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Smoke and Mirrors: Florida's Tobacco-Related Medicaid Costs May Turn Out to Be a Mirage

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Smoke and Mirrors: Florida's Tobacco-Related Medicaid Costs May Turn Out to Be a Mirage

"Florida's sunshine will surely clear the smokescreen that the tobacco companies have put up for so long."

—Lawton Chiles, Governor of Florida¹

"We don't intend to lose."

—Daniel W. Donohue, Deputy General Counsel for R.J. Reynolds Tobacco Co.²

I.	INTRODUCTION.....	1062
II.	FLORIDA CONFRONTS BIG TOBACCO	1066
	A. <i>Laying the Groundwork: Florida's Cigarette Habit and the Legislative Response</i>	1066
	B. <i>Florida's Case Against Tobacco</i>	1069
	C. <i>Approval of the Case and the MTPLA by Florida's Supreme Court</i>	1070
III.	PROOF OF DAMAGES	1071
	A. <i>Use of Statistical Evidence as Proof of Damages In-Fact and to Show Extent of Injury</i>	1072
	B. <i>Calculating Compensatory Damage Awards</i>	1073
	C. <i>Reduction of Damages</i>	1076
	1. Calculation of Savings from Smokers' Lower Life Expectancy	1078
	2. The Collateral Source Rule	1079
	3. Cigarette Excise Taxes Offset Damages	1081
	D. <i>Florida's Analysis</i>	1082
IV.	A BETTER SOLUTION	1084
	A. <i>Require Safer Cigarettes</i>	1084
	B. <i>Pass National Preemptive Legislation and Develop a Settlement Fund</i>	1085
	C. <i>Raise National Excise Taxes</i>	1087
	D. <i>Benefits to All</i>	1087
V.	CONCLUSION	1088

1. Press Release, Office of the Governor, State of Florida 1 (Aug. 9, 1996) ("Press Release of August 9, 1996").

2. Mark Hansen, *Capitol Offensive*, 83 ABA J. 50, 53 (Jan. 1997). Mr. Donohue characterized Florida's action as lacking "merit in law or fact." *Id.*

I. INTRODUCTION

Since the 1950s, anti-tobacco forces and the United States government have widely publicized the harm that the consumption of cigarettes can cause to humans.³ Smoking causes diseases of the oral cavity, cardio-pulmonary system, larynx, and bladder.⁴ In addition, the use of tobacco may also be related to sterility, ulcers, cancers of several internal organs,⁵ and even blindness.⁶ The severity of the consequences increases with the amount of consumption.⁷

Experts estimate that 400,000 Americans die each year from smoking,⁸ almost one out of every five deaths.⁹ In addition, the Surgeon General reports that as many as 2,400 deaths occur annually because of the inhalation of second-hand smoke.¹⁰ Such large numbers contrast sharply with the recent increase in health consciousness among so many Americans.¹¹ Although consumption of cigarettes is

3. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 *Stan. L. Rev.* 853, 856-57 (1992).

4. Elizabeth A. Frohlich, *Statutes Aiding States' Recovery of Medicaid Costs from Tobacco Companies: A Better Strategy for Redressing an Identifiable Harm?*, 21 *Am. J. L. & Med.* 445, 446 (1995). In spite of overwhelming evidence supporting this conclusion, *id.* at 445, tobacco companies continue to assert that no study has ever conclusively shown smoking to be injurious. Hansen, 83 *ABA J.* at 50 (cited in note 2). The companies also continue to claim that nicotine is not addictive. *Id.*

5. Frohlich, 21 *Am. J. L. & Med.* at 446 (cited in note 4).

6. Doug Levy, *Smoking Found to Increase Sight Risk*, *USA Today* 1A (Oct. 9, 1996) (discussing risk of macular degeneration and resultant loss of vision attributable to smoking).

7. Jane G. Gravelle and Dennis Zimmerman, *Cigarette Taxes to Fund Health Care Reform: An Economic Analysis*, CRS Report for Congress 6 n.9. (Congressional Research Service, 1994) ("CRS Report for Congress") ("[T]he magnitude of external effects from tobacco depends in part on the amount of exposure in packs per day and the number of packs per day.").

8. J. Michael McGinnis and William H. Foege, *Actual Causes of Death in the United States*, 270 *JAMA* 2207, 2208 (1993); Timothy Noah, *How to Reduce Deaths From Tobacco? Duh. Take the Toxic Stuff Out of Cigarettes*, *U.S. News & World Rep.* 65-66 (Dec. 30, 1996). This is greater than the combined totals of deaths caused by alcohol, suicide, fire, automobile accidents, and HIV/AIDS. *Id.* at 65.

9. McGinnis and Foege, 270 *JAMA* at 2208. (cited in note 8).

10. Willard G. Manning, et al., *The Cost of Poor Health Habits* 4, 83 (Harvard U., 1991) (citing *The Health Consequences of Involuntary Smoking: A Report of the Surgeon General* (Public Health Service, 1986)). The effects of second hand smoke are less certain than those of personal consumption of cigarettes. Gravelle and Zimmerman, CRS Report for Congress at 10 (cited in note 7). Florida's lawsuit does not refer to second-hand smoke directly, perhaps because any incremental health care expense related to the exposure of second-hand smoke cannot be reasonably calculated. Manning, et al., *The Cost of Poor Health Habits* at 69-72 (cited in this note) (discussing difficulty in ascertaining the effect of second-hand smoke). In any case, one study has shown that second hand smoke generates less of an expense to society than leading a sedentary lifestyle. *Id.* at 11. See also Mike France, et al., *The World War on Tobacco*, *Bus. Week* 99 (Nov. 11, 1996). Phillip Morris recently took advantage of this information and initiated an advertising campaign in Western Europe asserting that second-hand smoke is less harmful than drinking whole milk or eating cookies. *Id.*

11. Manning, et al., *The Cost of Poor Health Habits* at 1 (cited in note 10). Tobacco companies have, of course, sought to counter the image of cigarettes as unhealthy. *Id.* ("Phillip

declining in the United States by 1.2% annually,¹² the difficulty of quitting is a factor in the continued high incidence of tobacco-related deaths.¹³

The federal government's response to smoking-related illness, albeit somewhat belated,¹⁴ has been to consistently increase the regulation of cigarettes. In 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act, which required warning labels on cigarette packaging.¹⁵ Congress banned the advertisement of cigarettes on television in 1970.¹⁶ In 1984, Congress required billboards advertising cigarettes to display the same warnings previously required on packages of cigarettes.¹⁷ Most recently, in 1995, the Food and Drug Administration asserted it had broad jurisdiction to regulate tobacco as a drug.¹⁸

Morris now publishes . . . a free magazine extolling the 'smoking lifestyle' and championing 'smokers' rights.'").

12. *Outlook*, U.S. News and World Rep. 24 (Nov. 25, 1996). *Id.* Per capita consumption has dropped from 4,345 cigarettes annually in 1963, before the advent of the Surgeon General's warnings on advertisements and retail sale packages, to the 1996 level of 1,891. See also note 15 and accompanying text.

13. Nearly 70% of all smokers want to quit, but cannot. *Outlook*, U.S. News & World Rep. at 24 (cited in note 12). This inability to kick the habit may have something to do with the fact that cigarettes are as addictive as heroin. Frank J. Vandall, *Reallocating the Costs of Smoking: The Application of Absolute Liability to Cigarette Manufacturers*, 52 Ohio St. L. J. 405, 406 (1991). See also Press Release, *Excerpts of Documents and Statements by Cigarette Companies*, Office of the Governor, State of Florida 1 (quoting an internal Brown & Williamson memorandum of July 17, 1963, "Nicotine is addictive") (on file with the Author).

14. Some states prohibited tobacco use altogether in the late nineteenth and early twentieth centuries. Jendi B. Reiter, *Citizens or Sinners?—The Economic and Political Inequity of "Sin Taxes" on Tobacco and Alcohol Products*, 29 Colum. J. L. & Soc. Probs. 443, 445 (1996). Indeed, as early as 1601, smoking was seen as "a custom loathsome to the eye, hateful to the nose, harmful to the brain, [and] dangerous to the lungs." Daniel W. Donohue, *The States Are Asking Courts to Abolish Principles of Factual and Legal Proximate Cause*, 83 ABA J. 56, 56 (Jan. 1997) (quoting King James of England).

15. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965), codified as amended at 15 U.S.C. §§ 1331-41 (1994 ed.). This legislation has been amended since then to increase the efficacy or at least the stridency of the required warnings. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 88 (1970), codified as amended at 15 U.S.C. § 1333; Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 2200, 2201-02 (1984), codified as amended at 15 U.S.C. § 1333. Presently, the Comprehensive Smoking Education Act requires that four health advisories be rotated, one to appear in all cigarette advertisements and on all cigarette packs. *Id.* § 4, 98 Stat. at 2201-03, 15 U.S.C. § 1333.

16. Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 2, 84 Stat. 87, 89 (1970), codified as amended at 15 U.S.C. § 1335 (making it unlawful to advertise cigarettes on any electronic medium "subject to the jurisdiction of the Federal Communications Commission").

17. Comprehensive Smoking Education Act, Pub. L. No. 98-474, § 4, 98 Stat. 2200, 2202, codified as amended at 15 U.S.C. § 1333.

18. Analysis Regarding the Food and Drug Administration's Jurisdiction Over Nicotine-Containing Cigarettes and Smokeless Tobacco Products, 60 Fed. Reg. 41,453 (Aug. 11, 1995). See also *id.* at 41,488, 41,536-37 (discussing pharmacological and physiological nervous system effects of nicotine). The FDA makes it clear, however, that it presently only seeks to regulate tobacco sales to minors. *Id.* at 41,786. Thus far, the FDA has restricted the sale of tobacco from

Individual plaintiffs have repeatedly sought damages from tobacco companies for illnesses allegedly caused by smoking. However, these efforts have generally failed.¹⁹ Such lawsuits can be grouped into two "waves."²⁰ The plaintiffs in the first wave of suits relied upon negligence and warranty theories of recovery.²¹ Few of the first wave cases went to trial and none was successful.²² In 1965, the American Law Institute effectively ended the first wave of tobacco litigation by publishing the Restatement (Second) of Torts section 402A comment i.²³ Comment i specifically absolved tobacco producers from liability under section 402A unless the plaintiff could show a manufacturing defect causing a cigarette to be more injurious than a consumer would ordinarily anticipate.²⁴

The second wave of anti-tobacco litigation commenced in the 1980s and persists to the present day.²⁵ Successful product liability suits involving toxic harm²⁶ comprised the second wave. Nonetheless, factors such as the large amount of resources invested by tobacco companies in their defense,²⁷ preemption of claims by a federal cigarette labeling law,²⁸ difficulties in proving causation,²⁹ and affirmative defenses such as assumption of risk³⁰ have limited the success of the second wave. After over forty years of smoking-related lawsuits against the tobacco companies,³¹ only two plaintiffs have been

vending machines accessible to minors and limited tobacco advertising in certain youth-oriented publications. Noah, U.S. News & World Rep. at 66 (cited in note 8). Eventually, the FDA may seek to proscribe tobacco advertising at sporting events. Doug Levy and Nanci Hellmich, *FDA's Tobacco Regulations Final Triumph for Departing Chief Kessler*, USA Today 4D (Feb. 17, 1997).

