

SENATE AGRICULTURE COMMITTEE

GALE NORTON

ATTORNEY GENERAL OF COLORADO

September 11, 1997

Chairman Lugar and members of the Agriculture Committee, thank you for the opportunity to address you today regarding the largest litigation settlement in the history of this Nation. I appreciate this committee's willingness to become familiar with its provisions, which may have a profound impact on the future of both public health and an important American industry. I am honored to be part of the same panel as General Koop and Commissioner Kessler. I would like to begin by explaining my own entry into tobacco litigation. I am not an anti-tobacco activist.

I am a free-market conservative and an advocate of judicial restraint. My public policy agenda does not include creating new legal theories to outlaw business activities that were lawful at the time they took place. I am a proponent of personal responsibility, not someone who views it as an antiquated concept. Moreover, I know that the history of the war on drugs demonstrates the difficulty of regulating Americans' use of substances. With 48 million Americans addicted to nicotine, I believe there is little chance of developing a public consensus at least in the next 10-15 years favoring tobacco prohibition, much less overcoming the practical problems of administering a worthwhile enforcement program. Given these views, I was a tough sell on the idea that litigation against the tobacco industry was justified.

However, to fulfill my responsibilities to the People of Colorado, my staff and I examined thousands of pages of documents revealing the behavior of the tobacco industry over several decades. We engaged in a thoughtful and thorough analysis of the strength of various claims under Colorado law. After extensively reviewing the information available to us, I became convinced that Colorado did indeed have a solid case based upon mainstream legal theories: antitrust violations, false advertising, and contributing to the delinquency of minors by marketing cigarettes to kids and encouraging them to obtain tobacco products illegally. I found that the financial burden to the People of Colorado from increased health care costs has been enormous. Since it appeared that the tobacco companies had violated Colorado law, I decided to file suit. Although I believe Colorado has a solid case, and we are prepared to proceed through discovery and trial if necessary, I strongly support the settlement agreement.

The proposed settlement presents us with a unique opportunity to fundamentally change how the tobacco industry markets and sells its products -- but as part of a negotiated compromise -- not as a result of unilaterally imposed government regulations. Under the regulatory plan contemplated by the settlement, the States and industry will be jointly responsible for enforcing limitations on retail sales and for decreasing the number of youth smokers. The settlement contemplates detailed regulations and enforcement mechanisms for compliance. Specifically, there will be no more biased industry research organizations, no more free samples, no more positioning of products in convenience stores to encourage shoplifting by kids. As a sign of good faith, the industry has already fired its favorite spokes-dromedary. Joe Camel is no more.

I would also like to address what some have perceived as a shortfall in the settlement agreement, curtailment or limitations on FDA's authority to regulate tobacco products and ingredients. The perception is misguided. In fact, the settlement agreement provides for increased authority and regulation by the FDA, and contemplates providing almost ten times as much funding to permit FDA to accomplish its tasks.

Significantly, while one district court has thus far ruled that FDA does have authority to regulate tobacco products as "drugs" or "devices," *Coyne Beahm, Inc., et al. v. USFDA*, U.S. District Court for the Middle District of North Carolina Greensboro Division, April 25, 1997 the litigation battle on that issue is not over. The case is currently on appeal to the Fourth Circuit Court of Appeals. The settlement agreement and proposal for legislation clarifies and affirms this authority and ensures that no more time will be wasted in debating the FDA authority.

The agreement also provides significant authority and direction to FDA to regulate ingredients, including testing and disclosure provisions, as well as oversight of tobacco product manufacturing. Additionally, the FDA will be asked to promulgate and review advertising restrictions to determine their impact on public health. In addition, FDA will have significant authority over introduction and licensing of new products by the industry to advance technological changes in tobacco products which will further the public health interests.

Currently, when FDA regulates a product, states are preempted from adding additional requirements. The settlement and proposed legislation ensures that states and local governments can enact more stringent laws or regulations with respect to sales of products, limitations on environmental smoking, and other areas of local concern.

The proposed settlement includes industry-funded programs for those who want to quit smoking. It provides payments amounting to \$368 billion over the next 25 years. Much of this money will go directly to states. As a consequence, States will have funding to pay for future health care needs, without raising taxes.

It is imperative that Congress act quickly to pass implementing legislation. Through unprecedented cooperation among the States and their respective Attorneys General, the States have collectively achieved a settlement that is far greater than any individual State could ever have reached on its own. Yet, this unity among the States will not exist indefinitely. As the chief legal officer of Colorado, I understand that each Attorney General must represent the best interests of each state even if it requires departing from the global settlement. Already, we have seen instances where the pressures of an imminent trial have caused some States to negotiate separate deals with the tobacco industry. If implementing legislation is delayed, the pressure for each State to negotiate a separate deal will only escalate. With each separate deal, the incentive for a global comprehensive settlement is diminished. Moreover, regardless of how tough the individual States are in negotiation, we can never achieve individually what has been achieved collectively. If this settlement fails, we will be left with a patchwork quilt of potentially inconsistent settlement agreements. The likelihood of inconsistency is even greater if suits are resolved by court decisions rather than settlements. Thus, I urge you to act quickly while the window of opportunity is still open.

