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Articles

ANNOUNCED TO TROUNCED: A JOURNALIST'S COMMENTS ON THE DEMISE OF THE TOBACCO SETTLEMENT

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I. INTRODUCTION

As a journalist for Bloomberg News, I covered the tobacco settlement, and saw it go from announced to trounced in just one year. The settlement contained many beneficial provisions, and its demise has already resulted in many negative consequences. The tobacco settlement, in my opinion, was never passed by Congress largely because the key players in the settlement placed their personal agendas ahead of the need to compromise. In this article, I elaborate on these ideas, provide some lesser-known history behind tobacco litigation and the settlement, and offer an outlook for the future.¹

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1. Parts of the article were adapted from CARRICK MOLLENKAMP ET AL., *THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS* (1998) [hereinafter *THE PEOPLE VS. BIG TOBACCO*], a book co-authored by Levy, and *Death of a Settlement: Bitter Defeat for Tobacco Negotiators*, Bloomberg News, June 18, 1998, available in LEXIS, Nexis Library, Bloomberg News File [hereinafter *Bitter Defeat*], a Bloomberg News article co-authored by Levy.

II. A TELLING STORY²

In the second week of June 1997, two small groups of attorneys met late at night in a room at the Park Hyatt Hotel in Washington, D.C. One of the groups was comprised of attorneys for some of the largest manufacturers of cigarettes in the United States — Philip Morris Cos., the manufacturer of Marlboro brand cigarettes, and RJR Nabisco Holdings Corp., the manufacturer of Camel brand cigarettes. The other group was comprised of the private trial attorneys who had filed class-action lawsuits against the tobacco industry on behalf of their clients, thousands of addicted smokers.

After three months of very heated negotiations, these attorneys — along with scores of attorneys general, tobacco industry lawyers, leading public health advocates and White House officials — had negotiated all but the final details of what could have been the biggest legal settlement in history.³ Hours earlier on that sweltering day, under direct orders from White House Deputy Counsel Bruce Lindsey, the two sides had arrived at a \$368.5 billion price tag to settle most of the pending lawsuits against the tobacco industry giants (“Big Tobacco”).⁴

After dinner, one of the anti-tobacco attorneys mentioned in passing the \$368.5 billion price of the settlement to the two lead attorneys representing the tobacco industry. At that moment, all of the color washed out of the face of Meyer Koplw, the soft-spoken but powerful New York City attorney from Wachtell, Lipton Rosen & Katz, who was representing Philip Morris, the biggest cigarette manufacturer in the world.⁵

Koplw said he had been told that the deal was for \$386 billion, not \$368 billion. The anti-tobacco attorneys were flummoxed. One reached for a cellular telephone and called Hugh Rodham, another attorney representing smokers in class-action lawsuits. Rodham, incidentally, also provided the anti-tobacco contingent with access to the President of the United States of America — he’s Bill Clinton’s brother-in-law.

Rodham immediately called Lindsey, who was at home getting ready for bed. While in his bathrobe, Lindsey reviewed the numbers

2. Interviews with Anonymous Sources (Aug. - Sept., 1997).

3. See *The Tobacco Resolution* (visited Sept. 19, 1998) <<http://www.tobaccoresolution.com>>.

4. *Id.* at tit. VI.

5. See Steve Bailey & Steven Syre, *\$300 Billion Settlement Wouldn't Likely Choke Tobacco Firms*, BOSTON GLOBE, Apr. 17, 1997, at D1 (stating Philip Morris made \$69 billion in revenue in 1996).

with Rodham. The lower amount — \$368.5 billion over the next twenty-five years — was correct. The attorneys walked back into the negotiating room and told the tobacco lawyers that \$368.5 billion was the true agreed upon amount. “We just saved you almost \$20 billion,” said one of them, rounding up the difference.

Twenty billion dollars — an oversight to these negotiators — is the combined value of Apple Computer, Black and Decker Corp. and the entire 5,100-store Wendy’s restaurant chain — combined, and times two.⁶ It’s also about forty percent of the total dollar amount of cigarettes sold in the United States in a single year.⁷ It would pay the salaries of all the professional athletes in the National Basketball Association until the year 2018.⁸

There were many beneficial provisions in the settlement proposal.⁹ Yet the fact that both sides would so sloppily handle \$20 billion, as if it were a low-value chip in a poker game, is telling. The high stakes provided anti-tobacco negotiators with an incentive to back a less-than-perfect settlement, in that they would have secured — for future elections — the bragging rights of having scored the biggest civil settlement in history. The story also shows how willing Big Tobacco was to settle and how deep its pockets are as well as how badly it needed a settlement: the industry would swallow an additional \$20 billion, just for relief from this litigation.

