

Enforcing the MSA

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The Master Settlement Agreement (MSA) that ended tobacco litigation between the four largest domestic tobacco companies and 46 states was signed on November 23, 1998.¹ Since then, a number of

¹ Master Settlement Agreement (MSA), http://www.naag.org/upload/1032468605_cigmsa.pdf [hereinafter MSA].

outside parties, including Non-Participating Manufacturers (NPMs), smokers' rights groups, cigarette wholesalers, and Indian tribes have challenged the MSA's validity in whole and in part. Their claims have been premised on a wide range of legislation including the Sherman Antitrust Act, Compact Clause, Commerce Clause, equal protection, and due process. So far, courts have uniformly upheld the MSA.

This paper seeks to explore the consequences of the MSA for the Attorneys General in their fight against the tobacco industry. Part I will summarize the courts' steadfast endorsement to date of the MSA against all challengers. Part II will investigate how the Attorneys General have implemented and enforced provisions of the MSA both within and without the courts, focusing specifically on violations of advertising restrictions. Part III will explore ongoing litigation over specific provisions of the MSA where the outcome is largely unclear. Part IV will highlight areas in advertising that are not covered by the MSA, and the steps Attorneys General are taking to fill the gaps. In conclusion, Part V will suggest that Attorneys General must continue to individually enforce the MSA while at the same time, pursue alternative methods to prevent tobacco companies from exploiting areas not regulated by the MSA.

Challenges to the Validity of the MSA

A variety of challengers and challenges have been brought against both the tobacco companies, or Participating Manufacturers (PMs), and the Settling States since they signed the MSA. Initially, attempts were made by public health interests to intervene in the early stages of the approval process in order to demand more stringent regulation. For example, in New York and Pennsylvania, public health advocates unsuccessfully challenged the MSA's ability to protect the public interest and the proposed allocation of settlement payments among governmental entities.²

Disputes over disbursement and allocation of the settlement funds among governmental units and plaintiffs' attorneys also arose but were similarly unsuccessful.³ Specifically, smokers and Medicaid recipients claimed that either state settlements had prejudiced their claims or that they were entitled to

² See Ryan Williams, *Stubbing Out the Competition: How and Why State Attorneys General, Courts, and Legislatures Helped Big Tobacco Cartelize the Cigarette Industry*, 19-20 (unpublished manuscript available from Jim Tierney). See also *State of New York v. Philip Morris, Inc.*, 179 Misc.2d 435, 686 N.Y.S.2d 564 (Sup. Ct. N.Y. 1998) *aff'd* 263 A.D.2d 400, 693 N.Y.S.2d 36 (N.Y.A.D. 1st Dep't 1999); *Com. ex. rel. Fisher v. Philip Morris, Inc.*, 736 A.2d 693 (Pa. Com. Ct. 1999); *Com. ex. rel. Fisher v. Philip Morris, Inc.*, 736 A.2d 705 (Pa. Com Ct. 1999).

settlement payments recovered that were in excess of state expenditures on their behalf.⁴ State municipalities⁵ and private attorneys⁶ also attempted to intervene to lay claim to their portion of the settlement funds.

Finally, a wide range of constitutional challenges to the MSA, both in whole and in part, have so far failed to dislodge the MSA's binding terms. Brought primarily by those adversely affected by the seemingly anticompetitive provisions of the Agreement, including NPMs, cigarette wholesalers, companies involved in cigarette importation and Indian tribes, these claims typically alleged that Settling States violated the United States Constitution in agreeing to and enacting the MSA either by exceeding their sovereign authority or by infringing on individuals' civil rights. Plaintiffs have alleged that the Agreement violates numerous constitutional provisions including the Commerce Clause,⁷ the Compact Clause,⁸ the Supremacy Clause,⁹ and the Fourteenth Amendment rights of Due Process and Equal Protection.¹⁰ While the parties bringing these challenges were often found to lack standing to assert their claims,¹¹ those courts

³ See Williams, *supra* note 2, at 19.

⁴ *Id.* at 21. See also *State ex. rel. Nixon v. American Tobacco Co.*, 34 S.W.3d 122 (Mo. 2000) (intervention attempt by injured smokers to protect interest in potential lawsuits against industry rejected); *State v. Brown & Williamson Tobacco Co.*, 18 S.W.3d 186 (Tenn. 2000) (same); *State of California v. Superior Court*, 83 Cal. App.4th 597, 99 Cal. Rptr.2d 735 (Cal. App. 2nd Dist. 2000) (Claim by Medicaid beneficiaries to "excess" of settlement funds denied).

⁵ *Id.* See *State of New York v. Philip Morris, Inc.*, 179 Misc.2d at 447-51, 686 N.Y.S.2d at 570-73 (Objection by City of New York and New York counties to disbursement of settlement funds rejected); *State ex. rel. Napolitano v. Brown & Williamson Tobacco Co.*, 196 Ariz. 382, 998 P.2d 1055 (2000) (Motion to intervene to assert claim to portion of state settlement denied).

⁶ *Id.* See *Millberg, Weis, Bershad, Hynes, & Lerach, LLP v. State*, 342 Ark. 303, 28 S.W.3d 842 (2000) (Motion to intervene to protect claimed attorneys' fee by law firms denied); *People v. Philip Morris, Inc.*, 192 Ill.2d 87, 759 N.E.2d 906 (2001) (Circuit Court could adjudicate lien against settlement proceeds to secure attorneys' fees because action was directed not at state but at funds owed by private defendants).

⁷ *Id.* at 22. See *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 346-47 (4th Cir. 2002); *PTI, Inc. v. Philip Morris, Inc.*, 100 F. Supp.2d 1179, 1200-03 (C.D. Cal. 2000); *Premium Tobacco Stores, Inc. v. Fisher*, 51 F. Supp.2d 1099, 1104-05 (D. Colo. 1999).

⁸ *Id.* See *Star Scientific*, 278 F.3d at 347-48; *PTI, Inc.*, 100 F. Supp.2d at 1200-03; *Hise v. Philip Morris, Inc.*, 46 F. Supp.2d 1201, 1210 (N.D. Okla. 1999) (alleging states had formed a "de facto government" and "unlawful confederation" by entering the MSA)

⁹ *Id.* See *PTI, Inc.*, 100 F. Supp.2d at 1204-06; *Premium Tobacco Stores*, 61 F. Supp.2d at 1105-06

¹⁰ *Id.* See *Table Bluff Reservation v. Philip Morris, Inc.*, 256 F.3d 879, 883-85 (9th Cir. 2001); *PTI, Inc.*, 100 F. Supp.2d at 1207-08; *Hise*, 46 F. Supp.2d at 1209-10; *Premium Tobacco Stores*, 61 F. Supp.2d at 1106-08

¹¹ *Id.* See e.g., *Table Bluff Reservation*, 256 F.3d at 882-86 (Indian tribe lacked standing to assert constitutional challenge based on members' alleged injuries); *Forces Action Project LLC v. State of California*, 2000 WL 20977, No. C 99-0607 (N.D. Cal. Jan. 5, 2000) (injury caused to smokers by cigarette price increases allegedly caused by MSA too speculative and remote to justify Article III standing) *aff'd* 16 Fed. Appx. 774 (9th Cir. 2001).

