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An Agricultural Law Research Article

**Casualties of the War on Tobacco: Can Farmers  
Survive the Anti-Tobacco Onslaught?**

by

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# CASUALTIES OF THE WAR ON TOBACCO: CAN FARMERS SURVIVE THE ANTI-TOBACCO ONSLAUGHT?

*Jamey Pregon*

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## I. INTRODUCTION

On June 20, 1997, a group of state attorneys general and tobacco industry lawyers announced that a settlement had been reached in a monumental lawsuit against five tobacco manufacturing companies.<sup>1</sup> The proposed agreement included a \$368.5 billion payment<sup>2</sup> by the participating tobacco companies to the states in return for immunity from future lawsuits.<sup>3</sup> The settlement, which required federal

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1. See C. STEPHEN REDHEAD, *THE TOBACCO SETTLEMENT: ISSUES*, CRS ISSUE BRIEF FOR CONGRESS NO. 98-022 (updated June 5, 1998) (on file with the *Drake Journal of Agricultural Law*). The five participating tobacco companies are: Philip Morris USA, R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., and United States Tobacco, Inc. See *id.*

2. See Milo Geyelin & Greg Hitt, *FDA Lacks Power to Regulate Tobacco*, WALL ST. J., Aug. 17, 1998, at A3. This was later hiked up to \$516 billion by Congress. See *id.*

3. See Ceci Connolly, *Elements in Place for Hill to Pass a Tobacco Deal*, WASH. POST, Sept. 21, 1997, at A01.

legislation before taking effect,<sup>4</sup> was sent to Congress to be finalized.<sup>5</sup> The proposed settlement did not make it out of Congress, and federal involvement, at least in the immediate future, seems unlikely.<sup>6</sup>

The proposed settlement announced in June of 1997 was a landmark turning point in the legal battles that tobacco companies have been fighting for nearly forty years.<sup>7</sup> Although the settlement ultimately failed in Congress, the legal problems for the tobacco industry are far from over.<sup>8</sup> Tobacco companies are being sued by the majority of the states over reimbursement for Medicaid funds each state paid out to care for citizens suffering from tobacco-related illnesses.<sup>9</sup> A few of these lawsuits have been settled out of court.<sup>10</sup>

As a result of the widespread litigation against the tobacco industry, much is being revealed about the business practices of some tobacco companies.<sup>11</sup> While

4. See REDHEAD, *supra* note 1. The tobacco companies would be required to enter into legally binding and enforceable contracts with the states. See *id.* In these contracts, the tobacco companies would voluntarily agree to waive their First Amendment rights to advertise their products in exchange for civil litigation protection. See *id.*

5. See Susan B. Garland, *What May Snub Out the Settlement*, BUS. WK., Sept. 8, 1997, at 83.

6. See Connolly, *supra* note 3, at A01. The media tracked the proposed settlement as it stalled and later died in Congress. Hope for the passage of federal legislation was high at first; it was described to be "shaping up as the deal of 1998." *Id.* For a variety of reasons, support would soon fall for the legislation in the Senate. See, e.g., Spencer S. Hsu, *Democrats in Va. Fault Tobacco Bill; Party Leaders Vow to Protect Workers*, WASH. POST, May 2, 1998, at D01. The bill eventually decided upon in the Senate was proposed by Senator John McCain (R-Arizona) and was defeated in the Senate. See Peter Baker & Sandra Torrey, *Federal Tobacco Lawsuit Muddled; Strategy to Replace Defeated Bill Sought*, WASH. POST, July 15, 1998, at A11. Some consideration was being given to a federal lawsuit to be patterned after state lawsuits against the tobacco industry. See *id.*

7. See Benjamin Weiser, *Tobacco's Trials*, WASH. POST, Dec. 8, 1996, at W15 (discussing what led up to the June 20, 1997 announcement).

8. See Frank Swoboda, *Tobacco Stocks Rally After Victory on Hill; Companies Still Face States' Lawsuits*, WASH. POST, June 19, 1998, at F01.

9. Nebraska became the 41st state to file such a lawsuit on August 21, 1998. See Leslie Reed, *State Files Suit Against Big Tobacco; the Attorney General Says the Collapse of a National Settlement Makes Suing Necessary*, OMAHA WORLD-HERALD, Aug. 22, 1998, at 13SF.

10. Minnesota settled its suit just as the jury was to begin its deliberations following a trial that lasted nearly four months. See David Phelps, *Judge Finalizes Tobacco Industry Settlement*, STAR-TRIB. (Minneapolis-St. Paul), May 20, 1998, at 03D. Minnesota will receive \$6.1 billion, Blue Cross and Blue Shield of Minnesota will receive \$469 million, and the Minneapolis law firm of Robins, Kaplan, Miller & Ciresi, which represented the two plaintiffs, will receive more than \$500 million. See *id.* Texas has also settled its lawsuit, receiving a record \$17.3 billion from the defendant tobacco companies. See *Judge Approves Texas Tobacco Pact; State's \$17.3 Billion Settlement Largest in History of Litigation*, DALLAS MORNING NEWS, July 25, 1998, at 2F. Florida settled for \$11.3 billion, and Mississippi settled for \$3.6 billion. See Doug Levy, *Florida Settles Tobacco Suit; Companies Agree to Pay \$11.3 Billion*, USA TODAY, Aug. 26, 1997, at 1A; Terry R. Cassreino, *State Gets Tobacco Money*, BILOXI SUN HERALD, July 16, 1997, at A1.

11. Some of the past business practices can be described as shady at best. Internal documents from some tobacco companies have revealed that the industry was well aware of the

much of the tobacco industry's dirty laundry has been aired, there still may be as many as 200,000 documents claimed to be privileged by tobacco companies.<sup>12</sup> The more the public learns about the practices of the tobacco companies involved in these lawsuits, the more likely the public will condone harsh treatment of the tobacco industry in courts, legislatures, and even in Congress.

The United States appears to be in the midst of an all-out war against the tobacco industry. There is the distinct possibility, given what we are learning about the practices of some tobacco companies, that this war is not only good but is necessary to protect American children from the devious practices of tobacco companies. This Note seeks neither to address the morality of the actions of the

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potential health risks secondhand smoke created, but publicly denounced studies even while trying to develop safer cigarettes. See Susan Headden, *Secondhand Smokescreen*, U.S. NEWS & WORLD REP., Aug. 3, 1998, at 20, 22. There have also been memorandums uncovered that have exposed plans to target underage smokers. See Richard Lacayo, *Smoke Gets in Your Eye*, TIME, Jan. 26, 1998, at 50. An R.J. Reynolds internal document, stamped "RJR SECRET," expressly reads "[t]o ensure increased and longer-term growth for CAMEL FILTER, the brand must increase its share penetration among the 14-24 age group which have a new set of more liberal values and which represent tomorrow's cigarette business." *Id.* There are also documents that show the tobacco industry paid 13 scientists more than \$156,000 to write letters and manuscripts discrediting studies linking secondhand smoke to lung cancer. See *Big Tobacco Hired Scientists to Rip Studies*, STAR-TRIB. (Minneapolis-St. Paul), Aug. 5, 1998, at 13A. In some cases, tobacco industry lawyers actually edited the letters before they were sent to publications. See *id.* Additionally, some tobacco companies paid movie producers and some movie stars to place cigarette ads or to smoke in movies. See Nancy Marsden, *How the Smell of Smoke Pervaded Movie Industry*, STAR-TRIB. (Minneapolis-St. Paul), Aug. 5, 1998, at 17A. A Philip Morris document describes how it provided tobacco for 54 films, including movies believed to be popular among children, such as: *Who Framed Roger Rabbit*, *The Dream Team*, *Crocodile Dundee*, *Die Hard*, *The Muppet Movie*, *Grease*, *Jaws II*, and *Robocop*. See *id.* A Department of Justice criminal probe may be looming on the horizon for many cigarette manufacturers. See John Schwartz, *U.S. Tobacco Probe Yields First Company Conviction*, WASH. POST, Sept. 23, 1998, at A04.

12. Thus far, courts have been fairly generous in the tobacco industry cases, ordering many documents to be turned over to plaintiffs despite the attorney-client privilege claims of the defendants. See generally *American Tobacco Co. v. State*, 697 So. 2d 1249 (Fla. Dist. Ct. App. 1997) (holding that tobacco industry internal documents fell under the crime-fraud exception and rejecting the industry's claim of privilege); *State v. American Tobacco Co.*, No. 96-2-15056-8 SEA, 1997 WL 728262, at \*20 (Wash. Super. Ct. 1997) (ordering tobacco industry to turn over requested documents to the state of Washington despite attorney-client privilege claims by the industry). Massachusetts has gone a step further and enacted a statute requiring manufacturers of tobacco products to disclose additives and nicotine-yield ratings of their products to the Massachusetts Department of Public Health. See MASS. GEN. LAWS ch. 94, § 307B (1997). If the Department determines there is a "reasonable scientific basis for concluding that the availability of such information could reduce risks to public health," the information must be made available to the public. See *id.* This statute has been held to be constitutional. See *Philip Morris, Inc. v. Harshbarger*, 122 F.3d 58, 87 (1st Cir. 1997). The tobacco industry apparently has appealed to the National Association of Criminal Defense Lawyers to write an amicus curiae brief for use in future legal appeals to support the industry's argument that courts have been too willing to order disclosure of internal industry documents. See Ann Davis, *Big Tobacco Turns to Criminal Bar for Help on Attorney-Client Brief*, WALL ST. J., Aug. 20, 1998, at B7.

tobacco companies, nor the morality of the groups that now attack the tobacco industry. For the purposes of this Note, we can assume what the majority of the American public already assumes—that tobacco companies have engaged in deceptive trade practices and something must be done to prevent them from continuing to target teenage smokers and mask health risks associated with their products.

Even making this assumption, the focus of this Note remains unchanged. Below the surface of the tobacco industry lies the tobacco farmers, and taking aim at the tobacco companies will unquestionably have consequences for those farmers. The impact of the tobacco litigation on tobacco farmers will be the focus of this Note. Part II surveys the tobacco industry, focusing on tobacco farmers and tobacco companies.<sup>13</sup> It also discusses litigation both before and after the landmark proposed settlement in June of 1997. Part III briefly details the rise and fall of the proposed settlement in Congress.<sup>14</sup> Part IV discusses the severity of the impact to be felt by tobacco farmers,<sup>15</sup> and Part V examines the proposed solutions which attempt to protect tobacco farmers from becoming casualties of the war on tobacco.<sup>16</sup>

## II. THE TOBACCO INDUSTRY AND THE SHIFTING BATTLEGROUND

The tobacco industry is composed of a chain of essential groups that begins with the farmer and ends with the retailer, with manufacturers in the middle.<sup>17</sup> The target of tobacco litigation has been, and continues to be, cigarette manufacturers.<sup>18</sup> The settlement discussions and other recent litigation has led to anger and fear up and down the tobacco chain, especially among tobacco farmers.<sup>19</sup>

### A. Tobacco Farmers

There are tobacco farms in twenty-three states,<sup>20</sup> and the majority of tobacco farms are concentrated in six states: North Carolina, Kentucky, South Carolina, Virginia, Georgia, and Tennessee.<sup>21</sup> In 1997, approximately 124,000

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13. See discussion *infra* Part II.

