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Prepared Testimony of Alan B. Morrison
Before the House Committee on The Judiciary
Subcommittee on Courts and Intellectual Property
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PREPARED TESTIMONY OF
ALAN B. MORRISON
BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS AND INTELLECTUAL PROPERTY
WEDNESDAY, DECEMBER 10, 1997

Summary

H.R. 2740 should be rejected because it is unnecessary, unconstitutional, and unwise. Because H.R. 2740 is tied to the global settlement, which Public Citizen opposes for a variety of reasons, that is another reason to reject it. Public Citizen believes that it is imperative to maintain strong financial incentives to encourage plaintiffs' lawyers to take on difficult and important cases, with high risks of nonrecovery, against powerful corporations. There are no cases for which that need is greater than those against tobacco companies. It is only because of the contingent fee cases brought by states and private parties that the tobacco industry is now seeking a deal from Congress.

However, there are lawyers who seek unreasonable compensation, and Public Citizen has worked to prevent lawyers from obtaining excessive fees. But if the fees in the tobacco cases brought by the states are excessive, H.R. 2740 is the wrong way to deal with the problem.

H.R. 2740 is unnecessary because there is no reason to believe that there was an imbalance in the bargaining positions between the states and the lawyers who were being hired to take on tobacco litigation so that the bargains struck over fees were unfair. In addition, states have their own laws that prevent lawyers from receiving fees that are unreasonable, and there is no showing that federal price controls for one limited category of attorneys' fees are required.

H.R. 2740 is unconstitutional for two separate sets of reasons. First, there is no basis under either the Commerce or Spending Clauses for this law. It is not designed to "regulate" commerce because any commerce that is involved has already taken place in the form of tobacco sales and litigation. Thus, because this bill seeks to alter the effects of prior conduct, it is not a proper subject for Commerce Clause regulation. Nor can it be justified as a condition on federal spending. The money to be spent -- the proceeds of the tobacco settlement -- already belongs to the states and not the federal government since it was their lawsuits that were the primary catalyst for the settlement. In addition, any attempt to tie future medicaid payments to limits on attorneys fees would be an impermissible attempt to regulate past conduct

and not a proper use of the spending power.

The bill also runs afoul of the Tenth Amendment, which prevents the federal government from trammeling on the sovereign interests of the state, and the Fifth Amendment's prohibition on the taking of private property without just compensation. It offends the Tenth Amendment because it attempts to dictate to the states how much they can pay for legal services in a situation in which the states have a very strong interest in making that determination on their own. Furthermore, the only federal interest is the impermissible desire to transfer money from attorneys to the states, which is also the principal reason H.R. 2740 violates the rights of attorneys to enforce their fee agreements under the Takings Clause. Because the United States has threatened to exercise its subrogation rights to obtain a significant part of the settlement proceeds, and because reductions in fees paid to attorneys may enable Congress to lower medicaid or other payments to the states, the federal government is not a neutral bystander under this bill.

Finally, H.R. 2740 is unwise because it is not a bill to regulate attorneys fees generally, but applies only to one type of legal work: tobacco suits brought by states. Moreover, it restricts only the fees for the lawyers for the states, leaving the tobacco companies free to pay (and deduct from their taxes) any amount they choose to pay their counsel. It also sets fees at rates that are far below the market, especially considering the risk of the litigation, the skills required, and the expenses to be advanced. It also seeks to require attorneys to justify their fees on the basis of hours spent, when their contracts were on a contingent fee basis and many, if not most, of the attorneys did not maintain time records that would satisfy the statute. Even if these defects were not eliminated, and the rates allowed were reasonable, there is no basis for Congress to step in and attempt to alter the effect of contracts freely entered into regarding a matter in which the states, not the federal government, have the primary interest.

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Mr. Chairman, Members of the Subcommittee. Thank you for your invitation to appear here today to testify on H.R. 2740, a bill to limit attorneys' fees in the proposed tobacco settlement. Since Public Citizen strongly opposes that settlement, as well as the variations that have been supported by the Clinton Administration and others, we oppose any legislation such as H.R. 2740 that is based on that settlement.

