

Smoking Is Dangerous To Your Health: Especially If You Are A Sports Advertiser

- I. INTRODUCTION 261
- II. BACKGROUND 264
 - A. *History Leading to the Settlement* 264
 - B. *Recent Developments* 267
 - C. *Sport-Related Litigation* 269
- III. THE SETTLEMENT 271
 - A. *Purpose of the Settlement* 271
 - B. *The Terms of the Settlement* 273
 - 1. Title I: Reformation of the Tobacco Industry 273
 - 2. Title II: "Look Back" Provisions/State Enforcement Incentives 275
 - 3. Title III: Penalties and Enforcement; Consent Decrees; Non-Participating Companies 275
 - 4. Title IV: Nationwide Standards to Minimize 277
 - 5. Title V: Scope and Effect..... 277
 - 6. Title VI: Programs/Funding..... 278
 - 7. Title VII: Public Health Funds from Tobacco Settlement 278
 - 8. Title VIII: Civil Liability 280
 - 9. Title IX: Board Approval..... 281
- IV. ECONOMIC EFFECTS ON SPORTS 281
 - A. *Motorsports Sponsorship* 282
 - B. *The Manufacturer's Role in Motor Sports* 284
 - C. *Other Tobacco Sponsored Sports* 288
 - D. *The Future of Tobacco Sponsorship* 293
 - E. *Advertising* 294
- V. SUMMARY AND CONCLUSIONS 295

I. INTRODUCTION

It was a late-August Sunday afternoon in Scranton, Pennsylvania as the nineteen-year-old minor league second baseman emerged from the tunnel leading from the team's

clubhouse to the dugout. This was only his fourth day with the Columbus Clippers and he was about to start in his first Triple-A ball game against the Scranton-Wilkes Barre Red Barons. As he surveyed the newly improved Lackawanna County Stadium from the top step of the dugout, he realized how lucky he was to be there. The azure blue sky seemed bluer than it had ever been and the freshly cut grass looked like a putting green. The sold out crowd of 1,200 was starting to trickle in as he gazed at the Lucky Strikes billboard hanging on the outfield wall. With his foot firmly planted on the top step, he took out his tin of Skoal Long Cut, placed a wad in his mouth and ran to his position to field ground balls.

Now, fifteen years later, the once budding star must watch games on television from his bed at home. At the age of thirty-four, the International League's two-time MVP's biggest decision each day is which nourishing food to liquify in the blender. It was four and half years ago that this young phenom was diagnosed with mouth and gum cancer as a result of chewing tobacco from the age of fifteen. As a ninth grader playing varsity baseball, the impressionable young star was quickly influenced by the "more mature" senior captains on the team to throw in a dip in between innings.

At the risk of sounding too grim, it should be noted that this is a purely fictional portrayal. However, it is a very realistic scenario which should be considered when evaluating the advantages and disadvantages offered by efforts to reduce youth tobacco use. The portrayal offers only one of many of the consequences of youth tobacco use.

The growing concern over the health risks derived from cigarette smoking and tobacco consumption has extended to all aspects of American society. Among the most publicized concerns regarding tobacco use is the increasing number of lung and throat cancer cases being attributed to long-term smoking.¹ This concern has led to an all-out war waged against tobacco producers and their supporters in the name of

1. See Henry Weinstein and Myron Levin, *\$368-Billion Tobacco Accord Deal with the States Would Restrict Marketing Health*, LOS ANGELES TIMES, June 21, 1997, at A1. Tobacco is estimated to cause over 400,000 deaths per year in America. See *id.* Specifically, tobacco is believed to cause death in the following proportions: lung cancer, 29%; heart disease, 24%; lung disease, 16%; stroke, 5%; and other, 27%. See *id.*

“protecting the youth.”² While twenty years ago it was believed that smoking may be dangerous to your health,³ today the focus has been aimed at reducing the high statistical numbers of those addicted to smoking. New schemes are being developed in order to prevent new, younger smokers from ever beginning.⁴ Ramifications of the war on tobacco has expanded well beyond mere health concerns. Today, tobacco has infected every nuance of American society and in the past twenty-five years has significantly influenced American economics and most recently has infiltrated American sports.⁵

This comment will address the impact on American sports advertising and the revenue loss incurred by professional sports franchises under the recently proposed global tobacco

2. Robert A. Levy, *Tobacco Settlement Review before the Committee on the Judiciary of the United States Senate*, July 16, 1997 (citing *Substance Abuse and Mental Health Services*, Administrators Preliminary Estimates from the 1995 National Household Survey on Drug Abuse at 68). Although many proponents of the tobacco settlement see the driving force behind the settlement as the reduction in smoking among youths, statistics show that over the past decade there has been an ever-increasing decline in youth smoking. *See id.* In fact, during the period 1985 to 1995 the percentage of smokers between the ages of twelve and seventeen has dropped from 29% to 20%, and the average age of first-time smokers did not significantly change from 1962 to 1994. *See id.*

3. *See* U.S. Dep't of Health, Education and Welfare, *Smoking and Health; Report of the Advisory Committee to the Surgeon General of the Public Health Service*, Public Health Service Pub. No. 1103, 1964:17-21. The Surgeon General's first report on the dangers of smoking was first presented in 1964 and the report has been updated in twenty-three editions. *See id.* The 1964 report first recognized the real dangers of tobacco use and, most significantly, smoking. *See id.*

4. *See* Campaign for Tobacco Free Kids, *Position Statement/Position of the National Center for Tobacco-Free Kids on the Agreement Between the State Attorneys General and the Tobacco Industry* (visited Sept. 26, 1997) <http://www.tobaccofreekids.org/html/position_statement.html>

5. *See, e.g.*, Ira Tenowicz and Jeff Jenson, *Gov't Takes Swing at Cig Signs in Sports*, *ADVERTISING AGE*, Apr. 10, 1995, at 34. (DOJ filed suit against Madison Square Garden and R.J. Reynolds claiming violations of Labeling Act and forcing MSG and R.J. Reynolds to remove Marlboro signs from court side scorers table); Rita Ciolli, *Extra Bases-High Noon for Marlboro Man*, *NEWSDAY*, Apr. 28, 1995, at 102 (Justice Department required Shea Stadium to remove sign located directly below DiamondVision scoreboard); *Government Snuffs Out Marlboro Ad for Game*, *ST. LOUIS POST-DISPATCH*, Jan. 23, 1997, at 8C (Justice Department forced removal of Marlboro sign from Louisiana Superdome prior to Super Bowl).

The Department of Justice has targeted big market teams and events as the starting point in its fight against tobacco advertising. *See* Ciolli, *supra* at 102. Specifically, the DOJ has recently begun to actively enforce the Labeling Act against sports teams and sports facilities. *See id.* The DOJ has required venues to remove tobacco ads from the purview of the camera's eye. *See id.* By doing this, the DOJ seeks to eliminate those ads which are strategically placed around arenas in order to gain exposure when the camera pans or focuses on one section of the arena or stadium. *See id.*

settlement (the "settlement") between major American tobacco producers and states' attorneys general.⁶ Part II will discuss the legally significant background from 1961 to the present which led to the settlement. Additionally, relevant sports-related cases will be cited and explained. Part III will introduce the specific details of the settlement, focusing particularly on the terms banning tobacco advertisements at all American sporting events. Part IV focuses on the direct economic effects on sports franchises and major sports associations to recover the economic loss left by the ban on tobacco advertising. Specifically, major cigarette-supported sports will be examined and the settlement's impact will be predicted. The Comment will conclude with an evaluation of whether the settlement is in the best interests of American sports and for American society.

II. BACKGROUND

A. *History Leading to Settlement*

Although tobacco has been actively promoted in America through sports for almost 100 years,⁷ it was not until the early 1960's that the federal government began to realize the health risks involved. In 1964, the Surgeon General issued the first report linking cigarette smoking to lung cancer.⁸ In reaction to the constant ebb and flow of monthly health journal articles, studies, and reports, Congress took action.⁹ When Congress enacted the Cigarette Labeling and Advertising Act (the "Labeling Act")¹⁰ on January 1, 1966, it represented the first time that Congress recognized the importance of tobacco as a legitimate health issue.¹¹ The Labeling Act enabled Congress to as-

6. See Campaign for Tobacco Free Kids, *Settlement Document*, (visited Sept. 26, 1997) <http://www.tobaccofreekids.org/html/settlement_document.html> hereinafter *Settlement Document*.

7. See generally Michele Kaufman, *Sports Would Survive Tobacco Ban*, ST. LOUIS POST-DISPATCH, Sept. 7, 1997, at 7G; see *infra*. notes 152-157 and accompanying text.

8. See Surgeon General Report, *supra* note 3.

9. See James C. Thornton, *The Liability of Cigarette Manufacturers for Lung Cancer: An Analysis of the Federal Cigarette Labeling and Advertising Act and Preemption of Strict Liability in Tort Against Cigarette Manufacturers*, 76 KY. L.J. 569, 575 (1987).

10. See 15 U.S.C. § 1331(1997).

11. See *id.* The statute currently provides:

It is the policy of the Congress, and the purpose of this chapter, to establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health whereby-

sume exclusive control over all aspects of cigarette promotion, labeling, and advertising, essentially precluding states from exercising any control.¹² The Labeling Act's purposes are to provide a national uniform warning system to avoid inconsistencies between states and to protect the national economy by not financially damaging the powerful¹³ tobacco industry.¹⁴

In 1970 Congress followed suit and engaged its next assault upon the tobacco industry (the "industry") when it passed the Public Health Cigarette Smoking Act giving the Federal Communications Commission (the "FCC") jurisdiction over tobacco advertising on the air waves.¹⁵ The legislation was the biggest hit on the tobacco industry to that point because it banned all television and radio advertisements for cigarettes effective January 1, 1971.¹⁶

Congress further continued its ostracization of the industry in 1973 and expanded its delegation of power when it permitted the Civil Aeronautics Board to establish no smoking sections on all commercial airline flights.¹⁷ The expansion of Congress's delegation power under the Constitution¹⁸ pro-

(1) the public may be adequately informed about any adverse effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and

(2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

Id.

12. Thorton, *supra* note 9, at 575.

13. See Barry Meier, *Fla. Wheels Tobacco Deal State Gets \$11.3 Billion, Slate of Anti-Smoking Initiatives as Compensation for Ending Suit*, ROCKY MOUNTAIN NEWS, Aug. 26, 1997, at 3A. The tobacco industry has estimated profits in the billions of dollars annually. *See id.* In 1981, the tobacco industry took in \$2.3 billion in profits. *See id.* By 1995 that amount had more than doubled to \$7.8 billion. *See id.*

14. *See id.*

15. See 15 U.S.C. § 1335 (1997).

16. See Charles J. Harder, *Is it Curtains for Joe Camel? A Critical Analysis of the 1995 FDA Proposed Rule to Restrict Tobacco Advertising, Promotion and Sales to Protect Children and Adolescents*, 16 LOYOLA ENT.L.J. 399, 402-03 (1995).

17. See *26 Flight Attendants Sue Cigarette Firms Secondhand Smoking Cited in \$5 Billion Suit*, ST. LOUIS POST-DISPATCH, June 2, 1997, at 3A. In 1972, the Civil Aeronautics Board took control over domestic commercial airline flight regulations and imposed a restriction requiring all domestic flights to have segregated non-smoking sections. *See id.* In addition, the government banned smoking on all domestic U.S. flights of less than two hours in 1988. *See id.*

18. See U.S. CONST., art. 2, § 2, cl. 2. The United States Constitution allows Congress to delegate some of its powers pursuant to federal law. The relevant clause provides:

duced an important message for the tobacco industry: that Congress was not afraid to use all of its resources in order to combat the harmful effects of cigarettes.¹⁹

After a moderate layoff, the government again attacked the tobacco industry with the enactment of the Comprehensive Smokeless Tobacco Health Education Act²⁰ which established a uniform federal program to control the sale, distribution, and advertising of smokeless tobacco products.²¹ In addition, Congress again demonstrated aggressiveness by codifying the FCC's jurisdiction to include regulation and enforcement of the tobacco industry's presence in the media.²²

Although the previous legislative attempts at oppressing the industry were powerful and had profound results in the war against smoking, it was not until 1988 that the crushing blow reached the industry. When the Surgeon General issued a 1988 report²³ declaring cigarette smoking addictive, the floodgates were opened for a national public outcry against smoking.²⁴ The amount of lawsuits filed against the tobacco producers following the report, which ranged from products liability to breach of warranty claims, flooded the courts.²⁵ Early cases regarding failure to warn and strict liability were

. . . . but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments. . . .

