

The “Global Settlement” With the Tobacco Industry: 6 Years Later

On June 20, 1997 a group of attorneys and health advocates proposed a “global settlement” of all public and private litigation against the tobacco industry. This agreement was controversial, and the subsequent implementing legislation was defeated. We sought to determine whether the global settlement represented a “missed opportunity” or a dead end.

We compared the global settlement with subsequent laws, regulations, settlements, and judgments against the tobacco industry and found that other than Food and Drug Administration regulation of tobacco, tobacco control advocates have achieved many of the policies included in the global settlement and several beyond it.

The policies that have been developed since 1997 have advanced tobacco control substantially, often beyond the provisions of the global settlement. (*Am J Public Health*. 2004;94:218–224)

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ON JUNE 20, 1997, A GROUP OF attorneys general, private lawyers, and public health advocates announced a “global settlement” designed to resolve litigation by the states and private parties against the tobacco industry.¹ The litigation developed because tobacco use annually kills 440 000 Americans and is responsible for \$157 billion in health-related costs.² The tobacco industry agreed to accept federal regulation of marketing and advertising, Food and Drug Administration (FDA) jurisdiction over tobacco products, and funding for tobacco control education, and it agreed to make substantial payments to government and private parties that had filed lawsuits. In exchange, the tobacco industry would receive substantial relief from legal punitive damages in present and future litigation and a cap on annual litigation payments. The global settlement was negotiated in a fashion similar to any large legal settlement, with the idea that it would be implemented as negotiated. However, as a result of the immunity and other provisions that required changes to federal law, implementation of the settlement required legislation, which opened it up to public debate.

There was a serious division within the public health community about the global settlement’s advisability, particularly because of the immunity requirements.^{3,4} Proponents⁴ viewed it as a major opportunity to make heretofore unthinkable progress. Opponents (including the second author of

this article) saw it as mortgaging the future, as occurred when public health advocates accepted federal preemption on regulation of cigarette advertising in exchange for health warnings on cigarette packages in 1965. While these warnings represented a step forward at the time, the legislation froze the situation in 1965 and has provided the legal basis for the tobacco industry stopping stronger regulation of cigarette advertising at the state or local level. Proponents saw the defeat of the implementing legislation, sponsored by Republican Senator John McCain of Arizona, as a major lost opportunity to advance tobacco control efforts at the federal level.⁴

In 1998, many of the same state attorneys general who had negotiated the global settlement announced the Master Settlement Agreement⁵ (MSA), designed to resolve the litigation between 46 states and the tobacco industry. (The other states, Mississippi, Florida, Texas, and Minnesota, had already reached separate settlements.¹) Unlike the global settlement, the MSA simply settled the litigation at hand and did not require legislative action. As a result, it could not grant the FDA jurisdiction over tobacco or provide the tobacco industry relief from private litigation, as the global settlement did. Several years have passed since these events occurred, and it is now possible to compare what has happened in tobacco control in the United States with what could have happened if the

global settlement had been enacted as originally intended.

SOURCES OF INFORMATION

We gathered data (available as of June 20, 2003) related to statutes, regulations, and settlement documents and budgets from several sources, including the global settlement, the MSA, and the 4 other state settlements.^{1,5–12} We obtained information regarding results of private judgments and settlements against the tobacco industry from the Tobacco Control Resource Center at Northeastern University.¹³ We compared individual negotiated global settlement provisions and budgets with subsequent comparable settlements, laws, regulations, and budgets to arrive at the conclusions offered here. We made section-by-section comparisons of the global settlement with subsequent litigation, settlements, and legislation. We then reorganized the results into tables based on logical groupings. Some provisions are discussed in the text only, when a tabular comparison was not necessary.