III. TOBACCO LITIGATION HISTORY — AND AN INGENIOUS IDEA

Taking on Big Tobacco was, at best, improbable. In four decades of tobacco litigation, no plaintiff collected damages from any of the tobacco industry giants based on health problems resulting from to-

6. The combined market value of the three companies as of June 15, 1998, was \$12.08 billion: Wendy’s stock market capitalization was \$3.18 billion, Black & Decker’s was \$5.19 billion and Apple Computer’s was \$3.71 billion. Search of Bloomberg Fin. Mkts. Commodities News, Bloomberg News, Atlanta, Ga. (Aug. 17, 1998).

7. The 40% estimate is based upon estimated annual United States tobacco sales of \$50 billion, based on figures compiled by Tobacco Merchants Association. Telephone Interview with Tobacco Merchants Association (June, 1997).

8. Telephone Interview with Billy Hunter, Executive Director, National Basketball Players Association (June, 1997).

9. For example, the settlement proposed to reduce underage smoking by penalizing retailers through fines of up to \$25,000 or the revocation of their license to sell tobacco products for three years. See *The Tobacco Resolution*, (visited Sept. 30, 1998) <<http://www.tobaccoresolution.com/prd/AVI-58.html>> app. II.2.f. It also allocated funds to government agencies to be used for enforcement of the settlement, including \$300 million annually to the Food and Drug Administration. See *The Tobacco Resolution* (visited Sept. 30, 1998) <<http://www.tobaccoresolution.com/prd/PHF-36.html>> tit. VII.A.2-4; see also notes 33-37 and accompanying text. For highlights of the Castano Smokers Common Benefits Funds, see generally, J.D. LEE, *THE SETTLEMENT* app. B (1997).

bacco products.¹⁰ Big Tobacco was bullet proof. Liggett, a division of Brooke Group Ltd., had lost a lawsuit in the early 1980s, *Cipollone v. Liggett Group, Inc.*¹¹ The jury returned a \$400,000 verdict to the husband of a deceased smoker named Rose Cipollone for a claim of breach of express warranty.¹² Yet after an appeals court reversed the verdict and the Supreme Court remanded for a retrial, plaintiffs could not afford to pursue the suit further.¹³ The industry retained its record of never having paid a penny in damages.

On a May afternoon in 1993, however, an ingenious strategy was hatched that would forever change the industry's invincibility.¹⁴ It all started with a little-known and deeply-personal story. Michael Lewis, a small-town lawyer from Clarksdale, Mississippi, visited Jackie Thompson, his friend and former secretary.¹⁵ Thompson was in Baptist Central Hospital, in Memphis, Tennessee, dying from complications tied to smoking cigarettes.¹⁶ As Lewis left the hospital, he thought about the costs of treating people dying from tobacco-related cancer — the long hospital stays, the teams of doctors and nurses trying to squeeze out a few more days for patients, the expensive equipment pumping life and feeling for vital signs, the last days at hospices.¹⁷ Lewis supposed that these expenses were costing \$1 million in his friend's case.

Lewis then formulated a plan to sue cigarette manufacturers for the cost of treating sick smokers. Imagine combining the total costs the state was spending treating sick smokers, he thought. What if Lewis were to sue the cigarette makers on behalf of his home state, Mississippi, to recoup the public money spent treating the indigent, the aged and others who became sick from smoking? It was a simple plan, but one that was brilliant and would ultimately prove to be very effective.

10. See Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, in *SMOKING POLICY: LAW, POLITICS AND CULTURE* 127 (Robert L. Rabin & Stephen D. Sugarman eds., 1993). Big Tobacco's winning streak in courts extends back to 1954 when the first case, *Lowe v. R.J. Reynolds Tobacco Co.*, No. 9673(C) (E.D. Mo. filed Mar. 10, 1954), was filed. See Rabin, *supra*, at 112. The case, which was later dropped, marks the beginning of the "first wave" of tobacco litigation. See *id.* at n.6.

11. 693 F.Supp. 208 (D. N.J. 1988), *aff'd in part and rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part and rev'd in part*, 505 U.S. 504 (1992).