Id.

19. See Henry Weinstein, *Tobacco Deal Could Stall in Congress*, THE NEWS & OBSERVER (Raleigh, N.C.) Sept. 4, 1997, at A4. In reaction to the settlement, several members of Congress emphasized the necessity of caution in proceeding with approval of the agreement. See *id.* These members are concerned that the agreement is not strong enough to provide the protections necessary to promote youth abstinence from smoking. See *id.* In reaction, Senator Edward M. Kennedy (D-MA.) stated that the present agreement, "should be the beginning, not the end, of the legislative process." *Id.*

20. 15 U.S.C. § 4402 (1994).

21. See Harder, *supra* note 16, at 403.

22. See *id.* at 402-403.

23. See *id.* at 402-403 n.148. (citing Dep't of Health and Human Services, Pub. No. 88-9406, *The Health Consequences of Smoking: Nicotine Addiction, A Report of the Surgeon General* 215 (1988)).

24. See *Sackman v. Liggett Group*, 173 F.R.D. 358 (E.D.N.Y. 1997) (court held documents relating to medical research of effects of tobacco use was discoverable).

25. See *id.*; *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990) (claims for intentional misrepresentation, strict liability, breach of warranty); *Palmer v. Liggett Group*, 825 F.2d 620 (1st Cir. 1987) (claims for inadequate warnings); *Wolpin v. Philip Morris*, No. 96-1781-Civ-King 1997 WL 535218 (S.D. Fla. 1997) (claims for negligence and civil conspiracy).

generally struck down by the courts.²⁶ However, following the Surgeon General's report in 1988, the courts appeared to become more deferential to plaintiffs' claims.²⁷

More recently, Congress gave the Food and Drug Administration (the "FDA") the authority to exercise jurisdiction over products containing nicotine, including smokeless tobacco.²⁸ The act gave the FDA the power to limit and control the contents of cigarettes and smokeless tobacco products.²⁹ The FDA's increased authority has become one of the most controversial issues leading up to the proposed global settlement.³⁰ Indeed, the FDA's role in the settlement will become even more prevalent in the upcoming months as the agreement becomes more solidified.

B. Recent Developments

In 1989 and 1990, several members of Congress proposed bills that had the potential to change the face of both culture and sports advertising in America permanently.³¹ The Protect Our Children from Cigarettes Act of 1989³² (the "1989 Bill") prohibited the display of a registered brand name of cigarette

26. See *Fine v. Philip Morris*, 239 F. Supp. 361 (S.D.N.Y. 1964) (court used discretion to dismiss all counts although there was at least one valid claim).

27. See *Cipollone v. Liggett*, 505 U.S. 504 (1992) (Supreme Court held that federal statutes regulating tobacco advertising did not preempt state law damages actions). *Cipollone* allowed individuals to file state claims against tobacco producers in certain types of actions such as tort actions not based upon failure to warn, breach of express warranty claims, intentional fraud and misrepresentation and conspiracy. See *id.*

28. 60 FED. REG. 41,314 (1995) Regulations restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco Products to Protect Children and Adolescents (codified as 21 C.F.R. §§ 801, 803, 804, 897).

29. See *id.*

30. See *Coyne Beahm v. U.S. Food and Drug Administration*, 966 F. Supp. 1374 (M.D.N.C. 1997) (court held that FDA may regulate tobacco products pursuant to Federal Food, Drug and Cosmetic Act (FDCA)). This most recent case, in effect, held that tobacco products are classified as drugs. See *id.* at 1374. With this designation, the FDA has complete control and discretion to control the contents, manufacture and distribution of tobacco pursuant to the FDCA. See *id.* However, the court also determined that the FDCA does not authorize the FDA to restrict the promotion or advertising of tobacco products. See *id.*

31. See *Randall Stoner, 200 MPH Cigarette Ads: A Comparison of International Restrictions on Tobacco Sports Sponsorship*, 15 HASTINGS INT'L & COMP. L. REV. 639, 648 (1992); H.R. 5041, 101st Cong., 2nd Sess. (1990); H.R. 1250, 101st Cong., 1st Sess. (1989).

32. H.R. 1250, 101st Cong., 1st Sess. (1989). The Act proposed, "No person may engage in the consumer sales promotion of any tobacco in or affecting commerce if that consumer sales promotion is or may be seen or heard by any person under the age of 18." *Id.*

on any car, boat, animal or other sporting equipment by any post-statute created entity.³³ Although not passed, the Act was progressive because it provided only the name of the sponsoring corporation be allowed to display its name.³⁴ In addition, while the Act permitted "tombstone" ads,³⁵ it forbade signs and billboards promoting tobacco products in any sports stadium or other sports facility.³⁶

Soon after, Representative Henry Waxman (D-CA) proposed the Tobacco Control and Health Protection Act in 1990 (the "Waxman Bill").³⁷ Had the bill been enacted, it would have re-defined the sports advertising industry. Specifically, it would have been necessary for sports such as auto racing and some major tennis tournaments to seek out new types of sponsors and take a hit on their financing arrangements. Although neither the 1989 Bill nor the Waxman Bill reached a full Congressional vote, they set the tone for important details which ultimately became part of the global settlement.³⁸

In 1994, the foundation was laid for a global settlement, leading to the June 1997 agreement. In the spring of that year, the first of several states filed suit against tobacco producers to recover Medicaid costs for payments made on behalf of cancer patients who suffered as a result of prolonged tobacco use.³⁹ It was also in 1994 that the first certified class action

33. *See id.*

34. *See id.*

35. Stoner, *supra* note 31, at 649. The term "tombstone" advertising refers to billboard advertisements that may only be printed in black and white lettering and may be no larger than the package size. *See id.* This has the effect of rendering billboards useless. *See id.*

36. *See id.* at 649.

37. H.R. 5041, 101st Cong., 2nd Sess. (1990) The act provided:

It shall be unlawful within the United States for the manufacturer, packager, distributor of tobacco products. . .to sponsor or cause to be sponsored any athletic, music, artistic, or other event in the name of a tobacco product trademark or in a manner so that a tobacco product trademark is publically identified as a sponsor of, or in any way associated with, such an event, . . . or to pay or cause to be paid to have any tobacco product trademark appear on any vehicle, boat, or any other equipment used in sports.

Id.

38. The complete details of the settlement and its provisions will be discussed in detail in Part III, *infra*.

39. *See In re Corr-Williams Tobacco Co.*, 691 So.2d 424 (Miss. 1997). The first suit for recovery of Medicaid funds was brought by the Mississippi Attorney General. *See id.* The suit not only set the stage for other states to follow, but it also became the springboard for the global settlement. *See id.*

suit was brought by cancer victims suffering as a result of tobacco products.⁴⁰ The class certification set the tone for several class action filings in the months following.⁴¹ Finally, in 1996, at least one tobacco company surrendered to Congress's relentless onslaught of negative publicity by admitting that cigarettes are addictive.⁴² Shortly thereafter, tobacco companies, in an effort to maintain damage control, began to seriously consider terms proposed by the states.⁴³

On June 20, 1997 in the wake of insurmountable odds, the industry agreed with the attorneys general of thirty states to pay \$368.5 billion over a twenty-five year period, in return for several considerations, including a limit on the number and type of civil lawsuits that could be filed against the industry by those injured from tobacco use.⁴⁴

C. Sport-Related Litigation

Although claiming to be committed to the reduction of to-

40. See *Broin v. Philip Morris*, 641 So.2d 888 (Fla. Dist App. 1994), *rev. denied* 654 So.2d 919 (Fla. 1995) (Flight attendants brought suit against tobacco producers alleging in-flight inhalation of second hand smoke caused injury).

41. See *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995). In *Castano*, Judge Jones certified the largest potential tobacco-related class suit. *See id.* at 737. The named plaintiff, Diane Castano was the wife of a throat cancer victim who had previously brought suit on his own behalf, on a loss of chance of survival claim. *See id.* at 738, nn. 4-5. In the class action, Ms. Castano claimed that tobacco producers fraudulently failed to provide warnings to smokers that nicotine is addictive. *See id.* at 738. In addition, the class claimed that tobacco producers intentionally manipulated nicotine levels in cigarettes with the knowledge that higher nicotine levels make cigarettes more addictive. *See id.*

42. See 26 *Flight Attendants*, *supra* note 17, at 3A. Liggett Company as part of a settlement with attorneys general from five states admitted that cigarettes are addictive. *See id.*

43. Contrast Kathryn Ericson, *Tobacco Companies Say No Settlements in the Works in State Litigation*, WEST LEGAL NEWS, Torts and Personal Injury: Tobacco Liability, Mar. 29, 1996, at 2755. Despite ongoing negotiations, tobacco representatives continued to deny any involvement in settlement. *See id.* In 1996, they announced, "[we] have no intention of settling these or any other pending tobacco cases out of court despite the comments of plaintiffs' lawyers." *See id.*

44. See Weinstein and Levin, *supra* note 1, at A1; see also Paul Barton, *Tobacco Pact Chesley: Tobacco Deal Averts 40 Years in Court*, CINCINNATI INQUIRER, July 17, 1997, at A8. In 1997, the tobacco producers began real negotiations with the states and attempted to resolve many of the difficult issues at bar. *See id.* It was evident to the industry that it was going to take a serious blow to its financial resources, as allegations and admissions by former employees about the extent of the knowledge of industry officials about the true dangers of tobacco and its addictive qualities. *See id.* The industry had no choice but to make an effort to stop the hundreds of potential suits waiting in the wings. *See id.* at A8.

bacco use by Americans following the 1988 Surgeon General's report, it took the United States Department of Justice almost twenty-five years to enforce the Labeling Act. For example, it was not until April 1995, that the Department of Justice (the "DOJ") brought its first civil suit against an arena for posting tobacco advertisements.⁴⁵ The suit sought an order compelling removal of a Marlboro sign from the scorer's table at Madison Square Garden which was visible during Knick basketball games.⁴⁶ As soon as the announcement that the suit had been filed was made, the owners agreed to sign a consent decree requiring removal of the sign.⁴⁷ Both Madison Square Garden and Philip Morris officials⁴⁸ claimed that the removal of the sign was due to an NBA rule requiring such signs to be removed.⁴⁹

Just one week later, the U.S. Attorney in New York filed a similar suit against the owners of Shea Stadium in Flushing, New York, seeking an injunction to force removal of a Marlboro sign located below the DiamondVision scoreboard.⁵⁰ In reaction, the city enforced a provision in its lease with the owners restricting advertising at Shea.⁵¹ Because the owners refused to remove the signs, the city sought relief in state court seeking injunction, which the court denied.⁵²

At the same time that New York officials sought compliance with federal law, other officials in high market cities also attempted reform.⁵³ In Michigan, health officials sent letters to the Detroit Tigers requesting removal of tobacco billboards in and around the stadium.⁵⁴ Similar enforcement proceedings in Boston had potentially damaging effects at Fenway Park when

45. See *Madison Square Garden Agrees to Keep Cigarette Sign Off TV*, AMERICAN MARKETPLACE, Apr. 6, 1995.

46. See *id.*

47. See *id.*

48. Philip Morris is the manufacturer of Marlboro brand cigarettes. See *id.*

49. See *Madison Square Garden*, *supra* note 45.

50. See Laura Rich, *Disappearing Act: Sports Arenas May Bid Farewell to the Marlboro Man*, INSIDE MEDIA, Apr. 26, 1995, at 22.