14. See discussion *infra* Part III.

15. See discussion *infra* Part IV.

16. See discussion *infra* Part V.

17. See Clara Sue Ross, *Judicial and Legislative Control of the Tobacco Industry: Toward a Smoke-Free Society?*, 56 U. CIN. L. REV. 317, 330 (1987).

18. See Douglas N. Jacobson, Note, *After Cipollone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?*, 38 AM. U. L. REV. 1021, 1030 (1989).

19. See *Tobacco Farmers Fear Fallout of Federal Deal*, ORLANDO SENTINEL, June 28, 1997, at C9.

20. See Ross, *supra* note 17, at 331.

21. See *id.*

tobacco farms<sup>22</sup> harvested 795,000 acres, with a yield averaging 2069 pounds per acre.<sup>23</sup> This total crop of 1.65 billion pounds could have a farm value of about \$3 billion once the season's marketing receipts are tabulated.<sup>24</sup> In addition to the farmers, tobacco farms employ many full-time or part-time employees "due to the labor intensive nature of tobacco farming."<sup>25</sup> While the tobacco industry earns about \$45 billion a year,<sup>26</sup> tobacco farming revenues are approximately \$3.4 billion per year, constituting about 2.4% of the crop market value from farming in the United States.<sup>27</sup>

Home base for tobacco production seems to be North Carolina,<sup>28</sup> where fifty-two percent of all domestically grown tobacco is grown and produced.<sup>29</sup> The tobacco industry accounts for about 6.5% of North Carolina's economy or about \$12 billion annually.<sup>30</sup> In North Carolina, tobacco cash receipts account for nearly thirty-two percent of total crop receipts, and nearly fourteen percent of total crop and livestock receipts.<sup>31</sup>

Tobacco farming is very profitable in comparison to other crops.<sup>32</sup> On average, a tobacco farmer can net up to \$2200 per acre, compared to \$120 an acre

22. According to the 1992 Census of Agriculture, about 124,000 out of the 2,000,000 farms in the United States produce tobacco. See REDHEAD, *supra* note 1.

23. See JASPER WOMACH, COMPENSATING FARMERS FOR THE TOBACCO SETTLEMENT, CRS REPORT FOR CONGRESS NO. 98-133, at CRS-5 (updated July 6, 1998) (on file with the *Drake Journal of Agricultural Law*).

24. See *id.* In 1992, tobacco farms averaged \$23,000 in tobacco sales and \$29,000 in total farm commodity sales. See REDHEAD, *supra* note 1.

25. Ross, *supra* note 17, at 331-32.

26. See Eric Harrison, *Growers Fear They'll Reap Short End of Tobacco Deal Economy: Farmers Say They Don't Have Option Cigarette Firms Do of Hiking Prices to Offset Drop in Consumption*, L.A. TIMES, June 23, 1997, at A1.

27. See Ross, *supra* note 17, at 330-31.

28. North Carolina is the center for flue-cured production, while Kentucky is the center for burley tobacco production. See REDHEAD, *supra* note 1. Together, North Carolina and Kentucky constitute about 65% of the total tobacco production in this country. See JASPER WOMACH, SUMMARY AND COMPARISON OF THE MAJOR AGRICULTURAL PROVISIONS OF THE TOBACCO SETTLEMENT POLICY PROPOSALS, CRS REPORT FOR CONGRESS NO. 97-1042 (updated July 6, 1998) (on file with the *Drake Journal of Agricultural Law*). Tennessee, Virginia, South Carolina, and Georgia combine to produce about 26% of the nation's tobacco. See *id.*

29. See Harrison, *supra* note 26, at A1.

30. See *id.* North Carolina is certainly not the only state where tobacco anchors the economy. In Virginia, tobacco is the primary crop in an agribusiness that accounts for 20% of its gross income, generating \$186 million a year and 48,000 jobs. See Doug Struck, *In Tobacco Country, Seeds of Fear; Virginia Farmers Face Unknown Future in Proposed Settlement*, WASH. POST, Nov. 23, 1997, at A01.

31. See WOMACH, *supra* note 23, at CRS-5. Similarly, in Kentucky, tobacco receipts account for nearly 42% of crop receipts and nearly 22% of total crop and livestock receipts. See *id.*

32. See *Tobacco Growers Appeal for Protection Congress: Clinton Also Wants Help for Farmers a Condition of the Deal with Cigarette Makers*, L.A. TIMES, Sept. 19, 1997, at D3.

for corn and \$600 an acre for tomatoes.<sup>33</sup> Tobacco farming is also generational; most of the current tobacco farms have been passed down through generations of families, causing many to be labeled "family farms."<sup>34</sup> Tobacco farms are smaller than other commodity farms, averaging 126 acres in total size, with 35 acres of cropland, and about 7 acres of tobacco.<sup>35</sup>

The federal government has supported and stabilized tobacco prices through the commodity support program, dating back to the 1930s.<sup>36</sup> The tobacco program operates through a combination of marketing quotas,<sup>37</sup> which limit supplies, and loans to farmers<sup>38</sup> to help balance marketings with demands.<sup>39</sup> Tobacco farms are able to maintain higher incomes<sup>40</sup> than other types of farms largely due to the tobacco program that is in place.<sup>41</sup>

Additionally, tobacco farming is partially made possible through insurance subsidies from the federal government.<sup>42</sup> The crop insurance program helps lower premiums for farmers of the country's major crops, including tobacco.<sup>43</sup> Through this program, the federal government acts as a safety net for private insurance companies that write crop insurance policies.<sup>44</sup> Tobacco farmers are protected from bad harvests and weather-related disasters by federal crop insurance.<sup>45</sup> There

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33. *See id.*

34. *See, e.g.,* Doug Levy, *Tobacco Turns over New Leaf*, USA TODAY, June 23, 1997, at 1B; Dale Moss, *State's Top Farmer Fears Time in Tobacco Patch Grows Short*, COURIER-J. (Louisville, Ky.), Sept. 10, 1997, at 01B; Susan Dentzer, *Can Farmers Kick the Habit, Too? The Government, Reports Susan Dentzer, May Have to Help Out the Tobacco Growers*, U.S. NEWS & WORLD REP., Oct. 7, 1996, at 56.

35. *See* REDHEAD, *supra* note 1.

36. *See* WOMACH, *supra* note 23, at CRS-3. The small farm character of tobacco production is viewed as a consequence of the tobacco program, which places quotas on how much tobacco can be produced. *See* REDHEAD, *supra* note 1.

37. A tobacco marketing quota is the quantity of tobacco that a farm is allowed to market each year, meant to keep tobacco supplies in check. *See* WOMACH, *supra* note 23, at CRS-3.

38. These loans occur when commercial buyers do not offer more than the support price. When this happens, the tobacco goes into storage and serves as collateral for an interest-bearing loan from the Commodity Credit Corporation. *See* REDHEAD, *supra* note 1.

39. *See* WOMACH, *supra* note 23, at CRS-3. Since the loans must be repaid with interest, the support activity is called a no-net-cost program. *See id.*

40. Some economists estimate that tobacco prices are about \$0.40 to \$0.50 per pound higher than they might be without a federal tobacco support program. *See* REDHEAD, *supra* note 1.

41. *See* WOMACH, *supra* note 23, at CRS-3. *See generally* TOBACCO PRICE SUPPORT: AN OVERVIEW OF THE PROGRAM, CRS REPORT FOR CONGRESS NO. 95-129 (1998) (explaining the federal tobacco support program).

42. *See Farmers Fear Subsidies of Tobacco to Die*, SAN DIEGO UNION-TRIB., July 19, 1997, at A17.

43. *See id.*

44. *See id.*

45. *See* Jeffrey Taylor, *Tobacco Farmers Lobby for Slice of Settlement to Protect Them Against a Decline in Demand*, WALL ST. J., July 16, 1997, at A24.

have been several recent attempts to end federal crop insurance for tobacco farmers that have narrowly failed in Congress.<sup>46</sup>

### B. Tobacco Manufacturers

Tobacco is primarily used in the manufacturing of cigarettes.<sup>47</sup> Six tobacco companies—R.J. Reynolds Tobacco Co.; Liggett Group, Inc.; American Brands; Lorillard Tobacco Co.; Brown & Williamson Tobacco Corp.; and Phillip Morris USA—control the overwhelming majority of the United States' cigarette market.<sup>48</sup> In addition, there are many industries that aid in the manufacture of cigarettes, including storage, transportation, banking, chemical, paper, cellophane, and lighter manufacturers.<sup>49</sup>

As the domestic tobacco growth leveled off and the legal battles escalated, the tobacco companies began diversifying.<sup>50</sup> The tobacco companies began to acquire related industries and eventually expanded to include different industries.<sup>51</sup> Today, although the companies are not exclusively tobacco companies, the majority of their profits continues to come from the sale of tobacco products.<sup>52</sup>

Tobacco sales overseas have increased dramatically, with over \$6 billion each year coming from overseas sales.<sup>53</sup> As much as forty percent of tobacco grown and manufactured in the United States is sold elsewhere, with major purchasers that include Japan, Belgium, Hong Kong, and Saudi Arabia.<sup>54</sup> As overseas consumption is rising, overseas production is also increasing; nearly thirty percent of the tobacco used to manufacture cigarettes in the United States is now imported from foreign countries, such as Brazil and Zimbabwe.<sup>55</sup>

Due to the current threatening litigation surrounding the tobacco industry, the stock market values the tobacco companies at about \$15 billion.<sup>56</sup> However, at least one analyst, Stanford Business School Professor Jeremy Bulow, estimates that

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46. See *id.*

47. See Ross, *supra* note 17, at 332.

48. See *id.* at 332 n.92. Note that only five companies—Phillip Morris USA, R.J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., Lorillard Tobacco Co., and United States Tobacco, Inc.—are participating in the settlement discussions. See REDHEAD, *supra* note 1. In March 1996, the Liggett Group, Inc. broke ranks with the other companies and settled initially with five states, later settling with all remaining states. See *id.*

49. See Ross, *supra* note 17, at 332.

50. See *id.*

51. See *id.*

52. See *id.* at 333.

53. See Joel Kirkland, *Ban Sought on Tobacco Trade Help*, CHI. TRIB., July 24, 1997, at § 1, 13.

54. See *The Weed that Rules No Longer*, THE ECONOMIST, Sept. 28, 1991, at 27.

55. See Dentzer, *supra* note 34, at 56.

56. See Brett D. Fromson, *Tobacco's Quiet Counteroffensive; PR Effort Seeks to Blunt Criticism that Settlement Wouldn't Hurt Them*, WASH. POST, Oct. 10, 1997, at G01.

the companies' domestic tobacco operations would be worth approximately \$45 billion if the threat of litigation were erased.<sup>57</sup>

### C. Tobacco Litigation

Prior to 1996, approximately eight hundred lawsuits had been filed against tobacco companies.<sup>58</sup> Of those eight hundred, only about twenty-four went to trial, and the plaintiffs failed to prevail in any of these trials.<sup>59</sup> Early success eventually deteriorated, leading to the settlement announcement on June 20, 1997.<sup>60</sup> The settlement, although ultimately failing in Congress, marked a decidedly different trend in tobacco litigation. The approaches used by plaintiffs in litigation leading up to the settlement announcement and immediately following the announcement are different than in previous tobacco litigation. The battleground has shifted, and the industry's approach to defending against the litigation has changed. The tobacco industry is now beginning to experience the fallout from this shift in plaintiffs' strategies, and it seems safe to say that the floodgates of litigation may have finally been opened.