12. See *Cipollone*, 693 F.Supp. at 210.

13. See RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 639-77 (1996) (describing the *Cipollone* suit).

14. See *THE PEOPLE VS. BIG TOBACCO*, *supra* note 1, at 23-30 (describing this story in more detail).

15. See *id.*

16. See *id.*

17. See *id.*

United States cigarette manufacturers had easily fended off decades of lawsuits. The companies had argued, successfully, that smoking is a personal choice, and that they should not be held accountable for people's voluntary behavior and decisions.¹⁸ They also argued that there was no conclusive evidence that cigarettes actually caused the illnesses that killed smokers.¹⁹ Lewis decided to skirt this effective defense by focusing not on individuals and the choices they made but instead on the states — by pressing for reimbursement of the billions of dollars the states spend to pay for the medical care of its sick smokers.²⁰ Lewis turned to two of his law school buddies from the University of Mississippi — Mississippi Attorney General Michael Moore and plaintiffs' attorney Richard Scruggs.²¹ Scruggs had made millions of dollars taking on asbestos manufacturers.²²

A year later, armed with internal industry documents showing that the manufacturers did in fact know of the dangers of smoking and took steps to conceal them,²³ Moore and Scruggs were ready to file suit. On May 23, 1994 in Chancery Court in Jackson, Mississippi, Moore filed Mississippi's landmark lawsuit against 13 tobacco companies.²⁴ Over the next three years, 40 other states brought similar suits.²⁵ These suits alone were not enough to drive the industry to the negotiating table. A series of other events converged just at the right time: leaks of confidential industry records,²⁶ defections by whistle-

18. See Tucker S. Player, *After the Fall: The Cigarette Papers, the Global Settlement, and the Future of Tobacco Litigation*, 49 S.C.L. REV. 311, 312-19 (1998).

19. See *id.* at 316 (explaining the tobacco company lawyers' revamped attack on causation in the second wave of tobacco litigation).

20. See THE PEOPLE VS. BIG TOBACCO, *supra* note 1, at 25.

21. See *id.* at 27-29.

22. Scruggs successfully sued asbestos users, including Ingalls Naval Shipyard, in a series of health liability cases in 1992. See *id.* at 28.

23. See *id.* at 37-48 (explaining how Merrell Williams, a paralegal at a law firm for Brown & Williamson Tobacco Company, absconded with confidential documents inculpatting Big Tobacco); see generally STANTON A. GLANTZ ET AL., *THE CIGARETTE PAPERS* (1996). Glantz anonymously received a box containing thousands of copies of Brown & Williamson documents detailing over thirty years of fraud and deceit by the tobacco industry. See generally *id.* (explaining much of the contents of these documents, and many of their strengths and weaknesses).

24. See THE PEOPLE VS. BIG TOBACCO, *supra* note 1, at 30.

25. See *id.* at 13. Other states that followed included Minnesota, Florida, California, West Virginia, Arizona, Texas, and New York. *Id.* at 53, 171. South Carolina, which filed suit in 1997, was the 40th state to sue and the first of the major tobacco-farming states to sue. Georgia is the state which most recently filed suit.

26. One example of a confidential industry document is a July 1963 memo from Brown & Williamson general counsel Addison Yeaman to a research conference in Britain. See *id.* at 40; KLUGER, *supra* note 13, at 239. The memo discusses reports of a new cigarette filter, and states in part, "Moreover, nicotine is addictive. We are in the business, then, of selling nicotine, an addictive drug." *Id.*

blowers,²⁷ an increasingly activist Food and Drug Administration (FDA)²⁸ and the re-election of Clinton, an anti-tobacco President eager to forge a lasting public-health legacy.²⁹

IV. BENEFICIAL PROVISIONS OF THE SETTLEMENT

There were several beneficial provisions in the settlement. Big Tobacco agreed to pay \$368.5 billion.³⁰ Consider that this price tag equals approximately the combined annual gross national product of Greece, Ireland, Chile, New Zealand, and Kenya.³¹ If the companies were paying in mid-sized family sedans, the line of cars would stretch from Los Angeles to Cleveland.³² The settlement would have required cigarette companies to pay, if the settlement's measures failed to reduce teen smoking by thirty percent in five years and sixty percent in a decade, an annual penalty of as much as \$2 billion.³³ The Senate bill, sponsored by John McCain of Arizona,³⁴ would have raised \$516 billion over twenty five years by taxing cigarettes and using some of the proceeds to finance tax breaks and drug-abuse programs.³⁵

The settlement, however, was more than dollars and cents. It would have imposed strict limits on marketing upon the United States tobacco industry, requiring it to advertise cigarettes less seductively and package them more truthfully.³⁶ Arguably the most important aspect of the settlement, though, was its provision allowing the Food

27. Former Brown & Williamson research chief Jeffrey Wigand cooperated with the United States Food and Drug Administration investigation into big tobacco. *See id.* at 111-14. He helped the Administration obtain thousands of pages of documents showing the tobacco companies' efforts to strengthen cigarettes and to make them more addictive. *See id.* at 113.

