

THE SO-CALLED GLOBAL TOBACCO SETTLEMENT: ITS IMPLICATIONS FOR PUBLIC HEALTH AND PUBLIC POLICY—AN EXECUTIVE SUMMARY OF A CONFERENCE AT THE UNIVERSITY OF WISCONSIN LAW SCHOOL

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On October 15–17, 1997, the Institute for Legal Studies of the University of Wisconsin Law School held a conference attended by over 80 lawyers, academics, and interested citizens on the proposed “global” settlement of the tobacco litigation. The Robert Wood Johnson Foundation was the principle sponsor of this conference along with the University of Wisconsin Law School. The purpose of the conference was to consider the implications of that settlement for public health in particular and public policy in general. This is a summary of those proceedings. Readers interested in the full, edited proceedings can obtain a copy from the Institute.¹

The Conference commenced on the evening of October 15, with a keynote address by William Schultz, Deputy Commissioner for Policy, Food and Drug Administration. On October 16, four sessions and a working lunch focused on central issues raised by the proposed settlement. The conference concluded on October 17, with two more formal sessions and a presentation by Wisconsin Attorney General James Doyle, Jr. The edited proceedings regrettably omit the discussion from the floor which was very informative. This summary does, however, draw on parts of that discussion to highlight aspects of the presentations reported in the proceedings.

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1. Copies of the *Proceedings of the Conference on the So-Called Global Tobacco Settlement: Its Implications for Public Health and Public Policy* are available from the Institute for Legal Studies, 975 Bascom Mall, Madison, WI 53706 at the price of \$30 for the two volumes.

This summary provides short abstracts of each of the six sessions of the conference and the three special presentations. We start, however, with a brief set of reflections on the part of the organizers on the significance of the conference with a particular emphasis on the themes that seemed to dominate much of the discussion throughout the conference.

First, the settlement's primary objective is to reduce the number of teenagers who start smoking. This objective is based on the assumption that if people do not initiate smoking in their teen years, they will either not initiate it at all or will be substantially less addicted; therefore, they will find it easier to stop smoking. Both the formal presentations (Professor Mark Kleiman, Professor John Mullahy, and Professor David Sugarman)² and floor discussion raised the question of the validity of that core assumption. Those with a proclivity to smoke and to acquire a strong addiction to tobacco do commence smoking before they reach the age of 18. There is, however, only a weak empirical base for the conclusion that if those with such tendencies are kept from smoking before they reach the age of 18, then they will not start to smoke or will not become strongly addicted if they do begin smoking after they reach the age of 18. The assumption about age rests on current experience which shows that few people start to smoke after the age of 18 and those that do have less tendency to be addicted. No one presented evidence to counter the assumption, but given its centrality to the core policy of the proposed settlement, the linkage between age and starting to use cigarettes is a major concern.

Second, assuming that reducing teenage commencement of smoking is key to long-term reduction in the incidence of smoking, many participants expressed doubts about the likely effectiveness of specific methods of control (Professor Jon Hanson, Kleiman, Sugarman, Professor Thomas Merrill)³ especially where the basis on which young people decide to smoke is not necessarily evident. Under some plausible economic models, higher prices might make smoking more attractive (Mullahy, Kleiman)⁴, and other controls may be easily evaded or ineffective (Hanson, Sugarman).⁵

Third, an important element of discouraging smoking is raising the price of cigarettes. The presenters saw several problems with this. First, the proposed price increases may not be substantial enough to account for the actual costs of smoking (Hanson, Kleiman, Mullahy, but see Sugarman).⁶

2. See *infra* parts H (Session V-Economic Issues) and E (Session III-Liability Issues).

3. See *id.*

4. See *infra* part H.

5. See *infra* part E.

6. See *infra* parts H and E.

Second, the increases will tax existing smokers in a most regressive manner. Those most adversely affected economically will be the elderly poor whose potential health gains are least (Professor Patrick Remington, Kleiman)⁷ and who will pay a very large price to maintain their addiction (Kleiman, Sugarman, Mullahy).⁸ While possible remedies exist for this problem, it seems that there has been little focus to date on the actual impact of increased prices and which segments of the public will have to bear this cost.

Fourth, there is a vast population of existing smokers who would benefit substantially in health and economic terms if they can stop smoking (Remington).⁹ Moreover, a substantial number of smokers want to quit but find it difficult or impossible (Remington, Dr. Michael Fiore, Kleiman).¹⁰ There are improved techniques to facilitate quitting (Fiore)¹¹ but the settlement does not focus on this problem, nor does it provide adequate support or oversight for aiding this process (Fiore, Remington, Kleiman).¹²

In sum, there was a general skepticism that the proposed settlement was necessarily a very good resolution to the central public health issues that tobacco smoking created.