that have actually ruled on the merits of the constitutional claims have rejected them as baseless, affirming the validity of the MSA.¹²

Plaintiffs' challenges to specific provisions of the MSA, such as its anticompetitive clauses, under federal antitrust laws have also been rejected. Indeed, every court that has analyzed an antitrust challenge to the validity of the MSA has found the Agreement protected by petitioning immunity, state action immunity, or both.¹³

Although courts have been uniform in their rejection of plaintiffs' claims to date on all these grounds, parties continue to bring suit and to appeal unfavorable decisions.¹⁴

Attorney General Enforcement of Advertising Restrictions in the MSA

The MSA, broadly speaking, was a binding agreement that settled the claims of all participating states against four major tobacco companies, Philip Morris, R.J. Reynolds (Reynolds), Brown & Williamson, and Lorillard, and precluded future actions in exchange for a substantial financial payout. Its terms, however, are complex and cover many areas that a judicial resolution would not have been able to regulate. For instance, the MSA contains substantial advertising restrictions on outdoor advertisements, such as billboards¹⁵, advertising content¹⁶, and promotional activity directed at youths¹⁷. The MSA specifically targets reducing underage tobacco use, with the funds that Settling States receive being important toward that end.¹⁸ There are also limitations on PM product placements and endorsements¹⁹ as well as certain lobbying restrictions on PMs²⁰. Finally, the Settling States authorized the establishment of a non-profit national foundation by the executive committee of the National

¹² See *supra* notes 7-11.

¹³ *Id.* at 26. *A.D. Bedell Wholesale Co. v. Philip Morris, Inc.*, 263 F.3d 239 (3d Cir. 2001); *PTI, Inc.*, 100 F. Supp.2d at 1192-96; *Forbes Action Project, LLC*, 2000 W L 20977; *Hise*, 46 F.Supp.2d at 1205-07.

¹⁴ See e.g., *Mariana v. Fisher* Memorandum and Order (MDPA, June 17, 2002) and *Freedom Holdings v. Spitzer* (district court rulings granting defendants' motion to dismiss, both currently on appeal).

¹⁵ See MSA II(ii)(1) & (2), and III(d), *supra* note 1.

¹⁶ See MSA II(l) & III(b), *supra* note 1.

¹⁷ See MSA III(a), *supra* note 1.

¹⁸ Although the settlement funds were earmarked for that public health purpose, recent state budget deficits have prompted states to divert that money towards other ends. See e.g., Richard Perez-Pena, *Officials Weigh Tobacco Funds for Fiscal Fix*, N.Y. TIMES, Nov. 21, 2002, available at <http://www.nytimes.com/2002/11/21/nyregion/21FISC.html?ex=1038905424&ei=1&en=d50ecb287cce14cc>.

¹⁹ See MSA III(c), (e), & (f), *supra* note 1.

Association of Attorneys General (NAAG) to reduce youth use and abuse of tobacco products and to support the study of and educational programs to prevent diseases associated with tobacco use.²¹ In exchange, the States provided protection to the PMs from current and future state claims, including claims of state agencies and subdivisions,²² and from NPMs to prevent them from gaining market share at the expense of PMs.²³

The NAAG Tobacco Committee, a standing committee currently consisting of nine state Attorneys General, has the authority to exercise the Settling States' enforcement rights.²⁴ A subsidiary of this Tobacco Committee is the Tobacco Enforcement Committee, a group of six Attorneys General including Maine, Pennsylvania, California, New York, Tennessee, and Connecticut, that was organized to police the MSA and resolve conflicting interpretations of provisions as courts settle conflicts within their respective states.²⁵ Section VII(f) directs the Attorneys General, NAAG, and the PMs to confer together and use their "best efforts to coordinate and resolve" discrepancies which are not "exclusively local".²⁶ Towards that end, the MSA allocates \$50 million to NAAG for enforcement, which is dispersed primarily by grants to States for expenses such as depositions and expert testimony.²⁷

a. Outside the Courts

Some disputes over whether tobacco companies have violated MSA provisions have been settled amicably. The NAAG Tobacco Enforcement Committee has identified areas of disagreement that a more detailed investigation later disperses. For instance, a PM who printed a merchandise catalog sold an item of apparel that appeared to closely resemble the design on one of the

²⁰ See MSA III(m), (o), (p) & Exhibit F, *supra* note 1.

²¹ See MSA VI(a), (c) & (d), *supra* note 1.

²² See MSA XII, *supra* note 1. Note that the preclusion does not apply to all claims. For example, criminal suits and state suits concerning tax liabilities or liabilities under any licensing fee provision are not precluded. See MSA XII(a)(7) and II(nn)(1), *supra* note 1.

²³ See MSA IX(d)(2), *supra* note 1.

²⁴ See National Association of Attorneys General Standing Committees, http://www.naag.org/naag/naag_committees.php.

²⁵ Telephone Interview with William Lieblich, Tobacco Enforcement Counsel, National Association of Attorneys General (Dec. 18, 2002). [hereinafter Lieblich 2002]

²⁶ See MSA VII(f).

²⁷ Telephone Interview with William Lieblich, Tobacco Enforcement Counsel, National Association of Attorneys General (Jan. 3, 2003). [hereinafter Lieblich 2003]

packages for one of the manufacturer's brands.²⁸ Such an action would violate Section III(f) of the MSA, which prohibits a PM from distributing or selling apparel or other merchandise that bears a Brand Name.²⁹ However, after looking at the item of apparel, the Enforcement Committee found that the design was not sufficiently similar to the design on the cigarette packaging to constitute Brand Name Merchandise.³⁰

Other examples illustrate how the Enforcement Committee and PMs have worked together to resolve disputes. A PM sponsored two cars to race in a series distinct from the racing series that the PM officially sponsors under the idea that because the sanctioning body of the racing series that the PM officially sponsors permitted the team to take part in another series, their participation was consistent with the MSA.³¹ However, Section III(c)(2) of the MSA limits a PM to one Brand Name Sponsorship in the United States per year, with Brand Name Sponsorship defined as sponsorship of a single national or multi-state series or tour (e.g., NASCAR) or of one or more events within a single national or multi-state series or tour, or of an entrant, participant, or team taking part in events sanctioned by a single approving organization.³² After the Enforcement Committee clarified the meaning of the provision and its application, the PM removed the Brand Name from the cars prior to the race.³³

A third example involved PM advertisements that used humor, fantasy, and unrealistic situations in what the Enforcement Committee believed to be a violation of Section III(l)'s ban of the use of cartoons in tobacco product promotion.³⁴ Although the PM disagreed with the Committee's position, the issue became moot when the ad campaign was discontinued.³⁵

An additional instance of cooperation involved the appearance of third-party billboards advertising tobacco products in several Settling States, either on the premises of tobacco retailers or by the

²⁸ See Provisions in the Enforcement Committee Summaries – Summary 13, <http://www.naag.org/upload/NAAGSummary13.pdf>.