#### 1. Early Litigation

Early tobacco litigation consisted entirely of individual cases in which the plaintiff typically sought compensation for injuries caused by tobacco-related illnesses.<sup>61</sup> Tobacco companies were always able to successfully defend these cases by asserting that the plaintiffs chose to smoke and that because federally mandated warning labels were printed on tobacco products, smokers assumed the risk by choosing to smoke.<sup>62</sup>

The starting point for lawsuits against tobacco companies was in the 1950s and continued into the 1960s.<sup>63</sup> Ten lawsuits were filed during this period, four of which were being dropped by the plaintiffs, three of which juries rendered verdicts in favor of the cigarette companies, and three of which courts rendered summary judgments in favor of the cigarette companies.<sup>64</sup> Plaintiffs generally pursued their

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57. See *id.*

58. See Weiser, *supra* note 7, at W15.

59. See *id.*

60. See REDHEAD, *supra* note 1.

61. See *id.*

62. See *id.*

63. See Jacobson, *supra* note 18, at 1030.

64. See *id.* Jacobson goes on to discuss these early cases in greater detail in both the text and footnotes of his piece. The early cases included: *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3d Cir. 1961); *Fine v. Phillip Morris, Inc.*, 239 F. Supp. 361 (S.D.N.Y. 1964); *Mitchell v. American Tobacco Co.*, 183 F. Supp. 406 (M.D. Pa. 1960); *Padovani v. Bruchhausen*, 293 F.2d 546 (2d Cir. 1961); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962); *Lartigue v. R.J.*

lawsuits under theories of negligence and breach of implied and express warranties.<sup>65</sup>

In these early lawsuits, trial and appellate court rulings often favored plaintiffs, but juries did not find in favor of the cigarette companies in the cases that went to the jury.<sup>66</sup> The cigarette companies relied on the assumption of the risk defense, and benefited from the inconclusive medical studies that failed to prove a causal link between smoking and the plaintiffs' injuries.<sup>67</sup> Even though some courts did find that sufficient medical evidence existed to prove a causal link, the assumption of the risk theory seemed to be a persuasive argument for juries.<sup>68</sup> These early victories by tobacco companies made the success of future lawsuits unlikely.<sup>69</sup> This futility was reflected in the relatively quiet 1970s, when few suits were filed against tobacco companies.<sup>70</sup>

## 2. *The Shifting Battleground*

Many things had to change before the tobacco companies could become vulnerable to tort liability. Changes occurred, beginning with the Surgeon General's published report on the health consequences of smoking in 1972, which suggested that not only could smokers face health problems but that nonsmokers were also at risk from secondhand smoke.<sup>71</sup> Medical studies have become more conclusive, indicating that smoking is a human carcinogen, in addition to causing numerous other serious diseases and afflictions.<sup>72</sup> Studies also suggest that smoking is the single largest preventable cause of illness and premature death in the United

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*Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963); *Ross v. Phillip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964); *Cooper v. R.J. Reynolds Tobacco Co.*, 234 F.2d 170 (1st Cir. 1956); and *Hudson v. R.J. Reynolds Tobacco Co.*, 427 F.2d 541 (5th Cir. 1970). *See id.* at 1031-36.

65. *See* Jacobson, *supra* note 18, at 1031.

66. Jacobson discusses these cases in detail. The cases included *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962), which was heard by three different juries, two of which found in favor of the defendant, while in the third trial, the case was dismissed before the jury could consider it; *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19 (5th Cir. 1963); and *Ross v. Philip Morris & Co.*, 328 F.2d 3 (8th Cir. 1964). *See* Jacobson, *supra* note 18, at 1033-34.

67. *See* Jacobson, *supra* note 18, at 1032.

68. *See id.*

69. *See id.* at 1036.

70. *See id.*

71. *See* Matthew Baldini, *The Cigarette Battle: Anti-Smoking Proponents Go for the Knockout*, 26 SETON HALL L. REV. 348, 349 (1995). The persuasiveness of such reports recently was dealt a setback by a federal judge who struck down an Environmental Protection Agency (EPA) report that concluded secondhand tobacco smoke causes cancer. *See* *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435, 466 (M.D.N.C. 1998). The EPA stands behind its report, despite the harsh criticism contained in the federal court ruling. *See* *EPA Will Fight Ruling on Secondhand Smoke*, OMAHA WORLD-HERALD, July 20, 1998, at 1.

72. *See* Baldini, *supra* note 71, at 354.

States, responsible for an estimated 434,000 deaths annually.<sup>73</sup> This number comes from the estimated thirty percent of all cancers and ninety percent of all lung cancers in the United States that are attributed to cigarette smoking.<sup>74</sup>

Another change that occurred came in products liability law.<sup>75</sup> Nearly every state has adopted strict liability in tort law either through common law or by statute.<sup>76</sup> Strict liability holds manufacturers liable for defective products they produce, regardless of negligence.<sup>77</sup> The goals that strict liability seeks to achieve include compelling manufacturers to produce safer products and the simple notion of fairness.<sup>78</sup> Under strict products liability, the plaintiff is not required to prove that the defendant was negligent or otherwise at fault for the harm caused by the product.<sup>79</sup> Instead, the plaintiff must only show that the product was somehow defective, that the product's defect somehow caused the injury or harm to the plaintiff, and that the defendant sold the product to the plaintiff in its defective or dangerous state.<sup>80</sup>

Even with the advent of these important changes, tobacco companies were still able to dodge legal bullets in the 1980s.<sup>81</sup> The first major defeat for the tobacco companies came in *Cipollone v. Liggett Group, Inc.*,<sup>82</sup> where a jury found

73. See *id.* Baldini discusses the 1979 Surgeon General's Report and also the EPA's *Health Effects of Passive Smoking, Lung Cancer, and Other Disorders*, published in 1992. See *id.* at 354 n.29. Of the 434,000 annual deaths, the EPA estimates that about 20% of the deaths resulting from heart disease are caused by smoking, and 20% of the 150,000 annual stroke-related deaths in the United States are also caused by smoking. See *id.*

74. See *id.*

75. See Jacobson, *supra* note 18, at 1036-37. For an in-depth analysis of products liability law as it pertains to cigarettes and other tobacco products, see Anne M. Payne, Annotation, *Products Liability: Cigarettes and Other Tobacco Products*, 36 A.L.R. 5TH 541 (1996).

76. See Jacobson, *supra* note 18, at 1036.

77. See Ellen Wertheimer, *Pandora's Humidor: Tobacco Producer Liability in Tort*, 24 N. KY. L. REV. 397, 400 (1997).

78. See *id.* at 400-08.

79. See *id.* at 414.

80. See Jacobson, *supra* note 18, at 1037.

81. Jacobson discusses two important cases tried under strict liability theories: *Roysdon v. R.J. Reynolds Tobacco Co.*, 623 F. Supp. 1189 (E.D. Tenn. 1985), *aff'd*, 849 F.2d 230 (6th Cir. 1988), where the district court held that Roysdon failed to establish a prima facie case that cigarettes were unreasonably dangerous; and *Horton v. American Tobacco Co.*, 16 Prod. Safety & Liab. Rep. (BNA), at 227 (Miss. Cir. Ct. 1988), where the court held that cigarettes are not dangerous under section 402A of the *Restatement (Second) of Torts*. See Jacobson, *supra* note 18, at 1037-39.

82. *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208 (D.N.J. 1988), *aff'd in part and rev'd in part*, 893 F.2d 541 (3d Cir. 1990). Jacobson discusses this case in great detail, including the factual background and pretrial issues. See Jacobson, *supra* note 18, at 1042-56. One of the most important pretrial rulings involved a claim by the tobacco companies that the Federal Cigarette and Advertising Act preempted the plaintiff from making a common law tort claim based on labeling and advertising. See *id.* at 1045. These issues would eventually make their way to the United States Supreme Court. See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). A plurality decision held that the 1965 Federal Cigarette Labeling and Advertising Act did not pre-empt state law damages

that the Liggett Group had failed to properly warn consumers of the known health risks associated with smoking, and that this failure to warn was the proximate cause of the plaintiff's death.<sup>83</sup> This case marked the first time that a plaintiff had recovered damages from a tobacco company.<sup>84</sup>

Although these cases did not bring the tobacco companies to their knees, they did mark the beginning of new approaches to tobacco litigation. While scientific and medical evidence was weakening the tobacco companies' defense that cigarettes were not harmful, their main argument—that smoking is a personal choice, which is a variation on assumption of the risk—seemed to carry a lot of weight with courts and with juries.<sup>85</sup> The argument can be clearly stated as the following: a person has the right to choose to smoke cigarettes, and people who choose to smoke have no one to blame but themselves.<sup>86</sup> Tobacco companies carry this argument a step further, stating that holding the manufacturer liable for their cigarettes interferes with a person's right to smoke.<sup>87</sup> This argument appears to be fairly persuasive.<sup>88</sup>

The strength of this argument forced plaintiffs to find a new way to attack tobacco companies, and after the Food and Drug Administration announced they were investigating allegations that the tobacco industry manipulated the level of nicotine in cigarettes, plaintiffs had found a powerful argument.<sup>89</sup> While the tobacco companies had warned consumers about the health risks associated with smoking, they had not warned people about the risk of addiction. Not only were no warnings of addiction given, but the tobacco manufacturers were allegedly manipulating the nicotine content in cigarettes to get people addicted to cigarettes.<sup>90</sup>

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actions, but the 1969 Public Health Cigarette Smoking Act, which amended the 1965 Act, did preempt certain actions but did not other actions. *See id.* at 530-31 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). The Court held that when determining if a state action is preempted, the central inquiry in each case is to ask "whether the legal duty that is the predicate of the common-law damages action constitutes a 'requirement or prohibition based on smoking and health . . . imposed under State law with respect to . . . advertising or promotion . . .'" *Id.* at 523-24.

83. *See Jacobson, supra* note 18, at 1052. The jury found the plaintiff, who had died prior to the verdict, to be 80% responsible for her injuries, and Liggett Group to be 20% at fault. *See id.* at 1052. Under New Jersey comparative negligence law, the plaintiff did not recover damages on this issue. *See id.* However, the jury also found that Liggett Group's advertisements constituted an express warranty and awarded the deceased plaintiff's husband \$400,000 in damages. *See id.*

84. *See id.* at 1059.

85. *See Wertheimer, supra* note 77, at 420-21.

86. *See id.*

87. *See id.*

88. Again, note that the jury in *Cipollone* found that the plaintiff was 80% responsible for her own injuries, while Liggett Group was only 20% at fault. *See Jacobson, supra* note 18, at 1052.

89. *See Weiser, supra* note 7, at W15.

90. *See id.*

This discovery, among others, began to surface around 1994 with the disclosure of industry documents and deposition testimony of former industry employees in private lawsuits against the industry.<sup>91</sup> This new information shifted the focus of plaintiff suits away from liability issues stemming from the health risks of smoking and towards issues of industry misconduct.<sup>92</sup> Once this battleground shifted, the tobacco industry was forced to begin considering settlement offers.