28. FDA Commissioner David Kessler waged a three-year war against Big Tobacco from 1994 to 1997. *See id.* at 107-21.

29. *See id.* at 114-15 (describing President Clinton making tobacco an issue in his 1996 re-election campaign by blaming corporate greed, the industry's youth-targeted advertising, and the industry's relentless congressional lobbying).

30. *See The Tobacco Resolution* (visited Sept. 30, 1998) <<http://www.tobaccoresolution.com/prd/A-34.html>> tit. VI.

31. *See THE PEOPLE VS. BIG TOBACCO*, *supra* note 1, at 32. These countries' gross national products may be found at World Factbook (visited Sept. 20, 1998) <<http://www.odci.gov/cia/publications/factbook/>>.

32. *See THE PEOPLE VS. BIG TOBACCO*, *supra* note 1, at 32.

33. *See* Robert Langreth, *The Settlement: Accord Is No Match For Power of Nicotine*, WALL ST. J., June 23, 1997, at B10.

34. S. 1415, 105th Cong. (1998).

35. *See Death of a Settlement*, *supra* note 1.

36. The settlement would have required cigarette packages to state, for example, that cigarettes are addictive and can cause cancer. *See The Tobacco Resolution* (visited Sept. 30, 1998) <<http://www.tobaccoresolution.com/prd/A-1.html>> tit. I.B.

and Drug Administration to regulate the toxic content of cigarettes,³⁷ America's most harmful consumer product. The settlement could have been not just a legal deal, but a paradigm for how to resolve vital public policy issues.

V. NO HEROES IN THE TOBACCO SETTLEMENT

Although the settlement contained beneficial provisions, its tale is not one of some lawyers from Mississippi using grass roots efforts to slay a dragon. Make no mistake about it — there are no heroes in the saga of the tobacco settlement.

Michael Moore, the de facto leader of the state attorneys general, may be the protagonist, but he is not a hero. Moore prodded dozens of states to file lawsuits against Big Tobacco³⁸ and fought valiantly for the disclosure of internal tobacco industry documents.³⁹ As Moore's critics charge, however, he probably pushed for too lenient a settlement in an effort to raise his political profile.⁴⁰ He agreed to some major industry demands, as the final settlement included a ban on individual class-action lawsuits⁴¹ and an enormous loop-hole that would have made it simple for the tobacco industry to escape the regulatory control of the FDA.⁴² Moore has hinted that he may run for Governor of Mississippi in 1999.⁴³

The private attorneys involved in the settlement stood to gain. Scruggs has said he invested millions in the fight against Big Tobacco. Other attorneys did so as well, and they were not guaranteed to receive anything in return. While this was a big risk, these private plaintiffs attorneys stand to make a phenomenal (some argue obscene) amount of money. For example, Florida's settlement was for \$11 billion, and six of the twelve private law firms that played a part in negotiating the settlement argued that they should receive a contingency fee of \$2.5 billion over twenty five years — as much as \$280 million

37. See *The Tobacco Resolution* (visited Sept. 30, 1998) <<http://www.tobaccoresolution.com/prd/A-39.html>> tit. I.E.

38. See *THE PEOPLE VS. BIG TOBACCO*, *supra* note 1, at 52-53.

39. See *id.* at 46.

40. Moore's critics were concerned that he was tailoring the settlement toward congressional approval. See *id.* at 76.

41. See *The Tobacco Resolution* (visited Sept. 30, 1998) <<http://www.tobaccoresolution.com>> tit. VIII.A.1.

42. See Lauran Neergaard, *Tobacco Foes Find Flaws in Fine Print*, *TIMES UNION* (Albany, N.Y.), June 23, 1997, at A1; Henry Weinstein, *The Longer They Talk, The Less They Agree*, *THE SEATTLE TIMES*, June 9, 1997, at A2.

43. See *THE PEOPLE VS. BIG TOBACCO*, *supra* note 1, at 98. For an article discussing Moore's mistakes in his efforts for the settlement, and his political interest and ambition, see *Death of a Settlement*, *supra* note 1.

per firm.⁴⁴ Some analysts have calculated that with such a return, the attorneys would make about \$100,000 an hour from the tobacco settlement.⁴⁵

The tobacco company executives also stood to gain. The Chief Executive Officers of Philip Morris and RJR Nabisco, Geoffrey Bible and Steve Goldstone,⁴⁶ steered the tobacco companies into settlement negotiations.⁴⁷ They were bold and shattered the mold of Big Tobacco chieftains who for decades were a bunch of southern tobacco barons who defied public opinion, disputed medical evidence, and lied or dissembled information.⁴⁸ But Bible and Goldstone aren't heroes. The companies — which manufacture and distribute the most dangerous consumer product in the land — were motivated to strike a deal to protect themselves,⁴⁹ boost stock prices,⁵⁰ and, not incidentally, boost the CEOs' stock options.

