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# THE STATE ATTORNEY GENERALS' TOBACCO SUITS: EQUITABLE REMEDIES

*Edward Correia and Patricia Davidson*†

## INTRODUCTION

Commencing with the first lawsuit filed by the State of Mississippi, on May 23, 1994, about forty states and several cities have filed claims against the tobacco companies regarding industry conduct over the last three decades.<sup>1</sup> On June 20, 1997, Attorneys General from these states agreed to a proposed settlement with the tobacco industry.<sup>2</sup> This agreement requires federal legislation that may or may not be forthcoming. To date, all of the states scheduled for trial since June 20, 1997 that were prepared to litigate their claims have also settled.<sup>3</sup> Moreover, each of the

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<sup>1</sup> See, e.g., *Florida v. American Tobacco Co.*, (visited June 1, 1998) No. CL 95-1466 AH (Fla. Cir. Ct. filed Feb. 21, 1995) <<http://stic.neu.edu/Fl/flsettle.htm>> [hereinafter *Fla. Complaint*]; *Kansas v. R.J. Reynolds Tobacco Co.*, (visited June 1, 1998) No. 96-CV-919 (Kan. Dist. Ct. filed Aug. 20, 1996) <<http://stic.neu.edu/KS/complaint.html>> [hereinafter *Kansas Complaint*]; *Massachusetts v. Philip Morris, Inc.*, (visited June 1, 1998) CA No. 95-7378 (Mass. filed Dec. 19, 1995) <<http://stic.neu.edu/27MA/8macomplaint.htm>> [hereinafter *Mass. Complaint*]; *Kelley v. Philip Morris, Inc.*, (visited June 1, 1998) Case No. 96-84281-CZ, at para. 87. (Mich. Cir. Ct. filed Aug. 21, 1996) [hereinafter *Mich. Complaint*]; *Minnesota v. Philip Morris Inc.*, (visited June 1, 1998) No. C1-94-8565 (D. Minn. filed Aug. 17, 1994) <<http://stic.neu.edu/MN/3BCBS.HTM>> [hereinafter *Minn. Complaint*]; *Moore v. American Tobacco Co.*, (visited June 1, 1998) No. 94-1429 at para. 2 (Miss. Ch. Ct. filed May 23, 1994) <<http://stic.neu.edu/MS/2moore.htm>> [hereinafter *Miss. Complaint*]; *New York v. Philip Morris, Inc.*, (visited June 1, 1998) (N.Y. Sup. Ct. filed Jan. 27, 1997) [hereinafter *N.Y. Complaint*]; *Verniero v. R.J. Reynolds Tobacco Co.*, (visited June 20, 1998) at paras. 1, 240 (Ch. Div. filed Sept. 9, 1996) <<http://stic.neu.edu/NJ/NJcomplaint.htm>> at para. 2 [hereinafter *N.J. Complaint*]; *Texas v. American Tobacco Co.*, (visited June 1, 1998) No. 5:96 CV91 (D. Tex. E.D. filed Mar. 28, 1996) <<http://stic.neu.edu/Tx/3TXCOMP.HTM>> [hereinafter *Texas Complaint*]; *McGraw v. American Tobacco Co.*, (visited June 1, 1998) No. 94-1707 (W.Va. Cir. Ct. filed Sept. 20, 1994) <<http://stic.neu.edu/WV/4wvcomp.htm>> [hereinafter *W.Va. Complaint*]; *Wisconsin v. Philip Morris Inc.*, (visited June 1, 1998) (Wis. Cir. Ct. filed Feb. 5, 1997) <<http://stic.neu.edu/Wi/complaint.htm>> [hereinafter *Wis. Complaint*].

<sup>2</sup> See Proposed Resolution (visited June 20, 1998) <<http://stic.neu.edu/settlement/6-20-settle.htm>> [hereinafter *Proposed Resolution*].

<sup>3</sup> See Northeastern Univ., The State Tobacco Information Center, Attorneys General Bringing the Tobacco Industry to Justice (visited November 20, 1998) <http://stic.neu.edu/summary.htm> (listing state suit summaries).

state agreements specifies that the terms of any national settlement will supersede it.<sup>4</sup> The Florida agreement also provides for continuing state court jurisdiction over “claims for non-economic injunctive relief provided by the Proposed Resolution” if national legislation does not pass by June 1, 1998.<sup>5</sup>

Although most of the public commentary on these cases has focused on the claim for damages, each suit also seeks equitable relief.<sup>6</sup> This equitable relief, meaning mandatory remedies other than the payment of damages,<sup>7</sup> may result in a highly significant set of tobacco control policies. The purpose of this article is to discuss equitable relief and to explore some possible forms, which it might take.

#### A. FOCUS ON “INVOLUNTARY” RELIEF

The primary focus of this article is the type of equitable relief appropriate in the absence of a settlement. This type of “involuntary” relief would occur where the cases proceed to litigation and eventually state courts order relief over the objections of the tobacco industry. Such court orders flow directly from the specific allegations and legal theories contained in the complaint, which are proved at trial.<sup>8</sup>

In the event of a settlement, presumably all such “involuntary” relief would still be appropriate; however, an extremely wide range of additional remedies is also conceivable. Settlement remedies could include, for example, provisions that are not directly related to the theory

<sup>4</sup> The Minnesota agreement has a “limited and most-favored nation provision.” *Minnesota v. Philip Morris, Inc.*, No. C1-94-8565 at 3 (D. Minn. May 8, 1998) (settlement agreement and stipulation for Entry of Consent Judgment) [hereinafter *Minn. Settlement Agreement*]. The Florida settlement agreement provides for a limited exception.

In the event that the Proposed Resolution is enacted as federal legislation, or if any substantially equivalent federal program is enacted, the settlement provided herein shall remain in place, but the terms of such Proposed Resolution or federal program shall supersede the provisions of this Settlement Agreement, except for the Pilot Program and to the extent that the parties have otherwise expressly agreed.

*Florida v. American Tobacco Co.*, No 95-1466, at II.B.5 (Fla. Cir. Ct. Aug. 25, 1997) <<http://stic.neu.edu/Fl/flsettle.htm>> [hereinafter *Fla. Settlement Agreement*].

<sup>5</sup> See *Fla. Settlement Agreement*, *supra* note 4, at I.A. (discussing the types of claims that may be preserved under the Fla. Settlement Agreement).

<sup>6</sup> The Mississippi and New Jersey complaints are unique in that the claim for monetary relief is equitable in nature. See *Miss. Complaint*, *supra* note 1; *N.J. Complaint*, *supra* note 1, at paras. 1, 240. The use of equitable relief to recover damages is outside the scope of this article.

<sup>7</sup> In some cases, the line between “equitable” relief and damage remedies (often called “remedies at law”), is difficult to draw. For example, a court order that the defendants contribute to a fund to pay for nicotine withdrawal programs would have aspects of both. See *infra* notes 99-101 and accompanying text.

<sup>8</sup> See *infra* note 11 and accompanying text.

of the complaints, such as prohibitions on smoking in the workplace or limitations on sales abroad.<sup>9</sup>

As a general matter, “[a] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.”<sup>10</sup> Thus, the relief in a consent decree available in settled cases could be broader than the relief ordered over the defendant’s objections after a trial. The court is likely to approve the consent decree as long as the court has jurisdiction to enter the order, the provisions of the settlement are reasonably related to the complaint, and the agreement does not violate some federal or state policy.<sup>11</sup> The consent decree also cannot adversely affect the rights of those persons not parties to the agreement if it is to be immune from collateral attack.<sup>12</sup>

The greater discretion available in the context of a settlement allows remedial provisions, which could not be ordered over the defendants’ objections to be included in an enforceable settlement. For example, remedial provisions that would otherwise be preempted, such as additional warning labels,<sup>13</sup> would be enforceable by the state courts. The industry would be viewed as having waived its preemption objections and, thus, would not have standing to attack the requirement on appeal or in later litigation. On the other hand, agreements that affected the rights of non-parties would be subject to challenge. For example, provisions that eliminated tobacco advertising on billboards could affect distributors who

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<sup>9</sup> The proposed national settlement, for example, features, *inter alia*, restrictions on environmental tobacco smoke. *Proposed Resolution*, *supra* note 2, at Title IV. The absence of limitations on international sales has been criticized. *See, e.g.*, ADVISORY COMMITTEE ON TOBACCO POLICY AND PUBLIC HEALTH 19-20 (1997) (recommending a series of regulatory and research policies designed to ensure that the United States promotes tobacco control measures worldwide).

<sup>10</sup> *See* Local 93, Int’l Ass’n of Firefighters v. Cleveland, 478 U.S. 501, 525 (1986) (citation omitted).

<sup>11</sup> The standards for approving consent decrees vary somewhat from state to state. The United State Supreme Court’s comments regarding the standards for federal consent decrees suggest some general standards. *See Int’l Ass’n of Firefighters*, 478 U.S. at 525-26 (“[A] consent decree must spring from and serve to resolve a dispute within the court’s subject-matter jurisdiction . . . [It] must come within the general scope of the case made by the pleadings . . . and further the objectives of the law upon which the complaint was based . . . .”) (citations omitted).

<sup>12</sup> In general, litigation orders (including consent decrees) are binding only on parties and persons represented by named plaintiffs in a class action. *See, e.g.*, *Int’l Ass’n of Firefighters*, 478 U.S. at 529; *Martin v. Wilks*, 490 U.S. 755, 761-65 (1990); Richard L. Marcus, *They Can’t Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858 (1995); Douglas Laycock, *Consent Decrees without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103 (1987).

<sup>13</sup> *See infra* notes 39-47 and accompanying text for a discussion of the preemption issue.

wished to advertise. Thus, any settlement should take into account the rights of non-parties.<sup>14</sup>

The discussion below assumes that the Food and Drug Administration ("FDA") has and will continue to have jurisdiction to regulate tobacco products under the Food, Drug and Cosmetic Act.<sup>15</sup> While not making a final decision about the validity of particular FDA actions, a recent federal district court decision rejected the industry's arguments that the agency did not have jurisdiction.<sup>16</sup> While this decision could be overturned on appeal, the district court soundly rejected virtually every industry argument on the FDA's authority.<sup>17</sup> Thus, the prospect that the FDA's position will eventually be upheld appears to be good.

