

**NLWJC - Kagan**

**DPC - Box 052 - Folder-001**

**Tobacco-Settlement: New  
Legislation - Myers Bill**

Proposal Idea

- 1) FDA - Based on version drafted by Senator Frist and contained in S.1415
- 2) Advertising Restrictions - As contained in June 20, 1997 Proposal and S.1415 minus the addition in S.1415 of the ban on the use of actual images of animals.
- 3) Youth Access - as contained in June 20, 1997.
- 4) Public Education - as contained in June 20, 1997. If possible, do this as part of state settlements through an independent foundation funded at \$500 billion a year. Alternatively, fund it through HHS at the same level.
- 5) Health Warnings - As in June 20, 1997 and S.1415
- 6) Look Back - DeWine Durbin - but with lower caps, i.e. \$ 2 billion company specific; \$1.5 industry wide. Alternative No. #1 - As contained in the Manager's Amendment to S.1415. Alternative No. #2 - Hatch proposal, but with payments divided up by youth market share, not overall market share.
- 7) ETS - As in June 20, 1997. Alternately, as contained in the Manager's Amendment to S.1415
- 8) Public Health Programs and funding, including cessation - as in June 20, 1997, but at a minimum - - FDA - ramp up to \$300 million a year for FDA (probably \$150 in year one, \$200 million in year 2, \$250 million in years 3 and 4, \$300 million in year 5; Full \$500 million for counter advertising; funds for research, youth usage studies, community activities.
- 9) International - \$100 million a year annual funding
- 10) Something on growers - ideally something that does not force us to choose between Lugar and Ford, but which funds farmers who are hurt and during transition. Perhaps, it just sets aside x dollars for buy outs and transition money, but leaves the future of the program to a commission that is given 3 to 5 years to report.
- 11) State cases - allow states to settle them on their own, subject to the conditions that are necessary to make sections like the advertising and marketing section work. This takes the \$196.5 billion off budget, lessens the overt cost of the legislation, and, hopefully, removes the attorneys fee issue. Permit states to keep 100% if the agreements meet certain conditions and the states agree to spend x on tobacco control. This will be necessary because the states think they are achieving this through their current negotiations.

12) Tobacco Industry Liability Settlement -

- A. Industry pays \$200 billion over twenty-five years, volume adjusted
- B. Annual aggregate cap for past wrongdoing only, but not future wrongdoing. Cap could be between \$5.5 billion (the amount in the June 20, 1997 Agreement) and \$6.5 billion, however, it should all be outside the annual payments. If not all outside the annual payment, no more than \$2 billion should be inside the payment and the \$2 billion should be equally split between the state portion and the federal portion.
- C. No limits on punitive damages or class actions or aggregation. Punitive damage payments for past wrongdoing fall within the cap. Since there is no cap for future wrongdoing, there is no limit on punitive damages for future wrongdoing.
- D. No liability for existing non-tobacco subsidiaries of tobacco companies and truly independent future subsidiaries of tobacco companies. This remains true as long as there are no fraudulent future transfers of assets to a subsidiary. Parent companies do remain liable, but the cap applies to them.
- E. No special protection for tobacco industry lawyers. Manufacturers can be the responsible party for retailers and farmers for past wrongdoing purposes, but not in a way that defeats diversity jurisdiction where appropriate.
- F. Application of evidentiary Rule parallel to Federal Rule of Evidence 407 to encourage innovation for all cases, whether in federal or state court - evidence of the development of safer or less hazardous products after the enactment of the legislation is not admissible "to prove negligence or culpable conduct" on the part of the tobacco industry that prior to the enactment of the legislation.