On the political side, recall Al Gore's tearful lament at the Democrat National Convention when he mourned the death of his sister who started smoking at age 13.⁵¹ Gore neglected to share with the conventioners that until 1988, the Gore family farmed tobacco.⁵² It was the family's most lucrative crop.⁵³ President Clinton, who may have had good intentions of helping curb teen smoking, surely sees the tobacco settlement as part of his legacy.⁵⁴ Clinton doesn't have many good public policy issues to take with him to the history books, so this entire crusade can be seen more as a personal issue than a public health concern.

Even the seemingly heroic figures are far from virtuous. Consider, for example, Merrell Williams. Williams was a theater major at

44. See Joyce Howard Price, *Lawyers, States Tussle Over Tobacco-Suit Fees*, WASH. TIMES, June 7, 1998, at A1.

45. *E.g.*, Interview with Lester Brickman, Professor, Benjamin Cardozo Law School; see also Price, *supra* note 44 (stating Brickman saying that the lawyers in the Texas settlement would receive \$2.3 billion for the settlement, equal to \$92,000 an hour). The Florida lawyers, he said, would receive \$15,000 to \$25,000 an hour. See *id.*

46. See THE PEOPLE VS. BIG TOBACCO, *supra* note 1, at 6.

47. See *id.* at 14.

48. See *id.* at 11.

49. If the industry had continued with the litigation, it would have run the risk of paying hundreds of millions of dollars in legal fees and paying for jury verdicts against it. See *id.* at 54-55.

50. Stock prices of the tobacco companies fell as the cases against the industry gained momentum. See *id.* at 55.

51. See *id.* at 235.

52. See *id.* at 236.

53. See *id.*

54. Clinton considered the tobacco settlement a key part of his legacy especially considering the failure of his health care reform proposal. See *id.* at 244.

Baylor University in Texas when he became hooked on smoking Kool cigarettes.⁵⁵ Later, after a failed marriage and two failed careers, Williams got a nine dollar an hour job as a paralegal at a law firm sorting through confidential documents of the tobacco company Brown & Williamson.⁵⁶ He was sickened by what he read, as document after document showed the lengths to which tobacco company executives had gone to cover-up the risks of smoking.⁵⁷

Although Williams was supposed to sort and guard the company's secrets, he instead stole more than 4,000 pages of documents — smuggling many of them out by taping them to his body.⁵⁸ He eventually gave the documents to the Mississippi attorneys, Moore and Scruggs, who were suing the tobacco industry.⁵⁹ These documents proved to be crucial evidence which bolstered the states' fight.⁶⁰ But nothing is black and white. Before Williams turned over his documents to Mike Moore and his partners, he tried selling them back to the tobacco industry — for \$2.5 million.⁶¹ Williams, a thief for stealing the documents, didn't have an attack of conscience which made him steal the documents. He was looking to make some quick dollars — 2.5 million of them. As these examples illustrate, personal agendas were pervasive among the players in the settlement.

VI. POLITICS SNUFFED OUT THE SETTLEMENT

Personal agendas played an especially crucial role when Congress considered the settlement. The force that snuffed out the settlement can be summed up in one word — politics. The original accord never had a champion in Congress.⁶² Rather than championing the settlement, lawmakers cluttered the year-long debate with issues such as whether married couples should get a break on their income taxes.⁶³ President Clinton claimed he wanted to cut teen smoking, but he never provided the strong support the settlement needed to

55. *See id.* at 38-40.

56. *See id.* at 37-39.

57. *See id.* at 40; *see also supra* note 26.

58. *See THE PEOPLE VS. BIG TOBACCO, supra* note 1, at 41. For a book about the contents of the documents and an analysis of them, *see generally* GLANTZ, *supra* note 23.

59. *See THE PEOPLE VS. BIG TOBACCO, supra* note 1, at 46.

60. Scruggs saw the documents as showing that the tobacco company representatives had repeatedly lied under oath. *See id.* at 47. The documents could help show that smoking was not a mere personal choice, and that the industry could have revealed information that would have saved lives. *See id.*

61. *See id.* at 41.