51. See *id.*

52. See *id.*

53. See *id.*

54. See Rich, *supra* note 50, at 22. This action came amidst contract negotiations between the Tigers and Philip Morris, which potentially could have hurt the team's fiscal performance due to the late date, in that the season had already begun, of the enforcement. See *id.* It is more than conceivable that the team could have been financially damaged by the loss of the advertising space. See *id.*

owners were compelled by threats of federal sanctions to remove a legendary Marlboro sign hanging above the stadium.⁵⁵

Most recently, organizers of the Super Bowl were forced to remove tobacco signs with potential for television visibility at the Louisiana Superdome.⁵⁶ Just days before Super Bowl XXXI was to take place, the Justice Department's Office of Consumer Litigation sent a letter to Philip Morris attorneys requesting removal of the billboards, citing the extensive exposure of the signs during the Sugar Bowl held a few weeks prior.⁵⁷ Philip Morris agreed to remove the signs and billboards before any legal action was taken.⁵⁸

III. THE SETTLEMENT

A. Purpose of the Settlement

Although it took almost thirty years to accomplish, on June 20, 1997, the attorneys general of thirty states reached an accord with representatives of the major American tobacco producers that set forth an unprecedented payoff by the tobacco producers in the amount of \$368.5 billion over the next twenty-five years to states in order to reimburse Medicare costs of tobacco related illnesses.⁵⁹ The agreement demonstrated a recognition by the President, the FDA, the FTC, the states' attorneys general and public health authorities that all previous efforts at regulating the industry have failed.⁶⁰ It also showed that tobacco producers were ready, willing, and able to make the necessary concessions to reduce potential liability for the glut of suits predicted to be filed in coming months.⁶¹

55. *See id.*

56. *See Government Snuffs Out Marlboro Ad for Game*, ST. LOUIS POST-DISPATCH, Jan. 23, 1997 at 8C.

57. *See id.*

58. *See id.*

59. *See Weinstein and Levin, supra note 1, at A1.*

60. Settlement Document, *supra note 6, at 1.* The Preamble expressly recognizes that past efforts at correcting youth smoking have failed:

...

These officials have concluded that because past efforts to restrict advertising and marketing have failed to curb adolescent tobacco use, sweeping new restrictions on the sale, promotion and distribution of such products are needed.

Id.

61. Barton, *supra note 44, at A8.*

The purposes underlying the settlement are twofold.⁶² First, the government is unquestionably committed to fighting the harmful effects of underage smoking by providing a uniform system within which to control the production, marketing, sale, and distribution of cigarettes, not only to young Americans, but in an effort to upgrade the overall quality of all Americans' lives.⁶³ Second, the settlement provides an avenue of redress for those afflicted with disease attributable to prolonged tobacco use, but limits punitive damage awards.⁶⁴

Coming into the negotiations, the attorneys general had four goals in mind. The states sought an agreement that would: (a) protect children by limiting (and eventually eliminating) marketing of tobacco to children and reduce youth access to tobacco; (b) provide full disclosure to the public about health effects relating to tobacco use; (c) protect consumers by

62. Settlement Document, *supra* note 6, at 1. The Preamble to the Proposed Resolution states the mission and purposes of the agreement and provides, in relevant part:

This legislation would mandate a total reformation and restructuring of how tobacco products are manufactured, marketed, and distributed in this country. The nation can thereby see real and swift progress in preventing underage use of tobacco, addressing the adverse health affects of tobacco use and changing the corporate culture of the tobacco industry. The Food and Drug Administration ("FDA") and other public health authorities view the use of tobacco products by our nation's children as a "pediatric disease" of epic and worsening proportions that results in new generations of tobacco dependent children and adults.

Id.

63. *See id.* at 1. The states' attorneys general recognized past failures and the need for a comprehensive plan. To that end, the intent of the settlement states:

The FDA and other health authorities have concluded that virtually all new users of tobacco products are under legal age. President Clinton, the FDA, the Federal Trade Commission ("FTC"), state Attorneys General and public health authorities all believe that tobacco advertising and marketing contribute significantly to the use of nicotine-containing tobacco products by adolescents. These officials have concluded that because past efforts to restrict advertising and marketing have failed to curb adolescent tobacco use, sweeping new restrictions on the sale, promotion, and distribution of such products are needed.

Id.

64. *See id.* at 2. In recognizing the need for redress by individuals for harms resulting from long term tobacco use, the agreement states:

The legislation reaffirms individuals' right of access to the courts, to civil trial by jury, and to full compensatory damages. Resolution through the Act of potential punitive damages liability of the tobacco industry for past conduct is made only in the context of the comprehensive settlement proposed by the legislation. It is not intended to have precedential effect, nor does it express any position adverse to the imposition of punitive damages in general or as applied to any other specific industry, case, controversy or product and does not provide any authority whatsoever regarding the propriety of punitive damages.

Id.

reforming tobacco producers business practices; and (d) provide relief to states and individuals for tobacco-related health care costs.⁶⁵

B. *The Terms of the Settlement*

The agreement, divided into nine titles with subsections and appendices, carefully considers each proposed issue. This Commentary is concerned primarily with the provisions limiting advertising and, more specifically, the effects on sports advertising and sponsorship. Therefore, a discussion of the relevant provisions will be discussed in detail. However, in an effort to gain an overall understanding of the principles and the full context of the agreement, it is necessary to discuss each provision to some extent. Although a detailed analysis of each title and subsection is beyond the scope of this Commentary and will serve no legitimate purpose, only those sections pertinent to the issues effecting advertising, sports or revenues will be analyzed. Some will be developed fully and others will be examined only tangentially.

1. Title I: Reformation of the Tobacco Industry

Title I redefines and expands the FDA's authority to regulate all nicotine-containing tobacco products for a term of five years. During that period the FDA may make any necessary revisions to present tobacco regulations. After the five year period expires, the FDA may revise the rules under its applicable agency rules.⁶⁶ Subsection A⁶⁷ restricts the marketing and ad-

65. See States Attorney General, *The Tobacco Agenda; Protecting Our Children and Improving Public Health* (visited Sept. 26, 1997) <[HTTP://WWW.WA.GOV/AGO/TOBAGENDA.HTML](http://www.wa.gov/ago/tobagenda.html)>

66. Settlement Document, *supra* note 6, at 8.

67. See *id.* Subsection A, hereinafter referred to as Part A, entitled "Restrictions on Marketing and Advertising," is perhaps the most crucial section of the settlement proposal. This part proposes to allow the FDA authority to:

(1) Prohibit the use of non-tobacco brand names as brand names of tobacco products except for tobacco products in existence as of January 1, 1995. This proposal would ban all new brands of cigarettes;

(2) Restrict tobacco advertising to FDA specified media;

(3) Allow only "tombstone" advertising (black text on white background) except in adult-only facilities and adult publications;

(4) Ban all non-tobacco merchandise (such as caps, jackets or bags bearing logo of tobacco brand);

(5) Require all tobacco advertisements to carry statement of intended use of product (i.e. "Nicotine Delivery Device");

vertising of tobacco products. This subsection includes several restrictions that exceed the limits of the FDA's present rules,⁶⁸ including those that have been challenged on First Amendment constitutional grounds.⁶⁹ Part B, entitled Warnings, Labeling and Packaging describes the types of warnings required on all tobacco products.⁷⁰ Part C, Restrictions on Access to Tobacco Products, announces tougher strategies to prevent youth access to tobacco products.⁷¹ Part D, Licensing of Retail Tobacco Product Sellers requires strict licensing procedures with close monitoring and swift enforcement by every level of government for violations.⁷² Finally, Parts E and F deal with the intricacies of tobacco product development and manufacturing

(6) Ban offers of non-tobacco gifts in exchange for proofs of purchase from tobacco products;

(7) *Ban sponsorships, including concerts and sporting events, in the name, logo or selling message of a tobacco brand;*

(8) Ban the use of human images or cartoon characters to promote tobacco brands;

(9) *Ban all outdoor tobacco product advertising, including enclosed stadia as well as brand advertising directed outside from a retail establishment;*

(10) Prohibit tobacco advertising on the Internet, unless inaccessible to the users in the United States;

(11) Restrict point of sale advertising in non adult-only facilities;

(12) Ban all payments (direct and indirect) for tobacco product placement in movies, television and video games;

(13) Prohibit payments used to "glamorize" tobacco use in media that is appealing to minors; and

(14) Require all product descriptors (i.e. "low tar" or "lights") to be accompanied by a disclaimer stating that the product is no less harmful than any other type of cigarette.

Id. (emphasis added).

68. The FDA's rules regarding tobacco regulation are codified at 61 FED. REG. 44396 (Aug. 28, 1996) and its sub parts.

69. See *Coyne Beahm v. FDA*, 966 F.Supp. 1374, 1399-1400 (N.D. N.C. 1997).

70. Settlement Document, *supra* note 6, at 10. Part B specifically requires a quarterly rotation of warning labels on all tobacco product packages and cartons to include warnings such as:

"Warning: Smoking can kill you"; "Warning: Cigarettes are addictive"; "Warning: Tobacco smoke can harm your children"; "Warning: Cigarettes cause fatal lung disease"; "Warning: Cigarettes cause cancer"; "Warning: Cigarettes cause strokes and heart disease"; "Warning: Smoking during pregnancy can harm your baby"; "Warning: Tobacco causes fatal lung disease in non-smokers"; and "Warning: Quitting now greatly reduces serious risks to your health"

Id. at 10.

71. See *id.* at 11-12. Subpart C mandates state and local governments to adhere to restriction such as: setting minimum age of 18 to purchase tobacco products (this provision is already required in most states); requiring retailers to check identification; and setting minimum package sizes. See *id.*

72. See *id.* at 12.

processes and ingredients.⁷³ In addition, a schedule of effective dates for all compliance and/or enactment of provisions falls under these sections.⁷⁴

2. Title II: "Look Back" Provisions/State Enforcement Incentives

Title II has two central aims. First, the title establishes the targets by which under age tobacco use is to be reduced.⁷⁵ Second, the Proposed Settlement requires states to actively enforce the new restrictions. States that fail to actively enforce the restrictions will be subject to drastic reductions in federal health care funds.⁷⁶

3. Title III: Penalties and Enforcement; Consent Decrees; Non-Participating Companies

This title allows enforcement by both the federal government, through the FDA and the Department of Justice, and by individual states. States will be granted enforcement power pursuant to that state's consumer protection laws and any other applicable state or federal statutes.⁷⁷ Additionally, the FDA will be permitted to contract with state enforcement agencies in order to effect compliance and enforcement.⁷⁸ Also, any state enforcement proceeding will be removable to federal court.⁷⁹

This provision also allows for severe penalties for the failure to disclose or willful withholding of research or health-re-

73. Settlement Document, *supra* note 6, at 13.

74. *See id.* at 13-20.

75. *See id.* at 24. This section provides that underage use of tobacco must decrease by at least 30% over estimated levels for the previous decade within the first five years of enactment, by 50% within seven years and by at least 60% by the tenth year and must remain at that level or below thereafter. *See id.* at 24.

76. *See id.* at 24-25. The section requires states to maintain an adequate enforcement effort. *See id.* Each state must have a "no sales to minors" law; conduct random, unannounced inspections at least monthly to ensure compliance; and conduct no fewer than 250 inspections of each licensed retailer for each one million residents of the community. *See id.* at 58. Those states who fail to comply will risk forfeiture of the allocated health care funds and those states with substantial compliance will have those lost amounts reallocated to them. *See id.* at 59-60. Compliance determinations are made pursuant to annual reports submitted by the states. *See id.* at 60.

77. *See* Settlement Document, *supra* note 6, at 25.

78. *See id.* at 26.

79. *See id.*

lated results by the industry.⁸⁰ Specifically, the industry could face civil penalties and fines of up to \$10 million per violation.⁸¹

Title III also requires that certain terms of the agreement be reinforced by consent decrees to be executed by the states and the producers.⁸² The consent decrees will be identical to the terms of the settlement in certain specified areas.⁸³

Finally, this title recognizes that certain tobacco producers exist that do not wish to participate in the settlement and negotiation process.⁸⁴ In facing that potential problem, the parties agreed to several detailed provisions.⁸⁵ The agreement provides the following: non-participating manufacturers will receive none of the civil liability protections;⁸⁶ non-participating manufacturers will be subject to access restrictions; and non-participants will be subject to a user fee equal to the por-

80. *See id.* at 27.