A. William B. Schultz- Keynote Address

In opening the conference, Mr. Schultz discussed the factors that led the tobacco industry to come to the negotiating table: the changed political environment which, for the first time, featured support for regulation of tobacco, especially protecting children from tobacco addiction; the increased press scrutiny of industry practices, including the long history of suppressed research results; the state lawsuits seeking restitution of Medicare and Medicaid payments; and the growing number of private law suits. The initial, favorable reaction to the proposed settlement might have led to its quick acceptance by many interested groups. Fortunately, in Mr. Schultz's view, the White House did not make a quick endorsement, but rather established a task force to review the details of the proposal. The task force's analysis raised a number of troubling questions. Simultaneously, various public health groups also began reviews and raised concerns. Five substantial concerns emerged from these evaluations: (1) the fairness and

7. See *infra* parts B (Session I—The Public Health Implications) and H.

8. See *infra* parts H and E.

9. See *infra* part B.

10. See *infra* parts B, and H.

11. See *infra* part B.

12. See *infra* parts B and H.

precedential implications of limits on the use of state tort law to be imposed by federal law; (2) the constraints on FDA control over nicotine could foreclose its usual function of developing a comprehensive scientific record and fashioning appropriate regulation based on that information; (3) the proposed antitrust immunity for the tobacco companies would be inconsistent with general competition policy, although collusion to raise prices might deter consumption especially by young people; (4) the restrictions on advertising create serious constitutional questions; (5) the settlement did not address either the international aspects of tobacco or the impact that the proposed limits on tobacco would have on farmers.

At the same time, there are significant positive aspects of the settlement: the industry would consent to FDA authority to control tobacco, and the FDA's general authority to impose nation-wide regulation on advertising is probably a more sweeping delegation than would have occurred if a new agency were to be created; the industry would accept substantially more significant warnings both in wording and size; a very large sum, \$500 million, would be devoted to public education focused on young smokers; and an additional, larger sum would go to the states and national government that could be used to do a great many useful things.

Given these positive and negative potentials, the crucial questions remain: Will this settlement actually have a positive impact on public health? What are the real costs of the caps on liability and the elimination of class actions and punitive damage claims? What does a settlement like this mean for the treatment of other industries that want similar immunity from liability?

B. Session I—The Public Health Implications

Professor Patrick Remington of the University of Wisconsin Medical School's Department of Preventive Medicine made the primary presentation. Based on standard epidemiological methods, he developed estimates of the likely public health gains from reductions in the numbers of smokers. The combination of the incidence of particular types of disease, the relative impact of smoking in the causation of the disease, the age of the person who either does not start or stops smoking, and the difference between short term and long term impacts explain the results. Thus stroke and heart disease risks change quickly after cessation of smoking. Other diseases, such as lung cancer and chronic lung disease, can occur long after cessation. Hence, tobacco related deaths from diseases such as lung cancer and chronic lung disease remained steady from the 1960s until 1990 despite substantial

declines in the number of smokers in the population. As a result, preventing the youth from smoking will have no substantial effect on death rates for 30 more years. After this 30-year period, however, the effect will be major. In contrast, cessation by those 65 and over should have a substantial short run effect (the next 10 years). Not surprisingly, however, the effect will diminish over time. Given the very large number of smokers in absolute terms, even a small percentage reduction in smoking would avoid a substantial number of deaths. The following table shows Professor Remington's estimates of the short term and long term impact of changes in smoking:

Table 3: Number of deaths avoided per year in the U.S. for various reductions in smoking.

	Percent reduction in smoking				
	4%	10%	20%	40%	100%
Short term*	6,000	14,000	29,000	57,000	43,000
Long term**	8,000	19,000	39,000	77,000	93,000
Total	14,000	33,000	68,000	134,000	136,000

* Short-term benefits are primarily related to reductions in heart disease and stroke deaths

** Long-term benefits are primarily related to reductions in cancer and chronic lung disease

This analysis does not tell us whether the anti-smoking methods adopted by the settlement will, in fact, produce any change in the incidence of smoking. Closing on a note of caution, Professor Remington reminded the audience that "past . . . initiatives supported by [the] . . . tobacco industry have not resulted in improvements in the public's health."

Two commentators elaborated on the initial presentation. Brion Fox of the University of California, San Francisco, discussed the uncertainties within the public health community as to the appropriate response to the tobacco problem. The uncertainty stems from a lack of agreement as to what controls will be effective. In part, this can be traced to the great diversity of participants from grass roots activists to politicians to research scientists and past underfunding of public health initiatives to deal with smoking issues.

Consistent with their varied resources, different groups adopted specific strategies, ranging from litigation to supply side controls, aimed at limiting youth access to tobacco products. In this context, the proposed settlement seemed to offer something to every position. Yet most of the public health groups have, on reflection, rejected the deal. The fundamental uncertainty as to how to respond successfully to smoking dangers remains. Hence, a key question is the extent to which the settlement will foreclose potentially useful controls because it has funded other controls. Like Professor Remington, Mr. Fox is skeptical of an industry whose profits rest on selling the product that is to be regulated.

