

Tobacco Litigation

**Lessons for Canada
from the U.S. Master
Settlement Agreements**



Physicians for a Smoke-Free Canada

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Executive Summary

A decade has passed since the lawsuits filed by U.S. Attorneys General against tobacco companies were settled in an historic “Master Settlement Agreement” (MSA). The results of that agreement and their impact on public health may be instructive for Canadian jurisdictions currently contemplating or engaged in litigation efforts aimed at recovering public health care costs that results from smoking.

The 1998 MSA addressed many of the same issues that are the focus of policy, programming and legislative efforts in Canada during the same period. These measures include reductions in tobacco marketing (implemented in the U.S. through the MSA and in Canada through amendments to the federal *Tobacco Act*, 1997 and related provincial laws) and increases in tobacco prices (implemented in the U.S. through the MSA and in Canada through amendments to federal and provincial excise tax rates).

A comparison of developments in these two jurisdictions suggests that litigation has not achieved superior outcomes in several areas:

- Total state revenues from tobacco taxes and Settlement payments are not higher than provincial revenues from tobacco taxes alone.
- Total state expenditures on tobacco control programming are not higher, on a per capita basis, than provincial expenditures.
- Both the U.S. and Canada have achieved restrictions on tobacco marketing, but those in Canada (including retail display bans) are arguably stronger.

The MSA has, however, resulted in outcomes that have not been achieved in Canada. These include:

- The establishment and funding of an independent agency (the Legacy Foundation).
- The disbanding of tobacco industry organizations.
- The availability of formerly secret industry documents.
- Restrictions on lobbying and other impositions on corporate behavior.
- The coordinated enforcement efforts of state governments.

Unexpected consequences of the MSA that are also without Canadian equivalent include the ‘securitization’ of MSA funds by state governments, the increased value of tobacco companies resulting from resolving the uncertainties associated with litigation, the enrichment of plaintiff lawyers, and the engagement of tobacco companies in youth prevention programming. In both countries, there was an increase in profits of major tobacco companies in the 1998—2004 period.

There have been significant public health advances in both countries in the form of reduced smoking prevalence and tobacco consumption. Overall, the drop in tobacco use has been greater in Canada.

The litigation efforts of Canadian governments may be informed by the results of the U.S. Master Settlement Agreement.

1 Why sue tobacco companies?

Two decades ago, a small number of individuals in the tobacco control community started promoting the idea of litigation against tobacco companies as a component of a public health or tobacco control strategy.

Although courts had been used (unsuccessfully) by individual smokers to claim personal damages from tobacco companies, and had been engaged in the successful appeal for the “fairness doctrine” to require broadcasters to provide equal time to anti-smoking ads, the concept of litigation only became part of a mainstream approach to tobacco control in the United States in the late 1980s.

Over the past quarter century, several arguments have been advanced to support litigation as a public health tool:

‘INSTRUMENTAL’ REASONS

Litigation produces results that are otherwise unattainable

One of the early advocates of suing tobacco companies was the American lawyer, Richard Daynard. In 1984, he founded the Tobacco Products Liability Project, the purpose of which was “to further the filing of product liability/personal injury law suits against tobacco companies and their agents as a strategy to compensate victims, prevent disease, and save lives.” [Daynard, 1984]. He encouraged the health community to see tobacco liability litigation as a component of a cancer control strategy. In a paper published in the Journal of the National Cancer Institute in 1988, he presented beneficial outcomes of litigation, including:

- Shifting billions of dollars, of health and productivity costs from families and third-party payers to

cigarette companies.

- Forcing increases in cigarette prices and consequent large drops in consumption, especially among children and teenagers.
- Driving home the point about the dangers of smoking.
- Forcing the industry to stop its deceptive advertising, promotion, and public relations.
- Weakening the tobacco industry’s hold on public policy by revealing its behaviour through the release of documents obtained by plaintiffs lawyers during the discovery stage of litigation.

A recurrent theme in U.S. reflections on tobacco litigation was the potential to circumvent the barriers to legislative and administrative advances in tobacco control.

The tobacco industry thus far has been able to defeat most proposed anti-smoking measures both in Congress and the state legislatures. Thus it is a strength of the tobacco products liability strategy that it does not require affirmative legislative support.

[Daynard, 1988].

SOCIAL JUSTICE REASONS

Litigation creates coherence in application of consumer safety and other tort laws.

Litigation was not only a way to achieve public health goals, Daynard and others suggested, it was also a way to create policy coherence with tobacco and other consumer production. They pointed out that the principles of unfair consumer practices, fraud, manufacturers’ duty of care, and employers’ duty to provide a safe work place had not been appropriately

applied to the “deadliest consumer product ever marketed.” [Daynard et al., 1988].

In Canada the Non Smokers’ Rights Association was quick to apply this approach. In 1987, it created a splinter group, Relatives (and friends) of Dead and Dying Smokers (RODDS), to promote the idea of tobacco litigation in Canada. In addition to individual lawsuits, RODDS encouraged “amendments to the Criminal Code or new legislation to hold tobacco and advertising industry executives criminally responsible for acts of deception or failure to warn associated with tobacco marketing practices.” RODDS integrated proposals for legislative reform (like bans on advertising) with recommendations for litigation reform: they proposed a new criminal offence for manufacturers who misrepresent the risks of using their products, public funding for some product liability suits against tobacco companies, and reforms to facilitate class action suits. [RODDS, 1987a and 1987b].

Tobacco litigation changed dramatically in 1994 when U.S. state attorneys general began to file government suits against the industry. The rationale for these suits was presented by the litigating attorneys general, but also by health analysts. The principal stated objectives of the Medicaid litigation were, as Jacobson and Warner described them:

to protect children by stopping the marketing of tobacco to minors and reducing youth access to tobacco products; (2) to provide full disclosure of tobacco’s adverse health effects (by releasing tobacco industry documents obtained through litigation); (3) to protect consumers by reforming tobacco industry business practices; and (4) to recover the states’ tobacco-related health care expenditures.

[Jacobson and Warner, 1999].

The rationale for litigation has been expressed somewhat more colourfully, and with more emphasis on social justice values, by those leading the lawsuits. In his press statement for the very first state suit, Mississippi Attorney General, Michael Moore said:

This lawsuit is premised on a simple notion – you cause the health crisis, you pay for it... The free ride is over. It’s time these billionaire tobacco companies start paying what they rightfully owe to Mississippi taxpayers. It’s time they quit hooking our young people on nicotine delivered through the dirty needle of cigarette and other tobacco products. It’s time justice prevailed.

[Mississippi Attorney General, 1994].

Two years later, Texas attorney general, Dan Morales, expressed an intention to bring “this industry to its knees”.

The purpose of this lawsuit is to change how this industry does business ... We are going to stop them from selling their deadly product to minors. We are going to force them to manufacture a safer product.

[Curriden, 2007].

In Canada, British Columbia Premier Glen Clark, echoed similar goals of reforming industry practice when, in June 1997, he announced that province was prepared to file the first government suit to recover damages from the tobacco companies. The Globe and Mail reported that Clark hoped “to use the threat of broad, government-backed class action suits to persuade the tobacco companies that it is time to become “more responsible corporate citizens.” [Globe and Mail, 1997].

ECONOMIC REASONS

Litigation corrects market failure

In 1998, the Non Smokers’ Rights Association summarized the benefits of government lawsuits to recover tobacco-caused public expenditures as a way to correct market distortions:

This ongoing ability of the cigarette companies to externalize the inevitable costs of their business practices produces four undesirable effects: (i) it unjustly foists a significant economic burden onto those taxpayers who did not contribute to the problem; (ii) it strengthens the tobacco companies financially; (iii) it emboldens the tobacco companies, leading them to believe they can evade political and economic realities other manufacturers must face; and (iv) it distorts the marketplace and deters technological development by removing the economic incentive to produce less harmful tobacco products.

Ancillary objectives, beyond just acquiring satisfactory sums from the industry, which may be advanced include: (i) a rigorous quantification of the type and magnitude of the social and economic damages tobacco industry products cause; (ii) obtaining industry information; (iii) increased public education; (iv) denormalization of the tobacco industry; (v) alteration of tobacco industry behaviour; (vi) reduction of tobacco consumption; and (vii) reduction of tobacco-caused morbidity and mortality.

[LeGresley, 1998].

POST MSA REFLECTIONS ON THE BENEFITS OF LITIGATION

GLOBAL PERSPECTIVES

Litigation contributes to comprehensive tobacco control

Member states of the World Health Organization considered the role of litigation in a tobacco control strategy during the development of the global tobacco treaty, the Framework Convention on Tobacco Control. In 2001, delegates met to discuss litigation in the context of this treaty.

This WHO initiative agreed with the rationale for litigation identified two decades earlier by Daynard: increased cigarette prices, broader public debate, disclosure of tobacco industry behaviour and compensation for smokers and public agencies. They also considered the outcomes of such litigation, and the 'relief' that could be sought through the courts.

[T]he most important types of relief for advancing tobacco control and public health are non-monetary. A realistic understanding of tobacco litigation over the last fifty years, and an appreciation for tobacco use as a global health problem, both suggest that decisions about tobacco litigation and the relief to be sought should be premised not on the expectation of large financial recoveries, but on the goal of advancing public health in a meaningful fashion.

[WHO, 2001].

The public purpose outcomes identified by this WHO process [WHO, 2001] included:

Release of industry documents.

"Tobacco litigation's single greatest contribution to global tobacco control has been the release of long-secret industry documents."

Declaratory relief.

"A formal judicial determination that defendants are liable, or have engaged in unlawful conduct, can be a direct catalyst for policy change, can provide a legal basis for individual victims' cases to proceed, and may make individual litigation economically viable."

Injunctive relief, including

- General prohibitions against future misconduct.
- Restrictions on packaging, advertising, marketing, sponsorships or selling practices.

- Changes in the design or formulation of cigarettes or other tobacco products.
- Public disclosures, warning labels or statements, including corrective public educational campaigns.
- Termination of industry programs or the disbanding of business associations.
- Restrictions on public smoking.
- Creation of smoking cessation programs.
- Orders requiring governments to develop and enforce tobacco control programs.

Equitable relief

"This could be financial, as in the case of restitution or the disgorgement of improper profits; could involve the invalidation or reformation of tobacco companies' contracts; or could require the industry to provide medical monitoring or testing."

AMERICAN PERSPECTIVES

Litigation expands public health reach.

In its review of tobacco control strategies, the U.S. Surgeon General evaluated the contribution of litigation to reducing tobacco use. This report found advantages in addition to the benefits from cigarette price increases, the encouragement of the tobacco industry to produce less harmful products and to discontinue their dishonest marketing practices, the delegitimization of the industry and public education through media coverage. Lawsuits also served to enlist "skilled, resourceful and relentless advocates" for tobacco control, who would be motivated by the "contingency fees plaintiffs' attorneys would receive if they won or settled cases against the industry." They also had the potential to "compensate injured parties, including smokers, afflicted nonsmokers, their families and the health care system." [U.S. Surgeon General, 2000, p. 224].

CANADIAN PERSPECTIVES

Litigation is desirable if it is done right.

Several Canadian health agencies have promoted litigation as a way of advancing tobacco control.

In 2001, the Coalition québécoise pour le contrôle du tabac (CQCT) urged the Quebec provincial government to launch a suit to recover health care costs, but to not limit such an action to monetary compensation:

En ce qui concerne les poursuites, la Coalition insiste sur le fait qu'elles ne devraient pas se limiter qu'à une question monétaire, si importante soit-elle. Elles doivent aussi faire progresser toute la lutte contre le tabac.

[Coalition québécoise pour le contrôle du tabac, 2001].

The Coalition insists that lawsuits should not be limited to monetary issues, important as they are. They must also advance the whole of tobacco control. (Translation).

The Canadian Cancer Society, like the CQCT, provides four foundations for such tobacco litigation:

From a public policy perspective, the potential benefits of B.C.'s medicare cost recovery lawsuit include:

JUSTICE - *hold the tobacco industry accountable before the law for their wrongful behaviour*

TRUTH - *obtain the truth, through public disclosure of internal documents*

COMPENSATION - *obtain possibly billions of dollars as compensation for health care costs, thus benefiting taxpayers*

HEALTH - *force companies to stop acting in ways detrimental to public health, so that in the future the companies do not repeat their behaviour of the past*

[Canadian Cancer Society, 2005].

In the spring of 2006, dozens of health organizations united under the banner "Campaign for Justice on Tobacco Fraud" wrote the Ontario Premier, Dalton McGuinty, to encourage that province to join in litigation efforts of British Columbia and other provinces. In addition to the goals of Justice, Truth, Compensation and Health, Public Education and Deterrence, these agencies identified the role that litigation can play in achieving tobacco control policy.

The threat of bankruptcy and the achievement of public health reform – *The industry will negotiate if it faces bankruptcy and the disposition of its assets including trademarks. Out of settlement negotiations, huge public health benefits could flow. It is important that the Ontario government capitalize on the potential to create this kind of leverage over the manufacturers given that the health of generations of kids could be at stake.*

[Campaign for Justice on Tobacco Fraud, 2006].

In a further appeal the following year, the Ontario Campaign for Action on Tobacco (OCAT) identified

specific policies that could be included in a litigation settlement:

Litigation of this type is about far more than simply recovering funds expended on health care costs. Any settlement could include a variety of potential non-monetary provisions, such as look-back requirements. Under these requirements, the industry would be required to meet various youth smoking initiation reduction targets on an annual basis, or be required to pay additional penalties, which could then be redirected into tobacco control or other public health measures directly.

[OCAT, 2007].

Individual plaintiffs and class action suits have also identified public policy goals in their suits. Following the death of her husband, Ronald, Maureen McIntyre requested permission from the Ontario government to enter into a contingency arrangement in order to seek damages arising from his tobacco-caused death. The purpose of the action from the viewpoint of Maureen McIntyre, as stated in the initial ruling allowing the contingency fee arrangement, was:

(a) To educate the Canadian public, and especially children, about tobacco industry misconduct;

(b) To punish the tobacco industry for their decades of disinformation about the risks of smoking, and about the addictiveness of nicotine;

(c) To force the tobacco industry to reform itself, to be honest with consumers, and to work to develop a safer product; and

(d) To prevent the tragedy which happened to my family from being repeated for other Canadians.

[Wilson, 2001

Ontario Superior Court, file 00-CV-195898].

DISSENTING VIEWS

Not all legal scholars nor health analysts support litigation as a tool for public health outcomes. Concerns about the use of litigation are based on moral and practical grounds.

POLITICAL REASONS

Litigation weakens democratic institutions

Law professor Richard Ausness argues that such efforts undermine government, as they:

- Usurp the responsibility of legislatures to make policy.
- Allow government officials to avoid accountability (especially when financed through contingency fees).
- Encourage the imposition of unconstitutional restrictions* (such as bans on advertising in jurisdictions where commercial freedom of expression is considered to disallow such bans).
- Allow for outcomes that are not in the general public interest.

A particular concern is the secrecy in which litigation efforts are often, or even usually, conducted.

Lawyers and their clients do not discuss litigation strategies in public. Consequently, decisions about who to sue, what kinds of claims to make and what kind of relief to seek are not openly debated, nor is there any provision for public comment at this, or any other, stage of the process. Likewise, settlement negotiations between plaintiff and defense lawyers are held in private and are usually not subject to public scrutiny until a final agreement has been reached. The secrecy associated with the litigation and settlement process also leaves affected third parties without any influence or input.

[Ausness, 2004].

Consideration is also given to the legal reforms that result from public litigation, and the impact of these efforts on tort law.

Public tort litigation affects courts, lawyers and the legal system in general. More specifically, this type of litigation creates pressure on courts to distort traditional legal principles and it enables some lawyers to collect grossly excessive fees. ... One of the reasons why government plaintiffs are so willing to base their claims on questionable legal theories is that they apparently do not expect their cases to actually go to trial. If they can survive a motion to dismiss, government plaintiffs feel that the defendant will settle the case and, therefore, the doctrinal soundness of their position will never be truly evaluated. This strategy worked quite well in the tobacco litigation where the states obtained billions of dollars without ever having to defend their dubious and novel liability cases in court.

[Ausness, 2004].

Public health and tobacco control practitioners have also expressed concerns about the role that has been given to litigation as a way of setting tobacco control policy.

In 1999, in the wake of the agreements to settle public litigation with tobacco companies, Peter Jacobson and Kenneth Warner reviewed the role of litigation and public health policy making in the context of tobacco control. The achievement of public policy objectives becomes hindered because monetary damages become the focus of litigation efforts and because legislators failed to support litigation efforts with policy change. "Litigation has stimulated a national debate over the role of smoking in society and eventually may well move the policy agenda. But a sustained legislative and regulatory presence is required to ensure meaningful policy changes."

[Jacobson and Warner, 1999].

The use of litigation to achieve public purposes has been criticized from many quarters. The Cato Institute expressed concern about the anti-competitive impact of the U.S. outcome:

The 1998 tobacco settlement is a sophisticated, white-collar crime instigated by contingency fee lawyers in pursuit of unimaginable riches. In collaboration with state attorneys general and the four leading tobacco companies, they concocted a scheme that forces all tobacco companies—even new companies and companies that didn't join the settlement—to engage in a program of price fixing and monopolization. Essentially, the major cigarette makers bought permission to fix prices and exclude competitors.

The result of the settlement is that the settling tobacco companies have purchased, with smokers' money, permission to raise prices collusively and suppress competition. In return for not enforcing the antitrust laws, the states receive a new source of revenue, which is essentially the same as a national excise tax but without the budgetary and fiscal controls applicable to taxes.

[O'Brien, 2000].

* Ausness further describes his concerns about unconstitutional provisions: "Proponents of tobacco regulation would no doubt argue that the tobacco companies "waived" their constitutional rights when they agreed to the settlement's advertising and marketing restrictions. As a technical matter that is correct in the sense that the tobacco companies might be stopped from subsequently challenging these restrictions in court. However, concerns about restrictions on basic constitutional rights go beyond the interests of the contracting parties. The public has a strong interest in upholding and supporting constitutional rights even when the immediate beneficiaries of these rights are willing to waive them."

Constitutional concerns were not limited to tax issues, but also to jurisdictional powers within a federated state:

[T]he MSA creates a national – but not federal – entity to regulate state lawmaking on tobacco, unconstitutionally increasing the states’ political power through collective action. The MSA forces companies to agree to restrictions on the selling, marketing and pricing of cigarettes – restrictions that no single state would have been able to impose on its own.

[Rajkumar, 2006].

POLICY REASONS

Litigation may not be the most efficient way to achieve tobacco control objectives

The use of the courts to achieve public policy objectives that would normally be the subject of legislative review is a challenge to litigation observers. The perception of achievability of policy reform through legislative process may be different in the United States than in Canada:

“The fundamental questions are how social policy should be made regarding the use of tobacco products, and which institutions should be responsible for controlling tobacco use: the market, the political system (i.e. the legislative and regulatory branches of government), or the courts. On balance, we conclude that litigation is a second-best solution. We see a distinct role for litigation as a complement to a broader, comprehensive approach to tobacco control policy making, rather than as an alternative to the traditional political apparatus of formulating and implementing public health policy. Our analysis suggests that, in general, public health goals are more directly achievable through the political process than through litigation, though situations such as those concerning tobacco control blur the bounds between litigation and the politics of public health. .. We conclude that a sustained legislative and regulatory presence ought to be the foundation of meaningful policy changes.

[Jacobson, 1999].

Some consider that the relative lack of transparency of litigation relative to legislative efforts erodes democratic institutions and governance, and find flaws in the tobacco litigation outcomes:

They were negotiated privately by the parties at interest. They were not published for public comment in advance of adoption, as are the proposed products of legislation and administrative rulemaking. They were not published afterward, except on the Internet. ...

The document is impenetrable to anyone who is not a lawyer. There is no official record of debate about the contents, no published rationale or justification for them, and no legislative history to refer to as a guide to the authors’ intentions.

[Derthick, 2001].

These events developed, however, with the engagement of civil society and outside public bodies in the litigation effort:

Although the MSA was not brokered between state legislative leaders and the interest groups that lobby the key legislative committees, it was ultimately approved by judges in every state. And yet there is no indication that legislators came before the judges and objected that their turf was being improperly infringed. Moreover, like the “global settlement,” the MSA was widely debated within the community centrally concerned about tobacco control, and many members of that community participated in crafting the details. Clearly the state attorneys general turned to the agenda of the tobacco control movement to decide what behavioral changes to seek from the tobacco companies, such as limits on billboard advertising and other promotional activities. In short, this “interpenetration” of one arm of the government with the tobacco control community to achieve a new state policy on tobacco control is, in the end, not very different from ... normal politics.

[Sugarman, 2001].

Others consider that, especially when legislative bodies are involved in the drafting of enabling legislation, legislators are using litigation to achieve their objectives through another channel than lawmaking.

Should it matter, for example, that it was based on legal claims that were almost wholly untenable at the time the suits were filed? This was, as I shall argue, almost certainly the case. Given the legal infirmity of the states’ third-party litigation strategy, but its obvious attractiveness given the results it produced, should it matter that was essentially a political solution cloaked in a legal pretense.

[Sebok, 2004].