I am an attorney with Public Citizen, having been with the Litigation Group since I cofounded it with Ralph Nader more than 25 years ago. Before explaining why we believe this bill is unnecessary, unconstitutional, and unwise, I first wish to give you some background regarding Public Citizen's involvement on the issue of excessive attorneys' fees and then describe the bill briefly.

Although we oppose this legislation, we too are concerned about the size of some of the fees that are being sought in the tobacco lawsuits that are being settled. In fact, there is no organization in the United States that has done more to limit the excessive fees by attorneys than the Public Citizen Litigation Group. Beginning shortly after I founded the group in 1972, we took on the representation of Lewis and Ruth Goldfarb in their antitrust challenge to the minimum fee schedule system of the Virginia State Bar under which lawyers were subjected to discipline if they charged less than the official rates set by the bar associations. Our lawsuit eventually led to the Supreme Court victory in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), holding that minimum fee schedules of lawyers are price fixing and therefore violative of the antitrust laws. Since that time, we have attacked the legal profession's attempts to monopolize the provision of legal services through its unauthorized practice rules, its attempts to deny consumers object to settlements on a variety of other grounds, particularly where class members receive little or not benefit from the deal). In virtually all of the cases, we were the only one arguing that the fees sought were excessive, and that a significant portion of those fees belonged to the class members and should not be paid to attorneys. In doing so, we have made ourselves extremely unpopular with many members of the plaintiffs' bar, including some considered to be the leaders of the bar, who, but for our efforts, would have received very large fees from these class action settlements. A summary of our activities in class action settlements, as of June 12, 1997, is being submitted for the record.

It is also significant that the defendants have almost never sided with us in these class actions, but have always acquiesced in the fees, no matter how excessive they may be. This is no doubt due to the fact that, in many of these cases, the relationship between class counsel and defense counsel is all too cozy, with the real victims being class members. It is obviously to the defendant's advantage to pay a large legal bill so long as the total cost of the settlement is kept down and class members are foreclosed from further litigation. While we have not always succeeded in achieving our goal of lowering fees, we have done so in a number of cases, and in virtually every case the courts have been compelled to analyze the issues very carefully.

Perhaps most significant for this bill is our effort in a state court case in Texas, which is not a class action, but in which we intervened solely to object to the amount of fees. The case involved the massive damages from polybutylene plumbing that was installed in millions of homes, but unfortunately did the one thing that plumbing should not do: produce massive leaks and water damage. The case in which we intervened, Adkins v. Hoechst Celanese Corp. Cause No.92-24674, was in the District Court for the 334th Judicial District in Harris County, Texas, and involved an attempt by the plaintiffs' lawyers, who represented more than 60,(XX) individual clients, to collect attorneys' fees and expenses of $108.8 million out of a cash settlement of $170million. After a two day hearing on fees, in which we were the principal objectors, the court reduced the amount to $10,024,179 in expenses and $33,115,164 in fees for a total of $43,139,343, or a reduction of approximately 60%, because it found that the fees were excessive and unreasonable as a matter of Texas law. The attorneys have appealed, but we believe that the decision will be sustained. A copy of the court's unreported opinion is being submitted for the record of this hearing. I would also note that this is one of the few cases in which we have been involved in which the defendants supported our objection to plaintiffs' fees, both at the hearing and in the appeals court.

H.R. 2740

Before explaining our objections to H.R. 2740, I want to explain clearly what it does and what it does not do since these elements form an essential part of our criticism of the bill. The bill limits attorneys' fees only in lawsuits brought by a state, only with respect to tobacco, only for attorneys for the state and not for the defendants, and only for those cases resolved by the proposed tobacco deal. It applies to cases that are settled and those that go to judgment, it applies to cases in the state courts (none of these cases is in the federal courts), and it applies to lawsuits in which the party contracting with the attorney is a sovereign state, not a minor or an individual suffering from mental incapacity or other disability. The statute applies only to existing lawsuits and similar ones that might be brought with respect to tobacco and that would be settled by the proposed tobacco deal. It has no impact of any kind on any future lawsuit but affects only cases already on file, some of which have now been finally settled, including partial payment of attorneys' fees.