Fourth, I must admit, and I am sure that all of my colleagues would agree, that this settlement is not perfect. There are portions that, in a perfect world, I would change. However, like any settlement, this proposal represents a significant compromise by both sides. It is the best product possible under the circumstances. Attempts to significantly alter the terms of the settlement will destroy that fragile compromise. If the goals of the settlement are to be achieved and if the years of costly, uncertain, and inconsistent litigation are to be avoided, this settlement must be implemented without upsetting the compromise.

Attorneys General Mike Moore of Mississippi, Christine Gregoire of Washington, Dick Blumenthal of Connecticut, Bob Butterworth of Florida, Grant Woods of Arizona worked hard as the lead negotiators for the states, and I hope their work will form the basis for legislative action.

Since my personal involvement in the settlement has centered primarily on the civil liability provisions, I would like to discuss briefly those provisions of the settlement.

One aspect of the settlement concerns limitations on punitive damages. At the outset, I think it is important to recognize that the tobacco industry obviously desires a limit on their liability and some predictability of financial responsibility. The settlement in fact recognizes \$60 billion of the settlement payments as punitive damages. There are reasons that others may view the negotiated limitations as sound public policy particularly in view of what industry has agreed to pay.

Indeed, punitive damages have been a key topic of discussion in legal system reform efforts. For example, of the 50 proposals for legal reform offered by the President Bush's Council on Competitiveness, headed by Vice President Dan Quayle, 5 dealt with punitive damages. More recently, 1997's Senate Bill 5 on product liability reform contains provisions limiting punitive damages, as did last year's House Bill 956. Moreover, a number of states already have limited or eliminated punitive damages for claims under state law. Colorado is one of the States that has limited punitive damages.

Based on the evidence I have reviewed, I believe the tobacco industry will end up paying billions of dollars either through the settlement or through future litigation. But there is a critical difference in the outcome depending on which mechanism is selected.

In private litigation with large punitive damage awards, a few lucky winners get the disproportionately large awards. They get to buy expensive cars and mansions, while everyone else gets no financial benefit. Through the settlement, there will be no lottery winners. Instead, the public as a whole will get cessation programs, health care improvements, anti-smoking campaigns – exactly the benefits sought by the public health community. I certainly think most people would prefer the latter approach – the one embodied in the settlement.

Let me present another way of analyzing the issue. There are three possible future scenarios on the punitive damages front in the absence of settlement.

The first scenario is that courts continue to rule in favor of tobacco companies. As has been frequently pointed out, if the past is the best predictor of the future, this is the most likely outcome. No one has yet collected a single judgment against the tobacco companies. If this scenario is what the future holds, then everyone except the tobacco companies would have been better off with our settlement.

The second scenario is that the lawsuits are fabulously successful. The existing tobacco companies are driven into the ground. They pay huge judgments, then declare bankruptcy. New companies start up by purchasing the remaining assets from the bankruptcy court. Foreign imports (whether legal or illegal) fill the void. The claims of outrageously improper conduct are now gone. The devastating internal corporate memoranda are now worthless. There is no corporate entity left to foot the bill for even the most compelling individual claim.

The third scenario is that the litigation results provide a mixed bag. Some suits are successful and others are not. Some states will get huge awards and some will get nothing. Some individual litigants will buy yachts; some will have nothing to show for their litigation efforts but their still-unpaid medical bills. This scenario will cause us to spend the most time in litigation and appeals. It will waste tremendous time and money in litigation costs.

At some point, settlement may again be proposed, but it will be from a base of inconsistency, not from the base of commonality found in the current settlement. From the Congressional perspective, it will be more difficult to adopt proactive legislation – since different rules will affect different suits in different ways. Each side will develop a vested interest in those points that each respectively has won. All the while, more kids will become addicted to tobacco.

By examining each future scenario, we see that none has the rosy glow envisioned by the settlement's critics. Our choice is between a settlement that provides predictability, and a chaotic situation with unpredictable results.

Another aspect of the civil liabilities provisions involves restrictions on class actions, consolidations, and similar mechanisms for handling suits. By eliminating the communal approach to litigation, this provision would admittedly make it less efficient for successfully certified classes of plaintiffs to pursue their cases. It should be noted, though, that very few proposed classes have actually been certified by the courts.

To balance out this disadvantage, injured plaintiffs will have access to a virtual library of internal company documents, available in a centralized manner. They will have some assurance that a continuing fund will be available to pay their claims, although they may have to spread their recovery over time if there are more claimants than available money in the fund. I expect that, in a fairly short time, case outcomes will become predictable, and settlements compensating people for their legally cognizable injuries will become routine.

This settlement offers an opportunity for rapid action. Through a consensual agreement, advertising restrictions can be more far-reaching than the Constitution might otherwise allow. The industry's funding will finance counteradvertising and smoking cessation programs. Disclosure requirements and advancements in "safer" cigarette technology will give smokers more information and options. Most importantly, however, action is needed now because a year of delay will mean a million more children will become addicted to cigarettes.

I want to pledge my assistance and the assistance of my staff in whatever form you may need. It is imperative that Congress pass implementing legislation expeditiously. I look forward to working with this Committee and the other members of Congress.