The Tobacco Litigation Merry-Go-Round: Did the MSA Make It Stop?

Shital A. Patel
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“What is different about tobacco litigation, however, is that the potential claimants are so numerous, the scope of the offending conduct so vast and the resources of the defendants so huge, that conventional litigation is simply inadequate to capture and contain the issues or assure appropriate relief. It thus fails as both a policy and a compensatory vehicle.”

I. INTRODUCTION

It is rarely disputed that litigation in this country rises every year, and tobacco litigation is no exception. The sheer numbers demonstrate that the tobacco litigation war is far from over, and the 1998 Master Settlement Agreement has failed in decreasing tobacco litigation overall. The Master Settlement Agreement (“MSA”) is an accord signed on November 16, 1998 between the state Attorneys General of forty-six states, five U.S. territories, the District of Columbia and the four major tobacco and cigarette producers: Philip Morris Inc., R.J. Reynolds Tobacco Co., Lorillard Tobacco Corp., and Brown & Williamson Tobacco Co. Arguably, an underlying assumption of the settlement is that it existed for settlement purposes and should discourage further litigation. A settlement somewhat implies that a resolution—an agreement—has been reached; thus, the tobacco war should have been quelled somewhat in the last six years. In other words, an implicit goal of the MSA was to reduce and resolve the onslaught of tobacco litigation. While it was formally a settlement

5Id.
6See Federal News Service (July 24, 2003).
between the States Attorneys General and the tobacco companies, the upshot could have—or should have—been a much greater reduction of tobacco-related litigation.\textsuperscript{7} While the States Attorney Generals may have resolved their legal dispute with Big Tobacco temporarily, the rest of Americans have not and continue to battle it out in court. Even its name—the Master Settlement Agreement—suggests great expectations for what seemed to be a landmark conclusion between the industry and the people, as represented by the U.S. government.\textsuperscript{8} It possessed elements of a public-private partnership, which might have had the long-lasting effect of solutions to tobacco litigation.\textsuperscript{9} Thus, the MSA was insufficient in terms of deterring litigation and a second settlement is necessary.

A. The Master Settlement Agreement

"The Master Settlement Agreement is just one brick in the regulatory edifice that houses the smoking policy of the United States."\textsuperscript{10} "The MSA was a unique, litigator-created document of monumental scale that arose out of unprecedented litigation strategy."\textsuperscript{11} The MSA resolved numerous state-initiated suits against the four major tobacco companies, known as the "Majors".\textsuperscript{12} The Majors and Attorneys General signed the MSA after four prior agreements were entered between the Majors and the states of Florida, Minnesota, Mississippi, and Texas.\textsuperscript{13} As an omnibus settlement among state governments and tobacco companies, the MSA represented the final product of a massive negotiation process for the states seeking recovery of Medicare funds from tobacco manufacturers.\textsuperscript{14} The MSA addressed two demands that tobacco control advocates have asserted for years: restrictions on the industry's advertising and more money for anti-smoking campaigns.\textsuperscript{15} Thus, the settlement stipulated that states, territories, and the District of Columbia could attain portions of a $256 billion pool, financed by the

\textsuperscript{7}Id.
\textsuperscript{8}Donald W. Garner, \textit{Up in Smoke: Coming to Terms with the Legacy of Tobacco, Tobacco Wars and the New Minority}, 2 J. HEALTH CARE L. \& POL’Y 15, 16 (1998).
\textsuperscript{11}Wood, supra note 9, at 597.
\textsuperscript{12}Id.
\textsuperscript{13}See Tobacco Settlement Agreement, supra note 3.
\textsuperscript{14}Wood, supra note 9, at 597.
\textsuperscript{15}Jacobson, supra note 2, at 229.
Majors, in exchange for dismissing pending or soon-to-be-pending litigation against those companies.\textsuperscript{16}

In addition to monetary benefits to the states, the MSA places restrictions on marketing, advertising, and promotion of tobacco products—primarily cigarettes.\textsuperscript{17} “Restrictions placed on tobacco advertising have been hailed as the most important non-monetary restriction achieved by the MSA.”\textsuperscript{18} The Agreement forbids tobacco companies from marketing directly or indirectly “to Youth within any Settling State...”\textsuperscript{19} Advertising restrictions include bans on transit and outdoor advertising and on the usage of cartoon images.\textsuperscript{20} Another section of the MSA obligates the tobacco companies to pay the private practice attorneys who represented the settling states "$750 million per year for five years and, thereafter, $500 million per year indefinitely."\textsuperscript{21} Moreover, the MSA provides each signatory state Attorney General with independent enforcement authority to ensure compliance with the agreement.\textsuperscript{22} A $50 million dollar enforcement fund was established for this purpose.\textsuperscript{23}

In the wake of the Master’s Settlement Agreement came a landslide of tobacco litigation, often resulting in highly publicized, multi-million or billion dollar damage awards to aggrieved smokers and their families.\textsuperscript{24} Furthermore, as this article will discuss, post-MSA tobacco litigation involves the enforcement and interpretation of the settlement agreement, as well as individual lawsuits from citizens asserting claim to MSA settlement money to the states. In addition to the main goals of the MSA—reducing youth smoking and recouping payment for state medical treatment—an implicit goal has been to resolve the mountain of pending tobacco litigation. Six years after the signing of the MSA, however, tobacco litigation has not been

\textsuperscript{16}Wood, supra note 9, at 597.
\textsuperscript{17}Robert L. Kline, Tobacco Advertising After the Settlement: Where We Are and What Remains To Be Done, 9 KAN. J.L. & PUBL. POL’Y 621, 622 (2000).
\textsuperscript{18}Id.
\textsuperscript{19}Tobacco Settlement Agreement, supra note 3.
\textsuperscript{20}Kline, supra note 17, at 624.
\textsuperscript{21}Michael DeBow, The State Tobacco Litigation and The Separation of Powers in State Governments: Repairing the Damage, 31 SETON HALL L. REV. 563, 568 (2001). The net present value of these payments to these private attorneys is "about $ 8 billion, using a seven-percent discount rate." Id.
\textsuperscript{22}Tobacco Settlement Agreement, supra note 3.
\textsuperscript{23}Id.
The MSA leaves many questions unanswered. This article surveys the post-MSA tobacco litigation landscape, argues that the MSA failed to reduce tobacco-related litigation, and proposes some suggestions for a second settlement.

The first section of this article discusses the smoking problem which lead to the MSA, and provides a background of the Master’s Settlement Agreement. The main focus of the article will discuss the major cases and kinds of tobacco litigation following the MSA. While the MSA was, indeed, a major stepping stone for Big Tobacco in accepting responsibility and curbing marketing to youth, the MSA has done little in the way of remedying excessive litigation. The litigation following the MSA demonstrates that tobacco issues still need to be addressed and resolved. The analysis section examines the litigation statistics of two major tobacco companies, Philip Morris Inc. and R.J. Reynolds Tobacco Co., between 1998 and 2004 to show how the litigation has in fact increased since the signing of the MSA. Finally, this article offers some recommendations for a second settlement.

A. Background: smoking as a health issue

While the problem of smoking and tobacco-related illnesses may have already fatigued the ears of the public health, the problem bears at least brief consideration in light of what led to such a colossal deal as the Master’s Settlement Agreement. Why such a public outcry against the tobacco industry? Why smoking? The subject of tobacco control, much like gun control and abortion, sparks heated debate. Opinions span the gamut from fiercely protective of the right to use tobacco freely to staunch advocates of government regulation or abolition of cigarettes because of second-hand smoke danger. The stakes of smoking,
nonetheless, are vast.\textsuperscript{28} Tobacco kills more Americans than AIDS, drugs, homicides, fires, and automobile accidents combined.\textsuperscript{29} Globally, smoking-related deaths will rise to 10 million per year by 2030 and 7 million of these deaths will occur in less than industrialized nations.\textsuperscript{30} Worldwide, tobacco products kill approximately 4.9 million people per year.\textsuperscript{31}

Irrespective of whether tobacco companies continue to advertise to young people, smoking is clearly a significant problem among youth. Approximately 80\% of adult smokers started smoking before the age of 18.\textsuperscript{32} Every day, nearly five thousand young people under the age of 18 try their first cigarette.\textsuperscript{33} Two thousand of them will then become daily smokers.\textsuperscript{34} If the current smoking patterns in the United States persist, an estimated 6.4 million of today's children will die prematurely of tobacco-related diseases.\textsuperscript{35} During the decade prior to the MSA, youth smoking was on the rise, according to The National Cancer Institute, and approximately 35\% of youth were smokers in 1999.\textsuperscript{36} According to a June 2001 report released by the Federal Interagency Forum on Child and Family Statistics, adolescent cigarette use is declining.\textsuperscript{37} This report indicates that smoking by eighth, tenth, and twelfth grade students peaked just before the MSA and has decreased since then.\textsuperscript{38}

\textsuperscript{28}Edward M. Kennedy, \textit{The Need for FDA Regulation of Tobacco Products}, 3 \textit{Yale J. Health Pol’y, L. & Ethics} 101, 102 (2002).
\textsuperscript{33}Id.
\textsuperscript{34}Edward M. Kennedy, \textit{supra} note 28, at 102.
\textsuperscript{35}\textit{Id.}
\textsuperscript{38}Id.
Smoking is not a cost-free vice to American taxpayers.\(^3\) Direct medical expenditures attributed to smoking amount to more than \$75 billion per year in the United States.\(^4\) Furthermore, smoking costs an estimated \$80 billion per year in lost productivity.\(^5\) Each of the approximately 22 billion packs of cigarettes sold in the U.S. in 1999 cost the nation an estimated \$7.18 in medical care costs and lost productivity.\(^6\)

The U.S. Department of Health and Human Services asserts that tobacco control saves money.\(^7\) For example, an economic assessment found that a health care plan’s annual cost of covering treatment to help people quit smoking ranged from \$0.89 to \$4.92 per smoker, whereas the annual cost of treating smoking-related illness ranged from \$6.00 to \$33.00 per smoker.\(^8\) Recent studies have concluded that reducing smoking prevalence among pregnant women by one percentage point over 7 years would prevent 57,200 low-birth weight births and save \$572 million.\(^9\)

What does the current smoking problem look like? According to a study released in October 2003 by the Centers for Disease Control and Prevention (CDC), the percentage of American adults who regularly smoke cigarettes fell slightly in 2001.\(^1\) The CDC welcomed these findings, attributing them in part to state anti-tobacco programs funded by the tobacco companies pursuant to the Master’s Settlement Agreement.\(^1\) However, Dr. Corinne Husten, medical officer in the CDC’s Office of Smoking and Health warned, “The states were starting to fund some comprehensive tobacco-prevention and control programs,

\(^{3}\) CTR. FOR DISEASE CONTROL, supra note 32.
\(^{4}\) Id.
\(^{5}\) Id.
\(^{6}\) Id.
\(^{7}\) Id.
\(^{8}\) Id.
\(^{9}\) Id.

Paul Simao, Smoking Rate Dips Among U.S. Adults – CDC Study, Medline Plus Health Information (Oct. 9, 2003), at http://www.nlm.nih.gov/medlineplus/news/fullstory_14228.html (last visited Nov. 12, 2004) (on file with author). According to this federal study, an estimated 46.2 million adults, or 22.8 percent of those 18 years and over, reported they were current smokers in 2001. This compares to an estimated 23.3 percent of adults who smoked the previous year and 25 percent who did in 1993. Id.