²⁹ *Id.*

³⁰ *Id.*

³¹ See Provisions in the Enforcement Committee Summaries – Summary 12, <http://www.naag.org/upload/NAAGSummary12.pdf>.

³² *Id.*

³³ *Id.*

³⁴ See Provisions in the Enforcement Committee Summaries – Summary 5, <http://www.naag.org/upload/NAAGSummary5.pdf>.

³⁵ *Id.*

side of an interstate highway.³⁶ Under Section III(i) of the MSA, PMs are required to take “commercially reasonable” steps, consistent with industry custom and the course of dealings between the parties, to see that third-party billboards exceeding 14 square feet are removed.³⁷ After the Committee sent a letter to PMs reminding them of their obligations in regard to third-party billboards and PMs were notified of billboards displaying their Brand Names, PMs wrote to retailers, resulting in the removal of most of the advertisements.³⁸

As these examples show, the Enforcement Committee has clearly been very active in monitoring and facilitating non-litigious resolutions of disputes that have arisen, where possible. In addition, States often raise issues directly with the company involved rather than involve the Enforcement Committee, especially if the issue is a local matter.³⁹ Therefore, a number of potential conflicts are solved without the attention of or aid from an outside enforcement body.

b. Within the Courts

Although some disputes have been resolved without litigation, a number of cases, primarily relating to advertising and promotion provisions in the MSA, have been brought by Attorneys General to enforce violations of provisions identified by the Enforcement Committee. Filed by the Attorneys General of individual states rather than through a multi-state effort, these efforts have been largely successful. So far, seven state actions have been filed around four areas of advertising and marketing violations.⁴⁰

i. Free Cigarette Samples

In January 2001, California settled a suit originally filed against Reynolds in San Diego Superior Court on May 25, 2000, for distributing free cigarettes through the mail without first properly verifying the identity and age of recipients and ensuring they wanted to participate in consumer testing and evaluation of

³⁶ See Provisions in the Enforcement Committee Summaries – Summary 9, <http://www.naag.org/upload/NAAGSummary9.pdf>.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Lieblich 2003, *supra* note 27.

cigarettes.⁴¹ Although the MSA allows tobacco companies to engage in consumer testing and evaluation, it prohibits tobacco companies from giving away free samples where children might gain access.⁴² In California, many of the people who received cigarettes had not asked to receive them and some were even non-smokers.⁴³

The settlement, approved by the San Diego Superior Court on December 28, 2000, allows Reynolds to mail free cigarettes specifically for evaluation or testing purposes only to adults who have given their prior consent.⁴⁴ The company must verify that each person who signs one of its consent forms is, in fact, an adult, and may only mail free cigarettes to persons whose consent forms or consumer evaluation forms are recently received (that is, within the prior 180 days).⁴⁵ In addition, the settlement limits the number of packs per mailing and the size of mailers so they fit into the smallest slot allowed by Postal regulations.⁴⁶ Reynolds is required to report the number of free cigarettes it mails to Californians and also agreed to pay \$175,000 for investigative costs, to be shared between California and Arizona.⁴⁷

ii. Brand Name Merchandise Involving Matchbooks

In Ohio, Reynolds distributed matchbooks free-of-charge at retail locations.⁴⁸ The Enforcement Committee, believing that the matchbooks were prohibited Brand Name Merchandise because they bore the cigarette Brand Name in violation of Section III(f) of the MSA, requested that Reynolds refrain from distributing the matchbooks or it would recommend formal enforcement action.⁴⁹ Reynolds argued that the matchbooks were not “merchandise” because they were given away for free in connection with the

⁴⁰ See Lieblich 2002, *supra* note 25.

⁴¹ See Press Release, California Attorney General, *Attorney General Reaches Settlement with R.J. Reynolds Over Free Cigarette Mailings* (Jan. 5, 2001) (available at <http://caag.state.ca.us/newsalerts/2001/01-001.htm>). Note that California Attorney General Bill Lockyer worked with Arizona Attorney General Janet Napolitano to achieve this settlement, and that Arizona is actually included in the settlement as well. *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ See Provisions in the Enforcement Committee Summaries – Summary 8, <http://www.naag.org/upload/NAAGSummary8.pdf>.

⁴⁹ *Id.*

purchase of cigarettes.⁵⁰ When it proved impossible to resolve the issue amicably, Ohio filed suit against Reynolds.⁵¹ Although the Ohio trial court ruled against the state, the Attorney General is appealing the decision.⁵²

iii. Magazine Advertisements Targeting Youth

California's most recent successful civil action against Reynolds, aided by Attorneys General from Connecticut, Pennsylvania, New York, Maryland, and NAAG, ended in June 2002, when a San Diego court ruled that Reynolds violated the MSA by advertising cigarettes in magazines with a large percentage of youth readers aged 12 to 17.⁵³ California had previously spearheaded a successful multi-state effort to convince Philip Morris and other companies to cease advertising in magazines that have a youth audience of more than 15 percent readership, but Reynolds refused to change its advertising practices.⁵⁴ Superior Court Judge Ronald S. Prager found that Reynolds made "absolutely no changes to its advertising campaigns," failed to include the goal of reducing youth exposure to tobacco advertising in its marketing plans, and failed to track whether it was meeting its professed goal of reducing youth smoking.⁵⁵ The court ordered Reynolds to pay \$20 million in sanctions, plus attorneys' fees and other costs.⁵⁶ Reynolds will also be required to take specific action to comply with the terms of the MSA, which prohibits tobacco companies from directly or indirectly targeting youth in advertising, promotion, and marketing.⁵⁷

iv. Winston Cup signs

⁵⁰ *Id.*

⁵¹ *Id.* See also Lieblich 2002, *supra* note 25.

⁵² See Lieblich 2002, *supra* note 25.

⁵³ See Press Release, California Attorney General, *Attorney General Lockyer Praises \$20 Million Fine against R.J. Reynolds for Targeting Minors with Ads* (June 6, 2002) (available at <http://caag.state.ca.us/newsalerts/2002/02-067.htm>).

⁵⁴ *Id.*

⁵⁵ See Press Release, *supra* note 53. See also *California v. R.J. Reynolds Tobacco Company*, No. 764118 (Cal. Sup. Ct. filed June 6, 2002), at http://caag.state.ca.us/newsalerts/2002/02-067-rj_ad_1.pdf.