19. See notes 31-33 and accompanying text.

20. Rabin, 44 Stan. L. Rev. at 857-64 (cited in note 3) (discussing the first wave of litigation).

21. Id. at 859.

22. Id.

23. Id. at 863 n.66; Restatement (Second) of Torts § 402A cmt. i (1965).

24. Restatement (Second) of Torts § 402A cmt. i (cited in note 23); Rabin, 44 Stan. L. Rev. at 863 (cited in note 3) (stating that the Restatement greatly influenced the courts in absolving tobacco producers from liability).

25. Rabin, 44 Stan. L. Rev. at 864 (cited in note 3).

26. Id. at 864-65 (explaining that successful asbestos cases encouraged a second wave of tobacco litigation).

27. Id. at 867-68 (describing the tobacco industry's attorneys' litigation tactics).

28. Id. at 869.

29. Id. at 870 (noting cases such as *Marsee v. U.S. Tobacco Co.*, 866 F.2d 319 (10th Cir. 1989), in which a jury found that a 19-year-old's death from tongue cancer was not related to his use of tobacco).

30. Id. at 871.

31. The first recorded lawsuit was *Lowe v. R.J. Reynolds Tobacco Co.*, No. 9673(c) (E.D. Mo.) (filed Mar. 10, 1954), cited in Rabin, 44 Stan. L. Rev. at 857 n.26 (cited in note 3). The action was later dropped.

successful in obtaining even an initial damage award.³² Still, tobacco companies have not yet paid one penny of damages.³³

Today, an entirely new type of plaintiff has emerged: state governments. Presently, two dozen states are suing to recover tobacco-related medical expenses.³⁴ The first of the cases is scheduled to go to trial in Mississippi in early March 1997.³⁵ While each of the many actions has different strategies, all are built on the premise that the wrongful conduct of cigarette manufacturers has caused increased health care costs and thus has injured the state government itself.³⁶ Indeed, many aspects of the Florida controversy discussed in this Note, including the use of statistics to show the extent of injury, employment of econometric modeling to determine cost savings, and application of cigarette excise taxes to mitigate net damages suffered by the states, are virtually certain to be components of any state's case. These state-sponsored lawsuits may have the best chance for success of any anti-tobacco lawsuits filed to date.³⁷ If the states do succeed, the defendant tobacco companies will be financially unable to pay out the quantum of aggregate damages sought by the plaintiffs.³⁸ This, then, may be the third and final wave.³⁹

Two states, Florida⁴⁰ and Massachusetts,⁴¹ have passed special legislation to enable the state to recover increased Medicaid costs alleged to be the result of tobacco use.⁴² This Note focuses on Florida's action against the producers of cigarettes marketed in that state and

32. Recently, in *Carter v. Brown & Williamson Tobacco Corp.*, No. 95-00934 CV-B (Fla. Cir. Ct. 1996), a court handed a cigarette manufacturer tobacco's second defeat. Hansen, 83 ABA J. at 51 (cited in note 2). See also Jolie Solomon and Peter Katel, *When There's Smoke There's Fire: A Maverick Florida Lawyer Takes on Big Tobacco*, Newsweek 52 (Oct. 28, 1996) (noting that *Carter* was the first case to come to trial of 250 suits that plaintiff's attorney Woody Wilner has filed). Industry lawyers feel certain that the adverse verdict will be overturned on appeal, matching the same outcome as the only other such verdict, *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 583 (3d Cir. 1990), *aff'd in part, rev'd in part, and remanded*, 505 U.S. 504 (1992). See also Solomon and Katel, *When There's Smoke, There's Fire* at 52 (cited in this note).

33. Hansen, 83 ABA J. at 50 (cited in note 2).

34. *Id.* at 52.

35. *Id.* at 51.

36. *Id.* at 52.

37. Frohlich, 21 Am. J. L. & Med. at 446-47 (cited in note 4).

38. Each of these suits has hundreds of millions of dollars of damages at stake, enough in the aggregate to bankrupt the tobacco industry. *Id.* at 446. See Kathryn Ericson, *Questions Submitted to High Courts on Attorney General Powers in Two State Tobacco Suits*, West's Legal News, 1996 WL 258659, 1 (Feb. 22, 1996).

39. In addition, there are still hundreds of individual and class-action product liability suits pending against the tobacco companies. Hansen, 83 ABA J. at 51 (cited in note 2).

40. Fla. Stat. § 409.910 (Supp. 1994).

41. 1994 Mass. Acts. ch. 60, § 276. For a complete overview of the Massachusetts law, see generally Frohlich, 21 Am. J. L. & Med. at 463 (cited in note 5).

42. Because Florida's case will come to trial earlier, this Note focuses on Florida's case instead of Massachusetts.

also against a related organization, the Council for Tobacco Research.⁴³ It addresses issues implicated in Florida's proof of damages.⁴⁴ Florida's litigation is worthy of investigation by other states because it presents many issues with which a state considering tobacco litigation must grapple. Part I provides general background information on the topic. Part II reviews the present litigation and surveys its contours. Part III presents a summary of applicable Florida damages law and examines the determination of damages in fact in the ongoing controversy. Part IV concludes that legislative action on the national level may offer the best solution to the economic costs caused by the manufacture, distribution, and consumption of tobacco products in the United States.

II. FLORIDA CONFRONTS BIG TOBACCO

A. *Laying the Groundwork: Florida's Cigarette Habit and the Legislative Response*

Over 28,000 Floridians die each year from tobacco-related diseases.⁴⁵ Indeed, Florida claims it has spent in excess of \$1.3 billion treating its indigent citizens for cigarette-connected ailments since 1989.⁴⁶ Lawton Chiles, Florida's Governor, maintains that 860,000

43. The Council is the "successor in interest" to the Tobacco Institute Research Committee. Complaint, *Chiles v. The American Tobacco Co., et al.* (No. 95-1466-A0) ¶ 33 ("Complaint"). These companies are named individually in the Complaint, id. ¶¶ 16-39, but they have been represented by a Florida trade association, Associated Industries, in other litigation. See generally *Agency for Health Care Admin. v. Associated Indus. of Florida, Inc.*, 678 So.2d 1239, 1239, cert. denied, 65 U.S.L.W. 3629 (Fla. Mar. 17, 1997).

44. This Note concerns compensatory damages. Punitive damages, which go beyond any actual expense incurred by the plaintiff, *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545, 547 (Fla. 1981), will not be discussed.

45. Press Release, Fact Sheet, Office of the Governor, State of Florida (on file with the Author); Executive Order No. 95-109, Office of the Governor, State of Florida 1 (Mar. 28, 1995). It is unclear how Florida's status as a popular retirement spot affects this number.

46. Fact Sheet, Office of the Governor at 1 (cited in note 45). Medicaid is a government medical services financing program initiated in the 1960s to care for indigent persons and others unable to provide necessary health care. Affidavit of J. Christopher Pilley, Former Director of Medicaid, State of Mississippi, *In re Mike Moore, Attorney General ex rel, State of Mississippi Tobacco Litigation* ¶ 7 (on file with the Author). In general, Medicaid coverage includes the medical expenses of those persons receiving Aid to Families with Dependent Children and Supplemental Security Income. Health Care Financing Administration Fact Sheet, Medicaid, Dep't of Health and Human Services 1 (Jan. 1991) ("HCFA Fact Sheet"). States must provide the following services: inpatient hospital services, outpatient services, physician services, laboratory and x-ray services, nursing home and home health care services, family planning, nurse-midwifery services, prenatal care, and transportation, if necessary. Id. at 1-2. A state compensates the providers of the services. Id. at 2. The federal government then reimburses the

Floridians covered by Medicaid were treated at government expense for smoking-related disease during 1994, 1995, and 1996.⁴⁷

In response, Florida's legislature passed the Medicaid Third Party Liability Act ("MTPLA") into law on May 26, 1994.⁴⁸ Significant controversy surrounded the passage of the Act,⁴⁹ as demonstrated by the Florida legislature's subsequent vote one year later to repeal the law.⁵⁰ However, Governor Chiles vetoed the repeal.⁵¹

The MTPLA is a vague statute. It allows the state, under any theory of recovery, to proceed against any party that causes the state to incur increased Medicaid expenses.⁵² The MTPLA also creates a new cause of action⁵³ that is independent of any right or claim of a Medicaid recipient.⁵⁴ The evident purpose of the MTPLA is to ensure that Florida's Medicaid program is the payer of last resort.⁵⁵ The

state for a portion of the costs of the program. Federal funds pay an average of 56% of the cost of the Medicaid program nationwide, with a range of 50% to 83%, inversely related to each state's average per-capita income. *Id.* The federal share is funded by a national payroll tax. Johnathan S. Massey, *The Florida Tobacco Liability Law: Fairy Tale Objections to a Reasonable Solution to Florida's Medicaid Crisis*, 46 Fla. L. Rev. 591, 600 (1994) (citation omitted).

Approximately 26 million individuals in the states and territories of the United States received Medicaid assistance in 1991. HCFA Fact Sheet at 2 (cited in this note). Medicaid coverage extends to over 10% of the adult population under 65. Selected Highlights, United States 1995, Dept. of Health and Human Services, Public Health Service 11 ("Selected Highlights"). In Florida, Medicaid treated over 1.7 million people in 1994. Press Release, Office of the Governor, State of Florida 2 (Oct. 15, 1996) ("Press Release of October 15, 1996"). The number of adults under age 65 receiving Medicaid coverage has nearly doubled since 1984. Selected Highlights at 11. Only 5.3% of adults age 65 and older are covered by Medicaid. *Id.*

Florida's total Medicaid expenses have risen almost \$1 billion each year since the early 1990s. Massey, 46 Fla. L. Rev. at 602 (cited in this note). As a result, Florida's government is in search of additional funding for the Medicaid program.

47. Press Release of October 15, 1996 at 2 (cited in note 45).

48. 1994 Fla. Laws § 94-251, § (4) codified at Fla. Stat. § 409.910 (Supp. 1994). Although Florida has taken a fairly unique step in seeking recovery of Medicaid expenses through the MTPLA, all states have statutory authorization to pursue reimbursement from the party or parties causing increased expenses to the Medicaid program. See 42 U.S.C. § 1396a (a)(25) (1994 ed.) (providing statutory authority for states to take all reasonable measures to ascertain the legal liability of third parties to pay for care and services provided pursuant to the Medicaid program). The MTPLA is unique because it eliminates many of the tobacco companies' best defenses and allows the use of statistical evidence alone to prove damages. See notes 57-65 and accompanying text.