\(^{1}\) Id.
but unfortunately with the budget crisis those funds are being lost and put into general revenues.\textsuperscript{48} Most states are, in fact, failing to use their portion of the multi-billion dollar settlement dollars from the tobacco industry to fund tobacco prevention and cessation efforts.\textsuperscript{49}

B. History of the Master Settlement Agreement

In order to create an analytical framework for the tobacco litigation that followed the MSA, it is useful to develop a very brief overview of the events leading up to the settlement. Before the early 1950s, the tobacco industry’s image remained unaffected by litigation and negative media attention to their products.\textsuperscript{50} This all changed with the publication of a Reader’s Digest article entitled, “Cancer by the Carton” in 1952.\textsuperscript{51} Two years later, the tobacco industry faced its first lawsuit.\textsuperscript{52} Eva Cooper, whose husband died of lung cancer, sued R.J. Reynolds.\textsuperscript{53} This was the first liability suit by a lung cancer victim alleging negligence and breach of warranty.\textsuperscript{54} Cooper lost the suit because the court ruled that there was no evidence that smoking caused cancer.\textsuperscript{55} The tobacco industry managed to outspend and outlast plaintiffs for years.\textsuperscript{56} From 1954 to 1994, approximately 813 claims were filed by private citizens in tort actions in state courts against tobacco companies.\textsuperscript{57} Only twice did the courts find favor of the plaintiffs, and both decisions were subsequently reversed on appeal.\textsuperscript{58}

\textsuperscript{48}Id.
\textsuperscript{49}Tobacco: States are Failing to Use Settlements to Fund Prevention Programs Report Says 2001, Bureau of Nat’l Aff. 1 (on file with author).
\textsuperscript{51}Id.
\textsuperscript{53}Id.
\textsuperscript{54}USA Today, Tobacco Settlement, at http://www.usatoday.com/news/smoke/smoke26.htm (last visited Nov. 12, 2004). Legal experts at the time believed this would be the first of many lawsuits, and plaintiffs would be rewarded generously. Id.
\textsuperscript{55}BBC News, supra note 50. Cooper’s case, however, was the first in an unbroken string of 300 victories by the tobacco industry over plaintiffs. Id.
\textsuperscript{56}Id.
\textsuperscript{57}LaFrance, supra note 1, at 190.
\textsuperscript{58}Id. By 1964, the first U.S. Surgeon General’s report was issued, citing the health risks associated with smoking, and warning labels were placed on cigarette packs a year later. PBS, supra note 52. By 1988, the Surgeon General reported that nicotine was an addictive drug. USA Today, supra note 54. At a 1983 trial involving plaintiff Rose Cipollone against the tobacco industry, a study called “The Motives and
It was Diane Castano’s 1994 case, nonetheless, that grew into the nation’s largest class action suit of smokers. In 1996, the court struck down the class action status of the Castano case, calling it too unwieldy to cover all states.

“No court has ever tried an injury-as-addiction case... The Castano class suffers from many of the difficulties that the Georgine court found dispositive. The class members were exposed to nicotine through different products, for different amounts of time, and over different time periods. Each class member’s knowledge about the effects of smoking differs, and each plaintiff began smoking for different reasons. Each of these factual differences impacts the application of legal rules such as causation, reliance, comparative fault, and other affirmative defenses.”

The tobacco industry became a public health pariah as an onslaught of individual liability suits occurred and as the federal government began to investigate the industry’s actions. Each of the seven executives of the leading tobacco manufacturers, including Philip Morris, R.J. Reynolds, Lorillard, and Brown & Williamson, testified and swore during the Waxman Congressional hearings that they “believe nicotine is not addictive”. At the same time, the states’ legal crusade against the tobacco industry began taking hold, on both the litigation and legislative fronts. Mississippi Attorney General Mike Moore filed the first state lawsuit against the industry in May 1994, explaining that the case was “premised on a simple notion—you cause the health crisis, you pay for it.”

Incentives of Cigarette Smoking” came to light. At the Cipollone trial, tobacco industry documents were revealed, denting the industry’s longtime armor. Id. PBS, supra note 52; USA Today, supra note 54. See USA Today, supra note 54. Castano v. American Tobacco Co., 84 F.3d 7-34, 742-43 (5th Cir. 1996). See PBS, supra note 52. Id. Id. DeBow, supra note 21, at 566. Id. At the same time, the Florida legislature laid the foundation for a similar suit by passing the Medicaid Third-Party Liability Act (MTPLA), which stacked the deck against tobacco company defendants in any recoupment suit brought by the state. The MPTLA stripped the defendants of all of their pre-existing common law affirmative defenses, allowed the use of market share liability, replaced long-standing concepts of causation and damages with “statistical analysis,” and dispensed with the requirement that the state identify the individual recipients whose illnesses were treated through state health care programs. Id.
Upon the gathering momentum among the states, the industry signaled a willingness to discuss settlement in early 1997. During the congressional deliberations, however, the tobacco companies had negotiated individual settlements with four states that had advanced farthest down the litigation trail—Florida, Minnesota, Texas and Mississippi. After the national settlement proposal settlement failed in Congress, the state and tobacco companies returned to the bargaining table. On November 16, 1998 a “Master Settlement Agreement” was announced between the four largest tobacco companies—known as the “Majors”—and the remaining forty-six states, the District of Columbia, and five U.S. Territories, collectively referred to in this article as “the states”.

Each state action lists two primary goals and forms of relief: first, to recover state funds expended in treating tobacco-related illness through its Medicaid or state employee health insurance plan and second, to enjoin the tobacco companies from engaging in any marketing that may appeal to underage consumers of tobacco products. “During a press conference following the release of the MSA, Washington Attorney General Christine Gregoire stated that these two aims were critical to the success of the settlement negotiations.” The MSA directly states these goals in the agreement that representatives of the settling states signed the agreement “in order...to reduce youth smoking, to promote public health and to secure monetary payments” to the states.

The monetary sum agreed to in the MSA required the tobacco companies to pay $10 billion per year to the states over the course of twenty-five years, until the year 2023. In addition, the tobacco companies agreed to “contribute” $1.5 billion over five years to an anti-smoking education and advertising campaign and $250 million to a

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66Id. at 567. Congress debated the 1997 settlement proposal at length, and, as it debate wore on, the debate attracted many special interest amendments and conditions. The tobacco industry also sought federal legislation during 1997 that would have settled its liability and imposed limited obligations upon it. This effort failed, however, and was followed by legislation proposed by Senator John McCain, with a price tag of approximately $520 billion. In late July 1998, settlement with the states was stymied, and the tobacco companies walked away from the settlement proposal. Id.

67Id.

68Id. at 568.

69Id.

70Wood, supra note 9, at 609.

71Id. at 610.

72DeBow, supra note 21, at 567; Kline, supra note 17.
foundation dedicated to reducing teen smoking.\textsuperscript{74} The net present value of these payments to the states pursuant to the MSA has been estimated at $281.6 billion.\textsuperscript{75}

The MSA also provided for payments to the plaintiffs' attorneys.\textsuperscript{76} In a typical court award to a plaintiff in a personal injury case, a portion of the award amount is used to pay the attorneys' fees.\textsuperscript{77} In the MSA, however, the attorneys' fees are borne by the tobacco companies rather than the states.\textsuperscript{78} An economist on the Harvard faculty, W. Kip Viscusi noted, "The general public may be so upset to see lawyers receiving billions of dollars in compensation so that the political salability of the agreement can be enhanced by making attorneys' fees appear to be a distinct and less visible component."\textsuperscript{79} Under the MSA provisions, the Majors are obligated to pay the private practice attorneys who represented the settling states $750 million per year for five years and, thereafter, $500 million per year indefinitely.\textsuperscript{80} Media experts have pegged the estimated total attorneys' fees to be awarded for all states to be in the $20 billion range for fewer than five hundred lawyers.\textsuperscript{81}

Besides requiring payments of about $325 million to a National Foundation directed at reducing youth tobacco use, the MSA includes some additional provisions that require direct cigarette company action related to reducing youth tobacco usages.\textsuperscript{82} This section on "Corporate Culture Commitments" includes requiring the tobacco companies to establish corporate principles that explain their commitment to comply with the MSA and otherwise reduce tobacco among youth and regularly communicate their commitment to reduce youth tobacco use to their employees and customers.\textsuperscript{83} In trying to change tobacco companies from the inside out, this section of the MSA requires them

\begin{footnotesize}
\begin{enumerate}
\item The process of determining these fees has been relatively well hidden. Id.
\item Id. The net present value of these payments to the private attorneys is about $8 million, using a 7% discount rate. Id.
\item Viscusi, supra note 27, at 542.
\item DeBow, supra note 21, at 568. How high the actual payments will be, or if they will be greater, is uncertain. Id.
\end{enumerate}
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to designate executive level managers to identify ways to reduce youth access to tobacco products and reduce youth tobacco use and encourage employees to find ways to reduce youth tobacco use.  

C. Why did they settle?

A focal question remains why the tobacco companies and states settled. One simplistic, yet plausible view is that the tobacco companies committed a tort against smokers, and the states, acting as representatives and insurers for smokers and their families, are subrogated to their claims. The states did not make a subrogation claim, however, because this would have invited litigation from the Medicaid recipients who would have had a right, under subrogation principles, to collect from the states if the states recovered damages in excess of the cost of care. Under *parens patriae*, this viewpoint expresses that the states have a quasi-sovereign interest in the well-being of their citizens. This theory proposes that the states are socially and financially harmed by the injuries suffered by all smokers—not only Medicaid recipients—and are entitled to restitution from the tobacco industry.

Critics have also reasoned that the tobacco industry settled because it believed it would become more vulnerable as tort standards evolved, as additional information about the tobacco executives’ past conduct became known, and as states prepared to use or create legal devices that were not available to individual plaintiffs. Essentially, attitudes towards smoking had been changing for many years before the MSA was negotiated, and the MSA was likely a reflection of these changes. For the tobacco companies to realize this and settle, it can be said then that “the decision to settle was prescient rather than foolish”. By inviting and settling the state litigation, the tobacco companies will have arguably obtained what Congress denied legislatively and will need only deal with individual litigation. Some

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84 Id.
86 Id.
87 Id. at 1144.
88 Id.
89 Id.
91 Id.
92 LaFrance, *supra* note 1, at 190. “Indeed, part of the companies’ motive in gathering the States into a single settlement may have been precisely to avoid a comprehensive resolution of health issues. The essence of litigation in our system focuses entirely on
commentators caution that individual litigation will be countered with individual settlements in tandem with legislative lobbying in the fifty states, a technique for reducing liability which has proven successful in other industries, such as asbestos and insurance.93

One of the practical theories of why the tobacco companies would agree to make such lavish payments to the states and live under new regulatory constraints is to gain protection from bankruptcy and loss of market share.94 The financial stakes in the state suits were great because the tobacco manufacturers faced a line of state plaintiffs, who could learn from one another's trials, and slowly drain the defendant's finances.95 Another perspective proposes that the tobacco industry benefits because the MSA cartelizes industry and guards against destabilization of the cartel by erecting barriers to entry that preserve the 99 percent market dominance of the tobacco giants.96

Why did the states and tobacco companies settle instead of continuing with individual lawsuits? One element of impracticability with respect to conducting numerous separate lawsuits concerns litigation costs.97 "As each state must incur costs litigating a particular case, its amount of possible recovery decreases."98 Some costs would at least be redundant, because litigants would have to pay for similar exhibits, experts, studies, and tests.99 Another important concern "with conducting multiple trials centers on conflicts over state common law actions and their results."100 Multi-state litigation may create inconsistent or varying adjudications that establish incompatible standards of conduct for defendants.101 "Proceeding under similar theories in separate states might result in different types of damages or equitable relief being imposed upon the tobacco companies."102 Multiple defendants would not be judged upon consistent standards

the case and controversy between the individual litigants and limits the resolution to their particularized grievances. Tobacco litigation is no different." Id. at 189.