The chain of events that would trigger the settlement talks began with a class action suit filed in federal court on behalf of "all nicotine dependent persons" in the United States.<sup>93</sup> Following the arguments advanced by the class action suit, state attorneys general began to file lawsuits against the tobacco companies, seeking to recover state Medicaid funds spent on health care for people suffering from injuries caused by cigarettes.<sup>94</sup> About one year after the first law suit was filed, the tobacco companies announced a settlement had been reached with state attorneys general, trial lawyers, and health advocates.<sup>95</sup>

### 3. *Current Litigation*

Although a federal settlement could not be reached, tobacco litigation clearly has advanced into a new stage. Current litigation can be categorized into two distinct subparts: state litigation and floodgate litigation. State litigation involves the Medicaid lawsuits filed against the tobacco companies by the state attorneys general. Floodgate litigation is the explosion of lawsuits filed by individuals who have begun pouncing on the tobacco industry at a time when it seems vulnerable.<sup>96</sup> There have been victories and defeats for the tobacco companies in both arenas.

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91. See REDHEAD, *supra* note 1.

92. See *id.* Industry misconduct issues included the industry's knowledge of and research on the addictive properties of nicotine, suppression of health information, and evidence of marketing its products to minors. See *id.* This new approach possibly will be followed in suits against other industries. See Paul M. Barrett, *Aiming High: A Lawyer Goes After Gun Manufacturers; Has She Got a Shot?*, WALL ST. J., Sept. 17, 1998, at A1.

93. Weiser, *supra* note 7, at W15. The class action lawsuit was later decertified and thrown out of federal court. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 734 (5th Cir. 1996). The suit was then refiled in more than a dozen state courts. See Weiser, *supra* note 7, at W15. At least one of the suits has been dismissed by a federal court. See John Swartz & Sandra Torry, *Assault on Tobacco Slows as Pennsylvania Case Is Dismissed*, WASH. POST, Oct. 18, 1997, at A03.

94. Mississippi was the first state to file a lawsuit against tobacco companies, filing on May 23, 1996. See Weiser, *supra* note 7, at W15. Thirty-nine other states followed Mississippi's example. See Mark Curriden, *Tobacco Seeks Talks Before Trial*, DALLAS MORNING NEWS, Oct. 11, 1997, at 1A. Nebraska became the 41st and most recent state to file its suit on August 21, 1998. See Reed, *supra* note 9, at 13SF.

95. See Garland, *supra* note 5, at 83.

96. A number of commentators suggested that the jury verdict against the tobacco companies in *Cipollone* would "open up the floodgates of litigation and unleash a great number of victories against the tobacco companies." Jacobson, *supra* note 18, at 1059.

a. *State Litigation.* The majority of the states have filed suit against the tobacco industry to recover money spent on smoking-related illnesses.<sup>97</sup> “An important public policy concern is whether the financial claims are justified.”<sup>98</sup> “[T]he most popularly cited number for the annual cost of smoking,” according to the Center for Disease Control, is \$50 billion.<sup>99</sup> Total Medicaid costs per year are estimated to be about \$5 billion,<sup>100</sup> and states pay a little more than forty percent of Medicaid costs.<sup>101</sup> The \$50 billion annual cost can be allocated as the following: \$18.1 billion for the federal government, \$3.6 billion for the states, \$17.8 billion for private insurance,<sup>102</sup> and \$10.5 billion for individual smokers.<sup>103</sup> There are also a substantial amount of indirect costs, not included in the \$50 billion estimate,<sup>104</sup> and these estimated expenditures are what the states hope to be compensated for at the conclusion of their lawsuits.

As mentioned previously, Mississippi, Florida, Texas, and Minnesota have already settled their lawsuits against the tobacco companies.<sup>105</sup> The Florida settlement, which included an \$11.3 billion payoff over twenty-five years, has arguably been the biggest defeat for the tobacco industry, and the end of most outdoor tobacco advertising in Florida and funding for anti-tobacco campaigns

97. See Connolly, *supra* note 3, at A01. On November 16, 1998, the four biggest tobacco companies—Philip Morris Cos., R.J.Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and Lorillard, Inc.—agreed to pay as much as \$206 billion to the remaining states with pending lawsuits. See Milo Geyelin, *Top Tobacco Firms Agree to Pay States Up to \$206 Billion in 25-Year Settlement*, WALL ST.J., Nov. 16, 1998, at A3. All of the remaining states, the District of Columbia, and four U.S. territories agreed to the settlement. See Sandra Torry & John Schwartz, *States Approve \$206 Billion Deal with Big Tobacco; Industry Retains Key Marketing Devices*, WASH. POST, Nov. 21, 1998, at A01. The new settlement has a much narrower scope than the failed June 1997 settlement. See *id.* At the time this Note went to publication, the November 16, 1998 agreement appeared to be in place, ending all of the remaining state Medicaid lawsuits. See *id.*

98. JANE G. GRAVELLE, *THE PROPOSED TOBACCO SETTLEMENT: WHO PAYS FOR THE HEALTH COSTS OF SMOKING?*, CRS REPORT FOR CONGRESS NO. 97-1053 E (updated Apr. 30, 1998) (on file with the *Drake Journal of Agricultural Law*).

99. *Id.* “This amount measures the estimated additional medical cost attributable to smoking related diseases in 1993 dollars, based on estimates of smoking attributable risk (what share of each disease is due to smoking).” *Id.* “The study also indicates the shares paid by various groups: 21% by smokers, 33.4% by private insurance, 20.4% by medicare, 10.2% by medicaid, 9.5% by other federal programs, 3.2% by other state programs, and 2.2% by other [groups].” *Id.*

100. See *id.* A recent study has resulted in a larger estimate: \$12.9 billion per year. See *id.*

101. See *id.*

102. See *id.* For the purposes of this allocation, “others” are grouped with private insurance companies. See *id.*

103. See *id.*

104. See *id.* The Center for Disease Control indicates that indirect costs include excess health costs, lost productivity, and premature death. See *id.* These indirect costs approximately double the \$50 billion estimate. See *id.*

105. See Levy, *supra* note 10, at 1A; *Judge Approves Texas Tobacco Pact; State’s \$17.3 Billion Settlement Largest in History of Litigation*, *supra* note 10, at 2F; Phelps, *supra* note 10, at 03D.

aimed at children.<sup>106</sup> The Texas settlement also was a major setback for the industry.<sup>107</sup>

There have been some victories for the tobacco companies in these suits. At least one state court, Iowa, dismissed most of the lawsuits against the tobacco companies.<sup>108</sup> A brief summary of the State of Iowa's complaint is as follows:

The petition alleges a long and detailed history of the defendants' misrepresentations and concealment of the truth about the health hazards of tobacco. The defendants have known since the 1930's of the health hazards of cancer, coronary heart disease, emphysema, and stroke due to smoking. Beginning forty years ago, defendants conspired to suppress and made every effort to hide scientific evidence of the deadly health consequences of tobacco and nicotine. Following the initial 'Big Scare' about tobacco causing cancer in 1953, the defendants created the Tobacco Industry Research Committee to manipulate information about tobacco-related research. The defendants' 'Frank Statement' of 1954, published in several newspapers in Iowa, misrepresented the knowledge available about tobacco's effects and promised to conduct valid research and report honestly the results. The defendants breached those promises virtually immediately and have continued to do so for over forty years. The defendants continued to deny and attack the evidence that smoking caused cancer, falsely represented their own research, and suppressed information that would have shown the actual consequences of smoking. The defendants agreed not to conduct individual research and to rely on their captive Council for Tobacco Research to promote 'favorable' research and suppress negative research. Specific wrongful acts included making false testimony to Congress, reporting false information to the surgeon general, publishing false reports, making a 'gentleman's agreement' to suppress research, using lawyers and attorney-client privilege to hide the results of research projects, firing scientists, closing laboratories, threatening legal action against scientists, and concealing studies if the results were

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106. See Levy, *supra* note 10, at 1A. See generally Symposium, *Transcript of the Florida Tobacco Litigation Symposium—Fact, Law, Policy, and Significance*, 25 FLA. ST. U. L. REV. 737 (1998) (discussing the background and goals of the Florida settlement).

107. See *Judge Approves Texas Tobacco Pact; State's \$17.3 Billion Settlement Largest in History of Litigation*, *supra* note 10, at 2F. Profits have been noticeably affected by the big payoff to Texas. See *Philip Morris Adjusts Income for Charge; Marlboro Maker's Payment to Texas Cuts Quarterly Profit to \$1.74 Billion*, DALLAS MORNING NEWS, Aug. 15, 1998, at 2F. Not everyone thinks that the Texas and Florida settlements hit the tobacco industry hard. See John Carey, *Smoke and Mirrors from Big Tobacco?*, BUS. WK., Sept. 21, 1998, at 6. There have been allegations that portions of the Texas and Florida settlements actually encourage teen smoking, rather than seek to reduce it. See *id.*

108. See *State ex rel. Miller v. Philip Morris Inc.*, 577 N.W.2d 401, 403-04 (Iowa 1998). Specifically, the counts of civil liability for deception, voluntary assumption of a special duty, indemnity, and unjust enrichment/restitution were dismissed by the district court, and these dismissals were upheld by the Iowa Supreme Court. See *id.* at 407.

unfavorable, canceling research on safer cigarettes, deceiving the public about the addictiveness and health effects of nicotine, and manipulating the level of nicotine to enhance addiction. The defendants have targeted slogans, magazines, glamorous images, and sexual themes at children to addict them and ensure their future markets.

Defendants directed their acts at and intended to have an impact on the State. The defendants acted purposefully knowing that when consumers use cigarettes as intended, Iowans would be certain to suffer tobacco-related diseases and the State itself would be injured. As a result the State was obligated to pay and has paid hundreds of millions of dollars to provide medical care for tobacco-related illnesses.<sup>109</sup>

The State of Iowa is seeking over \$1 billion in damages from the tobacco companies.<sup>110</sup>

The Iowa Supreme Court found that, under Iowa law, an employer cannot recover in a direct action against a third party for remote and derivative injuries resulting from a third-party's conduct towards the employee.<sup>111</sup> The court applied this remoteness doctrine to the state's lawsuit to uphold the district court's partial dismissal of the law suit.<sup>112</sup>

The Minnesota Supreme Court used similar reasoning in denying Blue Cross and Blue Shield of Minnesota from bringing a direct tort action against tobacco companies to recover for injuries to its consumers—the smokers.<sup>113</sup> The State of Maryland also had part of its lawsuit against the tobacco industry dismissed.<sup>114</sup>

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109. *Id.* at 403-04. The original petition filed by the Iowa Attorney General was 99 pages long. *See id.*

110. *See* Jeff Zeleny, *State's Tobacco Lawsuit Weakened*, DES MOINES REG., Aug. 27, 1997, at 1A. Under the November 16, 1998 settlement, Iowa would receive \$1.7 billion over the next 25 years. *See* Jane Norman, *Iowa Payout Is \$1.7 Billion*, DES MOINES REG., Nov. 17, 1998, at 1A. The settlement was agreed to by the remaining states on November 20, 1998. *See* Torry & Schwartz, *supra* note 97, at A01.

111. *See State ex rel. Miller*, 577 N.W.2d at 406.

112. *See id.* at 407. The court also was concerned about opening "the proverbial flood gates of litigation" to any employer or insurer who paid medical expenses of an employee or insured injured by smoking. *See id.* An Indiana superior court judge apparently followed this rationale in dismissing the State of Indiana's lawsuit against the tobacco industry. *See Judge Voids Indiana Suit Against Tobacco Firms*, WASH. POST, July 25, 1998, at A05. The State of Indiana is appealing this ruling. *See id.*

113. *See State ex rel. Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 495 (Minn. 1996). The Minnesota Supreme Court found that Blue Cross had standing to pursue claims arising under Minnesota's consumer protection and antitrust statutes and also for equitable relief claims. *See id.* at 495-98.