The negative aspects of the settlement include the limits on FDA regulation both of nicotine levels and of other aspects of cigarette composition such as tar, the heavy reliance on advertising regulation as the primary means to control sales to minors, the limits on potential OSHA regulation of smoke in workplaces, restrictions on disclosure of industry research, and the weak sanctions for excessive harms, which will not induce product innovation or effectively deter unsafe products.

Fox concluded with the observation that the public health community has developed in various ways a set of criteria for judging the public health merits of any legislative response to tobacco risks. Those criteria—fair compensation, reduction in marketing, no giveaways to the industry—produce a negative evaluation of the proposed settlement in its current form.

Dr. Michael Fiore of the University of Wisconsin Medical School and director of its smoking treatment clinic focused on the ways in which the settlement treats smokers. First, he emphasized that over the past 30 years there has been a dramatic reduction in the number of smokers in the population—from 43% in 1964 to 25% in 1994—although there has been little decline since 1990. Second, smoking is a very expensive business, costing smokers over \$52 billion (including taxes) in 1994. Third, each year approximately 40% of all smokers attempt to quit, but only 7% of those who try succeed. Thus, of the 20 million who try, only 1.3 million actually stop smoking. Fourth, the medical profession does know what can help smokers to quit (set forth in a new guideline from the Agency for Health Care Policy and Research).

Dr. Fiore drew several implications from the foregoing information and the prior presentations on the proposed settlement. First, the basic goal of the settlement, which is to reduce smoking by youth (preventing 500,000 minors from starting), is an essential and laudable goal. Second, he estimated that 80% of dollars provided by the settlement were to be focused on youth smoking. Third, the focus on youth smoking has obscured the potential gains from even modestly increasing the success rate for adults who

want to quit. An increase from the current adult cessation rate of 1.3 million to 2 or 3 million would produce a greater reduction in smoking than the target levels for reduction in youth smoking. Fourth, such an increased success rate could probably be funded at a very modest share of the total funds created by the proposed settlement. But, fifth, any increased support for such treatment will create risks of opportunistic behavior by sellers. Hence, stronger control of tobacco treatment may be necessary to reduce the risk of fraud.

C. Session II—Regulation and Free Speech

This session featured two principal presentations—from Professor Donald Garner of the Southern Illinois University School of Law and Gerald Thain of the University of Wisconsin Law School. David Vladeck, a litigator associated with the Public Citizens Litigation Group in Washington, D.C., who has participated in a number of Supreme Court cases involving commercial speech issues, and Professor Christine Harrington of New York University were the commentators.

Professors Garner and Thain, as well as Mr. Vladeck, focused their presentations on the substantial constitutional issues raised by the advertising controls in the proposed settlement. In Professor Garner's view, a constitutional challenge to the advertising controls was quite likely and, under the current standard set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,¹³ might prevail. In particular, Professor Garner postulated that one point of vulnerability would occur if a court required that the government prove that advertising influences individuals, particularly children, to start smoking and to continue to smoke. Because of these concerns and because he argued that the current doctrine is poorly focused with respect to advertising aimed at children, Professor Garner proposed an alternative standard to determine whether there is an unconstitutional interference with speech with respect to such regulations. His alternative is based in part on his reading of a recent Fourth Circuit decision involving regulation of tobacco and beer billboard advertising in Baltimore.¹⁴ His standard would allow government to forbid commercial speech which foisted "adult" choices onto children. Hence, if the "product is so dangerous to children . . . that its sale to them is prohibited, then courts should be especially accommodating of governmental efforts to shield

13. 447 U.S. 557 (1980).

14. See *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995).

children” Applying this standard to the proposed restrictions on commercial speech, Professor Garner felt that much of the regulation would be constitutional, but he recognized that there might still be questions concerning the limits on colorful advertising in magazines with substantial juvenile readership and the prohibitions against distribution of clothing items marked with a tobacco logo.

Professor Thain concurred that there were serious constitutional issues. He looked at the application of the *Central Hudson* test to the current state of information about tobacco. He noted that product promotion tends to move to whatever avenues are left open. Advertising does not disappear, it takes other forms. Second, he presented the case that advertising is, in fact, effective in promoting the total demand for products including cigarettes. Given the intent on the part of the producers (as evidenced in various documents that have surfaced in the continuing litigation) to use advertising to induce children below the legal age to start smoking, it has been shown that cigarette companies have intended to induce unlawful conduct by their advertising. He then reviewed in detail the application of the four elements of the *Central Hudson* test to this kind of advertising.¹⁵ In the end, Professor Thain concluded that the advertising would fall outside any of the protections offered by *Central Hudson*, because the advertising was targeted at inducing children to engage in an illegal activity.