93Id.
94DeBow, supra note 21, at 582.
95Id.
96Id. Viscusi also agrees that the MSA mainly serves to cartelize the tobacco industry at the expense of smokers. See generally, W. Kip Viscusi, SMOKE-FILLED ROOMS: A POSTMORTEM ON THE TOBACCO DEAL (University of Chicago Press 2002).
97Wood, supra note 9, at 607.
98Id.
99Id.
100Id.
101Id. at 608.
102Wood, supra note 9, at 608.
across state lines.\textsuperscript{103} Thus, advancing with separate state suits might have imposed substantial litigation costs on both plaintiffs and defendants.\textsuperscript{104}

**D. Provisions affecting the marketing of tobacco products**

A major consequence of the Master's Settlement Agreement is the severe limitations imposed on the marketing, advertising, and promotion of tobacco and tobacco products.\textsuperscript{105} The advertising restrictions are a complex thicket of legalese and cross-references among definitions.\textsuperscript{106} In order to gain a basic understanding of the kinds of advertising limitations imposed by the MSA, this article will present a simplified overview of the advertising restrictions, which are very specifically defined in the MSA itself.\textsuperscript{107}

The MSA bans "outdoor advertising", which includes billboards, and signs in arenas, video arcades, stadia, and shopping malls.\textsuperscript{108} Specific types of outdoor advertising are banned, as well as certain advertisements placed inside a store if they are still visible from the outside.\textsuperscript{109} However, a significant exception to these "outdoor advertising" bans is that they do not apply to tobacco retail locations, the places most interested in displaying tobacco advertising.\textsuperscript{110} A tobacco retailer may place an unlimited number of tobacco advertisements and promotions anywhere on that property as long as the displays are smaller than fourteen square feet.\textsuperscript{111} It has been criticized that this exception for tobacco retailers substantially undercuts the "outdoor advertising" bans.\textsuperscript{112} Thus, a gas station selling cigarettes must abide by the "outdoor advertising" bans, but a tobacco shop does not.\textsuperscript{113}

Another exception in the MSA allows outdoor advertising at the site of a tobacco brand-sponsored event held at an Adult-Only Facility during the event for fourteen days prior to the event.\textsuperscript{114} This includes

\textsuperscript{103}Id.
\textsuperscript{104}Id.
\textsuperscript{105}Kline, supra note 17, at 622.
\textsuperscript{106}Id.
\textsuperscript{107}See The National Association of Attorneys General, supra note 37.
\textsuperscript{108}Kline, supra note 17, at 623.
\textsuperscript{109}Id.
\textsuperscript{110}Id.
\textsuperscript{111}Id.
\textsuperscript{112}Id.
\textsuperscript{113}Kline, supra note 17, at 623.
\textsuperscript{114}Id.
“Camel Nights” at local bars and nightclubs. By sponsoring events of interest to young adults, these kinds of events target the 18-25 year old age bracket. Advertising here is limited to promoting the event by brand name; no other tobacco advertising is allowed.

A second major limitation on tobacco advertising in the MSA is the restriction on transit advertisements placed on or within private or public vehicles and within transit waiting areas such as bus stops, train stations, taxi stands, and airports. There is, however, an exception for tobacco retail establishments located in transit waiting areas that allows displays of tobacco advertising that are no longer than fourteen square feet. Furthermore, Adult-Only Facilities located at transit waiting areas are allowed to advertise if they are hosting tobacco-sponsored events during the event and for fourteen days prior to the event; advertising is limited to sponsorship of the event by brand name (e.g. “Camel Nights”) and no other tobacco advertising. Tobacco manufacturers were required to remove all non-conforming outdoor and transit advertisements by April 23, 1999. Additionally, tobacco companies may no longer place advertising upon tops of taxis and sides of buses.

E. Ban on targeting youth
As part of the Master Settlement Agreement, the tobacco companies agreed not to target youth within the settling states. They agreed “not to take any action the primary purpose of which is to initiate, maintain or increase youth smoking” within the settling states. However, the MSA has been criticized for making exceptions to marketing to youth, because, in fact, this same provision states that the industry may take actions “that have as their secondary purpose the initiation, maintenance or increase of youth smoking.” Thus, the anti

115 Id.
116 Id.
117 Kline, supra note 17, at 623.
118 Id.
119 Id.
120 Id.
121 Id. If time was remaining on the lease between a tobacco company and the billboard or transit company, the signatory state could use the billboard or taxi top for tobacco control messages. Almost all states took advantage of this opportunity in various ways. Id.
122 Kline, supra note 17, at 623.
123 Id. at 624.
124 Id.
125 Id.
youth-targeting provision is ambiguous, because the previous exception appears contrary to the overall prohibition of targeting youth.126

Consistent with the provision to cease targeting youth, the MSA bans the use of cartoon images in the advertising, promotion, packaging, or labeling of tobacco products.127 Incorporated within this ban of cartoon images are depictions of objects, people, or animal creatures with comically exaggerated features or superhuman powers.128 Depictions of the “Marlboro Man” and “Newport Lovers” remain unaffected by the cartoon ban.129 However, the general cartoon ban does not include any depictions that were in use July 1, 1998, in any state on a tobacco company’s corporate logo or tobacco product packaging.130 This exception allows R.J. Reynolds to use camels on Camel packages and advertising, but not in the form of cartoon Joe Camel.131

The MSA also places restrictions upon tobacco product placement.132 Tobacco companies are forbidden from making any kind of payment for product placement in movies, television shows, theatrical, musical and live performances, commercial films/videos, or video games.133 These restrictions prevent the tobacco industry from paying for indirect, subtle advertising in popular culture—where young people are often exposed—such as movies, music video, concerts, and video games.134 However, there are no restrictions upon media creators who choose to portray images of smoking or tobacco use without compensation.135

MSA provisions limit tobacco promotion by brand name merchandising.136 Tobacco brand names may no longer appear on shirts, hats, backpacks, or other gear that might appeal to children.137 Exceptions to these merchandising restrictions include allowing tobacco companies to finish any licensing agreements or contracts into effect as of June 1997 and not requiring recall of products and gear

126 Id.
127 Kline, supra note 17, at 624.
128 Id.
129 Kline, supra note 17, at 624.
130 Id.
131 Id.
132 Id.
133 Id.
134 Kline, supra note 17, at 624.
135 Id.
136 Id. at 624.
137 Id. at 625.
already marketed, distributed or sold before the signing of the MSA. Tobacco posters, coupons for tobacco products and merchandise, and merchandise used within Adult-Only facilities are still allowed. Critics point out that there is no way of knowing how much promotional merchandise is still available to the public and the loopholes make it difficult to track merchandise that violates the agreement. Still, the merchandising regulations are meant to prevent people from acting as billboards for the tobacco industry.

Other bans on marketing restrictions include a prohibition on the distribution of free samples of tobacco products, except in Adult-Only facilities, and giving "freebies" to minors based on coupons or proof-of-purchase. Tobacco companies, however, are not given guidelines or restrictions on how to check for proof of age. For example, a redemption offer could be made via mail by sending a photocopy of a driver's license or government identification as sufficient proof, so in-person identification is not necessary.

The MSA establishes a highly complex set of rules governing the issue of tobacco brand name sponsorship. The objective is to proscribe tobacco companies from sponsoring certain cultural and sporting events—primarily where a significant percentage of youth may be present. Common brand name sponsorships include the "Winston Cup NASCAR" series and "Marlboro racing". Tobacco companies may no longer sponsor concerts or "events in which the intended audience is comprised of a significant percentage of youth," such as football, basketball, baseball, or hockey. One shortcoming in the MSA is the ambiguity in defining what constitutes an audience of "a significant percent of youth". For example, if Marlboro were to sponsor a rodeo that drew a family audience, how can it be determined whether children are a significant percentage of the audience?

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138Id.
139Kline, supra note 17, at 625.
140Id.
141Id.
142Id.
143Id.
144Kline, supra note 17, at 625.
145Id. at 626.
146Id.
147Id.
148Id.
149Kline, supra note 17, at 626.
150Id. at 627.
Additionally, tobacco companies may only be allowed one brand name sponsorship within a twelve-month period, such as the Virginia Slims tennis tournaments, although, they may have multiple games played in different states throughout the year.\textsuperscript{151}

Much criticism has been given to loopholes that seem to undermine these advertising restrictions.\textsuperscript{152} What are the practical effects of some of these exceptions? One, for instance, is that the prohibition on product placement in various media does not apply to brand name sponsorships.\textsuperscript{153} For example, tennis players or race car drivers can be paid by the tobacco industry to endorse permitted tobacco brand name sponsored events.\textsuperscript{154} Secondly, limitations on tobacco product merchandising do not apply to merchandise promoting a brand name sponsorship if sold at the sponsored event (e.g., Winston Cup logos on merchandise at Winston Cup NASCAR racing events can be distributed by R.J. Reynolds).\textsuperscript{155} Thirdly, limitations on outdoor advertising do not always apply in the context of brand name sponsorship. As an illustration, Winston Cup racing billboards could be advertised for 100-day stretches at multiple locations across the country.\textsuperscript{156} Marketing areas left untouched by the MSA include direct mail, tobacco retailer activities, bars and nightclubs, point-of-sale advertising, and tobacco sales over the internet.\textsuperscript{157}

\section*{F. Tobacco companies and advertising}

Cigarettes are the most widely advertised product in the world, and, prior to the MSA, pervaded all comers of the U.S. market.\textsuperscript{158} The year the MSA was signed, tobacco companies spent nearly $7 billion—more than $18 million per day—on cigarette advertising and promotion.\textsuperscript{159} Prior to the crackdown on tobacco advertising, it was nearly impossible to drive down a freeway or sit at a bus stop without seeing a cigarette

\begin{footnotes}
\item[151]Id.
\item[153]Id. at 627.
\item[154]Id.
\item[155]Kline, supra note 17, at 627.
\item[156]Id. at 628.
\item[157]Id. at 632.
\item[158]Hahn, supra note 27, at 1033.
\end{footnotes}
Cigarette ads account for a large proportion of the advertising pages, although today some tobacco companies, such as Philip Morris, have stated that they do not advertise in magazines with more than 15% youth readership. According to a June 2003 report by the American Lung Association, as cigarette sales decline in this country, expenditures on tobacco advertising and promotion have increased. In 1982, when cigarette sales were at 632.5 billion cigarettes, the industry spent about 1.8 billion dollars on advertising on promotion. By 2000, when sales were reduced to 413.5 billion cigarettes, advertising and promotion had increased 5.3 times. The most current figure on tobacco advertising and promotion reported by the Federal Trade Commission is 9.6 billion dollars spent by tobacco companies in 2000, the most ever reported by the industry.

Why such heavy regulations on tobacco marketing? The impact of tobacco advertising on usage, particularly youth smoking, has been the subject of extensive debate for the past several decades. The public health community asserts that advertising encourages smoking and is a significant influence on the initiation of smoking among youth. The tobacco industry, on the other hand, maintains that cigarette advertising is a form of competition and simply affects the market share. The industry also argues that advertising provides useful information to smokers about their products, including information on tar and nicotine content.

Studies exist proving and disproving the idea that advertising leads to an increase in smoking. On the anti-tobacco advertising front, the Center for Disease Control reports that the effect on tobacco advertising on young people is best epitomized by R.J. Reynolds...
Company’s introduction of the “Joe Camel” campaign.\textsuperscript{171} It claims that, with the introduction of the “Old Joe” cartoon character in 1988, Camel’s share of the adolescent market increased dramatically from less than 1 percent share before 1988 to more than 13 percent in 1993.\textsuperscript{172} Additionally, some research has demonstrated a strong link between tobacco promotion and the decision among adolescents to begin smoking.\textsuperscript{173} The Federal Trade Commission reported in 1998 that research showed that young children regard and recognize tobacco advertising images in a positive manner.\textsuperscript{174} Sales statistics may demonstrate a connection between tobacco advertising and popularity. For example, about 85\% of adolescent smokers who buy their own cigarettes buy Marlboro, Newport, or Camel—the three most heavily advertised brands of cigarettes in the United States.\textsuperscript{175}

Another study by Eugene Lewit, “The Effects of Governmental Regulation on Teenage Smoking,” used data collected from about 6700 youth from ages twelve to seventeen, taken from 1966 through 1970.\textsuperscript{176}

"Based on measures of televised cigarette advertising and counter-advertising, and self-reported information of time spent watching television, Lewit and his colleagues estimated the number of pro- and anti-smoking commercials each youth would have seen. Their estimates provide support for the hypothesis that televised pro-smoking advertisements significantly increased youth smoking."\textsuperscript{177}

On the other side, there are mixed results. In 1989, some econometric studies, mostly from the United States and United Kingdom, explored the relationship between cigarette advertising and promotional expenditures and cigarette demand.\textsuperscript{178} These studies have generally produced mixed findings, with most studies concluding that advertising has, at most, a small positive impact on demand.\textsuperscript{179} “However, critics of these studies note that econometric methods, which estimate the impact of a marginal change in advertising

\textsuperscript{171} National Center for Chronic Disease Prevention and Health Promotion, \textit{supra} note 159.
\textsuperscript{172}Id.
\textsuperscript{173}Id.
\textsuperscript{174}Kline, \textit{supra} note 17, at 621.
\textsuperscript{175}Id.
\textsuperscript{176}See National Center for Chronic Disease Prevention and Health Promotion, \textit{supra} note 159.
\textsuperscript{177}Hahn, \textit{supra} note 27, at 1035.
\textsuperscript{178}Id.
\textsuperscript{179}Id.
expenditures on smoking, are ill-suited for studying the impact of advertising.\textsuperscript{180}