ADVERTISING AND MARKETING

With the exception of expanded warnings on cigarette packages and restrictions on Internet advertising, the advertising and promotional restrictions included in the global settlement have been largely implemented

TABLE 1—Tobacco Marketing, Advertising, and Product Development

Global Settlement	Master Settlement Agreement (MSA)	Other Federal Laws and State Court Settlements	Current Situation vs Global Settlement
Bans sponsorship of tobacco brands in events	Bans sponsorship of tobacco brands in certain events, including concerts (with a large percentage of youths) and athletics; limits sponsorship to once a year for all other events		Global settlement stronger
Bans tobacco advertising on Internet accessible to or from the United States			Global settlement stronger
New rotating package warning labels, such as “cigarettes are addictive” and “cigarettes cause cancer,” would occupy 25% of front panel of cigarette pack, in 17-point type in black-on-white or white-on-black format; cigarettes and other tobacco products contain phrase “Nicotine Delivery Device”			Global settlement stronger
Prohibits use of nontobacco brand names as brand names in sale of tobacco	Prohibits third-party advertising of tobacco brand names		Same
Bans all nontobacco merchandise with tobacco brand message	Bans all nontobacco merchandise with tobacco brand message		Same
Bans nontobacco gifts with proof of purchase of tobacco sale	Bans nontobacco gifts to minors		Same
Bans cartoon characters to sell tobacco	Bans cartoon characters to sell tobacco		Same
Bans outdoor advertising and transit advertising, except in adult-only venues	Bans outdoor advertising and transit advertising, except in adult-only venues; also bans use of sports teams and leagues to sponsor advertisements		Same
Tobacco manufacturers could not minimize health risk for tobacco use	Prohibits tobacco manufacturers to misrepresent health dangers of tobacco use or enter into agreement with other manufacturers to limit distribution of information or research on health hazards of tobacco use		Same
Requires minimum package size of 20 cigarettes	Requires minimum package size of 20 cigarettes		Same
Bans free tobacco samples	Bans free tobacco samples, except in adult-only facilities		Same
Develops national restrictions on point-of-sale ads appealing to youths	Bans advertising, promotion, or marketing of tobacco to youths		Same
Bans direct and indirect tobacco product placement in movies, on TV, or in video games	Bans advertising, promotion, or marketing of tobacco to youths; also bans tobacco product placement in movies, on TV, in video games, and at concerts or other live performances, except in adult-only facilities or performances for adults	1998 Minnesota state settlement bans payments to any person in a US movie to use any cigarette, cigarette package, cigarette advertisement, tobacco logo, or any product identified with any brand of domestic tobacco products	MSA combined with Minnesota state settlement stronger
Fines tobacco companies if youth smoking does not fall in accordance with specified targets			Global settlement stronger

through a combination of the MSA and the Minnesota state settlement (Table 1). These re-

strictions include an end to billboard advertising and cartoon characters to sell cigarettes and

limitations on gifts, tobacco promotional items, and free sampling of cigarettes.

One provision of the global settlement, known as the “look-back provision,” was designed to

TABLE 2—Youth Access to Tobacco

Global Settlement	Master Settlement Agreement	Other Federal Laws and State Court Settlements	Current Situation vs Global Settlement
Requires photo identification check of anyone younger than age 27 years			Global settlement stronger
Requires face-to-face sale of tobacco; bans vending machine sales, self-service displays, and tobacco sales through mail, except with proof of age			Global settlement stronger
Establishes a national program for licensing tobacco retailers			Global settlement stronger
Requires manufacturers to create youth access reduction plan			Global settlement stronger
Sets minimum age of 18 years to purchase tobacco		Current law (Synar amendment) sets minimum age of 18 years	Same
Requires manufacturers to work with retailers on compliance standards and to create plan to reduce youth access and consumption of tobacco.	Requires manufacturers to affirm commitment to customers to reduce youth access and consumption of tobacco and to identify and commit to ways to reduce youth access to tobacco		Same

Note. MSA = Master Settlement Agreement.

reduce the incentive for tobacco companies to aim marketing toward young people¹⁴ by implementing a system of fines against the companies if youth smoking did not fall in accordance with specific targets. This provision was not part of the MSA or subsequent legislation or litigation.

