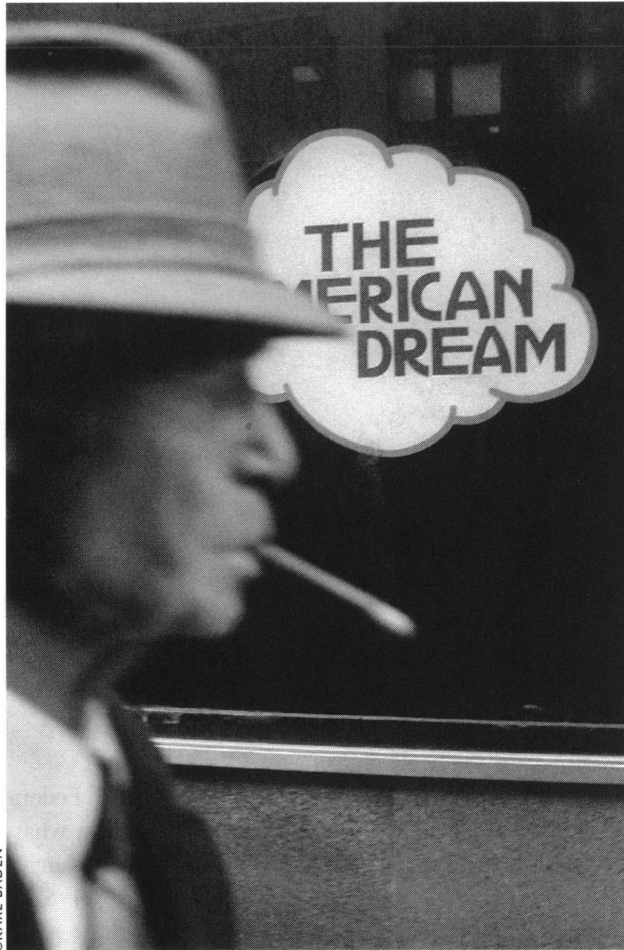
limiting plaintiffs' attorneys' fees in all new tobacco litigation. This was a devastating blow to opponents of immunity. Suits against the tobacco industry are extremely risky, and lawyers take these cases on a contingency basis, receiving payment only if they win. The possibility of large judgments attracts attorneys who have the resources to pursue these cases, and limiting lawyers' fees would have greatly reduced the incentive to take on these risky cases.

Despite its weaknesses, the McCain bill retained the support of a majority of Democrats, but supporters could not attain the 60 votes needed to cut off debate and permit a final vote. On June 19, 1998, after four weeks of debate, the Republican leadership pulled the bill from further consideration.

Many were bitterly disappointed. Former Surgeon General Koop's words were scathing: "What Senator Lott and his colleagues have done today is public health malpractice, plain and simple. I hope that the Senators who derailed this bill today lose sleep every night listening to the sound of children taking their first puff and the sound of emphysema and cancer patients gasping for their last breath."¹⁶

Both ENACT and Save Lives condemned the defeat, pointing to the tobacco industry's key role. Privately, however, some in Save Lives were relieved to know that, for now, the tobacco industry's chance of extracting special legal protections from Congress was ended.

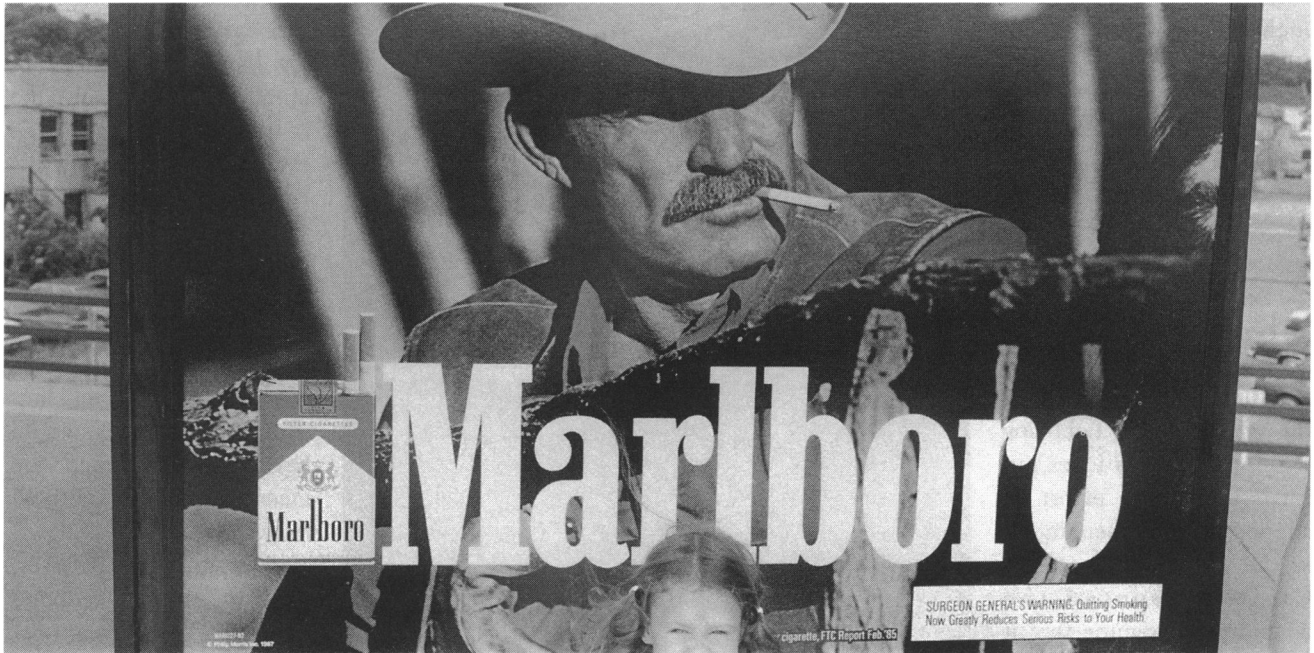
The tobacco industry had engaged in a massive lobby-