49. In fact, the MTPLA was rushed through in a late evening vote on the last day of the legislative session. Karen E. Meade, *Breaking Through the Smoke Screen, State Lawsuits for Reimbursements of Medical Expenses*, 17 J. Legal Med. 113, 128 (1996).

50. *Chiles to Veto Anti-Tobacco Repeal*, Wash. Post A11 (May 8, 1995).

51. Suein Huang, *Judge Upholds Law Letting Florida Sue Tobacco Industry*, Wall St. J. B6 (June 19, 1995).

52. Fla. Stat. § 409.910(1)(a).

53. Kathryn Ericson, *Florida Judge Dismisses Some Counts in State Tobacco Case; Post-1994 Negligence and Products Liability Claims Remain*, West's Legal News, 1996 WL 527454, 1 (Sept. 19, 1996).

54. Fla. Stat. § 409.910(6)(a).

55. *Id.* § 409.910(1).

MTPLA thus provides a mechanism for recovering costs of medical care provided at state expense from those who caused the predicate injury to Medicaid recipients.⁵⁶

The statute aids Florida in recovering Medicaid funds in several ways. First, the MTPLA automatically assigns a Medicaid recipient's right to sue to the state, allowing Florida to subrogate⁵⁷ the recipient's claim upon the recipient's receipt of Medicaid services or funding.⁵⁸ The MTPLA also allows the state to pursue an action on behalf of the assigned claims of the entire class of Medicaid recipients against an individual or aggregate defendant without identifying each individual of the class.⁵⁹ Second, the statute, in its original form prior to a ruling by Florida's Supreme Court,⁶⁰ allowed the state to pursue its claim under both market share liability theory and joint and several liability theory,⁶¹ while allowing the plaintiff to prove damages in the aggregate solely with statistical evidence.⁶² Finally, the MTPLA precludes the affirmative defenses most successfully employed by cigarette manufacturers in prior suits.⁶³

56. Id. § 409.910(6).

57. Subrogation enables one party to recover an incurred expense on behalf of another due to some obligation that is usually contractual. Richard N. Pearson, *The Florida Medicaid Third Party Liability Act*, 46 Fla. L. Rev. 609, 611 (1994). In addition, because the federal government requires the state to provide Medicaid coverage at a certain level, see note 44, the state avoids Florida's economic loss rule, at least to the level of mandated payments. This economic loss rule precludes the claimant's recovery for losses unconnected with physical injury or damage to property. *McDonough Equip. Corp. v. Sunset Amoco West, Inc.*, 669 So.2d 300, 302 (Fla. Ct. App. 1996) (citations omitted) (explaining the economic loss rule and its genesis in products liability cases). See Part III.A for a discussion of elements of damages in-fact in this case.

58. Fla. Stat. § 409.910(14).

59. Id. § 409.910(9).

60. See note 90 and accompanying text.

61. Florida's Supreme Court altered this particular aspect of the MTPLA, allowing the state to use only one theory. *Agency for Health Care Admin.*, 678 So.2d at 1256. See note 90 and accompanying text.

62. Fla. Stat. § 409.910(9).

63. The Act removes "[p]rinciples of common law and equity as to assignment, lien, subrogation, comparative negligence, assumption of risk, and all other affirmative defenses normally available to a liable third party" so that the state may be "[ensured a] full recovery by Medicaid from third-party resources." Id. § 409.910(1). Assumption of risk comotes that the injured party willfully subjected himself or herself to a "known and appreciated danger." Meade, 19 J. Legal Med. at 118 (cited in noto 49) (citing *Black's Law Dictionary* 123 (West, 6th ed. 1990)).

However, the defendants may still argue that the state was negligent in allowing the sale of cigarettes. If so determined, this would allow a reduction in any damage award by the percentage of fault were the state found to be accountable by some measure. Although the comparative fault doctrine is not technically an element of the proof of damages, it may nonetheless have significant bearing in the damage award in this case and in others in the many states following this principle. Because any reduction in damages awarded that may result from a comparative fault analysis is impossible to quantify or predict, it will not be the subject of further examination.

The Act also gives the state an important advantage by instructing the court to construe the rules of causation and damages liberally in favor of the state.⁶⁴ The court, however, is not obliged to admit erroneous statistical evidence or to “compel [the factfinder] to find that a particular quantum of statistical evidence offered by the state is good enough to prove . . . damages by a preponderance of the evidence.”⁶⁵

B. Florida's Case Against Tobacco

The State of Florida brought an action under the MTPLA⁶⁶ on February 21, 1995⁶⁷ against the manufacturers of cigarettes marketed in the state as well as their trade organizations and public relations firms.⁶⁸ The state alleges that the defendants suppressed the development of safer cigarettes,⁶⁹ conspired to deceive the public about the safety of cigarettes,⁷⁰ and targeted minors as the source of new markets.⁷¹

Florida seeks to recover damages under theories of negligence,⁷² misrepresentation,⁷³ conspiracy,⁷⁴ aiding and abetting,⁷⁵ unjust enrichment,⁷⁶ indemnity,⁷⁷ and product liability.⁷⁸ It seeks both

64. Fla. Stat. § 409.910(1).

65. Massey, 46 Fla. L. Rev. at 605 (cited in note 46).

66. Complaint ¶ 51 (cited in note 43).

67. Id. at ¶ 1.

68. Parties named in the complaint are: The American Tobacco Co., American Brands, Inc., Reynolds Tobacco Co., RJR Nabisco, Inc., Industries PLC, British American Tobacco Co., Ltd., Batus Holdings, Inc., Brown & Williamson Tobacco Corp., Philip Morris Companies, Inc., The Brooke Group, Ltd., Liggett Group, Inc., Liggett & Myers, Inc., Loews Corp., Lorillard Corp., United States Tobacco Co. and its Parent UST, Inc., The Council for Tobacco Research-USA, Inc. (successor in interest to the Tobacco Institute Research Committee), Hill & Knowlton, Inc. (a public relations firm, Complaint ¶ 59 (cited in note 43)), and Doral Tobacco Corp. Complaint ¶¶ 16-36 (cited in note 43). The Liggett Group, Inc., an original defendant in the action, Complaint, ¶ 28, has reached a settlement with Florida, Louisiana, Massachusetts, Mississippi, and West Virginia. *Liggett Issues First Tobacco Settlement Checks*, 1996 WL 259720, 1 (Apr. 10, 1996). Liggett's initial payment of \$200,000 to the State of Florida is the first installment in what could reach more than \$180 million over 25 years. Press Release, Office of the Governor, State of Florida 1 (Apr. 11, 1996).

69. Complaint ¶¶ 70-71 (cited in note 43).

70. Id. ¶¶ 82-94.

71. Id. ¶¶ 95-116.

72. Id. ¶¶ 155-59 (“Count Three”); id. ¶¶ 173-78 (“Count Six”).

73. Id. ¶¶ 180-87 (“Count Seven”).

74. Id. ¶¶ 188-98 (“Count Eight”).

75. Id. ¶¶ 199-203 (“Count Nine”).

76. Id. ¶¶ 141-48 (“Count One”).

77. Id. ¶¶ 149-54 (“Count Two”).

78. Id. ¶¶ 160-65 (strict liability-“Count Four”); id. ¶¶ 166-72 (breach of warranty-“Count Five”). See id. ¶ 53; id. at ¶ 128 (“Cigarettes are inherently, abnormally, and unreasonably dangerous.”); Ericson, *West's Logal News* at 1 (cited in note 53).

pecuniary losses⁷⁹ and injunctive relief.⁸⁰ The state claims that the adverse health effects⁸¹ of cigarettes have caused it to suffer \$1.6 billion in smoking-related Medicaid expenses⁸² since 1994.⁸³ The case is set to go to trial on August 4, 1997.⁸⁴

C. Approval of the Case and the MTPLA by Florida's Supreme Court

Facing the state's onslaught, tobacco manufacturers brought suit to prevent implementation of the MTPLA and contested its constitutionality.⁸⁵ The Florida Supreme Court ruled against the tobacco defendants and allowed the state to continue its action under the MTPLA's statutory authority,⁸⁶ but it restricted the state's ability to seek recovery to those Medicaid costs for which Florida law allows recovery⁸⁷ and that had accrued after July 1, 1994,⁸⁸ the date of the MTPLA's passage.⁸⁹ In addition, the court ruled that the state could

79. See generally Complaint (cited in note 43) (seeking damages for restitution).

80. The state seeks a court ordered end to "consumer fraud," id. ¶ 208(a), "disclos[ure of] research," id. ¶ 208(b), "[fund[ing of] corrective public education," id. ¶ 208(c), "[taking of] reasonable and necessary affirmative steps to prevent the distribution and sale of cigarettes to minors," id. ¶ 208(d), "fund[ing of] smoking cessation programs," id. ¶ 208(e), "dissol[ution of] the Council for Tobacco Research and the Tobacco Institute," id. ¶ 208(f), and "disgorge[ment of] all profits from sale of cigarettes in Florida." Id. ¶ 208(g). In short, Florida wants to put cigarette manufacturers out of business.

81. See notes 4-6 and accompanying text. See also Complaint ¶¶ 117-18 (cited in note 43).

82. The state did not seek punitive damages in the initial Complaint, but it reserved the right to do so at a later time. Complaint ¶ 10 (cited in note 43).

83. Press Release of October 15, 1996 (cited in note 46). The Complaint does not state an exact dollar figure. The figure in the Press Release of October 15, 1996 conflicts with the state's prior estimate of \$420 million per annum. Press Release, Office of the Governor, State of Florida (Sept. 17, 1996). The \$420 million figure is more in line with the figures the Author obtained. See Table 1.

84. Press Release of October 15, 1996 at 1 (cited in note 46).

85. See *Agency for Health Care Admin.*, 678 So.2d at 1243.

86. Id. at 1256-57. The court also validated the existence of Florida Agency for Health Care Administration, the permissibility of which had been in question. Id. See also Karen Pankowski, Deputy Director of Communications, Office of the Governor of the State of Florida, Untitled Memorandum (June 27, 1996) ("Untitled Memorandum of June 27, 1996") (providing background on the Florida Supreme Court's tobacco ruling).

87. *Agency for Health Care Admin.*, 678 So.2d at 1254 (disallowing claims otherwise prohibited by Florida's statute of repose).

88. This had previously been determined at the trial level and was upheld. Id. at 1256. For a discussion, see generally James Cahoy, *Florida Supreme Court Upholds Most of Tobacco Liability Law*, West's Legal News, 1996 WL 365758 (July 3, 1996).