YOUTH ACCESS

The global settlement’s policies limiting youth access to tobacco went beyond requirements imposed on the states by the Synar amendment (Pub L 102-321), which requires states to set the minimum age of sale of tobacco products at 18 years. As of 2003, most states had set the minimum age at 18 years; Alabama, Alaska,

and Utah had set the minimum age at 19 years (Table 2). Enforcement of the Synar amendment also requires annual and random unannounced inspections to ensure compliance with the law. In addition, states are required to establish a strategy and timetable for reducing sales of tobacco to minors. Under the global settlement, a national program for licensing tobacco retailers was established that would have enhanced youth access enforcement.

DOCUMENT DISCLOSURE AND REFORM OF INDUSTRY PRACTICES

Both the global settlement and the MSA contain provisions to make previously secret tobacco

industry documents public and to dissolve “scientific” and lobbying agencies established by the tobacco industry (Table 3). Events taking place since the global settlement have resulted in much stricter enforcement of the disclosure of industry documents than would have occurred under the global settlement. There are 2 reasons for this situation.

First, the global settlement was reached before the Minnesota state case—the case that led to the bulk of tobacco industry documents being released—was completed and went to trial. If the global settlement had been enacted, the Minnesota case would never have gone to trial, and its settlement, which required that the documents discovered in the

Minnesota case be made public, would never have occurred. The disclosure provisions of the Minnesota settlement are much stronger than those of the global settlement.

Second, the MSA required that these documents be made available on the Internet, providing access both domestically and internationally and thereby creating the opportunity for this information to influence policy. The Minnesota settlement also created a depository of the British American Tobacco documents in Guildford, England.¹⁵ The availability of these documents has had a substantial impact on national^{16,17} and international^{18,19} tobacco control issues.

SMOKE-FREE INDOOR AIR

The global settlement also contained provisions for national smoke-free indoor air legislation; because the MSA lacked federal implementing legislation, it did not contain any provisions in this area. In comparison with many local and state laws involving smoke-free indoor air, the provisions of the global settlement were weak. While the settlement called for creation of smoke-free workplaces, it also required ventilated smoking areas, which blunt the impact of smoke-free workplaces on cigarette consumption²⁰ and are not permitted under many current laws. Most important, the global settlement essentially implemented the tobacco industry’s “accommodation program” for smoking in restaurants²¹ by exempting all but fast food restaurants from any national smoke-free indoor air provisions. (Restaurant workers experience the highest rates of exposure to environmental tobacco smoke.²²

TABLE 3—Disclosure and Industry Practices

Global Settlement	Master Settlement Agreement	Other Federal Laws and State Court Settlements	Current Situation vs Global Settlement
Requires manufacturers' lobbyists to comply with the agreement and new business conduct policies	Requires manufacturers' lobbyists to comply with provisions regarding lobbying against youth access requirements, tobacco control business conduct policies, cigarette packs with less than 20 cigarettes, and diversion of settlement funds to nontobacco uses		Same
Requires disclosure of previously secret tobacco industry documents, with certain limitations on what had to be disclosed	Required that documents be made available on the Internet; added the requirement that future documents produced in tobacco litigation had to be deposited in the Minnesota depository and made available on the Internet	1998 Minnesota state settlement created broad disclosure of documents at depositories in Minnesota and England	Minnesota state settlement combined with MSA stronger
Dissolves the Tobacco Institute and Council for Tobacco Research	Dissolves the Tobacco Institute, Council for Tobacco Research, and Center for Indoor Air Research		MSA stronger
Requires disclosure of previously secret tobacco industry documents	Disclosure of previously secret tobacco industry documents in public depository and on the Internet	1998 Minnesota state settlement and subsequent state court cases provided for disclosure in public depository on Internet	Minnesota state settlement and MSA stronger

Note. MSA = Master Settlement Agreement.

In addition, about two thirds of all workers now have smoke-free workplaces.²³⁾

The global settlement would also have required that the Occupational Safety and Health Administration issue a rule regulating smoking in most workplaces. The Supreme Court has ruled that the Occupational Safety and Health Act preempts state and local laws. The global settlement specified that any implementing legislation would not preempt state and local legislation, suggesting that the Occupational Safety and Health Act would have been amended to remove this preemption.