114. *See State v. Philip Morris Inc.*, No. 96122017, 1997 WL 540913, at \*20 (Md. Cir. Ct. 1997). The Maryland circuit court granted motions to dismiss on counts of unjust enrichment, breach of voluntarily undertaken duty, fraud and deceit, negligent misrepresentation, breach of express

If the early state cases are any indication of the tobacco industry's strategy in defending these suits, it can be predicted that the tobacco industry will seek to settle suits rather than risk allowing juries to decide the cases. At the time this Note went to publication, a tentative settlement had been reached between the major tobacco companies and the remaining states with pending lawsuits.<sup>115</sup>

b. *Floodgate Litigation.* A new outbreak of individual and class action lawsuits have erupted due to the tobacco industry's perceived vulnerability. This renewed legal attack on the tobacco companies has had mixed results.

The State of Florida has been a hotbed of tobacco litigation with two major trials in the past two years and a third case now approaching trial.<sup>116</sup> Grady Carter, a cancer-stricken longtime smoker, recovered \$750,000 from Brown & Williamson Tobacco Company in 1996.<sup>117</sup> Carter had argued that he had become addicted to cigarettes, and that he had tried everything from hypnosis to a nicotine patch to stop smoking but was unable to do so.<sup>118</sup> However, a few months later in Florida, R.J. Reynolds was not found negligent by a jury in a similar case.<sup>119</sup> R.J. Reynolds won another Florida lawsuit a few months after its victory in the Carter lawsuit.<sup>120</sup> There are many more lawsuits to come for the tobacco industry in Florida, where more than two hundred lawsuits have already been filed against the industry.<sup>121</sup>

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warranty, breach of implied warranty, strict liability, and conspiracy. *See id.* Alleged violations of antitrust and the Consumer Protection Act were left intact. *See id.*

115. *See* Torry & Schwartz, *supra* note 97, at A01.

116. *See* *Jury Selection Set to Begin in Third Smoker's Trial*, MIAMI HERALD, Oct. 6, 1997, at 2B.

117. *See id.*

118. *See* Donald P. Baker, *Fla. Jury Finds R.J. Reynolds Not Negligent; Tobacco Firm Had Argued Smoking Is Personal Choice*, WASH. POST, May 6, 1997, at A01. Although a jury found for Carter, the decision was reversed on appeal. *See* *Brown & Williamson Tobacco Corp. v. Carter*, No. 96-4831, 1998 WL 323484, at \*6 (Fla. Dist. Ct. App. 1998).

119. *See* Baker, *supra* note 118, at A01. This case had some key differences from the Carter case: the plaintiff did not make the efforts to stop smoking that Carter had made, as Carter unsuccessfully attempted to quit several times; and the plaintiff sought more money than the \$750,000 Carter was awarded. *See id.*

120. *See* John Schwartz, *Lung Cancer Victim Loses Lawsuit Against R.J. Reynolds; Florida Case is Latest in Series of Wins for Tobacco Firms*, WASH. POST, Nov. 1, 1997, at A03. In that case, the plaintiff successfully quit smoking on her first attempt to do so, later suffering from various forms of cancer. *See id.*

121. *See* *Tobacco Company Hit with Historic Verdict*, ST. PETERSBURG TIMES, June 11, 1998, at 1A. In a recent Florida case, *Maddox v. Brown & Williamson Tobacco Corp.*, a jury awarded punitive damages of \$450,000 and compensatory damages of \$500,000 to the plaintiff, marking the first time a tobacco company has been forced to pay punitive damages. *See id.* Brown & Williamson is appealing the verdict. *See id.*

Despite the mixed results of individual suits, some analysts still believe such lawsuits remain nearly impossible for plaintiffs to win.<sup>122</sup>

Class action suits have become prevalent in lawsuits against the tobacco industry.<sup>123</sup> The prospect of winning large amounts of damages has encouraged plaintiffs' attorneys to pool their resources on behalf of all the class members.<sup>124</sup> Class actions against the tobacco industry now pending include most of the smokers in the United States.<sup>125</sup>

A class action suit filed by flight attendants<sup>126</sup> was settled by the major tobacco companies for \$346 million.<sup>127</sup> The suit marked the first courtroom test of the theory that nonsmokers could contract lung cancer, heart disease, and other ailments by breathing smoke-contaminated air.<sup>128</sup>

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122. See Mark Curriden, *Tobacco Companies Continue to Win Suits Industry's Litigation Success Makes Lawyers Reluctant to Take Cases*, DALLAS MORNING NEWS, July 26, 1998, at 1H. Curriden notes that of the eight hundred individual smoker cases filed since 1990, only two have resulted in plaintiffs' verdicts. See *id.*

123. See REDHEAD, *supra* note 1.

124. See *id.*

125. See *id.* There are several types of class action suits that have been filed. Union health funds have filed class action suits against the tobacco industry in at least twenty-six states seeking to recover millions of dollars spent by union insurance funds on tobacco-related injuries. See George Rodrigue, *Texas Union Insurers Sue Tobacco Industry State Groups Seek Repayment of Health Costs*, DALLAS MORNING NEWS, Nov. 1, 1997, at 1F. For examples of these types of class actions, see *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, No. Civ. 97-1051-MA, 1998 WL 544305, at \*1 (D. Or. 1998); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, No. 97 Civ. 4550(SAS), 97 Civ. 4676(SAS), 1998 WL 552669, at \*1 (S.D.N.Y. 1998); *Iron Workers Local Union No. 17 Insurance Fund v. Philip Morris, Inc.*, No. 1:97-CV-1422, 1998 WL 602033, at \*1 (N.D. Ohio 1998); *New Jersey Carpenters Health Fund v. Philip Morris, Inc.*, No. CIV.A.97-4728(MTB.), 1998 WL 547126, at \*1 (D.N.J. 1998); and *Eastern States Health & Welfare Fund v. Philip Morris, Inc.*, 11 F. Supp. 2d 384, 384 (S.D.N.Y. 1998). For examples of individuals who have filed class action lawsuits, see *Smith v. Brown & Williamson Tobacco Corp.*, 3 F. Supp. 2d 1473 (D.D.C. 1998); *Richardson v. Philip Morris, Inc.*, 950 F. Supp. 700 (D.Md. 1997); *Masepohl v. American Tobacco Co.*, 974 F. Supp. 1245 (D. Minn. 1997); and *Taylor v. American Tobacco Corp.*, 983 F. Supp. 686 (E.D. Mich. 1997).

126. See *Broin v. Philip Morris Cos.*, 641 So. 2d 888, 889 (Fla. Dist. Ct. App. 1994).

127. See Mark Curriden, *Tobacco Industry Settles Flight Attendants' Lawsuit, \$346 Million Pact Lets Individuals Sue for Damages*, DALLAS MORNING NEWS, Oct. 11, 1997, at 1A. The class action suit was filed by 60,000 flight attendants who claimed they were injured by secondhand smoke in airline cabins. See *id.* The plaintiffs had sought \$5 billion from the tobacco companies. See *id.* Some class members objected to the settlement and filed motions to intervene, all of which were denied with the exception of one class member. See *Ramos v. Philip Morris Cos.*, 714 So. 2d 1146, 1147-49 (Fla. Dist. Ct. App. 1998).

128. See *id.* This case was settled prior to the federal court decision that struck down the EPA's 1993 report, which had concluded that secondhand tobacco smoke causes cancer. See *Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA*, 4 F. Supp. 2d 435, 466 (M.D.N.C. 1998). This decision was not expected to impact the flight attendant settlement. See *EPA Will Fight Ruling on Secondhand Smoke*, *supra* note 71, at 1. However, the ruling in the North Carolina federal court may stall future secondhand smoke cases, which some thought would be the next major attack on the

Regardless of the frequency of victories by tobacco companies in these suits, this widespread litigation is taking its toll on the tobacco industry.<sup>129</sup> The impact will be discussed later in this Note.<sup>130</sup>

### III. THE FALL OF THE PROPOSED FEDERAL SETTLEMENT

In the early summer of 1998, the proposed federal tobacco settlement failed to make its way through Congress.<sup>131</sup> The settlement, as proposed, would have

tobacco industry. See Suein L. Hwang & Ann Davis, *Secondhand-Smoke Case May Kindle New Suits*, WALL ST. J., Oct. 13, 1997, at B1.

129. See *Lawsuits Cause Drop for PM*, RICHMOND TIMES-DISPATCH, Oct. 22, 1997, at C1; Suein L. Hwang, *Philip Morris Increases the Price of Cigarettes by Six Cents a Pack*, WALL ST. J., Aug. 4, 1998, at B6; *U.S. Tobacco Unit to Take \$103 Million Pretax Charge*, WALL ST. J., Aug. 17, 1998, at B6.

130. See discussion *infra* Part IV.

131. Forty-three Republicans and three Democrats voted to kill the tobacco bill in the Senate. See Major Garrett & Kenneth T. Walsh, *Congress Snuffs Out the Tobacco Bill*, U.S. NEWS & WORLD REP., June 29, 1998, at 30. There have been numerous political spins on this issue, and these spins were amplified since this unfolded in an election year. Compare Paul A. Gigot, *Why McCain's Tobacco Bill Turned to Ashes*, WALL ST. J., June 19, 1998, at A14 (focusing on the tax implications of "Mr. McCain's \$516 billion Godzilla"), with John F. Harris & Ceci Connolly, *Clinton Suffers Major Defeat on Tobacco*, WASH. POST, June 18, 1998, at A19 (discussing political ramifications of Republicans being classified as the "pro-tobacco party" and Democrats as the "anti-tobacco party"). This debate has not been limited to only the media. Compare the following two comments made on the Senate floor by Senator Tom Harkin, D-Iowa, and Senator Orrin Hatch, R-Utah. Senator Harkin stated:

I will say it loud and clear right here. The leadership has never wanted this bill, and they want to kill it. What we want—and I don't just mean Democrats, I mean a lot of Republicans, too, we want to put an end to teen smoking, and we want this bill. But, unfortunately, the Republican leadership and some on that side are going to try to make good on their threats to kill the bill.

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But it seems to me at this point in time the choice is very clear: You are either for tobacco company profits or you are for our kids. You are either for cutting down on the lies and deceptions of the tobacco companies, or you are for saving our kids' lives and keeping them from smoking.

144 CONG. REC. S6465-01 (daily ed. June 17, 1998) (statement of Sen. Harkin). Senator Hatch stated:

Pundits report that Democrats are in a 'win-win' position on this issue.

As conventional wisdom goes, the minority can keep on moving the goal posts of this legislation, proposing more and more harsh amendments, defying Republicans to vote against their ever-changing version of the bill.

In this way, the Democrats can either foster the perception that they are tougher on Big Tobacco by making the bill more and more onerous, or they can tar and feather any recalcitrant Republicans with the charge that Republicans are in cahoots with Big Tobacco. That is pure bunk.