⁵⁶ *Id.*

⁵⁷ *Id.*

Reynolds' violations of a restriction on outdoor advertising provides the substance of the other four state suits, filed by the Attorneys General of California, Arizona, Washington, and New York.⁵⁸ Specifically, tobacco advertisements promoting a Brand Name Sponsored event were observed at a California racetrack more than 10 days after the end of the sponsored event that they advertised, in violation of Section III(c)(3)(E)(ii) of the MSA.⁵⁹ That section lifts the ban on outdoor advertising if the ad is placed "at the site of the Brand Name Sponsorship no more than 90 days before the start of the initial sponsored event, is removed within 10 days after the end of the last sponsored event, and is not prohibited by subsection (3)(A) above".⁶⁰ The Enforcement Committee interpreted the words "at the site" in Section III(c)(3)(E)(ii) in conjunction with its surrounding phrases to allow advertisements for a 100-day period around the start and conclusion of sponsored events at the site.⁶¹ Reynolds, on the other hand, argued that the signs could stay in place all year because that section should be interpreted to allow advertising at any racetrack around the country from the date of the initial sponsored event "of the series" to the last sponsored event "of the series".⁶²

While courts in California and Arizona granted the Attorneys General's Motions for Summary Judgment, Reynolds prevailed in New York.⁶³ Currently, all three of these trial court decisions have been appealed to the intermediate state appellate courts.⁶⁴ In Washington, the suit became moot when the signs were taken down.⁶⁵

c. Enforcement trends

As the litigation list shows, a few states in particular, such as California and Arizona, have been especially vigilant at litigating violations. In fact, California has likely devoted the most resources to enforce the public health provisions of the MSA, with the most attorneys allocated to litigating tobacco

⁵⁸ See Lieblich 2002, *supra* note 25.

⁵⁹ See Provisions in the Enforcement Committee Summaries – Summary 1, <http://www.naag.org/upload/NAAGSummary1.pdf>.

⁶⁰ *Id.* See also MSA III(c)(3)(E)(ii), *supra* note 1.

⁶¹ See Provisions in the Enforcement Committee Summaries - Summary 1, *supra* note 57.

⁶² *Id.*

⁶³ *Id.* See also Lieblich 2002, *supra* note 25.

⁶⁴ See Lieblich 2002, *supra* note 25.

⁶⁵ *Id.*

violations than any other state.⁶⁶ Although part of California's significant effort is largely correlated to the size of the state and the state's Attorney General office, some small states, such as Arizona, Washington, and Maine have played disproportionately large roles in comparison to certain larger states, which have been surprisingly inactive.⁶⁷ States have, however, pooled their resources for important cases. For example, lawyers from the Attorney General's offices of Connecticut, Pennsylvania, New York, Maryland, and NAAG were qualified pro hac vice for the California magazine advertisement case.⁶⁸ Enforcement, however, is not measured by lawsuits; that is a last resort.⁶⁹ As NAAG's Enforcement Committee efforts show, many disputes have been resolved outside the courts.⁷⁰

Because most of these suits have so far been adjudicated only on a preliminary level, many questions remain, both on appeal and otherwise. For example, NAAG is supposed to resolve inconsistent rulings on MSA provisions, but it is largely unclear how the Enforcement Committee will go about doing so. In addition, how PMs will actually behave in response to these initial rulings is not apparent. Although Reynolds' loss in California on the issue of advertisements targeting youth in national magazines is technically confined to that state, the nature of the subject matter will have nationwide implications as a matter of course; it would not be practical for a magazine with national circulation to run different advertisements in different states. However, a ruling against Reynolds on the issue of matchbooks in Ohio, for example, could arguably be limited to that state and would not change Reynolds' marketing practices elsewhere.

Another consideration that implies that suits brought by individual states will still have national impact involves the application of non-mutual offensive issue preclusion.⁷¹ An Attorney General could use a judgment against a company in another state to easily establish a violation. Such facility in winning

⁶⁶ *Id.* California's Attorney General Bill Lockyer even established a Tobacco Litigation and Enforcement section in 1999 to enforce state laws on tobacco access. See Press Release, California Attorney General, *Attorney General Lockyer Marks One Year Anniversary of Tobacco Settlement* (Nov. 30, 1999) (available at <http://caag.state.ca.us/newsalerts/1999/99-088.htm>).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ It is interesting to note, however, that so far, all enforcement litigation has involved only Reynolds.

⁷⁰ See Enforcement Committee Summaries, <http://www.naag.org/issues/tobacco/index.php?smod=922>.

⁷¹ See Lieblich 2002, *supra* note 25.

judgments essentially would lead to company exposure in every state, implying that judgments against companies will often have national implications.

Important Pending Litigation: *American Legacy Foundation v. Lorillard*

As mentioned previously, the MSA directed the establishment of a non-profit organization, entirely separate from the Attorneys General, that would seek to accomplish two goals: (1) reduce youth use and abuse of tobacco products, and (2) support the study of and education programs to prevent diseases associated with tobacco use.⁷² The American Legacy Foundation (Legacy) was the entity so established by the MSA and organized as a non-profit organization under the laws of Delaware; the National Public Education Fund (NPEF) was Legacy's grant-making arm.⁷³ Legacy's board of directors, though inclusive of some Attorneys General, is selected according to a given set of criteria. Specifically, the board is comprised of eleven directors, with NAAG, the National Governors' Association, and the National Conference of State Legislatures contributing two members each.⁷⁴ Those six members select the additional five members to meet requirements that the directors be nationally geographically diverse, one is an expert on public health issues, and the other four have expertise in medical, child psychology, or public health disciplines.⁷⁵ Funded in large part by MSA payments from PMs made at the direction and on behalf of Settling States, Legacy's mission is to reduce youth smoking through a targeted nationwide public education effort. Legacy's truth campaign, an innovative multi-media grassroots and advertising initiative, has been cited as one of the main reasons for the declines in youth smoking nationwide.⁷⁶

While there are no dollar limitations on grants, there are several limits on Legacy activities and use of Legacy funds. First, the MSA prevents Legacy from engaging in and using Legacy funds for

⁷² See MSA VI(a), (c), & (d), *supra* note 1.

⁷³ See MSA VI(a) & (c), *supra* note 1.

⁷⁴ See MSA VI(d), *supra* note 1.

⁷⁵ See MSA VI(d), *supra* note 1.

⁷⁶ See Press Release, Monitoring the Future, L.D. Johnston, P.M. O'Malley & J.G. Bachman, *Cigarette Smoking Among American Deens Declines Sharply in 2001* (Dec. 19, 2001) (available at <http://www.monitoringthefuture.org/press.html>).

political activities or lobbying of candidates, ballot initiatives, referenda and other similar activities.⁷⁷

Second, all Legacy activities, including grants made by the NPEF, must be conducted within the states.⁷⁸

Third, Legacy's programs must be culturally and linguistically appropriate.⁷⁹ Fourth, Legacy is prohibited from using the NPEF for personal attacks or vilification of individuals, companies (including tobacco companies), or governmental agencies, whether individually or collectively.⁸⁰

Tobacco companies have taken up this fourth prohibition by challenging some of the truth campaign's ads, claiming that they unfairly vilify tobacco companies. The vilification clause in Section VI(h) of the MSA is copied by Article XII, Section 12.2 of Legacy's bylaws, which provide as follows:

The Foundation shall establish a Fund within the Foundation to be known as the National Public Education Fund. The National Public Education Fund shall be used only for public education and advertising regarding the addictiveness, health effects, and social costs related to the use of Tobacco Products, as defined in the Master Settlement Agreement, and shall not be used for any personal attack on, or vilification of, any person (whether by name or business affiliation), company, or government agency, whether individually or collectively.⁸¹

In particular, Lorillard, a PM, claimed that a radio advertisement entitled "Dog Walker", which ran for six weeks during the summer of 2001, violated this clause.⁸² The advertisement involved a recorded phone conversation between an actor hired by the producers of the advertisement and two real-life Lorillard employees who were unaware that they were speaking to an actor.⁸³ The actor claimed to be a dog walker and offered to sell dog urine he has collected to "you tobacco people".⁸⁴ Dog urine contains urea, "one of the chemicals you guys put in cigarettes."⁸⁵ Lorillard complained to Legacy over the summer and threatened to take legal action in North Carolina that fall, although it did not do so until much later, despite statements at the beginning of 2002 alluding to potential action in all 46 states.⁸⁶

⁷⁷ See An Overview of the Provisions of the Multistate Master Settlement ("MSA"), Tobacco Control Resource Center, Inc. and the Tobacco Products Liability Project, at 13, http://tobacco.neu.edu/tcu/3-2/overview_msa.htm. See also MSA VI(h), *supra* note 1.