It is not only that litigation replaces legislation (with or without the support of legislative bodies), it can serve to displace future policy changes:

The position advanced in opposition had basically four points: (1) the State was getting far too little; (2) it was giving up far too much;

(3) the structured nature of the settlement meant that the State's future interests were aligned with, indeed dependent upon, future success in tobacco sales, an exact reversal of existing health policy; and (4) the kinds of determinations underlying the MSA were essentially legislative, and well beyond the adjudicative and enforcement capabilities of a single judge sitting in a lower court of general jurisdiction. ...

[L]itigation is simply not an appropriate vehicle for setting health care policy within a state or across a nation. And yet, on several different fronts, litigation is the means by which we are setting that policy as it affects tobacco consumption, quite possibly the nation's leading health concern. Whether a comprehensive tobacco policy is possible may be in doubt; that it is disserved by litigation seems certain.

[Lafrance, 2000].

2 A short history of U.S. Litigation

A FEW RIPPLES IN THE FIRST WAVE: 1954-1962

The first product liability suit to be filed in the United States was in 1954 (*Lowe v. RJ Reynolds Tobacco Co.*), but the suit was abandoned before reaching a hearing. It is estimated that at least 150 more cases were filed, and dropped (without settlement) in the following decade. Of the ten cases that reached trial in this period, all were won by the tobacco companies. [Stephen Smith, 2002].

The suits were usually based on the theory of negligence (that the industry knew that the products were harmful and should take action accordingly) and/or the theory of implied warranty (that the industry was selling a product that was not of merchantable quality and they had failed to warn accordingly).

Smokers seeking redress in the courts faced a David and Goliath situation:

[T]he plaintiffs' attorneys were overmatched. The tobacco companies presented a concerted defense in every claim, no matter how small the damages sought, and through all stages of litigation. From the earliest cases, the tobacco companies retained lawyers from the country's most prestigious law firms and directed them to spare no expense in exhausting their adversaries' resources before trial. Plaintiffs' attorneys, typically operating from small practices under a contingent fee arrangement with clients who could not afford protracted

litigation, found themselves both outnumbered and outspent on all fronts.

[U.S. Surgeon General, 2000, p. 225].

Tobacco companies defended themselves by vehemently denying any causal link between smoking and lung cancer or other diseases. To sustain this denial, they enlisted a public relations and disinformation campaign to create a phony 'controversy' about the state of science. At the same time they argued that they lacked sufficient knowledge of any health risks to have a duty to warn their customers. "These arguments proved a complete defense to every case to reach a jury for thirty years." [WHO, 2002].

The courts' cool reception to the arguments that tobacco companies were negligent or had failed to warn increased when cigarette warnings began to appear on packages in 1965. In 1973, the influential American Law Institute issued guidelines on applying strict liability to products which were inherently harmful* which, effectively discouraged further litigation efforts for a number of years.

A GROWING TIDE IN THE SECOND WAVE: 1983-1992

Several events combined to encourage injured smokers and their lawyers to consider again the potential to sue tobacco companies in the early 1980s.

* The American Law Institute "Restatement (Second) of the Law of Torts" 402A: "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous." That is, a manufacturer is not liable unless the product is atypically dangerous when compared with a normal product of the same class."

John Banzhaf, a pioneering litigant for tobacco control, described the changing situation in a 1985 speech to colleagues. He felt the litigation landscape had changed dramatically, and that courts were more willing to allow injured customers to recover damages, even when there were inherent dangers to the use of a product. Combined with stronger and clearer medical evidence about the harms of smoking, including improved evidence of the addictive nature of tobacco, as well as decreased social acceptability of smoking and improved public understanding of the economic consequences of tobacco use, he foresaw that “within three years it is almost certain that we are going to see almost one, if not more, successful smoker verdicts against tobacco companies.”

The question is not “how are we going to recover [money from tobacco companies]”. The more logical question is “In light of all these other suits and recoveries, why has the tobacco industry escaped?”

[Banzhaf, 1985].

His enthusiasm was shared by others. Emboldened, perhaps, by the success of thousands of individual claims against asbestos companies, lawyers began to file lawsuits on behalf of injured smokers. Over 2,000 additional personal injury cases were filed in this period.

The legal theories under which these cases were fought (and defended) shifted from ‘negligence’ and ‘implied warranty’ to ‘negligent failure to warn’ and ‘strict liability’. Strict liability is a liability construct which focuses more on the defectiveness of the product than the negligence behaviour of the manufacturer. Banzhaf explains that, with strict liability “[Litigants] do not have to show that the manufacturer was careless, negligent or at fault in any way; we only have to show that the product was unreasonably dangerous, that it had a defect and caused the injury.” [Banzhaf, 1985, p. 29].

Responding to these new claims, Tobacco companies shifted their defenses.

For years they had denied their products were unsafe. Now they insisted instead that the hazards they had indignantly denied for so long were no longer preposterous, but were suddenly, in fact, “common knowledge” – so much so that smokers were fully aware of them and had, in fact “assumed the risk” of death and disease. So well known were these risks, manufactured argued that smokers could not claim to have “relied on the industry’s own denials.”

[WHO, 2002].

Again the industry employed a scorched earth strategy of wearing plaintiffs out. J. Michael Jordan, a lawyer who represented RJ Reynolds, is famously quoted as writing in 1988 “the way we won these cases was not by spending all of our money, but by making that other son of a bitch spend all of his.” [U.S. Surgeon General, 2000].

A chink in the tobacco companies’ armor appeared in 1988, when a jury awarded the widower of Rose Cipollone \$400,000 in punitive damages. This verdict (subsequently overturned) was the first time that an award had been made against the companies. The case was also noteworthy because it triggered a Supreme Court review of the legal theories that could be the basis of litigation, and whether or not the presence of health warning labels protected tobacco companies from liability suits.

The results for plaintiffs were mostly positive. Although the Supreme Court held that the cigarette acts pre-empted any claims based on failure to warn, it also held that any claims based on express warranty, intentional misrepresentation, fraud or conspiracy were not pre-empted by the Acts. Accordingly, the case was again remanded for a retrial. However, by this time, the law firm that had been representing the Cipollone family on a contingency basis had had enough – after nearly a decade of litigation they had spent nearly \$3 million and were now being forced to start over again at square one.

[Smith, 2002].

The withdrawal of the Cipollone suit, nine years after it was first filed, marks the end of the second wave of litigation.

THE THIRD WAVE GROWS TO TIDAL PROPORTION 1990s and later

Disappointment at the outcome of their renewed second wave attempts to successfully sue tobacco companies prompted litigants to reconsider the way they presented their cases and the way they managed their work.

Bigger cases, bigger budgets, bigger law-firms

The scorched earth strategy of the tobacco companies made it difficult for any individual lawyer representing an individual case to succeed, as inevitably that case would be overwhelmed by an industry that coordinated its efforts and pooled its resources. Lawyers realized that if they similarly pooled their efforts, and if they increased the size and volume of their cases, their efforts would be better matched

against the industry. Collaborating on class action suits allowed them to do both. [U.S. Surgeon General, 2000].

In March, 1993, the first class action suit was filed against tobacco companies. Sixty attorneys had pooled efforts to finance Castano v. American Tobacco Company. The suit aspired to represent as many as 40 million smokers and their claims for damages resulting not only from disease, but from addiction. (The case was originally certified but fell apart after a ruling that state law varied too much for a national case to be pursued.)

[WHO, 2002].

Big class actions and potential big class recoveries attracted new players to the tobacco litigation field, as well as new legal strategies.

Suffice it to say that a considerable number of sophisticated plaintiffs' attorneys who had previously shown no enthusiasm for involvement in tobacco litigation entered the fray with an especial eye to the prospects of class action litigation against the industry. [Rabin, 2001].

First, plaintiffs began to shift the emphasis of their claim from the product (the cigarette) to the product's marketing (lying about the cigarette). The increased emphasis on allegedly fraudulent acts of the tobacco industry came about partly as a reaction to the failure of those legal theories that emphasized the defective nature of the cigarettes as a product and partly out of the increase in information relating to fraud that the first two waves of litigation generated.

[Sebok, 2004].

By the mid 1990s, Litigation momentum was gained as the public (including potential jurors) learned more about tobacco industry behaviour. Evidence produced during the Cipollone suit convinced David Kessler, the Commissioner of Food and Drug Administration, that tobacco companies were controlling the levels of nicotine in cigarettes. This letter, and publicity from the report by ABC's Day One that tobacco companies manipulated nicotine levels in cigarettes. Documents chronicling decades of research by Brown and

Williamson and its parent company, BAT, were leaked by paralegal Merrell Williams and made public by Stan Glantz and others. Brown and Williamson fired Jeffrey Wigand, whose conflict with his employer over the health consequences of smoking was widely reported. A watershed moment came when the chief executive officers of the leading U.S. companies told a Congress committee that they did not believe that nicotine was addictive. The tobacco industry appeared "dishonest, disreputable and legally vulnerable". [U.S. Surgeon General, 2000, p. 229], [Sebok, 2004].

The impact of these public revelations on litigation potential was significant.

This information energized individual smoker cases because it gave juries a reason to ignore the tobacco companies' assumption of risk defense - if the tobacco industry set out to fool smokers, it was argued, then smokers could be forgiven for acting foolishly. It also created a new dynamic in the calculation of damages: in a number of cases, juries indicated that they thought that smokers still bore part of the blame for smoking, but they then granted multimillion dollar punitive damage awards to punish the industry for anti-social conduct.

[Sebok, 2004].

Three weeks after that iconic testimony, the companies were hit with the first suit from a state government: Mississippi Attorney General Michael Moore's suit aimed to recoup \$940 million the state spent treating sick smokers. By the end of the year, two other states (Minnesota and West Virginia) had 'joined suit,' as did two more in 1995. In the following 2 years, however, every state had laid claim for recovery of Medicaid costs.*

These state suits (as well as those of the several cities that also filed suits) introduced other legal arguments novel to tobacco litigation. These included 'unjust enrichment', antitrust, conspiracy and consumer fraud and racketeering. [Smith, 2002, Sebok, 2004, Rabin 2001, Annas, 1997].

To fully appreciate the ingenuity that produced such a remarkable victory for the opponents of Big Tobacco, one must come to terms with the way that the state reimbursement claims

* In order of filing date: Mississippi, May 1994; Minnesota, August 1994; West Virginia, September 1994; Florida, February 1995; Massachusetts, December 1995; Louisiana, March 1996; Texas, March 1996; Maryland, May 1996; Washington, June 1996; Connecticut, July 1996; Kansas, August 1996; Arizona, August 1996; Michigan, August 1996; Oklahoma, August 1996; New Jersey, September 1996; Utah, September 1996; Illinois, November 1996; Iowa, November 1996; New York, January 1997; Hawaii, January 1997; Wisconsin, February 1997; Indiana, February 1997; Alaska, April 1997; Pennsylvania, April 1997; Montana, May 1997; Arkansas, May 1997; Ohio, May 1997; South Carolina, May 1997; Missouri, May 1997; New Mexico, May 1997; Nevada, May 1997; Vermont, May 1997; New Hampshire, June 1997; Colorado, June 1997; Oregon, June 1997; Idaho, June 1997; California, June 1997; Rhode Island, June 1997; Maine, June 1997. [<http://www.library.ucsf.edu/tobacco/litigation/summary.html>]

changed the legal grounds of their complaints against the industry. The architects of the Mississippi case, for example, shifted the focus from the harms caused to smokers to the harms caused to the health care system. They did this for two reasons. First, they believed that by focusing on the states' losses, the question of smokers' own conduct would be completely mooted, thus removing the single most important weapon in the tobacco industry's arsenal.

Second, and equally as important, by making the state the plaintiff, all the issues of class certification raised in the Castano context would be mooted as well, since instead of millions of plaintiffs, there would be only one.

[Sebok, 2004].

Some considered that these theories [of unjust enrichment] were largely untested and as a result "the claim that the state's interest was independent of and distinct from the individual smoker's generally rested on shaky foundation " [Rabin, 2001, p. 337]. Perhaps this was not entirely disadvantageous, if the novelty of the cases, despite these uncertainties, made tobacco companies nervous:

Regardless of the legal merits of these cases, it is understandable that the tobacco companies would be afraid of them. With the home state attorney general suing them before a home state jury, they have reason to fear that a huge award might be imposed on them.

[Sugarman, 1998].

The rise and fall of the 'global' settlement

The first company to break ranks and decide to end a decades' long pattern of refusing to settle any claim against it was the Liggett Group, lead by majority shareholder Bennett LeBow. In March 1996, Liggett offered to settle four of the five state suits then pending as well as the Castano class action (which had not yet been decertified). But Bennett LeBow was not the only person to think that a settlement was a good business decision and that they industry should be "willing to buy, at a very considerable price... relief from litigation uncertainty." [Rabin, 2004].

The potential for a larger settlement was floated by some of tobacco's committed opponents and careful observers. In an April 1996 article in the New York Times Magazine, Richard Kluger (author of the best selling book, *Ashes to Ashes*), proposed a "Peace Plan for the Cigarette Wars". He suggested a "sweeping legislative compromise," involving blanket immunity for future claims, FDA regulation, larger health

warning messages, implementation of smoke-free workplaces, an end to youth smoking, increased taxes with dedicated funding for anti-smoking campaigns. [Kluger, 1996]. A similar concept was proposed in August that year by Richard Scruggs, lawyer for Mississippi and brother-in-law of Senate Majority Leader Trent Lott. His plan proposed that in exchange for legislation which capped damages for pending law suits, the industry would make large payments to the states and would agree to FDA regulation as well as legislative incentives to reduce youth smoking. [Annas, 1997].

On June 20, 1997, after months of rumors and confidential discussions, the attorneys general announced that they had reached "an historic settlement with the tobacco industry." The expectations for the settlement's impact were high:

"Today is V-Day for the American people in the war on tobacco," said Mississippi Attorney General Michael Moore. "This agreement will do more for the public health of our nation than all of our lawsuits combined—even if we had all won our individual suits. If enacted by Congress, it will save more lives than any public health initiative in memory."

[Kamber Group, Press release on behalf of the Attorneys General Offices, 1997].

The independence of the spheres of influence of national legislative bodies and state attorneys general became quickly apparent when the settlement so jubilantly revealed went for Congressional approval. Neither Congress nor the President supported the settlement as it was drafted. Through legislative proposal (S1415, the *Universal Tobacco Settlement Act*, a.k.a. the "McCain" bill), attempts were made to find a reformulation agreeable to the negotiators and elected public representatives. Efforts were eventually abandoned in June 1998, a year almost to the day from the announcement of the settlement.

The settlement received a rough ride in other quarters as well. The tobacco control community was deeply, at times bitterly, divided, especially over the provisions which extended immunity from future lawsuits. [Pertschuk, 2001].

During the year-long review of the 'global' settlement and before its Congressional implosion, tobacco companies settled with the four states whose actions were closest to the trial process: Mississippi on July 3, 1997, Florida on August 25, 1997, Texas on January 16. The only case to go to trial, Minnesota, began hearings on January 16, 1997 but was settled on May 8, 1997 before the jury could hear closing arguments.

**BLOWING SMOKE IN FRONT OF A FAN:
DAVE BARRY. AUGUST 10, 1997**

Q: Could you please explain the recent historic tobacco settlement

A. Sure! Basically, the tobacco industry has admitted that it is killing people by the millions, and has agreed that from now on it will do this under the strict supervision of the federal government.

Q: Will there be monetary damages assessed?

A: Yes. To compensate for the immense suffering caused by its products, the tobacco industry will pay huge sums of money to the group most directly affected.

Q: Lawyers?

A: Yes.

Q: Will the federal government also receive large quantities of money?

A: Of course.

Q: How will the tobacco industry obtain this money?

A: By selling more tobacco products.

Q: What if consumers stop buying tobacco products?

A: That would be very bad. That would mess up the economics of the whole thing. The government would probably have to set up an emergency task force to figure out ways to get people smoking again in order to finance the historic tobacco settlement.

Q: If the government really wants people to stop smoking, how come it doesn't just make cigarettes illegal?

A: Because people would smoke them anyway.

Q: Then how come the government makes crack cocaine illegal?

A: That is an unfair comparison. The tobacco industry is merely selling a deadly product; the crack cocaine industry is guilty of something far far worse.

Q: Failure to make large political donations??

A: Yes

In the wake of the global settlement

Congressional talks on a settlement may have collapsed, but state attorneys general and tobacco companies had not yet resolved any but four cases. Discussions began again when the court ordered representatives in the Washington state lawsuit to attempt negotiations for an agreement. The Washington case had already been weakened by pretrial decisions that reduced the potential claim of the state. These discussions expanded, and continued, and five months later, on November 17, 1998, a new settlement was announced between the four major companies (Philip Morris, RJ Reynolds, Brown and Williamson, Lorillard).

This "Master Settlement Agreement," about 300 pages in length, detailed both financial agreements (such as \$206 billion in payments to state governments in the first 25 years, payments to lawyers, payments for public education), marketing agreements (such as the suspension of outdoor advertising and the use of cartoon characters), behavioural agreements (such as limits on lobbying and the disbanding of some trade organizations). A summary of the agreement as provided by the National Association of Attorneys General is shown in Table 1.

The negotiators, learning perhaps from the tortuous deliberations over the previous 'global' settlement, did not allow this agreement to twist in the wind: states that had not been party to the negotiations had only 4 days to decide whether to join in. Health groups widely criticized both the agreement and the process. Among the concerns identified was:

The way it prevented city or other subordinate government agencies from suing tobacco companies for "all future acts, even those unrelated to Medicaid reimbursement, the subject of this action."

The protection of the multi-national assets of tobacco companies.

Permission for tobacco companies to continue to promote tobacco products as long as the "primary" purpose is not to market to children. [Dearglove, 2000].

Nevertheless, all 46 states and the five territories which had not yet settled with the industry accepted the terms by the deadline."

Responding, perhaps, to criticisms from those who had wanted the states to resolve their disputes in courtrooms, and not through pre-trial settlements, government negotiators revealed that the uncertain

court outcomes had put pressure on governments to settle, just as it had on industry.

"One of the Attorney Generals reticent in embracing the deal, Richard Blumenthal of Connecticut, stated, "There is no assurance we could have obtained these public health advances in our lawsuit...In any legal action, no one can know what the results will be or when they will be achieved. The advances in this settlement are certain and immediate" [quoted in Dearlove, 2000].

Unlike the 'global' settlement, legislative approval was not required. It did, however, require court agreement in each of the states involved. By the 12 November 1999, the MSA had been approved in the courts of 45 of the 52 jurisdictions, which was enough to bring it into force.

The U.S. Department of Justice steps in

Following the collapse of the McCain bill, there was focused interest in Washington D.C. in the U.S. federal government taking its own action against the companies. In his State of the Union address, President Clinton promised that a federal damages recovery suit would be filed.

The Department of Justice had, since 1994, been investigating the industry for criminal wrong-doing since 1994. The 1994 statement by tobacco CEO's that they "did not believe that nicotine was addictive" triggered an investigation on alleged perjury. This grew into a larger, more formal grand jury investigation following a complaint by Congressman Meehan. By 1998, there were three criminal investigations coordinated by the Justice Department: one related to misconduct arising from alleged "false statements to agencies and officials of the federal government," one related to a "conspiracy by major tobacco manufacturing companies to suppress legitimate medical research and promote biased research" and a third related to alleged securities fraud by "failing to disclose all it knew about a nicotine." [U.S. Surgeon General, 2000, p. 257].

On September 22, 1999, the Department of Justice announced that criminal charges would not be laid. On the same day, however, they filed a civil suit in federal court. *United States v. Phillip Morris, Inc.* was underway.

The Department of Justice (DOJ) alleged that for 50 years, the cigarette companies conspired to defraud

and mislead the American public and to conceal information about the effects of smoking. It sought the return of the profits obtained through these illegal acts, payments to establish programs to address the ongoing effects of their illegal conduct, and injunctions against making false, misleading or deceptive statements about cigarettes or engaging in public relations campaigns which misrepresent the harms of smoking.

Although the DOJ relied on other statutes to claim recovery of Medicare and other government health care costs, it was the provisions of the *Racketeer Influenced and Corrupt Organizations Act* (RICO) statute which survived a ruling in 1996 by the trial judge, Gladys Kessler.

It took 5 years after filing before the trial began (on September 9, 2004), and by the time hearings ended in June 2005 more than 80 witnesses had been heard over 117 trial days. In August 2006, Judge Kessler finds that the companies had, in fact, violated civil racketeering laws. Although she rejected the government's request for a payment of \$10 billion for a smoking cessation program, she determined that the companies must to stop using the descriptors "light" and "mild." A few months later, the U.S. Circuit Court of Appeals stayed implementation of her remedies and orders until the appeal process was concluded, a process that will not be resolved for years.

Towards regulating tobacco under the Food and Drug Administration

There have been continued attempts to bring tobacco products under the authority of the Food and Drug Administration since the collapse of the McCain bill in 1998, and there is reason to believe that this may eventually come to pass. In February 2007, bicameral, bipartisan legislation was introduced (The *Family Smoking Prevention and Tobacco Control Act*). This legislative proposal is "the product of months of negotiations in which lawmakers sought to balance the competing interests of public health groups and Philip Morris, the nation's leading cigarette company." This law would provide the FDA with regulatory authority to restrict advertising and promotion, product design and composition, increase the size and number of health warning messages on tobacco products, among other things. [Congressional Research Service, 2007].