David Vladeck also concluded that the advertising controls were generally constitutionally defensible. He elaborated on the kinds of challenges that might be made. Especially for First Amendment purists, the danger is, as William Schultz had suggested in the Keynote Address, that precedent would lead to suppression of other kinds of advertising deemed objectionable by some segment of the community. Nevertheless, looking at the constitutional problem from a litigator's perspective, these considerations would lead a court to uphold the regulation even though it would do so “with apprehension.” These controls represent one of the “most important public health initiatives in history” which a “pragmatic” court is unlikely to sacrifice on the “altar of First Amendment purism.” In addition, these measures are to protect children, which is a legitimate goal, and advertising to promote illegal conduct by children is not protected speech. Moreover, the limited success of past efforts to control tobacco use by minors will

15. The four elements are: (1) whether the expression is protected by the First Amendment and (2) whether the asserted governmental interest is substantial. If the first two inquiries yield positive answers, then the court must determine (3) whether the regulation directly advances the governmental interest asserted and (4) whether it is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

justify the new approach. Indeed, most of the limitations involve line drawing with respect to rules (such as no cigarette ads in the *Weekly Reader*) that the courts would agree are permissible at some level. Hence, the courts would have to redraw lines. But such a project is inconsistent with the institutional capacity of the courts. Based on this review, Vladeck concluded that most of the regulations proposed by the FDA would be constitutional with the possible exception of the ban on the use of human likenesses and cartoon figures in advertisements even aimed solely at adults.

Given these considerations, he would not endorse Professor Garner's effort to create a special category for child-oriented rules governing commercial speech, nor would he emphasize, as Professor Thain did, the subjective intent of the cigarette producers. He would focus more on the audience-in-fact and the message it is receiving, regardless of the putative intent of the advertiser. In closing, he discussed the negative implications for the cigarette companies of the very low informational content of their ads, which makes a defense on the merits of the advertising harder. Similarly, any trial on the merits would be unlikely because the cigarette makers would be reluctant to engage in litigation because of the factual record that would result.

Professor Harrington focused her comments on the methods by which the parties developed this settlement. The negotiated context meant that only some of those with stakes in the outcome were at the table. Such regulatory coordination is not new. It was an aspect of the turn of the century process by which workers' compensation was developed to replace emerging stricter tort liability regimes. In addition, the settlement is replete with promises of changes in corporate culture. As in the case of workers' compensation, this process is creating a government managed administrative compensation process. The use of consent decrees creates another problem for implementation because of the well known problems of getting judges to enforce such decrees and the potential that courts will subsequently void such agreements.

This approach to resolution of the problems posed by tobacco through informal, privatized negotiation among self-defined interested parties is being used in other toxic tort type situations. The common characteristic is that the economically powerful have the capacity to walk away from the table and the dispersed interests lack the capacity to respond effectively. Professor Harrington expressed concern that this approach will seriously undermine public interest law in a variety of these areas because of its lack of public access. Thus, although the tobacco settlement involved tactics from the past, it represents a departure from recent practice in developing legislation and regulation. As such, it deserves close scrutiny and informed public

discussion regarding the merits of this method of dealing with important questions of public policy.

D. Criminal Law Liability Issues—The Working Lunch Address

In his luncheon presentation, Professor Frank Tuerkheimer of the University of Wisconsin Law School evaluated the publicly available information about the conduct of the tobacco industry over the past 35 years to consider whether there is a potential for a federal criminal case. He used the civil complaint filed by Wisconsin as his basis for the facts he assumed and focused on whether those facts could establish a criminal violation, primarily of 18 U.S.C. § 371, which prohibits conspiracies to violate any other federal law and conspiracies to “defraud” the United States.¹⁶ Professor Tuerkheimer concluded that the assumed facts would support the claim that there was a pattern of deliberate and knowing misrepresentation of information to various federal agencies and legislative committees. Moreover, the pattern involved an understanding among the companies to follow an agreed course of conduct. Hence, there was a conspiracy to commit perjury. In addition, the legal definition of a “conspiracy to defraud” is sufficiently inclusive based on the leading cases so that it would make an agreement to engage in deceit of public agencies with respect to the facts about the health risks associated with tobacco an unlawful conspiracy. The actual application of these theories to the facts would require a very intensive and complex review of many documents. This would be especially difficult with respect to proving knowledge of the conspirators. This is despite the overall picture of deceit.

