THE MSA CALLS FOR THE STATES TO INVEST TOBACCO SETTLEMENT FUNDS TO PREVENT AND REDUCE TOBACCO USE

The Master Settlement Agreement (MSA) that settled the states' lawsuits against the major cigarette companies does not contain any explicit language requiring the states to spend specific amounts of their settlement payments on new state tobacco-prevention efforts. But it does contain explicit language that shows that the parties to the agreement – the states and the major cigarette companies – expected and intended that the MSA and the MSA's payments to the states would be used to prevent and reduce tobacco use, especially among children, and otherwise reduce the toll of tobacco on the states.[*]

Most notably, the MSA begins with a series of "whereas" clauses, including the following:

> WHEREAS, the Settling States that have commenced litigation have sought to obtain equitable relief and damages under state laws, including consumer protection and/or antitrust laws, in order to further the Settling States' policies regarding public health, including policies adopted to achieve a significant reduction in smoking by youth . . .
>
> WHEREAS, the Settling States and the Participating Manufacturers are committed to reducing underage tobacco use by discouraging such use and by preventing youth access to tobacco products;
>
> WHEREAS, the undersigned Settling State officials believe that entry into this agreement and uniform consent decrees with the tobacco industry is necessary in order to further the Settling States' policies designed to reduce Youth smoking, to promote the public health and to secure monetary payments to the Settling States; and
>
> WHEREAS, the Settling States and the Participating Manufacturers . . . Have agreed to settle their respective lawsuits and potential claims pursuant to terms which will achieve for the Settling States and their citizens significant funding for the advancement of public health, the implementation of important tobacco-related public health measures, including the enforcement of the mandates and restrictions related to such measures, as well as funding for a national Foundation dedicated to significantly reducing the use of Tobacco Products by Youth.[1]

These excerpts clearly indicate that the states are supposed to use their MSA payments to advance public health and support tobacco-prevention efforts. Indeed, the last whereas clause listed above explicitly says just that, and also very clearly declares that the states are expected to use their MSA funding for tobacco-prevention and other public health efforts above and beyond the separate MSA funding allocated directly to the MSA-created national foundation to combat youth tobacco use (now established and operating as the Legacy Foundation).

The whereas clauses in the MSA were also given considerable weight in the recent court decision finding that the R.J. Reynolds tobacco company (RJR) had violated the MSA's prohibition against cigarette company marketing to kids.[2]

Investing Settlement Funds in Tobacco Prevention Only Way to Make States Whole

The purpose of the state lawsuits against the cigarette companies that were settled by the MSA (and by the four individual state settlements that preceded the MSA) was to make the states whole again by securing funds from the cigarette companies to reimburse and compensate the states for their past, current, and future smoking-caused government expenditures caused by the wrongful acts of the cigarette companies. But the cigarette companies' settlement payments to the states do not come close

[*] Mississippi, Florida, Texas, and Minnesota settled their state lawsuits against the cigarette companies independently prior to the MSA through their own individual settlement agreements. These individual settlement agreements had their own language and provisions relating to the expenditure of settlement funds and the purpose of the settlements which more or less parallel those in the MSA.

to reimbursing the states for their smoking caused costs. For example, while the states received approximately $7.5 billion in settlement payments in 2001, their smoking-caused Medicaid costs, alone, totaled more than $10.1 billion and the state governments' total smoking caused costs were at least $12 billion.[3] The only way that the states can obtain adequate compensation through their tobacco settlement payments – and minimize the enormous ongoing toll of tobacco on the states and their citizens – is to invest an adequate portion to prevent and reduce future tobacco use, thereby reducing the state governments' smoking-caused costs (and saving hundreds of thousands of lives). Indeed, that is why the MSA whereas clauses anticipate and assume state investments of MSA funds to support new and expanded tobacco prevention efforts.

Must the States Obey the MSA?

It appears from the whereas clauses that a state would be violating the MSA if it sold off all of its future MSA payments to get a lump-sum payment now and did not use any of the money to prevent or reduce tobacco use or otherwise reduce tobacco's toll on the state. But that is exactly what some states are doing when they securitize their future MSA payments.[4] Similarly, many other states that have not securitized are still investing little or no settlement funds to prevent or reduce tobacco use.[5] However, because the MSA is not a law but a settlement agreement, only the parties to the settlement – the cigarette companies and the states – have legal standing to try to enforce its terms.

Campaign for Tobacco-Free Kids, June 26, 2002

More information on the effectiveness of tobacco prevention programs is available at http://www.tobaccofreekids.org/facts_issues/fact_sheets/policies/prevention_us_state/save_lives_money/.

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[1] Master Settlement Agreement, November 23, 1998, http://www.naag.org/backpages/naag/tobacco/msa.
[2] Statement of Decision, *People of the State of California v. R.J. Reynolds Tobacco Co.*, Case No. GIC 764118, Judge Ronald S. Prager, Superior Court of California, County of San Diego, June 6, 2002.
[3] Tobacco settlement payments from the National Association of Attorneys General and the independently settling states. For state government tobacco-caused costs see, e.g., U.S. Centers for Disease Control and Prevention (CDC), *State Highlights 2002: Impact and Opportunity*, April 2002; CDC, "Annual Smoking-Attributable Mortality, Years of Potential Life Lost, and Economic Costs—United States 1995-1999," *Morbidity and Mortality Weekly Report* 51(14):300-3, April 11, 2002, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5114a2.htm. Zhang, X, et al., "Cost of Smoking to the Medicare Program, 1993," *Health Care Financing Review* 20(4):1-19, Summer 1999.
[4] See, e.g., Campaign for Tobacco-Free Kids factsheet, *Securitizing State Tobacco Settlement Payments: Myth versus Facts*, http://www.tobaccofreekids.org/research/factsheets/pdf/0132.pdf.
[5] See, e.g., Campaign for Tobacco-Free Kids , et al., *A Broken Promise to Our Children: The 1998 State Tobacco Settlement Seven Years Later – A Report on the States' Allocation of the Tobacco Settlement Dollars*, http://tobaccofreekids.org/reports/settlements.