The assumption of FDA authority affects the assessment of the appropriate remedies in the state cases for two reasons. First, there is less need for the states to devote substantial resources to obtaining certain relief if the FDA has authority to order it by regulation. Second, in areas where the proper remedy is difficult to determine based on currently available information, the best course may be to await FDA investigation and analysis.<sup>18</sup>

## B. THE STATE COMPLAINTS

A remedy for any lawsuit follows from defendants' wrongful conduct, which the plaintiffs must establish. Consequently, the equitable remedies in the state cases will correspond to the allegations in the complaint that are established at trial.<sup>19</sup> There are three basic types of equitable remedies: (1) directives not to repeat wrongful conduct; (2) corrective actions to remedy the harm of past conduct; and (3) prophylactic or "fencing-in" provisions, intended to prevent a recurrence of violations of law in the future. Even in the case of a remedy ordered over defendants' objections, fencing-in provisions may extend, at least for a temporary

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<sup>14</sup> See *infra* note 29.

<sup>15</sup> 21 U.S.C. § 379(a). The proposed national settlement has been widely criticized for, *inter alia*, limiting FDA jurisdiction to regulate tobacco products. See Analysis, Report, and Recommendations of the American Medical Association Task Force on Proposed Tobacco Settlement Agreement 4-10 (July 31, 1997) [hereinafter *AMA Task Force*]; Final Report of the Advisory Committee on Tobacco Policy and Public Health at 3-4; app. 3, at A.1.-A.5.

<sup>16</sup> *Coyne Beahm, Inc. v. FDA*, 958 F. Supp. 1060 (M.D.N.C. 1997).

<sup>17</sup> The court rejected the defendant's motions for summary judgment as to the issue of whether nicotine is a drug and cigarettes are medical devices—the essential findings necessary to allow the FDA to regulate tobacco product sales. See *id.* at 41-52. On the other hand, the court concluded that the FDA did not have statutory authority to regulate tobacco product advertising. See *id.* at 53-59.

<sup>18</sup> A particular area that requires further study is the control of nicotine levels. See *infra* notes 118-24 and accompanying text.

<sup>19</sup> In the case of a settlement, there is greater flexibility but at least in the federal courts, a consent decree should still be related to allegations in the complaint. See *supra* notes 8-11 and accompanying text.

period, to prohibitions on conduct that is otherwise lawful. The breadth of fencing-in remedies is justified to ensure that the defendants will not return to their past pattern of wrongful conduct.<sup>20</sup>

While the state complaints vary somewhat, they are similar in their basic allegations. At the heart of all the complaints lies the allegation that the tobacco industry deceived the American public by suppressing its own research, which had indicated that cigarettes could cause disease and addiction. The various complaints also allege the tobacco companies' wrongful conduct included manipulating nicotine levels,<sup>21</sup> conspiring to suppress the development of a safer cigarette,<sup>22</sup> and deliberately encouraging minors to purchase cigarettes.<sup>23</sup> In addition, many complaints allege violations of particular state statutes, such as state consumer protection laws, antitrust statutes, or the RICO Act.<sup>24</sup> Consequently, the remedies in these cases may be unique to these specific laws.

### C. TYPES OF EQUITABLE REMEDIES

The allegations in the state complaints suggest several basic categories of remedies. A central theme of all the complaints is fraud, or knowingly deceiving the public. In Parts I and II, we discuss some strategies for dispelling the general public's lingering doubt regarding the hazards and addictive nature of smoking. We also discuss possible ways to deal with future and past fraud. Another important focus in the complaints is unfair marketing directed toward minors, found in Part III. The most significant remedies relating to minors involve restrictions on particular marketing techniques,<sup>25</sup> which we discuss below in Part III.C.

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<sup>20</sup> See *infra* notes 48-50 and accompanying text.

<sup>21</sup> See, e.g., *N.J. Complaint*, *supra* note 1, at paras. 141-91.

<sup>22</sup> See, e.g., *id.* at 103-25; *Minnesota Complaint*, *supra* note 1, at paras. 64-70.

<sup>23</sup> See, e.g., *N.J. Complaint*, *supra* note 1, at paras. 192-207; *Minnesota Complaint*, *supra* note 1, at paras. 71-75.

<sup>24</sup> See, e.g., *Fla. Complaint*, *supra* note 1, at paras. 233-38 (State RICO Act), *N.Y. Complaint*, *supra* note 1, at para. 7 (Bus. Corp. Law and Not-for-Profit Corp. Law); *id.* at paras. 8-21 (state antitrust law); *id.* at paras. 36-48 (Federal RICO Act); *id.* at paras. 89-100 (state antitrust laws).

<sup>25</sup> In addition to numerous restrictions on tobacco advertising, marketing and promotion, the proposed national settlement features a "look-back" provision which would require the industry to take steps to reduce youth smoking by certain percentages over time or pay surcharges. See *Proposed Resolution*, *supra* note 2, at Title IA (advertising, marketing and promotion restrictions), Title II, and app. V (look-back provisions). The mechanics of the proposed look-back program have been severely criticized and are likely to be amended should federal legislation emerge. See, e.g., AMA Task Force, *supra* note 15, at 22-23. President Clinton has also called for a tougher, escalating penalty system, which, *inter alia*, does not include caps or tax deductions for the industry. *President Clinton's Plan for Comprehensive Tobacco Legislation to Protect America's Children*, U.S. NEWSWIRE, WASH. D.C., Sept. 17, 1997.

In addition to these informational and marketing-related remedies, there are a variety of other possible remedies to address the industry's conduct. One possible corrective remedy is to require the industry to pay for nicotine withdrawal programs for addicted smokers. We discuss this possibility in Part IV. In Part V we explore further the issues of disclosure of past research and the contents of cigarettes. In Part VI, we focus on disclosure of future research. Finally, in Part VII, we turn to the issue of nicotine levels. We conclude that informational remedies, such as prohibitions on future misrepresentations and certain advertising and marketing practices, are most likely to be acceptable to courts but that courts may be reluctant to adopt remedies that would change the way the tobacco industry manufactures its products.

### I. ENJOINING FUTURE FRAUD

The state complaints allege that the tobacco companies made a series of misleading statements to the public regarding the hazards of smoking. For example, the complaints allege that the companies: (1) promised to conduct independent research and reveal the results to the public;<sup>26</sup> (2) claimed that the link between smoking and disease has not been established;<sup>27</sup> and (3) claimed that cigarettes are not addictive.<sup>28</sup> There is overwhelming evidence that the industry repeatedly made these claims while their own research showed otherwise.<sup>29</sup> A central goal of the industry's strategy to maintain sales in the face of growing evidence of the danger of smoking was to create uncertainty in the mind of smokers about the relationship between smoking, addiction, and disease.<sup>30</sup>

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<sup>26</sup> Much of the evidence that will be offered in the state cases appears in documents and analysis released by the Food and Drug Administration in connection with Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 61 Fed. Reg. 44,396-45,318 (1996) (to be codified at 48 C.F.R. § 801) [hereinafter FDA Rule]. Evidence regarding suppression of industry research is discussed in the FDA Rule's Jurisdictional Statement, 61 Fed. Reg. at 44,847-44,992. See, e.g., *Mass. Complaint*, *supra* note 1, at para. 185. Moreover, industry documents released during the Minnesota trial provide strong proof of these allegations. See *Minn. Complaint*, *supra* note 1.

<sup>27</sup> See, e.g., *Mass. Complaint*, *supra* note 1, at para 195; *Miss. Complaint*, *supra* note 1, at para. 59; *Fla. Complaint*, *supra* note 1, at paras. 93, 97.

<sup>28</sup> See, e.g., *Mass. Complaint*, *supra* note 1, at paras. 163-66; *Miss. Complaint*, *supra* note 1, at para. 48; *Fla. Complaint*, *supra* note 1, at paras. 93, 95, 96.

<sup>29</sup> The depositions of key industry figures in the Florida case, which was independently settled, reveal a recent shift in the industry's public position. For example, in response to the question from plaintiff's attorney Ron Motley, "[D]o you accept that cigarette smoking is a cause of disease in humans?" Stephen Goldstone, Chief Executive Officer for R.J. Reynolds-Nabisco stated, "I have always believed that smoking plays a part in causing lung cancer. What that role is, I don't know, but I do believe it." Deposition of Stephen Goldstone, *Florida*, CL 95-1466.

<sup>30</sup> See, e.g., a 1972 memorandum from Claude Teague, Assistant Director for Research and Design for R.J. Reynolds:

If equitable decrees are enacted, they should include a general provision enjoining misrepresentations in the future.<sup>31</sup> In order to avoid future litigation over which claims are prohibited, however, a decree could also specify certain kinds of false statements that are specifically prohibited. At a minimum, such decrees should include claims by the industry, made directly or indirectly, that smoking is not addictive and that the link between smoking and disease is not established.

Since a state court order would amount to a restriction on industry speech, formulating the order must take account of First Amendment limitations.<sup>32</sup> Even a settlement could raise First Amendment concerns if the rights of third parties are affected.<sup>33</sup> Commercial speech has less constitutional protection than noncommercial speech<sup>34</sup> and false or deceptive speech is not protected at all.<sup>35</sup> Truthful commercial speech can be regulated if the state can meet standards that have been set out by the

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[The typical smoker] does not start smoking to obtain undefined physiological gratifications or reliefs, and certainly he does not start to smoke to satisfy a nonexistent craving for nicotine . . . Only after experiencing smoking for some period of time do the physiological 'satisfactions' and habituation become apparent and needed . . . *We have deliberately played down the role of nicotine, hence the nonsmoker has little or no knowledge of what satisfactions it may offer him and no desire to try it. Instead, we somehow must convince him with wholly irrational reasons that he should try smoking, in the hope that he will for himself then discover the real 'satisfactions' obtainable.*

FDA Rule, *supra* note 26, at 44,480 (emphasis added).

<sup>31</sup> The consent decree in the Minnesota case permanently enjoins the settling defendants from "making any material misrepresentations of fact regarding the health consequences of using any tobacco product, including any tobacco additives, fillers, papers or other ingredients." *Minn. Consent Decree*, *infra* note 119, at V.B.