Studying the impact of advertising and promotion bans on cigarette smoking, some researchers have hypothesized, would provide more direct evidence on the impact of tobacco advertising.\textsuperscript{181} Some older studies examined the impact of the U.S. television ban on cigarette advertising that began in 1971.\textsuperscript{182} Those studies concluded that the ban did not significantly reduce cigarette smoking in the U.S.\textsuperscript{183} However, one might consider that the tobacco industry can shift its resources from the banned media source—television, for example—to alternative measures which are not banned, such as magazines or point-of-sale.\textsuperscript{184}

The debate between tobacco advertising and subsequent usage continues and is yet to be settled. Overall, there appears to be no "smoking gun that proves that advertising and promotion play a significant role in expanding or maintaining the market for tobacco products, or that they do not."\textsuperscript{185} Analyzing the evidence collectively, Kenneth Warner, who has studied the links between cigarette advertising and public health, has "characterized the extent of the influence of advertising as unknown and possibly unknowable."\textsuperscript{186}

II. TRENDS IN TOBACCO LITIGATION

According to litigation scholars, litigation occurred in three waves.\textsuperscript{187} The first occurred from 1954 to 1973 and the second from 1983 to 1992.\textsuperscript{188} These first two waves predominantly consisted of individuals suing the tobacco companies for negligence.\textsuperscript{189} In those cases, "litigation was intended to impose damages for the harms caused to individuals by the tobacco industry."\textsuperscript{190} With the exception of one case, all of these cases lost because jurors accepted the industry arguments on the individual freedom to smoke—knowing the risks and

\textsuperscript{180}Id.
\textsuperscript{181}Hahn, supra note 27, at 1035.
\textsuperscript{182}Id.
\textsuperscript{183}Id.
\textsuperscript{184}Id. at 1037.
\textsuperscript{185}Id. at 1038.
\textsuperscript{186}Hahn, supra note 27, at 1038.
\textsuperscript{187}Jacobson, supra note 2, at 229.
\textsuperscript{188}Id.
\textsuperscript{189}Id.
\textsuperscript{190}Id.
The third wave of litigation, beginning in 1994, has included individual lawsuits, but class actions have prevailed with multi-million and billion dollar awards for large groups of people claiming to suffer common injuries. "Under pressure from public health advocates, the focus of litigation shifted more toward securing public policy changes." Since the landmark settlement in 1998, where has tobacco litigation gone and what kinds of suits have arisen since then?

This article discusses five major trends of post-MSA litigation: 1) challenges to the MSA itself; 2) federal government suits; 3) cases involving violations to the MSA by the tobacco company signatories; 4) major awards against the industry; and 5) suits to gain tobacco settlement funds.

A. Challenges to the Master Settlement Agreement
Because of its many complex provisions and regulations, litigation has arisen as a result of effectuating the MSA. Within the first category of challenges to the MSA are cases such as Grand River Enter. Six Nations v. Pryor, which challenges provisions of the MSA. Plaintiffs were tobacco companies that were non-signatories to the MSA. Defendants were 31 states seeking reimbursement of costs for treating tobacco-related medical conditions. Although the MSA was only initially signed by the four major tobacco companies, referred to as the Majors or Original Participating Manufacturers ("OPMs"), other tobacco companies were permitted to participate as Subsequent Participating Manufacturers ("SPMs"). Thirty-six additional tobacco companies did join as SPMs. During settlement negotiations of the MSA, the parties were concerned that Non-Participating Manufacturers ("NPMs") would take advantage of the fact that OPMs and SPMs were subject to marketing restrictions and faced a significant price increase to pay the cost of the settlement to increase their sales in the States.

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191 Id.
192 Jacobson, supra note 2, at 229.
193 Id.
195 Id. at *1.
196 Id.
197 Id.
198 Id.
199 Grand River Enters., at *1.
200 Id., at *2.
The participating manufacturers were concerned with the threat of a significantly diminished market share, and the States feared that NPMs could continue to produce serious tobacco-related health care costs while avoiding liability. To resolve these concerns, the MSA requires each signatory state to enact "Qualifying Statutes." States that chose not to enact these Qualifying Statutes would have their portions of the settlement fund reduced.

In *Grand River Enterprises Six Nations*, the two Qualifying Statutes at issue were the Escrow and Certification statutes. The Escrow Statute required each NPM to establish and fund an escrow account in an amount determined by the manufacturer's sales volume. The Certification Statute prohibited the sale of cigarettes in a state by companies that fail to comply with the Escrow Statute. The plaintiffs in *Grand River Enterprises Six Nations* alleged that the Statutes were unconstitutional under several theories, including violation of federal anti-trust laws, and other claims including that the Qualifying Statutes constitute a Civil Rights Violation. The plaintiffs, however, lost on all claims, the MSA's Qualifying Statutes were upheld, and the case was dismissed.

Similarly, *Star Scientific v. Beales* upheld the Qualifying Statutes. The courts in both cases compelled payment by the NPM to the states and reaffirmed the MSA. There, Star Scientific, a tobacco company that did not participate in the MSA, brought action against the Attorneys General of Virginia, California, New York, the American Lung Association, the American Cancer Society, and several other groups. As a non-participating manufacturer, Star Scientific sued to have Virginia's Qualifying Statutes declared unconstitutional and the MSA declared an unconstitutional compact. The Court of Appeals held that the statute requiring NPMs to contribute to healthcare

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201 Id.
202 Id.
203 Id.
204 *Grand River Enter.,* at *2.
205 Id.
206 Id.
207 Id.
208 Id. at 17.
209 *Star Scientific v. Beales,* 278 F.3d 339 (4th Cir. 2002). Star Scientific Incorporated brought action against the Attorneys General of Virginia, New York, and most other states. Id.
210 *Grand River Enter.,* at *17; *Star Scientific,* 278 F.3d 339.
211 See *Star Scientific,* 278 F.3d 339.
212 Id. at 343.
costs escrow fund was not in violation of Due Process, Equal Protection, or Commerce Clauses and that the MSA was not an unconstitutional encroachment upon federal supremacy in violation of the Compact Clause.\footnote{Id.}

1. Anti-trust challenges

Another type of challenge to the MSA's existence are suits declaring that the MSA violated anti-trust laws. Illustrating this trend are two cases, \textit{PTI v. Philip Morris} and \textit{Mariana v. Fisher}.\footnote{PTI v. Philip Morris, 100 F.Supp.2d 1179 (C.D. 2000); Mariana v. Fisher 338 F.3d 189 (3rd Cir. 2003).} Judge Manella opined in \textit{PTI}, “This suit is one of a series of legal challenges to the MSA and statutes passed in conjunction with it. To date, these suits have been uniformly unsuccessful.”\footnote{PTI, 100 F. Supp.2d at 1185.} In \textit{PTI}, the plaintiffs were employed in the business of “cigarette re-entry and/or importation of cigarettes into the United States” and sought to invalidate the MSA on various constitutional and anti-trust grounds.\footnote{Id. at 1186.} As in prior suits, the plaintiffs challenged the state Qualifying Statutes.\footnote{Id.} \textit{PTI} alleged that defendant violated the Interstate Compact Clause, the Import-Export Clause, and alleged claims under California state law for a violation of the Unfair Competition Act, Cal. Bus. & Prof. Code § 17200.\footnote{Id. at 1187.} The court held that defendants were immune from plaintiff's anti trust challenges to the MSA and Qualifying Statutes and dismissed all claims.\footnote{Id. at 1209.}

On the same anti trust claim front, plaintiffs in \textit{Mariana v. Fisher} were smokers seeking injunctive relief from the Attorney General of Pennsylvania and Secretary of Revenue for the “continued implementation, enforcement, and performance of the MSA on behalf of Pennsylvania.”\footnote{Mariana, 338 F.3d at 194.} Plaintiffs claimed they did not seek relief as smokers, but represented the legal interests of SPMs and NPMs.\footnote{Id. at 206.} In addition to constitutional claims (i.e., Commerce clause), plaintiffs argued that the MSA violated the Sherman Act, acting as an output cartel.\footnote{Id. at 195.} The court found no constitutional violations in the MSA.\footnote{Id.}
In regard to the anti-trust claims, the court held that the defendants were entitled to immunity under the Noerr-Pennington doctrine, which states that parties are immune from liability arising from the antitrust injuries caused by government action resulting from petitioning of the government. The court concluded that the Noerr-Pennington doctrine applied to the defendants as state actors because they petitioned the courts and legislature in order to advance the goals of Pennsylvania residents.

2. Inadequate representation of group interests
The MSA has also been challenged broadly by groups that argue the agreement did not meet their interests. For example, in Table Bluff Reservation v. Philip Morris, nineteen Indian Tribes sued the Defendants, which included Philip Morris and other tobacco company signatories, on the grounds that the settlement violated their tribal sovereignty, equal protection, the Privileges and Immunity Clause, and others rights. As an equal protection claim, the "Tribes also assert injury in that they were unlawfully excluded from the negotiations leading up to and the execution of the MSA, as well as from the benefits provided for in the agreement." Furthermore, the Tribes complained that the MSA gave the courts of the settling states "exclusive jurisdiction over disputes regarding compliance with the MSA and gives the state Attorneys General enforcement powers, thus forcing the Tribes into state court and allowing state law enforcement on tribal lands." The court disagreed and concluded that the Tribes could not show injury by exclusion from the MSA, nor would they be

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224 Id. at 206.
225 Mariana, 338 F.3d at 206.
226 Id. "In Hise v. Phillip Morris Inc., plaintiffs filed a class action on behalf of themselves and consumers of tobacco products alleging that the defendants, a group of tobacco manufacturers, unlawfully agreed to raise tobacco prices in order to pay the costs of settling a lawsuit brought against the manufacturers by over 40 states to recover public health costs. In particular, the plaintiffs alleged that the tobacco companies' joint negotiation and execution of a master settlement agreement with the plaintiff states violated § 1 of the Sherman Act. The court granted summary judgment for the defendants, in part, on the grounds that the joint negotiation and execution of the agreement "is protected under the Noerr-Pennington doctrine as conduct incident to litigation." James R. Atwood, Securing and Enforcing Patents: The Role of Noerr-Pennington, 83 J. PAT. & TRADEMARK OFF. SOC'Y 651, 664 (2001).
227 Id. at 881.
228 Id at 883.
229 Id.
forced into state courts and then under state jurisdictional laws.\textsuperscript{230} To the Tribes' allegation that their smokers would have to pay higher cigarette prices without corresponding financial compensation, the court held that state settlement funds included the Indian population of that area and that Plaintiffs were unable to show injury from failure to receive payments under the MSA.\textsuperscript{231}

In a similar vein of group exclusion, Forces Action Project, a smokers' rights organization, sued the Attorney General of California and four major tobacco companies in \textit{Forces Action Project v. California}.\textsuperscript{232} Though the opinions over the course of this case have remained relatively vague, it is clear that Plaintiffs sought to invalidate the MSA initially on the grounds of equal protection and due process violations.\textsuperscript{233} Forces Action Project then sought to amend their complaint on anti-trust grounds that the Defendants were operating an output cartel and controlling cigarette prices in violation of the Sherman Anti-Trust Act, 15 U.S.C.S. § 1-7.\textsuperscript{234} In its most recent unpublished opinion, the court concluded that Plaintiffs presented no new facts, but only new theories, and failed to develop earlier theories.\textsuperscript{235} The court affirmed denial of the motion to amend the complaint. This line of cases demonstrates that all group interests may not have been included in the final settlement of the MSA; nonetheless, they have thus far been unsuccessful in their attempts to invalidate it.\textsuperscript{236}

3. Advertising challenges
The next line of cases represents challenges of the MSA due to the advertising regulations and their effects upon the industry. Two illustrating cases are \textit{Lorillard Tobacco Co. v. Reilly} and \textit{American Legacy Foundation v. Lorillard Tobacco Co.}.\textsuperscript{237} "In \textit{Lorillard Tobacco v. Reilly}, decided in 2001, the Court addressed for the first time the constitutionality of state restrictions on retail tobacco advertising."\textsuperscript{238} Just a few months after the MSA was signed, the Attorney General of Massachusetts promulgated comprehensive regulations governing the

\textsuperscript{230} Id.
\textsuperscript{231} Table Bluff Res., 256 F.3d at 884-85.
\textsuperscript{232} Forces Action Project v. California, 57 Fed. Appx. 322 (9th Cir. 2003).
\textsuperscript{233} See id.
\textsuperscript{234} Id. at 323.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{238} Hoefges, \textit{supra} note 152, at 269.
advertising and sale of cigarettes, smokeless tobacco, and cigars. For instance, the regulations prohibited any “outdoor advertising” for cigarettes, smokeless tobacco, and cigars located within a one thousand foot radius of any school or playground. The regulations also required point-of-sale advertising to be placed five feet or higher in retail operations that allowed children. “These regulations acted to close loopholes in the Master Settlement Agreement that allowed outdoor and point-of-sale tobacco advertising on the property of tobacco retailers.”