The tobacco control movement has continued to make progress in creating smoke-free workplaces, often including restaurants and bars, without federal legislation. Between June 20, 1997, and June 20, 2003, 650 communities enacted or amended smoke-free indoor air laws (according to the American Nonsmokers' Rights Foundation Local Ordinance Database), and 3 states enacted

smoke-free indoor air legislation that included smoke-free restaurants. This trend continued to accelerate in 2003.

FDA REGULATION

The most important differences between the global settlement and the MSA in terms of federal tobacco control policy related to granting the FDA explicit authority to regulate tobacco products and to play a role in monitoring and encouraging industry efforts to develop fewer dangerous products. In addition to codifying much of the then-existing FDA regulations, the global settlement added requirements for the following: FDA testing of tobacco smoke constituents (including nicotine) and approval of tobacco health claims, new technology alleged to reduce health risks, and tobacco and nontobacco ingredients used in cigarettes. Other requirements included provisions forbidding tobacco manufacturers from making statements minimizing the

health risks of tobacco use, establishing tobacco contamination controls, and instituting regulations regarding tobacco product inspection and handling. The FDA was also authorized to establish, and eventually require, a level of nicotine that was not considered addictive.

While the creation of explicit authority in these areas was broadly supported within the public health community, there was concern that the procedures defined in the global settlement would create several burdensome procedural requirements that would compromise the FDA's actual ability to regulate tobacco.^{1,24} (Many of these problems were corrected in the McCain bill.) In 2000 the Supreme Court, in *Food and Drug Administration v Brown & Williamson*,²⁵ ruled that the FDA had no jurisdiction to regulate nicotine or other substances contained in tobacco or to enforce youth access enforcement provisions without congressional approval.²⁵ Because the McCain bill

codifying the global settlement was not enacted, tobacco control advocates have been left with a clean slate regarding the FDA in which they have to return to Congress to establish any FDA authority. If the global settlement had been enacted, the FDA would have been given some limited authority over tobacco products. From a public health perspective, it is not clear whether weak authority to provide the basis for action or the current situation of a clean slate is the better outcome.

LEGAL LIABILITY AND MONETARY PROVISIONS

The most controversial provisions of the global settlement related to limiting the legal liability of the tobacco industry, both to states and to private plaintiffs. At the time the global settlement was negotiated, no private plaintiff had ever won a verdict or settlement against the tobacco industry. The global settlement would have settled all actions

brought by the state attorneys general and prohibited future prosecution of such actions, eliminated putative damages for and actions by the industry in the past, outlawed all private class action suits against the industry, and placed a cap on the total amount of money that the industry would have to pay in any year if it lost any lawsuit brought by a private party as an individual. These changes would have altered the economics of litigation against the tobacco industry in a way that would have all but ended any meaningful legal exposure faced by the industry in regard to either past or future conduct.

Since the MSA and other settlements did not amend federal or state law, these settlements could not grant the tobacco industry the kind of immunity granted by the global settlement. The industry has lost cases brought by individual smokers in Florida, California, Oregon, Kansas, and Puerto Rico.²⁶ As a result of legal verdicts, settlements, and the MSA—and in addition to the other 4 state settlements—the amount awarded in the years following the global settlement has totaled \$184 billion, \$72 billion greater than the amount originally proposed under the global settlement for a 25-year period (Table 4). All but one of these verdicts were still on appeal at the time of the writing of this article.

It is likely that some awards will be reduced, and others may be reversed, but the total number of awards will continue to grow unless the tobacco industry succeeds in convincing Congress to provide it with immunity. The one verdict to reach the Supreme Court so far (the Grady case from Florida) was upheld, and the defendant

tobacco company has paid the damages awarded by the jury. New litigation continues to be filed, and the scope of the litigation continues to expand (including cases on the misleading nature of “light” and “mild” cigarettes); thus, the total damages assessed against the tobacco industry are unknown but growing. For these reasons the MSA, in terms of increased liability against the tobacco industry, is stronger than the global settlement.