<sup>32</sup> See *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964). The First Amendment is invoked whenever a state restricts speech, even if the restriction is grounded on a common law standard rather than a statutory one.

<sup>33</sup> Actions by the state embodied in a consent decree are state action subject to the Fourteenth Amendment. See *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 518 (1986). While the defendants themselves might waive a First Amendment argument, in theory, others, such as retailers, would not. In addition, an individual could challenge a consent decree on First Amendment grounds since the "First Amendment protects not only the dissemination but also the receipt of information and ideas." *Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756 (1976) (restrictions on price advertising of prescription drugs); *Procurier v. Martinez*, 416 U.S. 396, 408-09 (1974) (restriction on outgoing prison inmate correspondence). In both of these cases, the right to know involved more significant information than is customarily contained in cigarette advertising. The Minnesota settlement provision barring misrepresentations of fact regarding health consequences also states that "Nothing in this paragraph shall limit the exercise of any First Amendment right to any defense or position which persons bound by the Consent Judgment may assert in any judicial, legislative, or regulatory forum." *Minn. Settlement Agreement*, *supra* note 4, at V.B.

<sup>34</sup> See *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 623 (1995); *Central Hudson Gas & Elec. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1979).

<sup>35</sup> See *Central Hudson*, 447 U.S. at 563.



Court.<sup>36</sup> Clearly, conventional cigarette advertisements are commercial speech.<sup>37</sup> Other industry advertisements, which make health-related claims, are harder to classify if they contain industry opinions.<sup>38</sup> The Supreme Court has applied the commercial speech standard to statements by commercial actors that go beyond traditional advertising claims,<sup>39</sup> so that even statements that contain discussions of important public issues can be classified as commercial speech.<sup>40</sup>

A decree should distinguish between commercial speech and non-commercial speech in order to minimize First Amendment concerns. For example, the decree could bar certain claims in print advertising in publications of general circulation while permitting similar claims to be made to Congress or other public agencies. The industry may argue that its "opinions," expressed in widely circulated advertising, are constitutionally protected. As a practical matter, however, such statements should be viewed as commercial messages if they have the primary purpose or effect of promoting the purchase of tobacco products.<sup>41</sup> There is even a

<sup>36</sup> See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 486 (1996) (citing *Central Hudson*, 477 U.S. at 566); *Florida Bar*, 515 U.S. at 624 (The state must show that the restriction is intended to advance a substantial state interest, directly and materially furthers that interest, and is reasonably and narrowly tailored to accomplish the government's objective).

<sup>37</sup> See *Bolger v. Youngs*, 463 U.S. 60, 66 (1983) (The core of commercial speech is "speech which does no more than propose a commercial transaction."); *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 421-22 (1993) (citing *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 385 (1973)).

<sup>38</sup> See, e.g., *Mich. Complaint*, *supra* note 1, at para. 87 (alleging that in 1970 the Tobacco Institute ran an advertisement captioned: "The question about smoking and health is still a question."). See also *id.* at para. 130 (alleging that "[a]n advertisement placed by Philip Morris in newspapers across the country in April 1994, affirmatively represented that Philip Morris does not 'manipulate' nicotine levels in its cigarettes and that 'Philip Morris does not believe that cigarette smoking is addictive.'").

<sup>39</sup> See *Bolger*, 463 U.S. at 60. The Court acknowledged that the materials at issue went beyond the core standard. *Id.* at 66. The Court commented that any one of several factors—that the materials were conceded to be advertisements; that they referred to a specific product; and that they were economically motivated—was not dispositive. *Id.* However, taken together they justified a conclusion that the material should be characterized as commercial speech. *Id.* at 67. The Court also noted that materials may be commercial speech even if they refer to a generic product or if a trade association sponsors them. *Id.*

<sup>40</sup> See *id.* at 67-68 (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 563 n.5 (1980)) ("The mailings constitute commercial speech notwithstanding the fact that they contain discussions of important public issues. . . We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded non-commercial speech.")

<sup>41</sup> See, e.g., *National Comm'n on Egg Nutrition v. Federal Trade Comm'n*, 570 F.2d 157 (7th Cir. 1977). In this case, the F.T.C. prohibited a trade association group from advertising that "there is no scientific evidence that eating eggs increases the risk of . . . heart and (circulatory disease) . . ." *Id.* at 159. In addition, they were barred from making claims that dietary cholesterol decreases the risk of disease, as well as related claims, unless there was an accompanying disclosure that many medical experts believe that there is evidence that increased consumption of cholesterol increases the risk of heart disease. *Id.* at 159-60. The court rejected a First Amendment challenge, including the argument that the claims were only "opin-

stronger justification for regulating these messages when the public's health is at stake.<sup>42</sup>

Another concern in devising a remedy is the preemptive effect of the 1969 Cigarette Act.<sup>43</sup> In *Cipollone v. Liggett Group, Inc.*, the Supreme Court concluded that state law restrictions on advertising or promotion are preempted if they are "based on smoking and health."<sup>44</sup> Thus, products liability personal injury claims based on alleged failures to provide warnings are preempted.<sup>45</sup> Similarly, many other forms of state regulation of advertising content are preempted as well.<sup>46</sup> A central rationale underlying the Court's conclusion was the assumption that Congress wished to avoid subjecting the industry to conflicting policies that increase the costs of regional or national advertising.<sup>47</sup> On the other hand, the Court in *Cipollone* expressly stated that state laws barring fraud are not preempted.<sup>48</sup> In the Court's view, restrictions on fraud do not raise the same potential for conflicting requirements as state laws mandating warnings.<sup>49</sup>

The Court in *Cipollone* took a broad view of the kinds of state laws subject to preemption.<sup>50</sup> Thus, under some circumstances, the preemptive effect of the 1969 Act could extend to court-ordered remedial decrees. The industry, in fact, is likely to argue that remedies extending beyond simple prohibitions of fraudulent statements are preempted. In determining what remedies are preempted, courts are to look to congress-

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ions" and thus, protected by First Amendment. *Id.* at 163 ("[The] Supreme Court's expressions on the subject of commercial speech . . . were not intended to be narrowly limited to the mere proposal of a particular commercial transaction but extend to false claims as to the harmlessness of the advertiser's product asserted for the purpose of persuading members of the reading public to buy the product.").

<sup>42</sup> *Id.* at 162 (citing *Virginia State Board of Pharmacy v. Virginia Citizens Council, Inc.*, 425 U.S. 748, 772) ("The fact that health is involved enhances the interests of both consumers and the public in being assured 'that the stream of commercial information flow [sic] cleanly as well as freely.'")

<sup>43</sup> See 15 U.S.C. § 1334 (1997).

<sup>44</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 528-29 (1992).

<sup>45</sup> See *id.* at 529.

<sup>46</sup> See, e.g., *Vango Media, Inc. v. City of New York*, 34 F.3d 68 (2d Cir. 1994); Edward O. Correia, *State and Local Regulation of Cigarette Advertising*, 23 J. LEGIS. 1, 25-27 (1997).

<sup>47</sup> *Cipollone*, 505 U.S. at 529. This goal is stated in the statute. See 15 U.S.C. § 1331(2)(B).

<sup>48</sup> *Cipollone*, 505 U.S. at 529. The Court also concluded that other state laws that regulate advertising, including claims based on breach of express warranty, negligence, and conspiracy are not preempted. *Id.* at 523-31.

<sup>49</sup> *Id.* at 529.

<sup>50</sup> See *id.* at 521 (Stevens, J., followed by Rehnquist, C.J., and White & O'Connor, JJ.) (concluding that common law damage claims as well as statutory restrictions were subject to the preemption provisions); see *id.* at 548-49 (Scalia and Thomas, JJ., concurring). Presumably, these Justices would also conclude that state court equitable decrees are also subject to the preemption provision.

sional intent.<sup>51</sup> It is unlikely that Congress intended that states should be able to bar fraudulent advertising but, at the same time, should be severely restricted in remedying it. Fencing-in provisions that are clearly necessary to remedy past violations of law are unlikely to be preempted. Moreover, the broad remedial powers of courts have traditionally enabled them to prohibit lawful conduct if necessary, to prevent the recurrence of unlawful conduct.<sup>52</sup> Congress was presumably aware of this tradition as well as the fact that effective remedies for fraud must go beyond simple prohibitions.<sup>53</sup> Consequently, state courts should be able to place restrictions on advertising that go beyond a simple bar on fraudulent statements, if they are reasonably related to the violations.<sup>54</sup>

Finally, an argument against preemption is stronger, to the extent that remedial provisions are closely related to the kind of wrongdoing proven in the case. Published reports suggest that the industry documents being reviewed and released pursuant to the state cases reveal that the tobacco companies knew about the addictive properties of nicotine, or knew about the devastating health effects of smoking, and deliberately marketed tobacco products to minors. If so, a variety of remedies are possible. Such remedies include corrective advertising, the release of past and future research, orders to eliminate youth advertising and taking steps to reduce youth smoking. These remedies go well beyond enjoining future fraud. We discuss some of these possibilities in the following sections.

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<sup>51</sup> See *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 30 (1996); *Gade v. National Solid Waste Mgmt. Ass'n.*, 505 U.S. 88, 96 (1992) (footnote omitted) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)).

<sup>52</sup> See DAN B. DOBBS, *LAW OF REMEDIES* 792 (1993):

If remedies should enforce rights, then the tailoring stage should shape the remedy to reflect the rights in question, subject only to practical constraints. Because injunctions can provide many different means and terms, they may at times be tailored to forbid acts that are not themselves wrongs, or to command acts that are not in themselves part of the plaintiff's entitlement.

*Id.*

<sup>53</sup> See, e.g., *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 326 (7th Cir. 1992) ("The F.T.C. has discretion to issue multi-product orders, so called 'fencing-in' orders, that extend beyond violations of the Act to prevent violators from engaging in similar deceptive practices in the future.") (citing *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965)). The courts have, therefore, recognized that the Federal Trade Commission, the federal agency primarily responsible for regulating deceptive advertising, can prohibit conduct that goes beyond that which is unlawful in order to "fence in" a company that has engaged in a pattern of wrongful conduct.