⁷⁸ *Id.*, at 14.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ See American Legacy Foundation Bylaws, Article XII, § 12.2.

⁸² See Opinion Denying Motion to Stay, *American Legacy Foundation v. Lorillard Tobacco Company*, C.A. No. 19406 (Del. Ch. April 29, 2002) at 2, <http://www.naag.org/upload/Opiniondenyingmtntostay.pdf>.

⁸³ *Id.* at 3.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 3-5.

On January 18, 2002, Lorillard announced its intention to sue Legacy for violation of the MSA's vilification clause.⁸⁷ This letter provided Legacy with 30 days' notice, a requirement under the MSA.⁸⁸ On February 13, 2002, six days before Lorillard commenced its action in North Carolina, Legacy filed suit in the Delaware Court of Chancery seeking a declaratory judgment that Lorillard had no authority to sue Legacy for violations of the MSA.⁸⁹ Although Lorillard filed a motion to stay or dismiss Legacy's suit, the Delaware court denied Lorillard's motion, calling Legacy's decision to preempt Lorillard's choice of venue merely strategic, not inequitable.⁹⁰

An evaluation of Lorillard's claims, however, indicates that their suit may not be so easily dismissed. Lorillard advances two primary contract claims against Legacy. First, Legacy is bound by the MSA because it has adopted and assumed its obligations, even though it was not an original party to the Agreement.⁹¹ Second, Lorillard claims standing to enforce Legacy's bylaws through either (1) contract rights under Section 12.2 of Legacy's bylaws, (2) third-beneficiary party status, or (3) the special relationship between Legacy, tobacco companies, the Settling States, and their Attorneys General.⁹²

Legacy parries Lorillard's first argument by claiming that because it is not a party to the MSA, it is not obligated to follow its provisions.⁹³ Even though the MSA contains a vilification clause and requires that the Settling States ensure that Legacy's "organizational documents" contain such a restriction⁹⁴, Legacy maintains that the contract's plain language indicates Legacy was never envisioned as becoming a party.⁹⁵

⁸⁷ *Id.* at 5-6.

⁸⁸ *Id.* at 6.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.* at 10-14.

⁹¹ See Defendant's Brief in Opposition to Plaintiff's Motion for Summary Judgment, American Legacy Foundation v. Lorillard Tobacco Company (No. 19406), at 21, <http://www.naag.org/upload/ALFvLorillardoppositiontoplaintiffsmotion.pdf>.

⁹² *Id.* at 19.

⁹³ See Plaintiff's Opening Brief in Support of its Motion for Summary Judgment on Claims I-III, American Legacy Foundation v. Lorillard Tobacco Company (No. 19406), at 20, <http://www.naag.org/upload/openingbriefclaimsI-III.pdf>.

⁹⁴ See MSA VI(d), *supra* note 1.

⁹⁵ See Plaintiff's Opening Brief, *supra* note 93, at 24.

In interpreting the MSA and consent decrees, ordinary rules of contract interpretation would appear to apply.⁹⁶ In construing a contract, the whole of the contract is to be taken together so as to give effect to every part.⁹⁷ And if the terms of the contract are clear and explicit, the intent of the contract governs its interpretation.⁹⁸

Arguably, the terms of the MSA appear clear – Tobacco companies will provide funds that will be used towards public health education.⁹⁹ Those funds, however, may not be used to vilify the tobacco companies or other entities.¹⁰⁰ The issue, therefore, boils down to whether Legacy can be held to the terms of the MSA.

In disclaiming contractual obligations, Legacy makes much of the fact that the funds paid to the Escrow Agent are the property of the Settling States, not the tobacco companies.¹⁰¹ Logic would seem to dictate that the funds originated from the tobacco companies, although they may have been allocated to Legacy at the request of the Settling States. It is true, as the Chancery Court stated in its Memorandum Opinion, that “[t]he Foundation is not a signatory to the MSA and is not identified therein as an intended beneficiary.”¹⁰² However, Legacy arguably has adopted the MSA, either implicitly or explicitly.¹⁰³ Legacy has certainly adopted key provisions of the MSA into its bylaws, as it was required to do, and has accepted the benefits, or payments, from the Agreement.¹⁰⁴ Therefore, it is conceivable that Legacy may not have been an original signatory, but its acceptance of benefits and adoption of key provisions implies that it has adopted the contract and should therefore be bound by its terms.¹⁰⁵

Even if the Chancery Court concludes that Legacy is not bound by the terms of the MSA, Lorillard’s second claim, which endeavors to enforce Legacy’s bylaws against it, may also allow them to resist summary judgment. Legacy labels Lorillard’s second claim “fundamentally flawed” because

⁹⁶ *Id.* at 20.

⁹⁷ *Id.* at 21.

⁹⁸ *Id.*

⁹⁹ See MSA VI(c), *supra* note 1.

¹⁰⁰ See MSA VI(h), *supra* note 1.

¹⁰¹ See Plaintiff’s Opening Brief, *supra* note 93, at 14.

¹⁰² See Opinion Denying Motion to Stay, *supra* note 82, at 1-2.

¹⁰³ See Defendant’s Brief, *supra* note 91, at 21-40.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

Lorillard was not a party to those bylaws and therefore, has no right to enforce them.¹⁰⁶ It is true that the Attorney General is usually the party tasked to enforce a charitable corporation's bylaws.¹⁰⁷ However, the circumstances of this case may call for an exception because the Attorneys General and NAAG suffer from a conflict of interest in enforcing these bylaws.¹⁰⁸ Equity may demand that another party, who claims to be a third-party beneficiary of those bylaws, be entitled to enforce them.¹⁰⁹

Even if Lorillard does not prevail against Legacy, its suit has raised interesting issues about contract interpretation and the ability of tobacco companies to hold non-signatories who receive payments from the MSA to the Agreement's responsibilities and obligations. Contract obligations cut both ways: while the tobacco companies certainly conceded many contested regulatory areas to the Settling States, they retained specific rights. One of those rights appears to be the right to prevent the tobacco companies' own funds from being used to vilify them.

