Op-Ed
by
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Now that the initial fever surrounding the tobacco settlement has subsided, health experts have examined the actual text of the agreement in detail. Unfortunately, the closer the agreement is scrutinized, the more fundamentally flawed its provisions appear.

To be sure, the agreement is a good deal for the parties who negotiated it. If enacted into law, the tobacco companies' stock prices will soar and the class action lawyers will make billions. The state attorneys general will also get a windfall. Although states pay only ten percent of the medical costs of smoking-related illnesses, they will get over half of the settlement funds.

The deal is not so good for the rest of us. Tobacco victims, private insurers, and the federal government get virtually no compensation. Moreover, the deal effectively bars FDA regulation of nicotine, gives the industry unprecedented immunity from civil liability, impedes the disclosure of incriminating industry documents, and completely ignores the burgeoning problem of tobacco exports.

The provision that purports to penalize the industry for failing to reduce youth smoking shows how the tobacco lawyers succeeded in filling the fine print with loopholes. No provision is potentially more important to the public health. The only way to achieve fundamental change in tobacco company practices is to give the industry an economic incentive to stop kids from smoking.

On this issue, however, the settlement is deeply flawed. Its so-called "look-back" provisions, which are intended to achieve a 60% reduction in youth smoking in ten years, appear to be deliberately designed for failure. Under the settlement, companies are not held individually accountable for reducing youth smoking. If RJR reduces youth smoking rates, but the industry as whole doesn't achieve the required reductions because Philip Morris keeps selling Marlboros to kids, RJR and Philip Morris get hit with the same penalty. This industry-wide approach is self-defeating. It removes any incentive for RJR -- or any other individual company -- to reduce its share of the youth market.

The settlement also fails to include meaningful penalties for noncompliance with the standards. The Advisory Committee on Tobacco Policy and Public Health, cochaired by Dr. Koop and Dr. Kessler, says that penalties should be severe enough to "directly reduce total revenues and affect total shareholder value." The settlement, however, has a maximum penalty of eight cents a pack -- hardly a serious deterrent. We should begin with a dollar-a-pack penalty for any company that doesn't meet the performance standards. Repeat offenders should face even more stringent sanctions. Philip Morris needs to know it will be placed at a substantial competitive disadvantage if it fails to reduce teen consumption of Marlboros.

Another problem is that the performance standards have not been designed to withstand court challenges from the tobacco industry. The complex calculations required under the settlement insure that the industry will be able to delay the imposition of any penalties through years of litigation. To avoid delay and endless industry nitpicking, we must make the industry pay before going to court and bear the burden of proving that they complied with the standards.

Other changes are also needed. The performance standards should take effect sooner and require greater reductions than in the settlement. Smokeless tobacco manufacturers should be held to the same standards as the cigarette makers. Reductions in youth initiation, not just daily tobacco use, should be required. There should be no rebate of penalties to manufacturers. And none of the noncompliance penalties should be borne by the taxpayer through industry tax deductions.

The many problems in the performance standards section of the settlement are emblematic of the whole agreement. The entire document is riddled with loopholes that benefit the industry. The tobacco industry got it half right when it called the agreement a "bitter pill." It is -- but for us, not for them.