89. *Agency for Health Care Admin.*, 678 So.2d at 1256. Florida's governor was said to be "elated" by the outcome. Pankowski, Untitled Memorandum of June 27, 1996 at 1 (cited in note 86). In fact, each side "claimed victory." Cahoy, 1996 WL 365758 at 1 (cited in note 88). Governor Chile's delight may have been based in part on the court's description of the MTPLA as "a rational response to a public need." *Agency for Health Care Admin.*, 678 So.2d at 1257.

proceed under either market share liability theory or joint and several liability, but not both.⁹⁰

Most importantly for Florida,⁹¹ the court allowed the state to proceed using statistical data to prove damages,⁹² and it found no constitutional infirmity in the MTPLA's abolition of affirmative defenses.⁹³ The court's decision, however, that the use of statistical evidence must be constrained by the usual rules of procedure and evidence⁹⁴ undermines any reliance on the MTPLA's requirement that courts liberally construe rules pertaining to proof of damages. In addition, the court left the burden of proof on the state.⁹⁵

III. PROOF OF DAMAGES

The usual elements of any tort claim are causation in-fact, proximate causation, fault, and proof of damages.⁹⁶ Tobacco's previous litigation victories have resulted from the plaintiff's difficulty of proving that cigarettes are in fact harmful⁹⁷ and the tobacco companies' effective use of affirmative defenses such as assumption of risk.⁹⁸ Recent studies, however, have found conclusively that tobacco use causes cancer.⁹⁹ As a result, cigarette manufacturers are now under pressure to admit that tobacco use is harmful, thus preventing satisfaction of causation-in-fact,¹⁰⁰ and they may be ready to concede

90. *Agency for Health Care Admin.*, 678 So.2d at 1255-56. This will likely be true in other states, at least those employing a hybrid of the market share liability and enterprise liability theories. See *Sindell v. Abbot Laboratories*, 26 Cal.3d 588, 607 P.2d 924 (1986) (erecting theory of market share liability). See also *Hall v. E. I. Du Pont De Nemours & Co., Inc.*, 345 F. Supp. 353 (E.D.N.Y. 1972) (applying enterprise liability theory).

91. *Agency for Health Care Admin.*, 678 So.2d at 1255-56. The use of statistical evidence by the state to prove the extent of damages removes the necessity to quantify damages on an individual basis for the thousands of medicaid recipients with tobacco-related diseases and also prevents tobacco industry lawyers from using such processes to drag out proceedings.

92. *Id.* at 1256.

93. *Id.* at 1251.

94. Pankowski, *Untitled Memorandum of June 27, 1996* at 1 (cited in note 86) (explaining the holding in *Agency for Health Care Admin.*). However, Florida's Supreme Court found the statutory language allowing the use of statistical data not to be "infirm," finding it "aspirational," *Agency for Health Care Admin.*, 678 So.2d at 1255, and similar to language found in other statutes meant to remove "insecurity and uncertainty" in terms of "equitable or legal relations."

95. *Agency for Health Care Admin.*, 678 So.2d at 1243.

96. Harvey P. Berman, *The Agent Orange Veteran Payment Program*, 53 *Law & Contemp. Probs.* 49, 54 (Autumn 1990).

97. Seuin L. Hwang, *Tobacco Firms May Shift Tack on Cancer Link*, *Wall St. J.* B1 (Oct. 21, 1996).

98. See note 30 and accompanying text.

99. Hwang, *Wall St. J.* at B1 (cited in note 97).

100. *Id.* Of course, strong indications of smoking's link to cancer have existed for many years. Current Intelligence Bulletin 54, *Environmental Smoke in the Workplace, Lung Cancer*

that cigarettes do cause cancer, which would eliminate any attempted argument of there being no causation-in-fact.¹⁰¹

In addition, the MTPLA prohibits the tobacco firms' use of certain affirmative defenses.¹⁰² If they are unable to rely on traditional tactics, the defendants in Florida's tobacco litigations will likely focus on proof of damages to defeat the suits.¹⁰³

To properly calculate compensatory damages, the quantity of the actual injury or damages must be reasonably determined.¹⁰⁴ The state of Florida receives five principal benefits from cigarette consumption: (1) excise taxes directly arising from cigarette consumption;¹⁰⁵ (2) the income and other tax receipts generated as a byproduct of Medicaid payments; (3) federal funding for Medicaid payments;¹⁰⁶ (4) a reduction in retirement and disability expenses;¹⁰⁷ and (5) lower state Medicaid costs in areas such as nursing home outlays.¹⁰⁸ Calculation of damages must take into account any benefit the state has received from tobacco production and consumption.

A. *Use of Statistical Evidence as Proof of Damages In-Fact and to Show Extent of Injury*

In the present litigation, the court will not require the state to identify each Medicaid patient by name.¹⁰⁹ This appears to be contrary to the prior ruling by the Florida Supreme Court¹¹⁰ and may make the

and Other Effects, Centers for Disease Control 1 (June 1991) ("Current Intelligence Bulletin 54") (quoting 1964 Surgeon General's first report on smoking and health, "Cigarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors. . . . The risk of developing lung cancer increases with duration of smoking and the number of cigarettes smoked per day, and is diminished by discontinuing smoking.").

101. *Id.* at 1 (cited in note 100). See also Donahue, 83 ABA J. at 56 (cited in note 14) (arguing that proximate, or legal, causation continues to be the source of legal friction).

Proximate cause is an essential element for a plaintiff's cause of action in tort, requiring a "reasonable connection" between the injury suffered by the plaintiff and the actions of the defendant. *Prosser and Keaton on the Law of Torts* 263 (West, 5th ed. 1984). Causation-in-fact is the predicate element in any tort claim and is fulfilled if the plaintiff's injury would not have occurred without the defendant's action or omission. *Id.* at 265.

102. See note 63 and accompanying text.

103. See Part III.B.

104. 22 Am. Jur. 2d *Damages* § 486 (1988).

105. See Part III.C.3.

106. See note 46 and accompanying text.

107. See Part III.C.1.

108. See note 153 and accompanying text.

109. Kathryn Ericson, *Florida Doesn't Have to Specifically Name Individual Medicaid Recipients in Anti-Tobacco Case, Says Judge*, West's Legal News, 1996 WL 605334, 1 (Oct. 24, 1996) (citing Order of Oct. 18, 1996). See also *Agency for Health Care Admin.*, 678 So.2d at 1254.

110. See Cahoy, West's Legal News at 1 (cited in note 88) (discussing order). It also appears contrary to Florida damages law in general. See notes 113 and 120 and accompanying text.

state's case much easier.¹¹¹ The court's decision to allow the state to refer to people by number alone is especially troubling in light of recent revelations of a great amount of fraud in the provision of government-funded medical services, including Medicaid.¹¹² Thus, the precise identification of each individual treated under Medicaid for a smoking-related disease is absolutely essential, or else damages would be a vague approximation, even assuming a high degree of precision in statistical evidence of damages.¹¹³

B. Calculating Compensatory Damage Awards

The basic rationale behind an award of compensatory damages is that justice should be done to both the defendant and the plaintiff pursuant to the facts of each case. Thus, a plaintiff is to be "made whole,"¹¹⁴ or as near thereto as pecuniary compensation can achieve.¹¹⁵ Once liability has been established,¹¹⁶ the plaintiff is entitled by right to compensatory damages.¹¹⁷

However, the court did order the state to "provide the identity of each individual" through the use of identifying numbers and lists of Medicaid providers and the payments made to those providers. Ericson, West's Legal News at 1 (cited in note 109). Medicaid records delivered by the state to provide the individuals' identities included the patient's Medicaid identification number, health provider name and Medicaid reference number, patient's date of death where appropriate, and a summary of medical costs. Press Release of October 15, 1996 at 2 (cited in note 46).

111. The court stated Medicaid providers were the "true recipients" of payments under the program. Ericson, West's Legal News at 1 (cited in note 109). The court's order has the effect of greatly constraining the defendants' ability to verify the veracity of individual Medicaid claimants' injuries and restricting any attempt to substantiate assertions that such injuries were in fact caused by the consumption of cigarettes.

112. Peter Eisler, *Fraud on the Rise: Those Who Get Caught Say It's "Just Too Easy,"* USA Today 1A (Nov. 12, 1996) ("[S]hady operators can easily set up shop and start billing taxpayer-paid Medicare and Medicaid for services never rendered."). "[B]illing fraud is easy to get away with," noted June Gibbs Brown, Inspector General for the U.S. Department of Health and Human Services. Peter Eisler, *Increase in Fraud Cases Has Officials On Lookout*, USA Today 2A (Nov. 12, 1996) (discussing increase of fraudulent billing practices in the home health care industry).

113. Statistical analysis can show vastly divergent outcomes, even given the same inputs, and may be inherently unreliable. See note 144. This seems particularly important in light of Florida damages law's requirement that future medical expenses are recoverable only so far as they are certain to be incurred. *Loftin v. Wilson*, 67 So.2d 185, 188 (Fla. 1953).

114. *Phillips v. Ostrer*, 481 So.2d 1241, 1246 (Fla. Ct. App. 1985) (citations omitted) (indicating damages are to set plaintiff right, as if the injury had never happened).

115. *Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545, 547 (Fla. 1981) ("[The] objective of compensatory damages is to make the injured party whole to the extent that is possible."); *Bisque Associates of Florida, Inc. v. Towers of Quayside No. 2 Condominium Ass'n, Inc.*, 639 So.2d 997, 999 (Fla. Ct. App. 1994) ("[The] objective of compensatory damages is to make the injured party whole to the extent that it is possible to measure the injury sustained in terms of money.").

116. The tortfeasor is liable for all injury caused by his or her actions. *Kokotis v. DeMarco*, 679 So.2d 296, 297 (Fla. Ct. App. 1996).

117. *St. Regis Paper Co. v. Watson*, 428 So.2d 243, 247 (Fla. 1983) (citation omitted).

However, in a typical tort case, the burden of proving the existence of damages is on the plaintiff.¹¹⁸ Therefore, Florida will have to show, by a preponderance of the evidence,¹¹⁹ that increased Medicaid costs are a result of tobacco consumption and not some other factor,¹²⁰ such as the general inclination of smokers to engage in risky activity.

Thus, the plaintiff in a typical tort case must prove the existence of injury and resultant damages¹²¹ with reasonable certainty.¹²² The mere occasion of a tortious act does not by itself give rise to the right of the claimant to recover damages.¹²³ Hence, the plaintiff must present evidence having some reasonable basis in fact¹²⁴ to show there was an injury actually suffered by the plaintiff that justifies that recovery.¹²⁵ Stated differently, a court may not award damages based upon speculation.¹²⁶ This is relevant in Florida's suit because the state must show that it has suffered financially from its Medicaid enrollees' consumption of cigarettes.

While inability to determine damages with "absolute exactness" will not prevent recovery,¹²⁷ the plaintiff still must show with

118. *Warfield v. Hepburn*, 57 So.2d 618, 621 (Fla. 1911).