One of the questions that falls out of Lorillard's suit is whether any Attorney General or NAAG has been remiss in enforcing either the MSA's vilification clause or Legacy's bylaws. That issue should be resolved by Lorillard's second suit regarding this matter, filed against NAAG in Delaware on September 13, 2002, to which the state of Delaware and its Attorney General were added as defendants about a month later.¹¹⁰ In that suit, Lorillard requests relief from these parties if it does not attain it against Legacy.¹¹¹

Addressing Areas in Advertising Not Covered by the MSA

Although the advertising restrictions in the MSA represent much more than could have been achieved through litigation, there are a number of areas that are not addressed at all. These are the very areas in which the tobacco industry has increased its advertising efforts.

d. Areas Not Covered by the MSA

¹⁰⁶ See Plaintiff's Reply Brief in Support of its Motion for Summary Judgment, *American Legacy Foundation v. Lorillard Tobacco Company* (No. 19406), at 33-44, <http://www.naag.org/upload/SJReplyBriefv11.pdf>.

¹⁰⁷ *Id.* at 36.

¹⁰⁸ See Defendant's Brief, *supra* note 91, at 56-61.

¹⁰⁹ *Id.*

¹¹⁰ See Lieblich 2002, *supra* note 25.

¹¹¹ See Lieblich 2003, *supra* note 27.

i. Direct Mail Advertising

The MSA does not restrict direct mail advertising, an area in which tobacco companies have stepped up their activities, although there are provisions in the MSA that regulate ad content.¹¹² This area is ripe for abuse because tobacco companies have no way of verifying whether a person is a minor, if the person certifies by mail that he or she is over 21 years old.¹¹³ In addition, in a household where an adult has certified adult status, a minor may be the one to receive the mail, and hence, the free samples.¹¹⁴ Finally, the MSA allows free samples in Adult-Only facilities but it is unlikely that all households on the waiting list could be considered Adult-Only facilities.¹¹⁵ One example of abuse in this area occurred in Arizona, where Attorney General Janet Napolitano accused Reynolds of violating the free sample restriction when it mailed samples of two to four packs of cigarettes to Arizona households, in some cases where the receiver had not first consented.¹¹⁶ California also brought suit against Reynolds for the same kinds of violations.¹¹⁷ Although Reynolds agreed to change its practices in both these states, abuse in this area remains ripe due to the difficulty of monitoring PM practices.

ii. Third Party Exemption

Because third parties, such as retailers who sell cigarettes and billboard companies, were not parties to the MSA, their conduct is not regulated by the restrictions on advertising although tobacco companies cannot authorize third parties to do anything the tobacco companies cannot do under the Agreement. In addition, the tobacco companies are obligated to take “commercially reasonable steps” to prevent such actions, although the MSA does not define what that term means.¹¹⁸

In practice, third-party violations of these restrictions are difficult to pinpoint and even harder to enforce. One example is emblematic of the problem. In April 1999, five days after the billboard ban went

¹¹² One example is the prohibition against the use of cartoons. *See* MSA III(b).

¹¹³ *See* Robert L. Kline, *Tobacco Advertising After the Settlement: Where We Are and What Remains To Be Done*, KAN. J.L. & PUB. POL’Y, 621, 629 (2000).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* *See also* Press Release, Arizona Attorney General, *Tobacco Manufacturer Changes National Program in Response to Attorney General Napolitano’s Demands* (Jan. 14, 2000) (available at http://www.attorney_general.state.az.us/press_releases/jan/011400.html).

¹¹⁷ *See* Press Release, *supra* note 41.

into effect, the WaWa convenience store chain placed billboards showing a pack of Marlboro cigarettes with the slogan “lowest prices”.¹¹⁹ WaWa removed the billboards after complaints by the Pennsylvania Attorney General, who threatened to take enforcement action, and state Health Secretary Robert Zimmerman, as well as other tobacco control groups.¹²⁰ In fact, Pennsylvania Attorney General Fisher commended WaWa in May 1999 for taking down more than 100 of its cigarette billboard ads in Pennsylvania, New Jersey, Maryland, Virginia and Delaware, and its withdrawal of plans to conduct any tobacco billboard advertising in the future.¹²¹ However, in November 1999, WaWa placed another billboard advertisement with the words “Lowest prices allowed by law. #1 brand even lower.”¹²² Although there was no picture of Marlboro cigarettes, tobacco control groups argued that the public knows Marlboro is the number one brand, so it was a thinly veiled advertisement for Marlboro.¹²³ Again, WaWa removed the signs under pressure.¹²⁴ Still, many people saw the advertisements and breaches like these likely occur with some frequency.

iii. Bars and Nightclubs

Although the MSA prohibits tobacco companies from targeting minors, it does not prevent the industry from targeting young adults aged eighteen to twenty-five. These young adults wield considerable influence, not just over their own consumer habits and contemporaries, but also over the youth that seek to emulate them. A national survey of 15,000 students by the Harvard School of Public Health found that in 1997, 28 percent of college students admitted smoking in the last month, compared to 22 percent in 1993.¹²⁵ Bars and nightclubs are one of the most effective areas to reach this young

¹¹⁸ See MSA III(i).

¹¹⁹ *Id.*

¹²⁰ *Id.* See also Press Release, Pennsylvania Attorney General, *AG Fisher Says WaWa Agrees to Drop Cigarette Billboards* (Dec. 1, 1999) (available at <http://www.attorneygeneral.gov/press/release.cfm?p=42E56C64-E948-11D3-8DEA0060972D2515>).

¹²¹ See Press Release, Pennsylvania Attorney General, *Fisher Commends WaWa Stores for Withdrawing Tobacco Billboard Advertising* (May 12, 1999) (available at <http://www.attorneygeneral.gov/press/release.cfm?p=42E56C37-E948-11D3-8DEA0060972D2515>).

¹²² See Kline, *supra* note 113, at 629-30.

¹²³ *Id.* at 630.

¹²⁴ *Id.*

¹²⁵ See David Rosenbaum, *Smoking by College Students is on the Rise, Research Finds*, N.Y. TIMES, Nov. 18, 1998, at A5.

population and because they are supposed to be Adults-Only facilities, are unhampered by some other restrictions concerned with protecting youth.

iv. Point of Purchase Advertising and Promotion

Point of purchase advertising, which includes signs on retailers' windows, the location of cigarette packs, and tobacco industry signage on store items, has increased significantly since the MSA restrictions on other kinds of advertising took effect.¹²⁶ The Federal Trade Commission calculated that point of sale advertisements grew by \$17.6 million, or 5.3 percent, from 1999 (\$329.4 million) to 2000 (\$347.0 million).¹²⁷ The MSA does not prevent tobacco retailers from posting tobacco advertising outside store premises or advertising inside the store but visible from the street if those signs are less than 14 square feet in size.¹²⁸ Because of the billboard ban, these high visibility areas have become the new advertising battleground.

More important, however, is the fact that promotional allowances, payments made to retailers to facilitate sales, were \$3.91 billion in 2000, an increase of 10.5 percent from the 1999 total of \$3.54 billion.¹²⁹ Accounting for almost 41 percent of the tobacco industry's 2000 total expenditures on advertising and promotion, this category of expense has nearly doubled since 1995.¹³⁰ The MSA neither regulates the amount of money spent in this area, nor does it impose any limitations on retailers, who are not parties to the MSA.

v. Internet Advertising and Sales

The internet, a medium just beginning to bloom when the MSA was signed, is another key area not regulated by the MSA. Tobacco companies have sites promoting their brands and can advertise on other sites as well.¹³¹ Sales of cigarettes over the internet have skyrocketed.¹³² Because

¹²⁶ See Kline, *supra* note 113, at 631.