Subsequently, a coalition of tobacco manufacturers including Lorillard, Philip Morris, Brown & Williamson, and R.J. Reynolds, contested these state regulations and asserted that they violated the First Amendment and the Federal Cigarette Labeling and Advertising Act (FCLAA). The FCLAA contains federal pre-emption provisions that prohibit states from enacting warning requirements for packaging or “advertising or promotion” of cigarette products covered by the FCLAA. The Supreme Court also examined the extent to which the First Amendment protects tobacco advertising and applied the Central Hudson commercial speech test. After much analysis, the Supreme Court struck down Massachusetts’ regulations limiting outdoor and retail point-of-sale tobacco advertising and held that the FCLAA pre-empts those state regulations.

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239 Tobacco: State Limits on Tobacco Ads Struck Down on Preemption, First Amendment Grounds 2003, BUREAU NAT’L AFF.
240 Id., supra note 152, at 293.
241 Id.
242 Id.
243 Id.
244 Id. at 286. See also Campaign for Tobacco Free Kids, supra note 82.
245 Kerri L. Keller, Lorillard Tobacco Co. v. Reilly: The Supreme Court Sends the First Amendment Guarantees Up in Smoke by Applying the Commercial Speech Doctrine to Content-Based Regulations, 36 AKRON L. REV. 133, 135 (2002). “Even though First Amendment protection of commercial speech began with Virginia Pharmacy, it was not until the landmark case of Central Hudson Gas & Electric Corp. v. Public Service Commission of New York that the commercial speech doctrine became well established. The importance of Central Hudson lies in the fact that the Court decided intermediate scrutiny was appropriate for commercial speech. The Court articulated a four-prong test that balanced the government's interests with the interests that are served by the commercial speech. First, the speech must not be misleading or related to unlawful activity. Second, the government must have a substantial interest in regulating the speech. Third, the regulation must directly serve the substantial interest. Finally, the regulation must be no more extensive than necessary.” Id.
Lorillard Tobacco v. Reilly has since been the subject of much scholarly debate. "Lorillard demonstrates that while tobacco companies may be willing to join the fight against youth smoking, they are not willing to give up their First Amendment rights." The decision affected the movement towards tobacco regulation by the legislature and had an impact on the lower courts. Soon after its decision, federal legislators began seeking to grant the FDA regulatory authority over tobacco. A month after its decision, a Utah Court struck down state regulations banning most liquor advertising in Utah, and Chicago voluntarily repealed an ordinance generally prohibiting outdoor advertising for alcohol and cigarettes.

The heavy tobacco advertising regulations came up to bat again in American Legacy Foundation v. Lorillard Tobacco Co. As discussed earlier, part of the settlement provided for the creation and funding of a foundation whose mission is to educate young people about the harms associated with tobacco use and to reduce youth tobacco use. Within this agreement, signatories agreed to certain restrictions in regard to the content of the foundation’s educational programs. The specific restriction at issue in this case is that that the foundation (ALF) would not engage in the “vilification” or “personal attack” of the tobacco companies or their executives. ALF engaged in several successful print, radio, and television campaigns, such as Florida’s “The Truth.” ALF’s anti-youth-smoking ads vehemently accused “Big Tobacco” and tobacco executives of deceiving the public and often portrayed them in a less than favorable light. Subsequently, one of the tobacco manufacturers threatened to sue ALF for allegedly violating the anti-vilification provisions provided for in the MSA and the foundation’s by-laws.

248 Keller, supra note 245, at 135-36.
249 Hoefges, supra note 152, at 302.
250 Id. at 305.
251 Id. at 303-304.
252 Am. Legacy Found., 831 A.2d 335.
253 Id. at 337.
254 Id.
255 Id.
256 See CrazyWorld Find Facts, supra note 29.
257 Id.
258 Am. Legacy Found., 831 A.2d at 337.
For fear of the tobacco companies filing in several jurisdictions, ALF made a pre-emptive strike by suing first; it sought declaratory judgment that Defendant had no standing to sue the foundation based on the MSA and the foundation’s bylaws. Furthermore, ALF attempted to protect itself for the future by seeking to bar the Defendant from ever suing the foundation under the MSA or the bylaws. The Court did not grant ALF shelter from liability and “decided in favor of the defendant tobacco company with respect to its ability to sue the foundation under a contract theory based on the settlement agreement.” The Court reasoned that the foundation expressly adopted the MSA and accepted its benefits with knowledge of its terms; the anti-vilification provision existed in both the bylaws and the MSA.

B. Suits by the federal government

The second major line of cases involves suits by the federal government against the tobacco companies. Why should the states be the only ones to benefit from the tobacco companies’ recovery payments? For the federal government, taking on the tobacco industry was a sizable undertaking requiring both financial resources and political support, which was unsteady at the time of administration change and impeachment hearings. In September 1999, Attorney General John Ashcroft, on behalf of the U.S. Department of Justice (“DOJ”), filed a lawsuit against tobacco manufacturers to recover health care expenditures that the federal government paid or will pay for treating tobacco-related illnesses. In addition to seeking monetary recovery, the government sought to enjoin the tobacco companies “from engaging in fraudulent and other unlawful conduct and to order Defendants to disgorge the proceeds of their past unlawful activity.”

1. Attempts at federal recovery

The federal government asserted claims under three federal statutes: the Medical Care Recovery Act (“MCRA”), the Medicare Secondary Payer

259 Id.
260 Id.
261 Id.
262 Am. Legacy Found., 831 A.2d at n.73.
263 Tobacco: Ashcroft Memo Seeks Executive Assistance in DOH’s Lawsuit Against Tobacco Industry 2001, BUREAU NAT’L AFF.
265 Id.
("MSP") provisions of the Social Security Act, and the Racketeer Influenced and Corrupt Organizations Act ("RICO").266 The first two claims were dismissed.267 In the September 2000 case of United States v. Philip Morris Inc., the court dismissed the federal government's claims under the MCRA, stating: "The congressional intent in enacting MCRA in 1962—at which time Medicare did not exist and the Federal Employees Health Benefits Act ("FEHBA") was still in its infancy—was to provide a means for the Government to recover from third-party tortfeasors' medical expenses it had furnished for (primarily military) employees."268 The Court concluded that Congress did not intend that the MCRA be used as a recovery mechanism for Medicare or FEHBA costs.269

In 2001, the court next addressed the federal claims under the MSP in United States v. Philip Morris Inc.270 The Court reasoned that tobacco companies were not "self-insured" entities within the meaning of MSP provisions.271 The MSP provisions state that Medicare is a secondary payer when another entity is required to pay under a primary plan, including a self-insured plan, for an individual's health care.272 Thus the government failed to state a claim under the MSP provisions.273 Despite the failure to succeed under the first two

266'Tobacco: Ashcroft Memo Seeks Executive Assistance in DOH's Lawsuit Against Tobacco Industry, supra note 263. The first statute, the Medical Care Recovery Act ("MCRA"), 42 U.S.C. §§ 2651-2653, "provides the Government with a cause of action to recover certain specified health care costs it pays to treat individuals injured by a third-party's tortious conduct (Count 1). The second statute is a series of amendments referred to as the Medicare Secondary Payer provisions ("MSP"), 42 U.S.C. § 1395y, which provides the Government with a cause of action to recover Medicare expenditures when a third-party caused an injury requiring treatment and a "primary payer" was obligated to pay for the treatment (Count 2). The third statute is the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (Counts 3 and 4), which provides parties with a cause of action to recover treble damages due to injuries they received from a defendant's unlawful racketeering activity, and to seek other equitable remedies to prevent future unlawful acts." United States v. Philip Morris Inc., 116 F. Supp. 2d 131, 134 (D.D.C. 2000).
268Philip Morris, supra note 267, at 135.
269Id.
270Philip Morris Inc., supra note 267 at 1.
271Id. at 4.
272Id.
273Id. at 4-5.
statutes, the district court did permit the DOJ to pursue claims under RICO.\(^{274}\)

While still pursuing the federal litigation, Ashcroft also opened the door to settlement negotiations with the tobacco companies, seeking a "mutually agreeable settlement."\(^{275}\) Although President Bush supported Ashcroft’s recommendations for settlement, it received much criticism by anti-tobacco activists and members of Congress, including allegations that the tobacco industry’s chief goal was to stop the litigation through political election contributions to Republicans.\(^{276}\)

"The settlement is intended to be a sweetheart deal for the tobacco industry," said Mike Myers, president of Campaign for Tobacco-Free Kids.\(^{277}\) Paul Gallagher, a leading tobacco litigation attorney, stated "the government is clearly protecting the interest of the cigarette manufacturers over the interest of individuals who have been defrauded and harmed by the tobacco’s 50-year conspiracy."\(^{278}\)

Illinois Senator Richard Durbin also commented on the federal government’s legal strategies: "...by not seeking full funding for the lawsuit from Congress, the Department [of Justice] is not preparing to go to trial...by downplaying its chances at winning, the Department is inviting the tobacco companies to be less than forthcoming during negotiations."\(^{279}\)

Due to all the condemnation of federal negotiations with the tobacco industry, a settlement was not reached at that time.\(^{280}\) The federal government continues to pursue recovery under RICO statutes seeking injunctive relief and damages for "an unlawful conspiracy to deceive the American public."\(^{281}\) The government’s complaint described a four-decade long conspiracy, beginning in 1953, by defendant tobacco manufacturers to intentionally mislead the public as to whether smoking causes disease.\(^{282}\) It further alleges that defendants published false articles, issued deceptive press releases, and concealed and destroyed documents indicating the correlation between smoking

\(^{274}\) Tobacco: Bush Agrees with Ashcroft Plans for Tobacco Settlement, Fleischer Says, 2001, BUREAU NAT’L AFF.

\(^{275}\) Id.

\(^{276}\) Id.

\(^{277}\) Id.

\(^{278}\) Id.

\(^{279}\) Tobacco: Bush Agrees with Ashcroft Plans for Tobacco Settlement, supra note 274.

\(^{280}\) See id.

\(^{281}\) Philip Morris Inc., 263 F. Supp. 2d at 75.