There is also potential liability for the lawyers who have advised the industry over the years. On the one hand, the lawyers were central to many of the activities, including creating a number of front groups. On the other hand, there is little direct evidence that lawyers were directly involved in creating false or incomplete testimony for Congress or did other specific acts that might fall into the section 371 conspiracy net. The opening of the Liggett files may help to overcome the strong privilege that attends the

16. Section 371 provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371 (1994)

attorney-client relationship. Given the central role of lawyers in the industry defense plans, Professor Tuerkheimer speculated that there is a definite potential that at least some lawyers could be implicated in a conspiracy claim.

E. Session III—Liability Issues

The session on liability featured three presentations as well as a brief comment. The major presenters were Professor David Sugarman of the University of California, Berkeley, Professor Robert Rabin of Stanford University, and Professor Jon Hanson of Harvard, whose presentation was co-authored with Professor Kyle Logue. In addition, Professor Peter Carstensen of the University of Wisconsin provided a brief comment. This session had the clearest division of views between support and opposition to the proposed settlement.

Professor Sugarman defended the settlement. In his view, smokers, including children, knew the risks they were taking and, thus, had a very weak case against the tobacco industry. Moreover, strict liability is costly and hard to administer given the high cost of producing information. Through taxes, smokers already contribute more to the government than their illnesses cost. Indeed, those engaging in most dangerous activities do not pay the full costs of the harms produced. There is no particular reason to impose such costs on smokers. The concern for regulating advertising and other marketing activity is also dubious because the assumption that advertising influences the decision to smoke is very questionable. The risks of liability may in fact deter producers from offering less risky cigarettes because of the impact of such actions on liability. Applying traditional tort analysis, then, it appears that, at most, a few individuals who started to smoke as a result of the advertising and other marketing efforts of the producers, without fully understanding the addictive impact of nicotine, might have individual claims.

In this analysis, the upshot is that neither the makers nor the general public gave up very much by embracing the settlement. The settlement will impose costs on smokers, and this is somewhat “bizarre” because they are the victims. On the other hand, the settlement will produce substantial money for the states and will impose a modest increase in the cost of cigarettes which may, in turn, produce lower rates of smoking. In addition, the companies now have the leeway to produce less risky products. On balance, Professor Sugarman concluded that the settlement was not such a bad deal.

Professor Rabin concurred in the view that smokers were poor plaintiffs because of their affirmative choice in smoking. He reviewed the youth smoking controls, but focused his analysis on the potential for a no-fault system to provide for better compensation for the victims of smoking. A no-fault system puts blameworthiness to one side and focuses on the problem of compensation. Several reasons would justify using such an approach with respect to tobacco injuries. First, such no-fault systems are a pragmatic response to the problems of substantial accidental injury. Second, they are most workable when there are identifiable sources of injury which can be made financially responsible and have a causal connection to the harms. On these bases, tobacco related injuries are plausibly within the category of situations to which no-fault could apply.

In contrast, conventional tort law has not provided any real compensation for such injuries. Neither individual claims which the companies are willing to allow under the settlement, presumably because they believe that they can defeat such claims generally, nor class action claims, whose status under current case law seems more in question, provide viable alternatives. Also, the limits on tort law make it a poor means of deterring undesirable behavior. On the other hand, it has had a very positive impact on public information. It has highlighted both the risks and the industry conduct in obscuring those risks.

The final issue is whether a no-fault approach is worth considering. First, there are currently substantial, uncompensated costs associated with many tobacco related injuries. Second, is a no-fault scheme administrable? This inquiry focuses on the practicality of designating compensable events, the capacity to define limits to compensation, and the finding of a satisfactory method of financing the system.¹⁷ Based on his review of currently available information, Professor Rabin concluded that each of these conditions could be satisfied and that a no-fault approach to compensating victims of tobacco harms deserves serious consideration.

Professor Hanson also discussed the use of a no-fault system, but he focused explicitly on the perspective of deterring undue risk.¹⁸ He critiqued the settlement for being fundamentally wrong in terms of the incentives it creates. It seeks to regulate access to tobacco and incentives for teenagers to smoke. This kind of direct regulation assumes that society has a great

17. See Robert L. Rabin, *Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme*, 52 MD. L. REV. 951 (1993).

18. The basis for this presentation is the article co-authored by Jon Hanson and Kyle Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 108 YALE L.J. 1163 (1998).

deal of specific knowledge as to what will or will not induce smoking and can convert that knowledge into specific commands. In contrast, a no-fault system that assigned the costs of treating injured smokers to the producers of the cigarettes that they smoked would create an after-the-fact incentive system. Knowing that these producer specific costs will occur, the producers could avoid these costs by improving the quality of the product or re-directing demand to smokers less likely to suffer harms. Thus, the producers would have a direct economic incentive to avoid foreseeable costs and thus enhance their revenue.

Professor Carstensen's comment expressed doubt about the feasibility of administering a no-fault system given the complex problems arising from assigning responsibility. More generally, he suggested that a central issue was to find workable institutions to control tobacco use. It is not clear, he concluded, that tort law was the best means.