62. *See Death of a Settlement, supra* note 1.

63. *See id.*

get through Congress, said several negotiators involved in writing the accord.⁶⁴

Senate Republicans, led by Majority Leader Trent Lott, criticized the McCain bill as a big-government, tax-and-spend plan, and ultimately mustered enough votes to defeat it.⁶⁵ Some public-health advocates immediately denounced the bill as being too soft on Big Tobacco.⁶⁶ “This settlement grants legitimacy and vindication to the industry — issuing to it a ‘get out of jail free’ card for too low of a price,” John Garrison, chief executive of the American Lung Association, said just a few days after the accord was announced.⁶⁷

In the process of attacking the bill, the parties diluted it. The legislation that the Senate ultimately rejected bore only a passing resemblance to the original settlement proposal.⁶⁸ The McCain bill didn’t include the proposed settlement’s \$25 billion for smoking-prevention programs.⁶⁹ It also didn’t have the protections from legal liability won by Philip Morris, RJR, and other cigarette makers last year.⁷⁰

Clinton said, “If more members of the Senate would vote like parents rather than politicians, we could solve this problem.”⁷¹ Michael Moore blames both Democratic and Republican lawmakers. “The states, through our lawsuits and settlement, brought this opportunity to Congress to enact a national tobacco policy that would reduce under-aged smoking and lead to greater control of the tobacco industry,” he said.⁷² “It’s unbelievable that Congress doesn’t want to seize that opportunity.”⁷³ For public-health activist Bill Novelli, the \$368.5 billion tobacco settlement was dead long before the Senate killed anti-smoking legislation in mid-June, two days shy of the one-year anniversary of the announcement of the settlement proposal.⁷⁴ “How did we start with a historic step forward and end up with nothing?” wonders

64. *See id.* “[Clinton] planted late and he didn’t use enough fertilizer, and now he can’t complain about the kind of crop he’s got,” Richard Scruggs, who represents 27 of the 41 states that sued the industry and a key architect of the original agreement, said a week before the Senate killed the settlement. *See id.* Scruggs is the brother-in-law of Senate Republican Majority Leader Trent Lott, and stands to make millions of dollars in legal fees from the states he represents in cases still pending. *See id.*

65. *See id.*

66. *See id.*

67. *See id.*

68. *See id.*

69. *See id.*

70. *See id.*

71. Audio tape of News Conference, held by Bloomberg News (June 17, 1998) (on file with author).

72. *See id.*

73. *See id.*

74. *See id.*

Novelli, president of the National Center for Tobacco-Free Kids, a non-profit agency in Washington.⁷⁵ The upshot of Congressional inaction, he fears, will mean even more teenagers hooked on cigarettes.⁷⁶ As these examples illustrate, political agendas had the parties doing too much fighting and too little compromising.

VII. NEGATIVE CONSEQUENCES OF THE SETTLEMENT'S DEMISE

The demise of the tobacco settlement is an opportunity lost. Embittered public health advocates are left wondering what might have been. "We'd have wasted an incredible opportunity and effort," said Matt Myers, executive vice president and general counsel for the National Center for Tobacco-Free Kids, who helped negotiate last year's accord.⁷⁷ Novelli says activists could have had a portion of a \$25 billion trust fund to mount a serious campaign to curb youth smoking.⁷⁸ Instead, teen tobacco use is soaring.⁷⁹ Smoking jumped by almost fifty percent among eighth and tenth graders between 1991 and 1996.⁸⁰ "If we had those resources, we'd be able to do a far better job," Novelli said.⁸¹ "A year has passed and the trend is going the wrong way," he added.⁸²

The demise of the tobacco settlement has also taken a toll on tobacco stock investors. Once the darlings of Wall Street, tobacco companies were renowned for delivering steady earnings gains, double-digit returns, fat dividends and regular share buybacks. But investors have seen the promise that the industry would receive a shield from future lawsuits, protection from crippling judgments, shattered. From June 1997 to June 1998, a year in which the settlement was announced and then trounced, shares of the two dominant United States cigarette makers, Philip Morris and RJR, dropped on average more than twenty percent, while the stock market gained

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*; *Statement by Center for Tobacco-Free Kids on FDA Regulations*, U.S. Newswire, Feb. 28, 1997, available in WESTLAW, USNWSW Database (citing the results of a study called *Monitoring the Future*, an annual, national survey of American secondary school students, University of Michigan, December 1996); *see also* Patrick M. O'Mally et al., *Adolescent Substance Abuse: Epidemiology and Implications for Public Policy*, 42 *PEDIATRIC CLINICS OF N. AM.* 241 (1995) (discussing tobacco use among eighth to twelfth graders).