<sup>54</sup> See *id.* ("[An F.T.C. fencing-in order] must be sufficiently clear that it is comprehensible and it must be 'reasonably related' to a violation of the Act."). "In determining whether a broad fencing-in order bears a 'reasonable relationship' to a violation of the Act, the Commission considers (1) the deliberateness and seriousness of the violation, (2) the degree of the transferability of the violation to other products, and (3) any history of prior violations." *Id.* (citing *Thompson Medical Co.*, 104 F.T.C. 648, 883 (1984); *Sears Roebuck & Co. v. F.T.C.*, 676 F.2d 385, 391-92 (9th Cir. 1982)).

## II. CORRECTING PAST FRAUD

At the heart of the state complaints is the allegation that the public has been misled. In particular, that the tobacco industry has undermined the public's worry about smoking by engaging in decades of misleading statements and by concealing its own research.<sup>55</sup> Correcting the effects of this misrepresentation is one of the most important goals that the state cases can achieve; however, changing public perceptions can be a formidable task. Conventional warnings can be inadequate since the underlying psychological dynamic of decision-making is heavily influenced by addiction.<sup>56</sup> Although many smokers express a general awareness of the risk of smoking, they continue to take such risks.<sup>57</sup> A remedial decree should, therefore, focus on strategies that take into account the unique set of attitudes held by smokers and potential smokers, including both minors and adults.<sup>58</sup>

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<sup>55</sup> See, e.g., *Wisconsin Complaint*, *supra* note 1, at para. 28-201; *Kansas Complaint*, *supra* note 1, at paras. 26(b)(c)(d)(e), 28, 42-177; *Texas Complaint*, *supra* note 1, at para. 30-102.

<sup>56</sup> "Each year, more than 15 million people in the United States—almost one-third of all daily smokers—try to quit smoking. Fewer than 3% of smokers achieve 1 year of abstinence." 61 Fed. Reg. 44,732 (1996) (citing Center for Disease Control and Prevention, *Smoking Cessation During Previous Year Among Adults—United States, 1990 and 1991*, 42 MORBIDITY AND MORTALITY WEEKLY REPORT 504-07 (1993)). "There are approximately 50 million Americans who currently smoke and another 6 million who use smokeless tobacco. It is particularly relevant that 77 to 92 percent of all smokers are addicted and that a substantial number of all users of smokeless tobacco are addicted." *Id.* at 44,413. "[V]ery few adults who have not used tobacco as children and adolescents choose to use these products as adults. Unfortunately, for the many individuals who have become addicted, their capacity to choose whether to use cigarettes or smokeless tobacco in large measure no longer exists." *Id.*

<sup>57</sup> "As many as 90 percent of smokers know that tobacco products are harmful to their own health, 65 percent of current smokers believe that smoking 'has already affected' their health, and 77 percent of smokers believe that they could 'avoid or decrease serious health problems from smoking' if they quit. Yet they keep smoking." FDA Rule, *supra* note 26, at 44,733 (citation omitted). "People even continue tobacco use in the face of life-threatening, tobacco-related illnesses. For example, studies have shown that about half of smokers who have had surgery for lung cancer resume smoking and that almost 40 percent of smokers who have had their larynxes removed try smoking again." *Id.* at 44,733-34.

<sup>58</sup> Some research shows that adults respond more to information while minors respond more to changes in prices. A study of adult males regarding the risk/benefit analysis of cigarette smoking noted that, "Youths are more sensitive to changes in money prices of addictive goods, whereas adults respond more to changes in the perceived or actual harmful consequences that take place in the future." Rachel Dardis & Thomas Keane, *Risk-Benefit Analysis of Cigarette Smoking: Public Policy Implications*, 29 J. CONSUMER AFF. 351, 362 (1995). They contend that:

[I]nformation and education may be more important strategies than taxes for adult smokers, in particular for higher income and more educated individuals. They can afford to pay higher prices, and are more likely to be more sensitive to the adverse long-term consequences of harmful addiction as they do not discount the future as much as possible.

*Id.* at 353.

Cigarette packages and advertising provide vehicles for increasing adults' perceptions of the dangers of smoking. Any requirement of additional warnings in advertising would raise serious preemption questions.<sup>59</sup> Newly mandated disclosures, such as required warnings about addiction, conflict with the literal language of the 1969 Labeling Act<sup>60</sup> and have the potential to impose conflicting burdens on the industry.<sup>61</sup> Avoiding such conflicts was a key congressional concern underlying the preemption provision.<sup>62</sup> This concern was recognized by the Supreme Court's preemption analysis in *Cipollone*.<sup>63</sup>

The proposed national settlement includes new health warnings on tobacco products similar to those mandated in Canada.<sup>64</sup> For example, some of the new warnings would state, "WARNING: Cigarettes are addictive"; "WARNING: Cigarettes cause cancer"; and "WARNING: Smoking can kill you."<sup>65</sup> However, since it is highly unlikely that an additional warning label could be ordered by a state court over industry objections of preemption, warning labels are best viewed as a part of a potential national settlement.<sup>66</sup>

Another potentially effective remedy for correcting past fraud would be a series of corrective advertisements, which prominently state the dangers of cigarettes as well as their addictive properties. The industry could be required to pay an amount necessary to dispel prior misrepresentations into a fund specifically established for media advertising.<sup>67</sup>

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<sup>59</sup> A voluntary agreement by one or more companies to make additional disclosures would not be preempted since the only party who could claim injury from conflicting requirements has voluntarily agreed to assume the burden.

<sup>60</sup> Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 87 (1969) (codified as amended at 15 U.S.C. § 1334 (1970)).

<sup>61</sup> *Id.*

<sup>62</sup> *See, e.g.*, S. REP. NO. 91-566, at 12 (1969), reprinted in 1970 U.S.C.C.A.N. 2652, 2663 ("In order to avoid the chaos created by a multiplicity of conflicting regulations . . . the bill preempts state requirements or prohibitions with respect to the advertising of cigarettes based on smoking and health.").

<sup>63</sup> *Cipollone*, 505 U.S. at 519.

<sup>64</sup> *Proposed Resolution*, *supra* note 2, at Title IB, app. I.

<sup>65</sup> *Id.* at Title B.

<sup>66</sup> The proposed national settlement would require new warning labels similar to those used in Canada. *Id.*

<sup>67</sup> The Florida settlement requires the tobacco industry to pay \$200 million for a two-year pilot program "aimed specifically at the reduction of the use of Tobacco Products by persons under the age of 18 years." *Fla. Settlement Agreement*, *supra* note 4, § II(B)(2). The pilot program will feature media campaigns, as well as enforcement, educational and other programs targeting minors. *Id.* The proposed national settlement would also require the industry to pay, *inter alia*, for some such media advertising campaigns. *Proposed Resolution*, *supra* note 2, at Title VII. For example, the settlement proposes establishing a \$500 million annual fund for "multi-media campaigns designed to discourage and de-glamorize the use of tobacco products" *Id.* § (C). A program to reduce tobacco usage "through media based and non-media based education, prevention and cessation campaigns" is also proposed. *Id.* § (B)(1).

Ultimately, courts would have to determine the appropriate amount, but the cost of the campaign would be reasonably related to the extent of the prior campaign of the industry, the egregiousness of the industry's concealment of crucial health information, and the seriousness of the health consequences that have resulted.<sup>68</sup>

Requiring the industry to pay the costs of such advertising directly responds to the wrongful conduct alleged in the complaint. Decades of deception can be cured only by an effort to inform the public about the truth.<sup>69</sup> Research on corrective advertising shows that it can be effective in changing perceptions if it is not limited to a small-scale, short-term effort.<sup>70</sup>

A corrective advertising program does not conflict with the First Amendment or with the 1969 Act's preemption provisions. First, corrective advertising orders have already been upheld over a First Amendment challenge<sup>71</sup> and the preemption concern is minimized for several reasons. Corrective advertising orders do not violate congressional policy with regard to potentially conflicting state requirements.<sup>72</sup> Instead, corrective advertising orders would simply require a new series of ads tailored to local markets. For example, they could require distribution of specific billboards or newspapers through a single state.

Second, requiring corrective advertising does not conflict with the 1969 Act's preemption provision since it would not be a "requirement or prohibition . . . with respect to the advertising or promotion of any cigarettes . . ." <sup>73</sup> Corrective advertisements are not advertisements in the

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<sup>68</sup> See, e.g., *Warner-Lambert v. Federal Trade Commission*, 562 F.2d 749, 763 (D.C. Cir. 1977) F.T.C. ordered the respondent to make disclosures in its own advertisements. The requirement terminated after the company had spent on advertising a sum equal to its advertising period for ten years prior to the order, approximately \$10 million. See *id.* at 752 n.1. The Commission explained that it was making its best judgment about the corrective advertising necessary to "dispel the lingering beliefs." *Warner-Lambert Co.*, 86 F.T.C. 1398, 1504-05 (1975). The Court of Appeals upheld the order as "reasonably related to the violation . . ." *Id.* at 764. It is not clear what, if any, relationship the proposed funding for media campaigns under the proposed national settlement has to the factors that would be considered by a court or the F.T.C.

<sup>69</sup> In *Warner-Lambert*, the court suggested that the current lingering effect from decades of deceptive advertising could be presumed under certain circumstances. See *id.* at 761. However, the F.T.C. offered as evidence the company's own surveys, which showed widespread misunderstanding among the public. This evidence clearly helped persuade the court to sustain the order. *Id.* at 763-64.

<sup>70</sup> See, e.g., Paul D. Frederickson, *Recovery for False Advertising Under the Revised Lanham Act; A Methodology for Computation of Damage*, 29 AM. BUS. L. J. 585, 607 n.124 (1991-92); Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 688-91 (1988); Kenneth L. Bernhardt et al., *A Field Study of Corrective Advertising Effectiveness*, 5 J. PUB. POL'Y & MARKETING 146, 161 (1986).

<sup>71</sup> See *Warner-Lambert Co.*, 562 F.2d at 758 (D.C. Cir. 1977).

<sup>72</sup> 15 U.S.C. § 1331(2).

<sup>73</sup> 15 U.S.C. § 1334(b) (1970).

sense contemplated by the 1969 Act, nor are they additional disclosures in industry advertising. They are stand-alone informational statements intended to correct the misimpression about a dangerous product.<sup>74</sup>

A corrective advertising campaign would not only be effective through the advertisements themselves but also through press commentary about the campaign. This "free media," in fact, may be as important as the corrective ads themselves. Therefore, the states should work to develop advertising campaigns that are imaginative, effective and likely to capture the attention of the public and the press. The states should pool their resources to hire professional consultants to develop and produce the advertisements keeping in mind that any campaign would ultimately have to be approved by the court after consideration of the fairness of the format and costs.