F. Session IV—Foreign Impact

The two primary presenters addressing the foreign impact of the proposed settlement were Eric LeGresley of the Non-smokers' Rights Association of Canada and Professor Geriant Howells of Sheffield University in the United Kingdom. Mr. LeGresley focused first on the reasons why the American resolution of tobacco issues should not be a "global" solution. He identified a number of factors that make it impractical, impolitic, and contrary to international law for the United States to try to dictate a settlement to the rest of the world. At the same time, the American settlement is likely to be a template for the rest of the world.

It is a less than ideal model. Other countries, such as Australia, have done better jobs, but they are unlikely to receive the same level of international interest. The negatives included the limited financial penalties for cigarette companies, the limits on future access to tobacco documents and limits on collections from American firms if the judgments have to be enforced in the United States. On the positive side, the United States trade negotiators who had previously been attempting to open foreign markets to tobacco sales are now likely to be insisting that all cigarette producers be held to comparable advertising limits. This, in turn, will potentially create a stronger worldwide limitation on the promotion of cigarettes. Indeed, there is some prospect for a United Nations convention on tobacco control which may be more attractive to the United States in light of the national settlement.

Professor Howells focused on reviewing the situation on tobacco control in Europe. Here too, the American experience and documents have provided important leadership and inspiration. Private litigation is only beginning. There is one reported case which the cigarette manufacturers won. However, there are a number of cases underway in many European countries. Those cases present the same problems of cost, complexity and legal standards that exist in the United States. Focusing on the litigation in the United Kingdom, Professor Howells explored how new forms of lawyer compensation (a conditional fee) and efforts to create groups of plaintiffs (class actions as such are not authorized in U.K. law) are emerging as means of facilitating such litigation. In addition, efforts are being made to explore whether medical insurance organizations have the right to seek compensation from the cigarette industry on theories roughly comparable to the state claims in the United States.

Professor Howells also reviewed the emerging administrative regulations of cigarette advertising in the United Kingdom. These restrictions are much stronger than in the United States or even the proposed settlement. The focus is on a total ban on the promotion of such products. These policies provide an interesting contrast to the American approach.

Two commentators, Professor Michael Waxman of Marquette University Law School and Professor R.S. Khare of the University of Virginia's anthropology department, both emphasized the great differences around the world in tobacco culture. Professor Khare focused on India where smoking is a long-standing practice and is deeply ingrained in social practices. In India, health issues relating to tobacco have only begun to be discussed. He predicted that it will take a long time to bring about much change. Similarly, Professor Waxman discussed the social response to smoking in Japan and China to illustrate the differences in both economics (in both countries the national governments share heavily in the profits from cigarettes) and culture. He too predicted that change is going to be very difficult in these situations.

G. A State Attorney General's Views

The final day of the conference commenced with a brief address by Wisconsin's Attorney General, James Doyle, Jr., who is among the attorneys general who declined to accept the proposed settlement. The settlement has some positive features. The companies have agreed to accept a number of specific controls that they have heretofore said are not possible. But there are a number of serious problems with the proposed settlement. First, the

states and the defendants have sought to define the jurisdiction and regulations of the FDA. This is not a role for which they have authority or position. Second, the states have committed to supporting federal legislation which will deny citizens of their own states access to the courts of the state. This is a dangerous approach to these problems. The precedent will invite Congress to interfere more generally. If attorneys general believe that access to state remedies should be altered, they should advocate such changes to their own legislatures and not to Congress. Finally, the payment to the states, while substantial, is low relative to the total costs that the states and their residents have been forced to bear. On a more general note, Mr. Doyle expressed his skepticism that there is any quick fix by legislation for the health problems posed by tobacco. As a parent, he had some doubts that the regulations being proposed would have the effect predicted.

H. Session V—Economic Issues

In this session, Professor Mark Kleiman of the UCLA public policy program presented an economic analysis of the proposed settlement. In addition, Professor Thomas Merrill of Northwestern Law School and John Mullahy provided comments intended to highlight additional economic issues.

Professor Kleiman started with an analysis of why public policy should even attempt to regulate smoking. While impact on others is a valid reason, it does not involve any quantitatively substantial amount of harm. The key impacts are on the smoker and his family. The addictive quality of cigarettes, as well as the age at which addiction occurs (teenage years), justifies looking at both costs. An economic argument justifies treating the costs of smoking as a detriment to smokers and not a measure of their gain as conventional economic analysis would regard it. The central reason is that a large proportion of smokers do not want to smoke (a point made earlier in the public health discussion). On this basis, and considering the high value people generally put on additional years of life (a value beyond the cost of sustaining life as people age), Professor Kleiman concluded that the “real” cost of smoking was approximately \$10 a pack (this is even higher than Professor Hanson’s estimate). The best feature of the overall settlement is that it will raise tobacco prices. This will have an impact on both existing smokers (making reduction or quitting more attractive), and it will make starting to smoke more costly and thus less likely. The burden of this higher cost is going to be unfairly allocated, however, to the poor, elderly smoker who will bear significant burdens in trying to stop and who will get much

less health benefit from stopping (this view conflicts somewhat with that of Professor Remington). Perhaps such smokers should get coupons or other subsidies so that they do not bear an unfair burden. Even so, the potential gain, assuming there is a modest reduction in smoking, is quite substantial when measured in life years saved. These estimates are consistent with those from Professor Remington.