The operative portions of the bill limit the fees that the states (the plaintiffs) may pay their attorneys to $150 an hour for actual time spent, plus actual expenses. The bill would also require the filing of detailed records of hours, even though most of these cases were brought under a contingency contract, and the lawyers are likely not to have kept time records at all. It also requires the public disclosure of all fee agreements, hours, and expenses, even though the agreements would be void as a result of this bill.

The sponsors of H.R. 2740 are clear about the purpose of this legislation: they want the money to go for public health benefits rather than to attorneys, and in particular they support efforts to persuade children not to smoke. The question before this Committee and ultimately the Congress is not whether money should go to prevention and cessation of smoking - we strongly support all of those efforts -- but whether taking money from attorneys who have entered into solemn contracts with states and have produced benefits to the states is a proper function for the Congress. For the following reasons, we believe it is not.
There Is No Need for This Legislation.

A fundamental premise of all legislation, particularly that which interferes with the free market and private contracting arrangements, is that there is some necessity for the government to step in and legislate, instead of allowing the parties to negotiate for themselves. Thus, when laws were enacted to limit the number of hours that children could work, to establish minimum wages, and to create safe conditions for workers, those decisions were made only after legislatures carefully analyzed the existing market structures and saw that the beneficiaries of these laws lacked the bargaining power to negotiate on their own. Therefore, the first question to be asked is not where would Congress like the money from the tobacco companies to go, but is there some reason to believe that the states were not able to negotiate reasonable fee contracts for themselves?

I have seen one or two of the actual contracts between states and outside counsel and have followed the press accounts about them, from several propositions are clear. First, not all of the contracts are the same, with various states negotiating various ranges of fees, in some cases dependent upon the level of recovery, while in others the fees applied an agreed percentage across the board. Second, all of the agreements are purely contingency contracts, which means that the lawyers do not get paid or even get their expenses reimbursed in most cases unless they prevail by trial or settlement, no matter how much time they may have put into the litigation.

Third, given the enormity of the financial and time commitments involved, there were initially very few lawyers who were willing to take on these cases, and so it is hardly surprising that some states may have entered into agreements with no cap whatsoever or without a declining rate of fees based on the size of the recovery. As this Committee is well aware, the tobacco industry had never lost a case and never paid a money judgment, in settlement or otherwise, thereby puffing these cases into a category of highest risk, with the certainty that the defense would be fierce and without limitation. In addition, there are apparently significant differences among the fee agreements depending on whether the State Attorney General's office is also participating in the litigation and the time at which the case was brought relative to the time of the settlement. The point of this discussion is not to approve or disapprove a fee agreement in particular case, but to demonstrate that there is no reason to think that states as a whole were uniformly in such a bad bargaining position that they had no choice but to accede to whatever demands class action lawyers made on them. Moreover, existing state laws provide various forms of protection against unreasonable contracts, and there is no reason to think that the contracts here do not comply with the various state laws. Thus, there are applicable procedures, including in some case competitive bidding and in some cases sole source contracting, applicable to state agencies generally. To the extent that those do not apply to legal services for which a state contracts, that is not because the state does not have the power to make those restrictions applicable, but because it has chosen not to do so for its own good reasons. It may be that states should rethink their policies on contingency fee agreements, but there is no reason for Congress to dictate that decision to them. In addition, even for contracts that are validly created, state courts may have the power to interpret them or set them aside in whole or in part on grounds that the fees actually being paid are unreasonable or unconscionable. The Adkins case described above establishes that state courts are fully capable of setting aside signed fee agreements resulting in fees that are wholly unreasonable. In addition, a state court judge in Florida, involving one of the tobacco cases that will be subject to H.R. 2740, has determined that the fee contract with the state produces unconscionable fees and that he would not enforce it. Whether that judgment will be sustained in the higher courts of Florida is not significant; rather, what matters for this Committee is that the state courts and state laws are available to assure that, as the code of professional responsibility applicable to every lawyer in the country provides, lawyers may not charge unreasonable fees, whether the client is a state or a private party.