119. *Saporito v. Bone*, 195 So.2d 244, 245 (Fla. Ct. App. 1967). This test "is more qualitative than quantitative." *Id.* (citation omitted) (declaring requirement of evidence of damages to be "convinc[ing] as of its truth" and "produc[ing] a reasonable belief" of its veracity). See also *Automated Management Systems of Florida, Inc. v. Thomson & McKinnon, Inc.*, 261 So.2d 531, 531 (Fla. Ct. App. 1972) ("[F]ailure to prove damages [is] fatal to recovery.").

120. Florida law requires that when there are possible multiple causes or a series of tortious acts in sequence, a party seeking recovery for an injury must delineate between the various causes and resultant effects to a reasonable extent. See *Washewich v. LeFave*, 248 So.2d 670, 672 (Fla. Ct. App. 1971) (stating requirement that injuries be delineated is relaxed "where evidence indicates that the defendant's negligence has proximately resulted in an aggravation of a pre-existing injury and the entire consequence cannot reasonably be divided").

121. *Farrington v. Richardson*, 16 So.2d 158, 159 (Fla. 1944) ("If damages claimed are so remote, contingent, conjectural, and speculative as to be immeasurable pecuniarily, no substantial recovery can be had therefore.").

122. *Broxmeyer v. Elie*, 647 So.2d 893, 895 (Fla. Ct. App. 1994) (citation omitted), cert. denied, 116 S. Ct. 566, 133 L. Ed. 2d 491 (1995).

123. *Trumpet Vine Investments, N.V. v. Union Capital Partners I, Inc.*, 92 F.3d 1110, 1110 (11th Cir. 1986).

124. *Miami Beach Lerner Shops, Inc. v. Walco Manufacturing of Florida*, 106 So.2d 233, 235-36 (Fla. Ct. App. 1958).

125. *Florida Ventilated Awning Co. v. Dickson*, 67 So.2d 215, 217-18 (Fla. 1953) ("There must be something to authorize or justify a definite amount in damages before it can be awarded.").

126. *Id.* In some cases, the fact that an injury has occurred may be absolutely certain, yet the calculation of damages suffered by the claimant may be difficult. In such a case, recovery is not precluded by mere difficulty in determining an exact figure. *McCall v. Sherbill*, 68 So.2d 362, 364 (Fla. 1953). The legal rule requiring certainty of damages applies to whether there has been injury in-fact, as opposed to the amount or extent thereof. *Saporito*, 195 So.2d at 245.

127. *Id.* See also *Conner v. Atlas Aircraft Corp.*, 310 So.2d 352, 354 (Fla. Ct. App. 1975) (indicating that while the law does establish minimum proof of damages, exact certainty is not required). But see *Ryan v. Atlantic Fertilizer & Chem. Co.*, 515 So.2d 324, 326 (Fla. Ct. App.

reasonable certainty that a significant loss has occurred,¹²⁸ including reasonable proof of the extent of injury,¹²⁹ before an award of damages is appropriate.¹³⁰ In addition, in cases concerning recovery of medical expenses, such as Florida's action, the claimant typically bears the burden of showing both the reasonableness and the necessity of those costs.¹³¹ This evidence must be supported by proof and cannot be merely speculative.¹³² Thus, Florida must prove by a preponderance of the evidence that it actually sustained additional Medicaid expenses because of smoking before it may recover. The state's ability to meet its burden becomes more difficult because of the inherent complications in the use of statistical evidence for proving damages.¹³³

Under Florida law, although calculation of the amount of damages is entirely the responsibility of the factfinder,¹³⁴ a plaintiff that has actually suffered some injury at the hands of a tortfeasor cannot be awarded zero damages.¹³⁵ Hence, if the jury in Florida's case determines smoking has had a negative pecuniary effect upon Florida's Medicaid program, it will be required to determine a damage award.

When damages are certain, but the amount uncertain, the factfinder has reasonable discretion in determining a proper award,¹³⁶ so long as the claimant has suffered substantial damages.¹³⁷ Such

1987) ("Unless a claimant proves what his actual damages are . . . there will be no recovery of damages.").

128. See notes 121-22 and accompanying text.

129. *Trumpet Vine Inv.*, 92 F.3d at 1119. There are "certain minimum requirements." *Ryan*, 515 So.2d at 326.

130. *Butler v. Mirabelli*, 179 So.2d 868, 873 (Fla. Ct. App. 1965) (construing law of damages for loss of profit as requiring "competent, substantial, [and] appropriate evidence in the record"). The question of damages in the Florida case under review contains much of the same uncertainty present in the calculation of damages in an action concerning alleged lost profits.

131. *Morris Kirschman & Co. v. Garrett*, 308 So.2d 475, 477 (Fla. Ct. App. 1975).

132. *Asgrow-Kilgore Co. v. Mulford Hickerson Corp.*, 301 So.2d 441, 445 (Fla. 1974) ("Damages will not be awarded when based on pure speculation." (citations omitted)); *John Hancock Mutual Life Ins. Co.*, 324 So.2d at 674 ("[A]wards for damage must be supported by evidence and cannot be based on speculation and conjecture."); *Florida Outdoor, Inc. v. Stewart*, 318 So.2d 414, 415 (Fla. Ct. App. 1975) (noting that damages must have a "reasonable basis in fact").

133. See Part III.A.

134. *Phillips*, 841 So.2d at 1246; *Wise v. Jacksonville Gas Corp.*, 97 So.2d 704 (Fla. Ct. App. 1957).

135. *Cowen v. Thornton*, 621 So.2d 684, 687 (Fla. Ct. App. 1993).

136. *Mori v. Matsushita Electric Corp. of America*, 380 So.2d 461, 465 (Fla. Ct. App. 1980) (citing *John Hancock Mutual Life Ins. Co. v. Mark-A, Inc.*, 324 So.2d 674 (Fla. Ct. App. 1975)); *Clearwater Ass'n v. Hicks Laundry Equip. Corp.*, 433 So.2d 7, 8 (Fla. Ct. App. 1983) ("[D]ifficulty in proving . . . damages does not preclude recovery if there is some reasonable basis in the evidence for the amount awarded.").

137. See *Florida Builders, Inc. v. Stephenson Tile, Inc.*, 167 So.2d 58, 59-60 (Fla. Ct. App. 1964) (citation omitted) (reviewing Florida damages in the law of contract). See also *McCall*, 68 So.2d at 364 ("There is a clear distinction between the measure of proof necessary to establish the fact that plaintiff has sustained some damage and the measure of proof necessary to enable

discretion is undoubtedly terrifying to the cigarette manufacturers. It suggests the possibility that the factfinder may, rightly or wrongly, find causation based upon its knowledge from outside the courtroom that cigarette smoking is harmful. If an inferential leap is made from that base knowledge it is easy to see how the factfinder might decide that such injury could be nothing short of substantial. Unfortunately for the defendants, it will likely take tremendous courtroom presence to keep the factfinder focused on the banalities of Florida's law of proof of damages, including its collateral source rule¹³⁸ while explaining the arguably unseemly notion that savings may accrue from each smokers' early demise.¹³⁹

C. Reduction of Damages

When calculating damages, a court must take into account any benefits the plaintiff derives from a defendant's conduct in calculating compensatory damages.¹⁴⁰ Such benefits then offset the total damages to determine the net damages for which the defendant is held liable.¹⁴¹

The consumption of cigarettes may be responsible for the loss of over 5.3 million person-years annually.¹⁴² The magnitude of this human cost, however, tends to obscure an important legal point: smokers, on average, die at an earlier age than nonsmokers.¹⁴³ Smokers also generate greater medical expenses than nonsmokers¹⁴⁴

the jury to fix the amount of damages." The law of damages in Florida is the same for tort as for contract except when exemplary damages are appropriate in tort. *Florida East Coast Railway Co. v. Peters*, 73 So. 151, 168 (Fla. 1916).

138. See Part III.C.2.

139. See Part III.C.1.

140. See notes 163-64 and accompanying text. See also 22 Am. Jur. 2d *Damages* § 550 (noting that benefits received by the plaintiff in connection with the defendant's behavior at issue are to be subtracted from gross damages to determine the net recoverable amount).

141. 22 Am. Jur. 2d *Damages* § 550 (cited in note 104).

142. Manning, et al., *The Cost of Poor Health Habits* at 3 (cited in note 10). A person-year is the time period of one year applied to one person. For example, one thousand people could each have their lives shortened by one year, thus one thousand person-years of life would be lost in the aggregate.

143. A pack of cigarettes reduces one's lifespan over two hours per pack. *Id.* at 8.

144. *Id.* at 11. Even though smokers are not more likely to visit a doctor during their lifetime than those who have never smoked, smokers are far more likely to require hospitalization.

All researchers do not agree that smokers cost more in terms of medical bills. In fact, one study focusing on diseases that were clearly smoking related found that smokers have lower lifetime medical expenses than nonsmokers due to their earlier demise. Gravelle and Zimmerman, CRS Report for Congress at 53 (cited in note 7). But see, for example, Thomas A. Hodgson, *Cigarette Smoking and Lifetime Medical Expenditures*, 70 *Milbank Q.* 81, 90-110 (1992) (suggesting overall greater expenses for smokers than the Manning study). This Note relies primarily on figures from the Manning study because it has been widely accepted by scholars. See Gravelle and Zimmerman, CRS Report for Congress at 4 (cited in note 7) (discussing effective

at all ages¹⁴⁵ and among all races,¹⁴⁶ during their lifetimes. Thus, incremental expenses may be offset by the fact that smokers do not live to receive all of the benefits non-smokers presumably receive.¹⁴⁷ As a result, the state may actually save money on smokers by avoiding the payment of these expenses.

The overall benefit accruing to state and federal governments from smokers' early deaths is magnified because smokers tend to die at the end of a normal working life.¹⁴⁸ While nonsmokers live beyond their productive years into years that are often accompanied by chronic disease and tremendous medical expenses,¹⁴⁹ smokers' lifetime contribution to society, and by extension the state, is maximized,¹⁵⁰ and some smokers are likely to contribute nearly as much or more than nonsmokers in terms of state tax revenue while receiving fewer benefits.

1. Calculation of Savings from Smokers' Lower Life Expectancy

Over the course of an average smoker's life, he or she will consume 16,300 packs of cigarettes.¹⁵¹ Each pack of cigarettes translates into twenty-six cents of incremental medical expense for the smoker's smoking-related medical requirements.¹⁵² For the purpose of determining Medicaid expenses, this expense is offset in part by a savings of three cents per pack in nursing home care not utilized by a

controls used in the Manning study). The Manning study sought to identify all monetary expenses and savings due to the consumption of cigarettes and to factor in necessary controls for other characteristics that may affect variances in health care costs for smokers and nonsmokers. One example of such a necessary control factor is that people who smoke cigarettes are also likely to engage in high risk activities and are therefore more likely to incur additional health care expenses from accidents and the like. *Id.* at 8 (citing W. Kip Viscusi, *Smoking: Making the Risky Decision* (Oxford U., 1992)). For a detailed discussion of Manning study controls, see *id.* at 3-8.