144 CONG. REC. S4226-01 (daily ed. May 5, 1998) (statement of Sen. Hatch). Following the November 1998 elections, modest Democratic gains in Congress raised speculation that federal

required federal legislation before it could become binding.<sup>132</sup> The main goal for tobacco companies was to gain immunity from civil lawsuits, which basically meant that the tobacco industry would be exempted from American tort law.<sup>133</sup> States, in addition to recovering funds that were spent on tobacco-related illnesses, would also be allowed to regulate the tobacco industry as never before.<sup>134</sup> Because of the unique constitutional implications, the settlement would effectively function as a contract between the tobacco companies and the states, with each side agreeing to waive certain protected rights.<sup>135</sup>

One of the main stumbling blocks of the settlement was the proposed regulation of the tobacco industry by the Food and Drug Administration (FDA).<sup>136</sup> The federal settlement suffered a major setback when the Fourth Circuit Court of Appeals held the FDA lacked power to regulate tobacco products.<sup>137</sup> The FDA had asserted jurisdiction over tobacco products based on its conclusion that tobacco products fit within the literal definitions of "drug" and "device" as defined in the United States Code.<sup>138</sup> The Fourth Circuit held that not only did tobacco products fit this definition,<sup>139</sup> but also that the FDA's assertion of jurisdiction over tobacco

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tobacco legislation would be revived in the upcoming session. See Jeffrey Taylor, *A New Call for National Tobacco Laws, Prompted by States' Deal, Faces Hurdles*, WALL ST. J., Nov. 17, 1998, at A4.

132. See REDHEAD, *supra* note 1.

133. See Susan B. Garland, *Tobacco: The Coming Free-For-All*, BUS. WK., Jan. 26, 1998, at 72. This would have been an unprecedented development in American tort law. See *id.*

134. See REDHEAD, *supra* note 1. This would include heavily regulating the tobacco industry's advertising. See *id.* Because the First Amendment is necessarily implicated, the tobacco industry would have to contractually agree to waive their First Amendment rights to advertise their products as part of the settlement. See *id.*

135. See *id.*

136. See Connolly, *supra* note 3, at A01. Specifically, the industry would submit to FDA regulation of advertising and marketing. See *id.* The terms of the settlement originally included black and white labels on the top front of cigarette packs warning "Cigarettes are Addictive" and "Cigarettes Cause Lung Cancer," a ban on billboard and outdoor advertising, and a nationwide licensing system for tobacco retailers so the FDA could enforce the pact. See Geyelin & Hitt, *supra* note 2, at A3.

137. See *Brown & Williamson Tobacco Corp. v. FDA*, 153 F.3d 155, 176 (4th Cir. 1998). The decision was immediately viewed as a victory for the tobacco industry and a defeat for anti-tobacco forces. See Geyelin & Hitt, *supra* note 2, at A3. The Clinton Administration has announced its intentions to appeal the ruling to the Supreme Court. See *id.*

138. See *Brown & Williamson Tobacco Corp.*, 153 F.3d at 160-61. The FDA was relying on 21 U.S.C. § 321 (1994). See *id.* at 161 n.3. The FDA plan would have required anyone who appeared to be younger than 26 to prove their age to buy cigarettes, required tobacco products to be placed behind sales counters to prevent shoplifting by teens, barred cigarette vending machines from many public places, banned cigarette billboards within one thousand feet of schools and playgrounds, required tobacco ads in magazines with significant underage readership to be restricted to black and white text, and banned name-brand sponsorship of sporting events and product-logo giveaways. See John Schwartz, *FDA Rebuffed on Cigarettes; Appeals Panel Says Agency Has No Authority to Regulate Tobacco*, WASH. POST, Aug. 15, 1998, at A01.

139. See *Brown & Williamson Tobacco Corp.*, 153 F.3d at 164.

products was inconsistent with Congressional policy set forth in the Federal Cigarette Labeling and Advertising Act.<sup>140</sup> This decision clouded the future of potential federal legislation regulating the tobacco industry, which had been a part of the proposed federal settlement.<sup>141</sup>

Another major stumbling block the proposed settlement faced was the initial exclusion of tobacco farmers from the deal.<sup>142</sup> Congress attempted to remedy the initial omission of farmers through several proposed bills as the tobacco settlement was debated in Congress.<sup>143</sup>

Congress eventually settled on a bill, sponsored by Senator John McCain (R-Arizona)<sup>144</sup> that raised the original \$368.5 billion settlement to \$516 billion.<sup>145</sup> The bill, amended numerous times, called for higher excise taxes to pay for health and education spending, and did not grant the liability protection that the tobacco companies sought.<sup>146</sup> As the bill grew larger, tobacco companies walked away from the deal.<sup>147</sup> The federal settlement was then left for dead in the Senate.<sup>148</sup>

With a federal settlement apparently no longer a possibility, there have been renewed negotiations between tobacco companies and the remaining states with pending lawsuits.<sup>149</sup> A new settlement between the major tobacco companies

140. See *id.* at 172-76. The Federal Cigarette Labeling and Advertising Act is codified at 15 U.S.C. §§ 1331-1333 (1994).

141. See Geyelin & Hitt, *supra* note 2, at A3. The settlement had died in Congress prior to the Fourth Circuit's ruling. See *id.* This means that without a settlement which the tobacco industry agrees to, federal authority to pursue settlement goals is sharply limited. See *id.*

142. See Taylor, *supra* note 45, at A24. It was fairly certain that tobacco farmers would suffer some negative impact as a result of the settlement, and the farmers sought some type of compensation for their losses. See *id.*

143. See WOMACH, *supra* note 23, at CRS-5.

144. See S. 1415, 105th Cong. (1998).

145. See Garrett & Walsh, *supra* note 131, at 30.

146. See *id.*

147. See *id.* After rescinding support for the settlement, the five major tobacco companies embarked on a \$40 million advertising blitz in opposition to the McCain bill. See John F. Harris & Ceci Connolly, *Clinton Suffers Major Defeat on Tobacco*, WASH. POST, June 18, 1998, at A19.

148. As a possible substitute for the failed federal settlement, the Clinton Administration was considering filing a federal tobacco lawsuit, similar to the suits filed by the majority of the states. See Baker & Torry, *supra* note 6, at A11. A federal lawsuit, which may result in a possible multibillion-dollar national settlement, would not require approval by Congress. See Jeffrey Taylor, *Clinton May Sue Tobacco Firms To Recap Costs*, WALL ST. J., July 15, 1998, at A4.

149. See Sandra Torry, *Tobacco Giants Try to Settle with States; 37 Cases Pending Against Companies*, WASH. POST, July 10, 1998, at A01. These new discussions are much more limited in scope than the proposed federal settlement, with a \$180 billion payoff for the states currently being negotiated. See *id.* However, these new settlement discussions do not involve granting tobacco companies immunity from civil suits. See *id.* These new settlement talks were not initially productive, with at least one state and two tobacco companies leaving the bargaining table. See Milo Geyelin, *Massachusetts Quits Group of 9 States Seeking a Deal with Cigarette Makers*, WALL ST. J., Aug. 31, 1998, at B5; Milo Geyelin, *R.J. Reynolds, B & W Drop Out of Tobacco Talks*, WALL ST. J., Aug. 27, 1998, at A6.

and the remaining states was announced on November 16, 1998.<sup>150</sup> Many details of this new settlement were not yet known at the time this Note went to publication.

#### IV. THE LIKELY IMPACT ON TOBACCO FARMERS

The failure of the proposed federal settlement has both positive and negative implications for the tobacco industry. Without a federal settlement, the tobacco industry does not face federal regulation of advertising and marketing of tobacco products.<sup>151</sup> Additionally, the price of cigarettes will not have to be dramatically raised to compensate for a large national settlement and higher taxes.<sup>152</sup> The bad news for the tobacco industry is that this may only be a temporary reprieve from the anti-tobacco onslaught.<sup>153</sup>

Tobacco advertising is still likely to change in states where settlements are reached.<sup>154</sup> Although the changes will be gradual, the changes in some states may be far more severe than those involved in the proposed federal settlement.<sup>155</sup> Additionally, the tobacco industry faces the costs of litigating hundreds, if not thousands, of lawsuits from states, employee health pension funds, unions, and individuals suing tobacco companies for smoking-related claims.<sup>156</sup> It is likely that the costs of litigation will be passed onto smokers, with incremental rises in the price of cigarettes.<sup>157</sup> Raising the price of cigarettes would help the states achieve

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150. See Geyelin, *supra* note 97, at A3. This settlement was agreed to by the remaining states on November 20, 1998. See Torry & Schwartz, *supra* note 97, at A01.

151. See Tara Parker-Pope & Milo Geyelin, *Tobacco: Without Legislation, Price Rises Could Ease*, WALL ST. J., June 19, 1998, at B1. The industry was facing heavy federal regulation in an effort to curb teen smoking. See *id.*

152. See *id.* Under the McCain bill, economists estimated that the price of cigarettes would rise to \$5.00 per pack over the next two to three years. See *id.*

153. See *id.* Tobacco companies continue to face a large number of individual and class-action lawsuits, and it is likely that plaintiffs' lawyers will keep looking for new legal theories to challenge the industry. See Suein L. Hwang & Milo Geyelin, *Tobacco: Is Tobacco Settlement Good News for Industry?*, WALL ST. J., Nov. 17, 1998, at B1. Additionally, the U.S. Department of Justice is continuing its investigation into whether tobacco companies conspired to mislead Congress and regulations. See *id.* There also remains a possibility that federal tobacco legislation will be revived in Congress. See Taylor, *supra* note 131, at A4.

154. See Parker-Pope & Geyelin, *supra* note 151, at B1.

155. See *id.* In Minnesota, for example, the tobacco industry agreed to an injunction against marketing cigarettes to children or making health claims about cigarettes in the state. Additionally, all cigarette advertising on billboards, buses, taxis, and bus stops must come down within six months, and all "[p]romotional merchandise with cigarette logos—including T-shirts, hats, gym bags, backpacks and CD players—are to be banned." *Id.*

156. See *id.*

157. See *id.* Cigarette prices have already been raised about twenty percent over a ten-month period. See *id.* The legal turmoil has triggered a price war among cigarette makers in an attempt to raise their market shares. See Suein L. Hwang, *Tobacco: Cigarette Makers in Discount War to Lock in Share*, WALL ST. J., Sept. 23, 1998, at B1. The tobacco companies apparently believe that

one of the key goals of the failed federal settlement and the current state lawsuits—decreasing both adult and teen smoking.<sup>158</sup>

Tobacco farmers fear the results will have a potentially devastating impact on them, as decreases in consumption would almost certainly mean decreases in production.<sup>159</sup> Less advertising and higher prices for cigarettes will likely lower the demand for cigarettes, which would mean the tobacco companies would produce less and, consequently, buy less from farmers.<sup>160</sup> Additionally, tobacco farmers anticipate that one way tobacco companies will attempt to offset their litigation costs will be to pay less for the tobacco they purchase from farmers.<sup>161</sup>

Tobacco farmers argue the prospect of selling reduced amounts of tobacco for less money creates a “double whammy” impact that few tobacco farmers expect to survive.<sup>162</sup> This “double whammy” impact will not be felt immediately by tobacco farmers but instead will be spread out over time.<sup>163</sup> However, as demand for cigarettes decreases and settlement payments to states remain constant, the “double whammy” impact would be unavoidable.<sup>164</sup> This “double whammy” would likely offset any positive aspect of any settlements—stability of the tobacco industry.<sup>165</sup>

There is little doubt that the tobacco industry’s suppliers—farmers—would shoulder some of the negative impact likely to be caused by the litigation assault on

widespread advertising restrictions will “freeze” their market positions because promotions and advertising would be largely curtailed. *See id.* These restrictions will put smaller rivals in difficult positions because they will be unable to persuade customers to switch brands with such advertising restrictions in place. *See id.* Even with the recent price war, smokers are still paying an average of eleven percent more per pack of cigarettes than they did a year ago. *See id.*

158. *See* JANE G. GRAVELLE, THE PROPOSED TOBACCO SETTLEMENT: EFFECTS ON PRICES, SMOKING BEHAVIOR, AND INCOME DISTRIBUTION, CRS REPORT FOR CONGRESS NO. 97-995, at CRS-1 (updated May 5, 1998) (on file with the *Drake Journal of Agricultural Law*).