\(^{282}\) Id.
and disease and addictiveness of nicotine.\textsuperscript{283} The court denied Defendants' motion for summary judgment, which argued against the Government's advertising, marketing, promotion and warning claims because they fall within the exclusive jurisdiction of the Federal Trade Commission Acts (FTCA).\textsuperscript{284} The court explained that, although the conduct alleged in the government's advertising, marketing, promotion, and warning claims fell within the reach of these statutes, such overlap was not sufficient to make the FTC's jurisdiction exclusive simply because there was no inherent conflict or "positive repugnancy" between RICO and the FTCA.\textsuperscript{285} The federal government's attempts were not completely successful, however, as their cross-motion on the Defendants' affirmative defenses was denied in part and granted in part.\textsuperscript{286}

2. Federal regulation and the FDA
The central focus of the federal government beyond recovery litigation was, and still may be, securing regulation over tobacco through the Food and Drug Administration (FDA).\textsuperscript{287} The FDA, in 1996, asserted jurisdiction to regulate tobacco products, concluding that nicotine is a drug under FDA standards.\textsuperscript{288} In response to tobacco regulations subsequently promulgated by the FDA under its newly asserted authority, a group of tobacco manufacturers, retailers, and advertisers filed a suit in 1999 challenging the FDA's regulations.\textsuperscript{289} Meanwhile, Senators Kennedy and DeWine proposed bills allowing for a new section in FDA jurisdiction for the regulation of tobacco products.\textsuperscript{290} As much political debate broiled over the FDA's authority to regulate tobacco and "nicotine as a drug", the court in \textit{Food and Drug Admin. v. Brown & Williamson Tobacco Corp.} finally decided that Congress had not granted the FDA authority to regulate tobacco products.\textsuperscript{291} The court considered that when Congress contemplated the Federal Food Drug and Cosmetic Act (21 U.S.C.S. $ 301) it had intended to exclude

\textsuperscript{283}Id.
\textsuperscript{284}Id. at 77.
\textsuperscript{285}Id. at 77-78.
\textsuperscript{286}See id.
\textsuperscript{287}Kennedy, supra note 28.
\textsuperscript{289}Id. at 125.
\textsuperscript{290}See Kennedy, supra note 28.
\textsuperscript{291}See Brown & Williamson Tobacco Corp., 529 U.S. at 135.
tobacco products from the FDA’s jurisdiction.\textsuperscript{292} The court reasoned that if tobacco products were within the FDA’s jurisdiction, the Act would require them to remove it from the U.S. market entirely.\textsuperscript{293} This ban would then contradict recent legislation, including the MSA.\textsuperscript{294} Thus, the court decided not to defer to the agency’s expansive construction of the statute, and maintained Congress’ original intent to deny the FDA the power to regulate tobacco products.\textsuperscript{295}

C. Alleged MSA violations by the tobacco industry
The third string of post-MSA tobacco litigation involves alleged violations to the MSA by the tobacco company signatories. Three examples will be discussed here.\textsuperscript{296} First, Attorney General Bill Lockyer of California filed suit against RJR in \textit{People ex. rel. Lockyer v. R.J. Reynolds Tobacco Co.} for an alleged violation of an MSA provision restricting outdoor advertising of tobacco products.\textsuperscript{297} After attempts to settle the matter out of court, California brought this litigation against R.J. Reynolds (“RJR”) in 2001 to enforce the MSA and obtain relief for its alleged violation of the MSA’s restrictions on outdoor advertising.\textsuperscript{298} Within the MSA’s extensive regulations banning billboards and other outdoor advertising, RJR was permitted to sponsor and promote its National Association for Stock Car Auto Racing (NASCAR) Winston racing cup series as a “Brand Name Sponsorship.”\textsuperscript{299} A dispute arose between the parties about whether, by not removing some outdoor advertising signs mentioning Winston located at Sears Point Raceway in northern California, RJR had

\textsuperscript{292}Id. at 142.
\textsuperscript{293}Id. at 135.
\textsuperscript{294}Id. at 139.
\textsuperscript{295}Id. at 133, 160. “The potential for FDA regulation of tobacco products has largely been resolved...The tobacco industry subsequently indicted its willingness to engage in discussions with Congress regarding federal regulation of cigarettes with respect to youth smoking. However, it is unlikely that individual companies would be in agreement on what is reasonable with respect to FDA regulation based on their ability to compete effectively in the marketplace.” Bernhard H. Fischer, \textit{New Developments in Securitization: Tobacco Settlements}, 843 PRACTISING LAW INST. COM. LAW AND PRACTICE COURSE HANDBOOK SERIES 1273, 1286 (2002).
\textsuperscript{296}It should be noted that while all the present examples involve the R.J. Reynolds Tobacco Company (RJR), this does not imply that RJR is the only tobacco company liable for infractions.
\textsuperscript{298}Id.
\textsuperscript{299}Id. at 520.
violated the MSA’s limitation on outdoor advertising. The court needed to determine the meaning of “initial sponsored event” within the outdoor advertising limitation of permitted signage 90 days before the event and 10 days after the event. If the first race in the twelve-month series was considered the “initial sponsored event” of the Brand Name Sponsorship as a whole, RJR could be allowed to put up uninterrupted advertising from February through November. The court, however, disagreed with RJR’s contentions and construed the phrase “initial sponsored event” as applying to each location and not the series as a whole. Thus, the court held that RJR’s signage exceeded the time limitations set forth in the MSA.

R.J. Reynolds faced charges for alleged violations of the MSA again in People ex. rel. Lockyer v. R.J. Reynolds Tobacco Co. There, RJR was charged with violating the Master Settlement Agreement by indirectly targeting youth in its tobacco advertising campaigns. Between February 1999 and October 1999, RJR operated tents in California where they distributed 108,155 free packs of cigarettes to 14,834 people at six various events, including the Long Beach Jazz Festival and Pomona Raceway. At the six events, licensed security guards were stationed at the tent entrances and cigarettes were only to be distributed to adults with IDs. The Defendant argued that the cigarette distribution fell within one of the MSA’s safe harbor provisions allowing the “distribution of free cigarettes on public grounds leased for private functions where minors are denied access by a peace officer or a licensed security guard.” The court ruled against the tobacco company and, based on penalty provisos delineated in the MSA, imposed a $14,826,200 fine on it. The fine was upheld on appeal and not held excessive.

A final illustration of litigation regarding MSA violations by a tobacco company signatory is State ex rel. Petro v. R.J. Reynolds

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300 Id. at 521.
302 Id.
303 Id. at 533.
304 Id.
305 See Lockyer, 112 Cal. App. 4th at 1377.
306 See id.
308 Id.
309 Id.
310 Id. at 1384.
311 Id. at 1397.
Tobacco Company. On March 19, 2001, the Attorney General of Ohio initiated a suit against RJR contending that the Defendant’s practice of buying advertising space on and distributing matchbooks, where its Winston Brand logo is exhibited, violated section III regarding Brand Name Merchandise outlined in the MSA. The state argued that because distribution of the matchbooks was restricted solely to Adult-Only facilities, it does not fall within that exception of the MSA. The court interpreted the word “merchandise” within section III to include brand name matchbooks “because they are tangible items, with a utilitarian value, that are bought and sold in commerce.” The court affirmed that the MSA prohibits the distribution by RJR of the matchbooks imprinted with their brand names.

D. Big Awards
The fourth major type of post-MSA tobacco litigation constitutes the substantial damages cases where smokers have been awarded very high sums of money through litigation. Some are often highly publicized class actions, where a large group of smokers, their families, or others affected by tobacco-related illnesses demand compensation from the leading tobacco companies. "...Since the late 1970s, there has been an "unprecedented increase in both the amounts and the numbers of punitive awards...in mass tort situations....As a result of this phenomenon, it seems the purpose of punitive damages awards is progressing from punishment to annihilation." This category of cases is quite large and a few cases are illustrative here. For instance, in February 1999, “a jury awarded Patricia Henley $1.5 million in compensatory damages and $50 million (later reduced to $25 million) in punitive damages” in Henley v. Philip Morris Inc. Henley, a Marlboro smoker for thirty-five years, brought an action for personal injuries sustained based on allegations of Philip Morris’ tortious

\[\text{[VOL.8.3:615]}\]
misconduct in the making and manufacturing of cigarettes.\textsuperscript{320} The jury found that the tobacco industry, including Defendant, "agreed to act together to counter mounting scientific evidence about the health risks of cigarette smoking... they launched a concerted public relations campaign to deny any link between smoking and serious illness."\textsuperscript{321}

Henley's award was followed by several other large damages cases.\textsuperscript{322} "In William-Branch \textit{v. Philip Morris}, a jury in March 2001 awarded the plaintiff $8 million in compensatory damages and $79.5 million (later reduced to $32 million) in punitive damages."\textsuperscript{323} Also in 2001, a California jury awarded $3 billion dollars in an individual smoker suit by Richard Boeken against Philip Morris.\textsuperscript{324} Since then, the Boeken punitive damage award has since been reduced to $100 million and Philip Morris continues to appeal the case.\textsuperscript{325} In a California tobacco-asbestos synergy case, the jury found against defendant tobacco companies, R.J. Reynolds and Philip Morris, and awarded $1.7 million in compensatory damages and $20 million in punitive damages.\textsuperscript{326} Both companies have appealed the award.\textsuperscript{327} In \textit{Jones v. R.J. Reynolds Tobacco Co.}, the plaintiff, a forty year smoker developed lung cancer and sued RJR in a wrongful death action.\textsuperscript{328} The Florida jury found against RJR for approximately $200,000 in compensatory damages, but no punitive damages.\textsuperscript{329} A motion for new trial was granted.\textsuperscript{330}

A landmark damage award is \textit{Engle} class action where a Florida jury awarded a staggering $145 billion in punitive damages in July 2000.\textsuperscript{331} The \textit{Engle} case was a class action lawsuit, certified in 1994, brought by individual smokers against several major tobacco companies, including the Majors.\textsuperscript{332} During its several phases, the trial focused on the individual conduct of the plaintiffs and then the

\textsuperscript{320}Henley, \textit{supra} note 319 at 205.
\textsuperscript{321}Id. at 207.
\textsuperscript{322}See Jacobson, \textit{supra} note 2.
\textsuperscript{323}Id. at 231.
\textsuperscript{325}Id.
\textsuperscript{326}Jacobson, \textit{supra} note 2, at 231.
\textsuperscript{327}Id.
\textsuperscript{329}Jacobson, \textit{supra} note 2, at 231.
\textsuperscript{330}Id.
\textsuperscript{331}See \textit{id}.
\textsuperscript{332}Crowley, \textit{supra} note 24 at 1521.
defendants' conduct separately.\textsuperscript{333} Nearly two years after the start of the trial, the jury set a U.S. record by awarding the largest personal injury award in history.\textsuperscript{334} The tobacco companies appealed the colossal award to no avail, despite that the judge admitted, "at first blush, a $14[5] billion punitive damage[s] award seems so far outside the comprehension of any reasonably thinking person..."\textsuperscript{335}

\section*{E. Getting a piece of the "settlement pie"}

The final category of cases consists of a wide array of individual and class actions that have cropped up in the wake of the MSA comprised of people attempting to attain a piece of the settlement pie or collect from the tobacco industry. Because the cases in this category are so numerous, this discussion will be limited in order to display a sampling of the existing cases. First, individual Medicaid recipients suffering from tobacco-related illnesses tried to compel distribution of their state’s share of the MSA in Cardenas v. Anzai, Villagrana v. Graham, and Arnold v. Kentucky.\textsuperscript{336} The Medicaid beneficiaries were largely unsuccessful in collecting MSA money, as courts pointed out that provisions in the MSA specifically precluded them from reimbursement.\textsuperscript{337}

Other groups tried to collect directly from the tobacco industry. A group of Washington hospitals brought anti-trust, RICO charges, and other state claims against the tobacco industry to recover reimbursement for treating patients suffering from tobacco-related illnesses in Association of Washington Public Hospital Districts v. Philip Morris Inc.\textsuperscript{338} The court, however, dismissed all claims, holding that the hospitals lacked anti-trust and RICO standing and that Defendants’ alleged unlawful conduct was not the proximate cause of the districts’ injuries.\textsuperscript{339} Recently, a California prisoner sued three major tobacco companies alleging that defendants’ tobacco products "caused him serious physical and mental addiction; pain & suffering; chronic headaches; emotional distress; mental anguish..." while in

\begin{flushleft}
\textsuperscript{333}Id. at 1522. \\
\textsuperscript{334}Id. \\
\textsuperscript{335}Id. \\
\textsuperscript{336}See Cardenas v. Anzai, 311 F.3d 929 (9th Cir. 2001); Villagrana v. Graham, No. 01-4023, 2003 WL 892896 (10th Cir. Mar. 6, 2003); Arnold v. Kentucky, 62 S.W.3d 366 (Ky. 2001). \\
\textsuperscript{337}See Cardenas, \textit{supra} note 336; Villagrana, \textit{supra} note 336; Arnold, \textit{supra} note 336. \\
\textsuperscript{338}Association of Washington Public Hospital Districts v. Philip Morris Inc., 241 F.3d 696 (9th Cir. 2001). \\
\textsuperscript{339}Id. 
\end{flushleft}
“Plaintiff argues that he should not be charged with the knowledge of his addiction because, as a ‘criminal,’ he is not a reasonable person.”

Here, too, the plaintiff was unsuccessful as his claims were barred by the statute of limitations.

