SUMMARY OF THE GLOBAL TOBACCO SETTLEMENT: THE TERMS OF THE AGREEMENT

About two weeks ago, nearly 40 state attorneys general made a momentous announcement, revealing a tentative tobacco litigation settlement unparalleled in our country's history. Months of tense negotiations between the various states and industry lawyers culminated in this multi-billion dollar announcement.

Presently, the Global Tobacco Settlement is merely a memorandum of understanding that must yet be ratified by the five participating tobacco companies. Furthermore, to be effective, many terms of a final agreement must be implemented by congressional legislation.

If implemented, the Global Tobacco Settlement would require participating tobacco companies to pay $368.5 billion over a 25 year period. Most of this would be paid out in annual installments starting at $10 billion and rising thereafter to correspond to increased domestic sales. These proceeds would be divided among states whose attorneys general litigated against the tobacco companies and public health groups. Part of the money would also be used to establish an industry fund that would be used to pay damage claims and treatment and health costs to smokers.

Tobacco advertising would also be restricted. It would be banned outright on billboards, in store promotions and displays, and over the Internet. Use of the human images, such as the Marlboro Man, and cartoon characters, such as Joe Camel, would be prohibited. The tobacco companies would also be banned from sponsoring sports events or selling or distributing clothing that bears the corporate logo or trademark. The sale of cigarettes from vending machines would be banned, and self service displays would be restricted. Cigarette and other tobacco packages must carry strong warning labels concerning the ill effects of cigarettes (such as, its use *causes cancer*) that cover 25 percent of the packages. The tobacco companies would have to pay for the anti-tobacco advertising campaigns.

Parties to the agreement would consent to the FDA's jurisdiction over nicotine. The FDA would have the authority to reduce nicotine levels over time. The FDA, however, could not eliminate nicotine from cigarettes before 2009.

Furthermore, as part of the settlement deal, tobacco companies would have to demonstrate a 30 percent decline of aggregate cigarette and smokeless tobacco use by minors within five years, a 50 percent reduction within seven years , and a 60 percent reduction within 10 years. If not successful, penalties may be assessed against the tobacco companies up to $2 billion a year.

In return, future class-action lawsuits involving tobacco company liability would be banned. This would settle suits brought by 40 states and Puerto Rico seeking to recover Medicaid funds spent treating smokers. It also settles one state class action against industry and 16 others seeking certification. Current class actions, therefore, would be settled, unless they are reduced to final judgment prior to the enactment of legislation implementing the agreement. Claimants who opt out of existing class actions would be permitted to sue for

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compensatory damages individually, but the total annual award would be capped at $5 billion. These amounts would be paid from the industry fund. In return for a payment of $50 billion (to be used as part of the industry fund), punitive damage awards would be banned. Nevertheless, claimants could seek punitive damages for conduct taking place after the settlement is adopted and implementing legislation is passed.

This proposed settlement also raises a myriad of challenging legal questions, including the profound ramifications for our civil justice system embodied in proposed changes affecting class action lawsuits, punitive damage awards, and tobacco advertising.

PROPOSED QUESTIONS (Civil Litigation)

1. Congress, under its Article III authority may restrict the jurisdiction of federal courts. For instance, the Supreme Court, in *Dames & Moore,* upheld the preempting of *federal* claims against Iran when Congress established a claims tribunal as the exclusive compensation mechanism. May Congress preempt *state* claims (future class actions, as well as the forced settlement of present class actions and the prohibition of all punitive damages -- now and in the future -- for all claims against tobacco companies) by approving the settlement? Under what theory? Are there any examples? Are there viable Tenth Amendment or federalism concerns here?

2. May Congress, consistent with due process, vitiate state punitive damage claims? What are the Seventh Amendment implications of the settlement? Are there any Takings Clause Fifth Amendment implications if Congress implements the settlement? Can Congress, consisitent with due process and equal protection, cap compensatory damages?

3. What effect will eliminating class actions and punitive damages have on the civil justice system? Should not Congress give other industries and product manufacturers the benefits of punitive damage caps and tort reform in universal legislation? In other words, why should Congress single out the tobacco industry for special treatment?

4. How does the recent Supreme Court holding of *Achem Products v. Windsor*, effect the settlement?

5. Are the settlement amounts the tobacco industry pays tax deductible?

6. Any other civil litigation questions you may think of.

7. The implementation of this agreement by Congress seems to be rather costly. The agreement delegates unprecedented authority to the FDA. Could not Congress accomplish the same ends far easier by using its taxing and spending powers to establish a trust fund to be used to treat ill smokers? (E.g., surcharge on Medicare; tax on tobacco). Isn't this particularly true given that Mississippi (and other states in the future) has entered into a separate consent decree? Simply put, why should Congress care to implement the agreement? Why

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not let industry, the states, and consumers fight it out through the tort sysytem? Why create another expensive bureacracy?

8. Most states already ban sale of tobacco products to minors. Instead of creating federal mechanisms to enforce the prohibition of tobacco sale and use to minors, would not a more efficacious approach be to give bloc grants to the states to allow increased enforcement of already existing laws?

9. Is the agreement an all-or-nothing proposal? In other words, are the implementation terms flexible?

10. [Are the state litigants able to demonstrate a net loss of revenue for state funded Medicaid treatment of smokers, given the revenue gained from taxation of tobacco products.]