159. *See* Joe Ward, *Growers Say Settlement Is a Bad Deal for Them*, COURIER-J. (Louisville, Ky.), June 21, 1997, at 1A. Tobacco farmers again have expressed concerns about the proposed settlement announced on November 16, 1998. *See* Craig Timberg, *Tobacco Farmers See Future as Cloudy; Va. Growers Wary of Proposed Deal*, WASH. POST, Nov. 18, 1998, at B07.

160. *See* Bob Battle, *Tough Row for Tobacco Farmers*, NASHVILLE BANNER, June 24, 1997, at A1.

161. *See* Ward, *supra* note 159, at 1A.

162. *See id.*

163. The ranks of smokers are projected to decrease over time. *See* Peter Baker, *Tobacco Pact Would Cut Smokers’ Ranks by Millions, Administration Says*, WASH. POST, Aug. 17, 1997, at A18. Payments made by the tobacco industry to states would also be spread out over time, although how much time is currently unknown. *See* Milo Geyelin, *Tobacco Firms and States Discuss Dollar Figures, but Progress Little*, WALL ST. J., July 31, 1998, at B10.

164. *See* Ward, *supra* note 159, at 1A.

165. *See id.* The stability of the industry remains in doubt with recent settlement talks, since immunity from civil lawsuits does not appear to be part of current deals being discussed. *See* Torry, *supra* note 149, at A0.

the industry.<sup>166</sup> The amount of the negative impact farmers will suffer is not yet known.<sup>167</sup> The bulk of settlement payments will likely fall on consumers who will see prices of cigarettes rise to offset litigation costs of the industry.<sup>168</sup>

A rise in cigarette prices will have an effect on consumption.<sup>169</sup> Analysis of consumer price behavior has been done to determine a price-elasticity of demand for cigarettes in order to predict likely consumption declines over the short term.<sup>170</sup> For a single pack of cigarettes, analysts estimate that each 1% increase in price causes a decline of 0.4 of 1% in purchases.<sup>171</sup> This consumption decrease must be adjusted to determine the effect on farmers because cigarette manufacturers in this country use both domestic and imported tobacco, a sizable quantity<sup>172</sup> of domestically manufactured cigarettes is exported, and the export market is a large outlet for unmanufactured leaf tobacco.<sup>173</sup>

Using the numbers from the original federal settlement, \$368.5 billion would be paid out by tobacco manufacturers over the next twenty-five years.<sup>174</sup> This was estimated to cause cigarette prices to increase by about \$0.60 per pack.<sup>175</sup> Using two dollars per pack as the average retail price, a sixty-cent price increase amounts to a thirty percent increase.<sup>176</sup> The formula used for calculating the consumption decline is multiplying the demand elasticity value (-0.4) by the percent increase

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166. See GRAVELLE, *supra* note 158.

167. Tobacco farmers certainly will face a reduction in income due to reduced demand, but the settlement payments could be shared by tobacco workers and stockholders of tobacco firms. See *id.* Effects on stock prices will depend greatly on whether tort liability is restricted by settlements. See *id.*

168. See *id.* The distributional effect would be similar to that of a tobacco tax, which is a regressive tax. See *id.* at CRS-2. This effect is due to the fact that lower-income families tend to consume a larger amount of tobacco than higher income families. See *id.* For the lowest income families that continue to consume tobacco products, current taxes, which are about \$0.50 per pack, are the same order of magnitude as the individual share of the payroll tax. See *id.* This is in excess of five percent of income. See *id.* Families below the median income pay one percent or more of their income. See *id.* Therefore, settlement payments would impose significant burdens on low income families. See *id.*

169. See WOMACH, *supra* note 23, at CRS-1.

170. See *id.* at CRS-2.

171. See *id.* This would be elasticity of demand minus 0.4. See *id.*

172. Thirty-three percent of cigarettes are exported. See *id.*

173. See *id.* Approximately 35% of unmanufactured leaf tobacco is disposed of on the export market. See *id.* Foreign sales for cigarettes and leaf tobacco may not be affected by settlement and litigation costs, except that export marketing efforts may intensify. See *id.*

174. See *id.*

175. See *id.*

176. See *id.*

(thirty percent).<sup>177</sup> The result is a twelve percent decrease in overall consumption.<sup>178</sup>

The impact on domestic tobacco production can be calculated once the amount of consumption decline is known.<sup>179</sup> In 1996, about 58% of the tobacco in domestically manufactured cigarettes was domestic leaf, leaving 42% manufactured from foreign leaf.<sup>180</sup> Nearly 65% of cigarettes manufactured in the United States were consumed in the United States, with the remainder exported.<sup>181</sup> The formula for calculating the reduction in the use of domestic leaf is the percent of domestic cigarette consumption multiplied by the percentage of domestic tobacco used in cigarette production (58%), multiplied by the percentage of domestically-manufactured cigarettes consumed in the United States (65%).<sup>182</sup> Using this formula, a 0.38% reduction in the use of domestic leaf will occur for every 1% decrease in domestic cigarette consumption.<sup>183</sup>

Therefore, using the earlier estimate of a 12% decline in domestic consumption, the use of domestic leaf can be expected to decline by about 4.5%.<sup>184</sup> The Clinton Administration projected a 28% decline in domestic cigarette consumption under the proposed federal settlement.<sup>185</sup> Using the provided formula, the decline in use of domestic tobacco would be about 10.5%.<sup>186</sup>

According to data from the USDA, tobacco production has averaged about 1.526 billion pounds over the five-year period of 1993 to 1997.<sup>187</sup> A 4.5% decline in output from the five-year average would amount to nearly seventy million pounds.<sup>188</sup> However, a 10.5% decline in output from the five-year average would amount to over one hundred sixty million pounds.<sup>189</sup>

177. *See id.*

178. *See id.* Some policy officials argue that to achieve a greater consumption decline among teenagers, a price hike of \$1.50 is required. *See id.* A \$1.50 price increase amounts to a 75% price increase, and when multiplied by the demand elasticity value, this results in a 30% overall consumption decrease. *See id.*

179. *See id.*

180. *See id.*

181. *See id.* According to USDA data, cigarette exports have shown a strong upward trend, increasing from 100,000,000,000 pieces in 1988 to an estimated 240,000,000,000 pieces in 1997. *See id.* Since there does not appear to be any settlement provisions that directly impact cigarette or leaf exports, the export market is held constant for purposes of this analysis. *See id.*

182. *See id.*

183. *See id.*

184. *See id.* Using the other figure of a 30% decline in consumption, use of domestic tobacco could decline by about 11.4%. *See id.*

185. *See Baker, supra* note 163, at A18.

186. *See WOMACH, supra* note 23, at CRS-2. This figure is calculated as follows:  $28\% \times 58\% \times 65\% = 10.556\%$ . *See id.*

187. *See id.*

188. *See id.* at CRS-2 to -3.

189. *See id.* at CRS-2 This figure is calculated as follows:  $1,526,000,000 \times 10.5\% = 160,230,000$ . *See id.*

It is difficult to say how much of an impact this would ultimately have on tobacco farmers. If the federal price-support system remains in place, the effects would be limited to quantity, not to the price.<sup>190</sup> Tobacco farmers would see a reduction in their quotas, which could be significant relative to their sales in that there is a significant reduction in demand.<sup>191</sup> Gravelle states that “[t]o the extent that returns on growing tobacco are higher than the returns on producing alternative crops and to the extent assets are specialized in tobacco production, there will be a financial loss” suffered by tobacco farmers.<sup>192</sup>

The economic benefits of the tobacco price-support system have also resulted in lucrative land values and marketing quota rents for tobacco farmers.<sup>193</sup> The holders of the 336,000 quotas will likely realize a loss in net worth under a national tobacco settlement.<sup>194</sup> Womach states that “[a] rough estimate [of the current system] is that 63% of the quotas are held by absentee landlords whose rental income could decline.”<sup>195</sup> All of the roughly 124,000 tobacco farm operators, owners, and lessees could expect to suffer a decline in sales revenues.<sup>196</sup>

There are various ways to determine the amount of economic loss tobacco farmers are likely to experience.<sup>197</sup> “One way to estimate the loss to farm owners from declining quotas is to calculate the present value of foregone future quota rent.”<sup>198</sup> If it is assumed that interest rates will continue at the current levels and tobacco quotas will earn annual rental income long into the future at the current \$0.42 per pound, the expected earnings should still be discounted by 10% or higher due to the possibility that quota levels may decline, or even that the federal tobacco system may be eliminated in the future.<sup>199</sup>

“Assuming a 10% discount rate over 25 years, the present value is \$3.81 per pound.”<sup>200</sup> Using the earlier calculations, “a decline of 70 million pounds due to the \$0.60 per pack price increase means lost quota value of \$266.7 million” to tobacco farmers.<sup>201</sup>

190. See GRAVELLE, *supra* note 158.

191. *See id.*

192. *Id.*

193. See WOMACH, *supra* note 23, at CRS-3.

194. *See id.*

195. *Id.*

196. *See id.* at CRS-2.

197. See GRAVELLE, *supra* note 158.

198. WOMACH, *supra* note 23, at CRS-3 to -4. A discount rate must be used for future earnings to account for inflation, account for risk, and consider whether the returns are pre- or post-tax. *See id.*

199. *See id.*

200. *Id.* This is a conservative estimate. If the future earning potential of tobacco quotas are viewed as highly secure, comparable to a U.S. Treasury note or bank certificate of deposit yielding five percent interest, then the present value would be \$5.92 per pound. *See id.*

201. *Id.* Again, the less conservative estimate of \$5.92 per pound present value would result in a \$414.4 million loss in quota value for tobacco farmers. *See id.*

"Another way to judge the value of tobacco quota[s] is to examine the price at which the quota is sold."<sup>202</sup> According to data from the state of Kentucky, "the average sale price for burley quota over the past 5 years was \$1.87 per pound."<sup>203</sup> "If all quota losses from the tobacco settlement are valued at \$1.87 per pound," then the seventy million pound decline under the earlier calculations "could eliminate about \$130 million from the net worth of tobacco quota holders."<sup>204</sup>

There are other concerns about the potential negative impact of a national tobacco settlement. The impact would likely be disproportionately felt in tobacco-concentrated areas.<sup>205</sup> On the national level, it is estimated that total employment would actually increase if domestic tobacco consumption were eliminated "because money now spent on tobacco products would be spent on more labor-dependent items."<sup>206</sup> However, direct employment in tobacco farming would decline by 79,000 jobs.<sup>207</sup> Womach makes the following predictions regarding the effect on tobacco-dependent communities:

The areas most adversely impacted by reduced tobacco production would be the isolated rural communities throughout Kentucky, the Virginia-Tennessee, the Virginia-North Carolina borders, the coastal plain of the Carolinas, Georgia, and northern Florida. In 1992, 311 of counties located in these areas had tobacco sales of more than \$1 million. In 43 of these counties, tobacco receipts exceeded 10% of local earnings . . . .<sup>208</sup>

It should be noted that the calculations and estimates in this section were based on the June 1997 national settlement. It is extremely difficult at this point to make estimates based on settlements reached in each state where lawsuits are currently being litigated. Costs could actually become much higher than the proposed \$368.5 billion national settlement, especially since it is unknown whether tobacco companies will be able to negotiate tort immunity in current settlement discussions. Not enough was known about the November 16, 1998 settlement at the time this Note was written for it to be considered here.