145. Kenneth E. Warner, *Health and Economic Implications of a Tobacco-Free Society*, 258 JAMA 2080, 2084 (1987).

146. Manning, et al., *The Cost of Poor Health Habits* at 63 (cited in note 10).

147. *Id.* at 7. In fact, if society as a whole were the plaintiff, collection of damages would be impossible under Florida law. Every pack of cigarettes consumed actually saves society 91 cents. *Id.* at 15.

148. *Id.* at 7.

149. Warner, 258 JAMA at 2085 (cited in note 145). Because smokers have shorter lifespans, however, they will pay less in taxes to finance all government programs, including those that benefit them personally. Willard G. Manning, et al., *The Taxes of Sin: Do Smokers and Drinkers Pay Their Own Way?*, 261 JAMA 1604, 1605 (1989). It would seem proper to include those lost taxes in any recovery Florida. This is another benefit of using the Manning analysis. See also notes 144 and accompanying text; Gravelle and Zimmerman, CRS Report for Congress at 15-17 (cited in note 7).

150. Warner, 258 JAMA at 2084 (cited in note 145).

151. Manning, et al., *The Cost of Poor Health Habits* at 75 (cited in note 10).

152. *Id.* at 79, Table 4-16 (using the 5% discount rate for present value).

prematurely-dying smoker.¹⁵³ Therefore, the total health care cost of smoking is twenty-three cents per pack, and the incremental costs of smoking per person may be quantified as \$3,749 per smoker, discounted for present value.¹⁵⁴ Balancing against that expense, the state saves \$489 per smoker in nursing home care costs.¹⁵⁵

Florida reaps benefits from the early demise of smokers other than reduced nursing home Medicaid expenses. Pensions and disability payments disbursed over the lifetime of smokers are dramatically lower than those paid out to persons who have never smoked.¹⁵⁶ Assuming 16,300 packs per smoker, a typical smoker will receive \$3,912 less in lifetime pension and disability payments than a typical nonsmoker.¹⁵⁷ Most pension and disability payments not made to Medicaid recipients who are smokers not only create savings for private insurers,¹⁵⁸ but also benefit government programs at the state and federal level.

Although this analysis would seem to yield a total of \$163 per smoker benefit,¹⁵⁹ the factfinder cannot properly use their figures to offset Florida's expenses unless the savings are actually realized by the state. Hence, the number of smokers employed by the state and otherwise entitled to state disability coverage and retirement benefits must be determined before any net savings are quantified. The factfinder must then apply such savings to reduce the increase in total state outlays for smoking-related expense.¹⁶⁰

2. The Collateral Source Rule

153. *Id.* at 75. However, this figure may be as high as 23 cents per pack according to other researchers. Memorandum in Support of the State's Motion for Ruling in *Limine*, *In Re Mike Moore, Attorney General ex rel, State of Mississippi Tobacco Litigation*, No. 94-1429 at 25 (citing W. Kip Viscusi, *Cigarette Taxation and Social Consequences of Smoking*, Duke U. Working Paper, 1994). If this latter figure is the correct one, "there is a net cost savings" for medical expenses from the consumption of cigarettes. *Id.*

154. Manning, et al., *The Cost of Poor Health Habits* at 75 (cited in note 10). All Manning figures are discounted for present value at the rate most likely to be correct, a 5% rate. See Gravelle and Zimmerman, CRS Report for Congress at 9 (cited in note 7).

155. The total nursing home care savings is the product of the number of the average packs of cigarettes per lifetime per smoker (16,300) multiplied by the cost savings per pack (three cents) for a total of \$489. See notes 151 and 153 and accompanying text.

156. Manning, et al., *The Cost of Poor Health Habits* at 79 (cited in note 10).

157. *Id.* at 78.

158. It is unlikely that Medicaid recipients have private or state pensions and disability plans given the nature of the program. See note 46 and accompanying text.

159. That is, if the savings derived from smokers' reduced life span (\$3,912) were deducted from the total incremental costs associated with smoking (\$3,749). See notes 154 and 157 and accompanying text.

160. Calculation of such savings by the government in general or states individually is obviously difficult to quantify. While figures for such savings may remain unavailable, the factfinder has the power to determine these figures.

The collateral source rule is a common law concept that allows a claimant full recovery, without a setoff for any compensation received from a third party who is fully independent of the tortfeasor.¹⁶¹ The factfinder is normally unaware of the third party's independent compensation.

Application of the collateral source rule in Florida is limited to benefits earned by the injured party.¹⁶² The factfinder does not consider compensation that is dependent upon the plaintiff's own action and expense in the calculation of damages.¹⁶³ The defendant may present evidence of unearned compensation to the factfinder. The factfinder may then use such compensation to offset the damage award.¹⁶⁴ To do otherwise may give an undeserved windfall to the plaintiff.¹⁶⁵ Florida's Supreme Court put it succinctly:

The purpose of compensatory damages is to compensate . . . it is not the purpose of such damages to punish defendants or to bestow a windfall upon plaintiffs. The view that a windfall, if any is to be enjoyed, should go to the plaintiff . . . borders too closely upon approval of unwarranted punitive damages, and it is not a view espoused by our cases.¹⁶⁶

Florida's statutory law supports and reinforces this common law concept¹⁶⁷ and Florida law thus prevents double recovery.¹⁶⁸

161. *Stanley v. United States Fidelity & Guaranty Co.*, 425 So.2d 608, 609 (Fla. Ct. App. 1982) (citation omitted); *Janes v. Baptist Hospital of Miami, Inc.*, 349 So.2d 672, 673 (Fla. Ct. App. 1977) (indicating that a tortfeasor should not benefit from the plaintiff's insurance compensation). But see *Robert E. Owen & Assoc., Inc. v. Gyongyosi*, 433 So.2d 1023, 1025 (Fla. Ct. App. 1983) (incorporating Restatement (Second) of Torts § 920A (1977) into Florida damages law). The Restatement (Second) of Torts § 920A (1977) provides in relevant part: "(1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability . . . (2) Payments made to or benefits conferred from other sources are not credited against the tortfeasor's liability . . ." *Id.* Many states have a similar rule. See 22 Am. Jur. 2d *Damages* § 566 (stating that courts generally apply the collateral source rule).

162. *Florida Physician's Insurance Reciprocal v. Stanley*, 452 So.2d 514, 515 (Fla. 1984).

163. *Economy Fire and Casualty Co.*, 629 So.2d at 627. For example, payments received from the plaintiff's own insurance company are not offset against damages. *Id.* The reason behind this policy is to prevent the cautious plaintiffs from being unduly penalized for providing their own insurance protection. *Id.* Florida courts will go so far as to award a windfall to the plaintiff to promote such caution and to promote generally the balance of equities. See *Respass v. Carter*, 585 So.2d 987, 990 (Fla. Ct. App. 1991) ("The principle behind [this rule] is that it is better for the wronged plaintiff to receive a potential windfall than for a tortfeasor to be relieved of responsibility for the wrong."). But see *Florida Physician's Insurance Reciprocal*, 452 So.2d at 516 (noting that Florida law disallows compensatory damages that appear to be a windfall as undeserved punitive damages). See note 166 and accompanying text.

164. *Florida Physician's Insurance Reciprocal*, 452 So.2d at 516.

165. *Id.*

166. *Id.* at 515.

167. Florida law provides:

[T]he court shall reduce the amount of such an award by the total of all amount which have been paid for the benefit of the claimant, or which are available to him, from all collateral sources; however, there shall be no reduction for collateral sources which a

Under Florida's collateral source rule, then, the tobacco companies will apparently not be entitled to a set-off of federal funds used in Florida's Medicaid program. Obviously, the federal government acted independently of the cigarette manufacturers named in the Florida suit when it created Medicaid. In addition, the federal government directed the states to provide procedures for Medicaid reimbursement actions predicated upon third party liability.¹⁶⁹

However, federal programs benefit from the early death of smokers in the same way as does Florida's Medicaid program.¹⁷⁰ As a result, any such federal savings, at the very least that associated with the Medicaid program, should offset any damage award the state seeks. The calculation of a set-off for the cost savings of the federal share follows the same numerical analysis, and suffers the same pitfalls, as the previously outlined state savings.¹⁷¹

3. Cigarette Excise Taxes Offset Damages

The primary benefit Florida enjoys in connection with the sale and use of cigarettes is the huge amount of revenue cigarette sales generate for the state's coffers. Florida gains tax revenues from the sale of tobacco products above and beyond the revenue generated from the sale of other products because of special excise taxes.¹⁷² This economic benefit is a direct result of the consumption of cigarettes by citizens of Florida.

subrogation or reimbursement right exists. Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of his immediate family to secure his right to any collateral source benefit which he is receiving as a result of his injury.

Collateral Sources of Indemnity, codified at Fla. Stat. § 768.76 (1994).

168. Fla. Stat. § 627.7372 (1991); *Economy Fire and Casualty Co.*, 629 So.2d at 267 ("Under Florida's collateral source rule . . . the total amount of benefits a claimant receives from collateral sources is to be deducted from the jury verdict, thus preventing the plaintiff from reaping a double recovery.").

169. 42 C.F.R. § 430.10 (1994). See also *id.* § 433.135. The States are authorized by federal statute to seek reimbursement on behalf of the Medicaid program from third parties. 42 U.S.C. § 1396a(a)(25).

170. Federal savings from programs such as Medicare may be dramatic and therefore important to the programs' longevity. Warner, 258 JAMA at 2084 (cited in note 145).

171. See Part III.C.

172. Fla. Stat. ch. 210 et seq. (1994). An excise tax is a "tax on the manufacture, sale, or use of goods." *Black's Law Dictionary* 563 (West, 6th ed. 1990). Other states also impose excise taxes on cigarettes, as well. See, for example, Miss. Code Ann. § 27-69-13(a) (1993). Federal and state excise taxes across the nation average 50 cents per pack, with the federal portion amounting to 24 cents. Gravelle and Zimmerman, CRS Report for Congress at 1 (cited in note 7). In Florida, however, the state excise tax on cigarettes is 33.9 cents per pack. Fla. Stat. § 210.02(3)(b) (1996).

Cigarette excise taxes apply only to cigarettes¹⁷³ and are imposed on top of the other Florida sales taxes.¹⁷⁴ Thus, every time a pack of cigarettes is sold, the state receives a direct benefit.¹⁷⁵ Funds generated by cigarette excise taxes, however, are not always set aside to pay smoking-related costs,¹⁷⁶ nor are they used to defray medical expenses in each case when earmarked to do so.¹⁷⁷ Thus, at the same time the state uses income derived from the sale of cigarettes to defray its general expenses, it seeks recovery of smoking-related medicaid expenses without the benefit of a set-off for the tobacco companies.