* Parties to the case have until May 2008 to finalize their submissions on the appeal. [Altria, www.altria.com/media/DOJ.asp]

TABLE 1:

KEY PROVISIONS OF THE MASTER SETTLEMENT AGREEMENT

THE FOUNDATION

- Requires the industry each year for ten years to pay \$25 million to fund a charitable foundation which will support the study of programs to reduce teen smoking and substance abuse and the prevention of diseases associated with tobacco use.

The foundation will:

- Carry out a nationwide, sustained advertising and education program to counter youth tobacco use and educate consumers about the cause and prevention of diseases associated with tobacco use.
 - Develop, disseminate and test the effectiveness of counter advertising campaigns.
 - Commission studies, fund research and publish reports on factors that influence youth smoking and substance abuse.
 - Track and monitor youth smoking and substance abuse with a focus on reasons for increases or failures to decrease tobacco and substance use rates.
- Creates an industry-funded \$1.45 billion national public education fund for tobacco control.
 - The fund is established to carry out a nationwide sustained advertising and education program to counter youth tobacco use and educate consumers about tobacco-related diseases.

TOBACCO MERCHANDISE

- Beginning July 1, 1999, bans distribution and sale of apparel and merchandise with brand-name logos (caps, T-shirts, backpacks, etc.).

CARTOON CHARACTERS

- The Settlement bans use of cartoons in the advertising, promotion, packaging or labeling of tobacco products.

TARGETING YOUTH

- Prohibits targeting youth in advertising, promotions, or marketing.
- Bans industry actions aimed at initiating, maintaining or increasing youth smoking.
- Requires companies to:
 - Develop and regularly communicate corporate principles which commit to complying with the Master Settlement Agreement and reducing youth smoking.
 - Designate executive level manager to identify ways to reduce youth access and consumption of tobacco.
 - Encourage employees to identify additional methods to reduce youth access and youth consumption.

PUBLIC ACCESS TO DOCUMENTS AND COURT FILES

- Requires tobacco companies to open, at their expense, a website which includes all documents produced in state and other smoking and health related lawsuits.
- Requires the industry to maintain the site for ten years in a user-friendly and searchable format (requires and index and other features to improve searchable access).
- Requires the industry to add, at its expense, all documents produced in future civil actions involving smoking and health cases.

DISSOLUTION OF ORGANIZATIONS

- Disbands the Council for Tobacco Research, the Tobacco Institute, and the Council for Indoor Air Research.
- Requires all records of these organizations that relate to any lawsuit to be preserved.
- Provides regulation and oversight of new trade organizations.

OUTDOOR ADVERTISING

- Bans most outdoor advertising, including: billboards, signs and placards in arenas, stadiums, shopping malls, and video game arcades.
- Limits advertising outside retail establishments to 14 square feet.
- Bans transit advertising of tobacco products.
- Allows states to substitute, for the duration of billboard lease periods, alternative advertising which discourages youth smoking.

PRODUCT PLACEMENT AND SPONSORSHIPS

- Bans payments to promote tobacco products in movies, television shows, theater productions or live performances, live or recorded music performances, videos and video games.
- Prohibits brand name sponsorship of events with a significant youth audience or team sports (football, basketball, baseball, hockey or soccer).
- Prohibits sponsorship of events where the paid participants or contestants are underage.
- Limits tobacco companies to one brand name sponsorship per year (after current contracts expire or after three years - whichever comes first).
- Bans tobacco brand names for stadiums and arenas.

FINANCIAL RECOVERY FOR THE STATES

- Requires industry payments to the states in perpetuity, with the payments totaling about \$206 billion through the year 2025.
- Provides that distributions to states will be made based on formulas agreed to by Attorneys General.
- Requires annual payments by the industry to begin April 15, 2000.

- Provides that if all states participate in the settlement, annual payments will "ramp-up" beginning with a \$4.5 billion payment on April 15, 2000. Ensuing April 15 payments will be at the following rates:

- 2001: \$5 billion
- 2002-2003: \$6.5 billion
- 2004-2007: \$8 billion
- 2008-2017: \$8.139 billion (plus \$861 million to the strategic fund)
- 2018 on: \$9 billion

- Requires tobacco companies to make "up front" payments of nearly \$13 billion in the following amounts: \$2.4 billion in 1998, \$2.472 billion on January 10, 2000, \$2.546 billion in 2001, \$2.622 billion in 2002, and \$2.701 billion in 2003.
- Requires the companies, on April 15, 2008 and on April 15 each year through 2017, to pay \$861 million into a strategic contribution fund.
- Money from the fund will be allocated to states based on a strategic contribution formula developed by Attorneys General in June 1999. The allocation formula reflects the contribution made by states toward resolution of the state lawsuits against tobacco companies.

ENFORCEMENT

- Provides court jurisdiction for implementation and enforcement
- If the court issues an enforcement order enforcing the agreement and a party violates that order, the court may order monetary, civil contempt or criminal sanctions to enforce compliance with the enforcement order.
- Key public health provisions of the agreement are included in consent decrees filed in each state.
- Settling states or tobacco companies may apply to the court to enforce the terms of the consent decree.
- Allows settling state Attorneys General access to company documents, records and personnel to enforce the agreement.
- On March 31, 1999, the industry is directed to pay \$50 million which will be used to assist settling states in enforcing and implementing

the agreement and to investigate and litigate potential violations of state tobacco laws.

FREE SAMPLES

- The Settlement states that free samples cannot be distributed except in a facility or enclosed area where the operator ensures no underage person is present.

GIFTS BASED ON PURCHASES

- The Settlement bans gifts without proof of age.

LOBBYING

- Prohibits tobacco companies from opposing proposed state or local laws or administrative rules which are intended to limit youth access to and consumption of tobacco products.
- The industry must require its lobbyists to certify in writing they have reviewed and will fully comply with settlement terms including disclosure of financial contributions regarding lobbying activities and new corporate culture principles.
- Prohibits tobacco lobbyists from supporting or opposing state, federal, or local laws or actions without authorization of the companies.

PROHIBITION ON AGREEMENTS TO SUPPRESS RESEARCH

- Prohibits manufacturers from jointly contracting or conspiring:
 - To limit information about the health hazards from the use of their products;
 - To limit or suppress research into smoking and health; and
 - To limit or suppress research into the marketing or development of new products.
- Prohibits the industry from making any material misrepresentations regarding the health consequences of smoking.

MINIMUM PACK SIZE

Limits minimum pack size to 20 cigarettes through December 31, 2001.

Prohibits tobacco companies from opposing state legislation which bans the manufacture and sale of packs containing fewer than 20 cigarettes.

COST RECOVERY AND ATTORNEY FEES

- Requires the industry to reimburse states for costs, expenses and fees for government attorneys.
- Requires the industry to pay for outside attorneys hired by the states.
- Establishes two payment methods - liquidated fee agreement and arbitration.
- Outside counsel can negotiate a liquidated fee agreement with the industry, and if accepted, would be paid from a \$1.25 billion pool of money from the tobacco industry over four years.
- If outside counsel rejects the liquidated fee process or cannot agree to an offer, they can go through arbitration.
- A three-member arbitration panel will be established with two permanent members and a member from the state represented by the outside counsel.
- The industry will pay whatever the arbiters award, but timing of the payment will be subject to a \$500-million-per-year cash flow cap.

3 A shorter Canadian history

In recent years, Canadian litigation efforts have echoed those in the United States but at a much smaller scale. Although there were no cases filed in Canada during the 'first wave' of U.S. lawsuits, by the mid 1980s, litigation was seen by health activists and governments as a way to advance public goals.

A full description of current Canadian litigation is available elsewhere.* The number of Canadian cases is small enough, however, that a brief description can still provide a near-complete listing of all known cases.

INDIVIDUAL ACTIONS

British Columbia is the Canadian jurisdiction with arguably the most interesting litigation history, and it was in this province that the very first lawsuit against a tobacco company was filed. On June 20, 1988 Vancouver lawyer Russell Stanton filed a suit against RJR MacDonald Inc. on behalf of his client, Roger Perron. Roger Perron had lost both his legs through amputation as a result of Buerger's Disease. The claim alleged that RJR MacDonald had "failed to carry out proper research" and had "failed to warn" smokers, physicians and the public about the relationship between Buerger's disease and smoking. The courts found that the suit was filed too late, and that the limitation period had expired. [Smith, 2002].

In 1996, Russell Stanton initiated another case based on Buerger's disease (David Rowland was the plaintiff), but this case was abandoned when Russell Stanton died. In 2002, Nova Scotian Peter Stright filed a suit for damages resulting from Buerger's disease (the case has not yet been heard).

The one other current individual case is a 1997 claim filed by by Mirjuana Spasic, who was suffering from lung cancer. Her case was represented by the same law firm, Sommers and Roth that represented the Caputo case. In addition to negligence and misrepresentation, her claim was based on the industry's alleged 'spoliation' of evidence. The novelty of this claim allowed the tobacco companies to prolong the pre-trial period as they protested this claim. Although Ms. Spasic died in 1998, her case has been continued by her estate. Ten years after filing, it has still not been tried.

Cases which have been resolved (but never in favour of the injured smoker) or abandoned include:

McIntyre v. Imperial Tobacco Company Ltd.

In 1999 Ronald McIntyre's widow entered into a contingency arrangement with Doug Lennox of Rochon Genova. Because contingency fees are not provided for under Ontario courts, the case needed the approval of the courts for this financial arrangement. Although the issue of contingency fees was somewhat resolved by 2002, Doug Lennox had changed law firms by this time and no further action has been taken in the case.

Kardos v. Imperial Tobacco Canada Ltd.

On April 10, 2000, Janos Kardos of Calgary, Alberta filed a claim against Imperial Tobacco for \$2 million for damages resulting from the death of his wife, Shirley Cardos. [Court of Queen's Bench of Alberta Action 0001-05941].

* For a more comprehensive report on Canadian litigation efforts, see the Non Smokers Rights Association "Tobacco-related litigation in Canada", 2007.

CLASS ACTIONS

The first class action suit against a tobacco company, was filed in Toronto on January 13, 1995 on behalf of three claimants, Donald Letourneau, David Caputo, and Luna Roth. Donald Letourneau withdrew from the case shortly thereafter, and the case was renamed in May of that year after another plaintiff, Caputo. This case was filed against the three major tobacco companies operating in Canada (Imperial Tobacco, RJR Macdonald, and Rothmans, Benson and Hedges), and sought damages of \$1 million per claimant as well as punitive damages and the funding by tobacco companies of "nicotine addiction rehabilitation centres". In 2004, certification of the case was disallowed because it was too broad and did not meet the requirements for certification. The same judge, Warren Winkler, also rejected a tobacco industry attempt to reclaim costs from the Plaintiff's lawyers, Sommers and Roth.

Another unsuccessful application for certification as a class action arose out of the deaths of three young people in a fire caused by cigarettes. On January 11, 2000, Davina Ragoonanan, mother of Jasmine and sister of Philip filed a claim against Imperial Tobacco Canada, Ltd., Rothmans, Benson & Hedges and JTI-Macdonald as a class action. On October 31, 2005, the Ontario Superior Court rejected certification of the case as a class action.

The first class action suit to successfully be certified in Canada was filed in May 2003. On behalf of representative plaintiff Kenneth Knight, Vancouver law firm Klein Lyons filed a suit against Imperial Tobacco Canada Ltd, alleging the company engaged in "deceptive trade practices" when it used the term 'light' on its Players Light cigarettes. Working on the suit is Doug Lennox, who had also represented Joe Battaglia. The suit seeks a return of the purchase price of these cigarettes, as well as directions from the company to change the way it markets these products. The "Knight" case was certified (on February 8, 2005). (Two other class actions involving light cigarettes have been filed - "Sparkes" in Newfoundland and "Gagnon" in Quebec - but certification on neither has been decided.)

Shortly after the certification of the 'Knight' case, the Quebec Superior Court authorized two class actions (recours collectives), to be managed concurrently. The "Letourneau" and "Blais" cases claiming damages for, respectively, addiction and lung disease, had begun in 1998.

PROVINCIAL GOVERNMENT ACTIONS TO RECOVER DAMAGES FROM HEALTH CARE COSTS

British Columbia was the first Canadian government to take the tobacco industry to court, and it modeled its approach on the contemporaneous experiences of the United States. The B.C. legislature passed a law to pave way for the case (*The Tobacco Damages and Health Care Costs Recovery Act*) in June 1997, and modeled this legislation on that adopted in Massachusetts and Florida [Berryman, 2004]. The statute was amended in 1998 to direct courts to not require government to prove causation, and a suit was filed in November 1998. The constitutional validity of this law was immediately challenged. The industry argued that the government had gone beyond its provincial powers, and that it had improperly interfered with common law doctrines of tort, civil procedure and independence of the judiciary, as well as arguing that it was discriminated against. Because the first law was ruled 'ultra vires,' B.C. amended its legislation and its suit, and filed its claim anew in January 2001.

There has been much in-court procedural wrangling, including a trip to the Supreme Court to establish the government's authority to pursue the case in the manner they are doing. The government side has recently prevailed in all procedural disputes. Courts have ruled the current version of the *Tobacco Damages and Health Care costs Recovery Act* to be valid law. They have also ruled that the government's formal complaint has been properly stated. The complaint names not only all the big Canadian tobacco companies, but also their multinational parent companies. Now the tobacco companies have tried to blame any alleged wrongs on the federal government by naming it as a third party through notices filed in court. With all the procedural disputes, the case has still not reached trial.

Other governments have taken steps towards filing cases similar to British Columbia's. New Brunswick passed a *Tobacco Damages and Health Care Costs Recovery Act* in 2006 and announced introduced and given first reading in the New Brunswick Legislative Assembly. In September 2007, the selection of lawyers (who will work on a contingency fee basis, earning up to 22% of any settlement) was announced.

RICO CLAIMS

The federal and Ontario governments attempted to use U.S. anti-racketeering provisions to claim damages. In 1999, the federal government filed a claim for \$1 billion in taxes and duties that it alleged the government had been defrauded of as a result of contraband activities from 1991 to 1994. The judge rejected the case on the basis that it was inconsistent with the 'revenue rule' that protects American companies from actions in the U.S. for tax actions by other governments. The Canadian government appeal of this decision was unsuccessful.

In March 2000, with lawyers working on a contingency arrangement, the Ontario government filed suit in New York for recovery of health care damages. The suit was dismissed in August of that year. [Smith, 2002].

CLAIMS IN "SMALL CLAIMS COURT"

The first Canadian product liability trial against a tobacco company took place in November 2000, following a claim originally filed in 1997 in Ontario's Small Claims court by Joseph Battaglia. Joseph Battaglia smoked *Matinée* cigarettes, and the case alleged manufacturers of *Matinée* cigarettes, Imperial Tobacco, negligently misrepresented of the amount of nicotine delivered to the smoker by these so-called low delivery products, and failed to warn. Justice Pamela Thompson rejected the argument in a ruling issued in June of 2001.

In December 1999, a small claims court (*petites créances*) rejected a claim for \$300 Cecilia Letourneau for reimbursement of the costs of her nicotine replacement therapy. (This is the same Cecilia Letourneau who subsequently became a plaintiff in a successfully certified class action suit).

OTHER GOVERNMENT ACTIONS.

To recover revenues lost as a result of smuggling, governments have taken the following actions:

- A federal lawsuit against JTI-Macdonald and related companies for \$1.5 billion filed in Ontario Superior Court on August 13, 2003.
- An order by the Quebec government to JTI-Macdonald to pay \$1.36 billion to the Quebec government for taxes, penalties and interest, arising from contraband. This action prompted a bankruptcy protection, which, in turn, prompted claims from 6 other provinces. Total claims against JTI-Macdonald now totaling \$9.6 billion.
- A criminal trial is pending for JTI Macdonald Corp and its former president alleging they exported billions of tax-free Canadian cigarettes into the United States so they could be smuggled back into Canada through the Akwesasne Mohawk reserve near Cornwall and sold on the black market.

The RCMP conducted a raid on Imperial Tobacco in November 2004, looking for documents to support allegations that Imperial Tobacco was similarly involved in smuggling in the 1990s. No charges have yet been laid.

4 A closer look at the MSA provisions

INTRODUCTION TO THE MSA

The settlement (outlined in table 1, pg. 14-15), contained wide-ranging provisions, which for the purposes of this analysis are grouped into the following categories:

A. FINANCIAL REMEDIES

The companies agreed:

- A1** to fund a National Foundation to research and run public education campaigns (\$1.45 billion between 2000-2003 and \$250 million between 2000 and 2010).
- A2** to make payments to states in perpetuity with an estimated total of \$206 billion over the first 25 years.
- A3** to reimburse states for the attorney fees, and to pay for outside counsel hired by the states.
- A4** to agree on an enforcement process, and to contribute to its costs.

B. CORPORATE CONDUCT REMEDIES

The companies agreed

- B1** to make a commitment to reducing youth access and consumption.
- B2** to disband tobacco trade associations and no longer suppress research
- B3** to restrict their lobbying.
- B4** to open their records and research to the public.

C. MARKETING REMEDIES:

The companies agreed:

- C1** to not make youth the primary purpose of any marketing
- C2** to ban cartoon characters in advertising;
- C3** to restrict brand-name sponsorships of events with significant youth audiences;
- C4** to end product placement in movies
- C5** to end outdoor advertising;
- C6** to stop providing free samples to youth
- C7** to set the minimum cigarette package size at 20 until 2001
- C8** to accept other marketing restrictions .

D. OTHER REMEDIES

The companies agreed to a mechanism to ensure compliance, and to provide some initial funding to support implementation and enforcement.

A. FINANCIAL REMEDIES

A1) The (Legacy) Foundation

The MSA required the settling companies to pay \$25 million each year for ten years to fund a charitable foundation to support the study of programs to reduce teen smoking. The foundation was to be charged with a nationwide, sustained advertising and public education program to counter youth tobacco use. It was also charged with evaluating the effectiveness of counter advertising campaigns, to support research on factors that contribute to youth smoking, and to track and monitor youth smoking. A separate fund of \$1.45 billion for a nationwide public education campaign was also established. [NAAG, 1998b].

The MSA did not provide this foundation with a 'carte-blanche,' to conduct its public education campaigns. It prohibited "political activities or lobbying" as well as "any personal attack on, or vilification of any person ... company, or governmental agency, whether individually or collectively." [Healton, 2001].

The foundation established to fulfill this role was the American Legacy Foundation (ALF). Established in 1999, it launched its public campaigns in early 2000,

and decided on 4 primary goals for its first 5 years of operation:

- *To reduce tobacco use among youths*
- *To reduce exposure to secondhand smoke in all populations*
- *To increase the successful quit rate among all ages and populations*
- *To reduce disparities in access to prevention and cessation services and in exposure to second hand smoke*

[Healton, 2001].

One of the Legacy Foundation's first actions was to adopt, re-energized and make national the "Truth" campaign that had been pioneered in Florida. (Florida was one of the four states that settled outside of the MSA, and similar provisions had been included in that state's settlement for the establishment of a public education campaign).

The Truth campaign used the novel and innovative concept of 'branding' (the name usually appears as Truth®), seeking to market knowledge to youth in the same way that sneakers and food were marketed to

**TABLE 2
AMERICAN LEGACY FOUNDATION REVENUES AND EXPENDITURES 2000-2006**

Revenue Source – (\$000s)							
	2006	2005	2004	2003	2002	2001	2000
Base	25,000	25,000	25,000	25,000	25,000	25,000	25,000
Public Education	937	3,687	3,407	272,753	273,624	276,027	269,684
Smokeless Tobacco	14,880	13,187	11,607	10,139	8,747	7,428	6,154
Investment	127,886	103,122	140,885	33,631	-40,925	-12,480	19,068
Other	7,655	6,415	7,469	2,491	582		
Total	176,358	151,411	188,368	344,014	267,028	295,975	319,906
Expenditures – (\$000s)							
Counter-marketing and public education	62,620	71,685	91,713	75,800	93,280	125,975	107,549
Grants	16,457	14,626	19,073	22,987	20,961	11,191	465
Other	13,177	17,967	20,898	31,235	25,167	158,809	211,893
Total	92,254	104,278	131,684	130,022	139,408	295,975	319,907

[Source: American Legacy Foundation, Progress reports 2001 – 2006].

them. This approach sought to apply branding principles to social marketing, and to use 'brand equity' values as a protection from youth smoking. By creating a brand value for Truth® that could compete with the strength of the marketing brands of cigarettes, the campaign could create a value barrier to smoking. Branding was self-reinforcing, and the marketing attempted to "encourage youth to adopt and pass on the values of the truth brand to peers." [Evans, 2005].

Challenges faced by the Legacy Foundation

The campaign was controversial (by design), and generated attention for its edgy approach. The iconic 'body bag' ad showed teenagers piling 1200 body bags around the headquarters of Philip Morris. Teenagers gave high levels of approval to the ads, and the campaign won International advertising awards. [Healton, 2001].

The reaction from tobacco officials was less enthusiastic. Lorillard challenged this campaign as breaking the no-vilification/no-personal attack provisions of the agreement, and filed court proceedings in an attempt to end them (both the Chancery Court and Supreme Court of Delaware rejected Lorillard's claims).