There is one other reason why H.R. 2740 is unnecessary: the proposed tobacco deal of June 20, 1997, is an unwise, unnecessary, and in many respects probably unconstitutional concept that should not be enacted into law. Since its announcement, Public Citizen has strongly opposed the settlement and continues to oppose it, even with the proposed modifications suggested by President Clinton and some public health organizations. We oppose it both because it is not strong enough in its public health benefits, and because it insists upon a trade-off of the rights of individuals, who have already been victimized by tobacco and are and will be suffering great damages in the future, to seek justice in our court system, as the price for the industry claiming it will not continue to attempt to seduce children into starting to smoke. This trade-off, which is explained more fully in an article that I authored in the Legal Times of Washington of November 10, 1997, a copy of which is attached, constitutes an undue interference with state law, of which H.R. 2740 is a similar manifestation. Both the Legal Times article and a detailed statement that I gave at a symposium at Harvard Law School this summer on the issues of immunity under the proposed tobacco deal can be found in Public Citizen's Web site at www. citizen. org. Since H.R. 2740 is intended to be enacted only if the tobacco deal goes forward, and since we expect that Congress will reject the deal, H.R. 2740 will fall by the wayside with it.

H.R. 2740 is Unconstitutional.

Even if H.R. 2740 were necessary, it should be defeated because it is almost certainly unconstitutional in a number of respects, that fall into two basic categories. The first involves the absence of any basis for congressional action, under the limited grant of authority to legislate under Article I of the Constitution, in particular under the Commerce and Spending Clauses. The second set of objections assumes that Congress has the power under Article I to enact H.R. 2740, but results in a finding of unconstitutionality because the bill would violate both the both Amendment and the Takings Clause. We deal with these two sets of objections in turn.

A. Absence of Article I Authority.

Under our constitutional system of federalism, Congress has only the power to legislate on subjects set forth in Article I, unlike the states which have the right to legislate on any subject whatsoever within their geographic reach. The principal basis on which H.R. 2740 is likely to be justified is the Commerce Clause. We recognize that tobacco moves in commerce and its sale and use could be regulated, but that does not end the inquiry. The problem for H.R. 2740 is that it does not regulate tobacco or anything else that moves in commerce, but attempts to set price ceilings on fees for cases that are based entirely on the laws of a single state, are brought by a single state, limited to the damages to that state,and are tried in state courts. The fact that money may move in commerce is no answer because if that were sufficient grounds to invoke the Commerce Clause, there would be no limits on the power of Congress under the Commerce Clause. Perhaps even more significant is the fact that there is no case of which we are aware in which the regulatory power of Congress has been exercised, let alone upheld, for a transaction that is already completed and there are no future effects on commerce. Until 1995, it might be argued that there were no longer any limits on the right of Congress to invoke the Commerce Clause to do whatever it wanted, but the Supreme Courts decision in United States v. Lopez.514 U.S. 549, 115 S. Ct 1624, changed that assumption by striking down a statute that it made it a federal offense to possess a gun in a school zone. The fact that guns regularly move in commerce and the possibility that even the gun involved in Lopez may have so moved were not enough to alter the decision because the statute imposed no commerce requirement, nor did Congress make any findings about commerce and firearms and the relation between their use and their proximity to schools. The reach of Lopez is not entirely clear. The Court based its decision in part on the fact that Congress had made no findings of impact on interstate commerce, but there are many who believe that the opinion can be read as saying that, even had Congress purported to do so, those findings could not have been upheld. In our view, at the very least, Congress must spell out in the law itself the connection with commerce since, like Lopez, it is far from obvious exactly how interstate commerce will be affected by voiding contracts entered into by the states with attorneys in tobacco litigation that has already been concluded by the time this bill will become law. Even if Congress can make such findings, we doubt that they could be sustained, but that can only be determined once Congress purports to connect this conduct with interstate commerce. It has also been suggested that Congress might justify these restrictions on attorneys' fees under its spending power by making certain payments to states conditional upon the states' agreement to abide by H.R. 2740, relying on South Dakota v. Dole, 483 U.S. 203 (1987). In that case, the Supreme Court upheld a condition imposed on federal grants for highway funds that the states raise their drinking age to 21.

