Chapter 3: A Complex Achievement: The Tobacco Master Settlement Agreement

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I. Introduction

It is hard to overstate the historic significance of the 1998 Master Settlement Agreement (MSA) between the major cigarette companies and 46 states—the largest legal settlement ever executed in the United States.[1] Following decades of unsuccessful individual lawsuits by injured smokers, the MSA and the four individual state tobacco settlements that preceded it[2] showcased the role of litigation as a formidable tool in public health policy and shifted the legal focus from the personal responsibility of plaintiffs, who were often smokers dying of tobacco-related diseases, to the corporate responsibility of the tobacco industry.

The initial goal of the tobacco litigation was to recover monetary damages for the states based on the Medicaid health care costs they had incurred in treating sick and dying cigarette smokers.[3] As part of the MSA, the tobacco industry agreed to compensate the settling states in perpetuity, with annual payments initially expected to total $206 billion through 2025.[4] The other

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1. *See* Master Settlement Agreement (1998), *available at* https://www.naag.org/naag/about_naag/naag-center-for-tobacco-and-public-health/master-settlement-agreement/master-settlement-agreement-msa.php [hereinafter MSA].
2. *See, e.g.,* Settlement Agreement & Stipulation for Entry of Consent Judgment, State v. Philip Morris, Inc., No. C1-94-8565 (Minn. Dist. Ct. May 8, 1998) [hereinafter Minnesota Tobacco Settlement Agreement]; *See also Tobacco Control Archives*, Univ. of Cal. S.F., https://www.library.ucsf.edu/archives/tobacco/ (last visited May 20, 2020) [hereinafter *State Tobacco Settlements*] (making available the texts of the other settlements).
3. *See The ABCs of the Tobacco Settlement Agreement*, Nat'l Ass'n of Att'ys Gen., https://www.naag.org/publications/naagazette/volume_1_number_2/the_abcs_of_the_tobacco_master_settlement_agreement.php (last visited May 22, 2020) [hereinafter *The ABCs of the Tobacco Settlement Agreement*].
4. *See* MSA, *supra* note 1; *see also* U.S. Gov't Accountability Off., Tobacco Settlement: States' Use of Master Settlement Agreement Payments 2 (2001); *NAAG Tobacco Project: 11 Years of MSA Coordination*, Nat'l Ass'n of Att'ys Gen., https://www.naag.org/publications/naagazette/volume-3-number-4/naag-tobacco-project-11-years-of-msa-coordination.php (last visited May 22, 2020).

litigation objectives were equally as ambitious: (1) restraining tobacco company marketing and advertising to prevent appeals to youth; (2) ending the industry's false and deceptive denials of science; and (3) funding public health policy efforts to help current smokers quit and prevent underage smoking.[5]

To this end, the industry agreed to several concessions, including restrictions on advertising, sponsorship, lobbying, and litigation activities—particularly those targeting youth. The restrictions included the creation of a charitable foundation to reduce teen smoking, the disbanding of three tobacco industry organizations, and public access to damaging internal documents demonstrating the extent to which the industry had misled the public about tobacco's health harms. By many measures, the tobacco settlement agreement was a success. Yet some in the public health community continue to view the MSA's long-term impact on public health policy and the landscape of tobacco control as a disappointment.

II. Background

A constellation of research, advocacy, legislative, and legal events made the state litigation possible and helped shape the core elements of the ultimate settlement. In the first half of the 20th century, nearly half of all adults in the United States were regular smokers.[6] The rise of the use of the cigarette during this time was paralleled by an alarming rise in lung cancer in the United States—a disease virtually unknown at the turn of the century when cigarette smoking was negligible.[7] Starting in 1950, the first scientific studies were published that linked cigarette use with lung cancer.[8]

In 1953, the tobacco companies established an initiative named the Tobacco Industry Research Committee. This organization, later renamed the Council for Tobacco Research, primarily functioned as a public rela-

Despite this estimate, MSA payments have only totaled $138.8 billion as of April 2020. Nat'l Ass'n of Att'ys Gen., 2020-04-21 Payments to States Since Inception Through April 21, 2020 (2020), https://www.naag.org/assets/redesign/files/tobacco/2020-04-21%20Payments_to_States_Since_Inception_through_April_21_2020.pdf. The discrepancy between projected and actual payments is the result of the decline in the consumption of cigarettes and a decrease in market share by the four largest cigarette manufacturers, discussed in more detail below.

5. *See* Campaign for Tobacco-Free Kids, Fact Sheet, Using Tobacco Settlement Funds for Tobacco Prevention: Supportive Quotes From High-Ranking State Officials (1999), https://www.tobaccofreekids.org/assets/factsheets/0120.pdf.
6. Jordan Goodman, Tobacco in History: The Cultures of Dependence 305 (1993).
7. Allan Brandt, The Cigarette Century: The Rise, Fall, and Deadly Persistence of the Product That Defined America 2–3 (2006).
8. *See, e.g.*, Ernst L. Wynder & Evarts Graham, *Tobacco Smoking as a Possible Etiologic Factor in Bronchiogenic Carcinoma: A Study of 684 Proved Cases*, 143 J. Am. Med. Ass'n 334 (1950); *see also* Brandt, *supra* note 7, at 131–57.

tions wing of the tobacco industry, casting doubt on accusations linking cigarettes to ill health and promoting cigarette consumption. The council's efforts, along with those of the Center for Indoor Air Research, played a central role in the fraud and misinformation charges later brought against tobacco companies.[9]

Despite the efforts of the tobacco industry, evidence of the health risks of cigarette use continued to mount, leading to the first U.S. Surgeon General's report on the health harms of smoking in 1964.[10] Just a year after the report's release, Congress passed the Federal Cigarette Labeling and Advertising Act of 1965, which required the first warning labels on cigarette packages—a candid acknowledgement of tobacco-related health risks.[11]

A. *Waves of Litigation*

As the popular media began to report on the dangers of tobacco use, a public health movement grew to reduce the prevalence and social acceptability of smoking and hold the industry responsible for the harm caused by its products. The obstacles were great, however. The tobacco industry at the time was largely unregulated, the political power of the tobacco industry and its lobbyists was unchecked, and the smoking culture was entrenched. Smoking was endorsed by doctors, athletes, celebrities, politicians, and other popular figures; intrinsically tied to the century's norms and beliefs; and an omnipresent prop in the rituals of adolescent identity.[12] Moreover, the tobacco industry had a formidable army of lawyers with a raft of legal defenses and an unrelenting determination to resist even the most modest of public health demands.[13]

Nevertheless, starting in the mid-1950s, individual smokers and their estates sued the tobacco companies for the illnesses and death caused by cigarette use. In the mid-1950s through 1994, individuals brought over 800 claims against cigarette manufacturers for damages related to the effects of smoking.[14] However, the manufacturers, raising defenses such as contribu-

9. *See Tobacco Industry Research Committee*, SourceWatch, http://www.sourcewatch.org/index.php/Tobacco_Industry_Research_Committee (last updated Dec. 25, 2019).
10. *Read the Surgeon General's 1964 Report on Smoking and Health*, Pub. Broadcasting Serv., Jan. 12, 2014, https://www.pbs.org/newshour/health/first-surgeon-general-report-on-smokings-health-effects-marks-50-year-anniversary.
11. Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§1331–40; 21 U.S.C. §387c.
12. Brandt, *supra* note 7, at 56.
13. Michael Pertschuk, Smoke in Their Eyes: Lessons in Movement Leadership From the Tobacco Wars 3 (2001).
14. Robin Miller, Annotation, *Validity, Construction, Application, and Effect of Master Settlement Agreement (MSA) Between Tobacco Companies and Various States, and State Statutes Implementing Agreement, Use*

tory negligence[15] and smokers' assumption of risk,[16] generally prevailed in these lawsuits. Because of this dismal record, the state tobacco litigation—beginning in 1994 and culminating in the MSA—took a different approach altogether, focusing less on the effects of the tobacco product than on the conduct of the tobacco manufacturers and the financial impact of their actions on states that had to pay for medical care for smoking-related diseases.[17]

The history of tobacco litigation has been described as three waves, each of which occurred at a time when public perception of tobacco and the tobacco industry was gradually changing.

1. First wave

The first wave of litigation (lasting from 1954 to 1973) alleged that cigarette manufacturers were liable for monetary damages for the medical expenses, lost wages, and pain and suffering caused by their products.[18] Approximately 100 to 150 cases were filed, principally under theories of the manufacturers' negligence, misrepresentation, and/or breach of warranty,[19] and they were almost all dismissed or withdrawn before reaching trial.[20] Those that did reach trial were unsuccessful. The industry claimed a lack of causation (i.e., no causal link between smoking and lung cancer or other diseases), and this defense prevailed even as the Surgeon General's 1964 warnings of the risks of tobacco use were gaining traction among the public and the medical community.[21]

Throughout and beyond this period, the tobacco industry continued to make outlandish claims, hiring doctors and academic scholars to defend its assertions that any medical evidence implicating smoking as a causative factor in lung cancer or other diseases was "merely statistical" or based only

and Distribution of MSA Proceeds, 25 A.L.R. 6th 435 (2007).

15. Contributory negligence is a tort defense that bars plaintiffs from recovery if they contributed to their own injuries or losses in any way. Restatement (Second) of Torts §840B (Am. Law Inst. 1979).
16. Assumption of the risk is another tort defense that bars or reduces a plaintiff's right to recovery if the defendant can demonstrate that the plaintiff voluntarily and knowingly assumed the risks associated with the dangerous activity in which the plaintiff was participating at the time of injury. Restatement (Second) of Torts §496C (Am. Law Inst. 1965).
17. D. Douglas Blanke, Towards Health With Justice: Litigation and Public Inquiries as Tools for Tobacco Control 24 (2002), https://www.publichealthlawcenter.org/sites/default/files/resources/who-tobacco-litigation-2002.pdf.
18. *Id.* at 8.
19. A breach of warranty claim in tobacco litigation would require the plaintiff to establish, for example, that cigarettes were unreasonably dangerous (known as a design defect) and that the tobacco company failed to provide adequate warning about the health hazards and addictiveness of the product (known as a warning defect). *See, e.g.*, Evans v. Lorillard Tobacco Co., 990 N.E.2d 977 (Mass. 2013).
20. *See id.* at 1036–37.
21. Lawrence Gostin, Public Health Law: Power, Duty, Restraint 205 (2d ed. 2008).

on "animal evidence"[22] and that the question of whether smoking caused harm was an "open controversy."[23] In 1954, the major tobacco companies purchased a full-page ad titled *A Frank Statement*, which ran in 448 newspapers throughout the United States, casting doubt on studies linking smoking with cancer and calling for more research.[24] The industry not only persisted in denying the harm and addictiveness of its products—including testifying in Congress in an infamous hearing in 1994[25]—but continued its blatant marketing to youth and children.[26] In the 1960s, for instance, the animated stars of *The Flintstones* promoted Winston cigarettes in a series of cartoon commercials,[27] and from 1988 until 1997, the iconic, kid-friendly Joe Camel cartoon character graced T-shirts, hats, billboards, print ads, and other items plugging R.J. Reynolds Tobacco Co. (R.J. Reynolds) tobacco products.[28]

2. Second wave

During the second wave of tobacco litigation from 1983 to 1992, nearly 200 personal injury cases were filed, with many alleging new legal theories, including strict product liability and negligent failure to warn.[29] Because the

22. For example, the industry argued that some animal experiments on the risks of inhaling cigarette smoke were not generalizable to humans. *See, e.g.*, Sharon Milberger et al., *Tobacco Manufacturers' Defence Against Plaintiffs' Claims of Cancer Causation: Throwing Mud at the Wall and Hoping Some of It Will Stick*, 15 Tobacco Control iv17–iv26 (2006), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2563590.
23. K. Michael Cummings & Robert Proctor, *The Changing Public Image of Smoking in the United States: 1964–2014*, 23 Cancer Epidemiology, Biomarkers & Prevention 32, 32–36 (2014), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3894634.
24. *A Frank Statement* appeared in newspapers with an estimated reach of approximately 43 million people nationwide, and it was widely promoted on the radio and on television. The 1954 statement claimed:
    > 1. That medical research of recent years indicates many possible causes of lung cancer. 2. That there is no agreement among the authorities regarding what the cause is. 3. That there is no proof that cigarette smoking is one of the causes. 4. That statistics purporting to link cigarette smoking with the disease could apply with equal force to any one of many other aspects of modern life. Indeed, the validity of the statistics themselves is questioned by numerous scientists.