FUNDING FOR TOBACCO CONTROL PROGRAMS

The global settlement had specific requirements to fund an anti-tobacco education campaign, tobacco-related medical research, and a large variety of other anti-tobacco cessation and prevention programs. The MSA, with the exception of creating the American Legacy Foundation, had no such requirement that the states use any of the money they received for purposes of tobacco control (Table 4). The individual settlements in Mississippi and Minnesota also created private foundations devoted to tobacco control¹; the aggregate allocations to these foundations are less than the global settlement would have provided for similar functions. While tobacco control advocates were free to compete in state legislatures for some of this money to be allocated to tobacco control, only 6 states have spent the minimum funds recommended by the Centers for Disease Control and Prevention on comprehensive tobacco control efforts.^{9,27}

Moreover, the budget difficulties of the 2002 fiscal year led many states to reduce funding of tobacco control programs or

mortgage future MSA payments through securitization (which involves selling future tobacco settlement revenues for an immediate payment, reducing the money available for tobacco control and health care in the future¹⁰) to fill current budget deficits.²⁸ In 2002, at least 18 states and the District of Columbia securitized part or all of their future tobacco settlement revenues. Rather than using it for tobacco control, most states used this money to balance state budgets.¹⁰ These difficulties could also have applied to any federal appropriations for tobacco control made under the global settlement; as is the case with the state expenditures, appropriations are made on an annual basis.

DISCUSSION

The essential deal in the global settlement was a trade-off of granting the tobacco industry legal immunity for most of its actions in exchange for monetary payments and several policy concessions.^{3,4} This trade-off was controversial, split the public health community, and contributed to the defeat of the effort to enact the global settlement into legislation.

A major area of “loss” since the global settlement has been the failure to achieve FDA jurisdiction over tobacco products. While there is general agreement that the global settlement created serious procedural problems for the FDA to actually act on this jurisdiction,¹ many of these problems were resolved in the bill based on the global settlement sponsored by Senator McCain. On April 2, 1998, the Senate Commerce Committee passed legislation that raised the mone-

etary payments of \$368.5 billion, as originally proposed in the global settlement, to \$516 billion.

In addition, the McCain bill would have imposed tougher restrictions on tobacco advertising, a less onerous burden on FDA regulation of tobacco, greater monetary penalties on the tobacco industry for failure to reduce teen smoking rates, and higher taxes. It would have eliminated the provisions granting the tobacco industry immunity for future class action lawsuits and other concessions related to private litigation against the industry. With these changes, the bill—which then differed substantially from the global settlement—was unacceptable to the tobacco industry, which successfully lobbied to kill the bill on June 17, 1998.

It is important to emphasize that the purpose of this article has been to compare the global settlement with the situation in 2003. There were several reasons for this approach. For example, the global settlement was presented as an integrated package that was negotiated with the intent of implementing it as written. It was *not* presented as a starting point for further negotiations. We sought to evaluate the implications had advocates of this position succeeded in having the global settlement implemented as written.

Other than FDA regulation of tobacco and ineffective²⁹ youth access requirements, 6 years after the global settlement was proposed, tobacco control advocates have achieved many of their original policy goals, most notably restrictions on tobacco marketing and substantial amounts of money for the states and some private plaintiffs. There has also been considerable growth in funded tobacco control