81. *See* Settlement Document, *supra* note 6, at 26. Fines may be imposed by the FDA against any producer for failing to disclose to the FDA results of any research or testing regarding the health effects of tobacco products or the toxicity of non-tobacco ingredients. *See id.*

82. *See id.* at 27.

83. *See id.* The consent decrees will provide additional documentary evidence of the agreement in the following areas:

- (1) restrictions on advertising, marketing and youth access to tobacco products;
- (2) trade associations;
- (3) restrictions on lobbying;
- (4) disclosure of tobacco smoke constituents;
- (5) disclosure of non-tobacco ingredients;
- (6) disclosure of all documents relating to health-related research;
- (7) compliance and corporate culture;
- (8) obligations to make payments to the states;
- (9) obligations by producers to only deal with registered and licensed distributors;
- (10) warnings, labeling and packaging; and
- (11) dismissal of other pending legislation specified by the parties.

Id.

However, there will not be consent decrees in the following areas:

- (1) product design, performance or modification;
- (2) manufacturing standards or practice;
- (3) testing and regulation as to testing of toxicity; and
- (4) the FDA "look back" provisions.

Id.

84. *See id.* at 28.

85. *See* Settlement Document, *supra* note 6, at 28-29.

86. *See id.* at 29. The settlement realizes that non-participants would not be subject to corporate culture commitments, requiring manufacturers to monitor distributor and retailer compliance with licensing and with underage access restrictions. *See id.*

tion of the payments by participating manufacturers.⁸⁷

4. Title IV: Nationwide Standards to Minimize

Title IV seeks to set a uniform standard of awareness and regulation relating to smoking in public places and the work place by setting forth several minimum standards, as follows. The title would restrict indoor smoking in "public facilities"⁸⁸ to ventilated areas.⁸⁹ The ventilation systems must exhaust the air to the outside only and may not re-circulate it.⁹⁰ Also, every work place would be restricted to smoking only in designated smoking areas. Finally, restaurants,⁹¹ bars,⁹² private clubs, hotel guest rooms, casinos, bingo parlors, tobacco merchants, and prisons would all be exempted.⁹³

5. Title V: Scope and Effect

The title sets out the scope of both the FDA's regulatory authority and the states' regulation over the agreement. The FDA maintains regulatory authority over all products sold in U.S. commerce.⁹⁴ However, its authority does not extend to the growing, cultivation or curing of raw tobacco.⁹⁵ Additionally, the FTC is to retain its existing authority,⁹⁶ except as to tar, nicotine and carbon monoxide testing.⁹⁷

The title also establishes the roles that state and local government would play in enforcement of the settlement.

87. *See id.* Most importantly, the agreement mandates that even non-participants would be subject to mandatory payments. *See id.* Non-participants would be compelled to contribute an amount equal to 150% of its share of the annual payment of participating manufacturers. *See id.* This amount would be deposited into an escrow account and would be earmarked for potential liability payments. *See id.* This pool fund would remain in effect for 35 years after which, non-participants could reclaim their payment with interest. *See id.*

88. *See id.* at 30. "Public facilities" are defined as any building regularly entered by 10 or more individuals at least one day per week. *See id.*

89. *See* Settlement Document, *supra* note 6, at 30.

90. *See id.*

91. *See id.* Fast food restaurants would be excepted. *See id.*

92. *See id.* This provision includes bars in hotels. *See id.*

93. *See* Settlement Document, *supra* note 6, at 30.

94. *See, e.g.,* *Coyne Beahm v. FDA*, 966 F.Supp. 1374, 1384-85 (M.D.N.C. 1997).

95. *See* Settlement Document, *supra* note 6, at 32. The authority to oversee these processes is controlled by the USDA. *See id.*

96. *See, e.g.,* *Coyne Beahm v. FDA*, 966 F.Supp. 1374 (M.D.N.C. 1997). Presumably, this authority would include all authority derived from newly decided judicial decisions as well as its legislatively appointed authority.

97. *See* Settlement Document, *supra* note 6, at 32.

Although the federal standards would provide a floor upon which states are required to stand, the states have the option of expanding the extent of tobacco measures to either further restrict or eliminate a product's use within its boundaries.⁹⁸

Finally, the provision gives the FDA authority to make language changes in the federally mandated system of warning labels.⁹⁹

6. Title VI: Programs/Funding

The first clause of this title requires a lump sum payment of \$10 billion due at signing of the accord.¹⁰⁰ Thereafter, progressive annual payments are due for the next twenty-five years to be disbursed on December 31st of each year.¹⁰¹ The proposal also expressly calls for the payments to be reflected in the price manufacturers charge for tobacco products.¹⁰² The title additionally calls for an inflation adjustment so that payments will be reflected as their true value for the life of the agreement.¹⁰³

7. Title VII: Public Health Funds from Tobacco Settlement

Title VII, perhaps the most vital part of the accord for the government, details the allocation and disbursement of the annual payments. It provides that \$125 million will go to the Secretary of Health and Human Services ("HHS") for the first three years and \$225 million every year thereafter for the life of the agreement in order to accomplish the goals of the settle-

98. *See id.*

99. *See id.* at 33.

100. *See id.* at 34.

101. *See* Settlement Document, *supra* note 6, at 34. The schedule of payments totaling \$358.5 billion will be disbursed as follows: year 1, \$8.5 billion; year 2, \$9.5 billion; year 3, \$11.5 billion; year 4, \$14 billion; year 5, \$15 billion; year 6-8, \$15 billion and \$15 billion per year following for the remainder of the settlement term. *See id.* In addition, producers are required to make an annual contribution to a Public Health Trust to ensure a proper base for research, care and cure of tobacco-related disease. *See id.* The trust payments are to be made in similar increments with the first two payments to be made in the amount of \$2.5 billion; year 3, \$3.5 billion; the fourth payment \$4 billion; payment 5, \$5 billion and a final payment of \$2.5 billion. *See id.*

102. *See id.* at 35. The present average cost per pack of cigarettes is \$1.74. With the settlement in enforcement, the price of a pack of cigarettes is expected to climb by \$1.50 per pack to \$3.24 per pack. *See* J. Scott Orr, *Clinton Squelches Tobacco Settlement*, NEWARK STAR LEDGER, Sept. 18, 1997, at 1.

103. *See* Settlement Document, *supra* note 6, at 34.

ment.¹⁰⁴ Also, \$300 million will be allocated to the FDA so that it may carry out its obligations of enforcement.¹⁰⁵ State and local governments will be given \$75 million for the first two years, \$100 million in the third year and \$125 million every year thereafter for the life of the agreement in order to control community based efforts and to encourage community involvement in reducing tobacco use.¹⁰⁶ Additionally, \$100 million will be given to fund research and development of methods to reduce youth smoking.¹⁰⁷ Most relevant to the scope of this Commentary, beginning in the second year of the agreement, the producers are required to pay \$75 million annually to teams, events, or entries in such events who lose sponsorship by the tobacco industry as a result of the agreement, or who receive tobacco industry funding to sponsor events and elect to replace that funding.¹⁰⁸

In addition, the Secretary of the HHS is to implement programs to encourage and promote campaigns to stop youth smoking. These programs include a \$500 million Public Education Campaign to be used in multimedia campaigns aimed at reducing youth smoking by de-glamorizing and discouraging tobacco use.¹⁰⁹ Also, a portion of the payments to the HHS will be made available to help those who wish to quit smoking and require financial assistance.¹¹⁰ These cessation programs will be taken from a trust fund which will be regulated and monitored by the Secretary of HHS.¹¹¹

Finally, a Presidential Commission will be appointed to include representatives of the public health community, attorneys general and the attorneys in the *Castano* action to determine how the \$25 billion Public Health Trust is to be

104. *See id.* at 36.

105. *See id.*

106. *See id.*

107. *See* Settlement Document, *supra* note 6, at 36.

108. *See id.* at 37. This provision shall remain in effect for ten years and is limited only to those teams, events or entries who are otherwise unable to replace its tobacco industry sponsorship during those given years. *See id.* The funds are earmarked for promotion of a Quit Tobacco Use theme only. *See id.* The funds are limited to ten years and the use is mandated as follows: 50% must be used to supplement funding of multimedia campaigns; 25% to supplement enforcement provisions; and 25 % to supplement community action programs. *See id.*

109. *See id.*

110. *See id.*

111. *See* Settlement Document, *supra* note 6, at 38.

spent.¹¹² Specifically, the Commission will determine in what areas of medical research the funds would serve the greatest purpose.¹¹³

8. Title VIII: Civil Liability

Title VIII defines the state of pending litigation relating to tobacco claims and denotes the possibility of all future claims against tobacco producers. The first provision of Title VIII states that all present attorney general actions, *parens patriae*,¹¹⁴ and class actions are legislatively settled.¹¹⁵ There will be no future prosecution of such actions.¹¹⁶ Also, all addiction and dependence claims are settled and all other personal injury actions are reserved.¹¹⁷ Appropriately, third-party payor actions still pending would be settled as set forth in the provisions for liability for past conduct.¹¹⁸

The provision also determines the requirements for civil liability for past conduct.¹¹⁹ Although the settlement does not prohibit all future civil actions by injured persons, it does place restrictions on the time, place and manner of such suits. Specifically, the agreement disallows any punitive damage awards.¹²⁰ Also, only individual trials may be held.¹²¹ The provision allows for certain permissible parties. All individual claims must be brought by the injured party or his or her heirs.¹²² Additionally, only suits against the companies, their assigns, or their agents may be brought.¹²³

112. *See id.*

113. *See id.*

114. *Parens patriae* refers to the legal standing of the state in certain equitable actions. *See Black's Law Dictionary* at 1114 (6th ed. 1990). These actions are primarily brought by the state on behalf of the people. It is presumed that the State becomes the responsible party when the "parents" cannot handle such action. Child custody and habeas corpus proceedings are typical of these types of actions. *See id.*

115. *See Settlement Document, supra* note 6, at 39.

116. *See id.*

117. *See id.*

118. *See id.*

119. *See Settlement Document, supra* note 6, at 39. These actions include all claims and suits filed by persons claiming injury or damage caused by conduct taking place prior to the enactment of the agreement. *See id.*

120. *See id.*

121. *See id.* Under this term there are to be no future class action, joinder, aggregations, consolidations, extrapolations or other devices to resolve cases other than on the basis of individual trials, without defendant's consent. *See id.*

122. *See id.* at 40.

123. *See Settlement Document, supra* note 6, at 40.

The Act does not permit removal to federal court unless it is in compliance with paragraph two of the agreement.¹²⁴ Statute of limitations periods for all actions are applicable pursuant to individual state laws.¹²⁵ Finally, the annual, aggregate cap for judgments and settlements is to equal thirty-three percent of the annual industry base payment.¹²⁶

9. Title IX: Board Approval

This section states, “[t]he terms of this resolution are subject to approval by the Boards of Directors of the participating tobacco companies.”¹²⁷

IV. ECONOMIC EFFECT ON SPORTS

The prominence of tobacco advertising in American professional sports has caused debate on many levels. Professional sports such as auto racing, tennis, baseball, basketball, and football have already seen what a television ban of tobacco products can do to advertising.¹²⁸ The economic effects of a ban will place severe economic pressures on several groups.¹²⁹ The sections of the proposed settlement most relevant to the economic effects on advertising are not only the direct bans on advertising of tobacco products on television, in print ads and on billboards, but also the proposed restrictions on indirect advertising.¹³⁰

124. *See id.*

125. *See id.*

126. *See id.* In addition to the civil penalties that may be imposed on producers, the failure by sellers of tobacco products to comply with FDA regulations may result in criminal violations. *See id.* at 44. Specifically, penalties ranging from \$500.00 to \$50,000.00 and license suspension or revocation will be imposed. *See id.* at 44-45. Permanent license revocation is mandatory for the tenth offense within a two year period. *See id.* at 44-45.