    Tobacco Indus. Research Comm., A Frank Statement to Cigarette Smokers (1954), https://www.tobaccofreekids.org/assets/factsheets/0268.pdf.
25. *Hearing on the Regulation of Tobacco Products Before the H. Comm. on Energy and Commerce Subcomm. on Health & the Env.*, 103d Cong. (1994), (statement of William Campbell, President and Chief Executive Officer, Philip Morris Inc.), *available at* https://senate.ucsf.edu/tobacco-ceo-statement-to-congress [hereinafter *1994 Tobacco CEO Statement*].
26. The evidence of the tobacco companies' marketing to youth is set forth in the opinion of the U.S. District Court for the District of Columbia in *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1, 566–606 (D.D.C. 2006), *aff'd in relevant part*, 566 F.3d 1095 (D.C. Cir. 2009).
27. *Outrageous Vintage Cigarette Ads*, CBS News, https://www.cbsnews.com/pictures/outrageous-vintage-cigarette-ads/15 (last visited June 14, 2020).
28. David Segal, *Joe Camel Fired*, Wash. Post, July 11, 1997, https://www.washingtonpost.com/wp-srv/national/longterm/tobacco/stories/joecamel.htm.
29. Blanke, *supra* note 17, at 17. No significant tobacco lawsuits were filed in the intervening years between 1973 and 1983.

mounting scientific evidence weakened the "lack of causation" defense, the industry abruptly changed tack and instead portrayed plaintiffs as "morally responsible for their own illness" because they had made the choice to smoke, fully aware of the risks.[30] The industry successfully contended that it was not liable because the cigarette package warning labels, along with equivalent warnings on print advertising, adequately informed smokers of health risks, and smokers had thus assented to whatever risks tobacco posed.[31]

For decades, smokers and their estates had filed individual personal injury lawsuits in attempts to recover against tobacco companies for medical bills and pain and suffering. Most of the individual lawsuits were unsuccessful until *Cipollone v. Liggett Group*.[32] When Rose Cipollone filed her product liability suit in 1983, she was suffering from lung cancer after smoking a pack and a half of cigarettes each day since 1942. She died at the age of 58 while the litigation was underway, but her estate pursued the case, eventually winning a $400,000 judgment that was later overturned.[33] The jury verdict was the first in the decades of tobacco litigation in which a plaintiff was awarded damages.[34]

The case was also significant in other respects. It brought to light the first industry documents that began to reveal what the tobacco companies knew about the health effects and harms of smoking, when they learned that information, and what they did with their knowledge. The public exposure of these documents proved essential to the nascent tobacco control movement. It transformed public perception of the tobacco industry, revealing that manufacturers were not only fully aware of the risks of smoking but were intentionally and aggressively deceiving the public. Moreover, the documents provided a road map for future plaintiffs seeking to hold the industry accountable, shifting the legal claims underpinning such litigation from personal injury to corporate malfeasance.

3. Third wave

By the onset of the third wave of tobacco litigation in the 1990s, the public health and economic tolls of smoking were clear. Although cigarette

30. Gostin, *supra* note 21, at 207.
31. *Id.* Because the Federal Cigarette Labeling and Advertising Act of 1965, required warning labels on cigarette packages, defense counsel pointed to these tepid warnings as nearly definitive evidence that plaintiffs were informed and aware of the risks and that they had still chosen to smoke.
32. Cipollone v. Liggett Grp., 505 U.S. 504 (1992).
33. Gostin, *supra* note 21, at 207–08.
34. Lawrence Gostin et al., *Tobacco Liability and Public Health Policy*, 266 J. Am. Med. Ass'n 31–82 (1991).

use was on the decline, one in four U.S. adults continued to smoke.[35] The trend among youth was especially alarming. Between 1991 and 1995, youth smoking prevalence increased more than 7%, from 28% to 35%.[36] Tobacco marketing campaigns flagrantly targeted youth and other populations disproportionately affected by tobacco use such as low-income individuals, adults who did not graduate from high school, and those experiencing mental health or substance use issues.

Other concerns were arising as well. As the Surgeon General had concluded in his 1964 report,[37] and as medical research was continuing to demonstrate, cigarettes cause and contribute to a host of diseases. The scope of tobacco-related healthcare costs and the subsequent burden on state healthcare systems was becoming a significant problem. Six studies between 1976 and 1993 found that smoking accounted for between 6% to 8% of U.S. healthcare costs, which amounted to more than $50 billion in 1993,[38] and a quarter of state Medicaid expenditures.[39]

Throughout this period, despite the health and economic costs that tobacco-related illness imposed on the United States, the tobacco industry continued to thwart serious public health initiatives to regulate its products. For example, it successfully weakened the two major federal tobacco regulations adopted at this time—package labeling and advertising restrictions—to protect its economic interests.[40] The industry also continued to use its hallmark scorched earth litigation strategy in which the industry committed almost inexhaustible resources to delay cases, "inundat[e] an opponent with reams of useless information, use . . . the court system to wage a war of motions and protective orders against an adverse party. . . fil[e] patently false and misleading responses to discovery requests,"[41] and drive up a plaintiff's

35. Ctrs. for Disease Control, *Cigarette Smoking Among Adults—United States, 1991*, 42 Morbidity & Mortality Weekly Rep. 230 (1991).
36. *Id.*
37. Dep't of Health, Educ., & Welfare, Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service 33–40 (1964), *available at* https://biotech.law.lsu.edu/cases/tobacco/nnbbmq.pdf.
38. Kenneth E. Warner et al., *Medical Costs of Smoking in the United States: Estimates, Their Validity, and Their Implications*, 8 Tobacco Control 3, 290–300 (1999).
39. In 1993, nearly 15% of state Medicaid expenditures were to address smoking, amounting to $13 billion. Leonard S. Miller et al., *State Estimates of Medicaid Expenditures Attributable to Cigarette Smoking, Fiscal Year 1993*, 113 Pub. Health Reps. 2, 140–51 (1998), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1308653.
40. *See, e.g.*, Brandt, *supra* note 7, at 402. For more on the failed efforts to bring tobacco under the FDA's jurisdiction, see *id.* at 357–99.
41. *See* Christine Hatfield, Note and Comment, *The Privilege Doctrines—Are They Just Another Discovery Tool Utilized by the Tobacco Industry to Conceal Damaging Information?*, 16 Pace L. Rev. 525, 527 (1996).

expenses.[42] In the *Cipollone* litigation, for instance, the plaintiff's attorneys spent approximately $4 million to litigate the case through 12 federal opinions.[43] The original attorneys were forced to withdraw from the case before it went to a second trial.[44]

During this third wave of tobacco litigation, more lawsuits were filed against tobacco firms in a three-year period (between 1994 and 1997) than had been filed in the previous 30 years.[45] This time, however, although many plaintiffs continued to lose, some prevailed. The successful cases were the result of three developments: "(1) an avalanche of revelations about tobacco company misconduct, (2) the emergence of new forms of litigation that allowed plaintiffs to amass resources and expertise on a scale sufficient to challenge the industry's litigation juggernaut, and (3) the development of new legal theories that avoided many of the tobacco industry's traditional victim-blaming defenses."[46]

Many revelations about the industry's conduct appeared in thousands of internal industry documents from Brown & Williamson Tobacco Corp. (Brown & Williamson) that were released by a whistleblower in 1994.[47] These documents, along with others obtained through discovery and press reports, contained damaging evidence about the tobacco industry's knowledge of the health effects of smoking, the addictive nature of nicotine, and the toxicity of elements contained in cigarettes.[48]

New tactics included moving beyond individual personal injury claims to class actions, which sought relief for potentially tens of thousands of individuals injured by tobacco products under a variety of legal theories including traditional tort law and manufacturers' violations of antitrust and consumer protection laws. New types of plaintiffs harmed by tobacco companies also

42. Blanke, *supra* note 17, at 18. (quoting one industry lawyer as saying, "To paraphrase General Patton, the way we won these cases was not by spending all of [R.J. Reynolds'] money, but by making that other son of a bitch spend all of his.").
43. Gostin, *supra* note 21, at 208.
44. *Id.*
45. Brandt, *supra* note 7, at 404.
46. Blanke, *supra* note 17, at 21.
47. Douglas Martin, *Merrell Williams Jr., Paralegal Who Bared Big Tobacco Dies at 72*, N.Y. Times, Nov. 26, 2013, https://www.nytimes.com/2013/11/27/business/merrell-williams-jr-paralegal-who-bared-big-tobacco-dies-at-72.html.
48. *See* Stanton Glantz et al., *Looking Through a Keyhole at the Tobacco Industry: The Brown and Williamson Documents*, 274 J. Am. Med. Ass'n 219, 219–24 (1995). To view the Brown & Williamson documents, see the University of California, San Francisco's *State Tobacco Settlements*, *supra* note 2, at https://www.library.ucsf.edu/archives/tobacco. Other online collections contain tobacco industry documents for a variety of sources. *See, e.g., Truth Tobacco Industry Documents*, Univ. of Cal. S.F., https://www.industrydocuments.ucsf.edu/tobacco (last visited May 20, 2020).

emerged, including health insurance companies and states with massive medical bills to pay.

a. State tobacco litigation

Reeling from the economic blow to their health care systems due to tobacco-related diseases, states developed an important new litigation strategy against tobacco companies during this period. Between 1994 and 1998, almost every state began to sue the tobacco industry for the recovery of Medicaid costs incurred due to smoking-related illness of their residents.[49] Having uncovered evidence that the tobacco companies had known for years about the harm caused by their products but had conspired to suppress the information and mislead smokers, the general public, and public officials, some states invoked Racketeer Influenced Corrupt Organization (RICO) statutes and sought sweeping injunctive and equitable relief (i.e., demands for future restrictions on tobacco industry behavior) as well as historic monetary recoveries.[50] The conspiracy aspects of RICO claims—RICO was originally enacted in 1970 to target the conspiratorial nature of organized crime[51]—were well suited to take advantage of the newfound evidence of collaboration and collusion among the companies.[52] Additionally, RICO civil claims are governed by a "preponderance of the evidence" standard—roughly "more likely than not"—and are less challenging to win than cases governed by the "beyond a reasonable doubt" standard applicable to criminal prosecution.[53]

Beginning in Mississippi in 1994,[54] state attorneys general filed one lawsuit after another against the country's largest cigarette manufacturers, including Philip Morris Inc. n.k.a. Philip Morris USA Inc. (Philip Morris), R.J. Reynolds, Brown & Williamson, and Lorillard Tobacco Co. (Lorillard). The cases sought injunctive and equitable relief as well as huge monetary recoveries for penalties, punitive damages, and sums spent by the states to treat smokers' illnesses.[55] Most were law enforcement actions focusing on