Lastly, in Nwanze v. Philip Morris, a group of 434 plaintiff prisoners were unsuccessful against the tobacco industry when they claimed damages for exposure to excessive quantities of second-hand tobacco smoke. Plaintiffs complained of Eighth Amendment violations due to defendants allegedly conspiring with the Director of the Federal Bureau of Prisons to distribute and sell cigarettes to the prison population with “deliberate indifference to the health risks”. The court responded, “The bulk of Nwanze’s contentions on appeal are meritless and repeat arguments.” These cases, though varied in scope and nature, have been largely unsuccessful in collecting money from the settlement pot or from the tobacco companies as the states did in 1998.

III. ANALYSIS

A. Introduction to examining the MSA

Indeed, the Master Settlement Agreement is a unique entity, given the size its geographic scope and its method of enforcement (entering individual consent decrees in each state or territory). Because the MSA requires each state through its courts to enter into a consent decree with the tobacco companies, the MSA relies upon those courts to enforce the decrees of the individual states.

“These distinctive qualities have made it difficult to identify an analytical framework for critiquing the creation and content of the MSA. While some scholars have begun to comment on the MSA, it has not been easy to find

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341 Id. at *3.
342 Id.
344 Id. at 100.
345 Id.
347 Wood, supra note 9, at 599.
348 Id.
analyses that focus on any given set of similar criteria.”

Thus far, “no academic literature relies upon a common forum of established content to evaluate the actual negotiation and substance of the MSA.”

First, a fundamental question is whether—almost six years after it was signed—the MSA achieved any of its goals. Initially, the explicit goal of the states’ Medicaid litigation had two goals: to obtain damages and to change public health policy. Then the MSA included provisions to address objectives that tobacco control advocates had pushed for—restrictions on the industry’s advertising and more money for anti-smoking ads. At this point, it is still difficult to discern whether policy shifts have occurred. One reason is that the industry has not completely stopped marketing to youth. Under some exceptions of the MSA discussed previously, certain types of tobacco advertising continue to exist; thus, youth are still likely to be exposed to tobacco marketing. Additionally, violations have occurred, as the litigation examined demonstrates. “With regard to the American Legacy Foundation’s anti-smoking advertising campaign, it is too early to determine what impact it might have. The campaign is currently being evaluated.” However, tobacco prices are generally higher now than before the MSA. “Over time, this should have the desired effect of reducing smoking prevalence among adults, along with reducing prevalence and incidence rates among children.”

“On balance, it appears fair to say “as an initial assessment that the agreement has achieved some positive public health policy goals, but no major breakthroughs. To the extent that the public health advocates are able to convince states to allocate more of the settlement money to tobacco control activities, the agreement could still prove to be a significant event in changing tobacco policy. Whatever its shortcomings, however, there is no question that these gains would not

349 Id. at 600.
350 Id. at 599.
351 See Jacobson, supra note 2, at 229.
352 Id.
353 Id.
354 Id.
355 Id.
356 Jacobson, supra note 2, at 229.
358 Id.
359 Id.
360 Id.
have been achieved absent the states’ Medicaid litigation. The industry had been in no hurry to negotiate with tobacco control advocates, and certainly would not have voluntarily disclosed damaging internal documents.

B. Has tobacco litigation increased or decreased since the MSA? From 1954 to 1994, individuals filed 813 claims against tobacco companies, winning only twice and both cases were reversed on appeal. A very different picture is evident today. “Litigation against tobacco manufacturers has increased markedly in the past several years…” This article examines the litigation statistics from two major tobacco manufacturers, Philip Morris and RJR, which account for 75% of domestic cigarette manufacturing and consumption. According to reports filed with the Securities Exchange Commission, 30 cases were pending against RJR in October 1994. This was followed by 89 total cases pending a year later. Then in 1996, litigation climbed to 277 cases pending against RJR. Less than one year after the MSA, this number jumped to 620 cases pending in June 1999. This number dipped momentarily to 535 cases pending against RJR in 2000, but rebounded to 1,680 total cases pending in June 2001. Examining the litigation statistics, tobacco litigation has generally been on the rise since the MSA was signed.

Another leading tobacco manufacturer, Philip Morris, demonstrates a similar trend in its litigation statistics. In the heat of the tobacco war—two years prior to the MSA—Philip Morris had 278 total cases pending against it (consisting of health care cost recovery, individual smoking, and class action). In 1997, the number of total cases pending against Philip Morris increased to 530. One month after the MSA was signed in 1998, Philip Morris faced 665 cases

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361 Id. at 230.
362 Id.
363 Jacobson, supra note 2, at 231.
364 Id. at 230.
365 Id. at 228.
366 Id. at 230.
367 Id.
368 Jacobson, supra note 2, at 230.
369 Id.
370 Id.
371 See id.
372 Jacobson, supra note 2, at 230.
373 Id.
Similar to RJR, the number of cases pending against Philip Morris dropped down to 490 in the year 2000. The number of pending cases against Philip Morris escalated in 2001 to a whopping 1,580. A January 2004 Security Exchange Commission filing report indicates that the number of “individual smoking and health” cases against Philip Morris remained steady at 250 cases pending in 2001 and 2002, but swelled to 423 as of December 31, 2003. Interestingly, it appears that class actions and health care cost recovery actions have dropped slightly. However, the number of cases in a new category of tobacco suits over “Lights/Ultra Lights” doubled between 2002 and 2003.

C. Shouldn’t a settlement agreement “settle” litigation?
A settlement implies resolution—an agreement, an accord, an understanding. Since it was a settlement of litigation between the states and the tobacco companies, an implicit goal of the MSA arguably is a reduction in tobacco litigation. However, tobacco litigation has actually swelled since its signing in 1998. In fact, the MSA may have further enraged the tobacco war due to its lack of specificity and broad scope. As discussed earlier, many cases arising from the MSA dealt with alleged violations by the tobacco company signatories (i.e., People ex rel. Lockyer v. R.J. Reynolds Tobacco) which required contract interpretation of MSA provisions. Specificity of contract provisions, such as what specific items constitute “merchandise” and whether a popular racing series constitutes an “initial-sponsored” event, could have prevented lengthy court battles over definitional terms. Without clear definitions, tobacco companies or the states took the liberty of interpreting the MSA for themselves and acting upon these interpretations, which resulted in litigation.

374 Id.
375 Id.
376 Id.
377 Notes to Consolidate Financial Statements, 2004 SEC. EXCH. COMM’N 47.
378 Id.
379 Id. This tobacco-related litigation includes class action suits alleging that the use of the terms “Lights” and “Ultra Lights” constitutes deceptive and unfair trade practices. Id.
381 Notes to Consolidated Financial Statements, supra note 25.
382 See Posner, supra note 10, at 1155.
383 See Lockyer, supra note 305 at 516.
384 See id.
385 See id
A major failure of the MSA leading to this landslide of reactionary litigation is caused in part by its lack of scope. Despite its potential to be an agreement of far-reaching scope and depth, the MSA is not a comprehensive document in terms of litigation deterrence. This is exemplified by the federal government’s attempts to regulate the tobacco industry through the Food and Drug Administration. Federal regulation might have a greater impact on reducing individual smoking and class action suits, including the recent “Lights/Ultra Lights” litigation. Just as many dangerous products, such as guns and pharmaceutical drugs, are regulated, the regulation of tobacco would lead to nationwide uniformity of its manufacturing, distribution, sale, and use. Regulation over tobacco could lead to fewer tobacco-related suits.

The MSA also falls short by overlooking—or purposely excluding—devices to control individual smoking and class action suits, as well as exorbitant payments. For instance, according to SEC reports from January 1998, the “proposed Resolution”, which would later become the MSA, would have many positive effects on litigation, including settling “health care cost recovery actions (or similar actions brought by or on behalf of any governmental entity other than the federal government)...smoking and health class actions and all “addiction/dependence claims, and would bar similar actions from being maintained in the future.” While the rights of individuals to sue the tobacco industry would have been preserved, caps on individual or aggregate judgments and settlements demonstrated that the “proposed Resolution” had governmental aims to reduce litigation. The 1997 national settlement proposal would have imposed “a $1 billion cap on the amount the industry would be required to pay individual smokers in any given year.” Caps on monetary

See Posner, supra note 10, at 1155.
Kennedy, supra note 28.
Kennedy, supra note 28, at 102.
See Gilhooley, supra note 388; Id.
Notes, supra note 391.
Id. at 40.
DeBow, supra note 21, at 567.
judgments could have deterred future tobacco litigation, such as frivolous attempts to gain settlement funds or reach the industry’s deep pockets.\textsuperscript{395}

A strong complaint against the MSA contributes to the disturbing new trend of “regulation by litigation” which favors lawyers and interest groups.\textsuperscript{396} Legislation and agency regulation may be more appropriate vehicles for dealing with the tobacco industry.\textsuperscript{397} Regulation has the traditional values of accountability and transparency, as affected parties have the opportunity to lobby legislators and regulators, and political leaders may be voted out of office for their role in the desired or undesired legislative choices.\textsuperscript{398} The MSA, a litigator-created document, has been faulted for encouraging this new trend of “regulations as litigation”.\textsuperscript{399} Private litigation not only floods the courts dockets, “but by its nature” “does not adequately address public health concerns, and therefore, will not create a comprehensive national tobacco policy.”\textsuperscript{400} Other commentators go further in criticizing the reliance on litigation as a form of governmental paternalism.\textsuperscript{401} Concern for judicial paternalism over personal choices lead one scholar to state: “No one should mourn the death of Joe Camel. But we should not allow our glee over his demise to blind us to the dangers of making the government the guardian of our private life and the judiciary the guardian of our public life.”\textsuperscript{402}

Other criticism focuses on the financial stakes in the MSA. It has been said that, “The states’ legal crusade against the tobacco industry will one day rank as one of the worst developments in American public law in the twentieth century, unless legislators and voters act to undo the mischief it has caused.”\textsuperscript{403} The tobacco settlements in total will lead to the largest transfer of wealth as result of litigation in history.\textsuperscript{404} It will be, and continues to be, financed by smokers paying higher prices for cigarettes.\textsuperscript{405} One week after the

\begin{thebibliography}{99}
\item{}\textsuperscript{395} See id.
\item{}\textsuperscript{396} Posner, supra note 10, at 1151.
\item{}\textsuperscript{397} Id.
\item{}\textsuperscript{398} Id.
\item{}\textsuperscript{399} Id.
\item{}\textsuperscript{400} Id.
\item{}\textsuperscript{401} LaFrance, supra note 1, at 188-89.
\item{}\textsuperscript{402} Jacobson, supra note 2, at 226.
\item{}\textsuperscript{403} See DeBow, supra note 21.
\item{}\textsuperscript{404} Id. at 564.
\item{}\textsuperscript{405} Id.
\end{thebibliography}
details of the MSA were made public, the three largest tobacco companies announced the increase of the wholesale price of cigarettes.406 This increase of 35 cents per pack has estimated to be able to generate more than enough revenue for the tobacco companies to finance their annual payment of $8 billion to the states under the MSA.407 Thus, it may be inaccurate to say that the tobacco industry alone is paying $250 billion to the states because smokers, rather than the industry, are paying, in part, future payments.408 In the MSA, the tobacco industry consented to make payments out of future revenues in return for protection against liability for Medicaid costs, past and future.409 According to one industry analyst, it was clearly designed to shift most of the cost of the MSA to the smokers because of smokers’ relatively inelastic demand for cigarettes.410

The fiscal mandates of MSA have also been criticized because states are not required to spend their allotments on tobacco prevention.411 A 2003 study reported that “most states have failed to adequately fund tobacco prevention and cessation programs despite the overwhelming evidence that such programs not only reduce smoking and save lives...” In fact, three states—Michigan, Missouri, and Texas—spend none of their tobacco settlement dollars on tobacco prevention, opting instead to use funds on highway repairs or scholarships.413 It has been commented that:

“The settlements may contain some of the worst public policy agreements ever made, but the money is enormous. These funds will go into states’ general revenues and will, therefore, be up for grabs for any purpose whatsoever...This means one thing: feeding frenzy. Everyone who has ever had a thought of how to spend money will suggest it, for everything from tax cuts, to schools, to filling potholes.”414

406Id. at 568.
407Id.
408Posner, supra note 10, at 1145.
409Id.
410DeBow, supra note 21, at 569.
411See Tobacco: States are Failing to Use Settlements to Fund Prevention Programs Report says 2001, BUREAU NAT’L AFF.; Tobacco: Groups Criticize States’ Use of Funds From Settlement to Balance Their Budgets 2002, BUREAU NAT’L AFF.
413Id. at 2.
Tobacco control advocates are angered by the lack of settlement dollars being used for tobacco control programs because they insist that these programs are, indeed, effective. In fact, the Center for Disease Control released a statement on September 18, 2003 that a landmark study analyzing cigarette sales data from all states and tobacco control program expenditures finds that cigarette sales dropped more than twice as much in states that spend more on comprehensive tobacco control programs than in the United States as a whole.