The launch of the "Truth" campaign by the Legacy Foundation was the first national anti-smoking campaign in the United States since the three-year 'Fairness Doctrine' ads ended in 1970 * [Ibrahim, 2007].

In addition to the Truth® Campaign, the Foundation also supported research efforts, cessation programming, youth empowerment programs, and programs focused at special populations. [Healton, 2004].

Court challenges from tobacco companies who alleged that the Legacy's campaigns infringed the 'no vilification' clauses of the MSA were not the only challenge faced by the Legacy Foundation in its first decade. Sustaining funding proved to be more difficult than was predicted in 1998.

Most of the money flowing to the American Legacy foundation dried up after 2003. That's because the funding was contingent on the four 'original



participating manufacturers' (Philip Morris, RJ Reynolds, Lorillard and Brown and Williamson) maintaining a market share of at least 99.05%. By 2003, smaller companies had eroded their market share, and the companies no longer had a legal duty to continue funding the public education component. This was not anticipated in 1993: "In retrospect, that percentage was probably based on erroneous projections." [Schroeder, 2004].

Significant efforts were launched to try to overcome the provisions that allowed the tobacco companies to cease funding the Legacy Foundation. In early 2004, a Citizens' Commission to Protect the Truth was launched, involving a very distinguished panel of health leaders:

All former U.S. Secretaries of Health, Education and Welfare and Health and Human Services; all former U.S. Surgeons General; and all former Directors of the Centers for Disease Control and Prevention today launched The Citizens' Commission to Protect the Truth to convince tobacco companies to continue financing the Public Education Fund. This fund, established under the 1998 Master Settlement Agreement between the states and tobacco companies, provides the financial resources for The American Legacy Foundation to conduct truth®, the most effective media campaign in reducing tobacco use by children and teenagers.

[www.protectthetruth.org, accessed October 1, 2007]

* Between 1967 and 1970, free airtime valued at \$75 million was provided for anti-smoking programmes as part of the "Fairness Doctrine" decision by the Federal Communications Commission that television and radio stations should provide free time for antismoking advertising when they aired paid cigarette advertising. This requirement on broadcasters was terminated in 1970 after the tobacco industry arranged through Congress a voluntary removal of all cigarette advertising on television and radio. [Ibrahim, 2007]

Despite the failure of all attempts to over-come the removal of funding, the Foundation continued its efforts beyond 2003 by investing slightly more than half of the funds it received, and subsequently drawing on those investments after funding by tobacco companies was reduced. "These long-term investments will fund the foundation in perpetuity but at a much reduced level." [ALF, 2005]. The Legacy Foundation spent less than a third on programming in 2006 than it did five years earlier (From \$295 million to \$92 million). [ALF, 2002, 2004, 2005, 2006].

Impact of the American Legacy Foundation public education campaigns

The American Legacy Foundation's contribution to public health has been generally well received, and the evaluation of its impact has been positive.

Funding to start and support the first 5 years of the American Legacy Foundation made possible an aggressive, impressive public education campaign. A significant aspect of that campaign was engaging young people in designing counter advertising that would reach and affect their peers. The truth® campaign has proved innovative and effective.

[Niemeyer, 2004].

A review by the Center for Disease Control of best practices in tobacco control singled out the Truth campaign as an effective approach:

In 2000, the American Legacy Foundation launched truth®, a national campaign to discourage tobacco use among youth, with funding from the MSA. An evaluation of this campaign, which demonstrated the health effects of smoking with graphic images and

revealed tobacco industry marketing practices, found it was associated with significant declines in youth smoking prevalence. This evaluation also demonstrated a dose-response relationship between exposure to the truth® campaign and youth smoking, with higher levels of exposure being related to lower prevalence of youth smoking.

[CDC, 2007, p. 33].

Evaluations of the Truth Campaign in Florida found that, two years after its launch in 1998, the prevalence of any past 30 day smoking among middle and high school students had dropped by 40% and 18%. [Farrelly, 2005]. The subsequent nation-wide version was also successful at reducing tobacco use. A review funded by the Legacy Foundation (but peer-reviewed) considered that one-fifth of the decline in youth smoking rates in the United States could be attributed to the Foundation's activities. [Farrelly, 2004].

Comparison with Canada

Canada does not have an agency equivalent to the American Legacy Foundation, but government and non-governmental organizations do deliver public education, cessation, research and other funding. National programmes are delivered by Health Canada through the Federal Tobacco Control Strategy.

No Canadian tobacco control campaigns have adopted the branded Truth approach, but nation wide mass media campaigns have been run by Health Canada. Health Canada has also funded regional campaigns. Comparative figures are provided in Table 3.

**TABLE 3:
COMPARISON OF HEALTH CANADA (HC) AND AMERICAN LEGACY FOUNDATION (ALF)
EXPENDITURES ON PUBLIC EDUCATION PROGRAMMING. (ALL FIGURES EXPRESSED IN \$000s)**

	2000-2001	2001-2002	2002-2003	2003-2004	2004-2005	2005-2006	2006-2007
Canada							
Population (000's)	30,750	31,082	31,373	31,676	31,990	32,300	32,623
HC expenditures	\$0	\$28,000	\$27,400	\$29,900	\$37,000	\$7,000	
Per capita	\$0.00	\$0.90	\$0.87	\$0.94	\$1.16	\$0.22	
United States							
Population (000's)	282,217	285,226	288,126	290,796	293,638	296,507	299,398
ALF expenditures	\$107,549	\$125,975	\$93,280	\$75,800	\$91,713	\$71,685	\$62,620
Per capita	\$0.38	\$0.44	\$0.32	\$0.26	\$0.31	\$0.24	\$0.21

[source: Population estimates from U.S. Census and Statistics Canada].

A2-a) Payments to state governments

Money received by state governments

The Settlement requires industry payments to the states in perpetuity. The estimate of revenues that was usually presented, however, ended in 2025. By this year, payments to state governments were stated to total \$206 billion.*

The actual payment that will be received by the states varies from the estimates depending on inflation and also depending on tobacco shipments (lower shipments/ smoking would result in lower payments). Each state was to receive a share based on a fixed percentage based on population and health care costs resulting from tobacco use. This percentage was written into the settlement. Payments varied widely: almost one-quarter of the payments went to only two states, New York and California and the lowest payment, to Wyoming, was for only one quarter of one percent [GOA, 2006].

The Agreement did not bind the state governments on how they were to spend the money. Disclosure of revenues and expenditures, however, has been made as a result of a 2002 law that required the Government Accountability Office (GOA) report on how states use payments received under the MSA from fiscal years 2002 to 2006. [GOA, 2006].

In its final report, issued in February 2007, the GOA provided information on the actual payments received by states for the years 2000 to 2005, as well as the estimated receipts for 2006. In that seven year

period, the 46 governments covered by the agreement received about \$60 billion, including \$42 billion in direct payments from tobacco companies and \$16 billion as a result of 'securitization', as shown in Table 4.

MSA transferred money from smokers – not shareholders – to governments

The most immediate effect of the state payments was an increase in the price of cigarettes by tobacco companies in order to generate revenues to cover settlement payments. That's because it was smokers, not shareholders, that absorbed the settlement costs. It was a defacto tax increase.

Cigarette prices surged 45 cents per pack on November 16, 1998, the day the Master Settlement Agreement was signed.

[Capehart, 2001].

Between 1998 and 2000, the consumer price index for cigarettes rose at ten times the rate of the overall consumer price index 60%,

[Capehart, 2001]

The fact that the increase in cigarette prices meant that it was smokers, not shareholders, who were bankrolling the settlement payments prompted some concern. Smokers, too, had arguably also been injured by the tobacco companies, but the state suits resulted in a financial transfer from smokers' pockets to government treasuries.

To the extent that actions of tobacco companies harmed the states, ultimate responsibility for past behaviour should fall on

**TABLE 4:
MSA PAYMENTS AND SECURITIZED PROCEEDS RECEIVED BY THE 46 STATES**

Fiscal year	MSA payments	Securitized proceeds	Total
2000-01	\$13,200,000,000	\$928,900,000	\$14,128,900,000
2002	\$6,238,393,496	\$3,838,376,465	\$10,076,769,961
2003	\$6,306,329,459	\$6,482,764,469	\$12,789,093,928
2004	\$5,340,128,223	\$4,374,698,723	\$9,714,826,946
2005	\$5,453,132,303	\$389,977,667	\$5,843,109,970
2006 (forecast)	\$5,441,567,020		\$5,441,567,020
Total	\$41,979,550,501	\$16,014,717,324	\$57,994,267,825

[Source: GOA, 2005, 2006, 2007].

* These payments are in addition to those negotiated by those states which had reached prior individual settlements in 1997 and 1998: Florida, Minnesota, Mississippi, and Texas. Payments under those four settlements would total \$40 million by 2025.

shareholders and on boards to which they delegated decision making responsibility. However, since the settlement payments were based on tobacco company sales rather than as a lump sum obligation, which would have been borne by shareholders, the payment schedule was structured like a per unit excise tax imposed on a commodity. Conceptually, such a tax is shifted to consumers of the product, and when the market structure is oligopolistic, as is the tobacco industry, there may be an overshifting of the tax...In the month following passage of the MSA alone, tobacco retail prices rose by 18.8% per pack

[Sloan, 2004].

It is important to understand that the companies are agreeing to pay out these rather large sums in a way that is almost sure to permit them to pass the costs on to smokers. In this way, the tobacco-related health care expenses of poor people with no insurance will really be subsidized by other smokers -- the very people that the public health community claims are addicted to smoking. In many ways this seems unfair. Yet the anti-smoking movement seems in agreement that raising the price of cigarettes is a good thing because that discourages consumption, especially by teenagers.

[Sugarman, 1998].

We must also say to the states that raising taxes on tobacco products is right because it reduces consumption. But higher taxes take a much bigger bite out of the budget of the poor

smoker than the well-off smoker. Higher taxes on cigarettes should not be a form of social injustice. States that raise taxes have a moral obligation to use these funds to expand prevention and cessation programs.

[Healton, 2001].

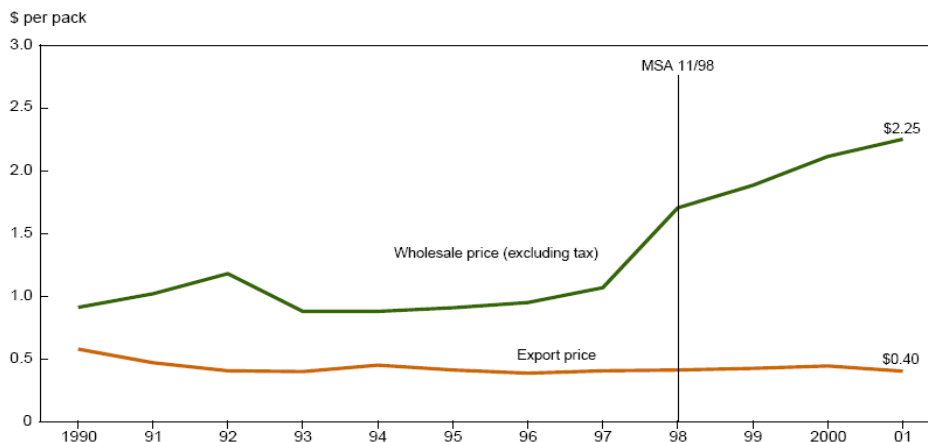
In simple terms, Settlement dollars are the blood money of the poor, and yet the states -- with some notable exceptions -- have made little effort to provide even the minimal amount of dollars recommended by the CDC to advance tobacco control. We must say to the states: Why did you move against the tobacco industry? Was it to protect your citizens from smoking, the No. 1 cause of death and disease? Or was it just a game of pork-barrel politics?

[Heaton, 2001].

Therefore, if we are happy with these results of the litigation, how should we explain away any anxiety we might feel over the lack of compensation to past smokers who were the target of the tortious conduct? One might take the position that, although the tobacco industry did in fact do some very bad things, individual smokers are not deserving recipients of compensation because they contributed to their own harm. I wonder, however, how many advocates of the state third-party litigation would admit to thinking this about the smokers themselves.

[Sebok, 2004].

Cigarette prices, 1990-2001



Source: Tobacco Situation and Outlook Report, Economic Research Service, USDA.

[Source: Capehart, 2001]

MSA paved the way for tax increases

Manufacturers' increases in wholesale prices were not the only post MSA events to increase the price of cigarettes. The litigation or settlement process is also considered to have emboldened state governments in increasing excise taxes, [Trogon, 2007] and licensing tobacco industry. [Derthick, 2005].

The combined effect of increased wholesale prices, increased taxes, inflation and other cost components increased the average retail price of a package of cigarettes to \$4.28, although state tax levels vary widely. [President's Cancer Panel, 2007].

These price increases are considered by many to have contributed to reductions in tobacco use in a post-settlement period. "Perhaps the clearest benefit derives from the cigarette price increase imposed to cover the first year's payments. That increase has produced a decline of about 10% in cigarette sales." [Daynard, 2001]. A later review of the effect of the price increases independent of other MSA provisions concluded that:

The MSA and the separate state settlements have led to a significant decrease in smoking since their implementation. The effect of the settlements was larger for younger adults: through 2002, the settlements reduced smoking rates by 3.5 percentage points for 18- to 20-year-olds and by 1 to 2 percentage points for individuals ages 21 and older. At the mean smoking rates in our sample, these figures correspond to a 13 percent decrease for ages 18 to 20 and 65 and older and a 5 percent decrease for other age groups. Most of the effect of settlements came through the

associated retail price increases for cigarettes. The remaining effect reflects changes in tobacco control policies other than state excise tax increases that may have been affected in preferences.

[Sloan, 2004].

In California, the impact was found to be almost as effective at reducing smoking as that of the previous decade's Proposition 99:

Over the period 1999 through 2002, the combined effect [of an additional 50 cents per pack state tax imposed by Proposition 10 of January 1999 and a 45% per pack increase in cigarette prices stemming from the master Settlement Agreement of November 1998] was to reduce cigarette consumption by 2.4 packs per capita per quarter (1.3 billion packs total over the 4 year period) and to raise state tax revenues by \$2.1 billion. These effects were similar to the effects of a 25% per pack tax increase enacted by Proposition 99 a decade earlier, although with decreased relative effectiveness as a measured by percentage of reduction in cigarette consumption divided by percentage of increase in taxation (-0.44 vs. -0.60).

[Hai-Yen Sung, et al. 2005].

Comparison with Canadian experience

Because of the way in which Settlement revenues have functioned as taxes, a comparison with Canada is perhaps most instructive by comparing total state tobacco tax revenues and settlement revenues with total provincial tobacco tax revenues.



Source: American Cancer Society. Cancer Prevention & Early Detection Facts & Figures 2006, American Cancer Society, Atlanta, GA 2006.

[Source: President's Cancer Panel, 2007]

In Fiscal 2007, U.S. states received \$14.7 billion in tobacco tax revenues, and a further \$7 billion in settlement payments. [Presidents Cancer Panel, 2007]. In the same period, Canadian provinces received approximately \$4.3 billion in tobacco tax revenues (the Canadian federal government received an additional \$2.5 billion). The population of the United States, at 303,000,000 is more than 9 times greater than that of Canada, at 32,000,000. [Statistics offices, Canada and U.S.], but the tax revenues from cigarettes at the state/provincial level in the United States, including settlement payments, are only 5 times as great.

A2—B) How MSA funds were used

The agreements, as mentioned earlier, did not limit how state governments could spend the money. Expenditures were tracked by the Government Accountability Office, among others, and show that the largest single budget objective was health (30% of funding over the first 6 years). Another large segment (23%) went to cover budgetary shortfalls. Tobacco-related expenditures included tobacco control (3.5%, or \$2.2 billion), payments to tobacco growers (1% or \$540 million). (See Table 6 and Figure 1). [GAO, 2005, 2006, 2007].

Governments were criticized by some in the health community for applying funds to projects that had nothing to do with health, and sometimes in ways that arguably hindered public health:

States have used their securitized monies for a range of uses reducing general state deficits; attracting news industry and jobs;

remodeling and building new schools, retiring capital debt

[Niemeyer, 2004]

The funds were even used for the building of a tobacco warehouse [Curidan, 2007].

[R]ather than seizing this one-time opportunity to devote significant funds to a major public health problem, the majority of state legislatures have allocated the settlement dollars to various items in their respective state budgets. In short, the MSA funds were seen as a timely "windfall" for states staggering under historic deficits.

[Niemeyer, 2004].

Very few states funded tobacco control at the levels recommended by the Centers for Disease Control [CDC, 1999]. At the 5 year mark, the leading national tobacco control advocacy agency admonished:

Only four states – Maine, Delaware, Mississippi and Arkansas – currently fund tobacco prevention programs at minimum levels recommended by the CDC.

Only eight other states are funding tobacco prevention programs at even half the minimum levels recommended by the CDC.

Thirty-three states are spending less than half the CDC's minimum amount.

Another five states – Michigan, Missouri, New Hampshire, South Carolina and Tennessee – and the District of Columbia allocate no significant state funds for tobacco prevention.

[Tobacco Free Kids, 2003].

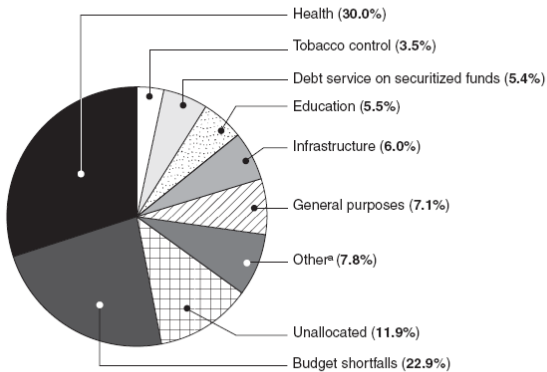
Some states even decreased their spending on tobacco control. California and Massachusetts, long

**TABLE 5
REVENUES FROM TOBACCO (EXCISE DUTIES AND TAXES AND SETTLEMENT PAYMENTS) AT THE STATE OR PROVINCIAL LEVEL, FISCAL 2007**

State/Provincial Tobacco Revenues	United States	Canada
Settlement	\$14,700,000,000	
Excise Taxes	\$7,000,000,000	\$4,308,562,482
Total	\$21,700,000,000	\$4,308,562,482
Per capita	\$72	\$128
Population	299,398,484	32,623,500

[Source: President's Cancer Panel, 2007; OTRU, 2007].

Figure 1: States' Allocations of Master Settlement Agreement Payments and Securitized Proceeds by Category, as a Percent of Total Allocations, Fiscal Years 2000-2005



Source: GAO analysis of data from state budget offices and their designs.

seen as leaders in comprehensive tobacco control programs, cut funding 34.3% and 90%, respectively. [Niemeyer, 2004]. Cuts to these programs and the early termination of Florida's high-powered program, exacerbated tensions between the public health community and decision makers about the allocation of settlement monies. Program cuts were often severe:

Funding for the Massachusetts tobacco control program was cut from \$48 million in 2002 to \$2.5 million in 2004. ... Similarly, tobacco control funding in Florida was cut from \$37.5 million in 2003 to \$1 million in 2004. The youth anti-tobacco campaign in Minnesota lost 75 percent of its funding in 2003 after operating for three years... In Mississippi, the previously exemplary state program has been entirely defunded due to aggressive opposition by the state's governor, a former tobacco lobbyist.

[President's Cancer Panel, 2007].

A particular irritant was the concurrent increase in tobacco industry marketing expenditures (which will be discussed in greater length below).

Based on the latest FTC figures, the tobacco companies are spending more than twenty dollars marketing their deadly products for every dollar the states spend to prevent tobacco use. Put another way, the tobacco companies spend more in three weeks marketing their products than all 50 states spend over a full year trying to prevent tobacco use.

[Tobacco Free Kids, 2003].

Why did states spend the money the way they did? After reviewing press coverage and other indicators of political context, one researcher found that only three states allocated the CDC recommended amounts to

tobacco control. The decision to divert funds to other purposes may have resulted from these monies being perceived as a "windfall", especially at times when financial crises hit state governments.

Our data suggest that the funds have been quickly formulated (at least by the press) as general state funds. Further, the presentation of allocation decisions through the media supports the allocation of funds to issues that can be constructed with a more immediately emotive rationale. Thus, we suggest that considerable caution is required in pursuing settlements with the industry where the objective is better funding for tobacco control efforts, as our data would suggest that such funds will be difficult to wrest away from claims made on behalf of other worthy causes. This is particularly relevant when aligned with the possibility that the tobacco industry may actually gain positive publicity from news coverage of settlement spending.

[Clegg Smith, 2003].

Other researchers found it a "very complicated analysis" to determine why some states appropriated higher funds to tobacco control, and others didn't. States in fiscal crisis were less likely to put money towards tobacco control, but other factors were at play too:

Tobacco-producing states and those with high proportions of conservative Democrats or elderly, black, Hispanic, or wealthy people tended to spend less on tobacco control. Education and medical lobbies had strong positive influences on per capita allocations for tobacco-control and health-related programs.

[Sloan, 2005].