49. Blanke, *supra* note 17, at 25.
50. Walter J. Jones & Gerard A. Silvestri, *The Master Settlement Agreement and Its Impact on Tobacco Use 10 Years Later: Lessons for Physicians About Health Policy Making*, 137 Chest 692, 693 (2010), *available at* https://pubmed.ncbi.nlm.nih.gov/20202950/.
51. Jeremy M. Miller, *RICO and the Conspiracy Construction: The Mischief of the Economic Model*, 104 Com. L.J. 26, 26, 31 (1999).
52. *See* Anthony J. Sebok, *The Federal Government's RICO Suit Against Big Tobacco: An Unprecedented Case Begun by the Clinton DOJ, and Continued by the Bush DOJ*, FindLaw, Oct. 4, 2004, https://supreme.findlaw.com/legal-commentary/the-federal-governments-rico-suit-against-big-tobacco.html.
53. *Id.*
54. Complaint, Moore *ex rel.* State v. Am. Tobacco Co., No. 94-1429 (Miss. Ch. May 23, 1994).
55. Blanke, *supra* note 17, at 25.

industry conduct and alleging civil violations of state laws, including consumer protection, advertising, antitrust (i.e., competition) and racketeering statutes. Other cases rested on theories of product liability[56] and equity, such as unjust enrichment.[57]

The tsunami of lawsuits was unprecedented—three by the end of 1994, 17 by 1996, and 39 by 1997. "The American legal system had never witnessed such an extravagant contest as would unfold over the next three years. By the middle of 1997, at least 530 law firms and thousands of attorneys were engaged in the battle for the hearts and lungs of millions of Americans."[58] While the primary thrust of these lawsuits focused on recovering state costs incurred to treat sick and dying cigarette smokers, the suits also sought to reduce youth smoking, de-normalize tobacco use by exposing the tobacco industry's misconduct and lies, prevent tobacco industry advertising and marketing targeted at children and youths, and secure monetary damages to finance state tobacco control programs including education, prevention, and cessation services.[59]

By early 1998, Mississippi,[60] Florida,[61] and Texas[62] had reached pretrial individual settlements with various tobacco companies. On May 8, 1998, the only state lawsuit against the major tobacco companies tried to completion was settled as closing arguments were set to begin after 16 weeks of trial (Minnesota Tobacco Settlement).[63] Led by Minnesota Attorney General Hubert Humphrey, in partnership with Blue Cross and Blue Shield of Minnesota and the law firm Robins, Kaplan, Miller & Ciresi LLP, *State of Minnesota v. Philip Morris Inc.* was the largest case in Minnesota history. In the Minnesota Tobacco Settlement, the state was awarded payments projected to

56. Under a product liability claim, a plaintiff would argue that tobacco companies made and marketed a product that was unfit to use. Restatement (Third) of Torts: Prods. Liab. §2 (Am. Law Inst. 1998).

57. Blanke, *supra* note 17, at 25. Unjust enrichment is sometimes included among theories of recovery pleaded in a product liability action. According to this theory, a product user seeks recovery from the defendant manufacturer of all proceeds from the sale of the allegedly defective product, claiming the money made from selling the product unjustly enriched the defendant. In tobacco litigation, states sought restitution by arguing that their costs for treating tobacco-related diseases constituted the unjust enrichment of the companies. Brandt, *supra* note 7, at 414.

58. Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces That Brought the Tobacco Industry to the Negotiating Table*, 25 Wm. Mitchell L. Rev. 387, 389 (1999).

59. *See, e.g.*, *id.* at 391–94; Brandt, *supra* note 7, at 412–27.

60. Barry Meier, *Acting Alone, Mississippi Settles Suit With 4 Tobacco Companies*, N.Y. Times, July 4, 1997, http://www.nytimes.com/1997/07/04/us/acting-alone-mississippi-settles-suit-with-4-tobacco-companies.html.

61. Barry Meier, *Cigarette Makers Agree to Settle Florida Lawsuit*, N.Y. Times, Aug. 26, 1997, https://www.nytimes.com/1997/08/26/us/cigarette-makers-agree-to-settle-florida-lawsuit.html.

62. *Texas, Tobacco Giants Settle Lawsuit, Avoid Trial*, Cable News Network (Jan. 16, 1998), https://web.archive.org/web/20160419220814/https://www.cnn.com/US/9801/16/texas.tobacco/.

63. *See* Minnesota Tobacco Settlement Agreement, *supra* note 2.

total $6.1 billion over 25 years and $200 million annually thereafter in perpetuity.[64] But beyond the financial compensation, the Minnesota Tobacco Settlement forced the public disclosure for the first time of some 35 million pages of internal tobacco industry documents, which have since informed hundreds of scientific articles, government reports, and policy debates across the United States and the globe, including those that helped lead to the Framework Convention on Tobacco Control—the first public health treaty negotiated under the auspices of the World Health Organization.[65] The Minnesota Tobacco Settlement also required public disclosure of any additional industry documents that might be unearthed in subsequent cases anywhere in the nation.[66] The "meticulous, time-consuming, eye-wearying process of discovery in Minnesota would—in large measure—create the massive record. . . [and] unprecedented archive of the industry's internal workings" that was now available to both the public and other tobacco litigants.[67] The resulting archive of documents detailing the tobacco industry's many illegal activities—including its long-standing denial of tobacco product risk despite maintaining research programs committed to understanding, maintaining, and enhancing the addictiveness of its products—provided state attorneys general with much-needed evidence of industry wrongdoing, all of which eventually led to the MSA.[68] Finally, the Minnesota Tobacco Settlement included a series of provisions permanently restricting abusive tobacco industry practices as well as a first-ever injunction against marketing practices that target youth, which were echoed six months later in the national MSA.[69]

b. Federal regulation

The state litigation against the tobacco companies happened against the backdrop of many years of fits and starts as Congress and several administra-

64. Under the settlement, the five major U.S. tobacco companies provided the state of Minnesota with six one-time payments, which were distributed into three separate accounts: the Tobacco Use Prevention and Local Public Health Endowment, the Medical Education Endowment, and an Academic Health Center Account within the Medical Education Endowment. Blue Cross and Blue Shield of Minnesota received an additional $469 million, which seeded the organization's Center for Prevention among other tobacco-related activities.

65. *See Minnesota Litigation and Settlement*, Pub. Health L. Ctr., http://www.publichealthlawcenter.org/topics/tobacco-control/tobacco-control-litigation/minnesota-litigation-and-settlement (last visited May 20, 2020). For more on the Minnesota Tobacco Settlement, see *Symposium—Tobacco Regulation: The Convergence of Law, Medicine & Public Health*, 25 Wm. Mitchell L. Rev. 373 (1999).

66. *See* Minnesota Tobacco Settlement Agreement, *supra* note 2.

67. Brandt, *supra* note 7, at 419.

68. *See, e.g.*, Roberta B. Walburn, *The Role of the Once-Confidential Industry Documents*, 25 Wm. Mitchell L. Rev. 431, 431–38 (1999).

69. *See* Minnesota Tobacco Settlement Agreement, *supra* note 2.

tions sought to address the industry's responsibility for the public health crisis. After the passage of the Federal Cigarette Labeling and Advertising Act of 1965, requiring a Surgeon General's health warning on cigarette packs,[70] the Federal Communications Commission ruled in 1967 that the fairness doctrine—an attempt to ensure that all coverage of controversial issues by a broadcast station be balanced and fair—applied to cigarette advertising.[71] Thereafter, stations broadcasting cigarette commercials had to donate airtime to antismoking messages.[72] Those messages ended in 1971, when Congress prohibited all broadcast advertising for cigarettes.[73]

As the science continued to develop, more definitively linking cigarette smoking with a growing list of injuries and disease, Congress and federal agencies moved incrementally to restrict tobacco sales and use. In 1973, the Civil Aeronautics Board began to require nonsmoking sections on commercial flights. In 1989, Congress banned smoking on domestic flights lasting less than six hours.[74] Smoking was not banned completely on all flights until 2000.[75]

Throughout this time, no federal regulatory agency exercised comprehensive jurisdiction over the tobacco industry. Then, in February 1994, U.S. Food and Drug Administration (FDA) Commissioner David Kessler announced plans to consider regulating tobacco as a drug, reasoning that because the products delivered nicotine to users to satisfy addiction, they fell within FDA's purview.[76] The following month, Commissioner Kessler testified about tobacco and nicotine in hearings convened by Congressman Henry Waxman of the House Energy and Commerce Committee. Commissioner Kessler's testimony prompted Congressman Waxman to invite the top executives from the seven largest cigarette manufacturers to testify before the committee that April. Each of the tobacco company executives testified under oath that he believed nicotine was not addictive.[77]

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70. Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. §§1331–40; 21 U.S.C. §387c.
71. *See* John C. Moore, *Advertising and Recent Developments in the Fairness Doctrine*, 29 Wash. & Lee L. Rev. 80, 81 (1972).
72. *See id.* at 87.
73. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, §6, 84 Stat. 87, 89 (1970).
74. *See* Brandt, *supra* note 7, at 303–06.
75. 49 U.S.C. §41706(a).
76. *See* Brandt, *supra* note 7, at 391–97; *id.* at 391 ("The FDA based its claim of jurisdiction on its finding that nicotine in cigarettes was a drug within the meaning of the 1938 Food, Drug, and Cosmetic Act, which defined *drugs* as 'articles (other than food) intended to affect the structure or function of the body.'"); *see also* Philip Hilts, *U.S. Agency Suggests Regulating Cigarettes as an Addictive Drug*, N.Y. Times, Feb. 26, 1994, https://www.nytimes.com/1994/02/26/us/us-agency-suggests-regulating-cigarettes-as-an-addictive-drug.html.
77. *1994 Tobacco CEO Statement*, *supra* note 25.

Building on Commissioner Kessler's work and the congressional investigation, on August 23, 1996, President Bill Clinton announced the nation's first comprehensive program to prevent children and adolescents from smoking cigarettes or using smokeless tobacco products and beginning a lifetime of nicotine addiction.[78] With the publication of a final rule in the *Federal Register* five days later, FDA sought to regulate the sale and distribution of cigarettes and smokeless tobacco to children and adolescents.[79] The intent of the FDA rule was to reduce youth access to tobacco products and the appeal of tobacco advertising to young people. Additionally, the FDA rule announced an intent to require the major tobacco companies to educate young people about the health dangers associated with tobacco use through a multimedia campaign.[80]

Tobacco companies immediately challenged the new FDA rule in court, arguing that FDA lacked the proper delegation of authority from Congress to regulate cigarettes and other tobacco products. In 2000, in a 5–4 ruling, the U.S. Supreme Court struck down the FDA rule, finding that the agency lacked the authority to regulate tobacco.[81] It was not until June 2009 that FDA was given sweeping authority to regulate tobacco products comprehensively.[82]

c. State and local legislation

In the meantime, public concern about cigarette smoking began to prompt policy responses from state and local governments to address the economic and health tolls of tobacco use in their communities. These measures included imposing smoke-free workplace laws, increasing tobacco taxes, and raising minimum age requirements to buy cigarettes.[83]

78. *President Clinton and the FDA Announce New Tobacco Regulations*, News Briefs, Sept. 1996, https://www.ndsn.org/sept96/fdarules.html.
79. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44396 (Aug. 28, 1996) (to be codified at 21 C.F.R. pts. 801, 803, 804, 807, 820, and 897).
80. *Id.* at 44538 (declining to use section 520(e) of the Federal Food, Drug, and Cosmetic Act (FFDCA) to require tobacco companies to establish a national education campaign to discourage children and adolescents from using cigarettes and smokeless tobacco as in the proposed rule but instead later using section 518(a) of the FFDCA to pursue the implementation of the education campaign).
81. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
82. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, §102, 123 Stat. 1776 (codified as amended in 2009 in scattered sections of 15 U.S.C. and 21 U.S.C.). The law gives FDA the authority to establish tobacco product standards, review products before their introduction to the market, restrict tobacco product marketing and advertising, prevent illicit trade, and strengthen warning labels.
83. *See generally* Peter D. Jacobson & Jeffrey Wasserman, Tobacco Control Laws: Implementation and Enforcement (1997).