There is no preemption concern about remedial provisions that do not involve regulation of marketing.<sup>75</sup> For example, a court could order the industry to make disclosures to state agencies,<sup>76</sup> to conduct educational programs in schools, or to set up an 800 number to answer questions. The real question is what makes sense given the cost and likely willingness of a court to order only a limited range of corrective programs. The states should work with the public health community to design the most effective educational programs in advance of court consideration.<sup>77</sup>

### III. SPECIAL PROVISIONS FOR MINORS

A number of state complaints specifically allege that industry marketing efforts have been targeted to minors, and consequently violate specific state statutes.<sup>78</sup> Other complaints allege marketing practices such as erecting billboards close to schools and using advertising themes

<sup>74</sup> The F.T.C.'s corrective advertising order in *Warner-Lambert* required the company to place the corrective statement in future advertising. 562 F.2d at 758. However, the purpose was not to prevent the advertisement from being misleading or to provide an additional necessary warning, but to correct an existing impression created by decades of prior advertising. *Id.* at 760-61.

<sup>75</sup> Conceivably, a requirement could constitute an unconstitutional burden on commerce, even if it is not preempted. For example, a single state's requirement that there be an extensive package insert in each pack of cigarettes might be viewed as increasing the costs of national distribution substantially, in light of other methods for conveying the health risks. *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669-71 (1981); *Storer Cable Communications v. City of Montgomery*, 806 F. Supp. 1518, 1554-57 (M.D. Ala. 1992).

<sup>76</sup> *See infra* Part V.B. (discussing the possibility of required disclosures of the contents of cigarettes).

<sup>77</sup> There is some research showing the effectiveness of advertising campaigns in Massachusetts. *See Cigarette Smoking Before and After an Excise Tax Increase and an Antismoking Campaign*, 1990-96, 42 MORBIDITY AND MORTALITY WKLY. REP. 966-70 (1996).

<sup>78</sup> *See N.Y. Complaint, supra* note 1, at paras. 1-7; *Fla. Complaint, supra* note 1, at para. 184.47; *Mich. Complaint, supra* note 1, at paras. 166-81, 199(f).

and images directed at minors as part of more general causes of action.<sup>79</sup> In fact, virtually all the states, even if they did not include specific allegations regarding minors in their complaints, have declared that a key goal in devising equitable relief is to reduce teenage smoking and addiction.

There are a number of considerations in devising remedies related to minors. First, in the event that cases proceed to litigation, a state court must be convinced that the proposed relief is warranted in light of the past industry conduct established at trial. It is likely that courts will be more willing to order such relief if the states can present evidence that the industry did directly target minors.<sup>80</sup>

Second, remedies intended to reduce teenage smoking will have to be designed specifically with young smokers in mind. Remedies targeted at adults, such as corrective advertising campaigns, will have some impact on minors. However, the "youth market" is different. For example, minors are particularly vulnerable to certain industry marketing and sales techniques.<sup>81</sup> Some industry practices, such as distributing free samples, selling individual cigarettes and offering merchandise or other premiums, may have a limited impact on adult smoking, but significantly affect the behavior of minors.<sup>82</sup>

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<sup>79</sup> See, e.g., *Wisconsin Complaint*, *supra* note 1, at paras. 210-253, 269(d), 275(d), *W. Virginia Complaint*, *supra* note 1, at paras. 85-106, 153.

<sup>80</sup> Congressman Henry Waxman (D-CA) released 81 R.J. Reynolds Tobacco Co. documents to the public that were discovered during the litigation of *Mangini v. R.J. Reynolds Tobacco Co.*, No. 939359 (Cal. Super. Ct. 1998). These documents allege that the company's Joe Camel campaign illegally targeted minors, revealing that the campaign was intended to increase R.J. Reynolds's share of the 14-17 year old market. See Memorandum from G.H. Long, Executive Vice President of Marketing, to E.A. Horrigan, Chairman of R.J. Reynolds Tobacco Co. (July 22, 1980) (confirming the company's share of the youth market has been an important objective of R.J. Reynolds's most senior management); Memorandum on "Teenage Smokers (14-17) and New Adult Smokers and Quitters" (Feb. 1, 1980) (representing the types of documents prepared by R.J. Reynolds to summarize youth smoking data); Myron Levin and Sheryl Stolberg, *Tobacco Company Admits Smoking Leads to Cancer*, L.A. TIMES, March 21, 1997, at A1 (discussing Liggett's statements that the industry targeted minors).

<sup>81</sup> See FDA Rule, *supra* note 23, at 44,446-68, 44,474-96 (1996) (Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents); see also U.S. PUBLIC HEALTH SERVICE, PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: REPORT OF THE SURGEON GENERAL (1994). The FDA Rule record discusses much of the research regarding the effects of advertising on minors.

<sup>82</sup> Nicola Evans et al., *Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*, 87 J. NAT. CANCER INST. 1538, 1545 (1995) (referring to a study "that found that participation in tobacco company promotions by 12 to 17 year olds is more predictive of susceptibility to tobacco use than is smoking by those close to the individual."). The Minnesota settlement enjoins several youth oriented marketing practices including offering or selling non-tobacco merchandise; i.e., caps, jackets, bags, or services bearing the name or logo of a tobacco brand and the use of billboard tobacco advertisements and tobacco advertisements in mass transit areas or vehicles. *Minn. Settlement Agreement*, *supra* note 4, at V.A., IV.C.; see also *Fla. Settlement Agreement*, *supra* note 4; *Texas Settlement Agreement*, *supra* note 3. While these remedies are state specific, the Minnesota consent decree also



## A. "FENCING-IN" AND CORRECTIVE REMEDIES

To the extent that states have alleged a violation of state law, which generally prohibits marketing cigarettes to minors, a court could certainly ban any past industry practices which were intended to affect the behavior of minors. It may be more difficult to persuade a court to ban practices where the intent to promote teenage smoking has not been shown. However, strong arguments have been made that remedies should do more than simply bar such practices.

First, "fencing-in" remedies can extend beyond strictly unlawful practices to the reoccurrence of past wrongful conduct.<sup>83</sup> Second, "corrective" remedies, which extend beyond corrective advertising, are justified as a means of reversing the effects of prior unlawful marketing to minors. For example, barring vending machines makes it more difficult for minors to obtain cigarettes. Such a prohibition is a reasonable way to reverse the effects of prior unlawful marketing practices. Thus, increased discretion of courts to order both fencing-in and corrective remedies broadens the range of available remedies.

To a large extent appropriate fencing-in and corrective remedies overlap the pending FDA Rule.<sup>84</sup> In theory, a state court could adopt some or all of the provisions of the FDA Rule, including the advertising restrictions that were rejected by the district court in the first review of the Rule.<sup>85</sup> The Florida, Texas and Minnesota settlements feature a ban on billboards and transit advertisements.<sup>86</sup> The Florida and Texas agree-

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amounts to a national ban, because it enjoins direct or indirect payments for tobacco product placement in movies. *Minn. Settlement Agreement*, *supra* note 4, at IV.D.

<sup>83</sup> See *supra* notes 49, 50 and accompanying text.

<sup>84</sup> See generally FDA Rule, 61 Fed. Reg. at 44, 396-45, 318. The key provisions: 1) require retailers to verify age through an ID check; 2) ban sales by vending machines except in adult-only establishments; 3) bar sale of individual cigarettes except single packaged cigarettes in packs holding fewer than twenty cigarettes; 4) bar distribution of free samples; 5) ban billboards or other outdoor advertising displays within 1,000 feet of any playground, park, elementary or secondary school; 6) limit advertising to black and white text in publications determined to have substantial readership by minors; 7) bar use of cigarette brand names or logos on non-tobacco items; and 8) prohibit use of cigarette brand names or logos in sponsoring sporting or musical events. The proposed national settlement incorporates many of the FDA youth advertising, marketing and promotion restrictions. See *Proposed Resolution*, *supra* note 2, at Title I.A., I.C. In some areas, including vending machines and billboard advertising, it would go beyond the FDA rule by imposing a total ban. *Id.* Although states and localities would retain their authority to enact more stringent youth access measures; it appears that they would be pre-empted from adopting more stringent advertising, marketing and promotion restrictions under the proposed national settlement. See Peter D. Enrich & Patricia A. Davidson, *Local and State Powers Under the Proposed Tobacco Settlement*, 35 HARV. J. ON LEGIS. 87-103 (1998).

<sup>85</sup> See *Coyne Beahm*, *supra* note 16.

<sup>86</sup> See *Fla. Settlement Agreement*, *supra* note 4, at II.A.I.; *Texas Settlement Agreement*, *supra* note 3, at para. 6; *Minn. Settlement Agreement*, *supra* note 4. As an initial step the industry must identify and remove all tobacco billboard advertising located within 1,000 feet of any public or private school or playground. See *Fla. Settlement Agreement*, *supra* note 4, at

ments also require the industry to support new state laws limiting vending machine sales to adult-only facilities, increasing civil penalties for sales to minors, including retail license suspension or revocation, and strengthening civil penalties for youth possession of tobacco.<sup>87</sup>

However, in the absence of a settlement agreement, a state court may hesitate to incorporate an extensive set of advertising and marketing regulations in a remedial decree. Outside of a settlement, such provisions raise preemption concerns.<sup>88</sup> Aside from these concerns, however, there are some disadvantages to attempting to make a state court responsible for enforcing an extensive regulatory program where the standards to be enforced duplicate those enforceable by state and federal officials. One possibility is to adopt all or part of the substance of the FDA rule, but to terminate the court's enforcement responsibilities with respect to this part of the decree on the final judicial approval of the FDA rule.