Impact of state expenditures of MSA funds

States which had allocated significant resources (i.e. close to the levels that had been recommended by the CDC) to tobacco control are credited with having achieved greater health benefits:

Between 1990 and 2001, adult smoking prevalence in Washington was nearly unchanged, as it was in the United States as a whole. However, from 2001, one year after Washington instituted its comprehensive tobacco control program, to 2005, the prevalence of smoking among adults in Washington declined significantly from 22.5% to 17.6%, and by a significantly larger amount than it did nationally during the same period (22.7% to 20.9%). In addition, the prevalence of youth smoking also declined faster in Washington than it did nationally: for example, from 2000 to 2004, smoking prevalence among

**TABLE 6:
STATES' ALLOCATIONS OF COMBINED MSA PAYMENTS AND SECURITIZED PROCEEDS FOR FISCAL
YEARS 2000 THROUGH 2006 (\$ MILLIONS)**

	2000-2001		2002		2003	
	Allocation	Percentage	Allocation	Percentage	Allocation	Percentage
Budget short falls			2448	20	5,038	36
Debt service (securitized \$)			271	2	339	2
Economic development for tobacco regions	466	4	218	2	285	2
Education	848	7	1,132	9	531	4
General purposes	623	5	684	6	1,111	8
Health	4,788	38	4,434	37	3,455	24
Infrastructure	294	2	1,222	10	1,044	7
Payments to tobacco grow- ers	235	2	192	2	43	0
Reserves/Rainy day funds	603	5	124	1	24	0
Social services	231	2	278	2	160	1
Tax reductions	416	3	35	0	109	1
Tobacco control	790	6	375	3	276	2
Unallocated	3,217	26	584	5	1,720	12
Total	\$12,511	100	\$11,998	99%	\$14,135	99%

	2004		2005		2006	
	Allocation	Percentage	Allocation	Percentage	Allocation	Percentage
Budget short falls	5,059	44	261	4%	85	1%
Debt service (securitized \$)	998	9	1,397	24	1,662	29
Economic development for	291	3	230	4	217	4
Education	280	2	287	5	330	6
General purposes	747	7	790	13	761	13
Health	2,263	20	1,867	32	1,850	32
Infrastructure	759	7	31	1	313	5
Payments to tobacco grow- ers	25	0	26	0	20	0
Reserves/Rainy day funds	14	0	45	1	17	0
Social services	142	1	150	3	154	3
Tax reductions	56	1	0	0	0	0
Tobacco control	223	2	279	5	272	5
Unallocated	575	5	543	9	86	2
Total	\$11,432	101	\$5,907	101%	\$5,767	100%

[Source: GOA, 2007].

**TABLE 7
PROVINCIAL AND STATE EXPENDITURES ON ANTI-SMOKING PROGRAMS**

	United States	Canada
State/Provincial Tobacco Programmes		
Total budget	\$597,500,000	\$108,609,000
Per capita spending	\$2.0	\$3.2
Population	303,266,582	32,623,500

[Source: President's Cancer Panel, 2007; OTRU, 2007].

8th graders declined from 12.5% in 2000 to 7.8% in 2004 in Washington but only from 12.2% in to 9.3% nationally.

[Dilley, 2007].

Conversely, the allure of diverting new money to other (non-tobacco control) priorities is blamed for failure to achieve tobacco control objectives:

"Had states [that were studied] spent the minimum amount of money recommended by the Centers for Disease Control and Prevention, the prevalence of smoking among youths would have been between 3.3% and 13.5% lower than the rate we observed over this period.

[Tauras, 2005].

The promise, then, of directing a fair share of settlement money to state-based tobacco control programs has not been fulfilled. Christine Gregoire, the attorney general of Washington State and a committed public health advocate, called the 1998 MSA results disappointing. "The settlement wasn't meant to be a tax windfall for the states—it was meant to be restitution to right a wrong, and was clearly intended to address the issue of under-age smoking and related public health concerns," she said. "A number of states have turned their backs on these goals, viewing the MSA money as a way to full fill a hole in their budgets". [Niemeyer, 2004].

Comparison with Canadian experience

Canadian provincial expenditures on tobacco control also vary considerably, from a low of \$0.50 per person in Manitoba to over \$8 per person in Northwest Territories and Yukon. [OTRU, 2007]. Not including federal expenditures on tobacco control (\$48 million), the combined provincial expenditure is \$3.2 per person. This is 50% higher than average state funding in the U.S. [President's Cancer Panel, 2007].

A2-c) Securitization

Several states elected to 'securitize' the MSA funds. That is, they sold the revenue stream for a set number of years in return for a single up-front payment. Unlike the traditionally securitized 'naked bonds', which transfer risk to the investors, with no state guarantee of payment, the largest States (New York and California) sold tobacco bonds that were backed by state tax revenues. [Schroeder, 2004]. This decision contributed to a view that the settlement, rather than leading to the end of the tobacco industry, might actually insure its survival:

The states have not put the tobacco industry out of business, and they do not control the tobacco companies. Instead, the states are now dependent on the tobacco industry's continued success at selling cigarettes since the \$250 billion settlement is 90 percent funded by current and future smokers. As an executive at R.J. Reynolds ironically put it, "There's no doubt that the largest financial stakeholder in the [tobacco] industry is the state governments." The states understand well how important it is that tobacco be spared the fate of asbestos. For example, in two recent cases in which it appeared that the industry might face bankrupting court proceedings brought by private litigants, the states came to the aid of the tobacco industry and helped the industry to blunt legal maneuvers by private plaintiffs that would have fatally wounded the industry.

[Seebook, 2004].

Health researchers saw a conflict of interest between securitizing/keeping tobacco companies in business and reducing tobacco use/funding tobacco control: "[N]o state has securitized MSA funds without severely underfunding tobacco control efforts." [Wilbur, 2004].

One reason cited for states adopting this strategy was their concern that the tobacco companies might go bankrupt, and no longer be in a position to make payments. Some states – including New York and California which received the largest payments – were prompted to securitize as a result of financial crises. Doing so allowed them to avoid cutting education, health and other state programmes. [McKinley, 2003].

The policy landscape for securitizing funds altered dramatically in March 2003, when Philip Morris USA faced the prospect of a \$12 billion appeal bond arising out of a judgment in *Price vs. Philip Morris* (a class action suit regarding the sale of 'light' cigarettes). Concerns that Philip Morris might not be able to both post this bond and fulfill its share of the annual MSA payment increased the risks associated with securitizing and made it a less attractive for states. [McKinley, 2003].

Impact of securitization on tobacco use

The securitization of state settlement payments was severely criticized by health agencies, especially for the potential for government conflict of interest. For example, when states become dependent on the continued flow of settlement revenues to meet their obligations under securitization arrangements, they may act in ways designed to continue the industry's

capacity to pay than to reduce smoking. These fears were heightened when, following the requirement that Philip Morris post a \$12 billion bond as a result of a private class action suit, several states requested that the bond be reduced in order to protect their settlement payments (it was reduced to \$6 billion). Subsequently, Missouri passed a bill to limit appeal bonds to \$50 million for tobacco companies, a move followed by 34 other states. [Sindelar, 2004], [American Lung Association, 2007].

Others have suggested that such conflict of interest can be mitigated by setting terms of the bond so that the risk is transferred to the investor and away from the state (although this would reduce the price that a state could receive from the sale). [Sindelar, 2004].

Another concern about securitizing is that it cuts off future revenue streams that could be allocated to tobacco control. In the last year reviewed by the U.S. Government Accountability Office, six states, including California, used all or almost all of their MSA revenues to service debt on securitized funds. [GAO, 2007].

A3) Cost recovery and attorney fees

Beginning in the mid-'90s, the attorneys general of a handful of states signed on with a small group of daring plaintiffs' lawyers bent on challenging Big Tobacco. The battle seemed quixotic, and most states agreed to pay standard contingency fees for any recoveries. When the gargantuan settlement was finally reached in 1998, some of the states were desperate to wiggle out of their contracts. The attorneys general feared a political firestorm if their constituents saw them giving hundreds of millions, and in some cases billions, of dollars of state money to plaintiffs' lawyers. As a condition of settling, the states insisted that tobacco pick up the tab for its attorneys.

[Beck, 2002].

The states' suits had been conducted on a contingency basis. That is, rather than paying the law firms involved on an hourly basis, the state attorney generals agreed to pay them a percentage of the final return. The percentage of the contingency fees was standard, but the size of the eventual awards was very out of the ordinary. The fee arrangements that had seemed appropriate at the outset were viewed as a political vulnerability when the settlement was concluded.

Plaintiff law firms were more than service providers in the development of state suits against tobacco companies, they had spearheaded the efforts. The litigation was conceptualized and bank-rolled by a handful of firms that were eventually involved in the majority of the state suits. [Pringle, 1998; Mollenkamp, 1998].

One may ask why a consortium of high-powered plaintiffs' attorneys invested so much time and money in the case. Although speculative, a real possibility is that the team was in essence engaged in very high stakes poker.

[Rabin, 2001].

In the settlement, the tobacco firms agreed to cover the lawyers' costs and to:

- reimburse states for costs, expenses and fees for government attorneys.
- pay for outside attorneys hired by the states, using two payment methods, negotiation for fees from a \$1.25 billion pool or through an arbitration panel (with a \$500 million per year cash flow cap).

The arbitration panel that was established to settle payments for the states' outside counsel awarded payments that varied greatly as a percentage of the final award. The amounts awarded before 2002 are shown in Table 8. [From Beck, 2002].

The settlement of the lawyers fees itself became a subject of controversy, dispute and lawsuits, and considerable criticism. [Beam, 2004].

[The states] are distributing the money as follows: (1) Legal fees; (2) Money for attorneys; (3) a whole bunch of new programs that have absolutely nothing to do with helping smokers stop smoking; and (4) Payments to law firms. Of course, not all the anti-tobacco settlement is being spent this way. A lot of it also goes to lawyers.

[Dave Barry, quoted in Beam, 2004].

In addition to criticisms about the size of the settlement, concerns were also expressed about the effect of contingency arrangements on public policy. Contingency fee arrangements could exacerbate the detrimental effect of litigation on government institutions, some argued, as they allow Attorneys general to avoid getting legislative approval (in the form of funding), prior to undertaking such actions, and because the financial incentives can lead to poor decisions about liability law. [Ausness, 2004].

**TABLE 8:
PAYMENTS TO STATES AND ATTORNEYS REPRESENTING STATES**

State/Date Fee Announced	Payment to State	Awards to Lawyers	Litigation Status when Settlement Reached	Law Firms
Mississippi 12/11/1998	\$4.1 billion	\$1.4 billion	Filed 5/94. First state to sue. Settled 7/97, before trial.	Richard Scruggs; Ness Motley
Florida 12/11/98	\$13.2 billion	\$3.4 billion	Filed 2/95. Settled 8/97, before trial.	Nine Florida firms plus Scruggs; Ness Motley
Texas 12/11/1998	\$17.365 billion	\$3.299 billion	Filed 3/96. Settled 1/98, before trial.	Five Texas firms plus Scruggs; Ness Motley
Massachusetts 7/29/1999	\$8.3 billion	\$775 million	Filed 12/95. Fifth state to sue. Trial set for 2/99; summary judgment motions argued. Lawyers had 25% fee contract.	Ness Motley; Lieff, Cabraser; four Boston firms. Lawyers suing to enforce contract
Hawaii 9/8/1999	\$1.38 billion	\$90 million	Filed 1/97. Survived motion to dismiss. No depositions taken.	Ness Motley; Scruggs; four Hawaii firms
Illinois 10/7/1999	\$9.3 billion	\$121 million	Filed 11/96. Survived motion to dismiss. No depositions.	Hagens Berman; Lieff, Cabraser; two other firms. Lawyers suing to enforce 10% contingency contract
Iowa 12/29/1999	\$1.9 billion	\$85 million	Filed 11/96. Medicaid reimbursement claim dismissed; upheld by Iowa Supreme Court.	Ness Motley; six other firms
Louisiana 1/31/2000	\$4.6 billion	\$575 million	Filed 3/96. Sued tobacco's insurers; removed to federal court. Little progress.	Seventeen firms
Kansas 1/31/2000	\$1.767 billion	\$54 million	Filed 8/96. Won key privilege issue.	Ness Motley; Scruggs; two Kansas firms
Ohio 5/8/2000	\$10.1 billion	\$265 million	Filed 5/97. No depositions taken or documents produced.	Ness Motley; Scruggs; and five other firms
Oklahoma 5/17/2000	\$2 billion	\$250 million	Filed 8/96. Significant discovery and trial prep.	Ness Motley; Scruggs; four Oklahoma firms
Puerto Rico 6/7/2000	\$2.2 billion	\$75 million	Filed 6/97. Credit given for increasing commonwealth's settlement share.	Ness Motley; Scruggs; two local firms
New Mexico 8/21/2000	\$1.25 billion	\$24.5 million	Filed 5/97. Not much progress.	Two local firms
South Carolina 10/23/2000	\$2.3 billion	\$82.5 million	Filed 5/97. After nine months, AG told lawyers to stop work.	Ness Motley
Utah 10/25/2000	\$1 billion	\$64.85 million	Filed 9/96. Modest contribution to MSA; counsel had 25% contract.	Giaugue, Crockett, Bendinger & Peterson (Salt Lake City); Ness Motley
California 3/5/2001	\$25 billion	\$637.5 million	Cases brought by counties, cities, and private AGs. Trial date for some set for early '99.	Milberg, Weiss; Lieff, Cabraser; two other California firms
Michigan 9/7/2001	\$8.7 billion	\$450 million	Filed 8/96. State AG's staff handled most of the work.	Ness Motley; Scruggs
New York 10/23/2001	\$25 billion	\$625 million	Filed 1/97. Outside counsel not retained until 9/97.	Ness Motley; Scruggs; Hagens Berman; three local firms
Davis/Ellis 7/15/2002	\$0	\$1.25 billion	Filed 6/96. Fourth private AG suit in California. Not included in master settlement.	Castano Group

[Source: *The American Lawyer*, December 2002]

Prohibiting contingent fees and requiring state officials to finance public tort litigation would force them to internalize the costs of litigation and might discourage them from bringing lawsuits based on dubious or radical legal theories.

[Ausness, 2004].

The Canadian situation

No Canadian suits against tobacco companies have yet been settled out of court, but fee arrangements with lawyers have nonetheless sparked criticism.

Canadian governments engaged in litigation against tobacco companies have variously used contingency and fee-for-service arrangements. (Each Canadian province now has laws which provide for contingency fees arrangements for non-criminal actions):

- The failed attempt by Ontario for health care cost recovery in U.S. courts involved a 20% contingency arrangement with the same U.S. firm (Ness Motley) that represented more than 30 U.S. states (and received more than \$12 billion in subsequent revenues). [Marsden, 2000].
- The failed attempt by the Canadian government to use a U.S. court to recover revenues lost to smuggling resulted in the highest (non contingency) fees paid to a lawyer in a single year by the Canadian government (\$3.76 million). [Marsden, 2000]. The total fees paid (\$18 million) are second only to law fees paid by the federal government to argue the softwood lumber dispute. [Vaughan Black, 2003].
- The New Brunswick Government has entered into a contingency arrangement with a consortium of a half dozen law firms, including Canadian firms (Philippe J. Eddie, Q.C and Correia and Collins of New Brunswick as well as Siskinds LLP, Fasken Martineau DuMoulin, and Bennett Jones of Ontario) and U.S. firms (Richardson, Patrick, Westbrook and Brickman, a spin-off firm from Ness Motley and another South Carolina firm, Martin and Jones)
- The contingency arrangement for the New Brunswick action provides for a settlement of 12% (if settlement is reached during the initial stage after their retainer), 18% (If a settlement is reached after issuance of the statement of claim), 20% (if a settlement is awarded after trial), 22% (if a settlement is awarded on appeal). [Government of New Brunswick, 2007].
- The Government of British Columbia, the only Canadian government to have filed a health

damages recovery suit, engaged Vancouver firm Bull, Housser and Tupper (as well as Thomas Berger), but no contingency arrangement is involved.

A4) Money to support the enforcement of the MSA

The Settlement included an agreement on how enforcement would be managed, as well as an agreement on the sum of money to support enforcement efforts by attorneys general.

Rather than setting up a separate tribunal process, parties agreed that the existing court system would have jurisdiction over implementation and enforcement, and that the courts had the option of how to order sanctions to enforce compliance. As part of the implementation of the MSA, 'consent decrees' were filed in the court systems of each state. These decrees became the terms against which the courts would enforce the agreement.

The industry provided a one-time payment of \$50 million to assist states. Subsequent enforcement decisions have also included payments against the states. [Eckhart, 2004].

In reviewing the enforcement mechanism of the settlement, as well as the funding for enforcement actions in the context of the Department of Justice suit against the tobacco companies, Judge Gladys Kessler found:

Second, the Court is unable to rely upon the states to vigorously enforce the MSA. This comment is not a criticism, but rather a realistic acknowledgment that enforcement depends upon the commitment of resources by each state and that many are stretched very thin financially. Even though the MSA allots a certain amount of money to each state for purposes of enforcement, in light of the fiscal pressures on states and the constant compromises they must make in reference to their financial priorities, this Court cannot be assured that adequate resources will be available in the future to enforce the MSA.

[Kessler, 2006].

B. CORPORATE CONDUCT REMEDIES

B1) Commitments to reduce youth consumption

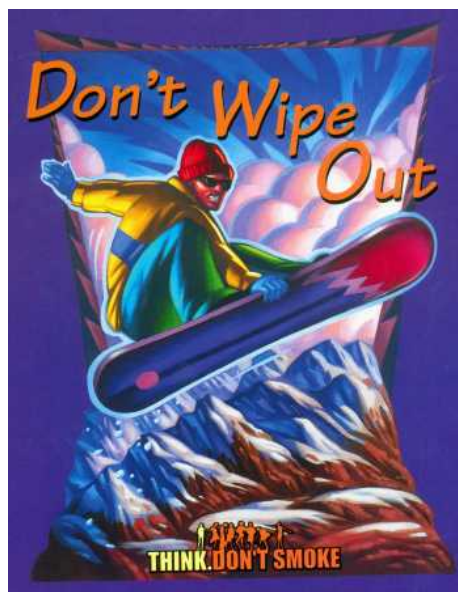
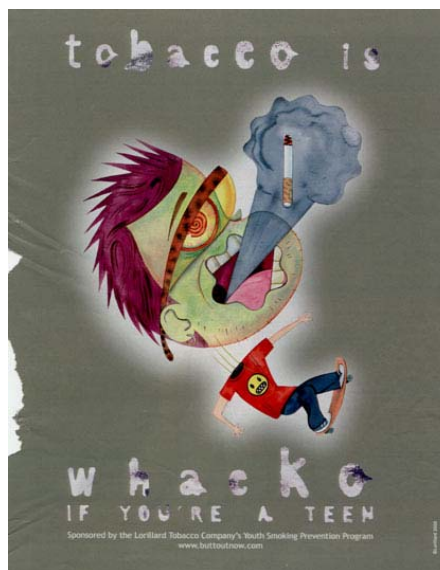
In agreement to the settlement, each of the companies made a commitment to help reduce youth smoking,* and many of them transferred this commitment into programs directly aimed at young people.

Mandating tobacco companies to become engaged in youth-directed programs has resulted in sustained concern by many health researchers. Although the MSA did not sanction or approve industry-run programs, it is considered by some that the industry was allowed to use the agreement as justification for doing so.

Industry-led 'anti-smoking' programs were not new in 1998. Tobacco companies have for some decades run programs aimed at youth (in Canada, such programmes have included Operation I.D., Wise Decisions, and School Zone), but after the MSA they were greatly expanded.

In December 1998, Philip Morris launched "Think. Don't Smoke," a television campaign with a budget of \$100 million that ran until January 2003. (This was the first time since 1971 that a tobacco company had been able to use television to reach its audience). Mid-campaign, the company distributed book-covers with this logo to elementary, middle and high schools. Philip Morris subsequently developed a campaign aimed at adults: "Talk. They'll listen." [Wakefield, 2006]. In 1999, Lorillard launched "Tobacco is Wacko if you're a teen," with a more modest budget of \$13 million.

Expenditures for these programmes were tracked, after 2001, by the Federal Trade Commission. In the



* "Corporate Culture Commitments Related to Youth Access and Consumption

Beginning 180 days after the MSA Execution Date each Participating Manufacturer shall:

- promulgate or reaffirm corporate principles that express and explain its commitment to comply with the provisions of this Agreement and the reduction of use of Tobacco Products by Youth, and clearly and regularly communicate to its employees and customers its commitment to assist in the reduction of Youth use of Tobacco Products;
- designate an executive level manager (and provide written notice to NAAG of such designation) to identify methods to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products; and encourage its employees to identify additional methods to reduce Youth access to, and the incidence of Youth consumption of, Tobacco Products."

four years for which these figures have been made public, the companies have spent more than \$250 million on direct advertising* (grants to other agencies are not included in this figure). [FCT, 2005, 2007].

Impact of youth smoking prevention programs

Public health researchers who reviewed the impact of these industry programmes found the provided no public health benefit:

We found increased exposure to tobacco company parent-targeted smoking prevention advertising was associated with lower recall of anti-tobacco advertising and stronger intentions to smoke in the future for all students.

[Wakefield, 2006].

Exposure to Philip Morris and Lorillard ads engendered more favourable attitudes toward tobacco companies.

[Henriksen, 2006].

We found that exposure to 'Think. Don't Smoke.' Engendered more favorable feelings toward the tobacco industry than we found among those not exposed to 'Think. Don't Smoke.'

[Farrelly, 2002].