From the 1960s to the 1980s, the public debate about smoking changed from an issue of consumer choice to a serious health issue, spurring the establishment of several national tobacco control advocacy organizations.[84] In 1967, Action on Smoking and Health (ASH) was formed; in 1971, the Groups to Alleviate Smoking Pollution (GASP) networks were established nationwide; in 1981, the Coalition on Smoking or Health was formed (consisting of the American Lung Association, American Cancer Society, and American Heart Association); and in 1986, Americans for Nonsmokers' Rights was established.[85]

In subsequent years, the Surgeon General continued to release damning reports about the health effects of smoking, nicotine addiction, secondhand smoke, and tobacco use by youth.[86] In 1993, the U.S. Environmental Protection Agency released a report titled *Respiratory Health Effects of Passive Smoking, Lung Cancer and Other Disorders*.[87] And in 1999 and 2007, the Centers for Disease Control and Prevention (CDC) issued *Best Practices for Comprehensive Tobacco Control Programs*.[88] This provided a growing number of tobacco control proponents and coalitions with the evidence they needed to persuade states and localities to pass tobacco control legislation.

III. Master Settlement Agreement

As one state after another continued to sue the tobacco companies in the 1990s,[89] the industry began to face the risk of financial ruin and felt intense pressure to settle. By 1998, Minnesota, Florida, Mississippi, and Texas had

84. Ctr. for Pub. Health Sys. Sci., Policy Strategies: A Tobacco Control Guide 3 (2014), https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-guide-tobacco-policy-strategies-WashU-2014.pdf.

85. *Id.* at 3.

86. *See, e.g.*, Dep't of Health, Educ., & Welfare, The Health Consequences of Smoking (1972); Dep't of Health & Human Servs., The Health Consequences of Smoking–Nicotine Addiction (1988); Dep't of Health & Human Servs., Reducing the Health Consequences of Smoking: 25–Years of Progress (1989); Dep't of Health & Human Servs., The Health Consequences of Involuntary Exposure to Tobacco Smoke (2006); Dep't of Health & Human Servs., Preventing Tobacco Use Among Youth and Young Adults (2012); Dep't of Health & Human Servs., The Health Consequences of Smoking–50 Years of Progress (2014) [hereinafter 50 Years of Progress].

87. Envtl. Prot. Agency, Respiratory Health Effects of Passive Smoking, Lung Cancer and Other Disorders (1992), https://www.epa.gov/sites/production/files/2014-09/documents/passive_smoke.pdf.

88. Ctrs. for Disease Control, Best Practices for Comprehensive Tobacco Control Programs (1999); Ctrs. for Disease Control, Best Practices for Comprehensive Tobacco Control Programs (2007).

89. As of October 1996, 16 states had sued the tobacco industry. *See Utah Sues Tobacco Companies*, Wash. Post, Oct. 1, 1996, at A9 (reporting that Utah joined 15 other states, along with many counties and cities, in filing lawsuits against major tobacco companies).

already reached settlements, and with 30 state suits in the pipeline and more on the way, the industry was feeling particularly vulnerable.[90] In 1997, the tobacco company executives and the 46 remaining states began negotiating what they described as a "global settlement agreement."

A. *Global Settlement Agreement*

As part of the proposed agreement, the tobacco industry agreed to accept federal regulation of the marketing and advertising of tobacco products, FDA jurisdiction over tobacco products, and funding for tobacco control education.[91] It also agreed to make substantial payments to government and private parties that had filed lawsuits against the industry. In exchange, the agreement would have granted the tobacco industry substantial relief from punitive damages in present and future litigation and capped annual litigation payments.[92] These industry protections were to be imposed not by settlements with present or future smoking victims but rather by congressional enactment without victims' consent. The so-called settlement's immunity provisions would also have mandated an end to all actions brought by the state attorneys general, with or without their consent, and would have prohibited future prosecution of any such actions.[93] This immunity would also have eliminated punitive damages for actions by the industry in the past, outlawed all private class action suits against the industry, and capped the total amount of money that the industry would have to pay in any year if it lost any lawsuit brought by a private party as an individual.[94] Although these provisions were of uncertain constitutionality, they were central to the global settlement agreement.

Because implementing the global settlement required legislation, it was subject to intense public scrutiny and exposed severe divisions within the public health community—particularly regarding the advisability of limiting the tobacco industry's legal liability to states and private plaintiffs.[95] A bipartisan coalition of legislators and private health leaders began working to strengthen the proposal's public health provisions such as youth access, warning labels, and smoke-free requirements; higher tobacco taxes; FDA regulation of nicotine; industry fines for its failure to reduce teen smoking;

90. Brandt, *supra* note 7, at 420.
91. Michael Givel & Stanton Glantz, *The "Global Settlement" With the Tobacco Industry: 6 Years Later*, 94 Am. J. Pub. Health 218, 218–24 (2004), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1448231.
92. *Id.* at 221–22.
93. *Id.*
94. *Id.*
95. *See, e.g.*, Brandt, *supra* note 7, at 420–31; Pertschuk, *supra* note 13.

and higher tobacco company penalties to be paid to the states and the federal government (raising the settlement proposal of the attorneys general from $385 billion to over $500 billion).[96] Most significantly, as the proposal was enhanced, key sponsors—including Senator John McCain of Arizona—were persuaded to abandon the immunity provisions at the heart of the industry's support for the bill.[97] Frustrated by this development and the strengthened health provisions, the industry reversed its position and worked to kill the legislation, even running advertising campaigns in the districts of key legislators.[98] Back in the halls of Congress, the industry—among other tactics—"loaded . . . up [the legislation] with amendments irrelevant to tobacco, and then opposed it on the ground that it was no longer a tobacco bill. The industry could no longer get whatever it wanted from Congress, but it still had the power to kill what it did not want."[99] Finally, tobacco manufacturers withdrew their support and the bill died in committee.[100]

B. *Master Settlement Agreement*

After Congress' inability to agree on federal tobacco legislation and the global settlement's subsequent failure, the states and tobacco companies regrouped to develop a settlement that did not require implementation by legislation.[101] On November 23, 1998, Philip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard (collectively, the "Original Participating Manufacturers"), along with 46 states, four U.S. territories, the Commonwealth of Puerto Rico, and the District of Columbia (the "Settling States"), finally entered into the MSA—the largest civil litigation settlement in U.S. history. Importantly, although American Indians and Alaska Natives (AI/ANs) suffer a disproportionate amount of health harms related to commercial tobacco use, tribes did not participate in the state tobacco litigation and were excluded from the MSA—a decision with complicated consequences, as discussed later in this chapter.

This agreement was a watered-down version of the global tobacco settlement, dropping many features of the earlier agreement such as "mandates for stronger package warnings, tighter enforcement on sales to youth, stronger public [smoke-free laws], and look-back provisions to reduce youth smoking."[102] Also,

96. Brandt, *supra* note 7, at 427.
97. Givel & Glantz, *supra* note 91, at 222.
98. Brandt, *supra* note 7, at 428.
99. *Id.* at 429.
100. *See* Gostin, *supra* note 21, at 210.
101. Brandt, *supra* note 7, at 431–34.
102. Brandt, *supra* note 7, at 432.

unlike the earlier agreement, which banned both human and animal figures in tobacco ads, the MSA only banned cartoons.[103]

According to the first section of the MSA, the parties settled "to avoid the further expense, delay, inconvenience, burden and uncertainty of continued litigation (including appeals from any verdicts)."[104] The Settling States intended the MSA to further "policies designed to reduce Youth smoking, to promote the public health and to secure monetary payments to the Settling States."[105] The MSA released the tobacco companies from liability for state- and local-government lawsuits for past and future legal claims for costs incurred in response to smoking-related illnesses and death and for equitable relief. Importantly, the tobacco industry gained no protection from class action lawsuits and claims brought by individuals, labor unions, private health care insurers, or the federal government.[106]

In exchange, the companies agreed to make annual payments in perpetuity to the Settling States and to substantially restrict their advertising, promotion, and marketing of cigarettes. The agreement also repeated the requirement—already in place from the Minnesota Tobacco Settlement six months earlier—that the tobacco companies make public the millions of pages of internal documents uncovered in the litigation.[107] It was this requirement that made publicly available decades of industry research and knowledge about the addiction, illness, and death caused by cigarettes, as well as the companies' intentional, coordinated campaign of deception.

1. Parties

The Settling States included 46 states, four U.S. territories, the Commonwealth of Puerto Rico, and the District of Columbia. The tobacco companies, referred to as Original Participating Manufacturers, included the country's largest cigarette manufacturers, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, and Lorillard Tobacco Company. Since the MSA became effective, mergers and acquisitions have left R.J. Reynolds as the successor in interest to Brown & Williamson and Lorillard, leaving two Original Participating Manufacturers remaining.[108]

103. *Id.*
104. MSA, *supra* note 1, at §I.
105. *Id.*
106. C. Stephen Redhead, Cong. Research Serv., Tobacco Master Settlement Agreement (1998): Overview, Implementation by States, and Congressional Issues 2 (1999) (RL30058).
107. MSA, *supra* note 1, at §IV.
108. *See The ABCs of the Tobacco Settlement Agreement*, *supra* note 3.

Later, additional tobacco manufacturers, known as Subsequent Participating Manufacturers, settled with the states under the MSA. (Original and Subsequent Participating Manufacturers are referred to collectively as Participating Manufacturers.) The number of Participating Manufacturers remains fluid as, over the years, additional manufacturers have settled with the states and others have gone out of business. As of October 2019, more than 50 Participating Manufacturers are bound by the terms of the MSA.

