

# The U.S. Tobacco Legislative Imperative

## *A Response to Stanton Glantz*

by William Novelli and Matthew Myers

**T**HIS PAST YEAR CONGRESS SERIOUSLY DEBATED and came very close to passing comprehensive national tobacco control legislation. If we are to be more successful in the future, we must understand why this opportunity fell short and plan where to go from here.

The legislative debate also exposed divisions in the public health community that prevented us from speaking clearly and doing more to keep the debate focused on saving lives and reining in the outlaw behavior of the tobacco industry. It is vitally important that we understand the choices that divided public health advocates, and take steps to prevent the tobacco industry from using any diversity in views in the future to undermine our ability to act decisively.

The process that led to the effort to pass comprehensive legislation started in April 1997, when the tobacco industry began serious negotiations with the state attorneys general who had sued the industry in order to recoup Medicaid funds the states had spent treating tobacco-related diseases. The result of the negotiations was a comprehensive agree-

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ment in which the tobacco companies agreed to advertising and marketing restrictions; restrictions on youth access to tobacco; tough health warnings; a \$500 million per year public education campaign; funding for state and local tobacco control programs; smoking cessation assistance; regulations against environmental tobacco smoke; recognition of the authority of the Food and Drug Administration (FDA) over tobacco products; and stiff penalties if tobacco use among children did not drop by specified levels.

The tobacco industry also agreed to drop court challenges to FDA regulation of tobacco and to the Environmental Protection Agency's risk assessment of second-hand smoke, and to pay \$365 billion to be divided between federal public health programs and payments to the states.

In return, the attorneys general agreed to settle their lawsuits as well as pending private class action suits. They further agreed to limitations on future lawsuits, including protection for the tobacco industry from class action suits and punitive damages, and an annual cap on the amount the industry could be forced to pay out in court judgments.

This agreement provoked intense opposition from some tobacco control advocates that focused on the limits the agreement placed on FDA jurisdiction, the adequacy of the payments by the industry and the restrictions placed on litigation against the tobacco companies.

In April 1998, the Senate Commerce Committee passed, by a 19 to 1 margin, a bill sponsored by Senator John McCain that was appreciably stronger than the original agreement. It gave full authority over tobacco products to the FDA, increased the per pack cost to \$1.10 and raised the penalties if youth reduction targets were not met. It also eliminated the specific provisions that made it more difficult for victims to recover damages, including the restrictions on class action suits and on punitive damages. While the bill retained an annual cap on the industry's maximum liability

annually from court judgments, the cap was increased from the \$5 billion in the June 1997 agreement to \$6.5 billion.

Initially, it appeared that the McCain bill would pass the Senate, but it faced opposition from those Senators who objected to the expanded role that it gave to the government and to the per pack price increase. There was also less support from the public health community than might have been expected, largely because of the opposition of some of its members to the annual caps, desire for larger penalties against the industry and for a higher per pack price increase. On June 17, 1998, the bill failed by three votes.

The primary responsibility for the bill's defeat lies with the tobacco industry and its supporters in Congress. The industry again proved the power of campaign contributions and a massive advertising and public relations effort targeted at defeating the bill. It is unfair to blame the public health community for the bill's failure, but the divisions within its ranks aided the efforts of the bill's opponents. Therefore, we need to better understand the choices that weakened the public health community's voice.

There was little disagreement among public health experts about what policies should be enacted to curb tobacco use, but there were strong differences about what was achievable and about when to compromise. Some felt that the power of tobacco control advocates and the public support for action would only grow over time. Therefore, they felt that there was little urgency for Congress to act quickly. Many also believed that compromise was unnecessary because tough legislation could be enacted over the opposition of the tobacco industry. Still others believed that pursuing change at the state level would be more effective.

We supported the federal legislative effort because we believed that there was a serious need for a national tobacco control policy, and that the unique combination of circumstances that created the pressures that led to this opportunity might not be sustained. While we felt that the McCain bill was not perfect, we believed that it was the strongest most far-reaching legislation to be introduced that could be passed. Given the makeup of Congress and the continuing power of the tobacco industry, along with our concern that it would be difficult to maintain the public's intense interest in tobacco control over the long run, we believed that this was an opportunity that should be seized.

We also felt that there was a need to act now because tobacco use is rising among children and has not been falling among adults to the extent it had previously. Further, only a few states have enacted strong tobacco control policies and the state battles that lie ahead remain difficult and are likely to produce uneven results. We also were concerned that many of the state attorneys general would seek to settle their cases on terms far weaker than the June 1997 agreement rather than go to trial, and that there was a chance the FDA could lose in court.

The most divisive issue was the legislation's treatment of the tobacco industry's liability. Part of this debate concerned disagreements about what was likely to be achieved in the courts. Some believed that victory in the courts was almost inevitable, would result in the release of additional damaging

industry documents and massive punitive damages, and would weaken the tobacco industry to a point that it could no longer exert undue influence on the political process.

We supported comprehensive tobacco control legislation because we were skeptical about the likelihood and ability of the courts to fashion thoughtful, uniform public health policy whether or not the courts ordered the tobacco companies to pay substantial damages. In addition, given that some of the opposition to the McCain bill came from those who oppose government regulation and higher taxes across the board, the fact that the tobacco companies had been weakened by court judgments would not necessarily lead to the legislative implementation of policies as strong as those in the McCain bill. Furthermore, if litigation forced one or more tobacco companies out of business, a new company would step in to fill the market vacuum. Finally, we also believed that victory in court could not be taken for granted. We were concerned that the impact of significant judicial losses might lessen the pressure, which had forced the tobacco industry to make important public health concessions.

The divisions over the tobacco industry's liability went beyond disagreements over the power of the courts, and into the goals to be accomplished through legislation and litigation. Everyone agreed that the tobacco industry does not deserve protection from liability, but as public health advocates, we believed that we should measure each legislative proposal against specific public health goals and principles of social justice, even proposals that included compromise.

From a public health perspective, litigation is a tool to reduce the addiction and death caused by tobacco. To accomplish these goals, litigation can and should make the tobacco industry pay for its past wrongdoing and compensate its victims. It should also serve as a deterrent to future wrongdoing, as a source of information about past misdeeds, and as a mechanism for making the tobacco industry meet accepted business standards.

Not all legislative compromises concerning the tobacco industry's liability, however, undermine these goals. Nor do they necessarily grant the tobacco industry immunity. Some segments of the public health community opposed all legislation that included any liability compromises concerning the tobacco industry. They held this position independent of the legislation's potential positive impact on public health, even if the legislation did not curtail an individual's ability to sue and fully recover damages and even if the legislation did not curtail the judicial system's ability to serve as a deterrent to future wrongdoing. The tobacco industry cited these positions when it argued that the public health community was more interested in promoting the prohibition of tobacco products and the punishment and destruction of the tobacco industry than in promoting the public health.

In summary, a year that began with the opportunity to enact policies to reduce the death toll from tobacco ends with no concrete results. While there will be continued opportunities for progress at the local, state and federal levels, we still need a comprehensive tobacco control policy that will protect people nationwide and that will rein in the tobacco industry. This must be our public health goal. ■