202. *Id.*

203. *Id.* It is arguable whether the sale price for burley quota represents an accurate measure of quota values, since only about one percent of the burley tobacco quota is sold annually. *See id.*

204. *Id.*

205. *See id.* at CRS-2.

206. *Id.* at CRS-5.

207. *See id.* There have been various estimates of the number of jobs threatened by a tobacco settlement: the American Economics Group estimates between 31,807 and 92,501 jobs will be lost; the Barents Group estimates jobs losses between 21,333 and 44,167; and the FDA estimates that only 1000 jobs will be lost. *See Less Tobacco Sales Will Not Cost Jobs, One Study Says; Others Say over 92,000 Jobs at Risk*, 10 No. 1 MEALEY'S LITIG. REP.: TOBACCO, May 2, 1996, available in WL, 10 No. 1 MLRTOBAC 26.

208. WOMACH, *supra* note 23, at CRS-5. In eight counties, tobacco receipts exceeded 20% to 30% of local earnings, and in one county, 55%. *See id.*

## V. ATTEMPTS TO PROTECT TOBACCO FARMERS

Several of the tobacco bills introduced during the 105th Congress in late 1997 and early 1998 contained proposals to compensate tobacco farmers for the inevitable decline in demand that would result from a national settlement.<sup>209</sup> However, when the national settlement was defeated in Congress, all proposed federal compensation for farmers went down with the settlement. For this reason, tobacco farmers were not standing behind the industry when it chose to rescind its support for a national settlement.<sup>210</sup>

There were several bills proposed that would have provided farmers compensation as part of a national settlement.<sup>211</sup> One proposal included opening a trust fund that would be operated with funds allocated through national settlement legislation.<sup>212</sup> Most of the funds would likely come from tobacco manufacturers and tobacco product importers.<sup>213</sup> The trust fund would be maintained and operated for the duration of the settlement, which would have been twenty-five years.<sup>214</sup> The trust fund “would provide assistance . . . to tobacco farmers, displaced industry workers, and tobacco-dependent communities” in response to any adverse impacts caused by the settlement.<sup>215</sup> This was a popular proposal in Congress, with various versions of this type of compensation appearing in several bills.<sup>216</sup>

A harsher alternative proposed in Congress was the termination of the federal quota program in 1999 and a three-year phase out of the price support loan program.<sup>217</sup> During the phase out period, buyout payments would be made to

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209. *See id.*

210. *See* Gail Gibson, *This Time, Growers Slow to Line Up Behind Big Tobacco*, SAN DIEGO UNION-TRIB., June 14, 1998, at A30. The November 16, 1998 proposed settlement included a paragraph “pledging that the industry would protect farmers from slackening demand or falling prices.” *See* Timberg, *supra* note 159, at B07. The details were not yet settled, but the industry reportedly has offered to make cash payments for the next 10 years to trust funds designed to assist tobacco farmers. *See id.*

211. *See* WOMACH, *supra* note 23, at CRS-6; WOMACH, *supra* note 28.

212. *See* S. 1310, 105th Cong. § 101 (1998). The trust fund would have been known as the “Tobacco Community Revitalization Trust Fund.” *See id.* § 101(a).

213. *See id.* §§ 101(b)(1), 102.

214. *See id.* § 101(d)(1). Assuming the bill had been enacted, the trust fund would remain in effect from 1999 through the year 2023. *See id.*

215. WOMACH, *supra* note 28. The total estimated cost of this bill, over its twenty-five year life, was \$28.5 billion. *See* WOMACH, *supra* note 23, at CRS-6.

216. *See* WOMACH, *supra* note 28. The McCain bill, S. 1415, contained a similar compensation plan when it came to the floor on May 18, 1998. *See id.* During the 105th Congress, bills introduced with variations on the trust fund proposal included S. 1492, H.R. 3028, S. 1582, and H.R. 3474. *See id.*

217. *See* S. 1313, 105th Cong. §§ 102-103 (1998).

quota owners to compensate for the lost value of the quota,<sup>218</sup> and block grants would be given to tobacco-growing states.<sup>219</sup> This plan gained support because many members of Congress believed the federal government could not continue to maintain the tobacco program while at the same time attempt to decrease the consumption of tobacco products.<sup>220</sup>

Another proposed bill combined both of the above approaches by creating a trust fund and ending the federal tobacco program through the transfer of the quota and loan system administration to a private corporation.<sup>221</sup> The bill also included annual community economic development block grants to tobacco-dependent communities.<sup>222</sup>

The McCain bill, which was the leading settlement bill, contained provisions that would have compensated tobacco farmers for financial losses related to the settlement.<sup>223</sup> The bill included the establishment of a trust fund,<sup>224</sup> maintained by funds paid by the tobacco manufacturers and importers as part of the settlement.<sup>225</sup> Economic grants to tobacco communities were also included in the bill.<sup>226</sup> These provisions were estimated to cost approximately \$28.5 billion, which accounted for some of the additional money Congress added to the original \$368.5 billion settlement.<sup>227</sup>

## VI. CONCLUSION

The war on tobacco raises some difficult questions regarding tobacco farmers. The current attack seems focused both on punishing the tobacco industry for its past conduct, and reducing the ranks of current and future smokers. Even assuming that these are noble goals, the consequences that may stem from the achievement of those goals must not be overlooked. The evidence indicates that

218. See *id.* § 104(a)-(b). The payment would be calculated by multiplying the average annual quantity of quota owned by the owner during the 1995 through 1997 crop years by \$8.00. See *id.* § 104(c)(1)-(2).

219. See *id.* § 111. The block grants would total \$300 million over a three-year period. See *id.* § 111(b). The grants would be used to assist in diversification and alternatives to the production of tobacco, and off-farm activities such as development of non-tobacco related jobs. See *id.* § 111(d)(3)(A)-(B).

220. See Mike Brown, *Tobacco Supports Look in Jeopardy: Lugar, McConnell Suggest Farmers Consider Buyout*, COURIER-J. (Louisville, Ky.), Sept. 19, 1997, at 1B.

221. See S. 1582, 105th Cong. (1998).

222. See *id.* § 204. Estimates indicated that the bill would cost \$22.8 billion. See WOMACH, *supra* note 23, at CRS-6.

223. See S. 1415, 105th Cong. § 1021 (1998).

224. The trust fund would be named "Tobacco Community Revitalization Trust Fund." See *id.* § 1011.

225. See *id.* § 1012.

226. See *id.* § 1023.

227. See Gibson, *supra* note 210, at A30.

tobacco farmers will suffer some negative impact from a nationwide settlement. How much of an impact is debatable at this point; most of the projections available only consider the effects of a national settlement. A national settlement appears to be in place at the time this Note went to publication.<sup>228</sup>

Even with this new national settlement in place, tobacco farmers face an uncertain future. With the November 16, 1998 settlement in place, the tobacco industry will now be subject to nationwide marketing and advertising restrictions.<sup>229</sup> If this scenario unfolds, then the national projections discussed earlier in this Note will likely become more accurate. Tobacco farmers and tobacco-dependent communities would then face a serious threat to their livelihoods.

There are other possibilities that may occur in the coming months. Congress could decide to end the tobacco support system. If this were to happen, tobacco farmers almost certainly would experience the "double whammy" effect discussed earlier. Manufacturers would almost certainly want to pay less for tobacco to help offset litigation costs, and if consumption would decrease as a result of the litigation, less tobacco would likely be purchased from farmers.

Another possibility looming in the background is the bankruptcy implications that these multibillion dollar lawsuits may trigger.<sup>230</sup> The state Medicaid suits and a possible federal suit patterned after the state suits may be viewed as bankruptcy threats to the industry.<sup>231</sup> Tobacco farmers almost certainly would face devastating consequences if such a scenario were to occur.

At this point in time, there are many questions raised by the current litigation attack on the tobacco industry. One question stands out: should tobacco farmers suffer for the sins of the industry? If the answer is yes, then this reasoning could be extended beyond tobacco farmers. This surely is a dangerous proposition that should be avoided.

There undoubtedly are those who realize that tobacco farmers will suffer unfavorable consequences but would still be willing to sacrifice the farmers for the greater good of society. This greater good would be the sharp reduction in smoking overall and particularly among teenagers. The prevailing concern here is

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228. The proposed November 16, 1998 settlement was approved on November 20, 1998. See Torry & Schwartz, *supra* note 97, at A01. The tobacco industry concedes that a comprehensive national settlement is the industry's best option. See Parker-Pope & Geyelin, *supra* note 151, at B1.

229. The settlement includes a ban on all billboards and on the use of cartoon characters, such as the popular "Joe Camel." See Torry & Schwartz, *supra* note 97, at A01. The settlement did not include protection from all individual and class-action lawsuits for the tobacco industry. See *id.*

230. Some major tobacco companies may be considering "spinning off" their tobacco units from the rest of their companies. See Mike France & Larry Light, *Ideal Time to Quit Smoking?*, BUS. WK., Sept. 14, 1998, at 134. "Spin-offs" might prevent plaintiffs from collecting judgments if the cigarette units that are spun-off declare bankruptcy. See *id.*

231. See *id.* At the time this Note went to publication, it was unknown what, if any, bankruptcy implications the November 16, 1998 settlement has for the tobacco industry.

one of fairness. If the tobacco companies are at fault here, surely tobacco farmers should not share the blame. Tobacco companies, if they were conspiring to promote addiction to products they knew involved health risks, certainly did not include tobacco farmers in their plot. There were no memorandums sent to farmers telling them of the companies' plans to manipulate nicotine levels in cigarettes to promote addiction. Such decisions, if they were indeed made by tobacco companies, were far removed from the fields where tobacco was grown. Tobacco farmers simply grew their crops, harvested them, and took them to the market to be sold. The family farm aspect must also be considered. Many tobacco farms have been passed down through generations of families. The legacy of these family farms should not be forced to end now.

With this in mind, consider the current condition of the tobacco industry. With the anti-tobacco sentiment prevalent among most of the public, it appears unlikely that Congress will enact legislation to protect tobacco farmers if no settlement litigation accompanies it. This leaves tobacco farmers to fend for themselves as the litigation assault continues to grow against the tobacco industry.

Tobacco farmers face an uncertain future without federal protection. Anti-tobacco advocates may argue that the current attack on the tobacco industry is aimed only at the manufacturers, but tobacco farmers certainly appear to be in the line of fire as well. This Note has discussed the potentially devastating impact this attack may have on farmers. While the aim clearly is at the tobacco companies, the impact will not likely stop with the companies. Tobacco farmers will be affected by the current litigation. This is an unfair result, and it should be an unacceptable result.

It is too late to stop the war on tobacco. If many of the allegations against the industry are true, then the war may indeed be justified. However, tobacco farmers should not be forgotten as this war rages on. Congress has demonstrated that there may be ways to help tobacco farmers weather the litigation storm. Federal legislation may be the only way for many tobacco farmers to survive, given the massive litigation attack on the industry. Without some type of federal protection in place, many of the 124,000 tobacco farms in the United States risk becoming casualties of the war on tobacco.