Smokers usually consume cigarettes for many years before a tobacco-related disease appears.¹⁷⁸ In addition, for any state, a dollar in hand today is worth more than a dollar to be received in the future¹⁷⁹ and less than a dollar received yesterday. It follows, then, that while Florida cannot recover pre-1994 Medical expenses,¹⁸⁰ excise taxes collected for years prior are an important component in determining any net damages the state's Medicaid program actually incurred.

D. Florida's Analysis

Florida must analyze what it has to lose by pursuing this litigation. That analysis must consider the impact of the potential loss of cigarette excise taxes. In the thirteen years preceding the passage of the MTPLA, cigarette excise taxes collected by the state of Florida totaled \$4.5 billion.¹⁸¹ Government data indicate that during those same years Florida's Medicaid program bore total smoking-related

173. Fla. Stat. § 210.02 (1) (Supp. 1994).

174. Id.

175. See *In re Mike Moore, Attorney General ex rel, State of Mississippi Tobacco Lit.*, No. 94-1249, Affidavit of William F. Shugart III ¶ 8 (on file with the Author). Income lost to the state due to discontinuation of the sale of cigarettes would not likely be made up in other areas because the state does not apply excise taxes to most other goods. See id. ¶ 9.

176. See, for example, *Orange County Delay in Payment Cleared by Its Noteholders*, Wall St. J. C15 (July 10, 1995) (stating that cigarette tax to be used to pay debts unrelated to smoking). See also Frank Phillips, *Weld Aides Reportedly Duck News Conference: Governor Shunning Tobacco Lawsuit*, Boston Globe 39 (Dec. 22, 1995) (noting that Florida abandoned a plan to utilize cigarette excise taxes to balance the state budget).

177. Robert Keatley, *Washington Wire*, Wall St. J. A1 (Sept. 1, 1995) (considering the impact of the Governor of California's decision to divert funds generated by excise taxes to other than prescribed anti-smoking education); Vandall, 52 Ohio St. L. J. at 406 (cited in note 13).

178. Gravelle and Zimmerman, CRS Report for Congress at 16 (cited in note 7).

179. Manning, et al., 261 JAMA at 1607 (cited in note 149).

180. This is especially pertinent because the State of Florida has been allowed to seek recovery of expenses incurred only subsequent to the passage of the MTPLA. See note 88 and accompanying text.

181. See Table 1.

expenses of \$1.372 billion,¹⁸² not taking into account savings from shortened life expectancies or other benefits the state received (as previously outlined).¹⁸³ Assuming that Florida will not be required to offset any federally provided funds, Florida's Medicaid program came out over \$3 billion ahead on the consumption of cigarettes in terms of excise taxes alone between 1980 and 1993.

State revenues from cigarette excise taxes vary from year to year, but have increased about five percent annually over the thirteen year period.¹⁸⁴ The same is true for federal cigarette excise tax receipts. Tax receipts, however, began to decline from smoking over the last few years of the sample.¹⁸⁵ During the same period, cigarette-related Medicaid expenses increased at approximately twelve percent per year.¹⁸⁶ If these trends continue—as a result of the increase in the cost of medical care in the United States and the continued information about the negative health consequences of smoking—smoking-related Medicaid expenses may exceed excise tax revenues sometime in the not-so-distant future.

The tobacco manufacturers should be allowed to set-off, in addition to the other savings and benefits realized by the state,¹⁸⁷ the cumulative surplus of over \$3 billion. The defendants may also be entitled to consider federal cigarette excise receipts from Florida over the same period,¹⁸⁸ which would raise Florida's surplus Medicaid expenses and excise taxes dramatically. In addition, the surplus's present value is even higher because of inflation and interest rates. This present value then must be set-off against the present value of possible future medical costs that will likely be incurred by Florida's Medicaid program.¹⁸⁹ Indeed, the state will likely insist that possible

182. *Id.*

183. See Part III.C.

184. See Table 1.

185. *Id.*

186. *Id.* A simple average, however, does not tell the whole story. The rate of increases in Medicaid expenses has been slowing since 1992. Between 1992 and 1995, Medicaid spending grew at a 9.5% rate. Jane Anderson, *Managed Care Not the Cause of Reduced Medicaid Spending, Managed Care Outlook*, West's Legal News, 1997 WL 8469578, 1 (Jan. 10, 1997). In the last year, Medicaid grew by only 3%. *Id.* If these trends hold true for smoking-related medical expenses, and there is reason to so conclude as the slowdown in Medicaid cost inflation is due to greater efforts at cost management on the government's part, *id.*, then cigarette excise tax revenues may outstrip expenses.

187. See Part III.C.

188. While federal receipts may not apply to the state's share of Medicaid expenses, they certainly could be used to defray the federal share, the recovery of which is being sought by the state.

189. Courts are to take into account that damages are awarded in advance of the time future damages are incurred. See 22 Am. Jur. 2d *Damages* § 647 (explaining relation to present worth).

future Medicaid expenses be reduced to a concrete figure. Therefore, a calculation of the probability of increased costs is necessary before determination of any damage award.

Thus, determining any damage award becomes at least speculative and may even be impossible to determine. While both sides will bring out econometricians, statisticians, and other expert witnesses, in the final analysis, any real damage to Florida's Medicaid program may be impossible to ascertain with a high degree of accuracy. In addition, the jury is only human. After all the calculations and experts, the tobacco companies may still confront a large damage award due to the vagaries of human emotion and Florida law allowing the factfinder to determine approximate awards.¹⁹⁰

In addition, Florida faces the reality that, taking into account only state excise taxes, no damages have in-fact been suffered to date or will be for at least a few years. It will be at least several years more before the surplus will be depleted.¹⁹¹ If the factfinder includes federal excise tax receipts in any damages calculation, state claims of net medical costs at any point in the future are currently no better than conjecture. A state plaintiff would have to wait a minimum of several years, before it could reasonably claim certain proof of increased smoking-related Medicaid costs.

Therefore, each side bears tremendous risk in the present litigation. Both the plaintiff and the defendants in Florida's and other states' litigation would be better served by a different approach to the resolution of the problems caused by the consumption of cigarettes.

IV. A BETTER SOLUTION

Some commentators have gone so far as to advocate absolute liability for tobacco companies.¹⁹² Yet, absolute liability would probably bankrupt the tobacco companies,¹⁹³ restrict state revenues,¹⁹⁴ and displace employees. Other experts have suggested requiring less

190. "We don't really have consistent, easy-to-understand controls over large awards." *Civil Trial Award Spark Rules Debate*, Tennessean 12A (Jan. 12, 1997) (quoting Victor Schwartz, counsel for American Tort Reform Association). Even more frightening to both the state and the tobacco companies, damage awards are basically "a lottery." *Id.*

191. While this Note uses data for a thirteen year period, the court may take a longer period into consideration in determination of the true applicable surplus.

192. See Vandall, 52 Ohio St. L. J. at 405 (cited in note 13).

193. See note 38 and accompanying text.

194. As a consequence of bankrupting the cigarette manufacturers, the state would lose revenue currently generated from the cigarette excise tax. See note 175 and accompanying text.

harmful cigarettes¹⁹⁵ or increasing the excise taxes with the proceeds earmarked for smoking-related expenses.¹⁹⁶ While each solution has merit, a combination of excise taxes, federal legislation preempting tobacco-related lawsuits, establishing a settlement fund, and regulations mandating safer cigarettes may offer the best solution.¹⁹⁷

A. *Require Safer Cigarettes*

Changing the composition of cigarettes may result in a decline in smoking-related health care expenses. For example, a reduction in the tar and nicotine levels of cigarettes may render them less lethal and safer for consumption.¹⁹⁸ Government regulators could either limit levels of harmful substances currently found in cigarettes or use what has been termed the "market approach," which involves the imposition of higher taxes on cigarettes with a more toxic composition, thereby employing market forces to drive creation of less harmful cigarettes.

Whichever of these methods may in the final analysis prove to be the best path, the chief benefit from this approach would be a reduction in the human cost of smoking. This is an important policy goal and may generate strong support for a national settlement. The creation of safer cigarettes, however, is not an adequate solution by itself. The possibility of higher future medical costs for individuals, private insurers, and government health care programs should be offset in some manner.¹⁹⁹ In addition, one problem in the marketing of safer tobacco products is that doing so may amount to an admission by cigarette manufacturers of the prior sale of unsafe products leaving the companies more vulnerable to litigation.²⁰⁰ Thus, safer cigarettes may be only one important component in a comprehensive solution.

195. Gravelle and Zimmerman, CRS Report for Congress at 15 (cited in note 7).

196. See Elizabeth M. Whelan, *A Smoking Gun: How the Tobacco Industry Gets Away With Murder* 151 (George F. Stickley Co., 1984).

197. In fact, there have been settlement negotiations between the states of Florida and Mississippi and the tobacco companies. *Tobacco Firms Want to Settle*, *Tennessean* 2E (Feb. 18, 1997). Whether these settlement negotiations will be effective remains to be seen. However, the smallest tobacco company, the Liggett Group, has already reached a settlement agreement with twenty-two states. *Liggett Breaks Banks, Agrees to Settlement*, *Tennessean* 2A (Mar. 21, 1997).

198. Gravelle and Zimmerman, CRS Report for Congress at 15 (cited in note 7). Lowering the amount of tar may be the best way to reduce tobacco related disease. Noah, *U.S. News & World Rep.* at 67 (cited in note 8). Tar is the "chief culprit" in terms of smoking-related harm. *Id.*

199. See Part IV.2.

200. Meade, 17 *J. Legal Med.* at 1335 (cited in note 49).

B. Pass National Preemptive Legislation and Develop a Settlement Fund

Though some tobacco foes advocate a new era of prohibition ending the sale of cigarettes, America may not be able to afford to end smoking as we know it. Medicare, another government program which provides medical services, would incur a cost liability of between \$204 and \$2,745 for each "male light smoker" who quits consuming cigarettes at age forty-five.²⁰¹ Presumably, those who quit even earlier and smoked less will live comparatively longer and will consume an even greater share of government funding. This is particularly important considering that smokers subsidize non-smokers' pensions to a large degree.²⁰² Americans aged seventy-five and older are expected to comprise nine percent of the population by the year 2040.²⁰³ If the United States were to become tobacco-free, the preponderance of all medical care would be gerontological by the early part of the next century.²⁰⁴ Because medical costs have historically risen faster than inflation,²⁰⁵ and care for the elderly continues to make up a greater portion of overall medical expenses as life expectancy increases, the costs of caring for former smokers would be great.

The ability of the federal government to finance programs such as Medicaid and Medicare is in question because these entitlements comprise an increasing percentage of the federal budget.²⁰⁶ Because medical expenses have risen sharply, even while the incidence of cigarette smoking has declined,²⁰⁷ such entitlement programs face greater pressure.