127. *See id.* at 42.

128. *See Meier, supra* note 13, at 3A.

129. *See Settlement Document, supra* note 6, at 8.

130. *See Rich, supra* note 50, at 22. The relevant sections of the proposed settlement read:

. . .

(7) Ban sponsorships, including concerts and sporting events, in the name, logo or selling message of a tobacco brand; and

. . .

(9) Ban all outdoor tobacco product advertising, including enclosed stadia as well as brand advertising directed outside from a retail establishment;

Id.

The American sports fan will likely be the hardest hit economically.¹³¹ Although it is arguable that a ban on tobacco sponsored events will not significantly effect individual franchises and associations because there are always sponsors waiting in the wings, some sports that rely almost exclusively on tobacco endorsements may be forced to restructure their entire marketing plans to target different demographic markets if tobacco sponsorship were to be eliminated.¹³² However, in addition to substitute sponsors, the proposed settlement also provides for reimbursement to franchises, events, and leagues in cases where substitute advertisers cannot be found.¹³³ On the other hand, the tobacco producers are at the highest risk to lose revenue if a complete ban on sports advertising and sponsorship is approved.

A. Motorsports Sponsorship

Tobacco companies began to sponsor auto motor sports in the early 1970's in reaction to the ban on televised tobacco ads.¹³⁴ Since then, the industry has turned this alternative marketing scheme into one of the most economically productive industries in the world.¹³⁵

131. See generally Kaufman, *supra* note 7, at 7G. Currently, the average ticket price for some racing events is between \$18-\$20. See Ralph Leef, *Racing Series is No Drag for SR's Murphy*, PRESS DEMOCRAT (Santa Rosa, Ca.), Oct. 10, 1997, at C1. It can be safely assumed that if a settlement prohibiting sponsorship is passed a fan's ticket price may be significantly effected.

132. See Harder, *supra* note 16, at 400. In 1995 it was estimated that 88% of adults tried their first cigarette by the age of 18 and that 71% of adult smokers were daily smokers by that same age. See *id.* This fact begs the question: who is the target of tobacco producers advertisements? Sports viewership is dominated by a youth audience. As such, it is only logical to conclude that tobacco ads strategically placed throughout sports, either by way of sponsor decals on race cars or on billboards at Yankee Stadium, will reach children. See *id.* Many feel that tobacco industry infiltration into American sports should be the driving force behind a complete ban on tobacco ads. See Stoner, *supra* note 32, at 646.

133. See *supra* note 108 and accompanying text.

134. See Shawn Courchesne, *Series Still Smoking—For Now*, HARTFORD COURANT, Oct. 10, 1997, at C3.

135. See generally, Stoner, *supra* note 31, at 643-47. Tobacco producers spend approximately \$75 million annually on American motor racing. See *id.* at 644. In addition, many producers have claimed to reach tens of millions of viewers through its sponsorship of racing events and teams. See *id.* Indeed, the cost of the advertisements over a single racing season pales in comparison to a thirty second spot on a prime network television show. See *id.* at 643-644. For instance, in 1995 the estimated cost for a thirty second spot on the Cosby Show was approximately \$250,000. See *id.* However, tobacco companies are banned from television ads. See *id.* But it is possible for a tobacco company to

Although there seems to be an inherent contradiction between sports and tobacco sponsorship,¹³⁶ many believe that the right to market and promote a product supercedes proposed government regulation.¹³⁷ Nowhere is this belief more prevalent than among the American motor racing industry.¹³⁸ For over a decade, tobacco manufacturers have dominated the auto racing industry.¹³⁹

purchase a season-long sponsorship for about \$500,000. *See id.* At 643. This entitles the sponsor to place a decal on a racer's car for a season. *See id.* The decal is displayed on television thousands of times over the course of an entire season. *See id.* Every time the car is shown racing around the track, so is the decal. *See id.* From a cost-analysis perspective then, this choice of advertising is a wise one. In addition, tobacco producers are able to select a market that is most susceptible to marketing ploys. *See id.*

Studies show that motor sport fans are among the most loyal of all consumers. *See id.* at 645. Moreover, motor sport fans most frequently will only purchase products that they have seen advertised by way of motor sports. *See id.* Finally, marketing analyses have shown that motor sports fans are most often blue collar workers and among the most likely to smoke. *See infra* note 146 and accompanying text.

136. *See* Charles Trueheart, *Writer Examines and Deplores the Sports-Tobacco Connection*, MINNEAPOLIS-ST. PAUL STAR-TRIBUNE, Sept. 9, 1989, at 4E. This review of an essay discusses the irony in athletes appearing in cigarette ads in order to promote tobacco sponsored events. *See id.* Specifically, the author chastised Chris Evert for appearing in a promotional ad for: Virginia Slims tennis tournament. *See id.* The essay calls for athletes to not only stop promoting tobacco, but also to take an affirmative stand against tobacco products. *See id.* Additionally, the writer urges on-air sportscasters to not mention the sponsored name of events such as the Winston Rodeo and Benson & Hedges on Ice. *See id.* The writer believes that sportscasts could be just as effective without using product names on air. *See Trueheart, supra*, at 4E.

137. *See* Philip J. Hilts, *Sullivan Would End Tie of Sports and Tobacco*, N. Y. TIMES, Apr. 11, 1991, at B5. In 1991, the Secretary of Health and Human Services Louis Sullivan decried sports fans to boycott tobacco sponsored sporting events. *See id.* Additionally, he called upon promoters to shun tobacco sponsorships in order to discourage those "who would encourage our children to use addictive substances." *See id.* Contrast David A. Locke, *Counterspeech As An Alternative to Prohibition: Proposed Federal Regulation of Tobacco Promotion in American Motorsport*, 70 IND. L.J. 217 (1994). Even though many drivers are extremely health conscious and some carry strict dietary and exercise regimens, many believe that corporate sponsorship of any kind is appropriate, provided the product is legal. *See id.* at 220. Perhaps their defense of the industry, in a seemingly obvious contradiction, can be attributed to their loyalty, not to the company, but to the money.

138. *See id.* at 221-222. It is estimated that approximately 75% of R.J. Reynolds' \$80 million annual sponsorship money is spent on sports. *See id.* at 218. That amount coupled with claimed attendances in 1993 of almost 10 million among all forms of racing, shows that the average amount spent on advertising per person is in the millions of dollars. *See id.* at 218. That is, assuming that the advertising is aimed only at paid attendees. Of course, with indirect advertising on television, the potential viewer ship per annum could be in the hundreds of millions. *See id.* at 222. Additionally, it is estimated that ESPN airs well over 50 auto races per year. *See id.* at 218.

139. *See id.* Bobby Rahal, Indianapolis 500 winner, has noticed "[t]oday, I'd say that 90 percent of the sponsors are not auto-related. . . *See id.* With the increase in popular-

With the proposed settlement in place, auto racing and other tobacco sponsored motor sports will likely feel the most economic strain.¹⁴⁰ The settlement would command a complete ban on tobacco sponsored sporting events including auto racing.¹⁴¹ Unfortunately for the leading tobacco producers,¹⁴² they would lose their greatest market and would be forced to find other ways to self promote.¹⁴³ Some companies, such as R.J. Reynolds, have set themselves up for the potentially devastating agreement.¹⁴⁴ Even though tobacco producers seem to be preparing for the worst, the proposed settlement is not as harsh as it seems at first glance.¹⁴⁵

B. *The Manufacturer's Role in Motor Sports*

The pervasiveness of tobacco producers in motor sports exemplifies the industry's commitment to subverting the health

ity and viewer ship of motor sports, tobacco companies have found their niche market. *See id.* In fact, RJR/Nabisco has boasted that it is the leader in the racing industry and claimed to have 25 million spectators at over 1,400 events in 1986. *See Stoner, supra* note 31, at 644.

140. *See Kaufman, supra* note 7, at 7G.

141. *See Settlement Document, supra* note 6, at 8.

142. RJ Reynolds and Philip Morris are the two leading cigarette producers in the United States and are heavy supporters of auto racing. *See Stoner, supra* note 31, at 644.

143. *See id.* Should the proposed settlement be ratified by Congress and include a ban on tobacco sponsorships of sporting events, the loss to these producers would be enormous. Tobacco producers have effectively found a way around the government regulation of televised tobacco ads by finding a market that allows them to reach the number one target market while at the same time staying within, as they believe it to be, the law. *See id.* at 645. Since the advent of the ban in 1971, tobacco producers and most significantly RJR and Philip Morris have circumvented the process. *See id.*

144. *See generally Kaufman, supra* note 7, at 7G. RJ Reynolds, either through foresight or exceptional business acumen, has acquired other companies through which it could still market itself while staying within the confines of the agreement. *See id.* Specifically, RJ Reynolds acquired the Nabisco company within the last decade. *See id.* Should the settlement be ratified, it is feasible that RJ Reynolds would still have the same dominating presence in motor sports as it does at present. RJR/Nabisco would become the sponsor, thereby circumventing the purposes underlying the ban. *See generally Stoner, supra* note 31, at 644-645.

145. *See Settlement Document, supra* note 6, at 8. For instance, the ban calls only for the abandoning of brand names. *See id.* It would still allow the companies to advertise themselves as a corporation. *See id.* However, they would not be able to link themselves to any identification of brand names with which it is associated. *See Tobacco Advertising and Youth: Hearings Before the Senate Committee on Commerce, Science and Transportation, ___th Cong., ___ Sess. 1 (1997)* (statement of Matthew L. Myers, Executive Vice President and General Counsel, National Center for Tobacco-Free Kids).

of America's youth.¹⁴⁶ The industry has developed several methods of marketing in order to convert innocent teenagers to a life of potential disease. The industry has developed several campaigns, some flashy and others subtle.¹⁴⁷ One method used by the industry to build youth support for motor sports has been the marketing of the drivers themselves.¹⁴⁸ In addition to incredibly lucrative endorsement deals, drivers are given unimaginable incentives to finish high among the season standings in order to boost their popularity.¹⁴⁹ The use of athletes in the promotion of tobacco is not a new invention.¹⁵⁰ Tobacco companies have been using athletes since the early

146. See Stoner, *supra* note 31, at 644-645. When televised advertising of tobacco products was banned in 1971, the tobacco companies needed a way to promote their products to an audience that was both susceptible to and supportive of tobacco ads. See *id.* As such, the industry selected a sport, watched by hundreds of thousands of blue collar workers, who didn't mind taking risks. See *id.* at 645. As a result, the industry selected motor sports, not only for the reasons stated, but because it reached a local target market, the South. See *id.* In addition, the industry recognized the susceptibility of young males to "rebellious adolescent instincts" and to enjoy items such as dirtbikes, hot rods, and motorcycle racing. See *id.* at 645-646.

The industry has since dedicated most of their advertising dollars into praying on the loyalty and ignorance of the adolescent male. See *id.* at 646. The industry has even tried to disguise marketing in youth education. See *id.* For example, in a driver's education program film featuring Harry Gant, a driver of the Skoal Bandit automobile in the Winston Cup series, U.S. Tobacco placed the driver behind the wheel of the Skoal sponsored car in a driving demonstration. See *id.* Industry executives have even boasted, "[i]f there was a world international tiddly winks championship, I'm sure we would consider that as much." *Id.* at 644.

