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Tobacco Settlement Provisions Regarding "Non-Participating
Manufacturers"

engage in wrongful conduct and
escape appropriate punishment.

One of the least-understood portions of the tobacco settlement agreement between the State Attorneys General and the tobacco industry is the so-called "Non-Participating Manufacturer" provisions, which were designed to guarantee the States a source of recovery from new -- or foreign -- manufacturers that engage in irresponsible practices that ultimately result in higher health care costs to the States in the future. These provisions are the best line of defense a way the States have to make sure that an entirely different group of tobacco companies than those that signed the tobacco agreement will not illegally recruit new generations of underage smokers and escape appropriate legal punishment.

- Non-Partic.
- ~~The Problem of Irresponsible Manufacturers.~~ The tobacco settlement-agreement imposes huge financial obligations on the participating tobacco companies; money that can be used by the States to combat youth smoking and to fund smokers' healthcare costs. It also prevents cigarette companies from targeting kids, and prohibits them from misrepresenting facts relating to smoking and health. However, because the settlement is a private agreement that applies only to its signatories, it cannot prevent other manufacturers -- including the big foreign companies -- from targeting kids, misleading consumers, or engaging in other illegal practices.

As the negotiators of the settlement thought more and more about this, they realized that they had a real problem that had to be solved: How do the States guard against the possibility that non-participating companies will -- without leaving the government any recourse against them -- leverage the resulting artificial (because they have not yet been sued) cost advantage, and use potentially illegal practices, to recruit a new generation of smokers that, many years later as they start becoming ill, become a health care costs burden to the State?

- engage in
- wrongful conduct
- ~~Solving the Problem by Creating an Escrow Fund Against Future Liabilities for Potentially Illegal Practices.~~ The only way to ensure that the States would have some recourse against new manufacturers' imposing substantial future healthcare costs through irresponsible conduct was to create a mechanism requiring a "security deposit" against potential future liabilities. This was accomplished by the innovation of the "Model Statute", which States are permitted (but not required) to enact in conjunction with the settlement.

This model law provides that all non-participating companies place money into escrow (based on the number of packs they sell in the State in question) for potential claims the States may have against them in the future because of their potentially illegal practices. If the State does successfully sue them

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during the escrow period, the fund can be used to satisfy any judgment; if it does not, *the companies get the money back, with interest.*

Thus, if the non-participating company does not ~~violate the law~~, it is not penalized by the statute.

*engage in such conduct.
is not found to violate the law*

The agreement encourages States to pass this statute by protecting those that do so against an accelerated reduction in settlement payments that could otherwise apply if participating tobacco companies lose substantial market share. Because of this, States that have taken steps to guarantee recourse against non-participating companies' ~~illegal~~ conduct are protected against a potential diminution of their projected settlement pool.

Of course, any tobacco company can entirely *wrongful* avoid the effects of the model statute by signing the tobacco settlement agreement, contributing to the payments and agreeing to ~~employ the same standards of responsibility that~~ apply to the rest of the industry. Participation would also ensure that the State will not sue a company in the future based on the same claims that the settlement covers.

comply with its provisions, which already

To date, 44 states have passed statutes patterned after the model statute, and several additional tobacco companies (over and above the original four) have agreed to sign on to the agreement.

- *The Solution has Already Withstood Legal Attack.* The model statute approach is similar to existing laws covering situations where sellers of potentially hazardous products are required to post bonds, or contribute to trust funds, to insure against potential future liabilities.

The tobacco settlement agreement itself has already been reviewed and approved by more than 50 State and Federal courts. Moreover, since the signing of the MSA, several Federal courts – including the U.S. Court of Appeals for the Tenth Circuit – have rejected antitrust or constitutional challenges to it.

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