Perhaps the most plausible means of ending current state-government litigation against the tobacco companies is an arrangement in which cigarette sales would pay for smoking prevention and cessation programs as well as to endow a fund for compensation of the

201. Warner, 258 JAMA at 2084 (cited in note 145).

202. Manning, et al., *The Cost of Poor Health Habits* at 63 (cited in note 10).

203. Warner, 258 JAMA at 2082 (cited in note 145).

204. *Id.*

205. See generally Anderson, *West's Legal News* at 1 (cited in note 186).

206. Robert P. Sigman, *Congress Must Cut Back: Some Lawmakers to Do Better Than Others in Trying to Balance the U.S. Budget*, *Kansas City Star* K1 (June 23, 1996). See also Frank Pompa and Dave Mathes, *Changing Tax Scene*, *Tennessean* 5E (Feb. 9, 1997).

207. Manning, et al., *The Cost of Poor Health Habits* at 2 (cited in note 10). In addition, there are other forces at work. America responds to the needs of tobacco farmers while decrying tobacco. While the federal government is busy collecting its \$20 billion in annual cigarette related tax revenue, it provides price supports to growers. Reiter, 29 *Colum. J. L. & Soc. Prob.* at 444 (cited in note 14).

states, private insurers, and individuals who claim past, present, or future tobacco-related expenses.²⁰⁸ Presumably, if the court established such a fund at the national level, it would have to require the pre-emption of all further litigation. The 1986 National Childhood Vaccine Injury Act²⁰⁹ provides precedent for such a comprehensive settlement. This solution would go a long way towards satisfying many of tobacco's critics and present litigants.²¹⁰

208. Mike France, *Big Tobacco May Be Ready to Deal*, Bus. Week 150 (Oct. 7, 1996). In fact, there are many lobbyists with connections to the tobacco companies "putting out feelers" to see if such a proposal would be acceptable to Congress, the states, the FDA, and other interested parties. *Id.* Of course, cigarette manufacturers refuse to admit that such investigation is done on their behalf. *Id.*

209. Pub. L. No. 99-660, 99th Cong., 2d Sess., codified at 42 U.S.C. §§ 300aa et seq. (1994 ed.). This Act relieves pharmaceutical manufacturers from vaccine-related liability and provides special procedures for resolution of claims, thus removing the threat of litigation and huge damage awards. *Id.* A similar approach could also relieve the threat of litigation from tobacco companies. For a general discussion of the contours of the Act, see Keith Abbott, *The National Vaccine Injury Compensation Program*, 20 Colo. L. Rev. 1825 (1996).

210. Press Release, Office of the Governor, State of Florida 1 (May 29, 1996) ("Our terms are simple: tobacco must pay for the damage it does to our taxpayers and the industry must stop targeting children in its marketing campaigns."). This proposal would be particularly effective especially when combined with regulations that drive development of an increasingly safe cigarette. See Part IV.1.

C. Raise National Excise Taxes

In addition to using money that would otherwise be spent on litigation, an increase in the national excise tax on cigarettes could generate the revenue required to endow a national fund of the requisite magnitude.²¹¹ Increased revenue from an additional twenty-five cents per pack excise tax would amount to \$25 billion per year.²¹²

The increased price of cigarettes would act to suppress the level of consumption, particularly among youth.²¹³ A higher tax could also ameliorate society's general distaste for the habit by providing at least the appearance that smokers are paying more.²¹⁴

While detractors argue that any tax is subject to legislative lobbying and may be diverted to alternative uses down the road,²¹⁵ tobacco companies can, in fact, be counted on to keep Congress honest. For example, if the funds are diverted from smoking-related costs to other programs in excess of the costs imposed, legislators may be tempted to impose added taxes on cigarettes or again allow lawsuits against cigarette manufacturers. This should motivate the tobacco companies to ensure that the settlement fund resources are utilized for the purposes originally intended.

D. Benefits to All

Society at large would benefit from a national settlement in other ways, as well. The top five tobacco companies alone could gain a

211. Admittedly, much negotiation would have to take place at the national legislative level to reach consensus on such a tax. Although one may expect the cigarette manufacturers to have opposed it, the governor of Florida is the party in the present litigation against such a move. Press Release, Office of the Governor, State of Florida, Memorandum to the National Media and Washington Press Corps 1 (May 9, 1996) (describing Governor Lawton Chiles' rejection of a proposed 18 cent increase in cigarette excise taxes). One may only speculate as to his true motive given an understanding of the industry's inability to pay damages sought, see note 38, as well as the state's effort to disgorge *all* the tobacco companies' profits earned in Florida as requested in the Complaint. See note 80 and accompanying text.

212. Solomon and Katel, *Newsweek* at 152 (cited in note 32). The seventy-five cents per pack tax originally proposed to fund President Clinton's failed health care initiative would generate an even greater income stream for such a fund. Gravelle and Zimmerman, CRS Report for Congress at i (cited in note 7).

213. Manning, et al., 261 *JAMA* at 1604 (cited in note 149); Gravelle and Zimmerman, CRS Report for Congress at iii (cited in note 7). Although this would undermine the financial basis for such a settlement over time, the decrease in loss of life due to tobacco consumption would certainly be compensation. In addition, the extended period over which the numbers of smokers would decrease would provide tobacco companies the opportunity to further diversify into other markets and different product lines.

214. Even if it is more than their fair share. See Part III.C.1.

215. This has been one criticism of increasing the cigarette excise tax. Frohlich, 21 *Am. J. L. & Med.* at 449 (cited in note 4).

whopping \$193 billion in market valuation overnight.²¹⁶ The actual beneficiaries of any rise in the tobacco companies' values therefore would be their shareholders. Most notably, retirement funds currently have huge holdings of tobacco company stocks.²¹⁷ Thus, the true recipients of the benefits of settling the tobacco litigation war include not only the parties involved in ongoing litigation, but also tomorrow's retirees. In short, this settlement proposal can be good for many parties, not least of which is the government, which may have to make up any serious shortfalls in future retirees' incomes through safety-net entitlement programs such as Medicaid.

V. CONCLUSION

Cigarette manufacturers note that cigarettes are a legal product and that both society and the state governments presently seeking recovery from the tobacco firms have made an overt policy decision to allow the sale of tobacco products.²¹⁸ Adults may legally purchase and consume tobacco products. Businesses may manufacture, distribute, and offer for sale tobacco products. Thus, Florida and other states are essentially contending that the mere distribution of an officially-sanctioned product is tortious and should be prohibited. If the government, in essence, seeks to ban the distribution and manufacture of cigarettes through the present litigation, there should be an honest and forthright debate concerning the decision in the legislature and the polity. Currently, however, the best option for all parties is the enactment of legislation on the national level that provides protection for manufacturers, their shareholders and employees, as well as funding for cessation programs, education of youth, and private and government-funded health care.

All parties to present and future litigation benefit from the proposed national settlement fund. In addition, the settlement would benefit other parties, including government entities responsible for retirement and medical benefits, smokers protected by regulations requiring safer cigarettes, and possible future smokers dissuaded from taking up the habit by increased excise taxes.²¹⁹ Thus, while the

216. Solomon and Katel, *Newsweek* at 152 (cited in note 32).

217. Eisler, *USA Today* at 1C (cited in note 112).

218. Donohue, 83 *ABA J.* at 54 (cited in note 14).

219. Members of other industries also have something to gain from ending publicity about government crusades against manufacturers of products that have pronounced external costs, such as liquor, motorcycles, and firearms. Although Florida promises not to employ the MTPLA

problem of tobacco-related Medicaid expenses may turn out to be a mirage, a real solution to the present controversy has substantial advantages.

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against other segments of industry, Press Release, Office of the Governor, State of Florida 1 (Feb. 19, 1996) (quoting the Governor's release to state legislators), continuation of this means of generating revenue is possible through employment of other statutes or by other states. Indeed, for government, increasing revenues by suing other industries is tempting. Donohue, 83 ABA J. at 54 (cited in note 14) (quoting Dexter Douglas, general counsel to Florida Governor Chiles: "At this point we don't have the statistics to proceed against [manufacturers of other products]. We're only going against tobacco. You gotta take 'em one at a time. I don't believe anybody could handle all those industries at once").

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Table 1: Comparison of Estimates of Smoking Attributable Medicaid Expenses to State and Federal Cigarette Tax Revenues, 1980-1993
 State of Florida
 (Dollar Amounts in Millions)

Year	Total Florida Smoking Attributable Medicaid Expenses ¹	Federal Matching Assistance Percentage ²	Federal Share ³	State Share ⁴	Florida State Cigarette Tax Collections ⁵	State Tax Surplus ⁶
1980	\$22.68	58.94%	\$13.37	\$9.31	\$253.48	\$230.80
1981	\$28.02	58.94%	\$16.51	\$11.51	\$266.19	\$238.17
1982	\$32.34	57.92%	\$18.67	\$13.57	\$276.14	\$243.90
1983	\$39.22	57.92%	\$22.72	\$16.50	\$273.42	\$234.20
1984	\$45.42	58.41%	\$26.53	\$18.89	\$277.61	\$232.19
1985	\$52.16	58.41%	\$30.47	\$21.69	\$285.37	\$233.21
1986	\$59.33	56.16%	\$33.32	\$26.01	\$289.70	\$230.37
1987	\$71.13	56.16%	\$39.95	\$31.18	\$344.70	\$273.57
1988	\$88.72	55.39%	\$49.14	\$39.58	\$343.16	\$254.44
1989	\$110.47	55.13%	\$60.95	\$49.51	\$335.15	\$224.68
1990	\$142.37	54.70%	\$77.88	\$64.49	\$323.78	\$181.41
1991	\$188.35	54.46%	\$102.58	\$85.77	\$436.91	\$248.56
1992	\$227.11	54.69%	\$124.21	\$102.90	\$424.08	\$196.97
1993	\$264.49	55.03%	\$145.55	\$118.94	\$419.30	\$154.81
TOTAL	\$1,381.81		\$761.85	\$609.85	\$4,548.99	\$3,177.28

1. Leonard S. Miller, et al., *Expected Publicly Funded Smoking Attributable Medical Expenditures* (Oct 1995, rev. March 1996) (on file with the Author). The Miller model was designed in liaison with Dr. Thomas E. Norrhy, Centers for Disease Control and Prevention, Office of Smoking and Health, School of Public Health, University of California Berkeley.
 2. Telephone Interview with Miles McDermott, Health Care Financing Administration (Feb. 3, 1997). Federal Matching Assistance Percentage was in effect for two year periods prior to 1986. *Id.*
 3. *Id.*
 4. *Id.*
 5. Florida's state cigarette excise tax net revenues after cost of collection. *The Tax Burden On Tobacco* 209 (Tobacco Institute, 1995).
 6. Total Smoking Attributable Medicaid Expenses subtracted from cigarette tax collections.