147. See Tom Ford, *Joe Camel Not Only Bad Habit*, TAMPA TRIBUNE, Oct. 11, 1997, at 12. Producers, most specifically, RJ Reynolds, have used cartoon characters such as Joe Camel to attract younger customers. See *id.* In addition, "Team Winston" has recently introduced a new bright red and white paint scheme that will resemble the product's package. See *id.*

148. See *News Quiz*, CHI. TRIB., Sept. 14, 1997, Perspective Section at 4. Dale Earnhardt and Michael Schumacher have two of the top ten most lucrative endorsement contracts among American athletes. See *id.* Of the remaining eight, three are basketball players, three are golfers and two are tennis players. See *id.*

149. See Ford, *supra* note 147, at 12. Each year Winston, an RJ Reynolds brand, designates a one million dollar bonus to the driver with the highest amount of Winston Cup points, as computed by tour wins. See *id.* This program is one of the most hotly contested bonus incentive programs in American sports and is highly publicized. See *id.* In a recent effort to step up the competition, despite the possibility that the point may moot once the settlement is finalized, RJ Reynolds has announced that it will abandon the "Winston Million" and adopt a new incentive plan known as the "Winston No Bull 5." See *id.* The event allows the top five finishers in the Diehard 500 to collect 1 million dollars should any of them win the Daytona 500. See *id.* Also, the top five finishers at Daytona will earn a chance to win another million dollars with a Coca Cola 500 win. See *id.*

150. See Kaufman, *supra* note 7, at 7G.

1900's to promote their products.¹⁵¹ In the 1930's, 40's and 50's the use of athletes such as Stan Musial and Joe DiMaggio were used to promote Chesterfield cigarettes.¹⁵² In 1962, Frank Gifford appeared in Lucky Strikes ads reading "Get Lucky! - The Taste to Start With."¹⁵³

Some athletes, however, shunned the use of their likeness to hawk tobacco products. In 1910, Honus Wagner vehemently protested against the Piedmont Tobacco Company placing baseball cards featuring the Hall of Famer inside packs of their cigarettes without his permission.¹⁵⁴ Recently, one of those cards was sold for \$450,000.¹⁵⁵

The effectiveness of athlete endorsement has been intensified with the advent of televised motor sports.¹⁵⁶ Since ESPN decided to include NASCAR¹⁵⁷ racing in its broadcast line-up in 1979, viewership has increased tremendously. NASCAR, at present, is ESPN's number two most watched property behind only NFL football.¹⁵⁸ Since 1989, auto racing on ESPN has increased its viewing audience by over fifty percent.¹⁵⁹ In 1989 televised NASCAR events received a 2.8 share in the television market, where it was tied with college football and basketball, but has increased to a 4.5 share in 1997.¹⁶⁰ These numbers indicate that obviously, the message is being sent to the right market. The loyalty of the NASCAR fan is unmatched as far as consumer spending is concerned. Products promoted by NASCAR and purchased by NASCAR fans easily surpasses those promoted by any other sport.¹⁶¹

The increasing popularity of professional drivers has played a significant role in keeping fan support of motor sports

151. *See id.*

152. *See id.*

153. *See id.*

154. *See Kaufman, supra note 7, at 7G.*

155. *See id.*

156. *See NASCAR Not Just for the Good Ol' Boys*, ST. LOUIS POST-DISPATCH, Sept. 14, 1997, at 12F.

157. NASCAR is an acronym for the National Association of Sports Car Automobile Racing. *See id.*

158. *See id.*

159. *See Good 'Ol Boys, supra note 156, at 12F.*

160. *See id.*

161. *See Stoner, supra note 31 and accompanying text. See note 138 supra and accompanying text.*

abound.¹⁶² Additionally, television has been credited with the increasing sales of the products they promote.¹⁶³ Overall, the increased promotion of drivers on television has led to the increased popularity of motor sports as a whole.¹⁶⁴ Promoters and many city officials have seen the potential revenue draw from motor sports and have sat idly by for long enough.¹⁶⁵ With other sponsors waiting to step in to take the place of to-

162. See *Good Ol' Boys*, *supra* note 156, at 12F. It has been estimated that 74% of NASCAR fans buy products associated with their favorite drivers. See *id.*

163. See *id.* R.J. Reynolds has boasted that its support of NASCAR and other motor events was the catalyst for all other non-auto related sponsorship in racing. See *id.* The director of RJR Sports Marketing Enterprises stated, "We started the association of a non-automotive sponsor, and that let others into looking into it. You look at consumer goods now, we brought that to the party." *Good Ol' Boys*, *supra* note 156, at 12F. Although this may be true in some respects, as many major American companies such as McDonald's and Coca-Cola have expressed serious interest in sponsoring motor sports, tobacco support of NASCAR may not be as pervasive as it claims. See Kaufman, *supra* note 7, at 7G. Tobacco companies, who invested 95 % of their \$195 million sports budget into motor sports in 1996, only accounted for 20% of the overall sponsorships in auto racing. See *id.* Specifically, R.J Reynolds sponsors the Winston Cup circuit and the National Hot Rod Association 23 race circuit. See *id.* Also, tobacco companies sponsor four Championship Auto Racing Team ("CART") races and sponsor four racing teams, the most prominent of which is Team Marlboro for which the two top drivers receive almost \$20 million per year in salary. See *id.* In addition, Philip Morris also sponsors the Marlboro 500 and the Miami Grand Prix. See Kaufman, *supra* note 7, at 7G.

164. See *Good Ol' Boys*, *supra* note 156, at 12F. Most recently, many hosts of events, namely the owners of race tracks, have taken it upon themselves to promote from within. See *id.* Many track owners have not placed all of their faith in event sponsors and have taken initiative to rebuild and modernize their tracks in order to induce those spectators with higher per capita incomes to come the track. See *id.* Some tracks have cost as much as \$130 million to build. See *id.* For instance, the Texas Motor Speedway seats 150,061 and includes 94 luxury suites which feature closed circuit television, theater seats and private bathrooms. See *Good Ol' Boys*, *supra* note 156, at 12F. Las Vegas has construction underway for a 102,000 seat track with 110 skyboxes and will host the Las Vegas 400 in the spring of 1998. See *id.* In addition to the accommodations, many track owners also have installed state of the art concession stands and food service areas which rival any baseball, football or hockey stadium concession. See *id.*

165. See generally *id.* NASCAR was originally viewed as a "southern only" sport. See *Good Ol' Boys*, *supra* note 156, at 12F. When the popularity of the sport began to explode, many southern cities became worried at the possibility of serious revenue loss. See *id.* These communities have come to rely on the events scheduled at local tracks in order to offset the slower periods during the year. See *id.* As a result the competition between venues to host NASCAR events becomes intensified shortly before the circuit releases its schedule for the next season. See *id.* For instance, events such as the Southern 500 and the TransSouth Financial 400 can funnel as much as \$25 million into a small town's economy. See *Good Ol' Boys*, *supra* note 156, at 12F. With those types of numbers at stake, the competition becomes predictably fierce. As a result, many of the older, historical tracks, such as Darlington National Speedway in South Carolina, may soon be unable to compete with the large city, highly corporate funded city tracks such as Las Vegas or the planned tracks for New York City, Chicago and St. Louis. See *id.*

bacco sponsors, many speculate that completion of the settlement will not place an unmanageable burden on motor sports.¹⁶⁶

It seems ironic that the influx of non-automotive sponsors which the tobacco industry boasts to have inaugurated into motor sports may soon be the same sponsors that replace them.¹⁶⁷ Companies such as Coca-Cola and the Family Channel have recently considered stepping in to take the place of the tobacco companies.¹⁶⁸ However positive it may appear for the economic future of motor sports with the replacement of tobacco companies, realistically it is unlikely that the "tobacco influence" will disappear from motor sports forever.¹⁶⁹

C. Other Tobacco Sponsored Sports

Although motor sports will inevitably survive a ban on tobacco sponsorship under a global settlement, other tobacco sponsored sports may not be as lucky. In addition to NASCAR and CART Racing, tobacco companies sponsor other sporting events and tours such as the Virginia Slims Legends tennis tour, the Vantage Senior PGA Championship, the Camel Pro Billiards Series, and the Copenhagen/Skoal Pro Rodeo.¹⁷⁰ The economic effects of a tobacco ban on these events will have a

166. See Kaufman, *supra* note 7, at 7G. At present NASCAR has over 250 corporate sponsors in addition to the tobacco sponsors. See *id.* As such, many believe that the sport could withstand either a partial or total ban of tobacco sponsors. See *id.* One expert commented, "I don't think a tobacco ban would have a devastating effect on auto racing. The participation of non-tobacco sponsors in NASCAR has mushroomed in the past few years, so they have a built-in group of companies ready to set up." See *id.* Another added, "This is widely perceived as one of the most sought after sponsorship properties in sports." See Kaufman, *supra* note 7, at 7G.

Even those inside the sport realize the magnitude of non-auto related sponsorship. In fact Kyle Petty has predicted that, "the next guy will pay double." See *id.* CART President Andrew Craig has even claimed, "If tobacco went away, it would be a significant loss, but, at the same time, I'm very confident that we can fill the vacuum." *Id.* Finally, NASCAR issued a statement in reaction to the speculation that tobacco will inevitably be banned from the sport via a global settlement. It stated, "It would be premature to speculate on what effect this will have on motor sports, but NASCAR racing has been in existence for nearly 50 years, long before tobacco companies became actively involved in the sport. . . We will continue to aggressively promote the sport." *Id.*

167. See *supra* note 166 and accompanying text.

168. See *id.*

169. See Kaufman, *supra* note 7, at 7G. R.J. Reynolds has yet to make a statement about their future in the racing industry, but given the positive relationship between the industry and auto racing, the tobacco companies seem to be staying put. See *id.*

170. See *id.*

more severe effect.¹⁷¹

Virginia Slims began its sponsorship of women's tennis in 1971.¹⁷² Sponsorship of the Virginia Slims Championships was among the first to support and actively promote women's tennis.¹⁷³ With the slogan, "You've Come A Long Way, Baby," and its marketing aimed at women exclusively, sponsorship of the sport seemed the perfect match in the early 1970's.¹⁷⁴ Recently, with the increased pressure on tobacco companies to cut back promotion of cigarette smoking and sports, the marriage has come under fire.¹⁷⁵ Originally, women's tennis welcomed the tobacco sponsorship because the sport was in need of financial stability and smoking was not considered a real public health danger at the time.¹⁷⁶ Now, however, with the volume of medical knowledge and information pointing squarely at the dangers involved with smoking, athletes are severely criticized for their promotion of inherently dangerous products.¹⁷⁷ In addition to fans scoffing at the disparity be-

171. See Rachel Shuster, *Tobacco Sponsor Sullies WTA*, USA TODAY, Mar. 4, 1993, at 3C. In 1993 Philip Morris, producer of Virginia Slims and parent company to Kraft General Foods, pulled its \$33 million sponsorship of the Virginia Slims women's tennis tour because of mounting pressure from anti-smoking groups. See *id.* Instead, the company kept its relation with women's tennis by sponsoring local events until the tour's dissolution in 1994. See *id.*

172. See Bob Greene, *Graf is Favored to Capture Slims Title This Week*, HOUSTON CHRONICLE, Nov. 14, 1993, at 2.

173. See *id.*

174. See Julie Hanna, *Tennis Tourney Gains New Sponsor*, CHICAGO TRIB., June 8, 1994, at 5. The original sponsorship was set up much like that of the Winston Cup Series in NASCAR racing. Compare Ford, *supra* note 149, at 12 and accompanying text. Players would earn points by competing in and winning specified tobacco sponsored events for the right to play in the Virginia Slims Championships at Madison Square Garden at the end of the season. See Hanna, *supra* note 174, at 5. The championship was considered the highlight of the tennis tour's season and was worth \$3.7 million just before the tour was dissolved in 1994. See *id.* It was marked as the richest non-Grand Slam event in tennis. See *id.* The sponsorship included, in its hey day, 16 events and had slipped to just three before the tour's demise. See *id.* As expected, though, the tour's sponsor was quickly replaced by Ameritech, a much more neutral sponsor. See *id.* The decision to disband the tour, according to Philip Morris, was "[f]or business reasons and new marketing priorities here, we decided not to [sponsor the tour]." *Id.*

175. See *Athletes Urged to Refuse Tobacco Money*, THE SATURDAY OKLAHOMAN, Feb. 24, 1990, at 3. At a protest of a Virginia Slims sponsored tennis tournament, Secretary of Health and Human Services Louis Sullivan called for athletes to turn away tobacco sponsored endorsements. See *id.* Mr. Sullivan pleaded, "this blood money should not be used to foster a misleading impression that smoking is compatible with good health." See *id.*