ing and media campaign throughout the year, hiring expensive lobbyists including former Democratic Texas Governor Ann Richards and former Senate Majority Leaders Howard Baker (R-TN) and George Mitchell (D-ME). In 1997 alone, a non-election year, the tobacco industry spent \$30 million on lobbying and political contributions.¹⁷ Business groups, including the U.S. Chamber of Commerce, lobbied against the McCain bill, fearing that trial lawyers would use income from tobacco litigation to finance lawsuits against other companies, to extend their political influence, and to oppose the busi-

harshly criticized by the health community as inadequate.

In contrast, Democrats pressured the Speaker for action. Representatives James Hansen (R-UT) and Martin Meehan (D-MA), co-chairs of the Congressional Task Force on Tobacco and Health, and Henry Waxman (D-CA) introduced the No Tobacco for Kids Act, garnering more than 100 cosponsors, almost all Democrats. The bill provided no liability protections, raised taxes by \$1.50 per pack over three years, and confirmed FDA authority to regulate nicotine as a drug. However, by August 1998, news reports described tobacco legislation in the House as "dead."¹⁸



ness community's efforts to change tort liability law. Corporate executives read the handwriting on the wall and wondered who would be next.

The tobacco industry supported the settlement to which it was a party but opposed the McCain bill, funding an unprecedented \$40 million advertising campaign against it. This advertising campaign, almost entirely unanswered by the tobacco control community due to limited financial resources, painted the McCain legislation as another "tax and spend" bill, permitting Senators to vote against it and be confident that voters would not turn on them in the fall elections. Not surprisingly, the tobacco industry took great pains to deflect attention from its role in the demise of the McCain bill.

The House of Representatives. House Speaker Newt Gingrich (R-GA) and other House Republican leaders delayed action until the Senate completed its work on tobacco issues. Defeat of the McCain bill greatly relieved pressure on the Speaker to bring forth legislation, and the Republican leadership never offered more than a "framework for tobacco legislation," which was swiftly and

THE ROAD AHEAD

With the defeat of Federal tobacco control legislation in the 105th Congress, what avenues remain to combat the tobacco epidemic? Many of the major developments since the landmark 1964 Surgeon General's Report¹⁹ have occurred at the state and local level; states and localities will continue to play a leading role in efforts to enact tobacco control and prevention measures. Some day a united tobacco control community may successfully press for measures that only the Federal government can grant, for example, returning authority to the states to regulate tobacco advertising for health purposes or implementing restrictions on marketing practices in other countries.²⁰

Litigation still holds enormous promise for tobacco control. As of August 1998, dozens of state Medicaid cases are pending against the tobacco industry, and the Department of Health and Human Services may seek similar recoveries. Hundreds of private law suits are headed for trial. The Department of Justice continues to investigate alleged fraud in the tobacco industry;²¹ many expect criminal indictments that may help leverage signif-

icant changes in industry practices.²²

The historic debate over the McCain bill marked the first time Congress had considered adopting a comprehensive policy to decrease the nation's appalling disease and death toll from tobacco. To their credit, Democrats under the leadership of Kent Conrad (D-ND) put forth and actively supported a landmark anti-tobacco bill, although all involved knew its chances of passage were nil. And a majority of Senators voted to deny the tobacco industry the special legal protections it so desperately sought.

President Clinton, who had won high praise from the public health community for his support of FDA Commissioner David Kessler, proved in the end to be a poor advocate for public health. Weakened by scandal, immersed in a legal quagmire, and facing an intransigent Republican majority in Congress, the President was powerless to promote sound legislation either to ensure his "legacy" in terms of reducing smoking among children or to fund social programs. And many members of Congress placed a higher value on the potential for new revenue than on the potential to benefit the public health.

Given the makeup of the 105th Congress and the immense resources of the tobacco industry, it may have been inevitable that sound Federal legislation would fail to pass. However, the tobacco control community's inability to recognize and respect each other's differences and unite behind a common strategy was a distinctly negative factor.

The enormous financial resources and political clout of the tobacco industry sank the McCain bill. The Republican leadership's willingness to protect their allies,

together with conservative Republicans' automatic opposition to FDA regulatory authority and to any hint of "tax increases," helped the industry. While many advocates were relieved that industry's window of opportunity to obtain protection from legal liability had closed, no one can take comfort in the tobacco industry's victory.

Ultimately, blame for the failure of tobacco legislation lies with Congress, which failed to protect and promote the public health and welfare. More than 30 years have passed since the landmark Surgeon General's report on tobacco urged "appropriate remedial action."¹⁹ Once again, Congress declined to take the needed steps to decrease the nation's most important cause of preventable premature death. For 440,000 Americans who will die early due to tobacco each year, the events of 1998 are a deadly tragedy.

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