A LOOK AT...

The Tobacco Settlement

Don't Sign It

On Balance, a Bad Deal for Public Health

By Henry A. Waxman

At the outset, it's worth saying that this isn't a perfect world and that perfection is sometimes the enemy of the good. But those cliches can't obscure a basic truth—a bad agreement, no matter how lofty the rhetoric, is a bad agreement. And that's the case with the proposed tobacco deal.

In some ways, the tobacco industry's position reminds me of Paul Newman and Robert Redford's final moments in "Butch Cassidy and the Sundance Kid," when the duo are trapped in a market square by the Bolivian army. They have no place to go, no place to hide.

Instead of the famous shootout, imagine the movie ending with a legion of lawyers negotiating a settlement. They propose immunity for Butch and the Kid: Incriminating evidence about the pair's past crimes will remain secret, and the outlaws will be free to rob more banks, especially in other countries. In exchange, the pair promise to share their loot with the authorities and to lower their public profile.

That's the deal the tobacco industry is offering. It makes for bad cinema—and even worse policy.

I am not against a fair legislative compromise with the tobacco industry. David Kessler, the former Food and Drug Administration commissioner, and C. Everett Koop, the former surgeon general, are chairing an Advisory Committee on Tobacco Policy and Public Health. The recommendations they have made could provide a basis for a worthwhile resolution, but they are very different from the 68-page agreement announced last week. That deal gives the companies extraordinary relief from mounting legal and regulatory assaults.

The tobacco companies are now facing class action suits from both smokers and nonsmokers as well as innovative private attorney general lawsuits in California. And they face a raft of strong state lawsuits that attempt to recoup Medicaid and other costs for tobacco-related illnesses and deaths. Minnesota has already forced the industry to turn over 150,000 pages of secret attorney-client documents that contain evidence of a crime or fraud. A favorable judgment in just one of these cases could trigger an avalanche of anti-tobacco judgments—and drive the industry into insolvency.

In the face of attacks like these, the proposed settlement delivers to the industry its Holy Grail—what Roy Burry, a tobacco analyst, recently called "absolutely full immunity." The agreement eliminates class action suits, the state lawsuits and the right of individuals to bring addiction claims; it caps what individuals can recover annually; and it allows the industry to pay for judgments against it—including judgments based on future wrongdoing—by reducing its payments for child health insurance and other public health needs.

On the regulatory side, the settlement gives the industry something equally unprecedented: It effectively bars the FDA from regulating the nicotine content of cigarettes. Two months ago, a federal judge in Greensboro, N.C., gave the FDA sweeping authority over nicotine, but the fine print of the settlement reverses this victory for public health. It changes the FDA's burden of proof and requires the agency to prove a negative—namely, that no black market will be created—before regulating cigarette content. Martin Broughton, CEO of the company that owns Brown & Williamson Tobacco Corp., got it right when he said that the settlement makes FDA nicotine regulation an "unlikely prospect."

And there's more buried in the fine print. One provision mandates that the industry pay for the settlement by raising cigarette prices, not by reducing profits. Another makes all industry payments tax deductible, in effect forcing taxpayers to pick up 35 percent of the costs. The provision eliminating the Tobacco Institute is so weak that the Institute's head was recently quoted as saying "[a]ll we're going to do is change the name on the door."

The provisions won by state attorneys general pale in comparison to these breathtaking concessions. In Koop's words, it looks as if we've been "snookered" again.

Mississippi Attorney General Mike Moore and his colleagues deserve great credit for insisting on a long list of important new regulatory restrictions on tobacco sales and marketing. But experience shows that the tobacco industry always finds ways around new regulatory controls. Banning Joe Camel and the Marlboro Man are real victories—ones that I have been urging for years—but no one should be under the illusion that this is the long-term solution to keeping tobacco away from children.

If this were a once-in-a-lifetime opportunity, the argument for the deal might be stronger. But many of the same restrictions can be established without having to concede immunity or FDA jurisdiction. Already, many cities have acted to ban tobacco billboards and the Federal Trade Commission has commenced proceedings to abolish Joe Camel. The public's case against the tobacco industry will only grow more compelling as new documents become public and lawsuits like Minnesota's come closer to trial.

The industry's financial obligation—$15 billion a year—may also seem impressive, but it is far less than the $100 billion a year in health care and economic costs that tobacco use causes. And it's disappointing that so much of the money will pay for lawyers' fees—perhaps as much as $10 billion—while so little goes to protect public health.

The industry could afford to pay much more. After the settlement, tobacco prices in the United States will still be much lower than in other developed countries. If the industry's annual payments were doubled to $30 billion, tobacco prices would rise by about $2 a pack—still well below prices in England and Australia. Experts say this increase would have the added benefit of cutting cigarette consumption in half.

Martin Broughton, perhaps the most candid tobacco executive, summed up the settlement as a "business deal," saying, "They want to be paid off, and we want a peaceful life."

Koop and Kessler are right that it is not a question of business, but health. To enact genuinely historic legislation, we must adopt their recommendations.

First, we must change the industry's economic incentives. We need performance standards, combined with what the Koop-Kessler Committee called "predictable and severe" penalties. The No Tobacco For Kids Act, which Sen. Richard J. Durbin (D-Ill.) and I introduced, would impose a $1-a-pack fee on the tobacco products of any company that fails to reduce the number of children using its products by 20 percent in two years, 60 percent in four years and 90 percent in six years. The so-called "look back" provisions in the settlement will not work: The maximum noncompliance fee of 8 cents per pack is trivial, and applying the fee industry-wide eliminates the incentive for individual companies to comply.

The FDA must also have full regulatory authority over cigarette manufacture and marketing, including the regulation of nicotine. In the 1970s, car manufacturers were required to reduce toxic auto emissions. In the '80s and '90s, oil companies were required to clean up gasoline. In the next decade, the tobacco manufacturers should be required to make less dangerous cigarettes.

Beyond these provisions, Koop and Kessler recommend that the settlement should extend to *all* workers the protections against exposure to environmental tobacco smoke, require the release of all incriminating documents, establish an independent commission to oversee future industry conduct, and increase and reallocate tobacco industry payments.

Their committee also recommends that we take steps to curb tobacco exports, recognizing that we will have no credibility in our fight against international drug trafficking if we continue to allow U.S. companies to sell an addictive drug to children overseas. Foreign governments have to make their own decisions on health policy, but we should prevent American companies from exporting cigarettes that are more dangerous than those sold here.

Of course, the tobacco industry might oppose these improvements and threaten to continue marketing to our children. But, without legislation, they have no safe haven. Like Butch Cassidy and the Sundance Kid, they can come out shooting—but I don't think they'll like the result.

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