TABLE 4—Monetary Aspects^a

Global Settlement	Master Settlement Agreement (MSA)	Other Federal Laws and State Court Settlements	Current Situation vs Global Settlement
Awards a total of \$368.5 billion over first 25 years to compensate states and private plaintiffs	Awards \$206 billion for 25 years adjusted for inflation	Awarded Florida, Mississippi, Texas, and Minnesota \$40 billion over 25 years; total punitive damages awarded since June 20, 1997: \$144.3 billion (overall total: \$184.3 billion)	MSA stronger in total monetary amounts; punitive damages and state settlement amounts, to date, are \$34 billion greater than the global settlement would have provided; these amounts will increase with new court decisions awarding punitive damages
Public health funds for anti-tobacco programs to reduce tobacco use and provide for FDA enforcement, local and state tobacco control programs, and compensation for entities that lose sponsorship funds from the tobacco industry; starts in 1998 at \$2.1 billion and gradually increases to \$2.825 billion on and after the 11th year (totaling \$68 billion over 25 years)	\$480.32 million in fiscal year 2002 appropriated for state tobacco control programs; American Legacy Foundation funding is included in clause VI of MSA: \$25 million per year for 10 years, plus \$250 million in first year and \$300 million per year for 5 subsequent years, totaling \$1.7 billion	Total for other individual state settlements and state excise taxes for fiscal year 2002: \$281.75 million; future state expenditures for tobacco control depend on annual appropriations within legislatures	Global settlement stronger
Public health trust fund to fund tobacco-related medical research starting in 1998, ranging annually from \$2.5 to \$5 billion for 8 years (totaling \$25 billion)	Annual American Legacy Foundation research funding for tobacco use prevention in priority population and small innovative grants	Tobacco-related medical research in California, Colorado, Illinois, Kentucky, Minnesota (includes funding for research efforts on the part of the Minnesota Partnership for Action Against Tobacco), Virginia, Washington: \$355.23 million; 1997 settlement of <i>Broin v Philip Morris</i> established \$300 million in funding for FAMRI to conduct research regarding early detection of diseases related to cigarette use; funding by the National Institutes of Health for research related to tobacco-induced diseases and tobacco control	Difficult to compare
Funds a nonprofit organization to conduct a national anti-tobacco education campaign	Establishes a national foundation (American Legacy Foundation) to conduct study of and programs to reduce youth tobacco use and prevent diseases associated with tobacco use	<i>Broin v Philip Morris</i> established national foundation (FAMRI) for early detection and cure of diseases associated with cigarette smoke	MSA and FAMRI stronger
Civil liability fund for individual judgments against the tobacco industry, starting in 1998 at \$2 billion and gradually increasing to \$5 billion on and after the 11th year (totaling \$111 billion over 25 years)		Total average annual punitive damages awarded since global settlement: \$28.86 billion; total awards through June 20, 2002: \$144.3 billion (most awards are still being appealed)	MSA and court cases stronger
Unallocated funds, starting in 1998 at \$1.9 billion and gradually increasing to \$7.825 billion on and after the 11th year (totaling \$164 billion over 25 years)	Allocated to non-tobacco control programs in fiscal year 2002: \$5.9 billion; awards \$206 billion for 25 years adjusted for inflation (there is no requirement that any of these funds be allocated to tobacco control programs)	Allocated by Minnesota, Texas, Florida, and Mississippi to non-tobacco control programs: \$1.6 billion in fiscal year 2002; awarded Florida, Mississippi, Texas, and Minnesota \$40 billion over 25 years (there is no requirement that any of these funds be allocated to tobacco control programs)	MSA stronger

Note. MSA = Master Settlement Agreement; FDA = Food and Drug Administration; FAMRI = Flight Attendants Medical Research Institute.

^aThe global settlement, the MSA, and state settlements contain complex formulas for adjusting payments based on changes in cigarette consumption, company market shares, and inflation. (The terms used in the global settlement and the MSA are very similar.) Most of the payments continue in perpetuity. Since these factors are virtually impossible to predict, we follow the common practice of presenting nominal undiscounted payments over the first 25 years.

efforts, both through private foundations created by the MSA and through significant (but substantially less than in the global settlement; Table 4) state funding for tobacco control. (As mentioned, few states have funded comprehensive tobacco control programs at even the minimum levels recommended by the Centers for Disease Control and Prevention, and those programs remain at risk for future budget cuts.^{9,27,30})

The availability of the tobacco industry documents, particularly access via the Internet, has spawned an entire new area of investigation in tobacco control¹⁷ and has had a substantial impact on the tobacco policy-making process, both domestically and internationally.^{18,19} Private litigation has continued against the tobacco industry, with several victories for the plaintiffs. Smoke-free indoor air has enjoyed a resurgence at the local level and, in some cases (California, Connecticut, Delaware, Florida, Maine, and New York), the state level. Far from representing “missed opportunities,” the global settlement proposal, the subsequent debates leading to its rejection, the MSA, the ongoing litigation in the area, and the policies that have been developed since 1997 have advanced tobacco control substantially. ■

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