Once again there are serious difficulties with applying that approach in this case for the same basic reason the Commerce Clause difficulty arises: the statute is retroactive only and does not purport to govern future conduct. Thus, this is not a law that would condition the rights of states to receive future medicaid benefits upon their agreement to enter into only contracts that provide for reimbursement at the rate of $150 an hour for future tobacco litigation. Even if the statute made the right to future medicaid payments contingent upon compliance with H.R. 2740, all of the applicable conduct has already taken place, and thus the future Quid _pro quo justification given in South Dakota v. Dole cannot be applied here.

Nor could Congress condition the receipt of the settlement proceeds on reduction in the attorneys' fees since, at least for Florida and Mississippi, those states already have binding settlement agreements, and therefore the money is not even arguably federal funding as it would be for future medicaid benefits. Indeed, even for the other states, their rights to receive money from the settlement are entirely state based rights, and the attempt to use medicaid as a justification would be seen by a court as an obvious ruse, since the source of the settlement funding is the leverage created by the state court actions and not by the federal government.

It is possible that others will seek to justify H.R. 2740 on other grounds, but to date these are the only ones of which we are aware. But if those justifications are put forth, they are likely to run into the same barrier as is present in the two justifications offered so far: Congress is attempting to retroactively adjust rights instead of legislating prospectively.

B. Other Constitutional Barriers

There are at least two other sets of constitutional barriers that H.R. 2740 would have to surmount before it could be sustained: those under the Tenth Amendment and the Takings Clause of the Fifth Amendment. We deal with each in turn. As described above, this legislation has a retroactive effect, and hence its proponents have a special burden because of the bill's interference with settled expectations that prospective legislation would not. For purposes of this discussion on the Tenth Amendment, however, we assume that, even if Congress were to make this legislation wholly prospective - i. e. , the states were prohibited from entering into contracts for tobacco litigation which paid more than $150 an hour for any attorney -- that would clearly falter under recent interpretations of the Tenth Amendment.

As this Committee is undoubtedly aware, in a series of cases, the Supreme Court has breathed considerable new life into the Tenth Amendment, which provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." That litigation course began with several cases involving Congress's extension of the minimum wage and overtime provisions of the Fair Labor Standards Act to employees of the states. In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), the Court upheld the federal power to set minimum wages for state employees. As I discuss below, there is at least some question as to whether Garcia continues to be good law, but even assuming it is, it plainly does not apply here for several reasons.

First, the goal of Garcia, to equalize wages in the public and private sectors, has no applicability here when the sole focus of the 'wage controls' is on a single class of attorneys representing states in a single category of cases -- medicaid type tobacco litigation. It is one thing for the Court to uphold wage rules imposed on states as part of the general regulatory scheme, but it is quite another to insist that states limit their spending for only a single category of attorneys' fees without regulating the state or anyone else in any other payments for lawyers.

More importantly, however, there are three recent decisions of the Supreme Court, all of which make clear that a majority of the current Court sees state sovereignty as a very important concept, and it is unlikely to allow interference with states rights except in the most extraordinary circumstances. While the facts and laws at issue in each of the three cases are distinguishable from those that will be presented in a challenge to H.R. 2740, all three of them stand for the proposition that the interests of the states will be zealously protected by the Supreme Court. See Gregory v. Ashcroft, 501 U.S. 452 (1991); New York v. United States, 505 U.S. 144 (1992), and Printz v. United States, 117 S. Ct. 2365 (1997). Two aspects of H.R. 2740 stand out and strongly suggest that the Court would find it unconstitutional under the Tenth Amendment.