2. Elements of the settlement

a. Payments

The MSA set up initial, annual, and "strategic contribution" payments (described below) from Participating Manufacturers to the Settling States. Every year, based on national sales information submitted by the companies, an independent auditor calculates the settlement payment to be made by each Participating Manufacturer and the amount to be received by each Settling State.[109] If parties disagree with the auditor's calculations, the matter is submitted to binding arbitration conducted by three neutral arbitrators who must be former federal judges.[110]

Initial payments. In addition to annual payments (which began on April 15, 2000), the MSA required Participating Manufacturers to make upfront payments in each of the first five years after its execution for a total of about $12.75 billion, adjusted for the volume of cigarette shipments in those years compared with the volume in 1997.[111]

Annual payments (made in perpetuity). The MSA provides that the Participating Manufacturers' payments to the Settling States will continue in perpetuity—in much the same way as the Settling States' Medicaid and other health care costs due to their citizens' smoking-related illnesses are likely to continue indefinitely for as long as U.S. tobacco products continue to be legally sold and purchased.[112] The "base amounts" of these annual pay-

109. *See generally* MSA, *supra* note 1, at §XI.
110. *Id.* at §XI(c).
111. *Id.* at §IX(b). After applying the volume adjustment, the initial payments for the first five years were somewhat lower.
112. *See id.* at §IX(c).

ments gradually increased from 2000 to 2018 and will remain at the 2018 base amount, $9 billion, in perpetuity.[113]

All told, given these provisions, Participating Manufacturers are paying billions of dollars annually to the Settling States. For example, in 2018, the Participating Manufacturers paid close to $7.2 billion to the Settling States, pushing the total amount paid over $126 billion as of July 2018.[114]

The Settling States receive an allocation of these payments based on a percentage set forth in Exhibit A to the MSA. Participating Manufacturers are required to make annual payments based on their shares of national cigarette sales and shipments. Importantly, calculations of annual payments are complex and are subject to a variety of potential adjustments and offsets, including an inflation adjustment and a volume adjustment.[115] These payments are increased to account for inflation (with a minimum increase of 3% per year) but are reduced when the top four Participating Manufacturers' combined U.S. cigarette sales or their combined percentage share of the total U.S. cigarette market fall below 1997 levels—and their U.S. market sales and shares have been declining steadily.[116] This downward volume adjustment (i.e., percentage reductions in cigarette shipment volumes) has been greater than inflation adjustments since 1997 and, thus, actual annual payments have been lower than those set forth as base amounts in the MSA and are expected to continue to be. In addition, Participating Manufacturers have routinely withheld payments or placed the payments in an escrow account pending the resolution of disputes involving the above mentioned adjustments.[117]

113. The amounts were $4.5 billion in 2000, $5.0 billion in 2001, $6.5 billion from 2002 to 2003, $8.14 billion from 2008 to 2017, and $9 billion in 2018 and each subsequent year in perpetuity. Nat'l Ass'n Att'ys Gen., Payments to Date as of July 19, 2018 (2018), http://www.naag.org/assets/redesign/files/Tabacco/2018-07-25__Payments_to_States_Inception_through_July_19_2018.pdf.

114. *Id.*; *see also* MSA, *supra* note 1, at §IX(c)(1).

115. MSA, *supra* note 1, at §IX(c)(1). Other adjustments include the previously settled states reduction, non-settling states reduction, non-participating manufacturer (NPM) adjustment, federal tobacco legislation offset, litigating releasing parties offset, and offsets described in MSA subsections XI(i), XII(a)(4)(B), and XII(a)(8).

116. Campaign for Tobacco-Free Kids, Fact Sheet, Summary of the Master Settlement Agreement (2017), https://www.tobaccofreekids.org/assets/factsheets/0057.pdf.

117. Campaign for Tobacco-Free Kids, Fact Sheet, Actual Annual Tobacco Settlement Payments Received by the States, 1998–2019 (2019). These withheld payments have been subject to the resolution of disputes pursuant to the NPM adjustment, which have reduced the payments to Settling States beyond the base amounts specified in the MSA. The NPM provision was intended to protect the Participating Manufacturers from price competition from non-participating manufacturers that did not have to make annual payments. Due to the way related statutory provisions were enacted state by state, the NPM provision has led to protracted negotiation and arbitration over adjustment disputes for the states with the Participating Manufacturers, with parties often splintering in an attempt to collect their share of the disputed payments. *See id.*; Campaign for Tobacco-Free Kids, Fact Sheet,

Strategic contribution payments. The MSA also requires Participating Manufacturers to provide "bonus payments" to states that invested resources into the litigation that led to the MSA. The payments are allocated according to the percentages set forth in Exhibit U to the MSA, which were based on "each Settling State's contribution to the litigation or resolution of state tobacco litigation."[118] The Participating Manufacturers' base strategic contribution payment was $861 million each year from 2008 to 2017,[119] subject to the same adjustments as the annual payments.[120]

Each state can use its annual MSA payments as it chooses. This is an important feature of the settlement, which, in hindsight, is seen by many as a major flaw that has enabled state legislatures to use the funds for purposes unrelated to tobacco use and reduction. One of the core purposes of the MSA was "to reduce Youth smoking [and] to promote the public health . . . and achieve for the Settling States and their citizens significant funding for the advancement of public health . . . ."[121] Unfortunately, these statements are in the recitals or "whereas" clauses of the agreement.[122] The MSA lacks any binding provisions that require states to use the MSA payments—or any portion of them—to fund tobacco prevention and cessation.

Many state legislatures use a small amount of the funds for tobacco control and cessation programs, but many have also directed most of the money to other purposes such as security for loans or for a state's general funds.[123] No state provides for direct MSA payments to individuals to pay for medical costs resulting from tobacco use.

b. Restrictions

The MSA also imposes significant prohibitions and restrictions on tobacco advertising, marketing, and promotional programs or activities.[124] For example, it prohibits or restricts:

- Direct and indirect targeting of youth;

Multistate Settlement Agreement: The Non-Participating Manufacturers Adjustment and the Model Statute (1999), https://www.tobaccofreekids.org/assets/factsheets/0065.pdf.

118. MSA, *supra* note 1, at §IX(c)(2), Exhibit U.
119. *Id.*
120. *Id.* at §IX(c)(1).
121. *Id.* at §I.
122. Micah L. Berman, *Using Opioid Settlement Proceeds for Public Health: Lessons From the Tobacco Experience*, 67 U. Kan. L. Rev. 1029, 1036 (2019).
123. *See* Brandt, *supra* note 7, at 465; *see also* Jones & Silvestri, *supra* note 50.
124. MSA parties expressly waived their right to challenge provisions of the MSA on constitutional grounds such as violation of free speech rights under the First Amendment. *See* MSA, *supra* note 1, at §§III, XV.

- Use of cartoon characters;
- Billboards, transit ads, and other outdoor advertising not in direct proximity to a retail establishment that sells tobacco products;
- Product placements in entertainment media;
- Free tobacco product samples (except in adult-only facilities);
- Gifts to youth in exchange for proofs of purchase;
- Branded merchandise; and
- Brand name sponsorships.

In addition, the MSA prohibits tobacco industry practices and conduct that seek to hide negative information about smoking, such as:

- Lobbying against certain tobacco control legislation and administrative rules at the state or local level[125]'
- Agreements to suppress health-related research;
- Material misrepresentations about the health consequences of using tobacco[126]; and
- Dismantling/prohibiting certain tobacco industry initiatives.

The MSA dismantled key tobacco industry initiatives, including the Center for Indoor Air Research[127] and The Tobacco Institute, Inc. (the Tobacco Institute).[128] It also prohibits Participating Manufacturers from creating

125. *See id.* at §III(m); *see also* Campaign for Tobacco-Free Kids, Fact Sheet, Master Settlement Agreement Restrictions on Tobacco Company Lobbying Efforts (2005), http://www.tobaccofreekids.org/research/factsheets/pdf/0064.pdf [hereinafter *Restrictions on Lobbying Efforts*]. For instance, the MSA bars any efforts by the tobacco companies or their lobbyists to oppose proposals to restrict youth access to vending machines, include "cigars" in the definition of "tobacco products," enhance the enforcement of laws forbidding sales of tobacco products to youth, support the use of new technology to enforce age-of-purchase laws, limit promotions of non-tobacco products that use tobacco products as prizes or giveaways, enforce access restrictions through penalties on youth possession or use, limit tobacco product advertising or wearing tobacco logo merchandise in or on school properties, and limit non-tobacco products designed to look like tobacco products (e.g., candy cigarettes). *Restrictions on Lobbying Efforts*, *supra* note 125.

126. *See* MSA, *supra* note 1, at §III(r).

127. This initiative was initially formed and funded by Lorillard, Philip Morris, and R.J. Reynolds. Among other purposes, the Center sought to call into question reports linking environmental tobacco smoke (secondhand smoke) to lung cancer. Unlike the Tobacco Institute, the industry aimed to cast this center as a completely separate nonprofit entity. Tobacco Control Legal Consortium, The Master Settlement Agreement: An Overview 4 n.25 (2015), https://publichealthlawcenter.org/sites/default/files/resources/tclc-fs-msa-overview-2015.pdf.

128. After it forced the Institute to disband, the MSA required all its internal documents to be placed online. The tobacco industry used the Tobacco Institute as its main arm in challenging anti-tobacco

other industrywide groups unless such groups agree to act consistently with the MSA's provisions.[129]

However, companies are still permitted to fund independent research efforts, academic institutions, and other community organizations. For example, from 2000 to 2007 and before it shut down, the Philip Morris External Research Program awarded some $200 million to 470 research projects at 60 different medical schools.[130] Likewise, the tobacco corporation Altria Group (Altria) continues to donate to a variety of national, regional, and local organizations working in youth development, environmental protection, civic engagement, and the arts.[131] In 2019, charitable giving by Altria totaled $46.9 million.[132]

c. Creation of a tobacco prevention foundation

The MSA created the American Legacy Foundation (now known as the Truth Initiative), a research and educational organization that focuses its efforts on preventing teen smoking and encouraging smokers to quit. The foundation is responsible for the truth® campaign,[133] which has had success in reducing youth smoking.[134]

d. Required document disclosure

The MSA also requires the Participating Manufacturers to make available online the non-privileged documents they disclosed during the discovery

studies and initiatives. "[T]he bulk of public relations activity concerning industry response to the smoking and health controversy emanates from The Tobacco Institute . . . [T]he Institute acts as official spokesman for the industry, always reflecting the official strategy positions agreed upon by all members." *Status Report and Update: Public Relations Strategy of U.S. Tobacco Manufacturers re Smoking & Health Controversy*, Tobacco Inst. (May 1, 1976), http://industrydocuments.library.ucsf.edu/tobacco/docs/ptpk0146. The Council for Tobacco Research—the name given in 1964 to 1953's Tobacco Industry Research Committee—had already been dismantled six months earlier under the Minnesota Tobacco Settlement. *See* Minnesota Tobacco Settlement Agreement, *supra* note 2, at §VI; *Tobacco Industry Research Committee*, *supra* note 9.

129. *See* MSA, *supra* note 1, at §III(p).

130. Researchers under the auspices of the program published 1,200 articles in peer-reviewed journals ranging from *Science and Nature* to the *Journal of Clinical Investigation*. *See* David Grimm, *Philip Morris Pulls the Plug on Controversial Research Program*, 319 Science 1173 (2008).

131. *Investing in Communities*, Altria, http://www.altria.com/Responsibility/Investing-In-Communities/Pages/default.aspx (last visited Apr. 14, 2020).

132. *Id.*

133. *The Truth*, http://www.thetruth.com (last visited May 22, 2020).

134. *See, e.g.,* Donna Vallone et al., *The Effect of Branding to Promote Healthy Behavior: Reducing Tobacco Use Among Youth and Young Adults*, 14 Int'l J. Envtl. Res. & Pub. Health 1517 (2017), *available at* https://www.mdpi.com/1660-4601/14/12/1517 (finding that in just one year the truth® campaign prevented over 300,000 young people from starting to smoke); *see also* Cheryl Healton, *Who's Afraid of the Truth?,* 91 Am. J. Pub. Health 554, 554–58 (2001).

phase of the tobacco litigation as well as any such documents produced in discovery in any federal or state civil action concerning smoking and health.[135]

3. Enforcement provisions

Under section VII of the MSA, each Settling State may bring an action to enforce the MSA or the consent decree (the settlement contained in a court order) with respect to disputes or alleged breaches within its territory.[136] The court that entered a Settling State's consent decree has exclusive jurisdiction to implement and enforce the MSA with respect to that state.