¹²⁷ See Federal Trade Commission Cigarette Report for 2000, at 2, <http://www.ftc.gov/os/2002/05/2002cigrpt.pdf>.

¹²⁸ See MSA II(ii), *supra* note 1.

¹²⁹ See Federal Trade Commission Cigarette Report for 2000, *supra* note 127, at 3-4.

¹³⁰ *Id.* at 4.

¹³¹ See Kline, *supra* note 113, at 632.

many of these retailers are located on Indian reservations or low tax states, collecting taxes that are dedicated to tobacco control is even more difficult.¹³³ Most states require cigarette purchasers to show identification verifying that they are adults, but it is not clear how tobacco retailers do this in practice.¹³⁴

vi. Print Media

In addition, the MSA does not significantly address advertising in print media, although once again, certain content regulations, such as the ban on the use of cartoons, apply. Specifically, the quantity of advertising is unlimited. Tobacco companies spent approximately \$346 million on newspaper and magazine advertising in 2000.¹³⁵ Many of those publishers are dependent on tobacco ad revenues and appear to censor negative tobacco-related articles.¹³⁶ Some tobacco companies have also introduced or expanded their own self-published magazines, which are sent free to about five million subscribers.¹³⁷

vii. Tobacco “Counter-Advertising” Targeting Minors

Tobacco companies have also been broadcasting television commercials that are supposed to discourage children from using their products. In contrast to the effective tactics of the truth advertising campaign, which Lorillard seeks to curtail, the tobacco companies’ ads do not appear designed to discourage students from smoking.¹³⁸ The ads typically portray clean-cut kids in school hallways or buses saying “don’t smoke” and suggesting that if kids want more information about tobacco use, they should talk to their parents about the dangers of smoking.¹³⁹ Indeed, these ads appear specifically designed *not* to appeal to adolescents and stand in marked contrast to the ads that tobacco companies use, which show sexy, attractive young adults engaged in exciting activities.¹⁴⁰ For example, Philip Morris’s

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ See Federal Trade Commission Cigarette Report for 2000, *supra* note 127, at 3.

¹³⁶ See Kline, *supra* note 113, at 632.

¹³⁷ *Id.*

¹³⁸ *Id.* at 633-34.

¹³⁹ *Id.* at 633.

¹⁴⁰ *Id.* at 633-34.

“Think. Don’t Smoke” campaign likely has the effect of encouraging rebellion among teenagers.¹⁴¹ Other ads, like “Tobacco is Wacko if you’re a Teen” connotes that if the person is not a teenager, it would not be “wacko” to smoke.¹⁴² By implication, the decision to smoke is deemed an adult decision. Therefore, by giving the impression to youth that being a non-smoker is not “cool”, tobacco companies not only target youth, but also succeed in using one of the MSA’s requirements against Attorneys General.

e. Attorneys General Efforts to Plug the Holes

Attorneys General have only been able to combat a few of the many areas that have been exploited by tobacco companies. Perhaps recognizing that litigation consumes significant resources, Attorneys General have broadened their reach by using different tools, such as voluntary compliance assurances, to combat underage access to tobacco products.¹⁴³ These agreements with retailers have great potential to limit youth access to tobacco products. Studies show that more than 80 percent of adult smokers began smoking before the age of 18.¹⁴⁴ In particular, 47 percent of youth under 18 who report buying cigarettes identify gas stations as their primary point of purchase and 27 percent identify convenience stores.¹⁴⁵

Walgreens, one of the country’s largest drug store chains, Exxon Mobil, America’s largest oil company, and most recently, BP Amoco, another large oil company, have voluntarily agreed to implement major new policies to reduce the sale of tobacco products to minors.¹⁴⁶ Forty Attorneys General signed onto the Walgreens Agreement¹⁴⁷ and forty-three Attorneys General, the District

¹⁴¹ See Press Release, American Legacy Foundation, *Legacy Today Urged Philip Morris to Pull Its “Think. Don’t Smoke” Ads Based on Research Showing the Ads Make Kids More Likely to Smoke* (May 29, 2002) (available at <http://pressroom.americanlegacy.org/pressReleases/30-OKLqInNwUSoWGV4Ayt6l/viewTruth>).

¹⁴² See Lieblich 2003, *supra* note 27.

¹⁴³ See Walgreens Assurance of Voluntary Compliance, <http://caag.state.ca.us/tobacco/pdf/walgreens.pdf> [hereinafter Walgreens Assurance], and Exxon Mobil Assurance of Voluntary Compliance, http://caag.state.ca.us/tobacco/pdf/exon_assurance.pdf [hereinafter Exxon Mobil Assurance].

¹⁴⁴ See Exxon Mobil Assurance, *supra* note 143, at 1.

¹⁴⁵ *Id.*

¹⁴⁶ See Walgreens Assurance, *supra* note 143, Exxon Mobil Assurance, *supra* note 143, and Email from Jim Tierney (Dec. 20, 2002).

¹⁴⁷ See Press Release, California Attorney General, *Attorney General Bill Lockyer Announces Agreement with Walgreens to Curb Tobacco Sales to Minors* (Feb. 13, 2002) (available at <http://caag.state.ca.us/newsalerts/2002/02-011.htm>).

of Columbia, and two U.S. territories signed the Exxon Mobil Agreement.¹⁴⁸ The Attorneys General's authority to enter into such an agreement stems from their power to enforce individual consumer protection statutes, which were violated when compliance checks showed the retailer made tobacco sales to persons under the age of 18.¹⁴⁹

The Exxon Mobil agreement is modeled on the earlier Walgreens February 2002 voluntary compliance agreement in which both companies agreed to implement standards for the hiring, employment, and training of their employees regarding the sale of tobacco products.¹⁵⁰ Clerks will be instructed to check for identification of all customers who appear under the age of 27 and stores will use security cameras to monitor compliance.¹⁵¹ Exxon Mobil will also ban self-service displays of tobacco products, the sale of cigarette papers or pipes to minors, and the distribution of free tobacco samples in its approximately 1,000 stores nationwide.¹⁵² In addition, Exxon Mobil will attempt to ensure that the approximately 16,000 gas station franchises using the Exxon or Mobil name but not owned by the company comply with laws governing the sale of tobacco to minors.¹⁵³ The company will employ an outside firm to conduct random, anonymous performance checks in addition to internal monitors.¹⁵⁴

It is unlikely that Attorneys General would have been able to achieve anything approaching these new procedures through litigation if the companies had not otherwise voluntarily agreed because third party retailers are not regulated by the MSA. One of the reasons that the retailers may have agreed to comply is that in this day of increased Attorney General power and influence, it is not good to be on an Attorney General's bad side. Any investigation into a company's practices can bring bad publicity and a drop in stock price that would greatly outweigh any inconvenience caused by enforcing laws against minors purchasing cigarettes, for example. States often test major retailers to determine the percentage of non-compliance in enforcing state laws prohibiting youth access to cigarettes. Therefore, from the

¹⁴⁸ See Press Release, California Attorney General, *Attorney General Bill Lockyer Announces Agreement with ExxonMobil to Curb Tobacco Sales to Minors* (Aug. 13, 2002) (available at <http://caag.state.ca.us/newsalerts/2002/02-091.htm>).