Comparison with Canadian experience

Tobacco companies have managed youth smoking prevention programs in Canada and also outside of North America. In Canada, the major programs have been: Operation ID (launched in 1998) and "Wise Decisions" – a resource for middle-school programmes. They have been similarly criticized by Canadian Health advocates as inappropriate and ineffective. [Coalition québécoise pour le contrôle du tabac, 2001B].

B2) Dissolution of Tobacco-Related Organizations and Prohibition to Suppress Research.

Under the settlement, three organizations that had functioned as public relations and scientific dissemlers were disbanded: The *Council for Tobacco Research*, the *Tobacco Institute*, and the *Council for Indoor Air Research*, although their records were

preserved. New trade organizations were subject to oversight and some restrictions on their activities.

- The *Council for Tobacco Research* began in 1954 as the Tobacco Industry Research Committee. Putatively established to fund independent scientific research, it was actually used for public relations purposes to try to convince the public that the hazards of smoking had not been proven. Decisions on its activities were largely determined by lawyers, not scientists. [Bero, 2005].
- The *Center for Indoor Air Research* (CIAR) was formed in 1988 by three of the U.S. tobacco companies. Its main function was to downplay concerns about the impact of second hand smoke either by providing 'proof' of the harmlessness of second hand smoke to legislators or by focusing attention on other contaminants. [Bero, 2005].
- The *Tobacco Institute* was the umbrella organization to represent the U.S. tobacco industry in legislative and regulatory issues.

These three organization were disbanded. New organizations and procedures were established by the tobacco companies to continue their involvement with regulatory and scientific issues, such as the *Institute For Science and Health* and the *Life Sciences Research Office*.

Since the MSA, individual US tobacco companies have replaced their industry-wide collaborative granting organisations with new, individual research programmes. Philip Morris has funded a directed research project through the non-profit Life Sciences Research Office, and British American Tobacco and its US subsidiary Brown and Williamson have funded the non-profit Institute for Science and Health. Both of these organisations have downplayed or concealed their true level of involvement with the tobacco industry. Both organisations have key members with significant and long-standing financial relationships with the tobacco industry. Regulatory officials and policy makers need to be aware that the studies these groups publish may not be as independent as they seem.

[Schick, 2007].

In the agreement, the companies also agreed to a prohibition on their jointly contracting to or conspiring to limit information about the health hazards from the use of their products, limit or suppress research into

* The Federal Trade Commission reported that such expenditures were: 2002: \$74.2 million; 2003: \$72.9 million; 2004 - \$62.7 million; 2005 - \$55.5 million.

smoking and health, and limit or suppress research into the marketing or development of new products. It also prohibited the companies from misrepresenting the health consequences of smoking.

B3) Restrictions on Lobbying

The Settlement set some parameters on future lobbying activities of the industry. It prohibits lobbying against laws intended to limit or prevent youth smoking, it requires lobbyists to certify their compliance with settlement terms, and requires control by companies of lobbying on their behalf.

Despite this, the companies are considered to still have a wide scope for their lobbying activities:

Rather than banning all industry efforts to derail tobacco control laws, the MSA prohibits lobbying against specific hypothetical state laws or regulations, including laws limiting youth access to vending machines and laws enhancing pre-existing prohibitions on youth tobacco sales. Participating manufacturers remain free to oppose other significant youth access restrictions such as limits on self-service displays. The MSA makes clear as well that participating manufacturers may oppose all

tobacco related excise or income tax provisions. The industry can also continue to oppose enforcement of existing legislation or rules. Given that enforcement is often key to the success of tobacco control measures, this limitation may undermine the efficacy of the lobbying restriction. ...

The MSA also restricts participating manufacturers from supporting any diversion of the settlement proceeds to any other than tobacco- or health-related uses. However, it leaves the industry free to seek the diversion of the funds to health-related uses other than those focusing on tobacco.

[Daynard, 2001B].

The settlement has certainly not ended lobbying by tobacco companies, nor even reduced tobacco industry lobbying to the same level as public health agencies. The Center for Public Integrity tracks lobbying activities across U.S. Jurisdiction. During the 1998 – 2004 period (most recent data available), tobacco companies out-lobbied health agencies by a considerable margin, as seen in Table 9 below.

**TABLE 9:
COMPANIES/ORGANIZATIONS AND INDUSTRIES RANKED BY NUMBER OF FILINGS LISTING TOBACCO AS A LOBBYING ACTIVITY ISSUE.**

Rank	By company	Number of listings 1998-2004	By Industry	Number of Listings 1998-2004
1)	Altria	299	Tobacco	1028
2)	UST	158	Health	94
3)	R.J.	144	Non-Profit	86
4)	Brown	66	Miscellaneous	85
5)	Smokeless	46	Lawyers	68
6)	Lorillard	44	Retail	61
7)	Conwood	40	Insurance	47
8)	National	36	Miscellaneous	45
9)	Campaign	35	Business	44
10)	American	29	Agricultural	34
11)	The	29	State,	34
12)	Pipe	26	Commercial	21
13)	Swisher	25	Business	20
14)	Star	22	Recreation	18
15)	American	19	Miscellaneous	17
16)	Vector	19	Lobbyists	16
17)	American	18	Health	16
18)	7-Eleven	17	Food	15
19)	Tobacco	17	Pharmaceuticals	15
20)	American	16	Printing	14

Source: Public Integrity.org. <http://www.publicintegrity.org/lobby/profile.aspx?act=issues&is=TOB>

B4) Public Access to Documents and Court Files

MSA provisions:

The Settlement required tobacco companies to maintain websites on which all the all documents produced in state and other smoking and health related lawsuits were to be included. The sites were required to be maintained for ten years in a user-friendly and searchable format. The companies were also required to add, at their own expense, all documents produced in future civil actions involving smoking and health cases. The National Association of Attorneys General (NAAG) oversees the enforcement of this, and other, provisions.

With funding from the American Legacy Foundation and others, the University of California, San Francisco has established a de-facto meta-repository. It

amassed the U.S. documents into a Legacy Tobacco Documents Library, and made the documents available in word-searchable form. More than 40 million pages of documents are available on the site. The UCSF also tracks the research use of these documents, and cites more than 500 publications. [UCSF, 2007].

A thorough evaluation of the impact of this research has not yet, to our knowledge, been completed. Nonetheless, this material is clearly used and valued:

The availability of the tobacco industry documents, particularly access via the Internet, has spawned an entire new area of investigation in tobacco control and has had a substantial impact on the tobacco policymaking process, both domestically and internationally. [Givel, 2004].



Tobacco industry documents have been made research-friendly by the University of California, San Francisco

C. MARKETING REMEDIES

C1) No Targeting of Youth

The settlement prohibited companies from targeting youth in advertising, promotions, or marketing or from any actions whose primary aim was initiating, maintaining or increasing youth smoking.*

In addition to this general restriction, a number of specific undertakings were made (and are discussed in more detail below).

Perhaps because this undertaking did not specify what constituted ‘targeting’ youth, interpreting this section and the industry’s actions in light of this undertaking has resulted in significant disagreement between governments, tobacco companies and health researchers. A fundamental concern was that the MSA restricted types of advertising, but did not restrict volumes of advertising: the companies continued to have deep pockets to finance their promotions.

The MSA’s advertising restrictions also involve many loopholes. They follow past industry concessions by allowing tobacco companies to shift advertising dollars to other media while restricting a carefully defined set of activities.

[Daynard, 2001].

After signing the MSA, the companies shifted their marketing efforts away from the prohibited areas (detailed below) and into permitted areas. The companies had found a way to “appear to comply” with the MSA, but had actually found a way to circumvent it’s intent. [Chung, 2002a 2002b].

The industry shifted advertising from prohibited media such as billboards to magazines such as Rolling Stone and Sports Illustrated, which have a high youth readership.

[Niemeyer, 2004].

After negotiating and entering the MSA in 1998, Philip Morris increased its media presence in 1999 by placing more advertisements both in magazines with smaller but comparatively young readership and in magazines with larger but comparatively older readership.

[US Department of Justice, 2005].

The overall effect was that youth continued to be exposed at levels that concerned health researchers.

Magazine advertising which, like print advertising, had been substantially unaddressed by the MSA, became the flash-point for these concerns. Tobacco companies replaced billboards and sponsorship with print advertising, increasing “tobacco advertising by 33% in magazines with high (15% or greater) youth readership.” [Daynard, 2001]. Two years after the agreement, 80% of young Americans continued to see magazine advertisements, an average of 17 times each. The companies had reduced their expenditures in the second year after the settlement, but by targetting their marketing in magazines with high youth appeal, they had been able to reach as many youth but at lower cost. [King, 2001].

**TABLE 10:
CIGARETTE ADVERTISING AND PROMOTIONAL EXPENDITURES, PRINT ADVERTISING,
1997-2005 (\$MILLIONS)**

	1997	1998	1999	2000	2001	2002	2003	2004	2005
Newspapers	17	29	51	52	32	26	8	5	2
Magazines	237	281	377	295	173	107	156	96	45

[Source: Federal Trade Commission, 2000, 2007].

* An excellent collection of tobacco marketing before and after the MSA can be viewed at www.trinketsandtrash.org.



Table 10 shows the rapid increase in advertising expenditures in magazine in the year following the settlement.

Enforcement actions

In reviewing the post-MSA marketing of the companies, U.S. states attorney generals were concerned that the companies were continuing to target youth with the content and placement of advertisements in magazines which many young people read. They launched a series enforcement actions beginning in 1999, focusing on specific campaigns (including Reynold's "Viewer Discretion Advised" ads Brown & Williamson "B-Kool" campaigns shown above). [Eckhart, 2004].

In response to the states' actions, the companies amended their policies: In June 2000, Philip Morris agreed to stop advertising in magazines for which 15 percent or more of its audience were teens, or if two million or more of its readers were teens, and also agreed not to advertise on the back cover of any magazine (as this increased exposure of youth). Brown & Williamson and Lorillard subsequently adopted similar guidelines. [Eckhart, 2004].

Reynolds was less willing to reduce its advertising in youth-oriented magazines. Initially (December 1999), it agreed only to restrictions on advertising that would ban ads in magazines that had 50% or more youth readers ads to magazines that had fewer than 50% youth readership. Six months later it agreed to not advertise in magazines that had more than 33% young readers. In March 2001, California launched a court action (with the support of 21 other state attorneys general) to require Reynolds to stop reaching youth with its marketing. The Court ruled in

favour of California in August 2002, and an Appeal Court upheld most of the ruling in 2004. [Eckhart, 2004]. It was not until December of 2004 that the issue was settled when an agreement was reached between RJ Reynolds and the government of California, effective January 1, 2005 that RJ Reynolds would adhere to a formula limiting its marketing in publications with youth readership. [Settlement Agreement, signed December 24, 2004 between the State of California and R.J. Reynolds Tobacco]. In late November 2007, RJ Reynolds announced that it would not advertising in magazines or newspapers beginning in 2008. [Noveck, 2007].

Subsequent to 2003, tobacco industry expenditures on magazine advertising declined considerably (a drop of 83% from a high of \$377 million in 1999 to a low of \$45 million in 2005, the most recent year for which figures are available).

Comparison with Canada

There are fundamental differences in the way that Canada, through legislation, has implemented restrictions on advertising and the negotiated outcome of the MSA. In Canada there is a general prohibition on advertising, with some identified exceptions. In the United States, there is a general permission (coloured by a general prohibition on marketing to youth), with specific prohibitions.

Provisions regarding tobacco marketing in print publications are nonetheless comparable in Canada and the United States. In Canada, tobacco advertising is permitted in magazines with adult readership of no less than 85% (similar to the level applied, after government intervention, under the MSA). Unlike the United States, print advertising in Canada is restricted

THE EVOLUTION OF CAMEL ADVERTISEMENTS POST MSA



5/19/97
(Sports Illustrated)



10/4/99
(Sports Illustrated)



5/13/99
(Rolling Stone)



10/30/00
(Sports Illustrated)



9/13/02
(Rolling Stone)



GQ, 2003



Sports Illustrated, 2005



Playboy, 2007

to truthful brand preference, informational and non-lifestyle promotions. Unlike the United States, tobacco advertisements in Canada are not required to carry a health warning message. Unlike the United States, cigarette manufacturers have not chosen to place direct tobacco advertisements in newspapers, magazines or other publications since 1997. Indeed, during their failed legal contestation of the *Tobacco Act*, the tobacco companies claimed that the law prohibited all advertising, a claim firmly rejected by the Supreme Court. Nevertheless, to-date, the major cigarette companies have opted not to place direct advertisements for their products in print publications.

C2) Cartoon Characters

Although the settlement banned the use of cartoons in the advertising, promotion, packaging or labeling of tobacco products, the definition of cartoon in the agreement narrowed the impact of this measure.

For example, although "Joe Camel" cartoons are banned, drawings of a camel are permitted unless they exaggerate or attribute human or superhuman qualities to the camel. Moreover, the "no cartoon" rule does not ban the use of the "Marlboro Man" or other human characters. The MSA also "grandfathers" existing cigarette logos.

[Daynard, AJPH, 2001].

Joe Camel has not appeared in advertising since the implementation of the MSA, and the Camel brand has been marketed with different campaign themes in the post-MSA period, as illustrated below.

Comparison with Canada

The federal *Tobacco Act*, 1997 (section 21) indirectly bans cartoons on tobacco products or advertising by

banning testimonials, and then specifies that the depiction of any person, character or person is considered to be a testimonial for the product. The law provides a specific exception for a trade-mark that appeared on a tobacco product for sale on the day the bill was presented to Parliament (December 2, 1996). The "Lassie" of Export A, for example, is permitted.

C3) Sponsorships

Under the Master Settlement Agreement, tobacco companies did not promise to end sponsorship of events, but they did agree to a ban on some types of sponsorships. Specifically banned were:

- Concerts (with the exception of Kool Jazz Festival)
- Football, basketball, baseball, soccer and hockey leagues, teams or games
- Events whose intended audience has a significant percentage of youth
- Events where any of the paid participants are youth.

They also agreed to restrictions on other sponsorships, notably a limitation to one brand name sponsorship per year, and to limitations on the advertising of such sponsorships. Advertisement restrictions included: limits on display of outdoor promotions to the event site, and to a period 90 days before and 10 days after the event; prohibition on event advertising promoting tobacco products; no reference to the event in any tobacco product advertising; and limits on distribution of brand name merchandise to the event.

TABLE 11:
CIGARETTE ADVERTISING AND PROMOTIONAL EXPENDITURES, SPONSORSHIP AND OTHER FORMS OF "PUBLIC ENTERTAINMENT" 1997-2005 (\$MILLIONS)

	1998	1999	2000	2001	2002	2003	2004	2005
Public Entertainment	249	267	310	312				
Public Entertainment – Adult only					219	151	140	214
Public Entertainment – General Audience					34	33	.115	.112
Sponsorships					54	31	28	31
Total	249	267	310	312	307	215	168	245

[Source: Federal Trade Commission, 2000, 2007].

The MSA did not place any restrictions on sponsorships in adult-only venues, or to events by corporate name.

These restrictions were received with some doubt about their effectiveness: "These rules have many detailed exceptions that will permit tobacco companies to engage in a wide variety of brand name sponsorship activities and advertising." [Daynard, 2001]. Because the events could be advertised, permitting sponsorship meant the tobacco companies "will still be able to achieve more than 25 hours of television exposure and an equivalent television advertising value of \$99.1 million per year." [Siegel, 2001].

Implementation of restrictions on sponsorship

Like the ban on marketing to youth, there have been several instances where U.S. governments have expressed concerns about tobacco companies violating the provisions on sponsorship.

Tobacco companies became particularly adept at placing billboards on event sites, as permitted by the MSA, but facing them away from the seating areas and towards adjacent busy highways.

In 2001, Four states (Arizona, California, New York and Washington) filed suits against Reynolds for maintaining year-round billboards promoting "Winston Cup" NASCAR races, despite the general prohibition on billboards and the requirement that a sign must be removed 10 days after an event. The courts ruled in favour of two of these states (California and Arizona) and against one of them (New York), the fourth became moot when the owner of the billboard took it down. Reynolds stopped sponsorship NASCAR races in 2003, but this interpretation challenge has left lingering concerns:

[T]he cases hold much significance for future MSA enforcement actions. Reynolds has argued on appeal in Arizona and California that it should be allowed to challenge court interpretations of the MSA with which the company disagrees as infringing on its free speech rights under the First Amendment—this despite the fact that in section XV of the MSA the company expressly waived its right to challenge the provisions of the MSA on constitutional grounds.

[Eckhart, 2004].

The U.S. Department of Justice highlighted concerns about Philip Morris exceeding the MSA agreement by having 'multiple' sponsorship agreements and using

its international operations to defeat the purpose of the MSA agreement:

Philip Morris has circumvented and undermined the MSA's restriction on brand name sponsorships so that American youth are exposed to Marlboro imagery through multiple auto racing sponsorships. There are several auto racing leagues, such as the Indy Racing League (IRL), the Formula 1 racing league, and NASCAR. Philip Morris sponsors a Marlboro Indy Racing League team, Marlboro Team Penske, which races at multiple venues around the United States each year; its best-known race each year is the annual Indianapolis 500...

The Philip Morris Formula 1 sponsorship impacts audiences and viewers in the United States, particularly when the races are broadcast in the United States and when photographs of the Marlboro vehicles are printed in American magazines and newspapers. Numerous media in the United States cover the Formula 1 Marlboro racing team and thus increase U.S. exposure of the Marlboro brand.

[DOJ, 2005].

Concerns have also been expressed with third party promotions of tobacco products as a result of sponsorship, when the brand names of tobacco products appear in television commercials for other products (i.e. when a tobacco branded race-car appears in an advertisement for another good or service). This suggests "the Master Settlement Agreement is not entirely successful at keeping tobacco messages off television screens, and also shows the creative resiliency of the tobacco advertisers as they face new restrictions on promoting their products." [Zwarun, 2006].

Impact of restrictions on sponsorship

There have been some attempts to determine whether the MSA provisions resulted in reduced exposure to tobacco promotions. Gilpin et al. [2004] found that the number of children aged 12 to 14 who reported seeing tobacco logos on TV 'at least a few times' dropped from 50% to 46% between 1996 and 2002.

Data on industry expenditures is tracked by the Federal Trade Commission (FTC). The FTC changed the way it collected and reported on tobacco industry promotional expenditures in 2002, and provides more detailed information for the years following 2002. Expenditures on tobacco sponsorship were roughly equal in 2005 and 1998 (see Table 11).



Comparison with Canada

In 1998, at the time the MSA was agreed to, there were no restrictions on sponsorship promotions in Canada. Since that time, tobacco brand sponsored events have been virtually phased out of Canada, although international events can still be broadcast into Canada.

The federal *Tobacco Act, 1997*, which came into force in April 2007, originally anticipated ending outdoor and retail promotions for sponsorships on October 1, 1998 although the events themselves could continue. The government, after pressure from Formula 1 and other events, announced its decision to amend these provisions in the summer of 1997, and in June 1998 a bill (C-42) was introduced which introduced a new ban on sponsorships (after October 1, 2003), but extended the period during which the events could be promoted in stores and billboards until October 1, 2000.

Between October 1, 2000 and October 1, 2003, the events could be held, and could be promoted through direct mail, e-mail, internet, publications that were not directed to youth, and in places where young persons were not allowed to enter. Since October 2003, tobacco sponsored events have not been brand-related (i.e. sponsorship of business award or luncheon for trade show participants)

C4) Product Placement in Movies

Tobacco companies agreed in the MSA to not make any payments for product placement in movies, television, theatrical performances or any other live performances (except for those in adult-only facilities). Despite these provisions, the portrayal of smoking in movies has not disappeared since the MSA was agreed to. "Despite the tobacco industry's agreements not to promote cigarettes in movies,

**TABLE 12:
CIGARETTE ADVERTISING AND PROMOTIONAL EXPENDITURES, OUTDOOR, TRANSIT AND POINT OF SALE ADVERTISING, 1998 – 2005 (\$MILLIONS)**

	1998	1999	2000	2001	2002	2003	2004	2005
Outdoor	295	54	9	8	24	33	17	10
Transit	40	6	0	0				
Point of Sale	291	329	347	284	261	166	164	182

[Source: Federal Trade Commission, 2000, 2007].

smoking in the movies was as prevalent in 2002 as it was in 1950." [Charlesworth, 2006].

Post-MSA research has focused in two directions: the quantity and nature of smoking depictions in movies and the impact of film depictions of smoking on tobacco use.

The quantity and nature of smoking in U.S. films

The American Legacy Foundation (ALF), among others, reviewed depictions of smoking in top-ranking movies between 1996 to 2005. [American Legacy Foundation, 2006, 2007]. It found:

- The proportion of movies with tobacco use or imagery declined from 96% in 1996 to 63% in 2005; the decline in youth rated moves was from 88% in 1996 to 56% in 2005.
- Brand appearances declined by about 50% between 2000 and 2005
- Tobacco is depicted in 3 in 4 youth-rated movies and 9 in 10 R-rated movies
- The amount of tobacco imagery (screen-time) has remained stable from 1996.

In addition to the quantity of smoking on movies, the characteristics of the depiction have also been reviewed.