Section VIII(a) of the MSA places responsibility on the National Association of Attorneys General (NAAG) to coordinate and facilitate the MSA's implementation and enforcement on behalf of the attorneys general of the Settling States, who initiated the lawsuits that led to the adoption of the MSA.[137] NAAG carries out this mandate through an attorney general-level Tobacco Committee; an Enforcement Working Group, which consists of attorney general office staff working on tobacco issues; and the NAAG Tobacco Project, which is composed of staff attorneys within NAAG who support state enforcement efforts.[138]

Enforcement typically begins when a state attorney general or NAAG observes a potential violation of the MSA or a member of the public or a public organization complains about a Participating Manufacturer's marketing practices to a state attorney general or NAAG. If the matter is not resolved through negotiation, one or more Settling States may decide to bring an enforcement action against the Participating Manufacturer. The Settling States have several remedies for addressing MSA violations.

a. Voluntary cessation

The threat of enforcement can induce companies to voluntarily abandon challenged marketing campaigns. For example, the U.S. Smokeless Tobacco

135. MSA, *supra* note 1, at §IV. This requirement expired on June 30, 2010, but it has been continued until September 1, 2021, under the judgment entered in the federal government's RICO action against the major cigarette manufacturers. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 941–44 (D.D.C. 2006). The documents are also still available in the *Legacy Tobacco Documents Library*, https://industrydocuments.library.ucsf.edu/tobacco (last visited June 14, 2020).

136. *See* MSA, *supra* note 1, at §VII. The MSA begins with a series of "whereas" clauses, including the following: "WHEREAS, the undersigned Settling State officials believe that entry into this agreement and uniform consent decrees with the tobacco industry is necessary in order to further the Settling States' policies designed to reduce Youth smoking, to promote the public health and to secure monetary payments to the Settling States." *Id.* at §I.

137. *See id.* at §VIII(a).

138. The NAAG Tobacco Project is now known as the "NAAG Center for Tobacco and Public Health."

Co. withdrew a false statement about product safety after the Rhode Island Attorney General ordered the company to desist in 1999.[139] Similarly, Brown & Williamson discontinued its *B-Kool* campaign in 2000 after being investigated jointly by a number of states.[140]

b. Litigation

Ambiguities in some of the MSA's provisions have led states to initiate litigation to clarify or confirm whether free matchbooks qualify as prohibited "merchandise" under the MSA,[141] whether magazine advertisements are intended to target youth,[142] and whether the prohibition on brand name sponsored events has been violated.[143] If the plaintiff state prevails, it can seek injunctive relief, monetary remedies, and attorneys' fees.

Injunctive relief. For example, California sued R.J. Reynolds for failing to amend its advertising practices in the wake of the multistate backlash against the *B-Kool* campaign. The court subsequently ordered R.J. Reynolds to refrain from continuing to expose youth to its advertising at levels similar to exposure levels of adult smokers and to take other reasonable measures to reduce youth exposure to its advertising.[144]

Monetary remedies and attorneys' fees. Courts in every MSA state have approved a consent decree to facilitate enforcement of the MSA.[145] Many of

139. Dennis Eckhart, The Tobacco Master Settlement Agreement: Enforcement of Market Restrictions 4 (2004), https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-syn-marketing-2004.pdf.
140. This multistate investigation was pivotal in prompting other companies to reduce youth exposure to their ads in national magazines. *See id*. at 5.
141. State *ex rel.* Jim Petro v. R.J. Reynolds Tobacco Co., 820 N.E.2d 910 (Ohio 2004) (finding that R.J. Reynolds' matchbooks bearing brand names are brand name merchandise prohibited by section III(f) of the MSA).
142. People *ex rel.* Bill Lockyer v. R.J. Reynolds Tobacco Co., 11 Cal. Rptr. 3d 317 (Cal. Ct. App. 2004) (ruling that R.J. Reynolds intended to target youth in violation of section III(a) of the MSA because of the degree to which youth were exposed to its magazine ads).
143. The People *ex rel.* Bill Lockyer v. R.J. Reynolds Tobacco Co., 132 Cal. Rptr. 2d 151 (Cal. Ct. App. 2003) (ruling that R.J. Reynolds placed billboards at sites of brand name sponsorships for a longer time than permitted by the MSA); State *ex rel.* Terry Goddard v. R.J. Reynolds Tobacco Co., 75 P.3d 1075 (Ariz. Ct. App. 2003) (same). *But see* State *ex rel.* Spitzer v. R.J. Reynolds Tobacco Co., No. 401561/01, at *6, *8 (N.Y. Sup. Ct. Jan. 30, 2002), *available at* https://www.industrydocumentslibrary. ucsf.edu/tobacco/docs/#id=qqcf0064 (ruling in favor of R.J. Reynolds on same issue and finding New York's proffered interpretation of the MSA to be "unreasonable" and "a disingenuous effort to confuse").
144. Eckhart, *supra* note 139, at 6.
145. All states have such consent decrees except for Mississippi, Florida, Texas, and Minnesota because these states pursued individual settlements with four tobacco companies, settlements that preceded the MSA.

the noneconomic or public health provisions of the MSA are established in section V of these separate consent decrees.[146] If a company's conduct violates the consent decree as well as the MSA, the court can find the company in civil or criminal contempt of court, impose monetary fines and penalties on the company, and order the company to pay the state's costs and attorneys' fees.[147] The availability of monetary penalties and attorneys' fees as remedies for violations of a consent decree is a key difference between its enforcement and the enforcement of the MSA.[148] Monetary remedies could range from investigative costs[149] to funds that must be earmarked for tobacco prevention efforts[150] to punitive penalties.[151]

IV. Outcomes and Lessons Learned

A. *Successes*

1. Lowered smoking rates

The MSA was a landmark accomplishment that directly contributed to a reduction in adult smoking rates in the United States, achieving one of its primary goals.[152] The MSA and subsequent state and federal cigarette tax increases resulted in significant hikes to the price of cigarettes, which is one of the most effective ways to reduce smoking—especially among price-sensitive youth.[153] The MSA's perpetual payments to the Settling States led the major cigarette companies to raise prices by more than $1.10 per pack

146. Eckhart, *supra* note 139, at 1.
147. *Id.*
148. *Id.* at 1–2.
149. *Id.* at 7.
150. *Id.* at 4.
151. State v. R.J. Reynolds Tobacco Co., No. GIC 764118 (Cal. Super. Ct. 2002). *But see* People *ex rel.* Lockyer v. R.J. Reynolds Tobacco, Co., 124 P.3d 408 (Cal. 2005).
152. Since the adoption of the MSA, smoking rates among U.S. adults declined from approximately 23.3% in 2000 to 13.7% in 2018. Ctrs. for Disease Control, *Cigarette Smoking Among Adults—U.S., 2000*, 57 Morbidity & Mortality Weekly Rep. 642 (2002); *Current Cigarette Smoking Among Adults in the United States*, Ctrs. for Disease Control, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/index.htm (last visited May 21, 2020) [hereinafter *Current Adult Smoking*]. Moreover, smoking rates among U.S. youth declined from approximately 20.6% in 2000 to approximately 5.8% in 2018. Campaign for Tobacco-Free Kids, Fact Sheet, Tobacco Use Among Youth (2019), https://www.tobaccofreekids.org/assets/factsheets/0002.pdf. Note, however, that the rate of youth use of tobacco and nicotine products has recently risen, with an estimated 27.5% of high school students in 2019 reporting current use of e-cigarettes. Karen Cullen et al., *E-Cigarette Use Among Youth in the United States, 2019*, 322 J. Am. Med. Ass'n 2095 (2019), *available at* https://jamanetwork.com/journals/jama/article-abstract/2755265.
153. Dep't of Health & Human Servs., Smoking and Tobacco Control Monograph: Population Based Smoking Cessation 165-74 (2000), *available at* https://cancercontrol.cancer.gov/brp/tcrb/monographs/12/entire_monograph-12.pdf.

from 1998 to 2000.[154] Only part of these increases was used to fund the required payments to the states, while approximately half of the increase actually boosted tobacco company profits.[155] State and federal cigarette tax increases also raised cigarette prices, with the average combined federal-state cigarette tax increasing from $0.63 per pack in 1998 to $2.79 in 2018 as well as 49 out of 50 states increasing their state taxes on cigarettes since the MSA was executed.[156]

In 1999, MSA proceeds also created the national nonprofit American Legacy Foundation (renamed the Truth Initiative in 2015), whose award-winning counter-marketing truth® campaign,[157] combined with the increased tobacco taxes, helped reduce the smoking rate among young people—another stated goal of the MSA.[158] The truth® campaign had a significant impact on the drop in youth smoking, with one 2005 study finding that between 1999 and 2002, "smoking prevalence among [middle- and high-school] students declined from 25.3% to 18.0% . . . and that the [truth®] campaign accounted for approximately 22% of this decline."[159]

2. Disclosure and regulatory control

Another significant benefit of the MSA was its role in raising public and political awareness not just of the dangers of tobacco use but of the tobacco industry's conduct, including the extent to which it misled consumers about the health risks of its products. By requiring the tobacco industry to disclose internal documents and make them publicly available, the states' litigation enabled policymakers, regulators, journalists, researchers, lawyers, students, and the public at large to uncover new evidence about industry practices and tactics—evidence that was used effectively in subsequent seminal lawsuits such as *United States v. Philip Morris USA Inc.*[160]

154. Matthew L. Myers, *On 20th Anniversary of State Tobacco Settlement (the MSA), It's Time for Bold Action to Finish the Fight Against Tobacco*, Campaign for Tobacco-Free Kids (Nov. 26, 2018), https://www.tobaccofreekids.org/press-releases/2018_11_26_msa20.
155. *Id.*
156. *Id. See also* Campaign for Tobacco-Free Kids, Fact Sheet, State Cigarette Tax Increases Per Year (& Recessions) Since 1980 (2020), https://www.tobaccofreekids.org/assets/factsheets/0212.pdf.
157. Brandt, *supra* note 7, at 436–37.
158. Steven A. Schroeder, *Tobacco Control in the Wake of the 1998 Master Settlement Agreement*, 350 New Eng. J. Med. 293, 295 (2004).
159. Matthew C. Farrelly et al., *Evidence of a Dose–Response Relationship Between "truth" Antismoking Ads and Youth Smoking Prevalence*, 95 Am. J. Pub. Health 425, 425 (2005). This evaluation included authors from the American Legacy Foundation and so was not fully independent. *See also* Vallone et al., *supra* note 134.
160. United States v. Philip Morris USA Inc., 449 F. Supp. 2d 1 (D.D.C. 2006).

In that case, the U.S. Department of Justice filed its own suit against the tobacco industry for violating RICO. In 2006, after six years of litigation, nine months of trial, hundreds of depositions, and thousands of exhibits,[161] U.S. District Court Judge Gladys Kessler issued a 1,683-page opinion, holding that the tobacco companies "engaged in and executed—and continue to engage in and execute—a massive 50-year scheme to defraud the public, including consumers of cigarettes, in violation of RICO."[162] Drawing extensively from evidence revealed in tobacco documents now available as a result of the tobacco settlements, Judge Kessler held that the tobacco industry's decades-long conspiracy had misled the public about the risks of smoking and the danger of secondhand smoke, misrepresented the addictiveness of nicotine, manipulated the nicotine delivery of cigarettes, deceptively marketed cigarettes characterized as "light" or "low tar," targeted the youth market, and intentionally failed to produce safer cigarettes.[163]

The internal tobacco industry documents, which the public can easily access online[164] and in repositories at the University of California, San Francisco, can be used to reveal the industry's historical role in suppressing information, gain insight into its business practices, and provide hard evidence for attorneys building a case for tobacco control laws and policies or facing legal challenges to tobacco control measures. Disclosure of this evidence was key to finally compelling action on significant federal tobacco regulation. In June 2009, President Barack Obama signed the Family Smoking Prevention and Tobacco Control Act, giving FDA unprecedented authority to protect the public health by comprehensively regulating tobacco products.[165] Thus, after 40 years of failed legislative efforts, the states' judicial settlements—along with the federal litigation—were critical to the long-overdue introduction of federal tobacco regulation.