In addition to the prohibitions contained in the FDA Rule, it may be desirable to require the industry to engage in affirmative anti-smoking efforts—contributing to a fund for youth oriented anti-smoking programs, for example. The Florida settlement requires the tobacco industry to pay \$200 million over a two-year period for a pilot public health program “aimed specifically at the reduction of the use of Tobacco Products by persons under the age of 18 years.”<sup>89</sup> The proposed national settlement also includes funding for public health programs intended to reduce youth smoking.<sup>90</sup>

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II.A.I. The state also has the option, at its own expense, of substituting counteradvertising on any such billboard for the time left under an existing contract. *Id.* Then, within specific time frames, the industry must provide the state with a list indicating the location of all tobacco billboard and stationary transit advertising and remove all such advertising. *Id.*

<sup>87</sup> *Fla. Settlement Agreement*, *supra* note 4, at II.A.2.

<sup>88</sup> See *supra* notes 39-47 and accompanying text.

<sup>89</sup> *Fla. Settlement Agreement*, *supra* note 4, at II.B.2. The pilot program will apparently feature a number of elements, including “general enforcement, media, educational and other programs directed to the underage users or potential underage users of Tobacco Products.” *Id.* Many organizations have developed effective youth programs, which could provide a framework and strategies for building larger youth campaigns. See STOPPING TEENAGE ADDICTION TO TOBACCO: A COMMUNITY ORGANIZER'S MANUAL, 154-58, 194-209 (1992); *Working with Teens on Tobacco Issues*, Stanford Health Promotion Resource Center, Stanford Center for Research in Disease Prevention (1993); Center for Disease Control, *Guidelines for School Health Programs to Prevent Tobacco Use and Addiction*, 43 MORBIDITY AND MORTALITY WKLY. REP. 1 (1994).

<sup>90</sup> *Proposed Resolution*, *supra* note 2, at Title VII.C. For example, the proposed national settlement would establish a multi-media public education campaign to “discourage and deglamorize the use of tobacco products.” *Id.* The goal of the program, which would be run by an independent non-profit, “shall be the reduction of tobacco use by persons under the age of 18 and by encouraging current tobacco users to quit.” *Id.* Funding for several other public health initiatives, including tobacco cessation programs is also contemplated. *Id.*

## B. "EFFECTS-BASED" REMEDIES

In addition to establishing specific restrictions on tobacco industry marketing and advertising practices, a court could impose penalties related to the overall effect of industry practices, which are not tied to any particular restriction on industry practices. We call these "effects-based" remedies to distinguish them from "conduct-based" remedies. For example, a court could set penalties tied to rates of teenage smoking, rather than proof of future misconduct. There are obvious advantages to such an "effects-based" approach. First, it acknowledges the reality that there may be other, effective means of addressing prior wrongful conduct in addition to delineating particular conduct standards in a court order. In practice, neither the plaintiffs in these cases, nor the courts, have been able to accurately assess the most effective means of reducing teenage smoking.<sup>91</sup> The parties with the most knowledge about the problem—the tobacco companies themselves—have little incentive to share its expertise. An "effects-based" remedy attempts to circumvent this problem by requiring the industry to achieve a particular social result. Thus, it takes advantage of the industry's own creativity and marketing expertise to identify other methods of decreasing, rather than increasing, smoking.

"Effects-based" approaches are frequently used in contexts other than litigation. For example, contracts reward or penalize parties based on a share of the profits in an undertaking. Thus, coaches and sometimes players may be rewarded or penalized based on their team's record. We have not found in the reported cases an example of a court ordering an "effects-based" remedy under circumstances analogous to the tobacco cases. However, "effects-based" remedies may be the most logical, effective approach in cases where the wrongdoers have particular expertise about how to mitigate or eliminate a problem they have created.

Thus, individual states could consider asking for an order requiring the industry to meet youth smoking targets and imposing penalties for failing to meet those targets.<sup>92</sup> Such an approach requires that there are sufficiently strong incentives to encourage the industry to actually at-

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<sup>91</sup> See John Schwartz, *Officials Seek a Path to Cut in Haze of Youth Smoking; The Bottom Line: No One Knows What Works*, WASH. POST, Nov. 2, 1997, at A1. "The truth is we really don't know a lot about what we can do," said John Pierce of the University of California at San Diego, who measures smoking behavior for the state. "We certainly know that we're getting blown away by the industry at the moment." *Id.*

<sup>92</sup> Such an order would be consistent, for example, with the state of Minnesota's prayer for equitable relief "[o]rdering defendants to take reasonable and necessary affirmative steps to prevent the distribution and sale of cigarettes to minors under the age of eighteen." *Minnesota Complaint*, *supra* note 1, at para. 134(e). Florida's complaint also includes a request for an order requiring the industry "to take reasonable and necessary affirmative steps to prevent the distribution and sale of cigarettes to minors under the age of 18." *Fla. Complaint*, *supra* note 1, at para. 212(d).

tempt to reduce its own market share.<sup>93</sup> One possibility is to create incentives for the industry itself to reduce teenage smoking. The look back provisions of the proposed national settlement appear to be an attempt to create such incentives.<sup>94</sup>

Such an approach requires that there be data on teenage smoking sufficiently reliable to serve as a baseline to measure performance. As under the proposed national settlement, funds collected from the industry under a look back program could be "used in an [sic] manner designed to hasten the reduction of the levels of underage tobacco use."<sup>95</sup> At the same time, any such incentives should not undercut other desirable remedial goals or limit the rights of other parties.

### C. PREEMPTION

Finally, in the absence of a settlement, any proposed remedy that would regulate promotion or advertising will be subject to the objection that it is preempted by the 1969 Act.<sup>96</sup> One response to this argument is suggested above in the case of adult-oriented marketing. Congress did not intend to preempt reasonable remedies for fraud.<sup>97</sup> An additional argument in the case of minors, however, is that marketing restrictions aimed at protecting minors are not "based on smoking and health."<sup>98</sup>

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<sup>93</sup> According to one estimate, illegal sales to minors generated about \$1.26 billion in revenues and \$221 million in profit in 1988. See Joseph R. DiFranza & Jee B. Tye, *Who Profits from Tobacco Sales to the Children?*, 263 JAMA 2784, 2784-87 (1990). Reducing this figure by half would cost the industry over \$100 million *per year* (adjusted upward to current profit levels). The eventual long term cost to the industry is much greater because it consists of the profits from this group over time if they become committed smokers. More recently, in testimony before the Senate Commerce, Science, and Transportation Committee regarding the proposed national settlement, Dr. DiFranza stated that:

The penalty to tobacco companies if youth smoking rates exceed the targets set in the settlement is no penalty at all . . . Since there is a cap on the amount of penalty they have to pay, the best way for the industry to ensure future profitability will be to drive teen smoking rates up above the point where they reach the cap on the penalty. Any additional teen smokers recruited above the cap would be pure profit. So we should not expect the tobacco companies to try to drive down teen smoking rates. *The only financial incentive is for them to drive teen smoking rates as high as possible.*

Stop Teenage Addiction to Tobacco (STAT), 1997: *Hearings Before the Senate Commerce, Science, and Transportation Comm.*, 105th Cong. (1997) (statement of Joseph R. DiFranza, M.D.).

<sup>94</sup> *Proposed Resolution, supra* note 2, at Title II, app. V.

<sup>95</sup> *Id.* app. V.C.55. Under the proposed national settlement the FDA could retain up to 10 percent of the penalty funds to cover administrative costs. *Id.*

<sup>96</sup> Some of the FDA Rule provisions, if adopted by a state, such as a ban on vending machines, are not subject to preemption claims since they are not restrictions on advertising or promotion. 21 C.F.R. § 897.16(c).

<sup>97</sup> See *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992).

<sup>98</sup> *Id.* at 534. Under *Cipollone*, restrictions on advertising are not preempted unless they fall within the express terms of 15 U.S.C. § 1334, which preempts only restrictions "based on smoking and health." *Id.*

Instead, the underlying policy is to prevent minors from engaging in illegal purchases. This argument was upheld by the Fourth Circuit in *Penn Advertising*,<sup>99</sup> and by the California Supreme Court in *Mangini*.<sup>100</sup>

#### IV. ASSISTING SMOKERS IN QUITTING

The complaints allege that the industry knowingly addicted people to nicotine. One possible remedy, then, is to require that the industry pay for withdrawal or cessation programs for addicted smokers.<sup>101</sup> Paying the states for some kind of nicotine withdrawal program is probably the simplest approach. The fund contributions could be calculated on a formula based on the number of addicts and the percentage of these persons who have taken advantage of these programs in the past.

Outside the scope of a settlement,<sup>102</sup> this kind of remedial requirement raises questions as to whether such relief is justified. Remedies for traditional personal injury cases often include a requirement that the defendant pay for post-injury rehabilitation, e.g., physical therapy, counseling, or future medical monitoring. The costs of these programs are included in the damages assessed to the defendant.<sup>103</sup> Presumably, an individual suffering disease and addiction by the wrongful acts of the industry could assert a claim for a nicotine withdrawal program in order to avoid more serious disease in the future.

The state cases, however, claim damages to the states themselves rather than to individual citizens. It is less obvious that the state can assert a claim for such payments in the future. Still, there is a strong argument that the industry is obligated to fund nicotine withdrawal programs as a way of mitigating certain future damages to the state treasury.

<sup>99</sup> See *Penn Advertising of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated* by *Penn Advertising of Baltimore, Inc. v. Schmoke*, 116 S. Ct. 2575 (1996), *aff'd on remand*, 101 F.3d 332 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

<sup>100</sup> See *Mangini v. R.J. Reynolds Tobacco Co.*, 875 P.2d 73, 74 (Cal. 1994). R.J. Reynolds recently settled the case, brought by 13 California cities and counties claiming that Reynolds illegally marketed cigarettes to minors through its "Joe Camel" campaign, for \$10 million. *Teen Anti-smoking Program to Get Funds*, L.A. TIMES, Sept. 10, 1997, at B4; see also *Mangini v. R.J. Reynolds Co.*, No. 939359 (Cal. Sup. Ct. May 21, 1997) (settlement agreement).

<sup>101</sup> The proposed national settlement would require the tobacco industry to pay "For the first four years, \$1 billion, and thereafter, \$1.5 billion . . . into a Trust Fund to be used to assist individuals who want to quit using tobacco to do so." *Proposed Resolution*, *supra* note 2, at Title VII.D.

<sup>102</sup> The Minnesota settlement requires the defendants to fund a \$102 million smoking cessation program. *Minn. Settlement Agreement*, *supra* note 4, at VIII.A.I.