First, there is a powerful state interest in deciding for itself whether and on what terms and conditions it wants to employ outside counsel of its choosing, to be governed by state law, in actions to recover vast sums of money for the state treasury, in a situation involving extremely high risk of non-recovery. In contrast with the interest in Printz, where the Brady law required only that law enforcement officers conduct background checks in order to determine whether applicants who purchased hand-guns might be disqualified from doing so, the interest of the state here is far greater. Indeed, in Printz, there were no penalties if a state official failed to comply with federal law, and the provision was an interim measure lasting only a few years until the more comprehensive federal system could be put in place. In fact, the burden was so minimal that most state officers were complying with the law, yet the Supreme Court struck it down. The massive interference with state contracting rights here would be far harder to justify than the minimal intrusion in Printz. Second, the federal interest in telling states that they should pay less for their legal fees than the states have willingly agreed to do is difficult to discern if it exists at all. The decision to bring these cases was made entirely by the states with no support or involvement of the federal government whatsoever. To be sure, the federal government has now claimed a subrogation right to some of 'these funds, and the existence of these massive payments to the states may enable the federal government to reduce its medicaid payments in the future, but those are hardly the kind of federal justifications that were found in the minimum wage statutes in Garcia, in the anti-age discrimination provisions in Ashcroft, in the control of radioactive materials in New York, or in the prevention of a felon from obtaining guns in Printz. By contrast, the federal interest in diverting payments from attorneys to the states is itself a cause of suspicion, as I will argue in the next section of this testimony, and not the kind of justification needed under the Tenth Amendment. In fact, if the saving of federal dollars were an appropriate justification, that would have been enough to sustain the laws in both New York and Printz when in fact the basis for the Court striking down these laws was that the Congress was attempting to commandeer states into doing things which, if they needed to be done at all, should have been done and paid for by the federal government. Put another way, the most likely justification for this law -- its economic benefits from depriving attorneys of a large portion of their fees -- only underscores its inappropriateness and its unconstitutionality under the Tenth Amendment. H.R. 2740 also violates the rights of the attorneys whose contracts would be abrogated because of the Takings Clause of the Fifth Amendment to the Constitution, which forbids the taking of private property without just compensation. It is clear that, had a state tried to pass a law such as this, which in effect voids an existing contract between the state and attorneys for the state, there would be no question that it would violate the Contracts Clause of the Constitution. The only question is whether Congress can do this without violating the Takings Clause which is intended to achieve similar ends: to prevent the government from interfering with property rights, including those protected by contract. See E. P. Concrete Pipe & Products of Calif. Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 642 (1993). - At the outset, it is important to note that this is not a situation in which the United States has disclaimed all economic interest in the results of H.R. 2740. As noted above, the United States has formally notified the states that it is seeking subrogation for its share of the medicaid payments that states will receive though their tobacco settlements. If the states have to pay out 25% in attorneys' fees, for example, there will be less for the federal government to receive back. Similarly, even if the subrogation argument were not present, the massive influx of tobacco money into the state coffers will undoubtedly cause some in Congress to question the level of medicaid and/or other funding that the states will receive from the federal government in future years, thereby creating a second economic incentive for Congress to take money from attorneys and nominally give it to the states. In short, the United States is hardly an innocent bystander with respect to the outcome of any dispute between lawyers and states over attorneys' fees in the tobacco settlement. Second, this is not a typical regulatory statute of the kind that have been unsuccessfully challenged under the Takings Clause. Most obviously, it 'regulates' only past conduct and does not deal with future relations, which is the hallmark of virtually all regulatory statutes. It does not say that henceforth all attorneys fees shall be set at the rate of $150 an hour, nor does it even do that for lawsuits against tobacco companies generally or even those brought by the states in the future. It simply says that, with respect to lawsuits that have already been concluded, the fee can be no more than $150 an hour.

Third, unlike the other regulatory cases, where there are normally benefits as well as costs imposed on those who are complaining about the legislation, here all of the costs are imposed on the attorneys, and they receive no benefits whatsoever from this or any other legislation. Consider Mississippi where the case has already been fully resolved, and there is nothing left for the federal government to do. Under this legislation, attorneys will have their fees drastically reduced (and there is no doubt that this will occur since that is the very purpose of the law) with no conceivable benefit of any kind accruing to them. We know of no such one-sided statute, let alone one that acts only retrospectively. Particularly given the clear statement of the purpose of the legislation both in the law itself and in the Dear Colleague letter from its sponsors -- to transfer money from the attorneys to the states - and given the economic interest of the federal government in enlarging the pot for the states, this is a classic case of taking of private property without any compensation, let alone just compensation. As such, it cannot be defended under the notion that it is the kind of regulation to which attorneys and others are regularly subjected under our system of government. Therefore, H.R. 2740 would almost certainly fall as an unconstitutional taking.