176. See *id.*

177. See *id.* Many sports fans have expressed displeasure with once-respected ath-

tween athletes and tobacco, others concerned with the fight against youth smoking have actively taken up arms in some cases.¹⁷⁸ Despite the obvious dangers associated with tobacco use and the vehement protests by thousands of anti-tobacco sympathizers, some athletes just do not see the inherent contradiction between athletics and tobacco when they choose to play in tobacco-sponsored events.¹⁷⁹ Even with the medical ev-

letes for their support of the tobacco industry. See e.g., Eric Kassang, *Mixed Message*, Letter to Voice of the People, CHI. TRIB., July 6, 1997, at 12. Perhaps part of this is in reaction to the contradiction between sports and sponsors who knowingly place killer products into the stream of American commerce. An example of a fan's outrage was recently expressed in the Chicago Tribune. See *id.* In the commentary, the fan noticed the disparity in a recent interview with tennis legend Chris Evert. See *id.* In the interview, Evert disclosed that she is an active participant on the Virginia Slims Legends Tour, but is also a supporter and fund raiser for programs to fight substance abuse and to help children. See *id.* The fan went on to discredit Evert further by requesting that she explain to young cigarette smoking girls how "working as a 'tool' for a cigarette company is good, but smoking is bad," once she finishes touring with Virginia Slims. See *id.*

178. See Carl Irving, *Virginia Slims-Backed Tournament Challenged Anti-Smokers Protest at the Coliseum*, SAN FRANCISCO EXAMINER, Nov. 10, 1991, at B6; see also Lisa Mangenheimer, *Protesters Light into Tobacco-Sponsored Event*, TAMPA TRIBUNE, May 6, 1996, at 1. On at least two occasions in the past several years protesters have taken to picketing Virginia Slims sponsored events. In 1991, demonstrators lobbied arriving fans outside of the Oakland Coliseum by passing out brochures reading, "Emphysema Slims" and waiving picket signs bearing the photos of the featured players, Martina Navratilova and Pam Shriver. See Irving, *supra* note 178, at B6. Ironically, Shriver, when questioned about the protestors disclosed, "We are role models, but I think that's because of the way we play tennis and the way we conduct our lives." See *id.* Are these athletes kidding? Admitting to being role models in one breath and in the next defending their choices of sponsors in the next. Does Pam Shriver really need the money that bad that she must play in this one tournament? Obviously, they are role models because of the choices that they make. That is the definition of the word. Why admit to being a role model if you do bad acts?

In a similar protest in 1996 in Tampa, Florida, protestors held signs that read, "Tobacco is a bad racquet" and "Get tobacco out of women's sports." See Mangenheimer, *supra* note 178, at 1. Almost 3,000 spectators witnessed the protest of matches between "tennis greats" Martina Navratilova and Billie Jean King. See *id.* King, in reaction to the protestors, claimed, "This is a free country and people can do whatever they want, [cigarette companies] don't ask us to smoke. I don't smoke. The bottom line is that we're all responsible for ourselves." *Id.* Perhaps Ms. King should explain that to the twelve-year-old girl who is an avid tennis fan and aspires to be the next Mary Pierce or Venus Williams, but sees a Virginia Slims tennis match and decides that smoking is fine. There goes a career and maybe even a life. At least Ms. King doesn't portend to be a role model and then act in a way that is inconsistent with athletics.

The leader of the rally in Tampa summarized most fans feelings best when he stated, "A tobacco company shouldn't be sponsoring a sports event. It sends the wrong message, especially to kids who watch sports. They're indirectly indoctrinated into [smoking]." *Id.*

179. See John McBryde, *Tennis Keeps Navratilova Younger*, NASHVILLE BANNER, Oct. 13, 1997, at C3. After losing in a recent match on the Virginia Slims Legends Tour,

idence available,¹⁸⁰ the industry and event sponsors continually deny any wrongdoing in associating tobacco sponsorship with athletics.¹⁸¹

In addition to women's tennis, tobacco companies also sponsor one Senior PGA tour event.¹⁸² Prior to 1994, R.J. Reynolds spent an estimated \$4.625 million in Senior PGA Tour sponsorships.¹⁸³ However, in 1994, in an apparent reaction to tour officials' displeasure with unfavorable media attention, the company agreed to buy out all remaining sponsorships except for the Vantage Championship.¹⁸⁴ The agreement to end all sponsorship of Senior PGA Tour events by R.J. Reynolds took

tennis icon, Martina Navratilova claimed, "Tennis is a sport for a lifetime. As you get older, it becomes more and more important to keep in shape, and tennis is a great sport for that." *Id.* Navratilova's testimony was corroborated by a sports science expert, Dr. Jack Groppel, who stated, "It's the ideal all-around sport. It's a great aerobics exercise, but it's also recognized more as a sport that is beneficial psychologically. It helps recirculate the brain." *Id.* This is perhaps the most ironic statement ever made, in context, in sports. Minutes after stepping off of the court of a tobacco sponsored event, one of the most highly respected athletes of our time professes her respect for the sport as a physical fitness enhancer. It is difficult to imagine that these athletes actually hear what they say when they say it. It may be the truest statement in sports that tennis is the best aerobic exercise available, but given the context of the statement, can Ms. Navratilova justify such a statement? Until athletes realize that any substance known to be dangerous to the mind and body should not be supported because of its incongruity with their profession, support for anti-tobacco sentiment will not be diminished. Athletes' support of the ban on tobacco products in sports is integral to completing an absolute transition from the tobacco industry to more healthful and socially acceptable sponsors.

180. See Stephen Johnson, *Sponsorship of Virginia Slims Sparks Court Jest*, HOUSTON CHRONICLE, Apr. 12, 1991, at 25. In an effort to warn fans of the dangers of smoking, a group of doctors, in protest of a Virginia Slims event, jovially mocked the event. *See id.* The doctors message emphasized the hypocrisy in a tobacco company (Philip Morris) sponsoring a women's tennis event. *See id.* The president of the group exclaimed, "At a time when lung cancer has become an epidemic among women, it is ridiculous for a tobacco company to be sponsoring sports and women's tennis." *Id.*

181. See Darrel Fry, *Tour Sponsorship Draws Picketers Series*, ST. PETERSBURG TIMES, May 6, 1996, at 3C. As late as 1996, Philip Morris publically defended its advertising and promotion schemes amidst severe scrutiny. *See id.* In reaction to a May, 1996 protest against a Virginia Slims tournament, a spokesperson for Philip Morris stated, "It's never been proven that advertising or promotions gets anyone, adults included, to smoke. What it does is help people who have already made the decision to smoke choose a particular brand." *Id.*

182. See Helen Ross, *RJR's Senior PGA Tour Sponsorship Could End But Triad Event is Safe*, GREENSBORO NEWS & RECORD, Sept. 9, 1994, at C1.

183. *See id.*

184. *See id.* The Vantage Championship, worth \$1.5 million, was the only Senior PGA sponsorship left after the agreement which ended an eight year relationship between the tour and the tobacco company. *See id.* At the time, RJR was the tour's oldest sponsor. *See id.*

some valuable properties though.¹⁸⁵

Tobacco producers also have kept affiliations with some less popular sports as well. For example, R.J Reynolds also sponsors the Pro Billiards Tour.¹⁸⁶ In 1996, the company agreed to up its sponsorship in the Camel Pro Billiards Series from \$250,000 to \$1.5 million in guaranteed purses.¹⁸⁷ In addition to the individual event purses, the best players are awarded bonus money.¹⁸⁸

Perhaps the most highly infected tobacco supported sport is rodeo. The reason is simple. In its Copenhagen/Skoal Pro Rodeo Program, U.S. Tobacco Company bonuses pay to have its name on every single aspect of the sport.¹⁸⁹ In addition to the prize money offered to horse owners for rodeo wins,¹⁹⁰ corporate sponsors are adding bonuses to some riders and horses.¹⁹¹ Specifically, owners with horses winning Horse of the Year awards and other distinctions receive an additional bonus if the name of their animal includes "Skoal" or "Copenhagen."¹⁹² The competition is close and the added incentives make it inevitable that almost every horse on the tour will have a similar

185. See Helen Ross, *RJR Reduces Tourney Sponsorships Three Programs Will Be Discontinued*, GREENSBORO NEWS & RECORD, Sept. 24, 1994, at C7. The final agreement to end the eight year relationship between the Senior PGA Tour and RJ Reynolds took away the Vantage Classics, a series of 36-hole tournaments for golfers 60 and over worth \$1.875 million; the Vantage Aces, a hole-in-one program which awarded prized money to players hitting a hole in one in specified events worth \$350,000; and purse supplements at six events worth \$900,000. See *id.* In addition, RJR took away its sponsorship of the scoreboard systems available to the tour each season. See *id.*

186. See *Sports Briefs*, AUSTIN AMERICAN-STATESMAN, Apr. 17, 1996, at C2.

187. See *id.* The series was started in 1991 and the new agreement called for a 14-event nationwide tour. See *id.*

188. See George Sweeney, *Pro Billiards Pockets New Orleans as Tour Stop*, NEW ORLEANS TIMES-PICAYUNE, Oct. 5, 1996, at D5. Again, like NASCAR, the Camel tour promises bonus money to the player with the season's highest accumulated point total. See *supra* note 149 and accompanying text. The five-year deal promised to showcase the top players in billiards because of the potential prize money. See Sweeney, *supra* note 188, at D5. The increase in sponsorship now allows a player to make a living on the tour. See *id.* Specifically, when the tour began there were about ten major events with purses totaling \$400,000. See *id.* With the increase to \$1.5 million per season, many players can play longer. See *id.* In addition, a Senior tour began earlier this year. See Sweeney, *supra* note 188, at D5.

189. See Ed Knocke, *Name Game Earns Cash for Owners*, DALLAS MORNING NEWS, Apr. 25, 1991, at 14B.

190. See Willard H. Porter, *Is Rodeo Too Commercialized?*, SUNDAY OKLAHOMAN, Nov. 15, 1987, at 11. Some top prizes could range in the thousands of dollars per victory. See *id.*

191. See *id.*

192. See *id.*

name.¹⁹³ Many true rodeo fans feel that these marketing ploys take away from the sport.¹⁹⁴

D. *The Future of Tobacco Sponsorship*

The industry has certainly recognized that its prominence in sports sponsorship will be severely curtailed once the global settlement becomes finalized.¹⁹⁵ Industry officials began preparations for a loss to its sponsorship campaigns several years before any type of settlement was envisioned.¹⁹⁶ As a result, sports marketers have begun to look to other types of sponsors for their events and tours.¹⁹⁷ Fortunately, the list is long and new sponsors are plentiful.¹⁹⁸ The switch to more health con-

193. See Knocke, *supra* note 189, at 14B. The season's earnings are as follows: The owners of the top bucking animals receive \$3,000 and the top 30 riders make the selections for each stock event. *See id.* For any animal with a sponsor's name, the prize money to the owner is doubled. *See id.*

194. See Porter, *supra* note 190, at 11. Most rodeo fans feel cheated if every animal's name is similar. *See id.* This outrage is exacerbated by the fact that the reason for the name similarity is sponsorship advertising. *See id.* In addition, the money is given directly to the owners who did nothing more than name the animal. *See id.* Many believe that the money should be shared among the riders. *See Porter, supra* note 190, at 11.

195. See Christian Thompson, *Joe Camel, Victim of Tobacco Wars, Is Dead*, Gannett News Service, July 10, 1997. In early July 1997, R.J. Reynolds was forced to pull the plug on one of its strongest selling tools. *See id.* With the increasing pressure from anti-tobacco groups and a settlement with the attorneys general imminent, RJR was forced to retire its Joe Camel cartoon campaign, signifying a first step towards a total dismantling of marketing aimed at youth. *See id.*

196. See Courchesne, *supra* note 134, at C3. The tobacco companies were put on notice that the government was serious about curtailing cigarette ads in sports in 1995 when it began to actively enforce the anti-billboard laws in sports arenas. *See id.* It was at that time that sports such as NASCAR and the tobacco companies began to prepare for the inevitable. *See id.* NASCAR officials have recognized that a ban may substantially effect the circuit. *See id.* The vice president of marketing for NASCAR recently stated, "[w]e always have a plan for important scenarios like that [a ban pursuant to the settlement]. I can't get into any of the details but we're prepared to move the sport forward in any event of tobacco sanctioning. They're [tobacco companies] our partner right now and until regulations sort themselves out they will [continue to] be." *See Courchesne, supra* note 134.