Tobacco scholar, W. Kip Viscusi, controversially argues that state and federal governments do enjoy benefits, as well as incurring costs, from the early mortality of smokers. "Because smokers are sicker than other people, they require more medical care; and because smokers die earlier than other people, they cost more in life insurance and foregone payroll taxes. But because smokers die earlier, they also don't need significant nursing home or pension benefits...smokers are a "financial profit center" for society...to the tune of $1.72 per pack, or tens of billions of dollars per year..."

C. Counterarguments
The "Master Settlement Agreement between the tobacco industry and the state attorneys general produced several important steps forward in reducing the methods and media in which the tobacco industry can advertise and target children." The advertising restrictions would have been difficult to accomplish without lengthy legal battles or the settlement. Others similarly assert that the MSA "could still prove to

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415 See Comprehensive Statewide Tobacco Prevention Programs Effectively Reduce Tobacco Use, available at http://www.tobaccofreekids.org/research/factsheets/pdf/0045.pdf. (last visited Feb. 21,2004). In California, more than 1.3 million Californians have quit smoking because of the California Tobacco Control Program. In the first three years of the Florida comprehensive tobacco prevention program, from 1998 to 2001(modeled on programs in California and Massachusetts), current smoking declined by 47% among middle school students and 30% among high school students. With its MSA funding, Minnesota established a youth tobacco prevention program, and between 2000 and 2002, current cigarette use declined by 21% among middle school students and by 11% among high school students. Id.
417 Posner, supra note 10, at 1146.
418 Id.
419 Kline, supra note 17, at 634.
be a significant event in changing tobacco policy” “to the extent that public-health advocates are able to convince states to allocate more of the settlement money to tobacco control activities.”

“Whatever its shortcomings...there is no question that these gains would not have been achieved without the states’ Medicaid litigation. The industry had been in no hurry to negotiate with tobacco control advocates, and certainly would not have voluntarily disclosed damaging internal documents.”

Other scholars point out that another positive aspect of the MSA is that the industry has been forced to raise prices to account for the settlement. "Over time, this should have the desired effect of reducing smoking prevalence rates among adults, along with reducing prevalence and incidence rates among children.”

The MSA has also been praised for supporting public health in America. “The litigation has also taken place within a context in which there has been a rising interest in the social costs of smoking.” The increase in litigation is not always seen as a negative consequence, as some state that litigation can have a positive role in drawing public attention to health problem. The rise in tobacco-related litigation is not totally a negative consequence of the MSA according to some scholars. “Tobacco litigation has demonstrated even more dramatically how litigation may alter the political calculus...The revelations about the industry’s knowledge of nicotine’s addictiveness helped to alter public perceptions and make politicians more willing to consider regulating tobacco sales.” Deterrence theory, from a tort perspective, argues that the litigation, by imposing liability on tobacco manufacturers, creates incentives to warn the public more adequately about the health and addiction risks of smoking.

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421 Jacobson, supra note 2, at 230.
422 Id.
423 Id.
424 Id. at 229.
426 Viscusi, supra note 27.
427 Parmet, supra note 425 at 1695.
428 Id. at 1696.
429 Id.
430 Id.
Some say that it is not surprising that individuals concerned about public health threats have turned to the courts.\textsuperscript{431} For instance, in the absence of any nationwide law guaranteeing tobacco-free workplaces, "individuals harmed by environmental tobacco smoke have had little choice but to go to court, using civil rights and common law theories."\textsuperscript{432} While the rise in litigation may be understandable and good for public awareness, the bottom-line remains that the Master Settlement Agreement has failed to comprehensively address and resolve individual and class action litigation against the industry.\textsuperscript{433}

\textbf{D. Litigation remains high}

Despite the MSA's positive effects on advertising and release of industry documents, the current litigation statistics make evident that the MSA did not go far enough. The government did, in fact, recognize the increasing litigation prior to the signing of the MSA, yet did not implement measures to account for future deterrence.\textsuperscript{434} An SEC filing on the overview of tobacco litigation from January 1998 acknowledged "the substantial increase in the number of smoking and health cases...a trend which accelerated in 1997."\textsuperscript{435} At that time, the intentions expressed for the "proposed resolution" (the MSA) were measures to resolve "many of the regulatory and litigation issues affecting the United States tobacco industry," such as caps on judgments and barring smoking and health class actions.\textsuperscript{436} The lack of stringent mandates of the MSA may be partially responsible for not reducing the litigation that followed.

Mandating expenditures aimed at tobacco control programs, cessation or prevention, could have reduced litigation because potential litigants may have been deterred from suing if they perceived that efforts were being made by their state settlement funds to assist them.\textsuperscript{437} Smoking cessation programs, for example, might assist a long-time smoker in quitting instead of continuing the development of a smoking-related disease, leading to a lawsuit for lung cancer. Tobacco prevention programs for the future can impact litigation by not only improving public health, but by preventing tobacco-related

\footnotesize{\begin{itemize}
\item \textsuperscript{431} Parmet, supra note 425 at 1694.
\item \textsuperscript{432} Id.
\item \textsuperscript{433} See Jacobson, supra note 2, at 230.
\item \textsuperscript{434} Rabin, supra note 391, at 340-341.
\item \textsuperscript{435} Notes to Consolidated Financial Statements, 1998 SEC. EXCH. COMM’N 39.
\item \textsuperscript{436} Id. at 34.
\item \textsuperscript{437} Rabin, supra note 391, at 341.
\end{itemize}}
diseases, which has led to the onslaught of “addiction”/dependence, individual smoker, and class-action suits. The stance that smoking is a problem and that the states intend to make use of their settlement dollars from the tobacco companies can demonstrate to the public that the MSA was not simply a settlement in name, but a joint effort by the states and the industry to assist residents with tobacco-related problems, which eventually lead to litigation.

Both the lack of stringent tobacco control measures with settlement funds and an emphasis on monetary restitution indirectly relates to the surge of litigation, because smokers are not deterred from suing and they realize the amount of money available to them as a result of smoking. Because no caps were included in the MSA, no mandatory tobacco control spending by the states, and an emphasis on vast quantities of monetary payments, litigation reduction could not be achieved. An increase in litigation is disadvantageous for many reasons, including being a financial drain on the judicial system, clogging court dockets, discouraging amicable settlement, and instigating future court battles. Furthermore, the unprecedented phenomenon of punitive awards in mass tort situations “is progressing from punishment to annihilation.” Arguably, where “our world thrives on job opportunities, consumer products and services, and the revenue of large corporations, it would be in our nation’s best interest to protect corporate defendants, yet this has not occurred.” While the tobacco industry does, indeed, produce a risky product, a defendant’s wealth should not be the predominant factor. Moreover, some of these major awards “may be close to crossing the line of constitutional impropriety.”

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438Id.
442Crowley, supra note 24, at 1514.
443Id. at 1515.
444Id. at 1513, 1517.
445Id. at 1515-1516.
E. Recommendations for a second settlement
Because the tobacco war—both on the health and judicial fronts—has not ceased since the signing of the MSA, a second settlement may be able to address its failings. What recommendations for a second settlement could improve public health and potentially reduce further tobacco litigation? A second settlement might incorporate the monetary caps on judgments and settlements discussed during the MSA negotiations.\(^{446}\) In addition to imposing monetary chastisement upon the tobacco companies, a primary focus of the 1998 MSA was the advertising restrictions.\(^ {447} \) Simply imposing further advertising limitations on the tobacco companies, as many public health advocates espouse, may not be the best solution because stricter restrictions edge closer to violating the constitutional right to free speech.\(^ {448} \) However, a second settlement could promote counter advertising, zoning regulations, laws concerning promotional samples, and regulations of magazine sales.\(^{449} \) Furthermore, enforcement of minor access statutes or conduct laws, such as restrictions on smoking in public places may further the anti-tobacco effort.\(^ {450} \) An increase in tobacco excise taxes may also prove to be successful because “this is an important regulatory area for the states to take advantage of because increases in the price of cigarettes reduce cigarette smoking, and youth are as susceptible to price changes as adults.”\(^ {451} \)

Another proposal is to bar further health recovery cost, “addiction”/dependence, individual, and class action suits once a more comprehensive and expansive settlement has been reached.\(^ {452} \) In response to criticism against the loopholes allowing retailers to advertise and market, a second agreement might exert financial control on retailers to control minor access.\(^ {453} \) Retailers play a large role in

\(^{446}\) See Notes, supra note 440.

\(^{447}\) Kline, supra note 17, at 622.


\(^{449}\) Id. at 219.

\(^{450}\) Id. at 216.

\(^{451}\) Id. at 215. “Big Tobacco and poor smokers are like Siamese twins joined at the spine. A slap to the evil twin stings also the one who had the small misfortune to become addicted in the seventh grade. Given the unique bonds of dependency between cigarette makers and cigarette users, great care should be used in designing any new tobacco taxation scheme. The motivating principle should be to maximize public health while minimizing pain to the addicted poor.” Garner, supra note 8, at 29-30.

\(^{452}\) See id. at 34.

\(^{453}\) Kave, supra note 448 at 218.
whether minors have access to cigarettes, so giving retailers an
incentive to refrain from selling to youth may prove effective.\textsuperscript{454} Final
suggestions are to incorporate a mandatory distribution plan of state
settlement dollars and, more radically, to fine tobacco companies if
youth smoking does not decrease that year by a predetermined amount.\textsuperscript{455}

IV. CONCLUSION

Almost a contradiction in terms, the Master Settlement Agreement is
not a comprehensive, national accord that has diminished the tobacco
litigation war. While the MSA may have quelled the states’ desire for
Medicaid reimbursement, the litigation statistics demonstrate that
tobacco litigation has been steadily climbing in the past six years.\textsuperscript{456}
The types of subsequent litigation, such as MSA enforcement and
stringent state advertising laws being struck down, demonstrate some
of the problems the MSA has brought forth, or has not reconciled and
addressed. In addition to the problem of increasing litigation, many
other tobacco-related issues have yet to be resolved.\textsuperscript{457}

While some believe the MSA has yet to be as dominant a force
for policy change as expected, others comment positively that, “At a
minimum, the change in the culture of smoking based in part on
litigation is a very welcome development.”\textsuperscript{458} While the publicity of
the smoking problem is beneficial to public health awareness, increased
litigation is a financial drain on public resources, congests court
dockets, and has not solved the public health problem of smoking.
Thus, a second settlement is necessary to begin reducing this tobacco
litigation trend that has no sign of declining on its own in the near
future.

“In terms of the future prognosis for the tobacco industry, it is
clear that the industry did not buy peace with this settlement, but in fact
may have stimulated further litigation.”\textsuperscript{459} “The MSA was necessary,
then, not because it was adequate to public interest or proportionate to
the public need, but because litigation dynamics left no alternative.”\textsuperscript{460}

\textsuperscript{454}Id.
\textsuperscript{455}Id. at 217-218.
\textsuperscript{456}Jacobson, supra note 2, at 230.
\textsuperscript{457}See Viscusi, supra note 27; Posner, supra note 10.
\textsuperscript{458}Jacobson, supra note 2, at 234.
\textsuperscript{459}Viscusi, supra note 27, at 544.
\textsuperscript{460}LaFrance, supra note 1 at 198.
Furthermore, “the MSA leaves the tobacco companies largely free to pursue their pre-existing, offending misconduct.”\textsuperscript{461} Regarding a subject inspiring public controversy and political conflict, it is important to bear in mind that the positions need not be framed simply in terms of pro-smoking and anti-smoking. “In truth, tobacco litigation is poised midway between the destruction of a nation’s health, on the one hand, and the destruction of a major industry, on the other.”\textsuperscript{462}