<sup>103</sup> Foreseeable future medical expenses resulting from a physical injury, such as medical monitoring, can also be a component of the damages claim relating to the injury. See *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1523 (D. Kan. 1995); *Cott v. Peppermint Twist Management Co., Inc.*, 856 P.2d 906, 917 (Kan. 1993).

It is foreseeable that current smokers, if they continue their addiction, will increasingly be susceptible to disease and, thus, to imposing future damages on the state.<sup>104</sup>

## V. OTHER DISCLOSURES

### A. PAST RESEARCH

There should be full disclosure of past industry research concerning the effects of smoking. This requirement follows a basic allegation of the complaints—that the industry concealed its own research showing the dangers of smoking.<sup>105</sup> Such disclosure is essential to provide a complete and accurate compilation of the state of knowledge about the hazards of smoking. In addition, there should be disclosure of past research regarding safer cigarettes. Disclosure can advance the level of understanding of the mechanism by which smoking causes disease and the possibility of reducing its hazardous effect in the future. Moreover, disclosure will help correct the misleading impressions caused by a history of industry misstatements.

While some of this material may be public, there is no doubt that a substantial amount of other research has not yet been disclosed.<sup>106</sup> It is true that some results will have been rendered irrelevant by subsequent research or improvements in research methods. However, other studies may add to our understanding in particular areas or suggest future research possibilities.

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<sup>104</sup> Defendants are traditionally liable for reasonable expenses incurred by plaintiffs in an effort to avoid losses, whether or not the plaintiff is successful in doing so. See DOBBS, *supra* note 52, at 792; W. ALLEN FARNSWORTH, *CONTRACTS* 867-78 (1982). Similarly, the industry could be held liable for reimbursing the state for funding nicotine withdrawal programs if these programs constitute a reasonable means of reducing future damages.

<sup>105</sup> After reviewing more than 2,500 internal industry documents, the Special Master for the Minnesota case found that the cigarette companies “acted in concert to create a false controversy about the health risks of smoking” and repeatedly misinformed the citizens of the state by “denying or diminishing the health effects of smoking.” Henry Weinstein, *Tobacco Suit Reviewer Finds Industry Conspiracy*, L.A. TIMES, Sept. 24, 1997, at D3.

<sup>106</sup> The Florida settlement agreement calls for the expedited review and release of 400 industry documents. *Fla. Settlement Agreement*, *supra* note 4, at II.A.3. The Minnesota settlement includes provisions dissolving protective orders for industry documents and establishing public access to documents in a Minnesota repository which will be a valuable resource to state and private plaintiffs. *Minn. Settlement Agreement*, *supra* note 4, at VII.A-G. The proposed national settlement would create a controversial national tobacco document depository. *Proposed Resolution*, *supra* note 2, app. VIII, 64-68. A panel of three federal judges would decide “all disputes over claims of privilege or trade secrets” and the panel’s decision would be binding on all federal and state courts in all U.S. litigation. *Id.* at 66. The proposed creation of a federal documents review panel has been criticized on constitutional and federalism grounds. See WENDY E. PARMET, *JUDICIAL FEDERALISM AND THE PROPOSED TOBACCO SETTLEMENT* (Tobacco Control Resource Center Working Paper No. 3, 1997).

## B. THE CONTENT OF CIGARETTES

There should also be full disclosure of cigarette contents to state health departments. Such a requirement is justified because there is significant evidence that cigarettes contain a number of harmful components besides tar and nicotine.<sup>107</sup> Many cigarette ingredients have never been proven to be safe and effective. Even if these components prove to be safe under some circumstances, the biological effect of components inhaled while burning at high temperatures may differ from their effect after simple oral ingestion.<sup>108</sup>

Federal law already provides for some reporting of cigarette contents.<sup>109</sup> The federal statute is, however, severely limited because it allows all members of the industry to aggregate this information.<sup>110</sup> Thus, the amounts in individual brands are impossible to determine.<sup>111</sup> Moreover, the federal law specifically prohibits disclosure by federal officials of this information.<sup>112</sup>

There is substantial evidence that the industry concealed information about the hazards of smoking while holding itself out as fully cooperating with public health authorities. It is quite possible that the industry is currently concealing information it has generated about the hazards of smoking relating to many cigarette ingredients, including additives. Even if there is no specific proof that the industry is concealing information about hazardous materials in cigarettes, such a requirement is justified as a "fencing-in" provision.<sup>113</sup> Any disclosure requirement

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<sup>107</sup> U.S. PUBLIC HEALTH SERVICE, *THE HEALTH CONSEQUENCES OF SMOKING—THE CHANGING CIGARETTE: A REPORT OF THE SURGEON GENERAL* 16 (1981). The report states that "[s]everal thousand constituents have been identified in tobacco and tobacco smoke." *Id.* In addition, the report concludes that "[m]any suspected or proved toxic agents have been identified in the gas phase or in the particulate matter of smoke. It is not surprising that chronic exposure to such a complex mixture will lead to a variety of pharmacologic and toxicologic responses." *Id.* at 33.

<sup>108</sup> See *Evaluation of Toxicity and Disease Risks of Tobacco Additives, Before the Massachusetts Dep't of Public Health* 1-2 (Jan. 31, 1997) (statement of David M. Burns, M.D., Professor of Medicine, University of California, San Diego, School of Medicine). Dr. Burns testified that the tobacco industry's position that these additives are safe because most of them are on the "Generally Regarded As Safe" (GRAS) list, or are otherwise approved for ingestion by the FDA, "is not supported by logic, scientific evaluation of some individual additives or precedent with other food or drugs." *Id.* at 2.

<sup>109</sup> See 15 U.S.C. § 1335a (1997).

<sup>110</sup> *Id.*

<sup>111</sup> 15 U.S.C. § 1335a.

<sup>112</sup> 15 U.S.C. § 1335a(b)(2)(A).

<sup>113</sup> The standards for an F.T.C. fencing-in order suggest how a state court might also approach this requirement. See *supra* notes 49-50. In particular, several considerations support a broad fencing-in provision: (1) the pattern of past conduct has been serious and deliberate; (2) the nature of the violation is transferable, in this case to other potential hazards of smoking; and (3) a refusal to reveal the contents of tobacco smoke to public health agencies is closely related to the wrongful conduct alleged in the complaint.

should provide appropriate safeguards to preserve the industry's proprietary information. The Massachusetts statute requiring these disclosures provides a model for this provision<sup>114</sup>

## VI. FUTURE RESEARCH

### A. A PUBLIC HEALTH RESEARCH REQUIREMENT

The industry should be required to set aside some portion of its budget each year to conduct health-related research on smoking.<sup>115</sup> This research should address not only the effects of nicotine and other cigarette by-products on health, but also the effects of cigarette advertising and other marketing practices on smokers' behavior, and the possibility of a safer cigarette design. The results of these studies should be pub-

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<sup>114</sup> See MASS. GEN. LAWS ch. 94, § 397B (1997). Although the statute was upheld by the First Circuit Court of Appeals against a preemption challenge by the industry, its implementation has been delayed by a temporary restraining order pending a trial on the merits of the industry's claim that the disclosure statute is an unconstitutional taking. See *Philip Morris v. Harshbarger*, No. 96-11599-GAO (D. Mass. Feb. 7, 1997); see also *Philip Morris v. Harshbarger*, No. 97-8022 (1st Cir. 1997) affirming *Philip Morris*, No. 96-11599-GAO. Texas recently adopted an ingredients disclosure statute modeled on the Massachusetts law. See Tex. Health & Safety Code § 161.251 Leg., Reg. Sess. (Tex. 1997). The state of Minnesota also enacted a tobacco ingredients reporting and disclosure law which was initially challenged by the industry. See MINN. STAT. § 461.17 (1997); see also *R.J. Reynolds Tobacco Co. v. Humphrey*, No. 97-1317 (D. Minn. 1997). The Minnesota lawsuit, however, was dismissed pursuant to an industry motion on October 27, 1997. The Minnesota Attorney General's Office requested that R.J. Reynolds provide reasons for withdrawing the suit. *Recent Developments in Minnesota's Tobacco Wars* (Office of the Attorney General, Minnesota) (1997). "According to their lawyers, Reynolds believes that under the June 20th bailout deal, Congress will resolve the issue of ingredients disclosure. Reynolds also said they realized the suit was premature because the state Health Department will not require ingredient disclosure until mid-1998." *Id.*

Most recently, the Minnesota settlement prohibits the defendants from facially challenging "the enforceability or constitutionality" of a number of existing Minnesota tobacco control laws or regulations, including, *inter alia*, the ingredients disclosure statute. *Minn. Settlement Agreement*, *supra* note 4, at IV.A.2. The proposed national settlement includes new tobacco ingredients reporting and disclosure requirements that may be an improvement over the current federal reporting system. See *Proposed Resolution*, *supra* note 2, at Title IV, 19-20. The provisions, however, were criticized because they would preempt state action and feature long delays, safety standards, burdens of proof and procedures that appear to favor the industry. See Brion J. Fox et al., *Analysis of the Proposed Resolution of the United States Tobacco Litigation* 30-31 (Dec. 31, 1997) (draft on file with the Institute for Health Policy Studies); see also Peter D. Enrich and Patricia A. Davidson, *Local and State Regulation of Tobacco: The Effects of the Proposed National Settlement*, 35 HARV. J. ON LEGIS., (forthcoming Spring 1998).

<sup>115</sup> The proposed national settlement includes several provisions requiring the industry to pay for public health research. See *Proposed Resolution*, *supra* note 2, at Title VIIA(4), B(2), B(3), E, 28-29; see also *Minn. Settlement Agreement*, *supra* note 4, at VIII.A.2. The Minnesota agreement required the defendants to pay \$10 million each year, for a period of ten years into a national research account, to be administered by the court. "The parties envision that approximately 70 percent of the \$100 million total will be used for research grants relating to the elimination of tobacco use by children, and 30 percent for program implementation, evaluation and other tobacco control purposes. . . ." *Id.*



lished at the industry's expense. This requirement can be justified in several ways. First, it follows from allegations in some of the state complaints. For example, the complaints allege that the industry has been negligent in failing to conduct unbiased, adequate research on the dangers of tobacco.<sup>116</sup> Second, the requirement is justified as a means of forcing the industry to comply with its promise to protect the public's health. This is a key allegation underlying the theory of "special undertaking" alleged in a number of complaints.<sup>117</sup> Finally, the industry's past abuses in conducting biased research and in failing to reveal findings of its own past research justify restrictions on its future research.