197. See Joanne Korth, *McReynolds Still Has No Regrets Series*, ST. PETERSBURG TIMES, Sept. 27, 1997, at 12C; *see also* Shannon Stevens, *FedEx In Talks for CART Title*, BRANDWEEK, Sept. 15, 1997, at 4.

198. See Greg Johnson, *Advertising and Marketing Briefs SmithKline Gets in Fast Lane to Smokers*, LOS ANGELES TIMES, Sept. 25, 1997, at D5. In a remarkable turnaround, one NASCAR driver has rebuked the tobacco industry by agreeing to drive a car sponsored by NicoDerm and Nicorette Gum. *See id.* The products help to reduce the effects of tobacco. *See id.* The ultimate irony is that the driver, Dennis Vitolo, a non-smoker, drove the car in the Marlboro 500. *See id.* SmithKline, the manufacturer, plans to donate \$500 to the American Cancer Society for every NASCAR driver that quits smoking. *See id.*

scious sponsors may help to improve support for these sports even more.¹⁹⁹ The early recognition by the industry that an eventual settlement will preclude all future association with sports may help to ease the transition to less offensive sponsors.²⁰⁰

Additionally, the mounting pressure on sports franchises and associations to rid themselves of tobacco supported sponsorship will, in the not too distant future, force tobacco out of its raillery with athletics.²⁰¹ Appropriately, the tobacco companies are now scampering for other ways to "legally" market their products.²⁰² For example, Philip Morris has decided to get its feet wet in the music industry.²⁰³ Recently, the tobacco producer set up its own record label and will target the Virginia Slims audience.²⁰⁴ The label is based on the Virginia Slims slogan, "It's a Woman Thing" and will produce CD's, targeted at women in pop, rhythm and blues, and country to start.²⁰⁵ In addition, the company sponsors music tours such as "Club Benson & Hedges" and the Marlboro Music Tour which visits U.S. military bases.²⁰⁶ Of course, the company's involvement in the music industry has brought critics to the industry's door as well.²⁰⁷

E. Advertising

Aside from quelling tobacco sponsorship in American sports, the Proposed Settlement seeks to eliminate tobacco ad-

199. See Korth, *supra* note 197, at 12C. A spokesman for SmithKline Beecham has stated, "People have the right to smoke and the right to quit. Almost 75% of smokers polled say they would like to quit. So we are making our name visible at venues that cater to smokers, like car races." *Id.* The effort by SmithKline is the first healthful tobacco approach to enter auto racing. See *id.* The irony in such a product becoming a major sponsor of motor sports is that it targets the same market as the tobacco industry. See *id.*

200. See *supra* note 166 and accompanying text.

201. See *id.*

202. See Patrick M. Reilly, *Virginia Slims Gets Its Own Record Label*, WALL STREET J., Jan. 15, 1997, at B1.

203. See *id.*

204. See *id.*

205. See *id.* The company will be known as Woman Thing Music. See *id.* at B1.

206. See Reilly, *supra* note 202, at B1.

207. See *id.* Leaders of anti-tobacco groups abhor the new relationship, "It's horrendous on two counts. It changes the environment to support tobacco and cigarettes as a community norm, and secondly it exploits the artists too." *Id.* Others have seen the effect it will have on children, "[T]hey are trying to make a product attractive to the very person who is the role model of the younger kids." *Id.*

vertising in all forums.²⁰⁸ Of course, tobacco advertising has already been banned on television and camera-viewed billboards inside stadiums and arenas have been outlawed pursuant to federal law.²⁰⁹ The removal of camera-viewed billboards in stadiums and arenas that began in 1995 will now be expanded under the Proposed Settlement to all tobacco advertisements, regardless of whether they will be viewed on television.²¹⁰ With the settlement in place, any tobacco related sign, advertisement, billboard, or picture will be banned from sports forever.²¹¹ Additionally, the advertising ban keeps within the parameters of the terms banning tobacco sponsorship.²¹² If children are not introduced or exposed to tobacco products, especially those where athletes promote or endorse the deadly products, the likelihood of their starting smoking is greatly reduced.²¹³

V. SUMMARY AND CONCLUSIONS

The essence of sports is the spirit of competition and self-fulfillment through athletic prowess. An athlete's success is the result of either ability, desire or practice. The most successful professional athletes have the unusual capability to combine the three. Indeed, it is these factors that lead an athlete to seek both physical and mental strength and fitness on the playing field. As such, professional sports must seek to support its athletes by allowing only healthful products into its market. In return, athletes have a duty to return to the sport the same underlying healthful ideals by endorsing only sport and/or health related products.

There is an inherent contradiction in the phrase "tobacco sponsored sporting event." The marriage of sports and tobacco was consummated almost one hundred years ago in America. It is now time for the final divorce. The global settlement should be used as the guide for the final dissolution. It may have been permissible to allow the tobacco industry into the sports arenas and on the raceways of America in 1971 when

208. Settlement Document, *supra* note 6, at 8.

209. See 15 U.S.C. § 1331; see also *supra* notes 5, 10-11 and accompanying text.

210. See Rich, *supra* note 50.

211. See Settlement Document, *supra* note 6, at 8.

212. See Hilts, *supra* note 137, at B5.

213. See Settlement Document, *supra* note 6, at 1.

the long-term effects were still a mystery, but now the totality of facts are known. Tobacco is a deadly product that is directly responsible for the death and disease of hundreds of thousands of smokers every year. However, the horrors of tobacco products can be eliminated. Where better to start than in the sports industry in which health and fitness are paramount. The global tobacco settlement is a worthy attempt at solving one of the nation's most prolific evils.

The debate over the success of a global tobacco settlement is still in its infancy. The approval of Congress and the President are still required and the appropriate legislation must be drafted. Recently, however, the President's specially appointed review committee determined that the settlement was not powerful enough. In response, the President thrust the burden to Congress to draft a resolution that will satisfy angry smokers and set forth a capacious campaign to end youth tobacco use in America forever. In its effort to develop its campaign, Congress must consider the effects that a global settlement will have on different groups in America.

First, Congress must recognize the difficulty that will be involved in implementing a massive nation-wide attack on tobacco. Fortunately, with the aid of states, the FDA, and other government offices, the task will be less daunting. In addition, the requirement under the settlement that the industry "self police" will play a significant role in enforcement of a global settlement.

Second, the settlement must satisfactorily correct the rampant abuse of tobacco products by teenagers. The settlement must set out a coherent, well organized plan for reducing the number of young American smokers. The present proposed settlement seems to satisfy the requirement. However, perhaps the industry should be brought in not only to subsidize, but to actively participate in anti-tobacco programs.

Third, the settlement must consider those who will be damaged in some way by the effects of the settlement. In the areas of sports sponsorship and advertising this is of particular concern. A settlement that ignores such a vast and profitable American market, such as professional athletics, will not only economically damage those within the market, but will have severe consequences upon the American marketplace and economy. Professional sports' economic conditions must be

considered in evaluating a "complete, all encompassing settlement." The future of many American sports will be determined by a global settlement. As such, an agreement that leaves too great of an economic burden on the tobacco supported sports will not satisfy as a "complete settlement."

In the area of American sports sponsorship and advertising by the industry, the settlement provides a strong basis. The provisions outlined in the settlement would eradicate tobacco from American sports completely. The settlement would disallow any billboard advertising of tobacco products in sports arenas or stadiums. Additionally, the Proposed Settlement would remove tobacco sponsors from the sport to the extent that the products could not be displayed anywhere. This provision is vital to the future of several sports and could change the face of others. The most prevalent change, of course, would be in motor sports. Auto racing is the most heavily tobacco sponsored sport and many have expressed concern for the future of the sport, should a term eliminating tobacco sponsorship in sports be included in a global settlement. The Proposed Settlement presently before Congress does not go as far as many believe it should. It is true that the Proposed Settlement disallows tobacco brands to be shown on any car and that all tobacco billboards must be removed from racetracks. However, the settlement does not expressly mandate the removal of tobacco companies from sponsorship. The settlement would still allow tobacco companies to advertise, but they would only be permitted to place the company's name on the car, without reference to any brand produced by that company. The provision is in harmony with the goal of the tobacco settlement; to end youth smoking. The total extraction of tobacco is unnecessary if the goal of the settlement remains limited to ending youth smoking. Many would prefer the ban of tobacco sponsorship *in toto*. If the goal of the settlement were amended to include the limiting of tobacco use among all Americans, a total ban would be permissible.

Perhaps the most important codicil in the Proposed Settlement is the provision of supplemental funds to sports events or franchises who have difficulty replacing tobacco sponsors. This provision may become prevalent to the success of many smaller market teams and events. There is little doubt that motor sports will not have difficulty replacing tobacco sponsors. As

suggested, some of the most influential American corporations have already lined up to step into the shoes of the tobacco sponsors. The supplemental income provision will be more important to those events that do not have a large following, but are still important in their respective sports. For example, the Virginia Slims Legends Tour may potentially be shut down for lack of sponsorship. However, if some of its funding could be supported by an income pool under the settlement, the extra time that would have been used on fund raising can be used to find new sponsors. However, there is also an opportunity for abuse of this provision. Some events or franchises may depend on the supplement as part of its set budget and not search for new sponsors. A "complete provision" here would include a subjective test for each event and franchise requesting money requiring it to show that it has made good faith efforts and has been unsuccessful in its attempts to find other sponsors. The provision, however, is a strong start.

The global tobacco settlement fails to address many issues relating to sports and some additions are suggested. If the underlying purpose of the settlement is to reduce and eventually eliminate youth tobacco use, why is there not a no smoking ban included at all sports arenas and stadiums? The reason is the influence of the tobacco industry on sports advertising. However, it seems that such a ban would send a powerful message: that sports does not support and will not permit tobacco use in its facilities. A provision similar to this would be beneficial on several levels. First, it would reduce smoking in and around sports arenas and stadiums. Second, it would provide a cleaner atmosphere inside of the facilities. There is nothing more disturbing than watching a Yankee game next to someone who is smoking a two foot cigar. No matter which way you turn the smoke follows you and eventually your clothes reek of smoke. Of course, many arenas have outlawed smoking inside of the arena itself, but still permit smoking in the hallways and walkways. But this is not enough. Finally, a smoking ban in sport arenas and stadiums would give the message that sports will only allow healthful sponsors.

A final suggestive improvement includes the endorsement by prominent athletes against teen tobacco use. As one could imagine, a mandate of this kind under the proposed settlement is illegal due to the slavery laws in America. However, the set-

tlement could include a condition that sports leagues and organizations designate an express anti-smoking campaign that must be implemented through the use of its prominent athletes. The mandate could make any payment of supplemental funds contingent on implementation of such a plan.

In conclusion, the recently proposed global tobacco settlement is a positive step towards the goal of reducing youth tobacco use in America. However, as recognized by the President and his commission, its present form does not extend as far as it should. It is now incumbent upon Congress to work out a plan that sends a powerful message to the tobacco industry that their deceptive practices will not be tolerated nor accepted. Additionally, the Proposed Settlement must be made stronger in the area of American sports. The drafters have already recognized that the sports industry will be affected and as such, have attempted to provide protections. Yet the protections under the settlement, like most others, do not extend far enough. Sports do not need tobacco sponsors. Tobacco sponsors need sports. Based upon public policy principles, then, sports should be favored. The potential for success and the messages of good health and fitness promoted by American sports far outweighs the death and disease caused by tobacco use. Thus, a "complete tobacco settlement," would eradicate tobacco from sports, provide a means for economic protection to those franchises and events losing sponsorship, and provide a cleaner, more healthful atmosphere for athletes to play and fans to enjoy American sports.

Eric D. Brophy