81. *See Death of a Settlement*, *supra* note 1.

82. *See id.*

twenty percent.⁸³ “The most important provision for tobacco investors — the liability protection — just vanished,” said Martin Feldman, a tobacco analyst at Salomon Smith Barney.⁸⁴ “In essence, all the promises were erased,” he said.⁸⁵

So now, we’re left with almost nothing. There will be no advertising restrictions, so the Marlboro Man and Joe Camel won’t be banished as many attorneys general had promised. There will be no guaranteed multi-billion dollar payments to states. The FDA may continue to be unable to regulate tobacco products, particularly in light of a recent federal appeals court decision.⁸⁶ All we end up with, in essence, is a docket full of lawsuits. The blue haze of litigation hanging over the United States tobacco industry isn’t likely to clear any time soon. Big Tobacco likely will have to begin defending itself against numerous state lawsuits scheduled to go to trial in the next twelve months.⁸⁷ Since Congress failed to come to the rescue, the companies also will have to contend with at least twenty-five class-action suits, to date, brought by smokers and their families.⁸⁸

The tobacco industry has already settled out of court with some states. It agreed to pay \$36 billion over 25 years to the first four states that sued — Mississippi, Florida, Texas and Minnesota.⁸⁹ That’s just

83. *See id.* The Standard & Poor’s index of 500 stocks gained 22.4% from June 20, 1997 to June 19, 1998 (898.70 to 1100.65). Search of Bloomberg Fin. Mkts. Commodities News, Bloomberg News, Atlanta, Ga. (on file with author). Shares of Philip Morris, over the same period, fell 19.4% from 48 to 38 11/16, and shares of RJR declined 32.9% from 36 1/2 to 24 1/2. *Id.*

84. *See Death of a Settlement, supra* note 1.

85. *See id.*

86. *See Brown & Williamson Tobacco Corp. v. Food & Drug Admin.*, Nos. 97-1604, 97-1581, 97-1606, 97-1614, 97-1605, 1998 WL 473320, at *1 (4th Cir. Aug. 14, 1998). The FDA, on August 28, 1996, published a rule setting out regulations concerning the sale and distribution of cigarettes and smokeless tobacco to minors, and limiting the advertising and promotion of tobacco products. *See id.* In a 2-1 decision, a Fourth Circuit panel held that the FDA lacked jurisdiction to regulate tobacco products, and thus invalidated all of the August 28, 1996 regulations. *See id.* The panel opined that “Congress did not intend to delegate jurisdiction over tobacco products to the FDA.” *Id.* at *19. The decision is currently stayed, however, until the court rules on the government’s rehearing request.

87. States that have already sued the tobacco industry include Iowa, Minnesota, Florida, Washington, and Maryland. *See State of Iowa v. Philip Morris Inc.*, 577 N.W.2d 401 (1998); *State of Minnesota v. Philip Morris Inc.*, 1998 WL 257214 (Minn. Dist. Ct. 1988); *State of Florida v. American Tobacco Co.*, 707 So.2d 851 (Fla. Dist. Ct. App. 1998); *State of Washington v. American Tobacco Co., Inc.*, 1997 WL 714842 (Wash. Super. 1997); *State of Maryland v. Philip Morris, Inc.*, 1997 WL 540913 (Md. Cir. Ct. 1997).

88. *See, e.g., Small v. Lorillard Tobacco Co. et al.*, 1998 WL 398176 (N.Y.A.D. 1 Dept. 1998); *Geiger v. American Tobacco Co. et al.*, 674 N.Y.S.2d 775 (1998).

89. *See BAT Insurance/Tobacco Reports First-Half Profits 14 Percent Lower*, AGENCE FRANCE-PRESSE, July 29, 1998; *US Attorneys General Reach Agreement on Tobacco Strategy*, AGENCE FRANCE-PRESSE, July 15, 1998; *US Tobacco Firms in Secret Talks to Settle 37 State Lawsuits*,

the beginning of the state lawsuits. The state of Washington's opening arguments began September 28.⁹⁰ More states have court dates in the next 12 months — Oklahoma, Massachusetts, Arizona, California, Maryland, New Jersey, and New York.⁹¹

In addition, to date, there are some 800 lawsuits from individual smokers⁹² and, on a new front, United States tobacco companies are facing lawsuits from other countries. In May, 1998, Guatemala filed suit in United States District Court in Washington, D.C., against Brown & Williamson, Liggett and Philip Morris, in the first such action brought by a foreign government.⁹³ Attorneys in Israel, Ireland, and Australia are known to be considering lawsuits against the industry.⁹⁴