The themes common to cigarette advertising are common in movies. Smoking is routinely used to portray glamour, independence, rebelliousness, relaxation or stress relief, romance, socializing or celebrating, pensive thinking, and confiding in others. Smoking is portrayed differently for men and women, however. Men are more likely to be depicted using tobacco to reinforce their masculinity, whereas women are more likely to be portrayed using tobacco to control emotions, manage stress, manifest power and sex appeal, enhance body image or self-image,

control weight, or give themselves comfort and companionship .

[Charlesworth, 2006]

Film depictions of smoking are not limited to the movie theatre; films are watched on television, and trailers for movies are shown during commercial time on television. As a result "ninety-five percent of all youth aged 12 to 17 years in the United States saw at least 1 movie trailer depicting tobacco use on television during this year." [Healton, 2006].

The impact of film depictions of smoking on tobacco use

Experimental research on the impact of viewing smoking in films suggests that these depictions make nonsmokers (both adult and adolescent) more tolerant and accepting of smoking, and increased the likelihood of their smoking in the future. The type of depiction makes a difference – smoking by high status characters leaves a more favourable impression about smoking than viewing smoking by low status characters. Adult smokers who were exposed to depictions of smoking reported that it increased their desire to smoke, likelihood to smoke in the future and their perceived positive image of smoking. Seeing smoking in movies has a larger impact on youth smoking than tobacco advertising. [Charlesworth, 2006].

Stanton Glantz considers that "movies account for more than half (52%) of new adolescent smokers. Every day 1,070 light up their first cigarette because of smoking in the movies." [Smokefreemovies.ucsf.edu].

Actions taken by state attorneys general and the movie industry

Following reviews that smoking in movies had not declined following the MSA, state attorneys general took steps directed at the film industry to reduce youth exposure to smoking on screen. In 2003, 27 attorneys general wrote the Motion Picture Association

**TABLE 13:
CIGARETTE ADVERTISING AND PROMOTIONAL EXPENDITURES, SAMPLING DISTRIBUTION , 1998 – 2005 (\$MILLIONS)**

	1998	1999	2000	2001	2002	2003	2004	2005
Sampling distribution	14	34	22	17	29	18	12	17

[Source: Federal Trade Commission, 2000, 2007].

of America (MPAA) to express concern, in 2005 32 attorneys general they wrote the studios to request the inclusion of an anti-smoking ad on any DVD, in 2006, 41 attorneys general wrote the studios and the MPAA to renew their call and provided ads that could be used at no cost (one studio accepted the offer). In May 2007, 31 attorneys general wrote again:

[E]ach time a member of the industry releases another movie that depicts smoking, it does so with the full knowledge of the harm it will bring to children who watch it...

[E]liminate the depiction of tobacco smoking from films accessible to children and youth. There is simply no justification for further delay.

This last letter prompted a response from the MPAA that it would “consider” tobacco imagery in the ratings, but subsequent analysis found tobacco impressions had not fallen in the 5 months following that announcement. [Polansky, 2007].

C5) Outdoor advertising

The Settlement banned many forms of outdoor advertising. Billboards and signs in arenas, stadiums, shopping malls and video arcades were required to come down. Transit advertisements were similarly banned (including taxi signs). Tobacco companies were required to remove all prohibited advertising by April 23, 1999, and were not allowed to put new ads up between the time of signing (November 1998) and this deadline. Any time remaining on leases between tobacco companies and bill board, transit or other media owners were made available to state governments for tobacco control messages, [Kline, 2000] and, notwithstanding some challenges, these spaces were sometimes used to effect by government health departments. [Dearlove, 2000].

Notable exceptions to the ban on outdoor advertising were:

- Tobacco retailers may place any number of tobacco advertisements on their property; the maximum size of each advertisement cannot exceed 14 square feet.
- Advertisements at the site of tobacco brand sponsored events at adult-only facilities (i.e. “Camel Nights”), during the event and for the 2 week period leading up to it. [Kline, 2000]. (This is discussed above under ‘sponsorship’).

Impact of restrictions on outdoor advertising

Tobacco companies removed billboards and transit sides, and transferred their attentions to retail signs. In the period immediately following the MSA, an increase was observed across the United States in the number of retail promotions for cigarettes [Wakefield, 2000], especially those, like gas stations and corner stores, that were likely to be frequented by youth. [Celebucki 2002].

State-level studies also found an increase in signage at retail. A review of California found that almost all (94%) of retail outlets carried tobacco advertising, averaging 17 promotions per store. About half of the stores had ads at child’s eye level (below 3 feet), and one quarter had promotions next to the candy. [Feighery, 2001].

A Massachusetts study found that tobacco advertising occupies more than half of all storefront advertising in tobacco retail stores. Furthermore, storefronts were significantly more likely to display tobacco advertising the closer the store was to a school. As billboards have been removed these high visibility areas have become the new advertising battleground. Tobacco retailers have wallpapered their storefronts with these signs and they are particularly attractive to children.

[Kline, 2000].

In 2004, an estimated 500,000 retail businesses had outdoor advertising for tobacco products. [Eckhart, 2004].

The Federal Trade Commission reported a significant reduction in the amount of money spent on outdoor and point of sale promotions (from a total of \$626 million in 1998 to \$282 million in 2005).

Comparison with Canada

Tobacco billboards were removed in the United States a year in advance of their disappearance in Canada. The *Tobacco Act*, 1997 allowed billboard advertising for tobacco sponsored events until October 1, 2000. Unlike the United States, all retail signage at Canada, in theory, was also removed at that time (although some industry-provided signs, such as CART and Extreme Sports, still remain visible in retail outlets).

C6) Free Samples

The MSA established that free samples of cigarettes cannot be distributed except in adult-only venues, and

on the site of sponsored events that are allowed under the Sponsorship provisions of the MSA.

The state attorney generals intervened to reduce the visibility of sampling on event grounds, and requirements that the sampling booths be completely enclosed were agreed to.

In 2000, the first ever court action to enforce the MSA was filed by the government of California. It concerned unsolicited mailings of RJ Reynolds cigarettes. Reynolds eventually agreed to place conditions on its mailings of free cigarettes (but not to end them). Free distribution of cigarettes under this

agreement is limited to persons whose adulthood has been verified, who have given prior consent to receive the samples, and who receive no more than 5 mailings per year of no more than 2 packages per mailing.

Tobacco companies have continued to provide free samples: their budget for doing so has grown and shrunk in the past 9 years, and is now slightly higher in unadjusted dollars than it was in 1998 (as shown in Table 13).

**TABLE 14:
CIGARETTE ADVERTISING EXPENDITURES, 1998 – 2005 (\$MILLIONS)**

	1998	1999	2000	2001	2002	2003	2004	2005
Newspapers	29	50	52	32	25	8	5	2
Magazines	281	377	295	173	107	156	96	45
Outdoor	295	54	9	8	24	33	17	10
Transit	40	6	0	0	0	0	0	0
Point of Sale	291	329	347	284	261	166	164	182
Price Discounts					7,874	10,808	10,932	9,776
Promotional Allowances	2,980	3,543	3,913	4,453				
Retailers					1,333	1,229	542	436
Wholesalers					446	683	388	410
Other					3	3	1	1
Sampling distribution	14	34	22	17	29	18	12	17
Specialty Item Distribu-	356	335	328	334				
– Branded					49	9	8	5
– Non Branded					174	255	217	225
Public Entertainment	249	267	310	312				
Adult Only					219	151	140	214
General Audience					34	33	0	0
Sponsorships					54	31	28	31
Direct Mail	57	94	92	134	111	93	94	52
Coupons	624	531	705	602	522	650	752	870
Retail Value Added	1,555	2,560	3,453	4,761				
Bonus Cigarettes					1,060	667	636	725
Non Cigarette Bonuses					25	21	14	7
Internet	0	1	1	1				
Company Web-site					1	3	1	3
Internet – other								
Telephone					1	1	0	0
Other	62	55	63	105	113	118	102	99
Total	6,733	8,238	9,593	11,216	12,466	15,146	14,150	13,111

[Source: Federal Trade Commission, 2000, 2007].

Situation in Canada:

Distribution of free cigarettes has not been permitted in Canada since the 1970s, initially through a voluntarily agreement with tobacco companies and, from 1988 – 1995 and 1997 to date, as a result of legislation. Distribution of cigarettes for “sampling” or “evaluation” purposes has not been available since the coming into force of the *Tobacco Act*, 1997.

C-7) Minimum pack size

In the MSA, manufacturers agreed not to sell cigarettes in packages with fewer than 20 cigarettes. This voluntary agreement expired on December 31, 2001. The agreement also stipulated that the companies would not oppose state legislation that banned the sale of packages containing fewer than 20 cigarettes.

“It does not appear that ‘kiddie’ packs have made a strong appearance in settling states since the start of 2002, when the MSA’s prohibition against them ended.” Some states have passed laws to set a minimum pack size of 20. [Hermer, 2003].

Comparison with Canada

Since 1994, cigarettes can only be sold in Canada in packages with no fewer than 20 cigarettes [The *Tobacco Sales to Young Persons Act*, 1994 and *Tobacco Act*, 1997].

C8) Other Marketing Restrictions and considerations

The Settlement also impacted a number of marketing practices that were still common in the United States in the 1990s and continue to this day. A few of these (branded merchandise, or the misrepresentation of the health effects of tobacco) were banned under the MSA or restricted to adult-only venues.

Others continued to be permitted because they were not banned. Permitted marketing includes: print advertising, bar promotions, the use of coupons to purchase merchandise, direct mail, internet sales, point of sale promotions inside and outside retail stores, such as displays, slotting fees, retail value-added programs such as “two-for-one” offers, point of sale displays. These forms of marketing could be continued, but they were subject to the “general and undefined prohibition of direct and indirect targeting of youth” [Eckhart, 2004].

Applying an undefined prohibition across a large number of activities resulted in considerable enforcement interpretation challenges, and several enforcement actions.

Branded Merchandise:

The Settlement provided that tobacco companies would cease distributing or selling apparel and merchandise with brand-name logos (caps, T-shirts, backpacks, etc.) effective July 1, 1999. Merchandise could be distributed in adult-only venues.

Ohio complained in 2001 about RJ Reynolds distribution of a billion matchbooks covered with Camel and Winston ads, as a violation of the agreement to end brand name merchandise. The trial court agreed with Reynolds, but the judgment was overturned by the Court of Appeals.

Combined industry expenditures on merchandise remained over \$200 million in the post MSA period, but only a small proportion of that was branded merchandise.

In Canada, branded merchandise that could be appealing to youth is banned, and has not been readily available since the phase out of sponsored events in 2003. Information on merchandise provided in bar events has not, to our knowledge, been tracked or made available. However, a specific exception in the *Tobacco Act* allows cigarette-branded matches and lighters to be sold in Canada.

Gifts based on purchases:

The Settlement banned tobacco companies from providing ‘gifts’ to minors based on proof of purchases, or without proof of age. This has not reduced the number of companies which offer gifts with cigarettes. [Hermer, 2003].

Promotions like ‘coupons’ have not been available in Canada since the 1970s, initially through a voluntarily agreement with tobacco companies and, from 1988 – 1995 and 1997 to date, as a result of legislation.

Total spending on tobacco promotions post MSA

Promotional spending more than doubled from 1998 to 2005, with the biggest increases in promotional payments to wholesalers and retailers. Tobacco companies have been able to use their spending power to benefit from those promotional activities that are still allowed.

D. REFLECTIONS ON THE IMPACT OF THE MSA ON TOBACCO MARKETING.

The MSA is generally credited with having **changed** tobacco marketing in the United States. Less obvious is the extent to which it has **reduced the impact of** tobacco marketing on Americans.

In some aspects, the measured impact of tobacco marketing has diminished:

Major changes in the culture and the visual environment have occurred. No longer are drivers assailed by giant billboards touting particular brands of cigarettes. Mass transit commuters no longer see advertising of tobacco products. To a large extent, tobacco sponsorship of sports and music events, especially those aimed at young people, is not apparent. Gone from the scene are Joe Camel and the accompanying plethora of gear and gadgets designed to entice young would-be smokers. The absence of such visual promotional material may be subtle, however, many believe that it is a significant step, in the same vein as the important ban of cigarette advertising on television in 1969.

[Niemeyer, 2004].

The MSA restrictions on tobacco advertising and promotions were intended to protect underage youth, particularly young adolescents ages 12 to 14 years, from becoming receptive to forms of tobacco advertising and promotions that encourage them to smoke. The data we present suggest that they have shown some effectiveness. There was a substantial increase in the percentage of the California population who did not name a brand of a favorite cigarette advertisement in 2002 compared to 1999. This increase was particularly notable among young adolescents. Although adolescents were less likely to own a tobacco promotional item in 2002 compared to 1996, the decline was less marked than in young adults. In addition, after a decline between 1996 and 1999, adolescents were no less likely to have seen a tobacco logo on television in 2002 compared to 1999. Encouragingly, however, is the increase in exposure to advertisements against smoking on television in the past month. Close to 90% of adolescents and young adults reported such exposure in 2002.

[Gilpin, 2004].

The MSA restrictions appear to have reduced population receptivity to tobacco industry advertising and promotions. Along with other tobacco control measures, this should help

reduce the number of adolescents who initiate smoking and lead to a long-term improvement in public health as morbidity and mortality from smoking-related diseases declines. However, receptivity to tobacco advertising and promotions is still present, although to a lesser extent since the MSA, which indicates room for further restrictions on advertising and promotions. It also indicates that additional restrictions would likely have an impact in further reducing population receptivity to tobacco advertising and promotions.

[Gilpin, 2004].

In other respects, tobacco marketing continues to have a strong impact:

“Despite the Master Settlement Agreement, tobacco advertising remains prevalent in many sports. A new trend of placing alcohol and tobacco brand names in commercials for other products is evident.

[Zwarun, 2006].

The MSA’s advertising restrictions have eliminated tens of thousands of large outdoor billboards, but these have already been replaced by hundreds of thousands of smaller cigarette billboards located outside nearly every retailer right at children’s eye level.

[Godshall, 1999].

The balance of messaging between public health and tobacco companies is also problematic for some, with the industry spending (in 2001) “more than 13 times the total investment in state tobacco control efforts.”

[Tauras, 2005]

The path not taken

The settlement has been judged not only by what it did, but also by what it failed to do, and by what it was unable to do:

The MSA is necessarily limited to the concessions the major tobacco companies were willing to make voluntarily to settle the states’ lawsuits.

Efforts to achieve broader concessions, including sweeping federal legislation, failed. The states believed that the possibility that they could achieve greater public health gains

by going to trial against the tobacco industry was outweighed by the substantial risks associated with continued litigation.

[Eckhart, 2004].

In many respects, the Master Settlement Agreement fell short of the articulated demands of the health community in the late 1980s. It neither included all of the elements attached to the earlier 'global' settlement of 1997, nor the other elements of a comprehensive tobacco control agreement outlined by U.S. health experts during the same period.

Because of the controversy over the proposed global settlement, Congress requested two highly respected leaders in tobacco control, Drs. Koop and Kessler, to convene a panel of health experts to provide guidance on what policies should be included in any future settlement. The report, issued in July of 1997, outlined "a comprehensive tobacco control agenda" [Koop, 1997] Among the measures included in this report that could have arguably been negotiated amongst state attorney generals and tobacco companies but were not included in the MSA* were:

- Imposition on tobacco industry of performance standards for reduction of tobacco use by children and adolescents on a per-brand basis, and use of financial penalties for non-achievement.
- Bans (not restrictions) on marketing practices like merchandise, sponsorships, product placement, film portrayals, free samples.
- Ban on vending machines, self-serve displays, mail order sales, free distribution

- Ban on sales of tobacco products near schools, playgrounds and other areas
- Licensing of all participants in tobacco sales (e.g. manufacturers, distributors, wholesalers, importers, etc)
- Authority for both state and local governments to enforce violations
- Strengthening of warning and product content labeling
- Coverage for tobacco use cessation programs for all smokers who wished to sue them, paid for by tobacco companies
- Measures to reduce the number of smoking-caused fires
- Financing of future smoking cessation programs by the tobacco industry

The MSA also excluded measures that had been included in the 'global' settlement to which considerable objection had been raised by health researchers. One important such exclusion was any 'immunity' provisions. Measures to protect tobacco companies from future liability actions had been included in the global settlement and, at times, also in the McCain bill that flowed from it. They had drawn blistering criticism from several quarters. [Fox, 1998].

Another point of reference to assess the Settlement is the terms of settlement proposed by the Department of Justice in June of 2005, when it offered a "[Proposed] Final Judgment and Order." [U.S. DOJ, 2005]. This document outlined the Department of

* In addition to the above, the Task Force identified policy and programme measures that would have required the engagement of other government agencies or legislatures, including:

- Unlimited authority for the FDA to regulate of "all areas of nicotine" by FDA, including power to "phase out nicotine and remove ingredients that contribute to the initiation of smoking", and regulatory approval of non-tobacco nicotine devices (like nicotine inhalers) should be managed in ways that "encourages maximum overall reduction in disease"
- Schools and other child-service institutions should be 'smoke-free.'
- Continued and strengthened financing of IMPACT and ASSIST grants and increased public education
- Education of health care providers
- Smoke-free work sites, places of public assembly, outdoor areas where people assemble, public transportation, school facilities
- No pre-emption on any federal or state regulation regarding tobacco
- High level of enforcement of tobacco control regulations
- Full preservation of all available avenues of litigation, both civil and criminal
- Economic assistance to farmers to develop alternatives to tobacco farming
- Elimination of price support programs for tobacco.
- Promotion by U.S. government of tobacco control worldwide.
- Financing by U.S. government of international tobacco control efforts.

Justice's suggestions for the outcome of its litigation efforts against tobacco companies. Irrespective of whether or not Justice Gladys Kessler agreed with the proposed measures, they do provide guidance on what a government representative recently outlined as being both desirable and achievable through litigation.

The DOJ included monetary and non-monetary remedies. The monetary request was for \$10 billion for support for smoking cessation, and \$2 billion for other 'remedial measures.' Non-monetary remedies sought included:

- a 'look-back' provision which would penalize the companies if smoking among youth aged 12-20 did not decline by 6% per annum for 8 years (after it was reduced by 42%, there would be no further requirements on the companies).
- 'corrective communications' through mass media regarding the adverse health effects, the addictiveness of smoking and nicotine, low-tar cigarettes, the adverse health effects of second hand smoke and the impact of tobacco marketing on youth.
- a review of the business policies, practices and operations of each company to recommend ways to eliminate the economic incentives for defendants to sell cigarettes to youth, to change the compensation and promotion policies as well as oversight and reporting arrangements reduce

misconduct, to subcontract certain research to independent third parties, to transfer research on less harmful cigarettes to independent researchers, whistleblower protection.

- prohibition on certain marketing practices, including price promotions on popular brand with youth, sale of cigarettes in 'kiddie' packs of under 20 cigarettes, sponsorship of motorsports, flavoured cigarettes.

Although the Judge (Gladys Kessler) agreed with the allegations of the Department of Justice, she did not impose many of the suggested penalties, citing restrictions from a decision of an appeal court limiting remedies to those that restrain future violations. Her ruling, which remains under appeal (as of November 2007), prohibits future acts of racketeering or the making of false, misleading or deceptive statements. It also bans terms including "low tar" and "light", requires the companies to make corrective statements concerning the health risks of smoking, extends and expands requirements that internal documents produced during the litigation be made public, and requires the companies to report marketing data annually to the government. [Kessler, 2006].

5 9 years later— tobacco post- MSA.

The experience during the post-MSA period demonstrates that the MSA did no major harm to the companies. Some features of the MSA appear to have increased company value and profitability.

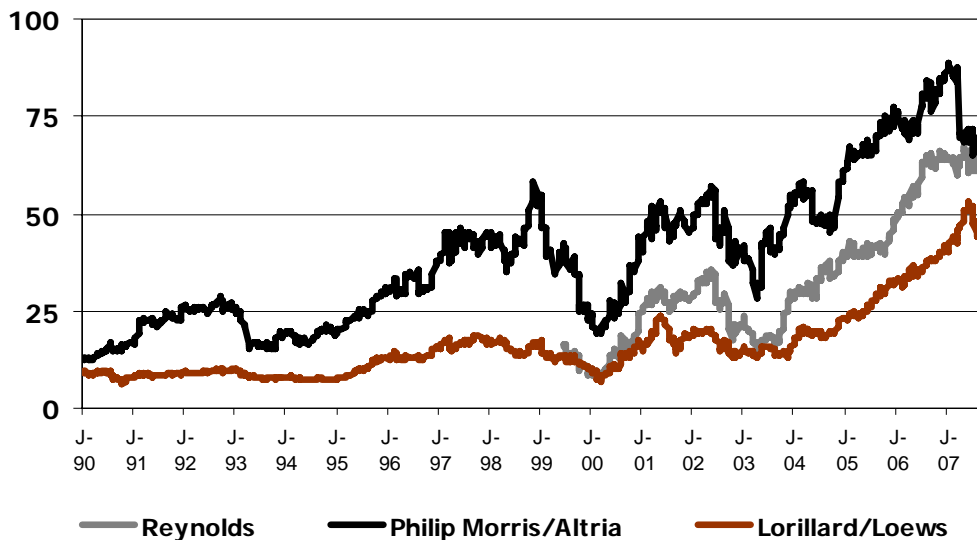
[Sloan, 2004].