The explicit subsidies to assist smokers in quitting, however, are more problematic. They involve complex problems of program choice. Even effective programs are likely to have a limited impact and that impact will diminish over time as the smokers least controlled by addiction are able to quit. The "lookback" provisions that impose additional expenses involve prices that are too low to have the deterrent effect sought. Similarly, the market conduct regulations are likely to have little impact.

Professor Mullahy reminded the audience of the many problems that exist in reaching plausible conclusions. The assumption is that smoker response to price increases is to reduce the quantity of cigarettes smoked (price elasticity), but the actual data are very dispersed and do not clearly demonstrate how much response there would be to price changes. This is because there is a great deal of ambiguity as to what the causal relationships are as opposed to mere correlation of events. The unknowns are vast and make prediction very hard. Future costs are hard to predict, and efficiency is also a problem. Also, there is a problem of expecting firms to change their culture and reject the profits that come from selling their products.

Professor Merrill focused his discussion on the "lookback" charges. The objective of these charges is to penalize producers if the goals of reducing teenage smoking are not achieved. The basic idea of imposing a stiff financial penalty for not meeting the targets is sound. There are, however, three major problems with the specific plan. First, it imposes collective responsibility. Penalties will be assessed if total teenage smoking does not decline, and they will be assessed based on total market share. This approach gives individual producers no incentive to reduce their level of teenage smoking. Indeed, they have some incentive to increase their share of this sub-market relative to other producers because some of the increased penalty will be paid by others. Second, the penalty itself is too low and incorrectly defined. The penalty is based on the projected profit of selling cigarettes for a lifetime of the excess smoker. This means that the penalty does nothing more than take away the producer's gain. Moreover, it focuses on profit to the producer and not social cost. The later measure would be much higher. Additionally, the penalty is capped which makes it even less of a threat. The better choice, assuming that the penalty is individualized for each producer, is to allow them to buy and sell the right to exceed their

quota. This will create a market mechanism to set the penalty price (the price necessary to acquire the right to exceed the permitted sales volume for a producer) which will be greater as more producers fail to reduce teenage smoking. Third, the current system does not provide a workable reward for doing a better job than the target. The tradeable rights system would provide a way to reward such success because such firms would have more rights to sell. There is a major political problem in adopting such a tradeable rights plan because many people have a visceral objection to any system that seems to authorize the sale of cigarettes to teenagers.

I. Session VI-The Implications for Civil Justice

The concluding session of the conference featured presentations by Professor Marc Galanter of the University of Wisconsin and Professor Roger Cramton of Cornell University Law School. Each looked at aspects of the settlement from the perspective of the overall concerns of the civil justice system. Ms. Mary Aronson of Aronson Washington Research, a consultant and evaluator of congressional actions with respect to health issues, provided a comment focused on the status of the settlement in the legislative process.

Professor Galanter's presentation focused on the transformation of the litigation process reflected in this settlement. The focus on limiting future personal injury litigation signals that the tobacco companies regard such claims as a central concern. The settlement significantly restricts the strategy and tactics available to plaintiffs, especially in aggregating claims in any way, and by limiting damages by precluding punitive damages and by capping total damages payable in any period. The proposal reflects the presence of rival groups of lawyers who are affected differently by this settlement. The settling attorneys general and their allies get substantial economic and political gains while other lawyers pressing individual and group claims against the industry would be cut out of any real opportunity to succeed on those claims. This is a contemporary variation on the long history of "lawyer buy-out," illustrated by the first asbestos lawyer in the 1930's who settled his claims and agreed never to sue again. Under the settlement, one set of lawyers agree not only to retire from the field, but to assist in disabling any others from entering it.

A second, troubling aspect of the settlement is its placement of the entire burden on the backs of current smokers who will have to pay the higher prices or taxes, or both, and on foreign smokers who will increasingly be the targets of the industry.

On a more general level, Galanter contrasted lawyers seeking to impose regulation or liability and those seeking to facilitate the capacity of their clients to do whatever the client wishes. Overall, the regulation and liability lawyers have several weaknesses. They lack reputational capital because of the demonization of both plaintiffs lawyers and public regulators. This results in limited funding, which means that the public agencies lack the litigating capacity to pose real threats to major economic interests absent an alliance with private lawyers. But the continued attack on the contingent fee makes it difficult for government agencies to overcome their limitations by such arrangements. Moreover, the small size of firms and their reliance on the contingent fee process create difficult problems of finance and governance in mounting major litigation on behalf of individual claimants.