The Bill Is Also Unwise.

In addition to the lack of necessity and the almost insurmountable constitutional problems, H.R. 2740 should be rejected because it embodies bad public policy. The lack of wisdom in H.R. 2740 can be illustrated by changing its provisions slightly, making it applicable only to future cases, only to those brought by states against the tobacco industry, and only for those fees paid by states to their lawyers. Why would any legislature, Congress or otherwise, pass such a limited measure? Why would it be limited to suits brought by states, and why would it be limited to suits against the tobacco industry?. And if the cost of tobacco litigation is the problem, why does it deal only with fees paid by the plaintiffs' lawyers and not those paid to defense counsel? And why only lawyers? There were many other high priced professionals, such as doctors, scientist, and economists, who were paid very handsomely by both sides in these cases, yet they are escaping all price controls.

Second, why $150 an hour now rather than $100 or $50, all of which are multipliers of the $12. 14 per hour wage earned by the average working person in the United States, cited by the sponsors of this legislation in their Dear Colleague letter?. If the objective is to put as much money as possible into the hands of the states and take as much as possible out of the hands of lawyers, what is the limiting principle that led to the $150 an hour figure? Surely, it cannot be that it is the figure which is representative of what the trial bar would command for handling a case like this, even if the fees were paid in advance and without any contingency. Surely, the $150 per hour rate is far less than what defense counsel are paid, and they are paid regularly and their expenses promptly reimbursed, with no risk of nonpayment whatsoever. It is inconceivable that anyone would take on a case of this magnitude, with this risk, knowing that the maximum recovery was $150 an hour, particularly when overhead, including cost of paying associates, secretaries and paralegals, would likely consume most of that rate, leaving very little for the attorneys who are running the case.

We wish to be clear that, although we think that the $150 an hour fee is wholly unreasonable, that is not the principal basis for our concern. We would also be opposing this legislation if the fee were $500 or $1500 an hour. The reason is that it is not the role of the federal government to replace the marketplace in the absence of the most compelling circumstances, and surely no one has made a case for mandatory price controls only for plaintiffs' lawyers in tobacco litigation brought by states. Federal intervention in this manner is particularly inappropriate because H.R. 2740 would compel the attorneys to justify their fees based on the hours spent, and most if not all of these attorneys did not maintain the necessary records, in large part because their agreements with the state were on a percentage of recovery, not hourly basis. As a result, they may be able to recover no fees at all if the substantiation requirement is strictly followed. We also wish to be clear that we are taking no position on whether the fees either in the contracts themselves or those which might be awarded as a result of an arbitration or court proceeding are in any way proper. In our experience, defendants all too often are willing to pay fees far in excess of what is reasonable simply to get rid of troubling cases, and we have no reason to doubt that the tobacco industry is any different from other defendants in this regard.

In our view, the proper way to decide whether the fees being sought are excessive is not through a legislative proceeding in Congress, but in the ordinary course of proceedings in the courts where fee matters are regularly handled under the usual rules described above. Only after the fee applications have been fully set forth on the record, and the justifications for the amounts sought been made clear, would we or anyone else be in a position to make a determination as to whether the amounts sought are proper. The only thing of which we are certain is that the Congress of the United States is not the appropriate place for that determination to be made for the fees in this or any other case.

CONCLUSION

H.R. 2740 is a rare statute for which there is no need, which has major constitutional flaws, and whose policies are unwise on their own. Any one of these reasons would be sufficient to reject H.R. 2740, and in combination they should clearly produce its demise. Moreover, its supporters defend it only as part of a larger tobacco deal which also should be rejected. In short, Congress has no business upsetting settled expectations of contractual relations between states and their attorneys in tobacco litigation or in any other matter, if there is a problem, the states and the courts can handle it. H.R. 2740 should be promptly rejected by this Committee, and nothing further should be heard from it. Thank you Mr. Chairman, and we stand ready to assist the Committee further.