161. *See* D. Douglas Blanke, *The Verdict Is In: Findings From* United States v. Philip Morris *Collection*, Pub. Health L. Ctr. (2006), https://www.publichealthlawcenter.org/topics/special-collections/verdict-findings-united-states-v-philip-morris-collection.

162. *United States v. Philip Morris (D.O.J. Lawsuit)*, Pub. Health L. Ctr., https://publichealthlawcenter.org/topics/commercial-tobacco-control/commercial-tobacco-control-litigation/united-states-v-philip (last visited May 22, 2020).

163. *See* Tobacco Control Legal Consortium, The Verdict Is In: Findings From *United States v. Philip Morris,* (2006), https://www.publichealthlawcenter.org/sites/default/files/resources/tclc-verdict-is-in.pdf.

164. See *State Tobacco Settlements*, *supra* note 2.

165. Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776. FDA regulatory authority includes establishing tobacco product standards, reviewing products before their introduction to the market, restricting product marketing and advertising, preventing illicit trade, and strengthening warning labels.

B. Shortcomings

1. Misallocation of funds

Despite its many important successes, the MSA includes some important flaws. When it was executed in 1998, the public health community was excited that huge state payments—estimated to total nearly $206 billion from the tobacco industry through 2025 and billions more in perpetuity—would be available to fight the tobacco epidemic.[166] As one tobacco control expert remarked, "For a brief historical moment, the air was filled not with smoke but with optimism that soon all states would mount credible, comprehensive tobacco control programs."[167] After all, as early as the 1990s, evidence had been mounting that states with well-funded and sustained tobacco prevention programs had substantially reduced tobacco use by their residents.[168] And what better way to fund and sustain tobacco prevention programs than with these hefty payments to the states from the MSA?

The public health community's jubilation over the signing of the MSA was short-lived. Although many state officials initially promised to dedicate MSA funds to public health and tobacco control, those promises were forgotten once they realized the MSA did not require them to allocate settlement revenues to tobacco prevention and cessation efforts. It did not take long for state legislatures to begin to treat MSA revenues as "found money"—a "cookie jar" to be tapped for general purposes and to cover budget shortfalls.[169] As a result of decisions by state legislatures, which are responsible for deciding how the money is spent, few of these funds have been designated for tobacco control and prevention programs. Between 1998 and 2019, less than 1% of the $161 billion in payments received by Settling States were earmarked for state tobacco prevention programs.[170]

166. *See The ABCs of the Tobacco Settlement Agreement*, *supra* note 3; Jones & Silvestri, *supra* note 50, at 694.

167. Kenneth E. Warner, *Tobacco Policy in the United States: Lessons for the Obesity Epidemic*, *in* Policy Challenges in Modern Health Care 99, 104 (David Mechanic ed., 2005).

168. Matthew C. Farrelly et al., *The Impact of Tobacco Control Program Expenditures on Aggregate Cigarette Sales: 1981–2000*, 22 J. Health Econ. 843, 843 (2003) (finding that between 1990 and 2000, sales fell an average of 43% in four key states with large program expenditures—Arizona, California, Massachusetts, and Oregon—compared with 20% for all states, and that program funding levels accounted for a substantial portion of this difference, with increasing expenditures producing bigger and faster declines in sales).

169. Jones & Silvestri, *supra* note 50, at 695.

170. Campaign for Tobacco-Free Kids, Fact Sheet, Actual Annual Tobacco Settlement Payments Received by the States, 1998–2019 1 (2019), https://www.tobaccofreekids.org/assets/factsheets/0365.pdf.

Rather than spending the MSA monies on tobacco control measures, many governors and state legislatures spent the funds to cover budget shortfalls or address fiscal priorities in areas other than tobacco prevention such as education, social services, or infrastructure. Some states even used MSA money for such expenditures as $700,000 for golf carts and a sprinkler system for a public golf course (New York), $12 million for laying fiber-optic lines for broadband cable (Virginia), and $1 million for juvenile offender boot camps, alternative schools, metal detectors, and public school surveillance cameras (Alabama).[171]

Several states, including New York, California, and Connecticut, went so far as to securitize some or all of their MSA revenues, selling their yearly MSA payments through state-backed bonds. For a variety of reasons, including meeting budget shortfalls, these states sold their rights to future payments in exchange for immediate smaller lump-sum payments on some or all their current and future settlement revenues.[172] While the industry continues to make its required MSA payments to these states, the funds are then immediately disbursed to bondholders, leaving the states with no future MSA revenues to allocate to tobacco control programs (or for any other purpose) for the duration of the bonds.[173] By 2010, 18 states, the District of Columbia, and three U.S. territories had securitized some or all of their MSA revenue entitlements into bonds, with the issued bonds totaling $40 billion.[174]

Few states have allocated more than a nominal amount of their tobacco settlement revenue to fund tobacco prevention and cessation programs,[175] making tobacco control programs the *smallest* state budget category to receive MSA funds.[176] Further, the percentage of MSA funds earmarked for tobacco control programs has steadily decreased from approximately 6% of

171. Howard Markel, *Burning Money*, N.Y. Times, Aug. 22, 2005, http://www.nytimes.com/2005/08/22/opinion/22markel.html.
172. *Id.*
173. *See* Berman, *supra* note 122, at 1037–38; *see also* Dearell Niemeyer et al., *The 1998 Master Settlement Agreement: A Public Health Opportunity Realized—Or Lost?*, 5 Health Promotion Practice 21S (2004), *available at* http://hpp.sagepub.com/content/5/3_suppl/21S.abstract.
174. *Tobacco Bonds: Janney Fixed Income Strategy*, Janney Montgomery Scott, Dec. 6, 2010; *see also Moody's Places 31 Tobacco Settlement Bonds Under Review*, Moody's Investor Serv., Jan. 22, 2013, https://www.moodys.com/research/Moodys-places-31-tobacco-settlement-bonds-under-review--PR_264367; *More Concern Over Tobacco Bonds*, FMSBonds, Inc., Jan. 29, 2013, https://www.fmsbonds.com/news-and-perspectives/more-concern-over-tobacco-bonds/.
175. Ctrs. for Disease Control, *State Tobacco Revenues Compared With Tobacco Control Appropriations—U.S., 1998–2010*, 61 Morbidity & Mortality Weekly Rep. 20, 370 (2012).
176. U.S. Gov't Accountability Off., Tobacco Settlement: States' Allocations of Payments From Tobacco Companies for Fiscal Years From 2000 to 2005 6 tbl.2 (2007), http://www.gao.gov/assets/120/115580.pdf (testimony of Lasa Shames, Acting Director, Natural Resources and Environment).

MSA funds in 2001 to only 1.9% in 2015.[177] As of 2018, funding in 15 states did not exceed even 10% of the funding level CDC recommended be devoted to tobacco cessation or prevention programs.[178]

2. Lack of sustainability for tobacco prevention programs

Unsurprisingly, although the MSA was intended to support state tobacco prevention programs, sustainability has been an ongoing problem for many of them. Over the years, program funding has been cut significantly in several states (e.g., Massachusetts, Mississippi, Washington, Indiana, Illinois, Hawaii, and Minnesota), while legislatures withdrew settlement funds entirely in states such as Ohio and North Dakota, forcing tobacco prevention programs to close.[179]

Significant evidence exists showing that comprehensive tobacco control programs reduce smoking rates and that the longer these programs operate, the greater the positive health impact.[180] As a result, the failure of states to invest consistently in tobacco control has had major public health consequences.[181] For example, large health disparities in tobacco use exist across "racial/ethnic groups and between groups defined by educational level, socioeconomic status and region"—a problem identified in the Surgeon General's 2014 report, *The Health Consequences of Smoking.*[182] Dedicated tobacco control resources and leadership at both the state and local levels are needed to address the high prevalence of tobacco use among vulnerable populations, including those with mental health and substance use issues.[183]

177. Cary P. Gross et al., *State Expenditures for Tobacco-Control Programs and the Tobacco Settlement*, 347 New Eng. J. Med. 14, 1080 (2002).

178. Am. Lung Ass'n, State of Tobacco Control 2018 (Jan. 2018), https://www.bhthechange.org/wp-content/uploads/2018/01/state-of-tobacco-control.pdf. While each of the Settling States receives MSA settlement funds in amounts well above both the minimum and ideal funding levels recommended by CDC for tobacco cessation or prevention, they spend significantly less. In 2017, states on average received MSA payments that were 242% of CDC recommended funding levels, yet they spent at only 26% of those recommended levels. In fiscal year 2020, the states will collect a record $27.2 billion from tobacco taxes and settlements but will spend only 2.7% of it—$739.7 million—on tobacco prevention and cessation programs that help smokers quit and prevent youth from starting to smoke. The $739.7 million the states have budgeted for tobacco prevention amounts to just 22% of the $3.3 billion CDC recommends for all states combined. Not a single state currently funds tobacco prevention programs at the level recommended by CDC.

179. *See generally* Berman, *supra* note 122 (including case studies of several state tobacco prevention programs affected by inconsistent settlement funding).

180. *See, e.g.*, Matthew Farrelly et al., *The Impact of Tobacco Control Programs on Adult Smoking*, 98 Am. J. Pub. Health 304, 304–09 (2008), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2376884.

181. Berman, *supra* note 122, at 1038.

182. 50 Years of Progress, *supra* note 86.

183. *See* Berman, *supra* note 122, at 1038; *see also Tobacco Use and Quitting Among Individuals With Behavioral Health Conditions*, Ctrs. for Disease Control, https://www.cdc.gov/tobacco/disparities/

Had the MSA required the allocation of such funding, states and localities might have had the means to tackle health disparities and been better prepared to address recent related industry developments such as the epidemic of youth use of e-cigarettes and nicotine delivery devices.[184] State and local programs committed to tobacco prevention and cessation, research, education, and legal technical assistance can provide much needed insight into tobacco industry practices and strategies—even regarding products such as e-cigarettes, which were unforeseen at the time of the MSA. The need for state and local tobacco control programs continues to exist as long as tobacco use remains the *largest preventable* cause of death and disease in the United States, with approximately 480,000 Americans dying from *tobacco*-related illnesses each year.[185]

3. Loopholes weaken public health provisions

Similarly, the MSA's restrictions on tobacco product marketing, advertising, and industry conduct, while welcome, have been criticized as "not going far enough to reform an industry that for decades knew more about the addictive nature and deadly effects of tobacco use than it ever acknowledged publicly . . . ."[186] Tobacco companies were both resilient and resourceful at finding loopholes to exploit—particularly in marketing their products.

For instance, although the MSA prohibited the targeting of underage persons in tobacco advertising and sharply restricted brand name sponsorship, outdoor advertising, and promotional paraphernalia, companies used other marketing and advertising strategies not covered by MSA guidelines.[187] These strategies have included aggressive point-of-sale advertising and promotion, outdoor signs smaller than billboards (up to 14 square feet), direct marketing, event sponsorship, brand loyalty programs, sweepstakes, and reduced product pricing via discounts and coupons.[188]

Also, despite the MSA's prohibition of product placement in media accessible to young people, movies still often depict the use of cigarettes—a controversial practice that has been shown to influence smoking behavior,

mental-illness-substance-use/index.htm (last updated Feb. 4, 2020).

184. *See* Berman, *supra* note 123, at 1038.

185. *See* 50 Years of Progress, *supra* note 86. This number represents roughly one in five American deaths. In 2018, nearly 14 out of every 100 U.S. adults aged 18 years or older (13.7%) smoked cigarettes, and more than 16 million Americans lived with a smoking-related disease. *Current Adult Smoking*, *supra* note 152.

186. *See* Eckhart, *supra* note 139, at 1.