In an alternative and more upbeat vein, Professor Galanter suggested that perhaps the tobacco industry may find itself whipsawed. In attempting to settle with one group of plaintiffs it has relinquished many of its best defenses, but this group may not be able to deliver the desired preclusion of later claims. If the proposed settlement's preclusion does not occur, the industry may now be very vulnerable to successful claims by many victims. While discounting the potential that tobacco's opponents actually plotted such a strategy, the plurality of competing claimants and the absence of central management may have created a situation in which the tobacco companies find it difficult to avoid ultimate responsibility.

Professor Cramton focused on the problems of conflict of interest that arose as result of the interests motivating the lawyers for the states to seek to settle the cases. He was very critical of the core strategy in which the attorneys general sought to borrow or usurp federal authority by attempting to define FDA regulation and to pre-empt federal legislation in exchange for payments which, as refunds to Medicare and Medicaid, belong in significant part to the federal government. A central problem for developing a truly public interest settlement was the limited interests of the key negotiators. The state attorneys general had personal political goals, their trial lawyer allies had an interest in their own income, and the lawyers for the tobacco companies put the interest of protecting their clients ahead of everything else. The result is a serious threat to democratic political process. Three central points frame this analysis.

First, the "smoke and mirrors" used to promote the settlement involved both misleading presentation and substantive misstatements, as well as omissions concerning the deal. For example, the "punitive damage" component is to be treated for tax purposes as a tax deductible expense. There are understandings that have not been put on the public record.

Second, the settlement involves an effort by states to appropriate federal powers and federal rights for the benefit—political and economic—of the states, their attorneys general, and the private lawyers associated with the state claims.

Third, it is arguable that the attorneys general have engaged in unlawful corrupt behavior. They have received something of value in return for a commitment to lobby Congress to get the legislation sought by the companies. Indeed, given the uncertainties of prevailing on the merits, the payments substantially exceed those that would have been plausible based on the putative dollar value of the claims being settled. The excessive payments indicate that the states were selling something else to the tobacco companies.

Viewed in this light, the settlement raises fundamental questions about the way in which political institutions should operate. Can we permit private economic actors to make deals involving vast sums of money which seek to pre-empt ordinary political processes?

The public interest gain from the proposed settlement is that it opens the door to appropriate political process and imposition of both regulation and liability, but the goal must now be to develop a response that best serves the public health and related interests. Like Professor Sugarman, Professor Cramton doubts that individual smokers have a very good tort claim because of their explicit knowledge of the risks they assumed. He is similarly skeptical about the state claims for reimbursement of medical expenses. Hence, the framework of the proposed settlement is “promising”—it confers immunity for past conduct in exchange for future-oriented controls over the marketing of tobacco and funding of future health costs. As to compensation, a variety of plans and proposals exist including those discussed at this conference by Professors Rabin, Kleiman, and Merrill that could provide appropriately limited compensation to those who suffer smoking related injuries.

Ms. Aronson discussed her perceptions of the current legislative situation (as of October, 1997). She emphasized that Congress preferred a piecemeal approach to problems rather than a comprehensive approach, such as that in the settlement. Also a crisis, real or perceived, tends to induce action, especially in the face of pending elections. The key factors in identifying the pieces that might emerge is the reiterated concern for children, which might become a “crisis” as the public health community continues to emphasize that 3,000 new, underage smokers start each day. There is an offsetting concern for the gains to the lawyers who are strongly disfavored by key leaders in Congress. Further complicating the legislative situation is the status of the challenge to FDA regulation pending in the Fourth Circuit Court of Appeals. The industry’s hopes for a favorable outcome in that case make

it less willing to compromise, but it also has great concerns about future civil liability which legislation alone can resolve. Recent hearings in the House illustrated how things have changed with many representatives now taking anti-industry positions, but also frequently revealing a lack of understanding of the terms of the proposed settlement and its implications. In Aronson's view, there is only a six-month period in 1998 (February to July) during which it is politically possible to develop a legislative resolution to the tobacco problem. After July, election campaigns will make any constructive action all but impossible. She concluded with the suggestion that perhaps the industry should look for other, partial solutions to address its greatest concerns such as developing a compensation scheme for smokers who are harmed as an explicit tradeoff against the open ended risk of tort liability.

CONCLUSION

No summary, or even an edited transcript, can capture the full richness of the discussions, formal and informal, held at this conference. What the conference revealed and what this summary at least suggests is that the "so-called global settlement" raises many more questions about specific and general public policy than it resolves.