A requirement to conduct and publish research is a reasonable means of ensuring that the industry does not repeat its pattern of wrongful conduct. This requirement can be accomplished by ordering that the industry fund an independent research arm, which would be managed by research experts under the general supervision of an independent board. The board could be made up of health experts, consumer representatives, relevant government officials, as well as some industry members.<sup>118</sup>

Undoubtedly, the industry will sponsor its own research, beyond the "public health" research required by court order. A disclosure requirement should extend to this additional research, not just that required as a result of a remedial decree. The order should be broad enough to include any findings, conclusions, or observations by any official or employee regarding health effects or smokers' behavior, in order to capture documents that the industry may choose not to characterize as formal "research." Some of this material will be confidential commercial information or trade secrets. However, there should be provisions restricting the ability of the industry to protect documents under the claim of attorney work product, attorney-client privilege, or confidential commercial information. The industry should be required to keep an index of documents for which it claims confidentiality, and the states should have a right to seek periodic *in camera* judicial review.

## B. OVERSIGHT OF THE COUNCIL ON TOBACCO RESEARCH

There is substantial evidence that the Council on Tobacco Research ("CTR") has been used to promote fraudulent messages and to withhold

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<sup>116</sup> *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992) (stating that personal injury claims based on negligence are not preempted).

<sup>117</sup> *Id.*

<sup>118</sup> Under the proposed national settlement, the industry would fund, *inter alia*, a public health research agenda to be determined by Presidential Commission. See *Proposed Resolution*, *supra* note 2, at Title V.II.E.29.

damaging research results.<sup>119</sup> This evidence was apparently sufficient to persuade the industry to agree to disband the CTR as part of the Minnesota settlement.<sup>120</sup> Under the terms of the consent decree the defendants must cease operating the CTR within ninety days "except as necessary to comply with existing grants or contracts and to continue its defense of other lawsuits."<sup>121</sup> The CTR will be entirely dissolved within a reasonable time thereafter.<sup>122</sup> Furthermore, the consent decree prohibits the defendants from reconstituting the CTR "or its function in any form."<sup>123</sup> All CTR smoking and health research must be forwarded to the Food and Drug Administration "subject to appropriate confidentiality protection required by the contracts between the Council for Tobacco Research and any third party."<sup>124</sup>

It is possible that a state court could have ordered the dissolution of the CTR outside of a settlement.<sup>125</sup> The New York complaint, for example, alleged that the formation and operation of the CTR violated the states non-profit corporation statute.<sup>126</sup> This theory could have justified dissolution of the CTR and, perhaps more importantly, disclosure of all CTR documents. Court ordered dissolution, however, would have raised First Amendment concerns.<sup>127</sup>

## VII. NICOTINE LEVELS

Most of the state complaints allege that the industry manipulated nicotine levels by using various techniques to enhance nicotine delivery, while holding tar levels constant or even lowering them.<sup>128</sup> There is little doubt that the sophisticated control of nicotine delivery contributes to expanding the number of smokers who become and remain addicted.

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<sup>119</sup> *Minnesota v. Phillip Morris, Inc.*, Report of the Special Master: Findings of Fact, Conclusions of Law and Recommendations Regarding Non-Ligget Privilege Claims, No. CI-94-8565 (Feb. 10, 1998).

<sup>120</sup> *Minn. Settlement Agreement*, *supra* note 4, at VI.

<sup>121</sup> *Id.*

<sup>122</sup> *See id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> The proposed national settlement would dissolve the Council for Tobacco Research and the Tobacco Institute while permitting the industry to form new trade associations. *See Proposed Resolution*, *supra* note 2, app. IV, 49-50. This provision has been criticized as "more symbolic than substantive." Susan Baer, *Tobacco Lobby Unlikely to Die: Settlement Provision Called Mostly Symbolic*, BALT. SUN, August 18, 1997, at 1A. "It's pretty much surface fluff and feel-good baloney," said a Tobacco Institute lobbyist, who spoke on condition of anonymity, after being briefed about the settlement by a negotiator. "You can't enact a law that does not allow an industry to meet; you can't ban them from lobbying. We just have to call [the institute] something else." *Id.*

<sup>126</sup> *See N.Y. Complaint*, *supra* note 1, at paras. 29-33.

<sup>127</sup> *See Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

<sup>128</sup> *See, e.g., Minnesota Complaint*, *supra* note 1, at paras. 64-70; *N.J. Complaint*, *supra* note 1, at paras. 141-91.

However, devising a remedy is difficult. Arguably, increasing nicotine/tar ratios may actually be in the public interest.<sup>129</sup> A related problem is that the industry's method of disclosing nicotine content may be seriously flawed. In particular, the current nicotine rating system may systematically understate actual nicotine intake.<sup>130</sup>

One possible approach is to mandate an upper limit to nicotine that could be lowered over time. Assuming a court would be willing to order such a substantial change in product content,<sup>131</sup> this approach has the advantage of gradually decreasing nicotine intake in the long run. However, it may have the disadvantage of increasing smoking and environmental smoke in the short run as smokers respond by attempting to maintain nicotine intake levels.

Another possibility is to prohibit the industry from making any efforts to increase nicotine/tar ratios or nicotine bioavailability. Such a prohibition could be quite difficult to administer since it would require monitoring the industry's process of selecting and blending tobacco. It may be more effective to prohibit the use of nicotine bioavailability enhancers such as ammonia. Moreover, a court might be hesitant to order the industry to stop producing what people wish to buy as long as the products themselves are legal and people know what they are getting.

Even if a court were willing to consider ordering some controls of overall nicotine levels, doing so would represent untested, dramatic changes in the nature of cigarette production and consumption. Their effects would be highly uncertain and potentially harmful to smokers. Consequently, these approaches, though clearly worthy of serious study, should be left for further analysis by the FDA and other researchers.

More effective disclosure of nicotine content along with nicotine withdrawal programs may be the only effective remedy. Many of the complaints allege that the FTC's method for measuring nicotine is

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<sup>129</sup> Industry documents released during the Minnesota trial state that "labeling the amount of tar and nicotine on a cigarette package cannot give to the smoker meaningful information as to the amount or composition of the solids and nicotine he receives from the cigarette he smokes. He is more likely to be misled than informed." *A Short Explanation and Analysis of Methods of Measuring 'Tar and Nicotine' in Cigarette Smoke*, (draft) January 22, 1965, included in Conference Materials, 13th Annual Tobacco Products Liability Conference, [*Tobacco Litigation: The Tidal Wave Begins*], Northeastern University Law School, May 29-31, 1998. Cross examination of a key industry witness during the Minnesota trial also revealed that the industry has no scientific basis for claiming that the "light" and "low tar" cigarettes are safer than high tar cigarettes. See *Dunn v. RJR Nabisco Holdings*, cross examination of David Townsend, at 8153-54.

<sup>130</sup> See Jack. E. Henningfield et al., *A Proposal to Develop Meaningful Labeling for Cigarettes*, 272 JAMA 312, 313 (1994).

<sup>131</sup> A proposal for such relief would encounter objections that it is not sufficiently related to the wrongful conduct that has been alleged and proved. In addition, there might be objections on the grounds that such an order would substantially burden interstate commerce, particularly if the requirements varied from state to state.

flawed and that the actual amount of nicotine entering the bloodstream is not captured by current measurement methods.<sup>132</sup> Massachusetts recently adopted a statute that provides for more extensive disclosures of nicotine yield as well as other cigarette ingredients.<sup>133</sup> It may also be desirable to require disclosures of nicotine content on cigarette packages themselves.<sup>134</sup> The FTC is currently reviewing its requirements for measuring and disclosing nicotine intake.<sup>135</sup>

## CONCLUSION

Formulating equitable remedies in the state cases presents a particularly challenging task because of the breadth and complexity of the interests involved. Informational remedies, including barring future misrepresentations, prohibiting certain marketing practices, and requiring corrective educational campaigns, are the most traditional remedies and the ones that will likely be most acceptable to the courts. Even these remedies must be developed with preemption and First Amendment limitations in mind. Disclosure remedies are also highly significant, particularly disclosure of past and future industry research. While these are not traditional fraud remedies, they are closely related to the past wrongful conduct and are directly responsive to the harm alleged in the complaints.

Courts are more likely to be hesitant about sweeping remedies that would substantially change the way the industry manufactures its products, for example, restrictions on nicotine content or requirements to produce a safer cigarette. Moreover, adequate information to enable the states to argue with confidence for a particular approach may simply not exist. It may, therefore, be more appropriate to leave these more far-reaching remedies for another day and another forum.

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<sup>132</sup> See, e.g., *Mass. Complaint*, *supra* note 1, at paras. 154-58; *Michigan Complaint*, *supra* note 1, at para. 149.

<sup>133</sup> See MASS. GEN. LAWS Ch. 94 § 307B(b). The regulations would revise and expand the method for measuring nicotine by requiring the following information: (a) cigarette length, weight of tobacco and total nicotine content, reported in milligrams; (b) the F.T.C. nicotine yield in accordance with the F.T.C. testing method; (c) nicotine yield under average smoking conditions, using the F.T.C. method with specified puff volume, interval and duration adjustments and with cigarette ventilation holes half-blocked; (d) nicotine yield under heavy smoking conditions using the F.T.C. method with specified puff volume, interval and duration adjustments and with ventilation holes fully blocked; (e) constituents that enhance nicotine bioavailability; (f) constituents that modify the effect of nicotine by interacting with neural receptors; and (g) any nicotine bioavailability study results for particular brands. MASS. REGS. CODE tit. 105, § 660.004 (1997). Similarly revised nicotine yield standards for smokeless tobacco must also be reported. *Id.*

<sup>134</sup> Any additional labeling requirement would likely be preempted, unless it is undertaken voluntarily in a settlement or it is incorporated into federal legislation. See *supra* notes 54-60 and accompanying text.

<sup>135</sup> See 62 Fed. Reg. 48,157 (1997).