187. *See* Jones & Silvestri, *supra* note 50, at 695.

188. *Id.*

especially among youth.[189] The tobacco industry continues to use loopholes and ambiguities in the MSA provisions—especially related to marketing and advertising—to circumvent the settlement's public health goals, spending billions of dollars annually on cigarette and smokeless tobacco advertising and promotion alone.[190] In addition, the MSA, which was executed in 1998, did not and could not have anticipated electronic advertising, marketing, and promotion. Although some MSA restrictions are broad enough to cover electronic communications, such as the prohibition on youth targeting, states have not been able to use the MSA effectively to counter the promotion of tobacco products in social media.[191]

4. Exclusion of tribes

AI/AN youth and adults have the highest prevalence of cigarette smoking among all racial/ethnic groups in the United States.[192] Nevertheless, AI/AN tribes were explicitly excluded from the MSA negotiations between state attorneys general and tobacco manufacturers. In 1997, tribal leadership and opinion leaders provided testimony to guide the global settlement agreement, but no tribal testimony or input was included in MSA talks.[193] Yet despite the lack of tribal participation in MSA negotiations, the Settling States still factored in their AI/AN populations in determining the amount of MSA compensation each state would receive from tobacco manufacturers.[194]

While tribal sovereignty generally exempts tribal entities from state law (such as tobacco taxation), tribes are still competing participants in the tobacco market and bear significant health cost burdens related to commer-

189. *See* Benjamin Alamar & Stanton A. Glantz, *Tobacco Industry Profits from Smoking Images in the Movies*, 117 Pediatrics 1462 (2006); Madeline Dalton et al., *Effect of Viewing Smoking in Movies on Adolescent Smoking Initiation: A Cohort Study*, 362 Lancet 281, 281–85 (2003).

190. Fed. Trade Comm'n, Federal Trade Commission Cigarette Report for 2017 (2019), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2017-federal-trade-commission-smokeless-tobacco-report/ftc_cigarette_report_2017.pdf; Fed. Trade Comm'n, Federal Trade Commission Smokeless Tobacco Report for 2017 (2019), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-cigarette-report-2017-federal-trade-commission-smokeless-tobacco-report/ftc_smokeless_tobacco_report_2017.pdf; *Economic Trends in Tobacco*, Ctrs. for Disease Control, https://www.cdc.gov/tobacco/data_statistics/fact_sheets/economics/econ_facts/index.htm (last reviewed May 18, 2020) ("In 2018, tobacco companies spent $9.06 billion marketing cigarettes and smokeless tobacco in the United States. This amount translates to about $25 million every day, or more than $1 million every hour.").

191. *See, e.g.*, Robert Zoinets, *How Big Tobacco Uses Big Tech to Hook New Smokers*, Fast Company, Mar. 27, 2019, https://www.fastcompany.com/90326078/how-big-tobacco-uses-social-media-to-hook-new-smokers.

192. *American Indians/Alaska Natives and Tobacco Use*, Ctrs. for Disease Control, https://www.cdc.gov/tobacco/disparities/american-indians/index.htm (last updated Nov. 25, 2019).

193. Makani Themba-Nixon et al., *More Money More Motivation? Master Settlement Agreement and Tobacco Control Funding in Communities of Color*, 5 Health Promotion Practice 113S, 114S (2004).

194. *Id.*

cial tobacco use.[195] Excluding Tribal Nations from MSA negotiations has resulted in enforcement confusion on the part of federal agencies, who mistakenly believe tribes are committing "MSA fraud" by failing to remit state escrow payments,[196] spawning several tribal lawsuits.[197] Much of this controversy might have been avoided if tribes had been given a seat at the table in the MSA negotiation process and benefited directly from MSA payments.

5. Legal immunity results in Big Tobacco expansion

The MSA has also been criticized for shielding the tobacco industry from future lawsuits by Settling States and related public entities[198] and for essentially granting a monopoly to the largest tobacco companies by preserving their market share[199]—all of which has enabled the industry to thrive, consolidate, and expand its operations into developing countries such as China and India.[200] As one researcher put it, "Beleaguered in America, the Marlboro Man has simply sought out new Marlboro countries."[201] Moreover, the industry has avidly entered into the burgeoning market of e-cigarettes and nicotine delivery devices. Major recent tobacco company investments in e-cigarette firms, such as Altria's 2018 purchase of 35% of Juul Labs, Inc. for $12.8 billion,[202] reveal the industry's determination to continue to produce and promote nicotine products that will addict new generations of users.[203] For tobacco control advocates who fault the MSA for failing to have extracted

195. Ryan D. Dreveskracht, *Forfeiting Federalism: The Faustian Pact With Big Tobacco*, 18 Rich. J.L. & Pub. Int. 291, 292, 300–04, 315–17 (2015).
196. *Id.* at 305.
197. *See* Themba-Nixon et al., *supra* note 193, at 114S.
198. The MSA preempts future litigation brought by any "settling states, subdivisions (political or otherwise, including, but not limited to, municipalities, counties, parishes, villages, unincorporated districts, and hospital districts), public entitles, public instrumentalities, and public educational institutions." MSA, *supra* note 1, at §II. Although individual and class action suits were exempt, this legal immunity "eliminated a wide range of legal vulnerability for the industry." Brandt, *supra* note 7, at 434.
199. *Tobacco Master Settlement Agreement*, State Energy & Envtl. Impact Ctr., N.Y.U. Sch. L., https://www.law.nyu.edu/centers/state-impact/settlements-project/tobacco-master-settlement-agreement (last visited Apr. 14, 2020) (remark of Mark Greenwold at 34:34) (noting that the market share of the largest companies was preserved through the MSA's imposition of obligations on non-settling tobacco companies).
200. *See* Jennifer Maloney & Saabira Chaudhuri, *Against All Odds, The U.S. Tobacco Industry Is Rolling in Money*, Wall St. J., Apr. 23, 2017, https://www.wsj.com/articles/u-s-tobacco-industry-rebounds-from-its-near-death-experience-1492968698.
201. Mukherjee Siddhartha, The Emperor of All Maladies: A Biography of Cancer 273 (2010).
202. On April 1, 2020, the Federal Trade Commission sued to unwind Altria's investment in Juul on alleged federal antitrust violations. *FTC Sues to Unwind Altria's $12.8 Billion Investment in Competitor JUUL*, Fed. Trade Comm'n (Apr. 1, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul.
203. *See, e.g.*, Rakesh Sharma, *The Company Behind Juul*, Investopedia, Jan. 30, 2020, https://www.investopedia.com/news/which-company-behind-popular-ecigarette-juul.

sufficient concessions from the tobacco industry, who believe that providing legal immunity to the industry was a fatal flaw, and who recall that tobacco stocks rallied at the endorsement of the 1998 agreement, the growth of and the singular power of the industry and its global investments confirms their greatest fears.[204]

V. Conclusion

The MSA is not without its critics. It has been viewed as a squandered opportunity to curb cigarette use[205] and a missed "opportunity to build a sustainable tobacco control (or broader public health) infrastructure."[206] It has been faulted for creating "client states" dependent on settlement payments and decried for shifting tobacco-related health costs to individual smokers rather than companies.[207] It has been disparaged as "a pale reflection" of the earlier global settlement, which had more robust tobacco control restrictions.[208] Many of these criticisms have merit. Still, it is worth remembering that the original agreement had limited goals. States sued the tobacco companies to recoup billions of dollars their governments had spent treating people with smoking-related illnesses. The litigation was not intended to help individual injured smokers get health care, curb all cigarette use, or put the tobacco industry out of business.

It is true that while the MSA provides states with massive annual payments, only a small portion of these funds relieve the social and financial burden caused by smoking or help in any systematic way to reduce the prevalence of tobacco use within the recipient states. In hindsight, given the almost universal diversion of MSA funds to non-public health areas, it is tempting to ask the question raised by legal scholar Micah Berman: "What if the MSA had mandated that the funds be used in a particular way, rather than merely placing aspirational language in the 'whereas' clauses?"[209] Requiring, however, state legislatures to allocate settlement funds for tobacco prevention could have had separation-of-powers implications with the executive branches (the attorneys general) in effect exercising the legislative power to appropriate funds, and many attorneys general at the

204. Brandt, *supra* note 7, at 434.
205. Renee Twombly, *Tobacco Settlement Seen as Opportunity Lost to Curb Cigarette Use,* 96 J. Nat'l Cancer Inst. 19 (2004).
206. Berman, *supra* note 122, at 1058.
207. Siddhartha, supra note 201, at 273.
208. *See, e.g.*, Brandt, *supra* note 7, at 432; Givel & Glantz, *supra* note 91, at 222.
209. Berman, *supra* note 122, at 1052.

time questioned their legal authority to compel a legislature to spend state money for a particular purpose.[210]

Despite its shortcomings, the MSA remains a remarkable achievement. It has been described as "represent[ing] one of the largest liability settlements ever reached, and, perhaps more profoundly, the most public admission of collusion and guilt in the history of the tobacco industry."[211] Growing awareness of the tobacco industry's deceit and deception, as exposed in industry documents, along with voluminous medical evidence on the health risks of tobacco use, have led to a shift in public opinion toward tobacco use and contributed to more restrictive and aggressive state tobacco control policies, including a proliferation of smoke-free laws.[212] Moreover, the disclosure of industry documents—first by the Minnesota Tobacco Settlement and later by the MSA—provided tobacco litigants with evidence-based research to support class action and individual lawsuits.[213] For smokers seeking monetary relief for their injuries, the states' litigation opened a treasure trove of evidence in millions of publicly available industry documents.[214] In the years since, tobacco litigants have relied on the incriminating evidence revealed in these documents to bring multiple individual suits against the industry, with many plaintiffs—including those in Oregon[215] and California[216]—winning substantial verdicts.[217]

Coming on the heels of decades of failed tobacco lawsuits, the MSA served as a dramatic reminder of the power of litigation to effect public health policy change. As the largest civil litigation settlement in history, it opened the door to future major tobacco regulation and ongoing federal, state, and local tobacco policy work and litigation. The MSA chastened the tobacco industry; it did not defeat it. Yet that, at the time—for many in tobacco control—was more than they had ever thought possible.

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210. *Id.* at 1052–53. Under constitutional separation-of-powers doctrines, a branch of government—whether legislative, executive, or judicial—cannot exercise the power, authority, and responsibilities of another branch. *See Exploring Constitutional Conflicts: Separation of Powers*, Univ. of Mo. Kansas City, http://law2.umkc.edu/faculty/projects/ftrials/conlaw/separationofpowers.htm (last visited Nov. 17, 2019) (discussing the U.S. Constitution's separation-of-powers doctrine).
211. Siddhartha, supra note 201, at 273.
212. Jones & Silvestri, *supra* note 50, at 698.
213. Gostin, *supra* note 21, at 211–12.
214. *Id.* at 224.
215. *See, e.g.*, Williams v. Philip Morris Inc., 127 P.3d 1165 (Or. 2006) (awarding the plaintiff's estate $79.5 million in punitive damages), *rev'd in part*, 549 U.S. 345 (2007) (holding that the punitive damages award was improperly based in part on the jury's desire to punish the defendant for harm to nonparties).
216. *See, e.g.*, Henley v. Philip Morris Inc., 5 Cal. Rptr. 3d 42 (Cal. Ct. App. 2003) (awarding the plaintiff $25 million in punitive damages, reduced in later proceedings); Boeken v. Philip Inc., 26 Cal. Rptr. 3d 638 (Cal. Ct. App. 2005) (reducing a punitive damage award to $50 million).
217. Gostin, *supra* note 21, at 211–12.