¹⁴⁹ See Walgreens Assurance, *supra* note 143, at 2-3; Exxon Mobil Assurance, *supra* note 143, at 2-3.

¹⁵⁰ See Press Release, *supra* note 148.

¹⁵¹ See Exxon Mobil Assurance, *supra* note 143, at 5-7.

¹⁵² See Press Release, *supra* note 148.

¹⁵³ *Id.*

¹⁵⁴ See Exxon Mobil Assurance, *supra* note 143, at 7-10.

company's perspective, it can more easily avoid prosecution and unfavorable publicity by implementing a program that has been approved by the Attorney General.¹⁵⁵

The Assurance, moreover, appears to be a flexible tool, allowing the Attorneys General the ability to increase requirements if necessary. Walgreens' agreement stipulates not only that the parties may make changes to the agreement over time, with due regard for changes in laws, regulations, equipment, technology, or methodology of retail sales, but also that the Assurance settles all Attorney General claims arising from Consumer Protection jurisdiction over Walgreens' acts and practices relating to tobacco sales, although Walgreens expressly does not admit any liability.¹⁵⁶ Attorneys General expressly reserve, however, other remedies available to state or local jurisdictions in the signatory states in connection with a past or future underage sale of tobacco.¹⁵⁷ The Exxon Mobil Assurance contains similar provisions.¹⁵⁸

Of the many areas that are not covered by the MSA's terms, there is not much Attorneys General can do to prevent tobacco companies from using certain mediums. Bars and nightclubs will likely remain key entry points to the young adult population, although a recent move to eliminate smoking on college campuses holds promise.¹⁵⁹ Attorneys General do not appear to have any recourse other than to monitor advertisements of sponsored activities and litigate individual violations. Some newspapers that are less dependent on tobacco companies for advertising revenues have recently renounced tobacco advertising in their pages, but those victories are few and far between.¹⁶⁰ Attorneys General can also monitor tobacco companies' self-published magazines to make sure that they do not misrepresent the health effects of tobacco use, which tobacco companies agreed they would not do in the MSA.

The internet is an area where access to tobacco imagery is supposedly being restricted beyond the scope of the MSA by other parties.¹⁶¹ Several online providers are responding to parental demand for screening of material offensive to children, which would allow parents to limit access to sites dedicated to

¹⁵⁵ See Lieblich 2002, *supra* note 25.

¹⁵⁶ See Walgreens Assurance, *supra* note 143, at 2-3.

¹⁵⁷ *Id.*

¹⁵⁸ See Exxon Mobil Assurance, *supra* note 143, at 3.

¹⁵⁹ See Associated Press, *Campuses Moving to Restrict Smoking*, N.Y. TIMES, Dec. 14, 2002, at A23.

¹⁶⁰ See Kline, *supra* note 113, at 633.

¹⁶¹ *Id.* at 632.

or promoting tobacco use.¹⁶² However, these services will most likely not restrict access to sites that are dedicated to other topics but display tobacco ads or themes, nor have they found to be actually effective in blocking out tobacco related sites.¹⁶³ Also, many households with children do not use these filters. Efforts to curtail internet sales to minors will be more successful using other means, such as trying to enact legislation, conducting stings for violations of state laws preventing cigarette sales to minors where the companies are disreputable, continuing to enter into voluntary compliance agreements with large, trustworthy companies, and discussing with tobacco companies whose cigarettes are being sold to minors what measures can be implemented, contractual or otherwise, against retailers.¹⁶⁴

Conclusion

Original opposition to the MSA raised basically four key points: (1) the State was not getting enough, (2) it was giving up far too many rights, (3) the structured nature of the settlement meant that the State's future interests were aligned with and dependent on future tobacco sales, and (4) the determinations underlying the MSA were basically legislative and far beyond the adjudicative and enforcement capabilities of a single judge sitting in a lower court of general jurisdiction.¹⁶⁵ Critics concluded that individual litigation was simply not an appropriate vehicle for setting comprehensive health care policy within a state or across a nation.¹⁶⁶ Because the essence of litigation focused on the case and controversy between the individual litigants, after those litigants were deemed to have standing to bring the action, the case's resolution necessarily was limited to the parties' specific grievances.¹⁶⁷ In addition, the limited resources of a judge and other parties to police the violations of tobacco companies in the agreement that was approved by the state may prove fatal to enforcing the MSA's dictates.¹⁶⁸

While litigation may not be the most efficient or preferred way to set national health

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ See Lieblich 2003, *supra* note 27.

¹⁶⁵ See Arthur B. LaFrance, *Tobacco Litigation: Smoke, Mirrors and Public Policy*, 26 AM. J.L. & MED. 187-203 (2000).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

care policy, the MSA has ensured that it is one of the few ways to do so. The MSA, though contested by many parties not bound by its dictates, has survived every challenge to its legitimacy, much to the disappointment of its challengers. For the parties bound by the Agreement, however, its provisions represent something more complex. The possibility that the MSA could be used by tobacco companies to curtail or even halt one of the most successful countermeasures to its own advertising barrage, the truth campaign, seems highly inappropriate. That possibility underscores the fact that the MSA is a contract that binds both sides, not just the side that claims the moral high ground.

Continuing to successfully fight the tobacco industry requires Attorneys General to evaluate the progress that they have made so far with the tools that they have at hand. Rightly so, NAAG's Enforcement Committee has resolved differing interpretations over provisions where possible and Attorneys General have taken PMs to court to enforce provisions that they believe are being violated. This activity should continue in full force, with coordination between the Enforcement Committee and individual states. However, an even greater effort should be made by other states to aid the often single Attorney General bringing suit, especially since any judgment may have nationwide implications. California, though it has achieved great success on its own, stands to achieve even more with the aid of other Attorneys General, such as was achieved in the case against youth targeted advertising in magazines.

In addition to enforcing the provisions of the MSA, Attorneys General should pursue alternative measures, such as the voluntary compliance agreements agreed to by Walgreens, Exxon Mobil, and BP Amoco. By concentrating their efforts in high impact areas, such as youth access through retailers, Attorneys General can achieve significant progress towards one of the key goals of the MSA. In that vein, the internet, another key tobacco access point for youths, should be Attorneys General's next area of focus.

What Attorneys General cannot do, however, is become complacent in thinking that the MSA's provisions are adequate to deter tobacco companies from targeting youth or defeatist in attitude that the fight against the tobacco industry is either never-ending or fruitless. Although it is disappointing that settlement funds have been diverted from tobacco health initiatives, the authority and power that Attorneys General have to protect consumers remains strong and is sufficient to win the fight against the tobacco industry.