

Tobacco's victory: Behind the settlement

by [Robert F. Drinan](#) in the [March 3, 1999](#) issue

This past November the tobacco industry agreed to give \$208 billion to the states over the next 25 years. The tobacco companies want us to think that they have redeemed themselves from their evil deeds. But the truth is that they've engineered a settlement that may be one of the best con jobs in American history.

The industry's exploitation of the American public began in the 1950s when scientific evidence was establishing the insidious effects of tobacco. Although in 1954 the tobacco industry proclaimed in nationwide ads that it would cooperate with scientists to keep smokers informed, it failed to do so. Instead it concealed the truth, withheld evidence from the U.S. surgeon general, and continued its campaigns to lure young people into nicotine addiction.

For 30 years the reports of the surgeon general have warned us of the deleterious effects of tobacco. The entire public health community has been unanimous and vigorous in urging the government to warn smokers that they are poisoning themselves.

Although the warnings have had some effect, the diseases of heart, lung and blood caused by smoking continue to lead to 1,000 deaths every day. And despite a decline in the number of smokers overall, the number of high school and college students who smoke has increased substantially.

Seeing the rise in public opinion against their product, tobacco companies allegedly altered the level of nicotine, placed filters in cigarettes and confused the public about the levels of tar. They continue to spend billions of dollars on advertisements, and use political action funds to reward their friends and punish their enemies.

Until recently, the hundreds of lawyers retained by the tobacco industry boasted that they never settle and always defeat the plaintiffs who sue on the basis of smoking-related illnesses. The case of the plaintiffs was strong: the tobacco

companies concealed the dangers of tobacco, exaggerated the meaning of the legal assumption of the risk, and harassed lawyers for the plaintiffs until these attorneys were exhausted from questionable tactics and endless delays.

Around 1995 the tobacco giants began to realize that their deceptive advertising and legal trickery might not keep them out of trouble forever. Three states launched lawsuits against the tobacco companies seeking indemnification for the billions that the states spent through Medicaid on citizens with illnesses caused by smoking. After delays and legalistic maneuverings, the tobacco companies settled with Mississippi, Texas, Florida and Minnesota for a total of \$40 billion.

I was an adviser on legal ethics for the attorney general of Texas in that state's suit against the tobacco companies. I was deposed about the many violations of legal ethics committed by lawyers who represented tobacco companies. The conduct of some lawyers who defended the tobacco companies was shameful. They concealed documents, deliberately misinterpreted scientific research, and harassed their opposition. These attorneys knew they were defending a substance that has no redeeming features and, if used as directed, is dangerous to a person's health.

The many lawsuits brought by state attorneys general led the tobacco companies to alter their strategy. Cigarette manufacturers agreed to seek a federal statute that would give them a lasting immunity from almost all lawsuits. The cigarette industry agreed to accept the \$368.5 billion package worked out by Senator John McCain (R., Ariz.). The tobacco cartel wrote in loopholes and insisted that there be no authorization to refer the question of tobacco to the regulators of the Food and Drug Administration.

But when the price escalated to \$516 billion in the Senate, the tobacco companies withdrew their consent and advertised their opposition everywhere. The bill collapsed. But the public was growing hostile, resenting the deception of the tobacco industry, and the influence of the public health community was growing stronger. The merchants of tobacco realized that they had to do something.

The result was the 131-page agreement signed in mid-November by the attorneys general of 46 states (excluding the four states that previously settled) and several U.S. territories. Lawyers for tobacco carefully removed some of the urgently needed provisions. Then the tobacco sellers increased the price of their product so that the payout of \$206 billion over 25 years would not harm the tobacco companies in their

bottom line.

Big tobacco is now free to do business as usual. Joe Camel is gone but brand-names sponsorship is permissible at one event each year. Philip Morris, RJR Nabisco, Brown and Williamson and Loews will continue to multiply brand names that convey the thought that smoking is cool. One-half of all films will continue the current practice of having 50 percent of movie characters smoke.

Political leaders will continue to defend and be influenced by the lavish contributions for their political campaigns from the giant tobacco industry.

The total of \$206 billion seems generous. But U.S. government experts estimate that the \$206 billion is only 8 percent of the \$2.5 trillion that society expects to lose over the next 25 years from cigarette-related health care and lost productivity.

Massachusetts will receive \$7.6 billion from cigarette makers over the next 25 years, but it will spend \$58.75 billion for tobacco-related diseases and lost productivity.

Only the lawyers for the tobacco industry understand the implications of concessions made by the attorneys general. The tobacco giants will continue to brag about their alleged generosity. In the future, state attorneys general will denounce the 1998 agreement as a crude bribe. And the public health community will continue to say that the 46 attorneys general should have resisted the money and the intimidation of the tobacco industry.

Some observers are already pointing out deficiencies of the settlement. Stan Glantz, professor of medicine at the University of California, documents four decades of deception and trickery by the tobacco industry in his book *The Cigarette Papers*. Glantz points out that if cigarette sales drop, the payment to states will decline. Furthermore, if Congress increases the tax on cigarettes and shares some of it with the states, payments from the cigarette industry will decline. This will turn state officials into opponents of any rise in federal taxes on cigarettes.

There will be sharp controversies about how to spend the money from the tobacco moguls. California will receive \$1 billion a year for the next 25 years. Private groups like the Campaign for Tobacco-Free Kids want to spend some of the money to reduce tobacco use among children. The federal government may well claim a share of the bonanza in order to reimburse Washington for the billions spent on Medicaid for citizens with tobacco-related diseases.

The tobacco industry has realized that jurors will support heavy penalties on tobacco vendors. As a result, the industry finessed the ability of juries to sit in judgment on the tobacco companies: the agreement makes it impossible for any state to bring legal action against a tobacco company for indemnification.

Tobacco companies are now free from the thrust of regulation by the Food and Drug Administration and probably from any significant action by Congress. If the companies lose any profits from the November deal (which is unlikely), they can make them up by broadening their worldwide drive to hook the young people of Asia and Africa on nicotine.

One of the primary functions of government is to help citizens to resist or overcome forces and substances which can destroy their health. The government has a moral duty to protect its people from major threats to their health. In the year 2023, when the \$208 billion has been collected and spent, there may still be 400,000 persons dying each year from tobacco-related causes.

The federal and state governments must intensify their collaboration with the American Medical Association, the American Cancer Society, the American Lung Association and the entire public health community. The government has many allies-almost everyone in America has a family member or a friend who is sick or has died from a tobacco-induced disease.

A strong and committed government supported by millions of antitobacco activists should theoretically be able to decrease the number of smokers. But the government and antitobacco activists will still have to take on the immensely profitable and resourceful tobacco industry, the industry that scored an unprecedented victory in its financial settlement with the states.