VIII. OUTLOOK FOR THE FUTURE

In the absence of the settlement, public health groups, tobacco stock investors, state attorneys general and individual smokers are completely dependent on the whims of jurors and appellate boards. Even if the anti-tobacco litigants start winning in court, Philip Morris and RJR could rip a page out of the history books and do what Dow Corning did in the wake of all the breast-implant litigation — file for

AGENCE FRANCE-PRESSE, July 10, 1998; Samuel Goldreich, *Tobacco Industry Settles Rather Than Fight*, THE WASH. TIMES, May 9, 1998, at A1.

90. See Matthew Ebnet, *Tobacco Industry Lied to America, State Says in Opening Statements*, SEATTLE TIMES, Sept. 28, 1998, at B1; John Bacon, *Tobacco Trial Begins Today in Washington State*, USA TODAY, Sept. 28, 1998, at 3A.

91. Court dates are as follows: Oklahoma - Jan. 25, 1999; Massachusetts - Feb. 1, 1999; California - Mar. 1, 1999; Oregon - Apr. 5, 1999; Maryland - Apr. 5, 1999; New Jersey - May 1, 1999; New York - May 17, 1999.

92. See, e.g., *Brown & Williamson Tobacco Corp. v. Widdick*, 1998 WL 476268 (Fla. App. 1 Dist. 1998) (opinion subject to revision or withdrawal); *Appavoo v. Philip Morris, Inc.*, 1998 WL 440036 (N.Y. Sup. Ct. 1998) *Geiger v. American Tobacco Co.*, 674 N.Y.S.2d 775 (1998); *Brown & Williamson Tobacco Corp. v. Carter*, 1998 WL 323484 (Fla. App.1 Dist. 1998); *R.J. Reynolds Tobacco Co. v. Cantley*, 1998 WL 290288 (Ala. 1998); *Buckingham v. R.J. Reynolds Tobacco Co.*, 713 A.2d 381 (N.H. 1998); *Pitre v. GAF Corp.*, 705 So.2d 1149 (La. Ct. App. 1997); *DaSilva v. American Tobacco Co.*, 667 N.Y.S.2d 653 (1997).

93. Mark Suzman, *Guatemala Files Lawsuit on Tobacco*, FIN. TIMES, May 13, 1998, at 6.

94. See N.Y. DAILY NEWS, Sept. 30, 1998, at 29; CHICAGO TRIBUNE, Sept. 29, 1998, at 3; Josh Karlen & Bob Van Voris, *WEB Fuels Suits Against Tobacco Worldwide*, NAT'L L.J., Mar. 30, 1998, at A7.

bankruptcy.⁹⁵ Bankruptcy would put a halt to lawsuits and to most of the payments Congress now hopes to get from the industry.⁹⁶

There is still some chance that the tobacco legislation killed by the Senate may yet rise again in a different form. Clinton vowed to press ahead in the aftermath of the bill's demise and said he would continue to fight for legislation to cut teen smoking.⁹⁷ "This battle is far from over," Clinton said.⁹⁸ But even if the President was to take an active role in crafting a new agreement, Congress did not pass any legislation this year, especially considering the 1998 Congressional elections in November.⁹⁹

IX. CONCLUSION

Having Big Tobacco pay a large sum on account of its actions and submit to regulation could improve the public health of the nation. And the industry may deserve to be reviled for denying the dangers of smoking while it full well knew that cigarettes were deadly and addictive. Yet the anti-tobacco lobby should have realized that regulating tobacco, not punishing the industry, was its primary goal. The only way to reach an accommodation is for the different sides — the tobacco companies, the states, the private plaintiff attorneys, and the others — to work together. If the parties would compromise their personal agendas, more than they did as the settlement was trounced, we could reach an accommodation with Big Tobacco.

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95. See Jay Mathews, *Breast Implant Maker Files for Bankruptcy: Dow Corning Tactic Threatens Settlement*, WASH. POST, May 16, 1995, at A1. Filing for bankruptcy shielded Dow Corning from creditors while it ordered its financial affairs. See *id.* Dow Corning, faced with lawsuits from harmful silicone breast implants, said that bankruptcy was the only way for it to avoid being overwhelmed by soaring legal costs. See *id.*

96. *Cf. id.*

97. See *supra* note 71 and accompanying text.

98. *Id.*

99. See *Death of a Settlement*, *supra* note 1.