The Master Settlement Agreement appears to have had a beneficial economic impact on the tobacco companies in a number of respects: their earnings are higher and the value of their shares has increased. This market improvement has happened

despite a concurrent increase in competition from small 'discount' manufacturers, who have increased their market share at the expense of the large companies involved in the Settlement. "Producers covered by the settlement accounted for 91.6 per cent of US market share in 2003, down from 99.6 per cent in 1997." [Tobacco Journal, 15 March 2006].

The years following the MSA have also witnessed improvements for public health. The amount of tobacco products consumed has decreased, both absolutely and on a per-capita basis. [USDA, 2007].

FIGURE 2:
WEEKLY CLOSING PRICES FOR THE THREE MAJOR TOBACCO COMPANIES,
JANUARY 1990 – OCTOBER 2007 (SOURCE: GOOGLE FINANCE).



The prevalence of smoking has also declined [CDC, 2006]. In both cases, the decline has not been as sharp as in Canada and other developed countries.

Earnings of companies post MSA

Because the tobacco companies raised their wholesale selling price of cigarettes by more than they needed to in order to cover the payments they needed to make to the states, they were able to increase their profits in the post-settlement period. Even though there was a decline in the number of cigarettes smoked in the United States (a tribute to the MSA's health impact, perhaps), cigarette price increases more than offset these reductions. This is a typical result of a price increases for cigarettes (whether taxes or manufacturer's earnings), but it was expected that the impact over the longer-term might not be so favourable:

For this reason, the long run effect of the MSA over a decade or more may be less favourable to the companies than was the effect during the first four post- MSA years.

[Sloan, 2004].

The fact that the industry's profitability has not been diminished is cause for concern among some:

The MSA did not eliminate cigarette use of the companies that manufacture them. The MSA

was never intended nor expected to destroy the tobacco industry. But neither was it intended to improve company finances nor create stakeholders newly dependent on their continued financial success.

[Sloan, 2004].

Tobacco profits thus far have been relatively unaffected by tobacco litigation, as manufacturers have passed the costs onto addicted smokers with relatively inelastic demand. As long as the companies' profits increase with every new addicted smoker, the industry will remain motivated to find ways to avoid or evade legal restrictions on its behaviour."

[Daynard, 2001].

In 1997, the total operating profits of the domestic components of U.S. tobacco manufacturers was estimated at \$7.2 billion [Harris, 1998]. In 2005, the pre-tax domestic tobacco operating profits of the 3 largest U.S.-Based cigarette manufacturers alone was \$7.1 billion [IOM, 2007].

Market value of companies post MSA

To a large measure, the MSA lifted the litigation cloud from over the tobacco company's prospects. This, together with sustained profits, resulted in the share value of companies also benefiting from the

TABLE 15:
PER CAPITA CONSUMPTION TOBACCO PRODUCTS, 1994 – 2004, SELECTED COUNTRIES

	United States	Canada	Australia	United Kingdom	Sweden
1994	2,435	2,347	2,336	2,044	1,434
1995	2,415	2,098	2,300	2,081	1,423
1996	2,355	2,145	2,044	2,081	1,327
1997	2,290	2,044	2,044	2,044	1,347
1998	2,190	2,023	1,971	2,044	1,021
1999	2,022	1,998	1,862	2,117	968
2000	1,974	1,883	1,789	2,081	1,103
2001	1,976	1,792	1,643	2,044	1,119
2002	1,909	1,602	1,606	2,008	1,134
2003	1,820	1,523	1,716	1,971	1,160
2004	1,747	1,455	1,643	1,898	1,100
% end/start	72%	62%	70%	93%	77%

Source: U.S.: US Department of Agriculture, Tobacco Outlook, 2007 and 2003; Australia, United Kingdom and Canada: Peter N. Lee: International Smoking Statistics; Sweden: Drogutvecklingen I Sverige 2006 (snus use is not included in Swedish data).

settlement agreement. "The MSA provided a boost for the industry." [Sloan, 2005].

Tobacco consumption post MSA

Tobacco consumption in the United States fell following the Master Settlement Agreement, whether measured as the total number of cigarettes consumed or as the number smoked per U.S. resident. Per capita consumption fell from an annual consumption of 2,355 cigarettes (or equivalents) in 1996 to 1,650 in 2006. [US Department of Agriculture, 2007]. This is a decline of 30%.

Equivalent data is available for the 1994 to 2004 period for a number of other countries in similar stages of development. The decline in U.S. consumption of tobacco products is not greater than it was in the other countries for which data is available (see Table 15).

Smoking prevalence post MSA

The prevalence of tobacco use fell in the United States following the MSA, to a greater extent among women than among men. The change in prevalence was greater in Canada during the same period, as shown in Table 16.

Tobacco control and the public health community post MSA

A review of the impact of the Master Settlement Agreement, and of the outcomes of U.S. litigation would be incomplete without reference to the very strong reactions these outcomes have triggered among the health community and the tobacco control community.

The announcement of the Global Settlement in 1997 initiated severe criticisms of the attorney general's negotiating objectives, and exposed stark differences in perspectives among leaders and rank-and-file members of the tobacco control community, and between public health authorities and justice officials.

The Global Settlement received support from neither of two leading figures in public health on tobacco control, then head of the U.S. Food and Drug Administration, Dr. Jonathan Kessler, and former U.S. Surgeon General, Dr. Everett Koop. It was roundly and repeatedly denounced by academic activist, Dr.

Stan Glantz. The heated debate and inflamed rhetoric that surrounded the settlement's review by Congress exacerbated the difficulties the legislature had in reaching a final agreement on this proposal. The divisions amongst tobacco control advocates that emerged during the review of the global settlement may have hindered subsequent advances on the issue. [Pertchuk, 2001].

The situation is summarized by a tobacco litigation expert, Stephen Sugarman, reviewing the version of these events recounted by another leading figure in tobacco issues, Michael Pertschuk:

For Pertschuk, by being to greedy and by being unwilling to accept sensible compromises, the tobacco control leadership squandered a rare opportunity to obtain significant policy gains, even if they were not all the gains the movement might legitimately want. Incrementalism lost out to extreme idealism.

[Sugarman, 2001].

Thumbs up. Thumbs down: reviews of the MSA

Ten years have passed since the Global Settlement was proposed and failed, and 9 years have passed since the Master Settlement Agreement was negotiated. In this decade, the MSA has been assessed by many researchers, to varying extents and towards divergent conclusions.

Those, like American Cancer Society President, John Seffrin, who had supported the 1997 'global' settlement, compared the MSA unfavourably to the previous option:

The MSA thus was, from the beginning, a missed opportunity to make historic change; it is not surprising that, 5 years later, its achievements pale compared to the promise of the 1997 settlement and the McCain bill. To date, the MSA has not lived up even to the limited advances it promised.

[Seffrin, 2004].

Some consider that the agreement has led to outcomes that could not have been anticipated at the outset:

Imagine that we were to write an article in 1993 and make the following prediction: Imagine that we predicted a future in which smoking would be increasingly socially unpopular and heavily taxed. Further, imagine that we predicted a future in which the tobacco

industry would be widely known to have lied about smoking and would be treated as untrustworthy by all parts of society. Finally, imagine that we predicted a future in which very few of the people who smoked in the past received compensation (despite a shared consensus that the tobacco industry engaged in many bad acts, including fraud) and that the state governments defended the industry against plaintiffs so that a steady stream of tax money (overt and covert) could be collected by the states although very little of that money was used for the prevention of smoking, smoking cessation, or the public health.

[Sebok, 2004].

Even some of the original litigants have expressed strong displeasure at some of the outcomes:

In [Mississippi Attorney General] Moore's words, "I call it moral treason. The losers are the people in the states where the legislators have chosen to spend the money on budget deficits instead of long-term investment in health."

[Schroeder, 2004].

Some have found that the agreement was followed by unexpected set-backs and disappointments:

Five years after the November 1998 state tobacco settlement, we find that most states have failed to keep their promise to use a significant portion of the settlement funds to reduce tobacco's terrible toll on America's children, families and communities. We also find that the settlement's marketing restrictions have done little to reduce the tobacco companies' ability to market their products aggressively in ways effective at reaching and influencing our children.

Disturbingly, in the past two years the states have cut funding for their tobacco prevention programs by more than a quarter, and several states have completely eviscerated some of the most successful and promising tobacco prevention and cessation programs in history. Most alarming of all, the states have reduced their commitment to protecting our children from tobacco even as the tobacco industry's marketing expenditures have skyrocketed to record levels.

[Schroeder, 2004].

Some have found that the agreement did not really change things so very much in the way the tobacco company operated, or in the impact of tobacco products on American Society:

"Still, the MSA has not fundamentally changed the way cigarettes are sold. Nor has it punished the industry for its misdeeds...."

Tobacco company profits actually increased subsequent to the MSA."

[Daynard, 2001b].

Altogether, these three areas of litigation—the state Medicaid litigation, the private litigation and the newly filed federal litigation—pose a real probability of extracting hundreds of billions of dollars from the tobacco industry, with the potential for changing its behavior, as well as compensating its victims. It seems clear, however, that the tobacco industry will survive and that its products will continue to inflict the injury they have inflicted over the past seventy-five years. Moreover, if the MSA is any indication, the tobacco industry will incorporate the probable settlements from the private and federal litigation into its costs of doing business. These added expenses will likely be passed on to an addicted consumer base. The tobacco industry will thereby self-insure against the injuries it inflicts and continue its course of destructive conduct. There will be no genuine improvement in the nation's health. Nor will there be a comprehensive national policy concerning tobacco.

[Lafrance, 2000].

But today, 10 years after the parties announced a record \$369 billion settlement – which was later reduced to \$246 billion – it's business as usual. Young adults still overwhelmingly make up the 3,000 people who start smoking daily. Cigarettes remain unregulated by the U.S. Food and Drug Administration ... the only big winners in the litigation appear to be the tobacco companies, the state treasurers and the lawyers who represented both sides.

[Curridan, 2007].

Some found that the settlement did not change the power balance between the tobacco industry and public health agencies:

[O]verall spending in 2003 from the MSA and other state revenue sources for comprehensive state anti tobacco programs favored the tobacco industry. State tobacco control efforts from 1990 to 2003 in the areas of state preemption of local clean indoor air and youth access enforcement ordinances and state public smoking restrictions continued to strongly favor the tobacco industry. In the aggregate, these policy outputs represents a failure from 1990 to 2003 to punctuate or replace the tobacco policy monopoly equilibrium in the states despite a sharp mobilization for increased tobacco regulation, higher tobacco taxes, and litigation against the industry.

[Derthick, 2005].

Some have found that the agreement marked a profound change:

What may be most important about the MSA is that the tobacco industry finally admitted that some of their activities were harmful and wrong. Couple this with the massive amounts of new documentary evidence that the states were able to discover in their actions, and the assistance that has been lent to future private litigants may be worth any price that may have been paid by the states. In any case, careful observation over the next two decades will be required to fully evaluate the effects of the MSA on American society."

[Smith, 2002].

Some found that it served the interests of tobacco companies very well, by presenting proclaiming victory against tobacco companies, and allowing the companies to reposition themselves as 'good corporate citizens':

Finally, one of the most far-reaching effects of the MSA may be that it provides a false sense of security that the battle against big tobacco has been won in the minds of Congress and many Americans... With a new image, settlement behind them, and a global market in front of them, tobacco companies are positioned in the 21st century to promote and sell their deadly product—resulting in an estimated 4 million deaths worldwide.

[Niemeyer, 2004].

Tobacco companies can appear to accommodate public health demands while

securing strategic advantages. Negotiating with the tobacco industry can enhance its legitimacy and facilitate its ability to market deadly cigarettes without corresponding benefits to public health."

[Wander, 2006].

Contributing to the challenge of evaluating the MSA is the absence of a common ground from which to analyze the agreement [Wood, 2003], and the difficulties for those outside of the negotiating process to be able to assess what other options were possible at the time:

However, post hoc critiques of the MSA suffer from Monday morning quarterback syndrome. In general, those who have critiqued the actual outcomes of the MSA were not participants in the settlement process and thus have little firsthand knowledge about what was possible.

[Healton, 2004].

"Some public health people miscalculated the fight against a very powerful foe. They saw the blood in the water and thought the enemy was mortally wounded, which wasn't true. They didn't understand what the trial lawyers knew, that the home run to be achieved in these cases was much more likely to happen in a settlement than through a trial."

[Myers, quoted in Curriden, 2007].

**TABLE 16:
PREVALENCE OF CURRENT SMOKING, CANADA AND THE UNITED STATES, 1999-2006.**

Age	Men		Women		Men		Women	
	United States	Canada	United States	Canada	United States	Canada	United States	Canada
	18+	15+	18+	15+	18-24	20-24	18-24	20-24
1999	25	27	22	23	30	40	26	31
2000	25	26	21	23	28	32	26	32
2001	25	24	21	20	30	35	23	29
2002	25	23	20	20	32	31	25	30
2003	24	23	19	18	26	31	22	30
2004	23	22	19	17	26	30	22	25
2005	24	22	18	16	28	29	21	23
2006	24	20	18	17	29	30	19	24
% change	-5%	-35%	-35%	-20%	-4%	-33%	-36%	-29%
Percentage point change	-1	-7	-6	-4	-1	-10	-7	-7

Source: U.S. National Health Information Survey, Canadian Tobacco Use Monitoring Survey

6 Lessons for Canada

Litigation is no panacea. Nor is it for everyone. In many countries, litigation may be inappropriate or doomed to failure. In others, it may need to take forms very different from the cases of the past. The monumental scale, expense and endlessness of U.S.- style health care cost recovery cases and class actions defy the imagination; they must be experienced to be appreciated. Even in the most experienced hands, this unwieldy tool remains, in the words of one leading scholar, "a highly unpredictable ally in the movement to reduce tobacco use."

[World Health Organization, 2001].

The transferability of the U.S. litigation experience to Canada has been the subject of reflection by governments (who have variously decided in favour and against suing tobacco companies), and also by researchers in the health and legal fields.

Similarities in tobacco use and culture between the two countries, however, belie large differences in the legal and political cultures of the two countries. Litigation in Canada is hindered by product liability law that is less willing to accept strict liability, might benefit from a greater willingness to not apportion blame to the smoker, and might be less fruitful because of a Supreme-Court imposed cap on non-pecuniary damages, argues Windsor law professor, Jeff Berryman. He is doubtful that tobacco litigation successfully results either in 'compensation' for smokers or 'general deterrence' to tobacco companies. In addition, he suggests that the culture which has allowed tobacco control to progress in Canada runs counter to support for public litigation:

"Initial Canadian deference to authority and elitism gave greater power to government and health policy makers to dictate smoking

cessation policies. But, today, Canadians demand of governments that they create appropriate policies towards smoking cessation and, by and large, Canadian legislators are ready to comply. Canadians remain willing to pay taxes, even at increased levels, if they advance national policies that have broad popular appeal, such as health care. This willingness itself militates against a desire to pursue litigation to pay for something which is universally provided and which the population takes pride in as a defining characteristic of being Canadian. Because government universally funds health care in Canada, efforts to pursue cost recovery from smokers, or the tobacco industry, are easier to attain through taxation or licensing fees, rather than engaging in the uncertain prospect of litigation.

[Berryman, 2004].

Berryman considers that litigation may actually impede the establishment of effective tobacco control measures, and that they 'may have dissipated the drive' towards policy change. He concludes by warning of the dangers of allowing "an influential legal elite to divert attention from collectivist community action, eventually weakening our democratic values ... is, indeed, pernicious. [Berryman, 2004].

Other Canadian lawyers reviewing the U.S. experience, including those within the tobacco control community, agree with Berryman that the differences between U.S. and Canadian legal, social and political systems are so profound that the transferability of a litigation approach cannot be assumed.

Eric Legresley points to 5 distinctions: the greater acceptance by Canadians of taxation as a policy tool; the relative success in Canada of passing tobacco control legislation; the higher potential costs of litigation in Canada (where, unlike the United States,

the loser often pays the legal bills of the winner); the lower damage awards in Canada; and the greater potential harm in Canada for litigation to be used as an excuse to forestall further legislative developments (because such developments are less likely in the United States). [Legresley, 1998].

Nonetheless, Legresley saw merit in Canadian litigation: "Still, as a vehicle to prod a negotiated solution rather than a direct cost recovery vehicle itself, public litigation in Canada retains many of the benefits it enjoys in the U.S." [Legresley, 1998].

Legresley identifies other options to litigation by which governments could recover costs or achieve similar results to the U.S. litigation outcomes without going to court. He singles out manufacturer's license fees as one potential mechanism, especially if twinned with a legal inquiry into tobacco industry actions:

Cost recovery could occur by imposing upon the cigarette companies a licensing fee as the cost of marketing their products in the province. For example, the yearly license fee for each tobacco company could be set equal to the annual health care costs that company's tobacco products foist on society...

Though the tobacco industry would undoubtedly raise a legal challenge to a licensing system, this is not as problematic as the required court case in a litigation-based approach. During any challenge the companies would still be required to pay their license fees, even if only into an escrow account, while the legal challenge proceeds. So unlike the American litigation approach which likely could produce a final damage award in, say, year seven, a license system could have the tobacco companies paying in year one. ...

[L]icensing system alone would not contribute to public education and industry denormalization as much as other cost recovery vehicles. However, prior to the implementation of a licensing system it would be prudent to undertake a Royal Commission or some other public inquiry with powers of subpoena into tobacco and the tobacco industry. Such an inquiry could undertake a comprehensive assessment of tobacco's costs and, in the process, educate the public and cast much needed light on the inner workings of the cigarette companies and their lobby.

[Legresley, 1998].

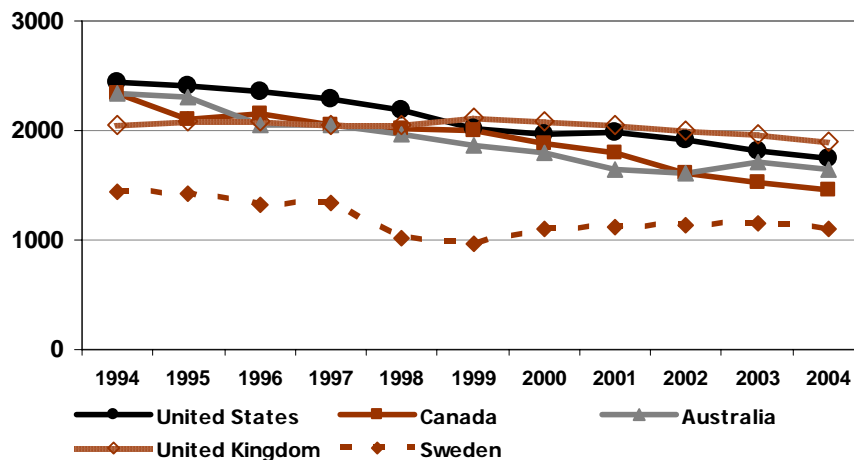
Lawyers, tobacco companies and health agencies are not the only groups exploring the potential impact of tobacco litigation in Canada. The insurance industry also has cause for reflection:

[S]imilar to the asbestosis settlements, there is a fear that rulings applied by the U.S. courts will eventually flow into the Canadian system, and secondly, if the tobacco companies are forced into a difficult financial position, they may be inclined to test their legal claim against insurers.

... Several experts within the Canadian insurance industry have identified tobacco liability exposures to be the biggest threat facing the industry since the asbestosis claims of the 1980s. A number of Canadian insurers have already engaged in legal discussions with tobacco clients over whether liability coverage of policies extends to include the damages being awarded by the courts. At least one of the major cigarette companies in the U.S. is in the process of suing its insurers for recovery in this regard.

[Van Zyl, 2001].

Smoking Prevalence among adults in Canada, the U.S. and selected countries, 1994—2004 (see Table 16)



THE MSA AND CANADIAN GOALS FOR LITIGATION

It is beyond the scope of this review to determine whether, through the MSA, the U.S. public health community achieved the goals that Canadians have established for litigation against tobacco companies.

Such an analysis could establish whether the MSA contains lessons on whether and how litigation against tobacco companies in Canada could result in:

- Advancing “the whole of tobacco control”. [Coalition québécoise pour le contrôle du tabac, 2001].
- Achieving “justice” by “holding the tobacco industry accountable before the law for their wrongful behaviour”. [Canadian Cancer Society 2005].
- Obtaining “the truth, through public disclosure of internal documents”. [Canadian Cancer Society 2005].
- Obtaining “compensation for health care costs, thus benefiting taxpayers”. [Canadian Cancer Society 2005].
- Forcing companies “to stop acting in ways detrimental to public health.” [Canadian Cancer Society 2005].
- “Look-back provisions” to require the companies to “meet various youth smoking initiation reduction targets.” [OCAT, 2007].
- The industry reforming itself, being honest with consumers and working on a safer product [Wilson, 2001].
- The punishment of the industry “for their decades of disinformation” [Wilson, 2001].
- Reduction of tobacco consumption and tobacco-caused morbidity and mortality. [Legresley, 1998].
- Denormalization of the tobacco industry. Legresley, 1998].

7

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Physicians *for a*
Smoke-Free Canada

1226 A Wellington Street
Ottawa • Ontario • K1Y 3A1
Tel: 613 233 4878 • Fax: 613 233-7797
www.smoke-free.ca

